

Present:- Shri J. Borah, A.J.S

Special Judge, Bilasipara.

Special (POCSO) Case No- 12 of 2019

u/s 4 of Protection of Children from Sexual Offences Act.

State of Assam

-Vs-

Montaz Ali @ Monta

..... accused person

Date of framing charge :- 01-06-2019

Date of recording evidence :- 17-06-2019

30-08-2019

27-09-2019

Date of Argument :- 11-02-2020

Date of Judgment :- 12-02-2020

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam.

For the defence :- Mr. Rabiul Islam,

Ld. Advocate for the defence.

<u>JUDGMENT</u>

1. This case is under section 4 of Protection of Children from Sexual Offences Act. So, the name of the victim is not mentioned and she is, hereinafter, referred to 'x'.

2. The prosecution case, in brief, is that Ayesha Khatun, the informant lodged an ezahar with the Chapar police station on 16-04-2019 informing that 'x' is the daughter of informant. 'x' was only 5 (five) years old. She lives at Ward no. 3, Chapar. On 14-04-2019, the informant was not at her house. The accused, taking the advantage of absence of the informant at their house, induced 'x' to go with him to his house. The accused took 'x' to the ceiling of house where he committed rape on 'x'. The accused Ambia Khatun went to the place of occurrence hearing the cry of 'x' and rescued her. But Ambia Khatun threaten 'x' not to divulge the incident to other.

So, the informant prayed for taking necessary action against the accused.

- 3. The Chapar police station received the ezahar and registered as Chapar police station case no. 133/09 under section 376(AB) Indian Penal Code read with section 4 of Protection of Children from Sexual Offences Act. The case was investigated and having found prima facie under section 376(AB) Indian Penal Code and under section 4 of Protection of Children from Sexual Offences Act against the accused Montaz Ali @ Monta, laid the charge sheet before the court for trial.
- 4. The accused Montaz Ali @ Monta, hereinafter called the accused, appeared in this case. He was furnished copy. Charge was framed under section 4 of Protection of Children from Sexual Offences Act, POCSO Act in short, against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 6 (six) witnesses, namely-

1.	Ayesha Khatun	P.W-1
2.	`x'/the victim	P.W-2
3.	Azad Ali	P.W-3
4.	Khaliluddin	P.W-4
5.	Magrab Ali	P.W-5
6.	Ganesh Das	P.W-6

6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence adduced by the prosecution witnesses and also claimed to adduce evidence in defence.

- 7. The defence examined only one witness, namely
 - 1. Ambiya Khatun D.W-1
- 8. Heard argument for both sides.

9. **POINTS FOR DETERMINATION**

i. Whether accused on 14-04-2019 at about 01.00 P.M at village Hardemara under Chapar police station, committed penetrative sexual assault on 'x', aged about 5 years old and thereby committed offence u/s 4 of POCSO Act?

DECISION AND REASONS THERE OF

- 10. In this prosecution case P.W-1 Ayesha Khatun is the informant, P.W-2 'x' is the alleged victim, P.W-3 Azad Ali is the brother of the informant. P.W-4 Khalil Uddin, P.W-5 Magrab Ali are the independent witnesses and P.W-6 Ganesh Das is the investigating officer.
- 11. Since P.W-1 Ayesha Khatun is the informant and P.W-2 'x' is the alleged victim, so, both are the prime witnesses in the prosecution case. So, let's see the evidence of this two witnesses at first.
- 12. P.W-1 Ayesha Khatun has stated in her evidence that she is the informant in this case. She lodged the ezahar against the accused. 'x' is her daughter and she is only 5 (five) years old. The occurrence took place two months ago (from the date of adducing her evidence on 17-06-2019). The occurrence took place at noon. On the day of occurrence, she went to work outside her house. She returned to her house in the afternoon. 'x' told in tears that she was playing in the field. The accused told her to pay money and he took her to his house and committed sexual act entering his penis into her private part. 'x' cried, but the accused gagged her mouth. The wife of the accused Ambiya Khatun asked her not to divulge the incident to others. She lodged the ezahar in connection with the occurrence. She gave her thumb impression on the ezahar.

In her cross P.W-1 has stated that she cannot say the date of occurrence. She denied to lodge the ezahar after 12 days. 'x' was not examined by the Medical & Health Officer before lodging the ezahar. The accused has five members in his family, wife, two sons and one daughter. 'x'

told her about the occurrence after three days. She denied that she lodged the case due to land dispute. She did not tell other about the occurrence.

13. P.W-2 'x' has stated in her evidence that the occurrence took place at the house of the accused. The accused took her to his house assuring to pay money. The accused put off her wearings and then he entered his penis into her private part. She screamed. The wife of the accused went there and then the accused left her. When the accused took her to his house, the wife of the accused was not at their house. She told her mother about the occurrence after three days. She gave her statement before the Magistrate.

In her cross P.W-2 has stated that sons and daughter of the accused was not at their house when the accused took her to his house. The accused took her upon the ceiling. Her mother has taught her to adduce evidence. She did not tell anyone about the occurrence upto three days. She denied that nothing had happened.

14. Thus, careful scrutiny of evidence of P.W-1 and P.W-2, it appears that according to P.W-1, she was not at house on the day of occurrence. She went outside to work. She returned to her house in the afternoon. Then 'x' told her about the occurrence. But in her cross P.W-1 has stated that she got to know about the occurrence after three day. 'x' told her about the occurrence after three days from the day of occurrence. So, there found gulf between the evidence in chief and evidence in cross examination.

Next aspect to consider where did the accused commit sexual intercourse.

According to P.W-1, the accused took 'x' to the ceiling of the house and he had committed sexual intercourse on her. Same is the evidence of P.W-2. But D.W-1 Ambiya Khatun has sternly denied to have ceiling at their house. According to D.W-1 their house is of 'kutcha' and there is no provision of ceiling. P.W-6 Ganesh Das is the investigating officer who visited the house of the accused. According to P.W-6 there was ceiling at the house of the accused, but the ceiling was made of jute stick and there was no stair facility to get into the ceiling.

Thus, the evidence of P.W-6 has made it clear that though there was ceiling at the house of the accused, but there was no such stair facility to get into the ceiling. In such a situation, the evidence of P.W-1 and P.W-2 that 'x' was committed sexual intercourse on ceiling cannot be accepted.

Another aspect is that the house of P.W-1, the house of accused is surrounded by many neighbours. According to P.W-1 there are the houses of Khalil, Khalek and Abedin nearby the house of the accused. There are the houses of Magar, Abu Kalam nearby the house of P.W-1. Now question arises, whether the informant told the neighbour about the occurrence. According to P.W-1, she did not tell anyone about the occurrence. An occurrence which is of serious nature had happened, but P.W-1 being the informant and mother of the victim kept mum to other is a strong enough.

Another aspect is that veracity of the evidence of P.W-2 'x'. P.W-2 is a little girl who is of 5 (five) years old. She has got capacity to understand. According to P.W-2, she has adduced evidence as taught by her mother. So, there is question of tutor. P.W-2 was tutored by her mother P.W-1. So, the evidence of P.W-2 is not free from doubt.

15. Now let see the evidence of other witnesses.

P.W-3 Azad Ali has stated in his evidence that he heard from Ayesha Khatun that the accused committed rape on 'x'.

In his cross P.W-3 has stated that his house is 1 (one) kilometer away from the house of the informant.

- 16. P.W-4 Khaliluddin has stated in his evidence that there was quarrel between the informant and the accused. But he did not know the cause behind their quarrel.
- 17. P.W-5 Magrab Ali has stated in his evidence that there was altercation between the informant and the accused. Except this, he knows nothing.

Cross examination of P.W-5 was declined by the defence.

- 18. Thus, the evidence of P.W-3, P.W-4 and P.W-5 shows that they are independent witnesses. P.W-3 has stated that the informant Ayesha Khatun told that the accused committed rape on 'x'. P.W-3 lives at about a distance 1 (one) kilometer. P.W-2, the informant has got many neighbours. The informant did not tell anyone either to Khalil, Magrab, Abedin or anyone who are her neighbour, but she told P.W-3 Azad Ali who lives 1 (one) kilometer away from her house cannot be expected.
- 19. P.W-4 and P.W-5 who are extreme neighbours to the informant have categorically stated in their respective evidence that there was altercation

between the informant and the accused. Both P.W-4 and P.W-5 have not stated anything regarding voluptuous act on 'x' by the accused.

20. P.W-6 Ganesh Das is the investigating officer. According to P.W-6, he sent the victim 'x' for her medical examination, but the victim 'x' did not agree to examine her by the doctor.

The accused is a major one having his wife and three children. If such a person commit penetrative sexual assault on a child who is just 5(five) years old, the victim would have sustained severe injury. Examination of private part of 'x' by a medical officer would have ascertained it. But the same was not done. This is a lapse on the part of the prosecution. The other evidence of P.W-6 is mere official.

- 21. Taking above all into consideration, it leads to conclusion that the prosecution evidence is not sufficient and reliable to prove the offence as alleged against the accused. The prosecution evidence is imbibed with many discrepancies and embellishment. The prosecution case is dearth of merit.
- 22. The prosecution has failed to prove it's case under section 4 of POCSO Act against the accused beyond all reasonable doubt.
- 23. Held, the accused is not guilty u/s 4 of POCSO Act.
- 24. The accused is acquitted and set at liberty.

The bail bond of accused stands cancelled and the bailor is discharged from all liabilities.

The case is disposed of.

Given under my hand and seal by this court on this 12th day of February, 2020 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by, Swmkhwr Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

P.W-1 Ayesha Khatun

P.W-2 'x'/the victim

P.W-3 Azad Ali

P.W-4 Khaliluddin

P.W-5 Magrab Ali

P.W-6 Ganesh Das

PROSECUTION EXHIBITS:-

Ext-1 Sketch Map,

Ext-2 Charge sheet.

DEFENCE WITNESS :-

D.W-1 Ambiya Khatun

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- NIL

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara