IN THE COURT OF THE SESSIONS JUDGE, KARIMGANJ AT KARIMGANJ

Present: Utpal Prasad. AJS

Sessions Judge

Karimganj at Karimganj.

SPECIAL SESSIONS CASE NO. 25 OF 2016 u/ss. 450/354/376 of the Indian Penal Code, 1860; u/ss. 4/10 of the Protection of Children from Sexual Offences Act, 2012

State of Assam

-Vs-

Selim Uddin S/o late Arab Ali R/o Village Patiala P.S. Ratabari

District Karimganj

Date of framing of charge : 02.08.2017

Dates of recording of

Prosecution's evidence : 23.04.2018, 21.07.2018, 24.04.2019,

13.08.2019, 14.08.2019, 13.09.2019.

Date of examination of the

accused u/s 313 of Cr. P. C. : 03.10.2019.

Dates of recording of

defence evidence : NIL.

Date of hearing of argument : 26.11.2019.

Date of judgement : 11.12.2019.

LEARNED ADVOCATES WHO APPEARED FOR THE PARTIES

For the State : Mr. B. Deb, Public Prosecutor

For the accused

: Mr. H. Dutta, Advocate.

JUDGEMENT

- 1. The accused Selim Uddin is facing trial on charges of having committed offences under sections 450/354/376 of the Indian Penal Code, 1860 and under sections 4/10 of the Protection of Children from Sexual Offences Act, 2012. He is alleged to have entered into the house of the minor prosecutrix after sunset with the intention of committing penetrative sexual assault on her, of having applied force on her, and of having committed penetrative sexual intercourse with her. The prosecutrix had lodged a written 1st information of the said import leading to registration of Ratabari police station case number 162 of 2016 r under sections 448/376(A) of the Indian Penal Code and under section 4 of the Protection of Children and from Sexual Offences Act, 2012 and after investigation, final form was submitted against the accused alleging proof of commission of the aforesaid offences. In due course, charges as aforesaid were framed against him and on his claiming to stand trial, the prosecution examined 8 witnesses whereafter, the accused were examined under section 313 of the Code of Criminal Procedure, 1973. After the accused submitted that he did not want to adduce any defence evidence, arguments were heard.
- 2. Learned that Public Prosecutor has submitted that the medical examination of the victim has confirmed that she was a minor at the time of the alleged incident and therefore, as prima facie, allegations levelled by the prosecutrix constitute offences of house trespass and penetrative sexual assault, presumption under section 29 of the Protection of Children from Sexual Offences Act, 2012 come into play and therefore, the burden lies on the accused to prove his innocence. On the other hand, learned Counsel for the accused has argued that the prosecution failed to prove the foundational facts for bringing the presumption under section 29 of the Protection of

Children from Sexual Offences Act, 2012 into play. He has further submitted that the testimonies of the victim, the informant, their mother and of the investigating officer clearly show that the instant case is a counterblast to the case instituted by the accused against the informant. He has also pointed out that medical report does not point to any assault, sexual or otherwise, on the victim. He has prayed for acquittal of the accused.

- 3. Based on the materials on record and the arguments advanced by the rival sides, the following points for determination arise for a decision by this court:
 - i. Whether the victim was a minor at the time of the alleged incident?
 - ii. Whether the prosecution has succeeded in proving foundational facts to bring the presumption under section 29 of the Protection of Children from Sexual Offences Act, 2012 into play?
 - iii. Whether the aforesaid accused committed rape on the victim after committing house trespass in her residence and after having abducted her for the purpose of compelling her to illicit intercourse?
- 4. The Doctor, who had conducted medico-legal examination of the victim, has given the opinion that the victim was below 16 years of age at the time of her examination. At the instance of the defence, during cross-examination, she has stated that the determination of age was not done by the radiologist. Apart from this, the finding of the concerned Doctor as to age of the victim has not been questioned by the accused. The defence has not pointed out anything suggestive of incompetence of the said Doctor for conducting age determination test. The prosecutrix has also stated that at the time of the incident she was 14 though she has stated that she does not remember the date of birth. Nevertheless, the opinion of the doctor that the victim was a minor remains unrebutted and therefore, it is held that the prosecution has succeeded in proving that the victim was a minor at the alleged time of the incident. Question number (i), thus, stands answered in the affirmative.

