# IN THE COURT OF ADDITIONAL SESSIONS JUDGE (FTC), DARRANG, MANGALDAI

PRESENT: Mr. J.M.Barman, A.J.S.,

Additional Sessions Judge (FTC),

Darrang, Mangaldai.

# Special (POCSO) Case No. 15 of 2018.

(under section 354(B) of I.P.C. R/W 4 of POCSO Act)

(Pertaining to G.R. Case No. 1330/2018)

State of Assam

-Versus-

Mahammad Ali, S/O. Late Naram Ali, Vill.- Muslimghopa,

P.S. Sipajhar,

Dist.- Darrang (Assam),

...... Accused person.

# **APPEARANCE:**

Advocate for the State : - Sri Dulal Kr. Ghosh, Addl.P.P.,

Advocate for the accused : - Mr. Hitesh Deka

Date of framing charge : - 06-02-2019.

Date of evidence :- 28-06-19, 19-07-19.

Date of argument :- 23.07.19

Date of judgment : 23.07.19

# <u>JUDGMENT</u>

## **PROSECUTION CASE**

**1.** The prosecution story in brief , is that informant Fatema Begum

lodged an F.I.R. before the Officer-in-Charge of Sipajhar Police Station on 15-05-2018, alleging that on that day at about 2.30 P.M. her daughter Nazma Begum, aged about 9 years, went to the shop of the accused to bring bathing soap, the accused forcefully committed rape on her inside the shop. After the incident her daughter returned home and informed them about the incident. Hence this case.

## **INVESTIGATION**

3. After receiving the ejahar from the informant, the officer in charge, Sipajhar P.S registered a case as Sipajhar P.S.Case No. 347/18, U/S. 376 of IPC R/W Section 4 of POCSO Act and entrusted S.I. Mr. Jadab Ch. Kalita to investigate the case. Upon completion of the investigation, the I.O. filed Charge-sheet against the accused Mahammad Ali under section 354 (B) of IPC R/W Section 4 of POCSO Act.

# **TRIAL**

- 4. As the offence against the accused person is exclusively triable by the special court, hence the learned Addl.C.J.M., Darrang, Mangaldai forwarded the case record to the Special Court i.e. the Court of learned Special Judge, Darrang, Mangaldai. After receiving the case record from the lower Court, the case was registered as Special (POCSO) No. 15 of 2018 and the learned Special Judge, Darrang, Mangaldai pleased to transfer the case record to this court for trial.
- 5. Upon receipt of the case record as well as after going through the materials available in the case record and after hearing the submission of the learned counsels for both sides, my learned predecessor had framed formal charge against the accused person Under Section 354 (B) of I.P.C. R/W Section 4 of the POCSO Act and

contents of the charges were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

6. The prosecution side in the instant case has examined 2 Nos. of witnesses i.e. the informant and the victim and exhibited two documents. After examination of the informant as well as the victim, the learned Addl.P.P appearing on behalf of the State declined to adduce any further evidence on behalf of the prosecution side as prosecution witnesses has not supported the prosecution story. After going through the evidence of the prosecution witnesses ie the informant, and the victim and after hearing the submission of learned Addl.P.P., prosecution evidence is closed. The statement of the accused person is recorded under section 313 of CRPC. The plea of the accused is of total denial. However, he has not adduced any evidence in his defence.

### **Points for determination :**

- (I) Whether on 15-05-18 at about 2.30 P.M. at Village- Muslimghopa under P.S. Sipajhar the accused using criminal force upon the victim to make her naked by removing her pant and outraged her modesty by squeezing the breast of the minor girl and thereby committed an offence punishable under Section 354 (B) of Indian Penal Code?
  - (ii) Whether on the same day, time and place the accused committed penetrative sexual assault to the minor daughter of the informant and thereby sexually harassed her and thereby committed an offence punishable under Section 4 of the POCSO Act?

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

7. I have perused the evidence on record and also heard the submission of learned defence counsel as well as learned Addl.P.P for State. Before proceeding further, let me describe in brief of the evidence adduced by the informant as well as the victim.

- 8. P.W-1 (Fatema Begum), the informant deposed that she knows the accused and the victim is her daughter, aged about 11 years. Her daughter (victim) is studying in Class-V at No.1 Pipirakuchi L.P. School. The incident occurred at about 2.30 P.M. On the date of occurrence she was at her residence and she sends her daughter to the shop of the accused person to bring soap. After some time, while her daughter came crying towards her residence, she asked her about the matter then her daughter told her that the accused caught her hand. PW-1, further deposed in her evidence that her daughter reported her that the accused committed forceful rape on her in his shop. Thereafter she lodged the case in the Police Station. Ext-1 is the Ejahar and Ext-1(1) is her signature. After lodging the ejahar, her daughter was medically examined at Sipajhar Hospital. Thereafter, her daughter was brought to Mangaldai Court and her daughter gave her statement before Magistrate. On being asked by police, she submitted school certificate of her daughter to the police. M. Ext-1 is the said certificate which she had seen in the court.
- 9. In her cross-examination she deposed in her evidence that while her daughter went to the shop of the accused person, there were other persons in the shop. She further deposed in her evidence that she later on came to know that the incident was not true as reported by her dauhgter. She further admitted in her cross-examination that she had lodge the instant case due to some misunderstanding.
- 10. P.W-2 (name withheld due to nature of the offence) is the victim of the instant case and deposed in her evidence that the She knows accused Mahammad Ali who is a resident of same village. PW-2 deposing her evidence that on the date of occurrence at about 2.00 P.M, she went to the shop of the accused to bring soap. Then the accused (grand-father) gave her a chocolate and then pulled her by holding her hand. Then she received pain in her hand and came home

by crying. She does not know whether her mother lodged case or not. She gave her statement before the Magistrate. Ext-2 is the statement and Ext-2(1) and Ext-2(2) are her signatures. She was medically examined.

