IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.08/2017

U/S- 448/34 of IPC R/W Section 8 of the POCSO Act, 2012.

State of Assam

-Versus-

1. Ayenuddin Mazumdar

s/o- Lt. Joyen Uddin Mazumdar

Resident of vill – Bhitardwar

P.S.- Chhaygaon

Dist- Kamrup (R)

2. Abdul Majid @ Majid Ali

s/o- Lt. Nalu Sekh

Resident of vill – Bhitardwar

3. Somej Ali

s/o- Lt. Wazaddin

Resident of vill – Tukrapara

Both of them are

P.S.- Chhaygaon

Dist- Kamrup (R)

-----Accused persons

Appearance:

Mr. A.K. Baruah. Ld. Addl. Public Prosecutor

-----for the State

Md. Kurban Ali and Md. Humayun Kabir , Ld. Advocates

-----for the

accused

Date of evidence: 06.07.2018, 03.07.2019, 16.09.2019 and

23.10.2019.

Date of Argument: 05.11.2019

Date of Judgment: 16.11.2019

JUDGMENT

- 1. The Prosecution case in brief is that— On 07.02.2017, Informant-Lalchan Ali lodged an ejahar alleging that on 02.02.17 at about 2 am , accused persons ,namely, Ainuddin Majumdar, Majid Ali & Samejuddin committed house trespass, pulled his minor daughter outside the house and attempted to rape her forcibly by opening her clothes. Upon hearing the noise, the informant and other family members rushed to the place of occurrence and on their arrival, the accused persons went away from there but the informant identified the three accused persons. Hence, this case.
- 2. On the basis of the said ejahar, Chhaygaon P.S Case No. 87/2017 U/S- 448 of IPC R/W Section 8 of the POCSO Act, 2012, was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused persons U/S- 448 of IPC R/W Section 8 of the POCSO Act, 2012.

- 3. The case was duly committed and the Special Court after hearing both the parties, framed charges U/S- 448 of IPC R/W Section 8 of the POCSO Act, 2012 against the accused persons. The aforesaid charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined 5 (five) witnesses including the informant and the victim girl.

5. POINT FOR DETERMINATION:-

- (I) Whether the accused persons on 02.02.2017 at 2.00 p.m at village Barbhita under Chhaygaon P.S attempted to rape upon the prosecutrix, aged below 18 years, and thereby, committed sexual assault within the meaning of section 7 of the POCSO Act, 2012 punishable under section 8 of the POCSO Act, 2012 ?
- (II) Whether the accused persons on the same date, time and place committed house trespass of the informant by entering into his house which was used as a human dwelling, and thereby committed an offence punishable under section 448/34 of IPC?

DISCUSSION, DECISION AND REASONS THEREOF

6. Let us go through the evidences on record to find out if the prosecution side has proved the case.

7. P.W.1, Prosecutrix deposed that the incident took place on 02.02.2017 at 2 am. At the relevant time, pw-1 was in her bedroom alongwith her younger sister aged 13 years. At that time, somebody knocked at the door from outside and she opened the door from outside. Then, she saw three accused persons. They grasped her mouth and forcibly took her to the courtyard. Thereafter, the accused undressed her and tried to commit rape upon her. Upon hearing the noise, her parents came out and on their arrival, the accused persons went away from there. Pw-1 stated that her parents saw the three accused persons. She further stated that her father gave the case after 5 days from the day of occurrence. Police interrogated her and produced her before the Magistrate for recording her statement. Pw-1 was also sent to the doctor. Ext-1 is the statement of the victim recorded U/S-164 Cr. P.C. Ext. 1 (1 and 2) are her signatures, Ext.2 is the medical report. Ext. 2 (1) is my signature. She disclosed her age to be 14 years at the time of the incident and she was reading in class VII of Barbheta Anchalik M.E School.

