IN THE COURT OF SPECIAL JUDGE, DARRANG, MANGADLAI

Present: Sri G. Baruah

Special Judge, Darrang, Mangaldai

Reference : Spl (POCSO) Case No.01/15

Complainant : State of Assam

Vs

Accused : Abdul Rahman

Charge: U/S-376/511 IPC, R/W Sec.8 of POCSO Act.

Date of Charge : 21.05.2015

Dates of deposition : 07.07.2015, 30.07.2015,

19.09.2015, 13.10.2015,

Date of statement U/S- 313 Cr.P.C. : 21.11.2015

Date of hearing : 27.11.2015

Date of Judgment : 05.12.2015

For the State : Sri G.R. Baruah, Public Prosecutor.

For the Accused : Md. O. Rahman, Advocate, Mangaldai.

JUDGMENT

PROSECUTION CASE

1. The prosecution case as unfolded during trial in short is that one Mustt. Bimala Begum on 28.11.2014 lodged an FIR before the O/C, Dalgaon P.S. inter-alia stating that on 27.11.2014 at around 2.00 PM her daughter Miss Rehena Begum aged about 8 years along with one Miss Nureda Begum aged about 7 years were going to the residence of the grandmother of Nureda Begum and on their way the accused person has induced the said two girls to his residence and in order to commit rape put off the clothes of her daughter. However, the other girl Nureda Begum raised alarm as

such the accused failed to commit rape upon her daughter. She also stated in the FIR that after hearing alarm she went to the house of the accused person and found her daughter in a naked position. In the FIR it is also mentioned that as the accused has given a public meeting to this regard there was delay in lodging the FIR. In the FIR the informant mentioned the name of the accused as Abdul Rahman.

- 2. On receipt of the FIR the O/C, Dalgaon P.S. registered Dalgaon P.S. Case No.747/15, U/S-376(2)(i)/511 IPC, R/W Sec.12 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and entrusted S.I. Soneswar Konwar to take up the investigation. The I/O during investigation has recorded the statement of the victim girls U/S-164 Cr.P.C. The I/O after completion of investigation has submitted the charge sheet against the accused Abdul Rahman U/S-376(2)(i)/511, R/W Sec.8 of POCSO Act.
- 3. In course of time the accused person has appeared before the court of the learned Judicial Magistrate, First Class, Darrang, Mangaldai and thereafter the accused was produced before the Special Court in view of the provisions of POCSO Act. In course of time the accused person was allowed to go on bail. A copy U/S-207 Cr.P.C. was furnished to the accused person. After going through the record and after hearing the learned counsel of both sides this Court found prima-facie materials to frame charge against the accused U/S-376/511 IPC, R/W Sec.8 of POCSO Act. On being read over and explained the said charges the accused pleaded not guilty and claimed to be tried.
- 4. The prosecution in order to bring home the charge against the accused person has examined 7 PWs. The 313 Cr.P.C. statement of the accused person was recorded. His plea was of complete denial. The accused declined to adduce defence evidence. I have heard the argument put forwarded by the learned PP as well as by the learned defence counsel. I have also carefully gone through the entire case record, the evidences brought into the record.

POINT FOR DETERMINATION

(i) Whether on 27.11.2014 the accused Abdul Rahman at Dharanipur under Dalgaon P.S. at about 2.00 PM attempted to commit rape upon the prosecutrix, a minor girl aged about 8 years, and thereby committed an offence punishable U/S-376/511 IPC, R/W sec.8 of POCSO Act?

DISCUSSION, DECISION AND REASON THEREOF

- 5. Prosecution has examined 7 numbers of PWs including the prosecutrix (PW2), the informant (PW1), the friend of the prosecutrix (PW3), three numbers of independent witnesses, (PW4, PW5 and PW6) and the I/O (PW7).
- 6. Charge has been framed against the accused person U/S-376/511 IPC, R/W Sec.8 of POCSO Act. To prove the charge U/S-376/511 IPC the prosecution has to prove that the accused person has attempted to commit rape upon the prosecutrix. To prove "attempt" the prosecution has to prove that the accused person has done some act towards the commission of the main offence.
- 7. Charge also has been framed against the accused U/S-8 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act) for committing an offence U/S-7 of POCSO Act which defines "sexual assault". "Sexual assault" means whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child to touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration. So to bring the charge U/S-8 of POSO Act the prosecution has to prove the sexual intent of the accused person coupled with physical contact without penetration.
- 8. In a case of sexual assault if the testimony of the prosecutrix is found cogent, trustworthy and inspires confidence then it can be the basis of conviction. In this case the prosecutrix is a minor girl of 8 years. The Hon'ble Supreme Court of India in a catena of cases held that before acting on the sole testimony of child witness Court should look for corroboration as children can be easily tutored. Though there is no rule

that corroboration of child witness is necessary but for judicial prudence the corroboration of the testimony of child witness is necessary before acting fully on the testimony.

