# IN THE COURT OF THE SPECIAL JUDGE, MORIGAON POCSO Case No. 57/2018

Present: Mr. P. Das

Special Judge, Morigaon, Assam.

#### State of Assam

#### -VS-

Md. Zahir Hussain @ Jahir Hussain ..... Accused

Date of Charge : 30.11.2018

Date of Argument : 24.07.2019

Date of Judgment : 03.09.2019

## **Appearance for the Parties**

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

Advocate for the Accused: Mr. M. Rahman, Ld. Advocate.

## <u>JUDGMENT</u>

- 1. The prosecution case in brief is that an ejahar was lodged on 23.06.2018, before the Mikirbheta Police Station alleging inter-alia that the accused Zahir Hussain @ Jahir Hussain who is her father has been sexually harassing the informant since her attaining puberty; that he used to show her vulgar signs; that he touched her private parts; that on 22.06.2018, at about 10 O'clock at night he entered her room and tried to commit rape upon her and that when her mother resisted him, he assaulted her and her mother was rescued by her relatives. On the basis of the ejahar, Mikirbheta PS Case No. 226/2018, was registered under Section 376/511/325/307 IPC and investigation started. During investigation statement of the victim girl was recorded u/s 161/164 Cr.PC.
- **2.** After completion of investigation, charge sheet was submitted against the accused, Zahir Hussain @ Jahir Hussain u/s 376/511 IPC r/w Section 10/12 of the POCSO Act, 2012. Subsequently, vide order dated 30.11.2018, charges were

framed against the accused u/s 376/511/323 IPC r/w Section 10/12 of the POCSO Act, 2012, by this Court. The charges being read over and explained to the accused, were denied by him, leading to commencement of the trial.

**3.** At the trial, prosecution side examined as many as 7 witnesses including the prosecutrix and her mother. Thereafter, the accused was duly examined u/s 313 Cr.PC, wherein, he denied the allegations. The defence adduced the evidence of one Md. Noor Ali, brother of the accused as DW-1 and the accused himself as DW-2. The accused was allowed to adduce evidence in exercise of power u/s 315 Cr.PC. Both the DWs were cross-examined by the learned prosecution.

# 4. <u>POINTS FOR DETERMINATION</u>

- (i) Whether, on 22.06.2019, the accused attempted to commit rape upon his daughter, the prosecutrix and thereby guilty of committing an offence punishable u/s 376/511 IPC?
- (ii) Whether, on 22.06.2018, at night, the accused voluntarily caused hurt to his wife, Suyara Begum and guilty of committing an offence punishable u/s 323 IPC?
- (iii) Whether, since the time of attaining puberty of the prosecutrix, the accused who is her father committed non-penetrative sexual assault upon her and guilty of committing an offence punishable u/s 10 of the POCSO Act?
- (iv) Whether, since the time of attaining puberty of the prosecutrix, the accused who is her father committed sexual harassment upon her and guilty of committing an offence punishable u/s 12 of the POCSO Act?

#### **DISCUSSION, DECISION AND REASONS THEREOF**

I have carefully perused the ejahar, the charge sheet, evidence adduced during trial including the defence evidence, exhibits and other relevant materials on record.

