

IN THE COURT OF THE SPECIAL JUDGE :::: BONGAIGAON

Special(P)Case No. 14(M)/2018
U/S 6 of POCSO Act 2012
(Arising out of Manikpur P.S Case No. 72 of 2018)

State of Assam

Vs.

Mofidul Islam
.....Accused person

***PRESENT : Sri B.K. Chetri,
Special Judge,
Bongaigaon.***

ADVOCATES APPEARED :

For the State : Sri R. Choudhury, Public Prosecutor

For the accused : Sri Mohidul Islam Advocate

Date of Argument : 17.12.2019

Date of Judgment : 21.12.2019

JUDGMENT AND ORDER

1. The prosecution case as per the FIR dated 21-02-2018 of Sumar Ali against the accused Mofidul Islam and Jonab Ali is that since last two years the accused Mofidul Islam on the inducement to marry had sexual intercourse with his cousin named H (17 years) and on 15-02-2018 at about 11:00 PM the accused Mofidul taking advantage of Miss H alone in the house came there, threatened her and had sexual intercourse with her during the whole night and left at around 4:00 AM. Prior to this incident also the accused had raped Miss H on the bank of the pond on four occasions. On 17-02-2018 the accused Mofidul called her to his

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21-12-2018
Special Judge,
Bongaigaon

house and when she went there the accused Jonab Ali rebuked Miss H, caught hold of her by her hair, dragged her and pressed her breast. They waited for the bichar, it did not took place for which there was delay in lodging the FIR.

2. The FIR was registered as Manikpur PS Case No. 2018 U/S 4 of POCSO Act, 2012. The victim girl was medically examined and her statement u/s 164 Cr.P.C recorded. The accused was arrested and produced before the Court on 13-04-2018, remanded to custody and released on bail on 15-06-2018. On completion of investigation charge sheet for offence u/s 4 of the POCSO Act was submitted against the accused. After receipt of the summon the accused appeared and allowed to remain on previous bail. Copies of the case were furnished to the accused. Considering the materials on record charge u/s 4 of the POCSO Act was framed against him, to which he pleaded not guilty.

3. In support of its contention prosecution examined 8 witnesses as follows

i) PW-1 Miss H	Victim
ii) PW-2 Sumar Ali	Informant
iii) PW-3 Firoja Khatun	Wife of the informant
iv) PW-4 Msst. Mofida Khatun	Sister-in-law of the victim
v) PW-5 Subarto Bhanu	Relative of the informant
vi) PW-6 Dr. Oli Roy Chakraberty	Medical Officer
vii) PW-7 Tilak Ch. Kalita	Investigating Officer
viii) PW-8 Sri Surajit Das	Judicial Magistrate First Class

4. Defence plea is of denial and that the victim girl interested to marry him and came to his house to which he refused for which the case was filed against him. The accused Mofidul Islam stated that he subsequently married the victim girl.

5. The charge sheet was submitted as against accused Mofidul Islam only and the other accused named Jonab Ali in the FIR was not sent up for trial for not finding materials against him.

Discussion Decision and Reasons Thereof

6. Let us start with FIR. The FIR is filed by PW-2 the cousin of the victim and the FIR itself appears to be exaggerated and contrary in as much as it is stated in the FIR (Ext-1) that the accused with promise to marry PW-1 had illicitly and illegally against the wish of the victim girl (PW-1) raped her. It is also mentioned that in the night of 15-02-2018 the accused had sexual intercourse with PW-1 the whole night after threatening her and prior to it also the accused had raped PW-1 on the bank of the pond on four occasions.

7. If the accused has induced PW-1 to marry her and had sexual intercourse with her then it was a consensual sex though it may fall within the meaning of cheating or even rape. The allegation of threat on the night of 15-02-2018 and then having sexual intercourse the whole night also do not go side by side. PW-1 could have raised hue and cry had the accused came there against her wish, threatened her and raped her. She having kept silent the whole night it indicates she was a consenting party if in fact such sexual intercourse had taken place.