- 11. This prosecution witness was declared hostile at the prayer of the prosecution side. Thereafter she was cross-examined by the prosecution side as well as defence side.
- 12. In her cross examination by the defence side that she deposed that while she went to the shop of the accused person, there are other person in the shop. She further deposed that at the shop, one Xerox machine was there, and wife of the accused person was working there.
- 13. Now from Ext-1, it reveals that Ejahar was written by one Majammil Haque, and as per version of the informant she was not read over the content of the ejahar before taking her signature in the ejahar. Although, the informant in her ejahar specifically stated regarding commission of rape upon her daughter inside the shop house by the accused person, but while adducing her evidence before the court she deposed that the incident was not true as reported by her daughter and due to some misunderstanding she lodged the instant ejahar before the police. It is pertinent to mention here it while her daughter went to the shop of the accused person, she was present in her residence, and came to know about the incident as reported by her daughter (victim).
- 14. The victim who is only aged about 11 years, puts forward a totally different story that of the incident narrated in the ejahar, which was lodged by her mother. According to her on the date of occurrence while she went to the shop of the accused person, accused person after giving her a chocolate pulled her by holding her hand due to which she feels pain on her hand and hence she return to her home, and informed the matter to her mother. She also deposed in her

evidence that while she was at the shop of the accused person other customer are also present in the shop and wife of the accused person was also in the shop, busy with her zorox machine's work.

- 15. Now, by holding of the hand of the victim who is aged about 9 years at the time occurence, cannot be presumed that accused person with bad intention to out rage the modesty of the victim, has hold her hand. The victim has not whisper a word that accused person hold her hand with intention to outrage the modesty. Moreover, while the victim was in the shop of the accused person, the other customer was present in the shop and the wife of the accused was also busy with her work with the zezox machine. In that situation it is not possible that that accused person hold the hand of the victim with an intention to out raged her modesty.
- 16. It also reveals that the victim had given her statement under section 164 of CRPC before the Judicial Magistrate, Darrang wherein she deposed incriminating material against the accused. The question is whether the statement given by the victim before the Judicial Magistrate under section 164 of CRPC can be relied upon in toto?
- 17. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence. Honourable Apex court as well as our own High Court in a Catena of judgement held that the statement of a witness recorded under section 161 of CRPC by Judicial Magistrate, cannot be treated as substantive evidence. Hence the Ext-2, statement of the victim recorded by the Judicial Magistrate, Darrang, can't be used in totality against the accused person while deciding the guilt against the accused person.

- 18. In the instant case, although the prosecution has not examined the medical officer, but from the perusal of the medical report it reveals that no any injury was seen on the private parts of the minor victim. The victim of the instant case is aged about 9 years at the time of incident, and if an adult male person did any sexual intercourse with a girl aged about 9 years, then normally there must be some injury on the private part of the victim, as the victim after the commission of the alleged incident was produced before the medical officer on the same day ie 15.05.18 for her medical evidence. But surprisingly, there is not a single stretch on the private part on the victim, as reported by the medical officer after the examination of the victim. It is pertinent to mention herewith the victim nowhere in her statement recorded by the Judicial Magistrate under section 164 of Cr.P.C had ever deposed regarding commission of sexual intercourse upon her by the accused person on the date of occurrence. Hence it is prove that mother of the victim initially tried to exaggerated the evidence, although later on she failed to support the prosecution case.
- 19. Now from the application of evidence of the informant as well as the minor victim there is no any ingredient of offence against the accused person under section 354B of IPC read with section 4 of POCSO Act. The victim nowhere deposed in her evidence that the accused to outrage her modesty hold her hand. Rather she explained that she was crying as she feels pain on her hand. There is no any iota of evidence regarding commission of penetrative sexual assault upon the victim by the accused person.
- 20. Considering all this aspect, in my considered opinion prosecution side failed to prove the charges against the accused person under section 354-B of IPC read with section 4 of POCSO Act, beyond all reasonable doubts. I therefore acquitted the accused person from the above mentioned charges and set him at liberty forthwith. The bail bond of the accused person shall be valid for the next six

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months from the date of delivery of the instant judgement as per provision of section 437-A CRPC.

- 21. Furnish a copy of judgement to the learned district magistrate Darrang Mangaldai as per provision of section 365 of CRPC.
- 22. Seized article be disposed of in accordance with the law. PSI Mangaldai is to take necessary steps.
- 23. Judgement is delivered in open court.
- 24. Given under my hand and seal of this court on this 23<sup>rd</sup> day of July, 2019 at Darrang Mangaldai

Sd- J.M.Barman

Additional Sessions Judge (FTC), Darrang, Mangaldai.

Transcribed and typed by me:

Smti S.Devi. (Stenographer).

(Contd....Appendix)

**APPENDIX:** 

# **A)Prosecution witnesses:**

i)PW1, Fatema Begum (informant)

ii)PW2, Nazma Begeum (Victim).

# **B)Prosecution exhibits:**

Ext-1, Ejahar.

Ext-2, Statement of the victim recorded U/S. 164 Cr.P.C.

# C) Defence witnesses:

Nil.

# **Defence exhibits:**

Nil.

Sd- J.M.Barman

Additional Sessions Judge (FTC), <u>Darrang, Mangaldai</u>.