IN THE COURT OF THE ADDL. SESSIONS JUDGE, BARPETA

Special POCSO Case No. 42 of 2017
(Arising out of Barpeta Road P.S. Case No.179 of 2017
U/S 366(A)/376 IPC R/W section 4 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on:- 21.07.2017

State of Assam

- Vs -

Safikul Islam.....Accused.

Date of Recording Evidence on – 28.02.2018,18.04.2018 & 20.06.2018

Date of Hearing Argument on – 04.04.2019

Date of Delivering the Judgment on - 25.04.2019

Appearance:

Advocate for the State-----Mrs. P. Das, Ld. Addl. P.P.

Advocate for the Accused------Mr. M. Rahman, Ld. Advocate.

JUDGMENT

1. The case of the prosecution, in nutshell, is that on 01.05.2017 one Bahadur Ali lodged an FIR in Barpeta Road police station alleging inter alia that on 29.04.2017 at about 6:30 P.M. his 14 years old daughter namely-(X) while going to her maternal uncle's house at Kalahbhanga in E.Rikshwa, accused named in the FIR allegedly called her in a mobile phone bearing No.8721925225 and then took her to a place at Raju Path Barpeta Road in his bike in the name of giving her lift into the house of her maternal uncle and then committed rape on her repeatedly in a room and left her on the road on 30.04.2017 at 8 A.M. Being disgusted with the conduct of accused, his daughter tried to commit suicide but she was somehow brought to his house. Hence

the case.

- Following the information, Barpeta Road police registered a case being Barpeta Road P.S.
 Case No.179/17 u/s 366-A/323/34 IPC and Section 4 of POSCO Act.
- 3. Acting on the information, police visited the place of occurrence, recorded the statement of the witnesses, drew sketch map, sent the victim for medical examination as well as her examination before Magistrate U/S 164 Cr.P.C. On completion of investigation, police collected the medical report and having found a primafacie case finally laid the charge sheet against accused Safikul Islam u/s 366-A IPC and Section 4 of POCSO Act, 2012 with a view to stand trial.
- 4. In due course, when accused entered his appearance in court after due compliance of section 207 Cr.P.C. the then learned Special Judge, Barpeta vide order dated 21.08.2017 framed charges u/s 366-A/376 IPC and Section 4 of POSCO Act, 2012. The particulars of the offences on being read over and explained accused person pleaded not guilty and claimed trial.
- 5. During the course of trial, prosecution examined as many as 6 witnesses namely-doctor Anima Boro as PW-1, Saiful Islam as PW-2, Bahadur Ali as PW-3, the informant, the victim (X) as PW-4, Nureda Khatun as PW-5 and Pabitra Bhuyan as PW-6, the I/O respectively.
- 6. Concluding prosecution evidence accused was examined u/s 313 Cr.P.C. Accused has however, denied the evidence of the prosecution as false and misleading. On being asked, accused declined to adduce defence evidence. His plea is total denial of the prosecution case.

7. Now points for determination ;-

- 1. Whether on 29.04.2017 at 6:20 P.M. accused kidnapped the minor daughter of the informant with intent that she might be compelled to marry or knowing it to be likely that she will be forced or seduced to illicit intercourse with criminal intimidation as alleged?
- Whether on the same day and time accused committed rape on the victim as alleged?
- 3. Whether on the same day accused committed penetrating sexual offence against the victim girl as alleged?

8. Discussion, Decision and reasons for such decision :-

I have heard the learned lawyers appearing for both sides.

- 9. The learned counsel Smti. Priti Das appearing for the State vehemently contended that the evidence of the victim girl (PW-4) is found credible supported by the evidence of other prosecution witnesses in material particular. Therefore, according to the learned Addl. P.P. it is a fit case to sustain conviction of accused person.
- 10. On the other hand, the learned counsel appearing for the accused highly disputed the submission of the learned Addl. P.P. and contended that in this case prosecution miserably failed to prove the age of the alleged victim girl. In the absence of any credible evidence regarding her age, the credential of PW-1 is under serious cloud of doubt. The evidence of other prosecution witnesses are also not found credible and trustworthy. Their evidence do not corroborate the evidence of the alleged victim. Moreover, the defence counsel further contended that it was a case of love affairs between the victim and accused and the victim girl went with accused on her own sweet will and she also consented to physical relation with the accused. She never resisted the accused in the alleged physical relationship and made no attempts to flee from the custody/ influence of accused, even though accused has been taking her to different places after the alleged kidnapping. The learned counsel therefore, vehemently contended that it is not a fit case to sustain conviction. Rather, there is strong suspicion about the very commission of the offence on victim by accused person. As such, the learned counsel prays for acquittal of the accused person.
- 11. Having heard the rival contention of the learned counsel, this court carefully examined the evidence of all the prosecution witnesses for arriving at a just decision in the case.
- 12. Contrary to allegations made by the victim in her evidence the medical officer who examined her on 02.05.2017 deposed that on examination of her genital organ she found no spermatozoa in the vaginal swab of the victim even after microscopic examination. She also found that the hymen of the girl tear and vagina admits two fingers. She also deposed that on laboratory and physical examination her age was found above 14 and below 16 years.
- 13. The evidence of PW-2 Saiful Islam carries not much weight as he is not an eye witness to the alleged occurrence. He heard it from others that Safikul Islam took his daughter when he did

not found his niece in the house.