8. It is also mentioned in the FIR that prior to the incident on 15-02-2018 the accused had sexual intercourse with PW-1 on the bank of

pond on four occasions. If it is so then also it indicates the consensus of PW-1 to such activity. There was no such threat or inducement to have sexual intercourse on such a number of occasions.

9. There is other allegation in the FIR (Ext-2) that on 17-02-2018 the accused called PW-1 to his house and when she came there the other accused named in the FIR i.e. Jonab Ali rebuked her, dragged her by her hair and pressed her breast. This allegation also do not appear to be a normal human activity. What for Jonab Ali will assault PW-1, nothing is mentioned therein. If Jonab Ali had no objection regarding PW-1 coming to the house of accused Mofidul Islam, at best he would have rebuked her and sent her back. At the most he would have pushed her or dragged her out of the house or the compound. IN such a situation he would not have embraced or pressed her breast. The allegation as such palpably appears to be exaggerated.

10. Now, coming to the evidence of victim PW-1, she deposed that the incident is of four months back and since last two years she was in love with the accused. The accused on the promise to marry her had sexual intercourse with her on four occasions. On that night when she was sleeping the accused came to her house and raped her and prior to it on three occasions the accused had sexual intercourse with her on the bank of the pond. After the incident in her house she went to the house of the accused as told by him and at that time the father and one Jonab Ali assaulted her. The accused refused to marry her. Jonab kicked her on her chest and she became senseless. Next day there was a bichar in the village but the accused did not turn up. Thereafter also a bichar was held and the accused refused to marry her. Thereafter her brother lodged the FIR.

11. In her cross she stated that earlier she was at Delhi where Mofidul the brother of the accused was also there. Safiqul was also at Delhi. They worked together at Delhi. She denied that at Delhi she was in love with one Johidul and regarding this matter there was a bichar at Delhi. She denied that in that bichar Usman Ali, Jiaul Haque, Joinal Ali and Safiqul Islam and the contractor was present and in that meeting she was given Rs.45,000/- as compensation. She stated that from Delhi she was in love with accused Mofidul. She denied of Rs.50,000/- from accused Mofidul to withdraw the case. She did not shout when the accused raped her in her house on that night. She also did not state anyone about it. She do not know about her date of birth. From the evidence of PW-1 it is clear that she was in love with accused and whatever physical relationship (if any) took place between them it was with her consent. She went to the house of the accused and she was driven out from there and on the refusal of the accused to marry her this case was filed. From the evidence of PW-1 there do not appear to be any such false promises or inducement by the accused for PW-1 to give consent to have sexual intercourse. From her evidence and facts and circumstances of the case it appears that they were in love and for this relation they entered into consensual sex.

12. The evidence of PW-2, the cousin of PW-1, also support PW-1's version of going to work at Delhi and having an affair with the accused Mofidul. He also deposed of the physical relationship between PW-1 and the accused and that when PW-1 went to the house of the accused Mofidul, he fled away from his house and his family members assaulted PW-1 and sent her away. Ext-2 is the seizure list by which the birth certificate of PW-1 was seized from PW-2. Material Ext-1 is the said birth certificate and as per Material Ext-1 the age of PW-1 was 16 years 7/8 months.

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13. PW-3 is the sister-in-law of the victim PW-1 and her evidence is that PW-1 had been to the house of the accused at which the family members of the accused assaulted her and drove her away from their house and in this regard a bichar was held. She also deposed that she heard that the accused had sexual intercourse with PW-1 on 6/7 occasions. According to her, PW-1 was driven out twice from the house of the accused. PW-4 is also the sister-in-law of PW-1 and her evidence is also quite similar. PW-5 also deposed of love affair between PW-1 and the accused and that when PW-1 went to the house of the accused she was assaulted there and at that time PW-2 went and brought PW-1 from the house of the accused. She heard later about the incident between PW-1 and the accused having took place 2/3 times on the bank of the pond.

14. PW-6 is the Doctor, who examined PW-1 and found no injury on her private parts or any other part of the body. There was no evidence of recent forceful sexual intercourse but old sexual intercourse was present. According to radiological examination the age of PW-1 was above 17 years and below 19 years.

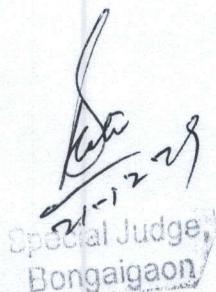
15. PW-7 is the I/O who investigated the matter and submitted the charge sheet (Ext-6) against the accused u/s 6 of the POCSO Act. The above discussion of evidence shows that there was love affair between PW-1 and the accused and at that time they had intimate physical relationship and it was a consensual sex between them. The allegation of threat and rape of PW-1 against her wish by the accused does not appear to be true. When they were in relationship the accused might have told her that he will marry her but subsequently did not keep his words for which PW-1 on her own went to the house of the accused to insist him to marry her and keep her in his house for which the family

member of the accused drove her out from their house. The evidence on record do not speak of any false promise or inducement by the accused to have sexual intercourse with PW-1. PW-1 has deposed of having sexual intercourse by the accused on the bank of the pond on 3 /4 occasions. Such activities in an open place is not possible without the consensus of both the parties. Whatever has taken place it was with due consent of PW-1 and it appears that at that moment she was swayed by the emotions. Subsequently, for some reason the accused did not marry her for which, went on her own to enter the house of the accused. There is no evidence that accused induced her by making false promises of marriage and compelled PW-1 to surrender to the lust of the accused.

16. The offence charged is u/s 4 of the POCSO Act and the prosecution claimed that PW-1 was below 18 years of age at that time and as such a minor and being a minor her consent is not a consent. During investigation the I/O has seized the birth certificate of PW-1. The birth certificate was issued on 16-06-2009 and the date of birth of PW-1 is shown as 19-06-2001. The birth certificate was obtained after 9 years of the date of birth and on what basis the said certificate was issued is not brought in evidence. The birth certificate is not proved by examining the issuing authority. The parent of PW-1 are not witness in this case to prove the date of birth of PW-1 or other fact. Being so the date of birth of PW-1 is not proved rather the medical evidence speaks of her age to be above 17 years and below 19 years at the time of incident. So it could be above 18 years also. Being so the benefit goes to the accused.

17. Subsequently, the accused married PW-1 and have a two months old baby boy, as stated by him during the time of recording his statement u/s 313 Cr.P.C on 30-11-2019. Same confirmed by Ld. PP and

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Special Judge
Bongaigaon



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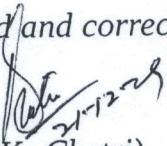
defence counsel. The marriage took place after recording the evidence of PW-1.

18. Summing up the above discussion, it is held that prosecution has failed to bring home the charge of rape of PW-1 by the accused against her wish and prosecution has also failed to prove that PW-1 was a minor. Being so prosecution has failed to establish the charge u/s 6 of the POCSO Act against the accused and as such the accused Mofidul Islam is acquitted of the charge 6 of the POCSO Act and set at liberty forthwith.

19. Given under my hand and the seal of this Court on the 21st day of December, 2019.


(Binod Kr Chetri)
Special Judge,
Bongaigaon.

Dictated and corrected by me,


(Binod Kr Chetri)
Special Judge,
Bongaigaon.

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APPENDIX

Prosecution witness:

PW 1 – Hasna Begum
PW 2 – Sumar Ali
PW 3 – Feruja Khatun
PW 4 – Msstt. Mafida Khatun
PW 5 – Sabarto Bhanu
PW 6 – Dr. Oli Roy Chakraverty (M/O)
PW 7 - Tilak Ch. Kalita (I/O)
PW 8 – Surajit Das (JMFC, Bongaigaon)



Defence Witness:

Nil.

Documents exhibited by Prosecution:

Ext.1 – Ejahar
Ext.2 – Seizure List Statement of the victim u/ 164 Cr.P.C
Ext.3 – Medical Examination Report of the victim
Ext.4 – Advice Slip of the victim
Ext.5 – Sketch Map
Ext.6 – Charge Sheet

Materials exhibited by Prosecution:

M.Ext.1 – Birth Certificate of victim

Defence Exhibit:

Nil


(Binod Chettri)
Sessions Judge,
Bongaigaon