- **6.** I have heard learned public prosecutor appearing for the State and Mr. M. Rahman, learned defence counsel for the accused and considered the submissions of the respective learned counsels.
- 7. PW-1 Suyara Begum stated in her deposition that the prosecutrix cum informant is her daughter. The accused is her husband. That, since about 13-14 years of age of her daughter the prosecutrix, the accused used to sexually harass her. He used to touch her body, tear her clothes, become naked before her, embrace her after becoming naked. Her daughter the prosecutrix used to cry before her and say that she will die by consuming poison. They did not loudly talk about the matter for fear of neighbors hearing about the matter. At night also, he used to try to sleep with her; remove her clothes. When she resisted, he would beat her, even with iron rods. He has been doing all these continuously since about 7-8 years. That their lives have become hell. She further stated in her deposition that the accused used to attempt to commit forced sexual intercourse upon her daughter, the prosecutrix, during these years of sexual harassment and abuse by the accused. That, during this period he might have succeeded in committing sexual intercourse upon her.
- 8. PW-1 further stated that prior to lodging of the instant case, on 22/06/2018, from about 9 PM in the night till about 10-11 PM in the night, while she was sleeping, she heard the screams of her daughter the prosecutrix and thereupon, she went to her room and saw that the accused had grabbed her daughter by throwing her on the bed, trying to commit sexual act upon her. When she resisted, the accused left her daughter and then assaulted her by pulling her by her hair and threw her on the ground. He assaulted her with iron rods and threw her out of the room. Thereupon, he locked the room from inside and kept her daughter the prosecutrix inside the room. At that time, her son was in a different place. Thereupon, she immediately informed her other family members. Thereupon, her family members came and somehow entered the room from the backside and rescued her daughter the prosecutrix. Thereupon, the accused told that this time he will openly sexually abuse her daughter the prosecutrix. He stated that now he will openly and in front of people sleep with her daughter the prosecutrix. When her daughter the prosecutrix was kept inside

the room by the accused, before she was rescued, she was screaming from inside the room and begging for her rescue saying that otherwise she will die. She was also screaming that she would commit suicide. On some occasions also, her daughter the prosecutrix had attempted suicide including attempt to suicide by slashing her wrists, due to which she had to undergo four stitches on her wrist. On one occasion, she attempted suicide by hanging; on another occasion she attempted suicide by trying to jump into a pond.

- **9.** When the accused first started sexual harassment upon her daughter the prosecutrix, she was aged about 12 years. That at the moment (at the time of deposition), she was aged about 20 years. This witness further stated that she was taken to the court for recording her statement before the Magistrate. Exhibit 1 is her said statement and Exhibit 1(1), 1(2), 1(3), 1(4) and 1(5) are her signatures thereon.
- 10. In cross-examination, this witness stated that regarding this incident, she had not informed other persons out of shame. She had only informed one of her sisters-in-law Pabitri Begum. She further stated that on the day of the last incident on 22/06/2018, upon hearing the cry of her daughter the prosecutrix she went to her room as stated earlier and she found the accused grabbing her and trying to harass her sexually. At that time he was wearing a *Gamosa* and her daughter the prosecutrix was wearing a short skirt. She denied having falsely stated that the accused, her husband used to commit sexual harassment upon her daughter the prosecutrix; that the accused her husband tried to commit sexual intercourse upon her daughter, the prosecutrix. She also denied having lodged a false case upon the accused due to some enmity over land transactions with the accused.
- **11.** PW-2, the prosecutrix stated in her deposition that she is the informant of this case. Exhibit 2 is the ejahar lodged by her, where Exhibit 2(1) and 2(2) are her signatures. She stated that the accused is her father. That on 22/06/2018, after having her meal, she had gone to bed. Thereupon, the accused went to her room. He was giving her vulgar signs (*Oslil Ingit*). He touched her body in wrong way and gagged her mouth. She was unable to shout. He tried to force her to sleep with him. Thereupon, after struggling for some time, she called out her

mother and told her to see what he was doing. When she shouted, to call her mother, the accused pulled her by her hair and threw her on the ground. When her mother came and asked her why he was doing and told that she would not tolerate any more and would inform other family members. Thereupon, he pulled her mother by her hair, threw her on the ground, beat her with iron rod and also beat her with a plastic chair and he also stamped her with his feet on her chest. Then he pushed out her mother from the house. He closed the grill and kept the prosecutrix inside the house.