In her cross-examination, pw-1 revealed that accused-Majid Ali's daughter -Pinjira Khatoon lodged a complaint against her brother and her mother and accused-Majid Ali is her Uncle. She further disclosed that Pinzira Khatoon got married with her brother – Rafiqul but the marriage has been dissolved. Pinjira Khatoon delivered a child out of her wed lock with Rafigul. Accused- Somejuddin was the earlier husband of Pinjira Khatoon, who got married with her brother after deserting Somez. But, after deserting her brother, Pinzira Khatoon again married said Somejuddin. But, the marriage of Pinzira with her brother was not accepted by her family and they were staying together for 3 years in her house. And the relation between accused-Mozed Ali"s and her father became strained due to this relationship. Pw-1 stated that she cried at the time of the incident. She does not remember the name of the neighbours, who arrived at the time of the incident. And there was delay in lodging the ejahar by her father as the matter was referred to the Village Headman for resolution. But, pw-1 does not know the name of the village Headman. Pw-1 revealed that she did not report the incident to anybody. She admitted that she refused to get herself medically examined as no offence of rape was committed. She disclosed that accused-Ayenuddin Mazumdar tried to rape her and other two accused persons were present there.

8. Pw-2 Md. Lalchan Ali is the informant and father of the victim. He testified that the incident took place about 2 years ago and the victim was 22 years old at that time. He also stated that the victim was then studying in class—IX . He disclosed that he was not at home at the time of occurrence. His wife and victim were in the house. Next day, when he returned home , his wife —Rup Bhanu told her that accused — Ainuddin Mazumdar and two other accused persons knocked the door of their house and when the victim opened the door , then accused-Ainuddin caught hold of her . The family members raised hue and cry . Neighbouring people arrived. But, the accused persons fled away. Thereafter, pw-2 lodged the ejahar. Ext-3 is the ejahar and Ext-3 (1& 2) are her signatures.

In his cross-examination, pw-2 stated that accused- Majid Ali is his brother-in-law and accused Somej is the son -in-law of accused-Majid Ali .and he divorced his wife -Pinjira, who is his niece. Thereafter, his son married said Pinjira and he also divorced her. But, she again remarried accused-Somez. Thereafter, said Somez gave a case against his son and wife. Pw-2 disclosed that he did not see the incident but only heard about it. He did not lodge any ejahar in the local police-station. He further revealed that he did not call for any village meeting regarding the incident. This witness stated that there are other houses near his house and if any incident occurred in his house, it could be heard by the neighbours. He stated that he does not know as to what is written in the ejahar and he did not state therein that upon hearing the shouts of the victim, he came running to the spot. Pw-2 admitted that he did not state before the police that he saw the accused persons in the place of occurrence and identified them. He does not know anything about the incident. He stated that victim deposed falsely before the court that she was 14 years at the time of occurrence.

- 9. Pw-3 Mustt Suraton Nessa deposed that she does not know anything about the incident.
- 10. Pw-4 Ajiran Nessa knew nothing about the incident.
- 11. P.W. 5, Kapil Pathak is the Investigating Officer of this case. He deposed that on 13.02.2017, he was serving as i/c Goroimari O.P under Chhaygaon P.S. On 11.02.2017 at 8.00 p.m upon receiving an ejahar lodged by one Lalchan Ali from SP, Kamrup, Amingaon, O/C, Chhaygaon P.S, registered a case being Chhaygaon P.S Case No.87/2017 U/S-448 of IPC R/W Section 8 of POCSO Act, 2012 and directed him to investigate the case on 11.02.2017. Accordingly, on 13.02.2017, P.W.5 visited the place of occurrence along with other staffs and recorded the statements of informant and other witnesses including the victim girl. P.W.5 also prepared the sketch map. Ext.4 is the sketch-map and Ext. 4 (1) is her signature. Next day, P.W.5 sent the victim to the Court for getting her statement recorded U/S-164 Cr. P.C before the Magistrat and also sent for her medical examination. P.W.5 searched for the accused persons—Ayen uddin Mazumdar, Abdul Majid and Somej Ali but did not find them. But later on accused persons—Abdul Majid and Somej Ali surrendered before the police and the other accused obtained pre-arrest bail from the Hon'ble High Court. P.W.5 then collected the medical report and completed the investigation and on finding sufficient materials against the accused persons, P.W.5 submitted charge sheet against them U/S-448 of IPC R/W Section 8 of POCSO Act, 2012. Ext.5 is the charge-sheet and Ext. 5 (1) is his signature.

In his cross-examination, P.W.5 deposed that he has not mentioned the name of the person, who resides in the Eastern and Western sides of the place of occurrence in the sketch map. The houses located in the Northern and Southern side of the place of occurrence are adjacent to the house of the informant. No boundary wall is there between these houses. P.W.5 has not

recorded the statements of the Sahjahan Ali and Juran Ali and their family members mentioned in the sketch map. Informant stays with his son and daughter (victim). P.W.5 did not record the statement of the mother of the victim. P.W.5 stated that if there is any 'hullah' in the house of the informant, then, neighbouring people can hear it. As per the FIR, the incident took place on 02.02.2017 at about 2.00 a.m. But the ejahar was lodged on 07.02.2017 and addressed to the SP, Kamrup, Amingaon. No ejahar has been lodged in Goroimari O.P or Chhaygaon P.S prior to 07.02.2017. P.W.5 did not examine the Village Headman or any elderly person of that village. The houses of accused-Majid Ali @ Abdul Majid and Ayen Uddin Mazumdar is located about 12/13 kms away from the house of the informant while the house of the accused—Somej is located 5/6 kms away from the house of the informant. The Goroimari O.P is located about 4/5 kms away from the house of the informant. P.W.1 (victim) did not tell him specifically that the accused persons knocked the door of her house from outside and she came out on hearing the sound. She stated that it was dark on that night. P.w.1 also did not state before him that accused—Ayen Uddin Mazumdar attempted to rape her and two other accused persons are present there. She did not tell him that she was sleeping with her younger sister at the time of occurrence. Victim refused to get herself medically examined though P.W.5 sent her for medical examination for determining her age, determination of any sign of sexual intercourse or any injury marks on her private parts and any other points. P.W.5 did not seize any Birth Certificate or School Certificate of the victim. P.W.5 did not examine the Head Master of Borbhita M.E School or any other institution, where the victim studied. So, P.W.5 cannot say the age of the victim. P.W.2 did not tell him that next day when he returned home, his wife—Rup Bhanu told him that accused—Ainuddin Mazumdar and the other two accused persons knocked the door of their house and when the victim opened the door then, the accused person—Ainuddin caught hold of her. P.W.5 further stated that before this FIR, another FIR was lodged in Goroimari O.P by one Pinjira Khatun, d/o-accused Abdul Majid and w/oaccused Somej Ali on 26.01.2017 against victim's mother and brother.

- 12. At the closure of prosecution evidence, statement of the accused persons U/S-313 Cr. P.C are recorded. They have denied committing the offence and declined to adduce evidence.
- I have heard the arguments of the learned Counsels for both the sides. Perused the evidences on record. Learned Defence Counsel submitted that the accused persons have been falsely implicated in the case due to previous enmity and that the allegations made against them in the ejahar and by the victim (P.W.1) are entirely false. He further argued that there are major contradiction in the contents of the ejahar lodged by the informant (P.W.2) and in his evidence before the court while raises a considerable doubt regarding the prosecution story. Learned Defence Counsel also pointed out that there has been delay in lodging the ejahar which is unexplained.
- 14. In this instant case, accused is charged u/s 506 of IPC R/W Section 8 of POCSO Act, 2012.
- 15. Now, **Sexual Assault** is defined **U/S 7 of POCSO Act** as "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child 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 is said to commit sexual assault." **Section 8 of POCSO Act** prescribes the punishment for the offence u/s 7 of the Act.
- 16. Upon careful perusal of the case record, it is found that the incident took place on 02.02.2017 but the ejahar was lodged on 07.02.2017. P.W.1 (prosecutrix) stated that the delay has been caused in lodging the ejahar as the matter was referred to the Village Headman by her father (P.W.2) for resolution, but P.W.2 disclosed in his cross-examination that he did not call for any village meeting regarding the incident. P.W.1 stated that her father gave the case after 5 days from the day of occurrence.