- 9. The prosecution has examined the complainant as PW1. In her statement the complainant Mustt. Bimala Begum deposed in examination-in-chief that she lodged this case against the accused person as she already had a quarrel with the accused person. She stated that the prosecutrix was about 6 years old and she along with her friend Nureda Begum on the day of occurrence was proceeding to the house of the grandmother of Nureda. She stated that after hearing hue and cry from the house of the accused Abdul Rahman she went to the house of the accused person and found Nureda outside the house of Abdul Rahman and her daughter the prosecutrix inside the house and on being asked her daughter stated to her that the accused has committed bad work with her and she found her daughter without pant and thereafter informed the matter to the public and thereafter lodged the FIR. She identified the FIR as Ext.1. In her CROSS-EXAMINATION she denied that she has not stated before police that she has found her daughter without her pant in the house of the accused. She admitted that she had a quarrel with the accused but denied that for the guarrel she lodged this case. She further stated in CROSS that her house is adjacent to the house of her father-in-law. However, the victim girl has no grandfather. In CROSS she has stated that the accused has not committed any bad work with her daughter. She denied that she has falsely implicated the accused person in this case.
- 10. The prosecution has examined the prosecutrix as PW2. As she was a minor girl of about 7 years at the time of recording her statement few questions were put to her to understand her understanding and after finding the victim girl capable of giving rational answer her statement was recorded without giving oath to her. She stated that Nureda is her friend and on the day of occurrence they were proceeding to the house of the grandmother of Nureda. She stated that the accused person took them to his house promising to pay Rs.10.00 to each of them and thereafter committed sexual intercourse with both of them. She also stated that thereafter she informed the matter to her mother and she raised alarm.

She also stated that police has recorded her statement before the magistrate. In her CROSS-EXMINATION she deposed that the accused person has called them for giving Rs.10.00 and thereafter gave Rs.1.00 only and sent them back. She also stated that on the day of occurrence her mother had a quarrel with the accused after the accused person had given Rs.1.00 to them. She also stated that as the accused person gave them Rs.1.00 instead of Rs.10.00 she narrated the fact to her mother.

- 11. While going through the evidence of the prosecutrix along with the evidence of the informant we found that there is a vast difference between the statements of both the witnesses regarding the occurrence. PW1-the informant in her examination-in-chief specifically stated that she lodged a case against the accused as she had a quarrel with the accused person. PW2-the victim girl in CROSS has also stated that her mother had a guarrel on that day with the accused. In her evidence PW1 has not stated that the accused person has committed sexual intercourse with her daughter. In her FIR also she has stated that the accused could not commit sexual intercourse with the victim girl. In her CROSS PW1 specifically stated that the accused has not committed any bad work with her daughter. However, PW2 the victim girl who is a minor in her statement before this court stated that the accused took them to his house promising to pay Rs.10.00 to her and to her friend and thereafter committed sexual intercourse with both of them. However, in her CROSS she stated that the accused person instead of giving Rs.10.00 gave them Rs.1.00 and sent them back. In her CROSS PW2 specifically stated that after giving Rs.1.00 the accused sent them back.
- 12. From the statement of the prosecutrix it appears that she has given an improved statement regarding what has happened in the house of the accused person.
- 13. The prosecution has examined Nureda Begum the friend of the prosecutrix who is also aged about 7 years as PW3 and in her CROSS Nureda specifically sated that on that day she along with the prosecutrix went to bring amla fruits from the garden of the accused person but he drove them away and nothing more happened. While scrutinising the

evidence of PW3 along with the evidence of PW2 the prosecutrix we found that there is a huge contradiction between their statements. The prosecutrix claimed that the accused person has committed sexual intercourse with both of them after inducing them to go to his home with Rs.10.00 but the PW3 in her CROSS has specifically stated that nothing has happened after the accused drove them away when they went to bring amla.

- 14. The prosecution has also examined one Abdul Khalek as PW4 who in his evidence has stated that he has heard that the accused person has called the victim girl and her friend Nureda to his home and wanted to give them some money in order to commit some bad work. He has stated that he has heard the above thing from the victim girl in presence of police. However, the I/O-PW7 Sri Soneswar Konwar in his CROSS has stated that the witness PW4-Abdul Khalek has not stated before him that he has heard in presence of police from the victim that the accused person tried to give money to the victim girl in order to do bad work. The statement of Abdul Khalek as such is found not reliable.
- 15. PW5-Mustt. Marjina Begum was declared hostile by prosecution. Before being declared hostile she has deposed that on the day of occurrence she has heard children shouting near the bagari tree in the house of the accused person and she after hearing the shout went there and then the victim girl told her that when them came to take fruits the accused chased them away. She has denied that she found the victim girl coming out crying from the house of the accused and at that time she has not seen the family members of the accused and that the wearing apparels of the prosecutrix was brought out from the house of the accused person by the friend of the prosecutrix Nureda.
- 16. It is a settled position of law that testimony of hostile witness cannot be discarded merely because prosecution has declared the witness hostile. If the hostile part of the testimony of the witness found corroboration from the fact of the case then it can be relied upon and taken into consideration for judging the guilt of the accused person. However, while going through the evidence in this case the hostile part of the witness

PW5-Mustt. Marjina Begum has not been supported by any other witness. The I/O in his evidence has only stated that PW5 has stated before him the hostile part but the hostile part of the statement of the PW5 has not been corroborated by any other witness. As such the hostile part of PW5 cannot be taken into consideration. The prosecution has also examined one Mustt. Basiran Nessa as PW6 and this witness also has not supported the prosecution case and has not stated anything about the incident.