- **12.** Thereafter, he again gave the prosecutrix vulgar signs (*Oslil Ingit*) and tried to commit rape upon her forcefully. After sometime, her *Jethai* & family members reached and they opened the door of the room from the backside and rescued her. Thereafter, she along with the family members went to the police station to lodge the case. The police recorded her statement.
- reached the stage of Class VI, from about 6-7 years back (prior to deposition), he has been harassing her sexually. He would touch her body wrongly; he would also touch her private parts. He has been doing these things regularly. That she has been reporting this to her mother, her mother has told her that what to do about it as it also involved their reputation and was a matter of shame. The sexual harassment and other things mentioned, done by her father were also noticed and seen by her mother but whenever she used to say something the accused used to assault her. That the accused, her father has been trying like this to commit sexual intercourse upon her, but he has not been successful in doing so. Her father, the accused has been sexually abusing and harassing her like this for 6-7 years.
- **14.** She stated that Exhibit 3 is her statement before the magistrate, where Exhibit 3(1), 3(2) and 3(3) are her signatures.
- **15.** During this period of sexual abuse and harassment over the years, on many occasions, the accused, her father used to sleep naked with her. Due to the sexual abuse and harassment upon the prosecutrix, she had attempted to commit suicide on several occasions. On one occasion, she had tried to kill

herself by slashing her wrist and she sustained several stitches (*the witness shows the mark on her hand*); on two occasions, she tried to commit suicide by hanging from the ceiling fan; on another occasion she tried to commit suicide by taking poison.

- **16.** PW-2 further stated that when the accused first started sexually abusing and harassing her, she was aged about 13-14 years of age.
- **17.** In cross-examination, she stated that on 22/06/2018, she was aged 20 years. That her father/accused used to do a job and he retired from job and came back home in 2012.
- **18.** The prosecutrix stated in cross examination that she did not state before the police and Magistrate that the accused touched her private parts; when her mother seeing the sexual abuse upon her tried to prevent her, she was beaten; he used to sleep naked with her; that she tried to commit suicide several times.
- **19.** She denied that her father the accused did not use to commit sexual abuse and harassment upon her for since about 6-7 years prior to lodging of the instant case. She also denied that on 22/06/2018, the accused did not try to grab her and commit sexual act upon her while she had gone to bed after taking meal. She denied that on the said date, the accused did not give her vulgar signs and denied that on that day he did not gag her mouth or that he did not try to forcefully sleep with her.
- **20.** She denied that she falsely stated that the accused had assaulted her and her mother with regard to the incidents.
- **21.** The prosecutrix denied in cross-examination that there was any land dispute between her mother and father. She also denied that she had lodged a false case upon the accused due to some enmity over land transactions of her mother with the accused.
- **22.** PW-3, Dr. Ramendra Kr. Mahanta stated in his deposition that on 22.06.2018, while working as Senior M & HO, Morigaon Civil Hospital, Morigaon, he had examined Sayera Begum, aged 37 years, W/o Md. Jahir Ali of village

Jaluguti. On examination, no injury was detected. However, there was complaint of pain on left shoulder. He proved as Ext. 4 the Medical Report pertaining to the aforesaid examination and Ext.(1) as his signature thereon. In cross-examination by the learned defence, he stated that in case of assault by iron rod usually some injuries would be seen.

**23.** PW-4, Musstt. Arfa Begum stated in her deposition that the prosecutrix is her niece (*Bhagin Suwali*) and the accused was her brother-in-law (*Bhoni-juwal*). She further stated that for 7-8 years, the accused has been sexually harassing the prosecutrix. It was told to her from time to time by the prosecutrix and her mother. On the day of the incident, she was informed by someone that the situation in the house of the prosecutrix was very bad, where upon she along with her son went to their house. There, she saw that mother was outside the house within the grill and there was crying going on inside the house. From the nature of the crying of the prosecutrix that she heard from inside the house, she could make out that the situation was very bad and shameful. Subsequently, the prosecutrix was brought out of the house and she was crying and was not able to express much. Thereafter, they went to the police station, along with the prosecutrix where the prosecutrix lodged the case.

