IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 38 of 2018

Under section 8 of POCSO Act/354 of IPC. (Arising out of Dhekiajuli PS Case No. 302/18)

State of Assam

-Vs-

Md. Majibur Rahman ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Md. Nijamuddin, Advocate

Date of Argument : 27-06-2019

Date of Judgment : 29-06 -2019.

JUDGMENT

- The prosecution case against the accused person as projected in the FIR (Ext. 2), in brief, is that on 21-04-2018, at around 8:30 p.m. finding the informant's 17 years old victim daughter alone on the road, accused Mojibur Rahman with intent to commit her rape attempted to take her to the nearby jungle but on raising alarm, local public caught red handed the accused and handed over to police.
- 2. On receipt of the FIR (Ext.2) on 22-04-2018 from the informant (PW 4), the victim's father, Dhekiajuli P.S. Case No. 302/2018 u/s 376/511 of IPC read with section 8 of POCSO Act was registered and launched investigation

of the case. During investigation, the Investigating Officer (PW 8) recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid chargesheet against the accused Majibur Rahman u/s 376/511 of the IPC.

- **3.** On appearance of the accused person before this Court, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge against the accused u/s 8 of POCSO Act and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial. Lateron charge u/s 354 of IPC was added and on being read over the charge, the accused pleaded not guilty and stood for trial.
- **4.** To substantiate the case, prosecution examined as many as nine witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and took the plea that the brother of the victim took him to their house with intent to give marriage the victim to him forcefully but when he refused to marry her, he was handed over to police.
- **5.** The points for decision in this case is that -
 - (1) "Whether the accused Majibur Rahman on 21-04-2018 at around 8 p.m. at village Dolabari Kochari under Dhekiajuli Police Station committed sexual assault on the victim Miss "X", aged about 17 years, and thereby committed an offence punishable under section 8 of POCSO Act? And
 - (2) "Whether the accused Majibur Rahman used criminal force to the victim with intent to outrage her modesty?

Reasons, Decisions and reason for decision.

6. Mr. M.C. Baruah, learned Special Public Prosecutor during argument referred me to the evidence of PW 2 and PW 5, the close relatives of the victim, who hearing alarm when reached the place of occurrence, had seen the accused pulling the victim towards jungle. Mr. Baruah also submitted that the prosecution has established the case against the accused beyond all reasonable doubt.

- **7.** Against the submissions, Md. Nijamuddin, the learned counsel of defence has argued that being a major one, the victim on her own came out from home and met the accused and the other witnesses being the interested witnesses cannot be believed and benefit should go to the accused person.
- 8. In the case in hand, the informant claimed the age of the victim as 17 years in the FIR whereas the victim in her deposition as PW 3 stated that at the relevant time she was about 18 years. The Investigating Officer seized no document regarding age of the victim. On the other hand, the medical report suggestive that the victim is above 18 years and below 20 years. In the above evidence coupled with the medical evidence, it can be safely held that she was major at the time of incident and as such it cannot be held that she was a child as defined in section 2(d) of POCSO Act and the alleged offence does not come within the ambit of POCSO Act.
- **9.** Now, the question is whether the accused Majibur Rahman committed any offence on the victim girl. In this respect it would be apposite to have a bird's view of the evidence on record.
- **10.** PW 1 Dr. Rika Ingtipi, the Medical Officer deposed that on 03-05-2018 she examined the victim who gave history of sexual assault by one Majibur Rahman who used to frequently talk with her on phone since last two months, called her to a neighbour's house at 8 p.m. and sexually assaulted her and on examination found no tear on hymen and as per X-ray report she is above 18 years and below 20 years but no any violence mark was found on her body or on her private parts. The doctor proved the medical report as Ext.1.
- 11. PW 2, the uncle of the victim girl, stated that on the day of incident at around 8 p.m. hearing hulla of his niece/victim near jungle, he along with Asadul and Khalil rushed to the place of occurrence and saw the accused dragging his niece by holding her hand and attempted to commit her rape. Then they apprehended the accused and the victim girl and informed the matter to the family members of the accused. Many people gathered there. The family members of the accused also came to their house. Thereafter, his brother lodged the FIR and police arrested the accused.