- 5. The Doctor conducting the medicolegal examination of the victim has stated that no injury was found on the person of the victim. Even though it is seen that the incident is alleged to have taken place on 06.07.2016 at about 6 PM and her medical examination was done at 2:10 PM on 08.07.2016, on microscopic examination of the vaginal swab of the victim, nor spermatozoa was found. The Doctor opined that there was no sign of recent sexual intercourse. She has also stated that the hymen of the victim was torn but the tear was old. In her evidence, the victim has stated that when she was in her kitchen, the accused had entered into her house and room, had gagged her mouth with a cloth from behind, had torn her clothes and then had forcibly committed rape on her. However, medical legal injury report does not support her story.
- 6. The victim has stated that at the time of the incident, she was somehow successful in removing cloth from her mouth and had cried whereafter, her mother had come and then the accused had left her house. She states that she had told her mother about the incident and in the meantime, the informant's brother had also come back to the residence from his workplace and she had narrated the incident to him whereafter, the said brother had gone to the accused and had asked him about the incident whereafter, the accused had started beating her brother. She states that on the same day, she had lodged the 1st information with the police. The accused could successfully show that during investigation, the victim had stated to the investigating officer that she was in love with the accused for about 1 year. The accused also succeeded in showing, in the similar manner, that the statement of the victim that the police had seized her wearing apparels is not correct.
- 7. The victim's mother has stated that at the time of the incident, she was in the adjacent room offering prayer and on hearing the cry of her daughter, she had rushed to the kitchen and had seen the accused running away from

the house. She states that the victim had told her that the accused had committed rape on her and that she had seen the clothes of the victim torn. However, it is seen that she had not stated to the investigating officer that the victim had told her that the accused had committed rape on her. The accused also could successfully show that she had not stated to the investigating officer that she had seen the clothes of her daughter torn.

8. The informant has stated that he had gone to work as a mason and when he came back, her mother and the victim told that the accused had entered into the kitchen and had committed rape on the victim. He states that then he had gone to the nearby shop of the accused's elder brother and had complained to him when the accused and his 4 brothers had started beating him whereafter, he had lodged a case against them alleging that they had beaten him. He further states that his sister had lodged another 1st information against the accused. In cross-examination he has stated that after assault by the accused and his brothers, he had gone to the police station straight away and had lodged a 1st information leading to Ratabari police station case number 161 of 2016. He has admitted that in the said 1st information, he had not made the allegation of rape on his sister. This conduct of the informant is highly unnatural and surprising. It is difficult to believe that he would have overlooked the incident of rape on his sister and would have stressed more on assault on him by the accused and his brothers. The defence has taken the stand that there was a scuffle between the informant and the accused and as the accused had lodged a 1st information against him, he had also lodged a police case against the accused but on realizing that his case was not strong enough, he got the instant case with serious allegation of rape instituted through his sister. Testimony of the informant shows that this stand of the accused is not improbable. In view of admission by the informant that in the 1st information lodged by him he had not mentioned that his sister had been raped by the

- accused and that he had gone to the accused's brother to complain about the same makes the case of the prosecution highly suspect. Even at the cost of repetition, it is worth mentioning that the medical report does not corroborate the claim of the victim and the informant.
- 9. Prosecution witness number 5 has stated that he does not know about the incident. Finding him not supportive of the case of the prosecution, the prosecution confronted him with his purported statement made during investigation and took the stand that to the investigating officer, he had stated that on hearing sudden hue and cry, he had come out of his residence and had seen that a physical scuffle was going on in front of the shop and that the accused, Fazir Uddin, Asab Uddin and Abdullah were physically assaulting Kutub Uddin, Amin Ali and Ali Hussain (victim's brother) with the help of lances and that he could know from others that the accused Selim Uddin had trespassed into the house of the informant and had jostled with her whereafter, Ali Hussain had gone to the accused to ask award the incident leading to the physical scuffle. The investigating officer has confirmed that this witness has made these statements to him. However, this stand of the prosecution goes on to show that there was indeed fight between the 2 groups. It is also seen that to this witness, no one had stated that the accused had committed rape on the victim. This further probabilises the stand of the defence that because of the said scuffle, case and counter case were filed and on realizing that the case instituted by the prosecution witness number 3 was not strong enough, the victim stepped in and had lodged the instant case against the accused with false allegations.
- 10. Similarly, though the prosecution witness number 6 has stated that on hearing scream from the house of the victim, he had gone there and had found the victim lying on the floor inside her house and covered with clothes with her mother crying and that the victim had told him that the accused had entered into her house and had committed rape on her and had then left the

house, the investigating officer has confirmed, at the instance of the defence, that this witness had not stated to him that he had seen the informant lying on the floor inside her house covered with clothes with her mother crying and that the victim had told him that the accused had trespassed into her house and had committed rape on her. The allegation of rape being the crux of the case, it is highly unlikely that this witness indeed knew this to have happened and despite that did not tell the investigating officer about it.

