# CAUSE TITLE POCSO Case No. 46/15

Informant: Smt. Jyotshna Murah,

W/o- Late Lukesh Murah, R/o- Jayanagar, Gutibari,

PS- Duliajan,

District- Dibrugarh.

Accused: (1) Sri Binod Kamti,

S/o- Late Maneswar Kamti,

R/o- Menatpur, PS- Basapatty,

District- Madhubari (Bihar) T/A: C/o- Manik Baruah,

R/o- Jayanagar, PS- Duliajan, District- Dibrugarh.

(2) Sri Mohan Doom,

S/o- Late Debanand Doom,

R/o- Baraipur,

PS- Rampur, Bhagamanpur, District- Chapra (Bihar) T/A: C/o- Ravi Singh,

R/o- Daily Bazar, Near Laxmi Palace,

PS- Duliajan,

District- Dibrugarh.

## ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor.

For the Defence: Mr. A. Rob, learned Advocate.

#### IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smt. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 46/15 G.R. Case No. 1665/15

> > State of Assam

-Vs-

Sri Binod Kamti and another

Charges: Under Section 450/366 IPC and Section 6, read with Section 5(g) of the POCSO Act.

Date of evidence on : 17-10-15, 17-12-15, 28-01-16, 29-03-16, 03-06-16,

07-09-16, 05-04-17 and 18-11-17.

Date of argument : 17-07-18. Date of Judgment : 16-11-18.

## **JUDGMENT**

- 1) Prosecution case in a nutshell is that on 22-06-15, at about 7:30 pm, Sri Mohan Das @ Doom and Sri Binud Kamti came to meet Natu Murah and as Natu Murah was not present in the house and as the victim 'X', Natu Murah's younger sister was alone, they committed rape by brandishing a sword. An ejahar regarding this incident was lodged by Smt. Jyotshna Murah (hereinafter the informant) which was registered as Duliajan PS Case No. 252/15 under Section 376(D) of the Indian Penal Code (IPC for short), r/w Section 4 of the Protection of Children From Sexual Offences Act (POCSO Act for short) and SI Jiten Gogoi was endorsed with the investigation.
- 2) The investigating officer (IO for short) embarked upon the investigation. He forwarded the victim for medical examination. He also forwarded her to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (CrPC for short). He prepared the Sketch-Map of the place

of occurrence and recorded the statements of the witnesses. He seized one blanket, bed sheet, gamusa, underwear, empty bottle of Whisky, one disposable glass, etc. He also seized mobile handsets, PAN Card, ATM Card, etc. On finding prima facie materials, he submitted Charge-Sheet against the accused persons under Section 376(D) IPC, r/w Section 4 of the POCSO Act.

- 3) On appearance of the accused persons, copies were furnished and after hearing both the sides, a formal charge under Sections 450/366/34 IPC, r/w Section 6 POCSO Act was framed and read over and explained to the accused. Both the accused persons abjured their guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced the evidence of eleven witnesses including the medical officer (MO for short) and the IO and exhibited several documents, while the defense cross-examined the witnesses to refute the charges. The answers of the accused persons to the circumstances arising against them, depicts a plea of total denial.

### **SUBMISSIONS:**

5) The learned Public Prosecutor Smt. Runumi Devi and learned Addl. Public Prosecutor Mrs. Sahnaz Akhtar emphasized through their arguments that the accused persons deserve stringent punishment while the learned defence counsel Mr. A Rob laid stress in his argument that this case is fraught with contradictions and replete with discrepancies and the accused persons deserve to be acquitted.

#### **POINTS FOR DETERMINATION:**

- 6) To decide the case in its proper perspective, the following points are apposite for a just decision of this case:
  - Whether the accused persons on 22-06-18, acted in furtherance of their common intention and committed

- house trespass by entering into the house of Smt.

  Jyotshna Murah in order to commit an offence?
- ii. Whether the accused persons acted in concert and in furtherance of their common intention, abducted the victim X by deceitful means in order that she may be forced or seduced to illicit intercourse?
- iii. Whether the accused persons acted in concert and in furtherance of their common intention, committed aggravated penetrative sexual assault on the victim 'X'?

