IN THE COURT OF ADDL. SESSIONS JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Addl. Sessions Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.06/2016

U/S-376 IPC R/W Section 4 of the POCSO Act, 2012

State of Assam

-Versus-

Md. Mamin Ali

s/o-Lt. Kalu Seikh

resident of vill -SingimariHabi

P.S.-Chhaygaon

Dist.-Kamrup

-----Accused

Appearance:

Mr. A.K. Baruah. Addl. Public Prosecutor

-----for the State

Md. Abdur Rahim, Advocate

-----for the accused

Date of evidence: 30.04.2016, 05.12.2017, 13.03.2018, 04.05.2018,

13.06.2018, 24.08.2018, 01.09.2018, 25.09.2018, 29.09.2018.

Date of Argument: 30.10.2018

Date of Judgment: 12.11.2018

JUDGMENT

- 1. The Prosecution case in brief is that—on 28.11.2014 the complainant Md. Moinul Hoque lodged an ejahar alleging that the accused induced his minor sister aged about 16 years with a false promise of marriage and in that process he often committed rape upon her. And on 23.11.2014 at about 7.30 p.m, the accused committed rape upon her. Hence, this case.
- On the basis of the said ejahar, Chhaygaon P.S Case No. 362/2014 U/S-376 IPC was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S-376 IPC.
- 3. The case was duly committed and after hearing both the parties, charges were framed U/S- 376 IPC r/w Section 4 of the POCSO Act, 2012 against accused—Md. Momin Ali. The aforesaid charges were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined as many as nine (9) numbers of witnesses including the informant and the victim girl.

5. POINT FOR DETERMINATION

- (I) Whether the accused person on 23.11.2014, at village Singimari, Chhaygaon P.S committed rape upon the minor sister of the informant aged about 16 years and thereby committed an offence punishable U/S 376 of IPC?
- (II) Whether on the same date, time and place the accused committed penetrative sexual assault on the minor sister of the informant and thereby committed an offence of penetrative sexual assault U/S-3 which is punishable U/S 4 of the POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined as many as 9 (nine) numbers of witnesses.
- 7. P.W.2, Moinal Hoque is the informant of this case. He has deposed in his evidence that he knows the accused person and stated that the incident took place on 23.11.2014. On the day of the incident, while he was at home in the adjacent house he heard his sister (prosecutrix) shouting and crying. Then, he went out to enquire what had happened. The prosecutrix told him that the accused taking advantage of absence of other family members committed rape on her. Prosecutrix further reported him that she had love affairs with the accused from last 2 years and the accused had promised to marry her. And hearing this, he (P.W.2) lodged the ejahar. He further deposed that at the time of incident, prosecutrix was 16 years old.
- 8. In her cross-examination, P.W.2 deposed that he was in his house which is adjacent to the house of the Prosecutrix. He arrived at the house of the prosecutrix immediately after hearing her cry. But he had not seen the accused there. Further P.W.2 disclosed that his sister was given in marriage with one Soleman after around 6 months of the incident.
- 9. P.W.3, is the Prosecutrix. She has stated in her evidence that informant is her brother. She knows the accused person. P.W.3 further deposed that about three years ago when she was 16 years old, the accused gave a promise to marry her and thereafter,he committed sexual intercourse with her. Accused also committed rape on her on the bank side of a pond and near a bamboo tree. Further, she stated that the accused had sex with her continuously for two years and during that period, one day accused was detected by her neighbours when he came to have sexual act with her and then he fled away. Thereafter, the villagers called a 'Village Mel' and in that 'Mel' the accused did not respond and thereafter, her brother (P.W.2) lodged the case against the accused. P.W.3 further stated that police took her to the doctor for her medical examination. Ext. 1 (4) and Ext. 1 (5) are her signatures on the medical report. She was also brought by police before the Magistrate for recording her statement U/S-164 Cr. P.C. Ext.2 is the statement, Ext.2 (1) and Ext. 2 (2) are her