- 11. Finding the prosecution witness number 7 not supportive of the case of the prosecution, the prosecution took the stand, later confirmed by the investigating officer, that he had stated to the investigating officer that when he had come out of his residence on hearing hue and cry, he had seen the accused coming out of the house of the victim, that the prosecution witness number 3 had come and had asked the accused about the incident whereafter, the accused had got enraged and fisticuffs had taken place between the two. As the investigating officer has confirmed that the victim had stated to him that she was having love affair with the accused for about 1 year, the accused coming out of her house does not indicate, necessarily, that he had trespassed into the house of the victim. Nevertheless, the stand of the prosecution, during examination of the prosecution witness number 7 shows that a physical scuffle had indeed taken place between the prosecution witness number 3 and the accused.
- 12. The aforesaid shows that neither the claim of the victim and her family members that she had been raped has found support from the Doctor, nor the testimonies of the witnesses and the stand of the prosecution show that the case of the prosecution's worthy of reliance.
- 13. As section 29 of the Protection of Children from Sexual Offences Act, 2012 mandates a Special Court to presume that the accused, being prosecuted for having committed, or having abetted, or having attempted to commit an offence defined under sections 3, 5, 7 and 9 of the said Act, has committed

or abetted or attempted to commit the offence with the reverse burden on the accused to prove the contrary for an inference that he has not committed or abetted or attempted any such offence. As it is settled law that a negative cannot be proved, in order to prove the contrary of something, it is necessary that that 'something' is proved first. If we read this with the definition of the word "proved" as given in section 3 of the Indian Evidence Act, 1872, it transpires that for raising the presumption under section 29 of the Protection of Children from Sexual Offences Act, 2012, foundational facts have to be proved. As the definition of the word "proved" enjoins that belief of the Court of existence of a fact with sufficient degree of probability so as to enable a prudent man to act upon it has to be based upon the evidence on record and not merely because charge has been framed against an accused with the allegation of the accused having committed any of the offences defined in sections 3/5/7/9 of the Protection of Children from Sexual Offences Act, 2012 it becomes clear that section 29 of the said Act does not require that the prosecution's case has to be taken as gospel truth and no reference is required to be made of the evidence on record howsoever improbable it may be. However, once the foundational facts for raising such a presumption are proved, it would be on the accused to prove the contrary. [See Sahid Hossain Biswas Vs. State of West Bengal 2017(3) Cal. L.T. 243]...

14. The analysis of the evidence adduced by the prosecution witnesses shows that by way of effective cross-examination, the defence has succeeded in showing that the prosecution has failed to prove, even on balance of probabilities, that the basic ingredients of the offences alleged against the accused. This means that the foundational facts for bringing the presumption under section 29 of the Protection of Children from Sexual Offences Act, 2012 have not been proved. As such, answer to the 2nd question posed above for determination is given in the negative. For the same reason, it is held that the prosecution has failed to prove that the accused had committed

- penetrative sexual assault on the victim after committing house trespass into her residence after Sunset.
- 15. In the result, the accused Selim Uddin is acquitted of the charges under sections 354/376/450 of the Indian Penal Code and under sections 4/8 of the Protection of Children from Sexual Offences Act, 2012 and is set at liberty forthwith. His bail bond and surety stand discharged with immediate effect.
- 16. With the above, the instant case stands dismissed on contest.
- 17. As no one has been shown to be the victim of any offence, no occasion for award of compensation under Victim Compensation Scheme of the State of Assam arises. As such, no order was passed in the said regard.
- 18. Send a copy of this judgment to the learned District Magistrate, Karimganj District and to The Superintendent of Police, Karimganj.

Given under my hand and seal of this Court in presence of the learned that Public Prosecutor, the accused and his learned counsel on this the 11^{th} day of December 2019.

Sessions Judge Karimganj at Karimganj.

APPENDIX

Prosecution Witnesses: --

P. W. 1 : Victim (name not disclosed)
P. W. 2 : Shrimati Sukurjan Bibi

P. W. 3 : Shri Ali Hussain P. W. 4 : Dr. Lipi Deb

P. W. 5 : Shri Abdul Mannan P. W. 6 : Shri Khalil Uddin P. W. 7 : Shri Mashuk Ahmed

P. W. 7 : Shri Ashim Ranjan Das (I. O.)

Prosecution Exhibits: -

Exhibit 1 : First Information.

Exhibit 2 : Printed form of the first information report.

Exhibit 3 : Medical Report of the victim. Exhibit 4 : X-ray report of the victim.

Exhibit 5 : Vaginal swab report of the victim.

Exhibit 6 : Police requisition for medical examination of the victim. Exhibit 7 : Statement of the P. W. 5 under section 161 of the Code of

Criminal Procedure, 1973.

Exhibit 8 : Statement of the P. W. 7 under section 161 of the Code of

Criminal Procedure, 1973.

Exhibit 9 : Sketch map of the place of occurrence.

Exhibit 10 : Charge-sheet.

Material Exhibits: - NIL

Defence Witness: - NIL

Defence Exhibit:- NIL.

Court Witness: - NIL.

Sessions Judge Karimganj at Karimganj.