In cross-examination, she stated that the mother of the prosecutrix, who is her sister, had got married to the accused about 20-22 years back. She further stated that she did not remember the exact date of the incident and that on the day of the incident, upon getting the information when she went to the house of the accused, it might have been around 10 PM in the night. She stated that she did not state before the police – that for several years, the accused has been sexually harassing the prosecutrix. It was told to me from time to time by the prosecutrix and her mother. She further stated that she did not know whether there was any dispute between the accused and the mother of the prosecutrix with regard to any land sale at Morigaon town near Morigaon Mahila Mehfil. This witness denied having falsely stated that - for 7-8 years, the accused has been sexually harassing the prosecutrix. This witness further stated that when she reached the house of the accused on the day of the incident, she saw injuries on the body of her sister the mother of the prosecutrix. The injuries were swollen

and blackened injuries on arms, shoulder and thigh. She further stated that the accused was involved in taking money from people with promise of giving job in Army, but denied that her sister was also involved. She stated that she did not tell others about being informed by the mother of the prosecutrix and the prosecutrix that the accused was harassing the prosecutrix sexually for the last 7-8 years and that she did not tell out of shame. She denied in cross-examination that a false case has been lodged upon the accused, by the prosecutrix and her mother to grab his property. She denied the defence suggestion that the accused has not committed any sexual harassment upon the prosecutrix.

- 24. PW-5 Dr. Shamim Ahmed stated in her deposition that on 24.06.2018, while she was working as M & HO-I at Morigaon Civil Hospital, she conducted examination upon the victim/prosecutrix, escorted by WHG, Minu Devi, in connection with Mikirbheta PS Case No. 226/2018, upon examination, she found as follows: Identification mark -a black mole at middle of chest. Height was 5 feet 5 inch. Weight 49 KG, Teeth -upper 14, lower 14. In her opinion, she stated that (I) there was no evidence of any recent sexual intercourse (II) vaginal swab for sperm detection was advised but the victim did not go through (III) There was no any injury mark on her body or private parts. She further opined that clinically, the age of the patient was about 22 years at the time of examination. She proved as Exhibit 5 her medical report and as Exhibit 5 (1) her signature thereon. In cross-examination by the learned defence, she stated that the X-ray for age determination of the victim girl was advised but was not done by the victim/prosecutrix. She further stated in cross-examination that if a victim is sexually assaulted by a person physically or attempted to do so, there might be some injury marks on the body, including private parts of the victim.
- **25.** PW-6 Mohidul Islam stated in his deposition that the prosecutrix was his cousin sister and the accused was her father. He stated that he knew that the accused used to behave inappropriately with the prosecutrix and touched her on her private parts and that this has been going on since about 6-7 years. He further stated that the mother of the prosecutrix who is his aunt had informed him that the prosecutrix had attempted suicide on several occasions and that he had done independent enquiry on that and found it to be true. He further stated

that on the day of the last incident before lodging of the case, he got a telephone call that there was some quarrel in the house of the accused and that the mother of the prosecutrix told him over phone that they should save her or as otherwise her modesty would be outraged, whereupon he went there. He further stated that some of the relatives of the prosecutrix came out of the house from the back door and that thereafter they could make out the incident from her gestures and body language and that she stated in a crying way that if her father stays at home she would commit suicide, whereupon he advised her to lodge a case and accordingly they came to the police station.