- signatures. Further P. W 3 disclosed that at the time of incident she was aged about 16 years old.
- 10. In her cross-examination, P.W.3 has stated that the she got married with one Surman Ali about 2 ½ years ago. P.W.3 has disclosed that she had love affairs with the accused but the accused had no feelings of love and inclination towards her.
- 11. P.W.4, Musstt. Hasina Khatun has stated in her evidence that she knows the informant of this case and victim also. She also knows the accused. They are her neighbours. She further deposed that the incident took place about 3 years ago at around 7.30 p.m and on the date of occurrence when she heard some noises coming from the informant's house. She went there and she met the prosecutrix. Prosecutrix told her that the accused committed bad act upon her. P.W.4 did not see the accused there. Other villagers were also present at that time. This witness stated that the age of the victim was 16 years at the time of occurrence.
- 12. In her cross-examination, P.W.4 deposed that prosecutrix is her neighbour. P.W.4 could not state the names of the villagers who were present in the informant's house.
- 13. P.W.5, Md. Rakibul Hussain has stated in his evidence that he knows the informant, victim as well as the accused. He further deposed that the incident took place about four years ago and on the day of the occurrence while he was walking on the road and going towards river, he heard a noise in the house of the prosecutrix. Then, he went there and saw the brother of the prosecutrix, her mother and many other villagers. The accused was also present in the house campus of the prosecutrix. P.W.5 asked the prosecutrix and other village people that what had happened. They told him that the accused had love affairs with the victim and on that day he tried to commit rape upon the prosecutrix. P.W.5 did not know the exact age of the victim but he assumed her age to be 17 years. Thereafter, one day police came and interrogated him.
- 14. In his cross-examination, P.W.5 has disclosed that he was not present at the place of occurrence at the time of occurrence. He did not know there was any quarrel between the accused and the family members of Moinul Hoque in respect of a sheep destroying paddy. Further, P.W.5 also stated that he did not know whether the sister in law of Momin went to the house of Moinul Hoque to get release of her sheep

andthat the informant-Moinul and their family members assaulted her. He also did not know about any Panchayat 'Mel' held to discuss the incident. Furthermore, he stated that his house is situated at a distance of 4/5 house from the house of the prosecutrix. He did not know date of marriage of the prosecutrix but recently, he came to know that she got married.

- 15. P.W.6Md. Nur Islam, has deposed in his evidence that he knows both the informant and the accused person of this case. Also he knows the victim. He deposed that on the date of incident after hearing the noise, he went to the house of informant Moinul where he came to know that accused Momin had committed bad act upon the Prosecutrix. At the time of incident, prosecutrix was aged about 16 years. He also heard that accused Momin gave some clothes to the prosecutrix as he loved her.
- 16. In his cross-examination, P.W.6 has stated that his house is situated at a distance of about 55 meters away from the house of the prosecutrix. The incident took place at around 7 p.m.He went to the place of occurrence after half an hour of the incident. P.W.6 further deposed that the date of incident was 23.11.2014. He also stated he did not know whether the prosecutrix got married with someone during that period.
- 17. P.W.7 Md.Hussain Ali has deposed that he knows the informant as well as the accused. He knows the victim also. P.W.6 has deposed in his evidence that the incident had taken place around 3 / 4 years ago at 8 p.m.He was in his house. He heard from the villagers that the accused person raped the victim girl and it took place near the house of the victim. P.W. 7 stays about 1 km away from the place of occurrence.
- 18. In his cross-examination P.W.7 has deposed that he heard that victim's goat had entered into the paddy field of the accused for which an altercation had taken place. He did not know if a 'Village Mel' had taken place regarding this incident. He did not go to the place of occurrence. He further stated that there was a discussion amongst the villagers regarding the incident of rape. Victim girl had got married to another person after 3/ 4 months of the occurrence.
- 19. P.W.8 is one Kobir Ali @ Abdul Kobir. He did not know anything about the incident. In his cross-examination P.W.8 has deposed that victim girl had got married.

- 20. P.W.1, is the M/O, Dr. Anurupa Choudhury of this case. She has deposed in her evidence that on 08/12/2014 one Miss Nur Jahan Begum was brought to her for medical examination by WPC 529, Purnima Das with reference to Chhaygaon P.S Case No. 362/2014, U/S-376 IPC.
- 21. On the physical examination of the victim found---

Her height—156 cm, weight—58 kg, chest girth—86 cm, abdominal girth—69 cm, total 28 teeth were present and all were permanent. She had adequate space for 3rdmoller in the lower 2 of mouth. Scalp hair-46-50 cm in length. Axillary hair 2-3 cm and pubic hair 2-3 cm was black, her breast were hemisphical in shape, soft in consistency, nipples and aeroda dark brown in colour. No discharge is present from breast on gentle sqeezing. Microscopic examination of vaginal area did not show any spermatozoa or gonococcus.

