IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

SPECIAL POCSO CASE NO. 31 of 2017

Under section 448 of IPC read with section 8 of POCSO Act. (Arising out of G. R Case No. 1905 of 2017)

State of Assam

-Vs-

Md. Nur Jamal Hussain .

Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Mr. B. Borthakur, Advocate

Date of Argument : 12-03-2019.

Date of Judgment : 26-03-2019.

JUDGMENT

1. The prosecution case as has been unfurled in the FIR, is that for last six months prior to filing the FIR dated 30-05-2017, accused Nur Jamal used to disturb the informant's daughter, aged about 14 years, by talking some objectionable words and lastly, on 29-05-2017 at night while all the family members of the informant including the victim were sleeping, at around 10 p.m. accused came to his house and by opening the door of the house proceeded near the victim girl and gagging her

mouth attempted to commit her rape but on raising alarm by the victim when he woke up and when he lit the light of his cell phone, the accused fled away.

- 2. On receipt of the FIR **(Ext.2)** on 30-05-2017 from the informant, the victim's father, the Officer-in-charge of Thelamara PS registered the case being Thelamara P.S. Case No. 66/17 u/s 448 of IPC read with section 8 of POCSO Act and entrusted ASI Danda Dhar Kumar to investigate the case. During investigation, the Investigating Officer (PW 8) visited the place of occurrence, drew the sketch map of the place of occurrence, recorded the statement of the witnesses, seized one school certificate of the victim, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C., arrested the accused and on completion of investigation having found materials, laid chargesheet against the accused Nur Jamal Hussain u/s 448 of IPC read with section 8 of POCSO Act.
- 3. On appearance of the accused person before this Court, after furnishing the necessary copies as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge u/s 448 of IPC read with section 8 of POCSO Act against the accused Nur Jamal Hussain and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- To substantiate the case, prosecution examined as many as nine witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and taking the plea of enmity regarding land dispute with the family members of the victim stated that the informant promising to sell their land to him, took money from him, but neither land was delivered to him nor returned the money and filed this case falsely.
- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.

- **6.** The points for decision in this case is that -
 - (1) "Whether the accused Md. Nur Jamal Hussain on 29-05-2017 at about 11 p.m., at Bhara Singri under Thelamara police station committed criminal trespass by entering into house of the informant and thereby committed an offence punishable u/s 448 of IPC?
 - (ii) Whether the accused committed sexual assault on the victim and thereby committed an offence punishable under section 8 of POCSO Act?

Reasons, Decisions and reason for decision.

- **7.** Mr. M. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of sexual assault on the victim girl. He further submitted that the evidence of the child victim of sexual assault is enough to convict the accused person.
- **8.** Controverting the said argument, Mr. B. Borthakur, the learned counsel appearing for the accused, submitted that no explicit reliance can be placed upon the evidence of the victim.
- **9.** Now, the question is whether the accused committed any offence on the victim. In this respect, let me travel through the evidence adduced by the prosecution side.
- 10. PW 1 is the informant as well as the father of the victim. He deposed that prior to some months of the incident, accused Nur Jamal taking advantage of being relative who is his related son-in-law started to disturb his daughter, aged about 15 years over mobile by saying some bad words and the victim informed him about the same. He testified that on the day of incident at night, at about 11.30 p.m. while he along with his wife and children were sleeping in one bed and the victim was sleeping in a separate bed in the same room, accused entered into his room, gagged the mouth of his victim daughter and also caught hold her in her bed. Then on raising alarm, he woke up and in the light of mobile, he saw the accused Nur Jmal but seeing him the

accused fled away. Thereafter, he chased the accused and on hearing alarm, villagers also gathered at his house. He further stated that his victim daughter informed him that accused Nur Jmal came to her bed, gagging mouth said her (victim) that he came to take her. On the next day morning, villagers convened a meeting regarding the incident but the accused did not turn up. Thereafter, on the next day evening, he lodged the FIR.

During cross, he stated that one Amir Ali informed the matter to police. He further deposed that the charge-sheeted witnesses are the residents of 3/4 km away from his house but his adjacent neighbouring witnesses namely, Amar Ali, Musha, Gandu, Billal, Dulal, Bakra, Hokku, Sabed Ali and Taribuddin did not come to his house at the time of incident. He stated that his house is a thatched house with jute wall and doors. His house is comprised of only one room and there are two beds in the room the distance of which only one ft. He clarified that he along with his wife and two children were sleeping in one bed and in another bed the victim slept. He also stated that the door of the room was closed by "Salakha" from inside which can be opened only from inside. He further stated that the night was dark and the accused being their relative used to visit their house quite off and on. He admitted that as per transfer certificate which he submitted to police, his victim daughter was more than 17 years one month at the time of incident. He admitted the dispute between him and the accused regarding purchasing a plot of land.

morning, the father of the victim girl informed him that on last night at around 10/11 p.m. accused came to his house with intent to rape his daughter. He further stated that on being asked the victim at the meeting, she also reported that at about 9/10 p.m. accused entering into her room, kept his hand upon her body which was witnessed by her father.

12. PW 3 Md. Amir Ali who turned hostile deposed that on the night at around 11.30 p.m. one of his neighbour rang him 2/3 times and on receiving the call, the neighbour informed her that accused entered into the room of the informant with intent to commit bad act with the victim. Regarding the incident there was a commotion. On the next day a meeting was held but he was not present there. On the very night, he informed police to which O/C asked him to come at 9 a.m.

During cross by defence, he stated that on receiving his phone call at night, police came at 9 a.m. and before police he stated that at night there was hulla regarding entering the accused into the house of the informant.

- **13.** PW 4 Md. Jalaluddin deposed that from villagers he heard that accused Nur Jamal entered into the house of the victim with intent to commit her rape regarding which, a meeting was held but he did not attend the meeting.
- **14.** PW 5 Md. Mojibur Rahman also declared hostile by prosecution side, who stated that he knew nothing about the incident as at that time he was in Kerela.
- 15. PW 6 is the victim herself. She stated that the accused married her cousin sister and for last six months prior to the incident, accused used to disturb her proposing to marry her but as the accused had already two wives, hence she did not agree. She further stated that the accused disturbed her since a long time and hence when she went to school, she never had gone alone. She testified that when she was sleeping in a bed in the room where her parents were also sleeping in a separate bed, accused came, hold her neck and breast. Then she woke up and raising alarm called her father. Then her father had seen the accused in the light of torch of mobile. She also saw the accused but then the accused fled away. She proved her statement u/s 164 Cr.P.C. as Ext.1.

During cross, she admitted that though police sent her to KCT, Tezpur for examination but she refused to get examine. She stated that at the time of incident her 12/13 years old younger sister was also sleeping with her and the bed where she slept was at a distance of 7/8 ft away from the other bed where her parents slept. She further stated that police did not seize the mobile by which they had seen the accused.

- **16.** PW 7, another hostile witness Babur Ali, deposed that from villagers he heard that accused entered into the house of the victim at night.
- 17. PW 8, Danda Dhar Kumar, the Investigating Officer, deposed that on 30-05-2017 on receipt of an FIR, the case was registered and on being entrusted him to investigate the case, he visited the place of occurrence, drew the sketch map of the place of occurrence vide Ext. 3, recorded the statement of the witnesses including the victim and informant, seized one school certificate of victim vide Ext.4, sent the victim to hospital for medical examination, got recorded her statement u/s 164 Cr.P.C. and on conclusion of investigation submitted charge-sheet against the accused Md. Nur Jamal Hussain u/s 448 of IPC read with section 8 of POCSO Act. He confirmed the statement made by hostile witness PW 3, PW 5 and PW 7.

During cross, he stated that on 30-05-2017 the FIR was lodged at night and accordingly, on the next day morning i.e. on 31-05-2017 he went to the place of occurrence.

- 18. PW 9 Miss B. Khakhlary, the then Judicial Magistrate, 1st class, Tezpur deposed that on 31-05-2017 she recorded the statement of the victim in reference to Thelamara PS Case No. 66/17 u/s 448 of IPC read with section 8 of POCSO Act. She proved her signature in the statement as Ext. 1(3) and order dated 31-05-2017 as Ext. 7 wherein Ext. 7(1) is her signature.
- 19 In this case, in the FIR the informant (PW1), who is the victim's father claimed the age of the victim as 14 years but he being the father

of the victim who is the best person to say the age of the victim, during cross, admitted that as per school certificate at the time of incident the victim was more than 17 years one month old. The seized school certificate reveals that the date of birth of the victim is 08-04-2000. So on the day of incident i.e. on 29-05-2017 she was more than 17 years one month old. It is in the evidence of the I.O. that after seizure of the original school certificate, it was handed over to the informant by keeping a Xerox copy and as such, the Xerox copy of the school certificate is available in the record. The original school certificate is not proved during trial. Prosecution also did not examine the issuing authority of the seized certificate to prove the same. Moreover, in this case admittedly the victim refused for medical examination for which her age could not be ascertained by Radiological test. In the above, it cannot be safely held that the victim was below the age of 18 years at the time of incident.