In cross-examination by the defence, he stated that as per his knowledge the accused used to have continuous quarrels with his wife due to his regular taking of alcohol. He further stated that after they shifted to Jaluguti, he came to know from his aunt over telephone about their quarrels as well as about the sexual harassment of the prosecutrix by the accused. He stated that however he did not share or discuss this with his family members at home though his family knew about the issue and that he had informed his aunt to inform the police. This witness further stated in cross-examination that he heard about the issue of sexual harassment of the prosecutrix by the accused only after they shifted to the place Jaluguti and that prior to that, he had not heard about the sexual harassment. He further stated that after they shifted to Jaluguti, he came to know about the sexual harassment going on for 6-7 years. This witness further stated in his cross-examination that on the day of the last incident, he reached the place of occurrence at about 9:30/10 PM and had found his aunt in a distressed condition with swelling in her face. He also saw some swelling on one of the hands of the prosecutrix. This witness stated in his cross-examination that he did not remember exactly whether he had stated before the police that he also knew that the accused used to behave inappropriately with the prosecutrix and that he used to touch her on private parts and that this has been going on since about 6-7 years. He denied having falsely stated about the sexual harassment and bad behaviour of the accused with the prosecutrix; about his touching her private parts; about these going on for six – seven years; about being informed by his aunt that the prosecutrix had attempted suicide on several occasions which he found to be true upon independent enquiry. He denied in cross-examination that the accused and the mother of the prosecutrix were having a dispute over property and denied that a false case has been lodged upon the accused by the prosecutrix and her mother to grab his property.

26. PW-7 Sh. Ibrahim Khalilulla Kabir is the investigating officer of the case and he stated in his deposition that on 23.06.2018, while he was working as OC of Mikirbheta police station, he received an ejahar lodged by the victim girl Mikirbheta PS Case No. whereupon, 226/2018 was registered 376/511/325/307 IPC and he took up the investigation of the same. He examined the informant at the police station and two other persons at the police station. Thereafter, he went to the place of occurrence, where upon being shown by the informant he inspected the same and drew a sketch map thereof. Ext. 6 is the said sketch map and Ext. 6(1) is his signature thereon. On the next day, he went to the house of the uncle of the victim, Md. Idris Ali, and examined other witnesses there. He seized some documents kept at that place by victim and again gave them in Zimma to the victim. According to the document - Admit Card, the date of birth of the victim is 20.02.1997. Ext. 7 is the seizure list pertaining to the aforesaid seizure and Ext. 7(1) is her signature thereon. Thereafter, he forwarded the victim to the Morigaon Civil Hospital, Morigaon for medical examination and he also forwarded her to the Magistrate for recording her statement u/s 164 Cr.P.C. Subsequently, he arrested the accused and forwarded him to the court for remand. On 26.06.2018, he forwarded the mother of the victim to the court for recording her statement u/s 164 Cr.P.C. Thereafter, he collected the medical reports of the victim and also her mother, who was medically examined earlier. Upon completion of investigation and upon finding materials he submitted charge-sheet against the accused Jahir Hussain u/s 376/511 IPC r/w Sec. 10/ 12 of POCSO Act 2012.

In cross-examination by the learned defence, this witness stated that he got information regarding the incident at 3.30 PM on 23.06.2018 and that he received the said information in the form of an ejahar in which the date and time of the incident is mentioned as 22.06.2018 at 10 PM. After registration of the case on 23.06.2018, he went to the place of occurrence at 5 PM where some family members of the informant such as mother of the victim, the victim herself,

her cousin brother were present. He wanted to examine some neighborhood persons, but none were forthcoming. He further stated in cross-examination that on 24.06.2018, at 11.10 AM, he forwarded the victim to Morigaon Civil Hospital for Medical Examination, but he has not forwarded the mother of the victim for any medical examination. This witness denied in cross-examination that he did not make any efforts to record the Section 161 Cr.P.C statements of any neighborhood persons. He denied that the date of occurrence is actually 21.06.2018. This witness stated that PW-1, Suyara Begum did not state the exact words before him that - since about 13-14 years age of her daughter the prosecutrix, the accused used to sexually harass her. He used to touch her body, tear her clothes, become naked before her, embrace her after becoming naked. Her daughter the prosecutrix used to cry before her and say that she would die by consuming poison.