- 17. Section 29 of POCSO Act deals with presumption as to certain offences. As per Section 29 of POCSO Act it is the statutory presumption that the court shall have to presume that if any person is prosecuted for an offence U/S-3, 4, 5, 7 and 9 of this Act that the person has committed the said offence unless contrary is proved.
- 18. Section 30 of the Act provides presumption regarding culpable mental state of the accused person. As per Section 30 of POCSO Act in any case under this Act which requires culpable mental state on the part of the accused in such cases the court shall have to presume the existence of such mental state. However, for the purpose of this Section the fact of existence of culpable mental state has to be proved beyond all reasonable doubt and not merely when its existence is established by a preponderance of probability.
- 19. In this case charge has been framed against the accused person U/S-376/511 IPC and U/S-8 of POCSO Act for an offence committed U/S-7 of POCSO Act and as per Section 29 of the Act presumption in respect of an offence U/S-7 of POCSO Act is statutory presumption unless contrary is proved. It is a settled position of law that presumption is always rebuttable either by giving defence evidence or by eliciting material fact from the mouth of the prosecution witnesses.
- 20. In this case the prosecutrix is a minor girl of about 7 years and when she came to depose before this court she was aged about 8 years. The Hon'ble Supreme Court in a catena of cases held that while scrutinising the evidence of the minor witness Court should look for corroboration before acting upon that statement of the minor witness as minors are vulnerable for tutoring. It has been held that though there is no rule to

- look for corroboration in respect of testimony of minor witness but as a judicial prudence the Court should look for corroboration.
- 21. In this case the FIR was lodged by the mother of the prosecutrix to whom as per the FIR the prosecutrix has narrated the fact after the incident and in that FIR the mother of the prosecutrix, PW1 stated that the accused tried to commit sexual intercourse with the prosecutrix and at that time the prosecutrix was accompanied by her friend PW3. On the other hand the prosecutrix in her evidence, which was recorded after one year of the incident, stated that the accused lured her and her friend to his house promising to pay Rs.10.00 to each and thereafter committed sexual intercourse with both of them and after the incident she narrated the above fact to her mother. However, her mother PW1 has not stated anything of sexual intercourse committed by the accused person upon her daughter. In CROSS (PW1) specifically stated that the accused has not committed any bad work with her daughter. PW3, a friend of the prosecutrix who was present as per the FIR and statement of the prosecutrix as well as the statement of the PW1 at the place of occurrence has stated before this court that they went to the house of the accused person to bring amla from the garden but the accused chased them away. PW2 the victim girl in her CROSS has stated that the accused after paying Rs.1.00 instead of Rs.10.00 sent them away. From the above evidence it appears that whatever the prosecutrix has stated in her examination-in-chief is a much improved statement of actually what happened. From her statement it appears that she was tutored by some other person and during her examination-in-chief she narrated whatever has been tutored to her. From the evidence it has also come into record that PW1 has filed this case as on the day she had a quarrel with the accused person. From the above evidence it appears that the defence has been able to rebut the statutory presumption against the accused person by eliciting material fact from the mouth of the PWs. Prosecution also has not been able to prove that the accused person has done any act in order to commit rape upon the prosecutrix.

- 22. In view of the above discussion in my view the prosecution has failed to bring home the charges against the accused person Abdul Rahman beyond all reasonable doubt. Accordingly the accused Abdul Rahman is acquitted from all the charges. He is set at liberty forthwith.
- 23. However, his bail bond shall remain in force for next six months U/S-437 (A) Cr.P.C.
- 24. The case is disposed of on contest.

Given under by hand and seal of this Court on this the 5th day of December, 2015.

(G. Baruah) Special Judge, Darrang, Mangaldai

APPENDIX:

Prosecution witnesses:

PW1: Mustt. Bimala Begum

PW2: Miss Rehena Begum

PW3: Miss Nureda Begum

PW4: Abdul Khalek

PW5: Mustt. Marjina Begum

PW6: Musst. Basiran Nessa

PW7: Sri Soneswar Konwar

PROSECUTION EXHIBITS:

Ext.1: FIR

Ext.2: Sketch Map

Ext.3: Charge Sheet

Given under my hand and seal of this court on this 5^{th} day of December, 2015 at Mangaldai Court.

(G. Baruah) Special Judge, Darrang, Mangaldai

Dictated and corrected by me and each page bears my signature.

(G. Baruah) Special Judge, Darrang, Mangaldai

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(P.K. Kalita) Stenographer