In the above circumstances, let us see the other factual aspect 20. of the case. In this case admittedly the parents of the victim were sleeping in one bed and in another bed the victim was sleeping in the same room. The victim deposed that on that day she was sleeping with her 12/13 years old younger sister in one bed when at a distance of 7/8 ft away in another bed her parents and two children were sleeping but according to the victim's father, the distance between two bed is only one ft. Further according to the informant his house is a thatched house with jute wall and door and they used to close the door by "Salakha" which can be opened only from inside. Though the victim and her father stated that the accused entered into the room but there is no evidence as to how the accused entered into the room when the door was closed from inside on that night. There is no iota of evidence that the accused by pushing or breaking the door or wall entered into the room. Moreover, in this case, the two other most natural witness i.e. the victim's mother and her sister who was sleeping with the victim were not examined by the prosecution.

- 21. Regarding sexual assault, the victim in her evidence stated that the accused entered into the room, hold her neck and breast whereas as per evidence of her father accused entering into his room, gagged the mouth of his daughter and caught hold his daughter on bed. He did not state that accused hold the breast and neck of the victim girl. Though the victim, in deposition alleged that the accused hold her breast but in statement u/s 164 Cr.P.C. she stated that when the accused entering into her room hold her neck with his hand, she called her father and then the accused pressed her mouth and saying that he is Nur Jamal asked to remain silent. Taking the evidence of the victim, if the accused identified himself by saying his name that he came to take her why again she claimed that she had seen the accused in the torch light of mobile. Moreover, during cross the victim's father also stated that though he switch on the mobile but the light of the mobile was not gone on. His evidence creates doubt regarding seeing the accused in the light of torch of mobile. Gagging mouth of the victim is also not supported by the victim herself during deposition. Moreover, in this case, it is in the evidence of the informant that being a close relative the accused quite off and on used to visit his home. So, the situation of the room where the informant, his wife, four children including the victim used to sleep in two bed, was well known to the accused. In such situation, it is not believable that the accused would enter into the room to commit sexual assault.
- Taking the evidence of the victim that the accused hold her neck even if accepted, it cannot be said that he entered into her room with intent to commit any sexual act, and making improvement of the case in the FIR, it is alleged that the accused attempted to commit her rape. In this case, enmity between the parties regarding purchase of land is also an admitted fact.

- 23. Under such circumstances, the entire prosecution story is found not to be trust worthy. The evidence of the victim is not of sterling quality as is required in a case of sexual offence to warrant conviction. Her evidence does not inspire confidence. When the victim's evidence and surrounding circumstances does not support the prosecution case, there is no other alternative but to give the accused the benefit of doubt.
- **24.** In the light of above discussion and in the given facts and circumstances of the entire aspect of the matter, I am of the considered opinion that the prosecution case is doubtful and the accused is entitled to get the benefit of doubt.
- **25.** Accordingly, the accused Nur Jamal Hussain is acquitted on benefit of doubt from the charge u/s 8 of POCSO Act and set him at liberty forthwith. His bail bond shall remain in force till next six months.

The seized document be returned from whom the same was seized.

26. Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **26th day of March, 2019.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Prosecution witnesses.

PW 1 : Father of the victim.
PW 2 : Abu Bakkar Siddique

3. PW 3 : Md. Amir Ali 4. PW 4 : Md. Jalaluddin

5. PW 5 : Md. Mojibur Rahman

6. PW 6 : victim girl 7. PW 7 : Aabur Ali

8. PW 8 : Dana Dhar Kumar, I.O.

9. PW 9 : Miss B. Khakhlary, JM,1st class, Tezpur

Exhibits.

Ext. 1 : 164 Cr.P.C. statement of the victim

Ext. 2 : FIR

Ext. 3 : Sketch map

Ext. 4 : Seizurelist.

Ext. 5 : Chargesheet.

Ext. 6 : Case diary of Dhekiajuli PS Case No. 66/17

Ext. 7 : Order dated 31-05-2017.

(I.Barman) Special Judge, SONITPUR: TEZPUR