He also stated that PW-1, Suyara Begum did not state before him that - the accused told that in this time he would openly sexually abuse her daughter the prosecutrix. He stated that now he would openly and in front of people sleep with her daughter the prosecutrix. When her daughter the prosecutrix was kept inside the room by the accused, before she was rescued, she was screaming from inside the room and begging for her rescue saying that otherwise she would die. She was also screaming that she would commit suicide. This witness also stated that PW-1 Suyara Begum did not state before him that the accused had committed sexual-intercourse upon the prosecutrix. He stated that he did not seize from the place of occurrence any broken plastic chair, iron rod, etc. This witness stated that he did not know as to whether there was any land dispute between accused and informant side.

**27.** DW-1, Md. Nur Ali stated in his deposition that the prosecutrix was his niece and the accused was his younger brother and that the accused used to work in the Army and he had retired in 2009. He further stated in his evidence that neither he nor his family members had heard about any illicit relation by the accused upon the prosecutrix as alleged in this case. He further stated that it is completely false that the accused had been trying to commit illicit sexual relationship with his daughter – the prosecutrix for a long time. He further stated

that the instant case has been lodged upon the accused to oust him from the property and that the wife of the accused along with some other persons had taken money from several persons with a promise to give job in the Army.

In cross-examination by the learned prosecution, this witness stated that his niece – the prosecutrix was a bright student from childhood and she had a good academic record and that at present she was doing her masters. He further stated that generally children take pride in their parents and that the girl normally would understand that if there was any rumour about her having any illicit relation with her father, she would have a lot of difficulty in the future in matters of marriage. He further stated that generally, a daughter would not lodge a case against her father alleging illicit sexual relation. He further stated that the prosecutrix bears a good moral character. He denied that he had deposed falsely.

28. DW-2, Jahir Hussain - the accused adducing evidence stated in his deposition that the prosecutrix was his daughter and elder child and that presently she was aged 22 years. He further stated that he also has a son who is presently aged 17 years. He further stated that he retired from Army service on 31.12.2012. He further stated in his evidence that when his daughter – the prosecutrix was studying in her secondary College, he used to bring her to college and take her back and that during her graduation also, he used to do this. He further stated that he used to have good relations with his daughter and son and that prior to this, they had not filed any case upon him. He further stated in his deposition that after lodging of the case upon him, he was arrested by the police and that he denied the allegations against him before the police. He stated that he had neither committed any sexual harassment upon his daughter - the prosecutrix nor given her any vulgar signs. The accused stated in his evidence that the instant case had been falsely lodged upon him and that the allegations were false. He further stated that his daughter had filed this case at the instigation of some other persons, probably that of her mother's family. He further stated in his evidence that prior to the lodging of the case, he used to always wash the clothes of his daughter whenever she was at home. He denied that his daughter - the prosecutrix had attempted suicide over any sexual harassment upon her by him. He stated that he is an ex-serviceman and that he was not involved in this case. In cross-examination by the learned prosecution, the accused as DW-1 stated that his daughter — the prosecutrix is very meritorious and that she has very good academic records. He also stated that his daughter — the prosecutrix has a good moral character and that she did not have casual relations with boys. The accused denied that he had falsely stated that he had not committed any sexual harassment upon his daughter — the prosecutrix or given her any vulgar signs. He denied that the prosecutrix had attempted suicide several times due to any sexual harassment by him upon her. He denied that he had deposed falsely.

- **29.** The prosecutrix as PW-2 has clearly stated in her evidence that since she reached the stage of Class- VI, about 6/7 years prior to her deposition, the accused, who is her own father has been harassing her sexually. The said testimony has also remained unshaken in cross-examination. The same has been corroborated by her mother as PW-1 who stated that such harassment started from 13/14 years of age of the prosecutrix. The prosecutrix stated about her attempting to commit suicide which is not only corroborated by her mother but also by her cousin brother, PW-6. The testimony of sexual harassment has also been corroborated by her aunt, PW-4.
- **30.** It is clear from the evidence of the prosecutrix, her mother and her aunt that such incident had not been revealed initially due to shame which is natural behavior by the victim side. The prosecutrix, her mother, her aunt and cousin brother had clearly denied the defence suggestion that false case has been lodged upon the accused over any property dispute.
- **31.** During deposition, the prosecutrix had also shown the mark on her hand while attempting suicide by slashing her wrist. The details regarding sexual harassment deposed by the prosecutrix has also been narrated above.
- **32.** On the basis of the evidence on record, especially the evidence of the prosecutrix, it is proved beyond reasonable doubt that the accused committed sexual harassment upon his own daughter for several years prior to her deposition at a time when she was still in her tender age of 13/14 years of age.

Therefore, I find the accused guilty of having committed the offence of sexual harassment defined u/s 11 of the Protection of Children from Sexual Offences Act, 2012, which is punishable u/s 12 of the Act with imprisonment of either description upto three years and also liable to fine.

- **33.** The accused has also been charged u/s 10 of the Protection of Children from Sexual Offences Act, 2012, which punishes the offence of aggravated sexual assault. In this context, Section 9(n) of the Protection of Children from Sexual Offences Act, 2012 provides that sexual assault upon a child by relatives through blood, adoption, marriage, guardianship etc. would constitute aggravated sexual assault. The prosecutrix has stated in her evidence that the accused would touch her body wrongly; touch her private parts; sleep naked with her and she has reiterated the same in her cross-examination. Her mother has also stated that the accused would touch the body of the prosecutrix, tear her clothes and embrace her after becoming naked.
- **34.** PW-6, the cousin brother of the prosecutrix has also corroborated the same and stated that he knew that the accused used to do inappropriate behavior of touching her private parts. The aforesaid testimony regarding sexual assault by the accused upon his own daughter has remained unshaken.
- **35.** On the basis of the evidence on record, I come to the considered view and finding that the accused has been committing sexual assault upon the prosecutrix- his own daughter and accordingly, he has committed the offence punishable u/s 10 of the Protection of Children from Sexual Offences Act, 2012.
- **36.** The accused has also been prosecuted for charge u/s 376/511 IPC with allegation that with regard to the alleged incident on 22.06.2018, he also attempted to commit rape upon the prosecutrix- his daughter. In this regard, the prosecutrix has stated in her evidence that on 22.06.2018, the accused gave her vulgar signs and tried to commit rape upon her forcefully. She has reiterated the same in her cross-examination that on that day, the accused had grabbed her and tried to commit sexual act upon her. She has also reiterated in cross-examination that he gave her vulgar signs and tried to sleep forcefully with her. Her mother also stated that on that day, the accused had grabbed his daughter and tried to commit sexual act upon her. In cross-examination, she reiterated

that the accused tried to commit sexual intercourse upon his daughter. The testimony of her aunt, PW-4 and cousin brother, PW-6 also lends support to the testimony of the prosecutrix and her mother about the incident on 22.06.2018.

- **37.** To come to any finding of attempt to rape, generally some details on the part of the prosecutrix regarding the incident may be necessary to ascertain as to whether any attempt to rape is made out. In this case, the prosecutrix has not mentioned any details as to how the accused, her father tried to commit rape but considering the fact that here is a girl who was testifying against her own father with the allegations of attempting to commit rape, I do not find any reason to disbelieve the same especially when testimony of her mother lends credence and support to the same.
- **38.** Consequently, on the basis of the evidence on record, I also come to the considered finding that the accused tried to commit rape upon the prosecutrix on that day and he has thereby committed the offence punishable u/s 376/511 IPC.
- **39.** PW-1, the wife of the accused and mother of the prosecutrix has also stated about the accused having assaulted her on 22.06.2018, when she tried to prevent the accused from committing sexual act upon the prosecutrix. During trial, Dr. R. K. Mahanta who examined her adduced evidence as PW-3, during which he proved Ext. 4, the Medical Report pertaining to the said assault. He has stated that upon examination no injury was detected. I have perused the said Medical Report of PW-1.
- **40.** On the basis of the evidence on record, I am of the considered finding that there is no material to sufficiently prove beyond doubt an offence u/s 323 IPC. Therefore, the accused stands acquitted with regard to the charge u/s 323 IPC.
- **41.** Thus, on the basis of the evidence on record and in view of the above discussion, accused Md. Zahir Hussain @ Jahir Hussain is hereby convicted u/s 376/511 IPC r/w Section 10/12 of the Protection of Children from Sexual Offences Act, 2012.