During cross he stated that at the time of incident he was at home which is adjacent to the victim's house. The jungle where the accused and the victim were found is about 50 meter away from his house.

- 12. The star witness of the case i.e. the victim (PW 3) deposed that on the day of incident, at around 8 p.m., accused rang her and asked her to take him to her house but she refused to come out due to absence of her parents. But the accused repeatedly asked her to come out and at last when she went out, the accused took her inside the jungle by holding her hands forcefully. On raising alarm, her uncle (PW 2) and her brother-in-law (PW5) rushed to the place of occurrence and brought her home along with the accused. The accused dragged her to jungle with intent to commit misdeed means rape. The accused was a married one at the time of incident. She reported the whole incident to her father and then her father lodged the case against the accused. She also accompanied her father to the police station. Police sent her to TMCH her medical examination and got recorded her statement u/s 164 Cr.P.C. During cross, she admitted that the accused used to talk with her over phone prior to the incident.
- that on the day of incident, at around 8 p.m. the accused who is a married person asked his victim daughter over phone to take him to his (PW1) house. Accordingly, when his victim daughter went out, the accused by holding her hands, forcefully took her to the nearby jungle. Then on raising alarm, victim's uncle (PW 2) and Asadul rushed to the place of occurrence and brought his daughter along with the accused to his house. He stated that the accused dragged his daughter to jungle with intent to commit rape and the victim reported him about the incident. Regarding the incident, though local public called the father of the accused but he did not come. Thereafter, he filed the FIR. During cross, he stated that at the relevant time of incident, he was at Mazjid. He admitted that he had not seen the incident.
- **14.** PW 5, the brother-in-law of the victim, testified that on the day of incident at around 8 p.m. while the victim was standing near the road, the accused by holding her hands dragged her towards the jungle with intent to

commit her rape. Then hearing alarm of the girl, he rushed to the place of occurrence and had seen the accused dragging her towards jungle by holding her hands with intent to commit her rape. Then he brought the victim and the accused to the house of the victim.

During cross, he denied the suggestion that when the accused refused to marry the victim, they concocted the story and filed the false case against the accused.

- **15. PW 6** Baharul Islam turned hostile. He stated that on the day of incident he had seen a gathering on the road and came to know that when the accused came to meet a girl, he was apprehended.
- **16.** PW 7 Noor Islam deposed that on the day of incident, at around 8/9 p.m. on being informed him by one person over phone that an incident took place in the house of the informant, he went there and had seen the accused. There he came to know that the accused took the victim girl to the jungle by calling her over phone but on raising alarm by the victim, local people caught the accused. On enquiry, both the victim and the accused denied any affairs between them.
- 17. PW 8, Danda Dhar Kumar, the Investigating Officer of this case, in his evidence stated that on 22-04-2018 on receipt of an FIR from PW 4, the father of the victim, he made the GDE No. 331 dated 22-04-2018 and forwarded the same to the O/C, Dhekiajuli PS for registering a case. Accordingly, Dhekiajuli PS Case No. 302/18 u/s 376/511 of IPC read with section 8 of POCSO Act was registered. On the same day, finding the informant at the out post, he recorded the statement of the informant, visited the place of occurrence and drew the sketch map of the place of occurrence vide Ext.3. He proved the extract copy of GDE No. 331 dated 22-04-2018 as Ext. 4. He also recorded the statement of the victim and other witnesses, sent the victim for medical examination, got recorded the statement of the victim u/s 164 Cr.P.C. and on completion of investigation, submitted chargesheet against the accused u/s 376/511 of IPC vide Ext. 5. PW 8 confirmed the statement of hostile witness Baharul Islam (PW 6) made before him. During

cross, he admitted that the place of occurrence is a road. He also testified that as per medical report the age of the victim was above 18 years.