## **DECISION THEREON AND THE REASONS FOR THE DECISION:**

- 7) To decide the case in its proper perspective, it is necessary to delve into the evidence.
- 8) The victim 'X' was 12 years at the time when she deposed in the Court on 17-10-15 as PW-3. She testified on oath that she came to know the accused persons from the date of the occurrence which took place about seven months ago (from 17-05-15). On that day, at about 9:00 pm, she along with her mother and younger sister were sleeping inside their house. Then both the accused persons broke into their house by kicking open the bamboo door. They entered into her house and accused Binud Kamti kissed her on her lips and thereafter, both of them took her away from her house on their motorcycle. They shoved away her mother and took her away. Her brother Sri Anil Murah was absent, as he went to Namrup to bring money. The accused persons took her on the motorcycle to the Settlement Area at Daily Bazar and they took her to a room of a hostel and made her lie on the bed inside the room. Initially, Binud committed sexual intercourse with her and thereafter, Mohan committed sexual intercourse with her. She raised alarm, but nobody

came out, as there was nobody near the place of occurrence. After the act, Mohan threatened her not to disclose about the incident, lest they would kill her. Thereafter, both the accused persons left the room leaving her alone inside the room and also leaving the door ajar. Mohan's house is situated across the road near the hostel. After the incident, she came out of the room and she met Mohan and his elder brother who resides in the same house. Her mother set out a frantic search for her and she went to the accused Mohan's house. She met her mother in Mohan's house and narrated the incident to her mother. Thereafter, she along with her mother went to the Duliajan Police Station which was situated at a little distance away from their house and she informed the police about the incident. On the said night, the police took her in the vehicle to the room in the said hostel where the alleged incident occurred. Mohan was sleeping in the room of the hostel where the alleged incident occurred. She led the police to the room of the hostel and the police apprehended Mohan and took him to the police station and the other accused fled. The police took her to the hospital along with her mother for medical examination. Thereafter, she was taken to the Assam Medical College & Hospital, Dibrugarh on the next day at about 2:00 pm. She sustained injuries on her hands, chest, back, belly and both legs. She was brought to the Court for recording her statement. The police seized her wearing apparels. At the time of the incident, she was wearing a frock.

9) After carefully scrutinizing the evidence of the victim, it is held that although the victim is 12 years of age, her evidence does not inspire confidence. The FIR is not corroborative to the testimony of this witness. In her crossexamination, she testified that she did not know whether the hostel is a boys or a girls hostel, but the inmates were present. She was cross-examined regarding her omission of certain statements before the IO under Section 161 CrPC. This was not affirmed by the cross-examination of the IO. Although she stated that she was 12 years of age, the MO's evidence depicts that she was above 14 years and below 16 years. The opinion of Dr. Nibedita Shyam as PW-10 clearly depicts that the victim was below 16 years and above 14 years of age. Her cross-examination also clearly depicts about a fiduciary relationship between her brother and the accused persons. She has categorically stated that her elder brother Anil Murah borrowed Rs. 800/from the accused persons and both the accused persons used to visit their house demanding back their dues. Her brother used to hide inside the house and her mother used to meet the accused persons whenever they visited their house to demand back their dues. Moreover, she made two contradictory statements. In her evidence-in-chief, she testified that Mohan went to his house after the act, but later she testified that the police found Mohan inside the hostel room after the incident.

10) The victim's mother Smt. Jyotshna Murah testified as PW-2 that both the accused persons are known to her and her daughter is 12 years of age. The incident took place about three months ago while she was staying at Joyanagar along with her two daughters and one son. On the day of the incident, while they were sleeping inside their house, both the accused persons kicked opened the door and barged into their house. Her son Anil was not present at home and they demanded Rs. 800/- which her son Anil borrowed from them. Then both the accused persons took their daughter along with them on the motorcycle. She ran after them to save her daughter. Then she went to the accused person's aunt's house to ask her if they took her daughter to their house. She also went to the Duliajan Police Station and

informed verbally about the incident. She met the accused Mohan's elder brother and narrated him about the incident. Mohan's elder brother called him over phone and asked him where he was at that time. Then Mohan came out of the house in which her daughter was locked inside and confined. Thereafter, her daughter was taken out from the locked house with the help Mohan's elder brother. Her daughter informed her that both the accused persons committed rape on her one after another inside the house and she sustained injuries on her private parts. Then she went to the police station along with her daughter and her daughter was taken to the OIL Hospital at Duliajan. She also lodged the ejahar with the police at Duliajan. The police recorded her statement and the statement of her daughter and she was forwarded to the Assam Medical College & Hospital, Dibrugarh. Her daughter was also forwarded to the Magistrate.