- 22. P.W.1 has further deposed that after completion of physical examination, radiological and laboratory investigation, she opined that there was no evidence of recent sexual intercourse detected on her person, her age was above 16 years and below 18 years and there was no evidence of pregnancy detected on her person.
- 23. P.W.9, S/I, Sri Lonkeswar Sarma, is the I/O of this case, who has investigated the case. In his deposition, he has stated that on 28.11.2014, he was at GoroimariOut post as I/c under Chhaygaon P.S. On that day, after receiving an ejahar lodged by one Moinul Hoque, at Goroimari out post a G. D. Entry was made.He forwarded the ejahar to O/C, Chhaygaon P.S for registering a case. Accordingly, a case is registered vide Chhaygaon P.S Case No. 362/2014 U/S-376 IPC and O/C directed him to investigate the case. Accordingly, P.W.9 visited the place of occurrence and recorded the statement of the witnesses. He also prepared the sketch map. The accused was arrested and produced before the Court. He sent the victim for medical examination and produced her before the Magistrate for recording her statement U/S-164 Cr. P.C. After completion of investigation and on finding sufficient materials against the accused, P.W.9 submitted charge sheet against the accused Momin Ali U/S-376 IPC. Ext.3 is the sketch-map and Ext. 3(1) is his signature, Ext.4 is the charge-sheet and Ext. 4 (1) his signature.

- 24. In his cross-examination P.W.9 deposed that the victim (P.W.3) did not state before him that—"one day the accused was detected by the neighbours when he came to have sexual act with her". And P.W.5 did not state before him that—"he saw the accused is there in the house campus of the victim". P.W.9 further deposed that he recorded the statement of the P.W.8 at the place of occurrence.
- 25. At the close of Prosecution evidence, statement of the accused person U/S-313 Cr. P.C has been recorded. He denied committing the offence and declined to adduce evidence on his behalf.
- 26. Heard the arguments of the both the sides. Learned Defence Counsel argued that the prosecutrix is a major and no documents have been submitted to show that she was 16 years old at the time of occurrence. He further submitted that no incident as alleged had taken place. On the other hand, Learned Additional Public Prosecutor submitted that the informant (pw-2) has fully supported the prosecution story.
- 27. In this case , charges were framed against the accused person u/s 376 IPC r/w section 4 of POCSO Act . Now , question comes as to whether the offence committed by the accused falls u/s 376 IPC r/w Section 4 of POCSO Act , 2012 or any other offence . In order to arrive at the correct conclusion , it is appropriate to examine the basic ingredients of Section 375 IPC punishable u/s 376 IPC.
- 28. 375 IPC Rape A man is said to commit 'rape' if he
 - (a) Penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or
 - (b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
 - (c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
 - (d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the seven following descriptions:

(First) — Against her will.

(Secondly) —Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (Sixthly) — With or without her consent, when she is under eighteen years of age.

Seventhly – When she is unable to communicate consent.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

- 29. To constitute the offence of rape, it is not at all necessary that there should be complete penetration with the male organ with the emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission of semen and even an attempt of penetration into the private parts of the victim would be quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. The depth of penetration is immaterial in an offence punishable under section 376 IPC. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape.
- 30. Now, coming to Section 4 of the POCSO Act which is as follows-;
- 31. **Section 4 of the POCSO Act** deals with punishment for penetrative sexual assault. It reads as " whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."
- 32. **Section 3 of the POCSO Act** deals with penetrative sexual assault.
 - **3. Penetrative sexual assault**—A person is said to commit "penetrative sexual assault" if—

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- 33. According to the prosecutrix (P.W.2) the accused committed sexual intercourse with her on several occasions with a promise to marry her. It is in the evidence of Pw-2 that on the date of occurance, upon hearing the shouts of the prosecutrix (his sister) coming from the adjacent house, he went out and was told by the prosecutrix that the accused committed rape on her. But , he did not see the accused there . On the other hand, it comes out from the evidence of the prosecutrix (pw-3) that on the one day when the accused came to have sexual intercourse with her , he was detected by the neighbours. Both pw-2 and pw-3 stated that the prosecutrix had love affairs with the accused and he had promised to marry her. In her crossexamination, prosecutrix disclosed that she had love affairs with the accused but the accused had no feelings of love and inclination to her. Pw-9 (I.O) confirmed that pw-3 did not tell him that one day the accused was detected by the neighbours when he came to her home to have sexual act. According to the other pws, they only heard from the prosecutrix that the accused committed the bad act upon her. Pw-4 confirmed that she did not see the accused in the house of prosecutrix on the night of occurance. While pw-5 stated that on the relevant night, on hearing noises in the house of the prosecutrix, he went there and saw the brother of the prosecutrix , her mother and many other villagers and the accused also in the house campus of the prosecutrix. He deposed that he heard aedbut Pw-9(I.O) confirmed that pw-5 did not tell him that he saw the accused in the house campus of the prosecutrix.