#### ORDER ON SENTENCE

- **42.** Heard the accused/convict and the learned defence counsel on the point of sentence. The accused has prayed for leniency.
- **43.** In the facts and circumstances, the Court cannot overlook the fact that the victim is the own daughter of the accused. Therefore, in the given facts and circumstances, the convict Md. Zahir Hussain @ Jahir Hussain is hereby sentenced as follows;
  - (i) The convict is sentenced to undergo rigorous imprisonment for 5 (Five) years for his conviction u/s 376/511 IPC.
  - (ii) The convict is sentenced to undergo rigorous imprisonment for 5 (Five) years and to pay fine of Rs. 5000/-, (in default, undergo simple imprisonment for two months) for his conviction u/s Section 10 of the POCSO Act, 2012.
  - (iii) The convict is sentenced to undergo rigorous imprisonment for 3 (Three) years and to pay fine of Rs. 5000/-, (in default, undergo simple imprisonment for two months) for his conviction u/s Section 12 of the POCSO Act, 2012.
- **44.** All the sentences shall run concurrently.
- **45.** Any period of detention undergone by the convict during investigation/trial shall be set off as against the substantive sentence in compliance with section 428 of the Cr.P.C.
- **46.** His bail bond is cancelled and sureties stand discharged.
- **47.** The convict shall be given a copy of this judgment free of cost.
- **48.** A copy of this judgment and order shall also be sent to the learned District Magistrate Morigaon in compliance with Section 365 of the Cr.P.C.
- **49.** Further, in exercise of power under Section 357-A Cr.P.C. and the Assam Victim Compensation Scheme, the District Legal Service Authority, Morigaon shall

award adequate and suitable victim compensation to the prosecutrix who is the victim of the crime, for her rehabilitation. Interim compensation, if any, already granted to the victim shall be adjusted. For this purpose, a copy of this judgment and order shall be sent to the learned Secretary, District Legal Service Authority, Morigaon for doing the needful.

**50.** The instant Special (POCSO) case stands disposed of on the aforesaid terms.

Given under my hand and seal on this the 3<sup>rd</sup> day of September, 2019.

Dictated and corrected by me

(P. Das) Special Judge Morigaon, Assam

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# **APPENDIX**

# **Prosecution Witnesses:**

PW-1 : Musstt. Suyara Begum.

PW-2: Prosecutrix.

PW-3 : Dr. Ramendra Kr. Mahanta.

PW-4 : Musstt. Arfa Begum.

PW-5 : Dr. Shamim Ahmed.

PW-6: Md. Mohidul Islam.

PW-7: Md. Ibrahim Khalilulla Kabir.

# **Defence Witness:**

DW-1: Md. Nur Ali.

DW-2: Md. Zahir Hussain.

# **Prosecution Exhibits:**

1. Ext. 1 : Section 164 Cr.PC statement of PW-1.

2. Ext. 2 : Ejahar.

3. Ext. 3 : Section 164 Cr.PC statement of the prosecutrix.

4. Ext. 4 & 5 : Medical Reports.

5. Ext. 6 : Sketch map.

6. Ext. 7 : Seizure list.

7. Ext. 8 : Charge sheet.

# **Defence Exhibits:**

Nil.

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