11) It is pertinent to mention at this stage that the statement of the victim under Section 164 CrPC depicts that the accused persons broke their bamboo door and demanded Rs. 800/- which her brother borrowed from them. Then the accused persons gagged her demanding that next morning, they will get her daughter after the money is paid. This statement of the victim is inconsistent to her testimony. She was silent about this fact that the accused demanded money and then they kidnapped her stating that she will be released only if the money if paid. However, during her cross-examination, it was unravelled by the defense that the accused persons lent Rs. 800/- to Anil. The statement of the victim under Section 164 CrPC also depicts that she was taken to a house, but her testimony in the Court depicts that she was taken to a hotel. Moreover, her statement under Section 164 CrPC depicts that the accused persons displayed obscene movies when they committed rape on her and

when she refused to have physical relationship with them, they hit her with a brick. On the contrary, she was silent about this incident, when she testified in the Court as PW-3. These contradictions casts a shadow of doubt over the veracity of her evidence. Moreover, the contradictions between her evidence and her mother's evidence also casts a shadow of doubt over the veracity of the evidence of both the witnesses. In her cross-examination, PW-2 testified that she did not notice any mark of injury on her daughter. This negates the fact that the accused persons assaulted the victim 'X' with a piece of brick on her head when she resisted as she has mentioned in her statement under Section 164 CrPC. The seized articles were not exhibited in presence of PWs-2 and 3. This is also a discrepancy in the evidence. It is not clear from the evidence of PW-2 and from the statement of the victim under Section 164 whether the second place of occurrence where the alleged rape is alleged to have committed, is a house or a hostel. However, PW-3 insisted that the second place of occurrence is a hostel. On the contrary, her mother testified that Mohan came out of a house, inside which her daughter was assaulted and Mohan's elder brother brought out PW-3 from the locked house.

12) The evidence of the medical officer Dr. Nibedita Shyam depicts that on 23-06-15, while working as GDMO in the Department of Forensic Medicine, Assam Medical College & Hospital, Dibrugarh, she examined the victim 'X' in connection with this case and found the following:

On genital examination: Genital organs were well developed. Vulva: Labia minora are reddened on inner aspect, tender on touch. Hymen: Recent tear present at 3, 6 & 10 O' clock position, margins of which are oedematous, reddened, tender and bleeds on touch. Vagina is healthy and rugosed. Cervix healthy

and Os closed. Uterus not palpable per abdominally. Vaginal smears were taken on glass slides from posterior fornix in and around the vagina and the result shows presence of intact non-motile spermatozoa.

- 13) The MO further testified on the basis of Physical examination, Radiological & Laboratory Investigation done on the victim 'X', she was of the opinion that
  - i. Evidence of recent sexual intercourse detected on her person;
  - ii. Evidence of injury detected on her private parts as described in 20(b) & 20(c);
  - iii. Her age is above 14 years and below 16 years.
  - Ext. 3 is the Medico-legal Report wherein Ext. 3(1) to Ext. 3(3) are the signatures of the MO.
- 14) According to her opinion, there was evidence of recent sexual intercourse and injuries in private part of the victim. She detected hymenal tear at 3 O' clock,6 O' clock and 10 O' clock position, the margins which are oedematus, redden, tender and bleed on touch.
- 15) Beside the injuries on the private parts, no other injuries were detected by the MO on the victim. Although the victim stated under Section 164 CrPC that the accused persons hit her on her forehead with a piece of brick, the doctor did not detect any injuries on her forehead. Beside the fact that the injuries of sexual intercourse were detected on the private parts of the victim, the veracity of her evidence is such that a benefit of doubts goes to the accused persons. Although the victim is a minor below 16 years of age, her conduct is shady and under a cloud of suspicion.
- 16) It is also pertinent to mention at this juncture that the victim's elder brother

  Anil Murah was also not examined as a witness. The victim has given her

- thumb impression on her statement under Section 164 CrPC, as she studied only upto Class-III.
- 17) The Judicial Magistrate Mrs. D Dutta testified as PW-6 that on 23-06-15, while working as Magistrate, she recorded the statement of the victim 'X' in connection with this case. The victim was accompanied by WPC-432 Rina Chakraborty. Ext. 3 is the statement of the victim X.
- 18) It has already been held in my foregoing discussions that the statement of the victim under Section 164 CrPC is not consistent to her testimony in the Court.
- 19) PW-1 Sri Dulal Borah testified that the accused persons are known to him while the informant and the victim are not known to him. The incident occurred on 22-06-16. Mohan Doom was working as a helper in his rented house. On the next day, the police called him over phone and he saw both the accused persons in the police station. He learnt that both the accused persons committed rape on a girl.
- 20) The evidence of Dulal Bora clearly depicts that it is true that there are charges against the accused persons in this case and he heard from the accused persons that the accused committed rape on the victim. His evidence cannot be relied to fasten the guilt on the accused persons.
- 21) Sri Mintu Gogoi testified as PW-4 that he came to know the accused persons from the date of the incident which took place about five months ago. He was on duty as a security personnel at a Bank situated at Duliajan. On the day of the incident, at about 12:00 noon, he went to one room of Sri Rupam Kumar Barman situated at Daily Bazar. The police came to the house and stopped him and the police took the accused persons with them to the room and seized one bed sheet from the room in his presence and in the presence