- **18.** PW 9 Smti Sparsita Garg, the learned Judicial Magistrate, 1st class, Tezpur, in her evidence stated that on 23-04-2018 she recorded the statement of the victim u/s 164 Cr.P.C. in the court chamber in connection with Dhekiajuli pS Case No. 302/18 u/s 376/511 of the IPC r/w section 8 of POCSO Act and after read over the same, the victim put her thumb impression on it.
- 19. In the case in hand, the evidence of the victim PW 3 reveals that on the day at around 8 p.m. accused rang her asking to take him to her house and when she refused for absence of her parents, he again repeatedly called her to come. At last, she came out from home but then the accused took her inside the jungle by holding her hand forcefully. Then on raising alarm, her uncle Samaruddin and brother-in-law Asadul came there and brought her along with the accused to her house. The accused dragged her to jungle with intent to commit misdeed. Clouse on the heels of her evdience, her uncle Samaruddin (PW 2) stated that on the day at around 8 p.m. hearing alarm of the victim, he along with Asadul (PW 5) and Khalil rushed there and saw the accused holding the victim's hand dragging her for attempting to commit rape and then they caught the accused and the victim. PW 5 Asadul Khan also categorically stated that hearing hulla he went to the place of occurrence and saw the accused holding the hands of the victim dragging her towards the jungle with intent to commit rape. PW 7 Noor Islam, the then VDP secretary heard that the accused took the victim to the jungle by calling her over phone. On raising alarm, people gathered there and caught the accused. PW 4, the victim's father also deposed that on the day of incident, at around 8 p.m. accused called his daughter over phone asking her to take him to their house and when his daughter went out, the accused took her inside the jungle by holding her hands forcefully. Then on raising alarm, PW 2 and PW 5 rushed there and brought the victim and the accused to his house.
- **20.** The evidence of victim shows that on that night at around 8 p.m. on being called by the accused though the victim at first did not agree but later

she came out and then the accused dragged her to the jungle by holding her hands forcefully with intent to commit misdeed. It is in her evidence that prior to the incident, the accused used to talk with her over phone and his house is just 100 meter away from her house. So, the accused was well known to her for which perhaps on being called by the accused at 8 p.m. she came out from home. On raising alarm, her uncle PW 2 and brother-in-law (PW 5) rushed there and had seen the accused dragging her towards the jungle by holding her hands. On the other hand, PW 4 the victim's father testified that the accused had taken her inside the jungle while so far the evidence of the victim herself, she was dragged towards jungle not inside the jungle. The sketch map, Ext. 3 also reveals that place of occurrence is a road and at a few distance there is jungle. Though as per the testimony of the victim and her father, on being asked by the accused over phone, the victim came out and then the accused pulled her towards the jungle but according to PW 2 the paternal uncle of the victim, the accused had taken away the victim from her house. On the other hand, PW 5, the brother-in-law of the victim who on that day in his father-in-law's /informant's house, stated that while the victim was standing near the road, the accused dragged her towards the jungle. Here a question arises as to being a girl of 18 years, why she came out from home at 8.30 p.m. without informing at home. Though there are discrepancies as to whether the victim on calling by the accused, came out from home or whether she was taken by the accused from her house but the evidence of the PWs and considering the fact that prior to the incident, the victim was in habit to talk with the accused, possibility of coming out from home voluntarily on call of the accused cannot be ruled out. The independent witness PW 6 though turned hostile but corroborating the presence of the accused at the place of occurrence, he also stated that the accused came to meet a girl and during cross by prosecution he admitted that lateron he heard that the accused forcibly took the victim to the jungle with attempt to commit rape. Another independent witness PW 7 Noor Islam the VDP Secretary also deposed that on being informed he came and heard that the accused took the victim towards the jungle by calling her over phone and then on raising alarm by the victim, people gathered there and caught the accused. Though the accused in statement u/s 313 Cr.P.C. took the plea that the brother of the victim took him to their house and asked to marry the victim and when he refused, he was handed over to police but examined none to substantiate the plea. The accused even did not put him in witness box to prove the same. From the evidence of the PWs discussed above, it is established that on being called by the accused, the victim came out from home and as soon as he holding her hands had taken her towards jungle she raised alarm and then the people gathered there and caught the accused.

- **21.** Now, let us see as to whether the facts as discussed above, it can be said to be an attempt to commit rape attracting section 376/511 of IPC which involvement the question as to whether it was an attempt to commit rape or criminal assault.
- 22. The distinction between attempt to commit rape and the criminal assault has been discussed in the case of **Rex Vs. James Lloyd** reported in (1836) 7 C and P 817: 173 ER 141, while summing up the charge it is observed as follows:-

"In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold the prosecutrix not only desired to gratify his passions upon her persons but that he intended to do so at all events and notwithstanding any resistance on her part."

23. Again in the case of Empress Vs. Shankar reported in (1991) ILR R 5 Bom. 403, the accused was charged for an attempt to commit rape wherein observed as follows:

"We believe that in this country indecent assaults are often magnified into attempts at rape and even more often into rape itself; and we think that conviction of an attempt at rape ought not to be arrived at unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and inspite of all resistance."

- **24.** Whether a certain act amounts to attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it.
- 25. The Hon'ble Supreme Court in the case of **Aman Kumar and Anr.** Vs. State of Haryanna, (2004) 4 SCC 379 while examining an attempt to commit rape held as follows:-
 - **"8.** The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.
 - 9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary

intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The

illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt."

- **26.** So, in order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events. The conduct of the accused is to be indicative of a determination to gratify his passions at all events.
- 27. In the instant case, the cogent evidence of the PWs shows that on the day at around 8.30 p.m., the victim came out from home, may be she willingly came out on call of the accused but after she came out, she was pulling by the accused towards jungle. There is no iota of evidence that the accused did something with intent to commit rape. The unshaken evidence of the PWs as discussed above, the conclusive which is irresistible is that the accused holding the hands of the victim while was taking towards jungle, on raising alarm by the victim, others reached there and caught the accused. Thus the act of the accused shows that it would not come within the purview of section 376/511 of the IPC and though the accused might not had the intention to commit her rape but the act of the accused in pulling the victim by holding her hand towards the jungle at around 8.30 p.m. would certainly amounts to an act of physical contact and advances involving unwelcome and explicit sexual overtures attracting section 354 A of IPC.
- **28.** Accordingly, accused Md. Majibur Rahman is convicted for the offence punishable u/s 354 A of the IPC.
- **29.** Convict/accused is heard on the point of sentence. He pleaded for leniency and stated that he is to look after his wife.
- **30.** I gave my anxious consideration on the aspect of quantum of sentence. Accused is a cultivator in occupation having his wife. Considering the facts and circumstances of the case and nature of offence committed by

the accused, I am not inclined to extend the benefit to the convict under the provision of Probation of Offenders Act.

- **31.** Record reveals that the accused in in hajot since 23-04-2018 till 16-06-2018. In given facts and circumstances of the case in its entirety, I am of the considered opinion that ends of justice would be satisfied if the accused is sentenced to undergo Simple Imprisonment for 50 (fifty) days with fine of Rs. 5,000/- (Rupees five thousand) only for the offence punishable u/s 354 A of the IPC in default to undergo Simple Imprisonment for 15 (fifteen) days.
- **32.** The period of detention already undergone by the convict shall be set off against the term of imprisonment as per provisions of Section 428 of Cr.P.C.

The fine amount on realization be paid to the victim.

- **33.** Let a free copy of the Judgment be furnished to the convict. Also send a copy of the Judgment to the District Magistrate, Sonitpur, Tezpur as per provision of section 365 of Cr.P.C.
- 34. Given under my Hand and Seal of this Court on this the 29th day of June,2019.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

APPENDIX

Prosecution witnesses.

PW 1
 Dr. R. Ingtipi, M.O.
 PW 2
 Uncle of the victim.

3. PW 3 : victim

4. PW 4 : father of the victim
5. PW 5 : Asadul Khan,
6. PW 6 : Baharul Islam.
7. PW 7 : Noor Islam

8. PW 8 : I.O. Danda Dhar Kumar.

9. PW 9 : S. Garg, Judl. Magistrate, 1st class

Exhibits.

Ext. 1 : Medical report.

Ext. 2 : FIR

Ext. 3 : Sketch map

Ext. 4 : Extract copy of GDE No. 331 dt.22-04-18.

Ext. 5 : Chargesheet.

(I.Barman) Special Judge, SONITPUR: TEZPUR