Independent witness, P.W.4 stated that on the date of occurrence upon hearing some noises coming from the informant's house, she went there and the prosecutrix told him that the accused committed bad act upon her. Another independent witness P.W.5 deposed that he heard from the prosecutrix that the accused tried to commit rape upon her. Similarly, P.W.6 and P.W.7 deposed that they heard that accused— Momin Ali had raped the prosecutrix. So the evidences of both the pw-2 and 3 are contradictory to each other. There are no eye-witnesses to support the evidence of the prosecutrix. None of the pws have alleged that the accused was detected by the villagers when he came to the house of the prosecutrix to do sexual act. So, the evidence of the prosecutrix is not supported by the pws on this point. The contradictory statements made by the victim and her brother (pw-2) clearly highlighted the unreliable statements made by the victim. The evidence of the victim and the findings of medical expert are contradictory. Again, in her statement u/s 164 Crpc (Ext – 2), prosecutrix alleged that while the accused was having sexual intercourse near the bamboo grooves by threatening her not to shout, then her sister-in-law and another lady arrived there and the accused fled away. But, nowhere in her evidence, prosecutrix narrated this story. The prosecutrix stated in her crossexamination that the accused committed rape upon her on several occasions. But medical evidence did not support the statement of the victim. Pw- 1 is the Medical Officer who examined the prosecutrix. She admitted that laboratory investigation of vaginal smears is negative and no spermatozoa occur. Pw-1 gave the opinion that there is no evidence of recent sexual intercourse detected on the person of the prosecutrix.

34. The testimony of prosecution is vague , unreliable and it is not corroborated with medical evidence. Pw-1 exaggerated the story by stating that on the date of occurrence , prosecutrix was raped by the accused. But , no allegation of committing rape on the night of occurrence by the accused on the prosecutrix has been made by her. Other pws are the hearsay witnesses. None of them had seen the incident. So, the prosecution story becomes doubtful . The accused has been charged u/s 376 IPC r/w sec 4 of POCSO Act. In this instant case , the important ingredient of the offence u/s 375 IPC is penetration which is missing in this case . The ingredients of the section 375 IPC have not been proved beyond reasonable doubt by the prosecution.

35. According to all the P.Ws, the prosecutrix was 16 years old at the time of occurrence.

M.O also opined that made it clear that the age of the prosecutrix at the time of examination was above 16 years and below 18 years. So, prosecutrix was minor at

the relevant time.

36. On careful perusal of the evidence of the victim and other pws, it is found that the provision of Section 4 of the POCSO Act has not been proved against the accused and medical evidence is silent in this regards and there is no credible evidence to

prove the said offence against the accused.

37. Considering the above facts , materials and evidences of the pws , it is concluded $\frac{1}{2}$

that the prosecution has miserably failed to establish the commission of offence u/s

376 IPC r/w section 4 of POCSO Act beyond all reasonable doubt against the accused

person—Momin Ali. Accordingly, the accused is held not guilty and he is ,hereby,

acquitted of the offence U/S-376 of IPC r/w Section 4 of the POCSO Act, and set at

liberty forthwith. The bailor is discharged from his liabilities.

38. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 12th day of November, 2018

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, is the M/O, Dr. Anurupa Choudhury

P.W.2, Moinal Hoque

P.W.3, is the Prosecutrix

P.W.4, Musstt. Hasina Khatun

P.W.5, Md. Rakibul Hussain

P.W.6Md. Nur Islam

P.W.7 Md. Hussain Ali

P.W.8 is one Kobir Ali @ Abdul Kobir

P.W.9, S/I, Lonkeswar Sarma

Prosecution Exhibit

Ext.1 is the medical report.

Ext. 2 is the statement made before the Court U/S—164 Cr. P.C of Prosecutrix

Ext.3 is the sketch map

Ext.4 is the charge sheet.

Special Judge, Kamrup, Amingaon