- 17. Again, it is in the evidence of P.W.1 that upon hearing the noise, her parents came out and saw the three accused persons, but P.W.2 disclosed that he was not present in the house at the time of incident. Next day, when he returned home, his wife and daughter (P.W.1) told him the incident. P.W.2 further disclosed in his cross-examination that he does not know as to what is written in the ejahar and he did not state therein that upon hearing the shouts of the victim, he came running to the spot and also P.W.2 did not state before the police that he saw the accused persons in the place of occurrence and identified them. So, the evidence of P.W.1 (victim) and her father (P.W.2) are contradictory to each other.
- 18. Further P.W.1 deposed that she was 14 years old at the time of incident but P.W.2 deposed that the victim was 22 years old and was studying in class- IX. P.W.2 disclosed in his cross-examination that victim (P.W.1) deposed falsely before the court that she was 14 years old at the time of occurrence. So, it is seen that there are contradictions regarding the age of the victim. Therefore, from the evidence of the informant (P.W.2) it is clear that victim was not a minor at the time of occurrence. He has revealed that victim was 22 years of age at the time of occurrence. So, victim is found to be major at the time of occurrence.
- Again P.W.5 (I/O) confirmed that P.W.1 (victim) did not tell him specifically that the accused persons knocked the door of her house from outside and she came out on hearing the sound and that accused—Ayen Uddin Mazumdar attempted to rape her and two other accused persons were present there. It has come out from the evidence of P.W.5 that before the FIR lodged by the informant (P.W.2)regarding the incident, another FIR was lodged in Goroimari O.P by one Pinjira Khatun, d/o-accused Abdul Majid and w/o- accused Somej Ali on 26.01.2017 against victim's mother and brother. P.W.1 also revealed that she did not report the incident to anybody. There are no eye witness to the incident. P.W.1 (victim) does not appear to be reliable and trustworthy at all.

- 20. Now, from the evidence of P.W.1, it has come out that accused—Majid Ali's daughter lodged a complaint against her mother and her brother and that said Pinjira was the wife of her brother but the marriage was not accepted by her family. So, the relation between her father and accused—Majid Ali was strained. P.W.2 also stated that accused—Majid Ali's daughter—Pinjira got married to the brother of the victim and they got divorced and now Pinjira is the wife of accused—Somej. P.W.2 also admitted that accused—Somej gave a case against his son and wife. This shows that there is enmity between both the parties. In the midst of such contradictions in the evidence of the witnesses, accused persons are entitled to get the benefit of doubt. So, the offence U/S- 448/34 of IPC R/W Section 8 of the POCSO Act is not at all attracted in this instant case against the accused persons.
- 21. In the result, the prosecution has miserably failed to prove the case beyond all reasonable doubt against the accused persons— Ayenuddin Mazumdar, Abdul Majid @ Majid Ali & Samejuddin. Accordingly, the accused persons are held not guilty and they are hereby, acquitted of the offence U/S-448/34 of IPC R/W Section 8 of the POCSO Act, and set at liberty forthwith.
- 22. Their bail bonds shall remain in force for next 6 (six) months U/S-437 (A) Cr. P.C.
- 23. The case is disposed of on contest.
- 24. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 16^{th} day of November, 2019.

Special Judge,

Kamrup, Amingaon

Dictated and corrected by me

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Prosecutrix

Pw-2 Md. Lalchan Ali

Pw-3 Mustt Suraton Nessa

Pw-4 Ajiran Nessa

P.W. 5, Kapil Pathak

Prosecution Exhibit

Ext. 1 is the statement of the victim recorded U/S-164 Cr. P.C.

Ext.2 is the medical report,

Ext.3 is the FIR,

Ext.4 is the sketch-map,

Ext.5 is the charge-sheet.

Special Judge, Kamrup, Amingaon