- of Rupam Kumar Barman. Ext. 1 is the Seizure List and Ext. 1(1) is his signature.
- 22) It is true that the police seize a bed sheet, but no forensic report regarding a bed sheet has been submitted in the Court. The evidence of PWs-1 and 4 does not at all implicate that the accused persons are complicit.
- 23) Sri Babu Ali testified as PW-5 that the incident took place about 5/6 months ago. The victim's elder brother is known to him. On the following day of the incident, the victim's elder brother informed him over phone that some incident had taken place and he asked him to go to the police station. When he arrived at the police station, the victim's elder sister whose name is Putali informed him that the accused persons had committed rape on her sister and he saw the victim at the police station.
- 24) This evidence of Bibu Ali was not helpful, because the victim's elder sister was not examined as a witness and his evidence remained hearsay, which cannot be accepted. Moreover, Bibu Ali did not know why the police took his thumb impression on some papers.
- 25) Similarly, the evidence of PW-7 also did not support the prosecution case. Smt. Mina Devi testified as PW-7 that the accused Binud Kanti is her son and other accused Mohan Doom is her neighbour. Jyotshna Murah is also known to her. She borrowed money from her son and she did not know anything about the incident.
- 26) Smt. Lalita Phukan testified as PW-8 that the accused persons are known to her. She was a tenant in Sri Bharat Gogoi's hosue. On the night of the incident, she heard a commotion and came out from her house and asked her neighbours about the incident. Then her neighbour told her that her daughter was taken by two boys on a bike. Then her neighbour went in search for her

- daughter. On the next day, she learnt that her neighbour recovered her daughter with the help of the police.
- 27) Similarly, Smt. Kamles Devi testified as PW-9 that the incident took place about one year ago. Jyotshna Murah was her tenant at that time. On the next day of the incident, she learnt from Jyotshna Murah that two persons came to their house and took her daughter on the previous night. Later on, the police recovered the victim girl.
- 28) After scrutinizing the evidence of PWs-8 and 9, it is held that the evidence is very vague. They have not implicated the accused persons although they have testified that two boys took Jyotshna Murah's daughter on a bike. It is also not clear from the evidence whether the boys took the victim 'X' forcefully or whether the victim willingly went with the accused persons.
- 29) The IOs evidence also did not help improving the prosecution case.
- 30) The IO Sri Jiten Gogoi testified as PW-11 that on 22-06-15, while posted as Attached Officer, the OC Sri Rajib Saikia endorsed him with the investigation of the case on the basis of an FIR lodged at the police station. Ext. 4 is the FIR and Ext. 4(1) is the signature of Sri Rajib Saikia. On the same night, he recorded the statement of the victim and the informant and went in search of the accused persons and apprehended Mohan Doom at Daily Bazar and after interrogation, he went to Joya Nagar, but could not find him in his house. In the morning, the victim was forwarded to the Assam Medical College & Hospital at Dibrugarh for medical examination and she was also forward to the Magistrate for recording her statement under Section 164 CrPC. Two mobile phones were seized from Mohan Doom, one PAN Card was also seized and the PAN Card was the victim's elder brother's PAN Card. One ATM Card was also seized from Mohan Doom. Ext. 5 is the Seizure-List and Ext. 5(2) is

his signature. The accused Binud Kamti was produced in the police station by his mother. He prepared the Sketch-Map as shown by the accused persons. Ext. 6 is the Sketch-Map and Ext. 6(10 is his signature. As shown by the accused persons, he seized one coloured blanket, one white coloured printed blanket with semen like stain, one green coloured gamusa with semen coloured stain, one purple coloured underwear used by Mohan Doom, one empty Officers Choice whisky bottle without cap, one glass and three disposable glasses which were lying on the wooden bed. Ext. 1 is the Seizure-List and Ext. 1(2) is his signature. On the same day, he seized one motorcycle used by the accused persons. Ext. 7 is the Seizure-List and Ext. 7(1) is his signature. On the said date, he seized one black coloured skirt with semen like stain, one white and stripped with black stain from the possession of the victim. Ext. 8 is the Seizure-List and Ext. 8(1) is his signature. On the next day, he forwarded the accused persons to the Court. He recorded the statements of the witnesses and also collected the Medico-legal Report from the Assam Medical College & Hospital at Dibrugarh. On 21-06-15, he went to the victim's house and he also prepared the Sketch-Map of the house from where the victim was taken. Ext. 9 is the Seizure-List and Ext. 9(1) is his signature. On finding sufficient materials against the accused persons, he submitted Charge-Sheet against them under Sections 376(D) IPC, read with Section 4 of POCSO Act. Ext. 10 is the Charge-Sheet and Ext. 10(1) is his signature. Material Ext. 5(A) is one white coloured Intex mobile, Material Ext. 5(B) is one Nokia mobile phone black colour. Material Ext. 5(C) is one PAN Card in the name of the elder brother of the victim. Material Ext. 5(D) is one ATM Card, Material Ext. 1(A) is the empty bottle of Officers Choice whisky of 375 ml without cap. Material Ext. 1(B) is one glass and three numbers of

- tumblers. The other articles seized, i.e., the motorcycle was given in zimma to the owner by the Court.
- 31) The IO is not authorised to opine about the semen like substance. It was the duty of the IO to forward the articles with semen like stain for FSL examination. But the investigation was conducted in a lackadaisical manner and there is no formal report from the forensic record to affirm semen detected from any blanket, bed sheet or underwear or other such articles.
- 32) It has already been held in my foregoing discussions that the victim's evidence does not inspire confidence. Her statement under Section 164 CrPC is not similar to their testimony in the Court. In her testimony, she has given a description that she was abandoned by the accused persons in the room in the hostel after the act. But later, she again testified that Mohan Doom was found in the room in the hostel. Her mother testified as PW-2 that her daughter was taken to a house, her mother did not mention anything about the room in a hostel. The IO testified as PW-11 that he apprehended Mohan Doom at Daily Bazar and after interrogation, he went to Jayanagar, but could not find him in his house. The evidence appears to be very clumsy and uncorroborative. The victim's statement under Section 164 CrPC depicts that the accused persons forcefully took her and then asked her mother to pay back Rs. 800/- if they want back their daughter, but such statement was not given in the Court. Papuli and Anil were not examined as witnesses. They were important witnesses. The victim gave her age falsely as 12 years, but the doctor detected that the victim was above 14 years and below 16 years.
- 33) In view of my foregoing discussions, it is thereby held that this case is replete with contradictions and both the accused persons gets the benefit of doubt despite the fact that they are alleged with a serious offence under Section

376(D) IPC and Section 6 of POCSO Act. It is also held that the prosecution

failed to prove beyond reasonable doubt that the accused persons acted in

concert and in furtherance of their common intention, committed gang rape

on the victim. It is also held that the prosecution failed to prove beyond

reasonable doubt that the accused persons acted in concert, committed

aggravated penetrative sexual assault on the victim 'X'. Thereby, both the

accused persons are acquitted from the charges under Sections 450/366 IPC

and Section 6, read with Section 5(g) of the POCSO Act on benefit of doubt

and they are set at liberty forthwith.

34) Destroy the seized articles as per law.

35) The victim 'X' does not deserve compensation and so this case is not

recommended for compensation under the Victims Compensation Scheme.

Judgment is signed, sealed and delivered in the open Court on the 16<sup>th</sup> day of

November, 2018.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

## POCSO Case No. 46/15 APPENDIX

#### List of witnesses:

- 1. PW-1 Sri Dulal Borah;
- 2. PW-2 Smt. Jyotshna Murah;
- 3. PW-3 The victim 'X';
- 4. PW-4 Sri Mintu Gogoi;
- 5. PW-5 Sri Babu Ali;
- 6. PW-6 Smt. D Dutta;
- 7. PW-7 Smt. Mina Devi;
- 8. PW-8 Smt. Lalita Phukan;
- 9. PW-9 Smt. Kamles Devi;
- 10. PW-10 Dr. Nibedita Shyam;
- 11. PW-11 Sri Jiten Gogoi.

#### List of Exhibits:

- 1. Ext. 1 Seizure-List;
- 2. Ext. 2 Statement of the victim recorded under Section 164 CrPC;
- 3. Ext. 3 Medico-legal Report;
- 4. Ext. 4 Ejahar;
- 5. Ext. 5 Seizure-List;
- 6. Ext. 6 Sketch-Map;
- 7. Ext. 7 Seizure-List;
- 8. Ext. 8 Seizure-List;
- 9. Ext. 9 Sketch-Map; and
- 10. Ext. 10 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh