IN THE COURT OF THE SESSIONS JUDGE, MORIGAON

Sess. Spl. Case No.25/2015
U/S 457/376 of IPC, read with Section 3/4 of POCSO Act.

Present: Md. M. Ahmed,

Sessions Judge, Morigaon.

State of Assam

Vs

Israfil @ Ishafil Ali.

Appearance for the Parties

Advocate for the State :- Mr. A. Kalam, Ld. P.P.

Advocate for the accused :- Mr. A. U. Siddique, Advocate,

Date of recording evidence :- 07.01.2016, 25.02.2016,

18.04.2016, 15.03.2016 and

05.07.2016.

Date of Argument :- 16.09.2016.

Date of Judgment :- 30.09.2016.

<u>JUDGMENT</u>

1. Prosecution case may be re-counted in a nutshell as under :-

Informant is one Md. Faizul Islam, son of Md. Hamed Ali of village Durabandhibeel, P.S. Moirabari, Dist. Morigaon (Assam). The victim 11 (eleven) years old daughter of informant (hereinafter designated as Miss – X to screen her from ignominy and infamy). The occurrence took place on 24.04.2015 at around 11.00 P.M. at dead of night. At the relevant time, the victim Miss – X along with her younger brother was sleeping on her bed inside their house. Their parents were also sleeping in another corner of the said room constructed of pucca wall having wooden door. While all the in-mates were

asleep, accused Israfil, whose house is located across the road tiptoed inside the house. Then, he neared the victim and by lifting the mosquito net he touched her sensitive part of her body. The victim woke up with a start and she made loud shriek and then her mother Musstt. Safia Khatun lighted a lamp and then the afore-named accused jumped out from the room by a window of the house in a half-naked condition. While he was on the run ,one Md. Sadikul Islam spotted him and when he challenged, he replied that he went to attend natures call.

On the following day of the incident, the informant went to Moirabari P.S. and he lodged an F.I.R. and on the basis of which Moirabari P.S. registered a case vide Moirabari P.S. Case No.81/2015, U/s 457/376/511 of IPC.

Investigation was set in motion. The I.O. during the course of investigation, visited the place of occurrence, drew up sketch map, recorded the statement of the victim, the victim was subjected to medical examination and also got recorded her statement U/s 164 Cr.P.C. He also tried to arrest the accused, but the accused went into hiding and evaded police arrest. Thereafter, the I.O. examined other material witnesses and he further collected the medical report of the victim and upon conclusion of investigation and having found sufficient materials against the afore-named accused, submitted charge-sheet against the afore-named accused for alleged commission of offences punishable U/s 457 IPC, read with Section 3 / 4 of POCSO Act. At the time of submission of charge-sheet, the accused was at large and he was shown as absconder in the charge-sheet. Subsequently, he was rounded up by the I.O. and produced before the Court and at later stage, he was let off on Court bail.

Thereafter, the present accused attended before the Ld. Court and he was furnished with copies of relevant documents as mandated U/s 207 Cr.P.C. Thereafter, the Ld. Court below committed the case to this Court by finding it to be exclusive triable by this Court. On receipt of the case record and after having heard Ld. Counsel of both sides and basing upon materials on record my Ld Processor-in Court framed charge U/s 457/376 of IPC, read with Section 3/4 of POCSO Act and read over and explained the particulars of charge to the accused to which he abjured guilt and claimed to be tried.

2. Point for determination:

- (i) In the instant case, it is to be determined if on the eventful day i.e. on 24.04.2015 at around 11.00 P.M. at Dorabandhibeel under Moirabari P.S. in the district of Morigaon, the accused committed the offence of lurking house-trespass at night by entering in the dwelling house of the informant and also committed rape upon 11 years old girl, by the name, Miss X and thereafter, she was subjected to penetrative sexual assault against her will.
- 3. In this case, the prosecution in order to bring home the guilt of the accused has examined as many as 8 (eight) PWs including the M.O. and I.O. After the process of recording evidence of the PWs was concluded, the afore-named accused was subjected to examination as warranted U/s 313 of Cr.P.C. with respect to the incriminating materials that surfaced again him in the evidence on record. The plea of the accused is of total denial and false implication. He has further asserted that there was land-related dispute in between him and the informant, one week prior to the incident a wordy duel with him and then the informant side threatened him that he will be framed in a criminal case . No evidence is led to substantiate this plea.
- 4. I have heard argument so advanced by Ld. Counsel of both sides. Considering the evidence on record, I have come to the following decisions.

DISCUSSION, DECISION AND REASONS THEREOF

5. In this case, the prosecution has examined the victim as PW-1. Now, let us see how far her evidence has supported the prosecution case. According to her, she was then aged about 15 years. She was a student of Class – VII at the relevant time. The occurrence took place at night hour at about 11.00 P.M. while she was sleeping inside the house. She has further stated that her brother Faijul, her sister-in-law Rajina, her mother Sofia, her father Hamid and her younger brother Sahidul were all inside the house. Accused Ishrafil entered into the house and he laid

his hands in her bosom and tried to undress her. Then she cried out and her mother woke up and her mother asked her the reason of her shouting, then the accused left the place by jumping through the window. She proves Ext.1 her statement recorded earlier at the time of investigation in the Court. Subsequently, police recorded her statement. She has further stated that she was medically examined. In her crossexamination, she has stated that she along with other family members resided in a single room. The dwelling house of the accused lies across the road in front of their house. The dwelling houses of Ajibur, Ziaur, Habibur, Gulzar, Neki were all located in the vicinity of her house. Her house has wooden door having hook from inside. Her brother Faizul used to come late at about 8/9 P.M. and he used to hook the door from inside. She has further stated that her brother used to reside in a separate house in the same campus. This part of her evidence remains murky as if her brother Faijul was a late comer and he used to hook the door from inside, how he came out from the house and go to the separate house to sleep. Proceeding further, she in her evidence has further stated that she has no knowledge if there was any land dispute in between her family and the present accused. She denied the fact that at night the accused did not enter her house nor he touched and undressed her and she deposed falsely as tutored by her family members. From her evidence name of Faijul crops up.

6. Now, let us see what his witness deposed in his evidence. His evidence has revealed that he supported the prosecution case on vital points. Now, the question is if his evidence is free from any infirmity and it can be safely relied upon. Deposing as PW-2, he has stated that he resided with his wife in one of the houses in the same campus where his parents along with the victim and his younger brother were residing. Electric bulb was on in the house of his parents. This part of his testimony comes in sharp conflict with the contention of the F.I.R. which he lodged. In the F.I.R. it is noted that since PW-3, the mother of the victim woke up on hearing the scream of the victim and she lighted a lamp, as if the said house was lighted with electric bulb why PW-3 lighted a lamp, so, this part of the testimony of PW-2 creates serious

doubt about authenticity and credibility of the prosecution story. Proceeding further, this witness has stated that he had seen the accused jumping through the window of the other house in naked condition and then he tried to catch him but failed. Then he came to learn from the victim that the accused entered into the house and touched her bosom and undressed her. On the following day, he lodged the F.I.R. He has further stated that he carried this matter to his neighbouring people as well as the Gaonburha. But it is guite interesting to note that those neighbouring people were not examined in this case. From the evidence of PW-1, it is found that the dwelling houses of Ajibur, Ziaur, Habibur, Gulzer, Neki were in the vicinity of her house; but none of them was examined in this case. So, it creates a serious doubt in the mind of this Court and it has seriously damaged the evidentiary value of the victim as well as other family members. It may be noted at this stage that most of the witnesses are the family members of the victim. There are only one independent witness examined as PW-6 and we shall discuss his evidence at later stage. Now, proceeding further, it is found that PW-2 has stated that at the relevant time he resides in a separate house adjacent to the house of the victim, where his parents also resided and on hearing hue and cry at nigh hour, he came out from his house and had seen the accused jumping through the window of the other house and then he tried to catch the accused but failed.

7. Now, let us see what PW-3 has deposed in connection with the case. She in her evidence has stated that the victim is her daughter and at the relevant time the victim was a student of primary school but she could not say the exact age of the victim. She has further stated that at the relevant time of the occurrence, the victim was sleeping inside the house. They have only one house and on that particular night the victim was sleeping with her younger brother and then the accused entered into the house and lifted the net and undressed the victim and also placed his hands in sensitive part of her (victim) body and then the victim cried aloud and on hearing her shouts, she (PW-3) woke up and had seen the accused going out from their house wearing an under-

pant in a naked condition, then she (PW-3) questioned her daughter and then she (victim) told her (PW-3) that accused tried to commit rape upon her by undressing her. PW-3 has further stated that the accused is a married person having three children. PW-3 denied the fact that she had verbal fight with the accused on the matter of boundary of their land. PW-3 has further stated that their house was a pucca house having wooden door. The door was hooked from inside and before going to bed; they closed the door from inside and her husband also was sleeping there. PW-3 has further denied that the accused did not enter into their house; neither he undressed her daughter and tried to commit rape upon her. PW-3 has further denied the fact that the accused did not jump out from the house wearing an underpant. PW-3 has further denied the fact that due to previous dispute over the boundary of land, they filed this false case against the accused.

8.

PW-4 is HamedAli, the father of the victim also supported the prosecution case by stating inter-alia that about one year back at around 11.00 P.M. the occurrence took place while he was sleeping inside his house. His bed is at the north point of the house and the victim's bed is at the south point of the house. Hearing the screaming of the victim, he woke up and had seen the accused going outside from his house wearing an under-pant. Then, he questioned his daughter and she told him that the accused removed her panty and did bad work with her. Now, let us pause a while at this stage. From the evidence, it has surfaced that the accused fled away from that house through the window but PW-4 had seen the accused going out from the house wearing under-pant, but he did not state that the accused jumped through the window of the house. Here we have found that there is serious conflict in the evidence of PW-4 with the evidence of rest of the witnesses. From his evidence we have found that they all reside in a single room having wooden door and no hook system. Now, question is if there is hook system or not and the door was closed from inside. But to that effect there is no clear evidence. Proceeding further we have found that PW-4 denied the fact that he has not stated before the police that he had seen the accused wearing an under-pant and a few

days prior to the occurrence there was a wordy fight with the accused regarding boundary of their land.

- 9. Another brother of the victim examined in this case as PW-5, Safigul Islam. He also admitted in his evidence by stating inter-alia that on the eventful day he was sleeping in his house and on hearing hulla he came out and went to the house of the victim. From the nature of his evidence, it is found that he is living separately from his other family members. From the evidence of PW-1, PW-2 and PW-3, it is found that there are two house in the campus, in one house the victim along with her parents resided and another house PW-2 used to reside. But from the evidence of PW-5 it has surfaced that he also resides in a separate house. So, it is found from the evidence of the PWs that to that effect there is no clear evidence. Proceeding further, we have found from the evidence PW-5 that on reaching the house of the victim he had seen the accused coming out from the house through the door and the accused left that place and then on questioning the victim he came to learn that the accused put his hand on her breast and also put his hand on her private part by lessening her underwear and then the accused left the place.
- 10. Thus, we have found that different witnesses deposed differently on the material points. Some of the witnesses stated that the accused escaped from the place by jumping through the window and some of the witnesses have stated that the accused left the place through the door of the house. Because of such conflicts in the evidence of the material witness, this Court has found that their evidence have failed to corroborate each other on material point.
- 11. Proceeding further, we have the evidence of PW-6, now let us see how far his evidence has supported the prosecution case on material point. Before handling with the evidence of PW-6, we have found that in the F.I.R. name of one Sadikul Islam, who had seen the accused left the place and he challenged him and the accused replied that he went to attend natures call. Now, the question is why this

Sadikul Islam was not examined in this case. For non-examination of this witness, the prosecution case is weakened to a great extent. Returning to the evidence of PW-6, we have found that he in his evidence has stated that on hearing hulla, he started to proceed towards the house of the accused which lies about 6/7 houses ahead from his house holding torch light and had seen the accused coming out from the house of the victim wearing underwear and also running away from that place. Then, he came to the house of the victim and questioned the victim about the incident and then the victim told before him that the accused put his hand on her breast and also put his hand on her private part by losing her underwear. PW-6 has further stated that other persons also came out from their house one after another and he raised hulla to catch the accused but they failed. PW-6 has further denied the fact that he has not stated before police that he had seen the accused running away from the place wearing underwear with the help of focus of the torch light.

12. Now, the question is if the house of the accused was in front of the house of the victim, then why the neighbouring people did not search the accused on that very night as it is claimed by the prosecution that since the incident was over, the neighbouring people also gathered there and why the neighbouring people did not try to apprehend the accused and handed him to the police after committing such heinous crime. The allegation of the prosecution is that the accused entered inside the house of the victim and touched her sensitive part of her body. It is claimed by the prosecution that at the relevant time the accused was in half naked condition. But naturally it is hard to believe that a man of sound mind became naked before committing an offence of rape in the house of the victim; it cannot readily believed.

Thus, we have found that the material part of the prosecution case remained un-substantiated, as the prosecution has failed to led cogent and convincing evidence to that effect.

13. That being the position and in view of the above discussion, this Court is not inclined to believe the prosecution story as projected as

there are loopholes in the evidence of the PWs and the prosecution has failed to establish the guilt of the accused by leading satisfactory evidence. In the result, the accused is not found guilty for the offences punishable U/s 457/376 of IPC, read with Section 3/4 of POCSO Act and as such, he is acquitted on benefit of doubt and set at liberty.

Judgment delivered in the open Court on this 30th day of September, 2016 under my hand and seal.

Dictated & corrected by me

Sessions Judge Morigaon.

APPENDIX

A. Prosecution witness

- 1. PW-1: Miss Taslima Khatoon,
- 2. PW-2 :- Faijul Islam,
- 3. PW-3: Sufia Khatoon,
- 4. PW-4:- Hamed Ali,
- 5. PW-5: Safigul Islam,
- 6. PW-6: Usman Ali,
- 7. PW-7: Dr. Rekha Bhuyan,
- 8. PW-8 :- Hareswar Hendique.
- B. <u>Defence witness: Nil.</u>

C. Prosecution Exhibit:

- 1. Ext.1, the statement of the victim U/s 164 of Cr.P.C.
- 2. Ext.2, the ejahar.
- 3. Ext.3, the medical report.
- 4. Ext.4, the sketch map.
- 5. Ext.5, the charge-sheet.
- D. Defence exhibits :- Nil.