- 14. In his cross examination he stated that accused Safikul Islam took the victim girl by dropping her from E. Rikshwa, and the members of women organization took Rs.500/- from Safikul. Then Jesmina told him that accused had physical relation with her. So, it appears that PW-2 is not an eye witness but his evidence is hearsay one.
- 15. PW-3 Bahadur Ali, who is the informant deposed that on the next day of the incident he heard that victim was recovered from somewhere else. After she was taken by Safikul in his bike. He further deposed that at the time of incident she was reading in Class IX and her age was 16 years.
- 16. PW-4 the victim (X) deposed that about one year back while she was proceeding to the house of her maternal aunt near Rajanikanta Higher Secondary School, the incident occurred at about 5 P.M. According to her, accused came and took her to a place namely Raju Path and then took her to the house of one of his friend where he indulge physical relation with her. On the next day he left her in front of the house of her grand mother.
- 17. In her cross examination she deposed that she voluntarily went with accused when he called her in a mobile phone and accused took her to the house of one of his friend where she stayed with him overnight. She further deposed that she seated on the bike of accused and went with him without any resistance or hue and cry. She also stated that when there is physical relation with accused she did not resist or object. when she was recovered, her parents also did not ask any question to her.
- 18. PW-5 Nureda Khatun deposed that on the day of incident she was in the residence and the victim girl went to the house of her grand mother. On the next day she was recovered by the members of Mahila Samity from Barpeta Road Railway Station.
- 19. PW-6 Pabitra Bhuyan is the I/O, who deposed that based on the information a case was registered and investigated and on completion of investigation charge sheet was laid against accused Safikul Islam u/s 366-A/376 IPC and Section 4 of POCSO Act.
- 20. The above is the prosecution evidence available on record, now, on appreciation of the prosecution evidence one thing is crystal clear that the prosecution miserably failed to prove the

age of the victim girl at the relevant time by producing her birth certificate. The I/O in his evidence clearly deposed that he did not collect the school birth certificate or school certificate of the victim girl. He also did not visit the house of the grant mother of the victim as well as the house of the victim for investigation. Therefore, it appears that prosecution could not establish the actual age of the victim girl at the relevant time by way of proving the birth certificate. On the other hand, the doctor who examined the victim girl deposed that on examination she did not find any foreign particles or spermatozoa on vaginal swab. Hymen was found tear and vagina admit two fingers. X-Ray investigation doctor found her age above 14 years and below 16 years. From the medical evidence it cannot be inferred that at the relevant time the age of the girl was below 18 years because medical examination report regarding the age is not the correct determination of age. So, in this count, serious doubt exist regarding the actual age of the victim girl.

21. The other reveling fact that have emerged in the mouth of the alleged victim girl is that she had an affairs with the accused and she voluntarily went with the accused in his bike and made no attempt to flee from the clutches of the accused person. She nowhere alleged that accused forcefully taken her with intent to seduce her with any person including himself. The physical relation that has taken place between them is also with the free will of the victim. There was no such force or physical relation was against the will of the girl. As such, the prosecution evidence available on record is insufficient to hold the accused guilty u/s 366-A/376 IPC or for that matter Section 4 of POCSO Act. In the absence of any credible evidence regarding her minority and for in the alleged sexual relation against her will or force no offence u/s 376 IPC or Section 4 of POCSO Act said to have been established. Though accused can be convicted based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradiction and also absence of injuries on the private part of the victim will not by itself falsify the case of rape nor can be construed as evidence of consent nor the opinion of a doctor that there was no evidence of any sexual intercourse or rape sufficient to disbelieve the victim. What is most pertinent is that under such circumstance the court should bear in mind that false charge of rape are not uncommon and there are some rare circumstances where the parents persuaded the daughter to make false charge of rape either to make revenge or extort money or to

get rid of financial liability.

- 22. In the instant case, admittedly the doctor found no recent sign of sexual intercourse and no injury mark on her private part. As it transpires in the evidence of the victim that on the day of alleged incident while she was proceeding to the house of her maternal aunt in E. Rikshwa she had talk with accused over phone and on the way he took her to the house of one of his friend where they stayed overnight and had their physical relation. On the next day he left her nearby the house of her maternal aunt. Having got this information his father and brother Saiful along with other persons took her to the police station and then took her to the residence. On the next day her father filed the case.
- 23. In her cross examination she categorically stated that she used to move with accused earlier and on the day at the request of accused she voluntarily went with him to the house of one of his friend. She went with him in his bike and never raised any objection and when accused had physical relation with her she never objected. Though she has no intention to marry him but she had her intention to have sex with him.
- 24. Therefore, on examination of the evidence of the alleged victim it is crystal clear that so-called relation of the victim with the accused was completely with free consent. Since as discussed earlier the age of the alleged victim at the relevant time is not legally proved, it is difficult to hold only on surmises that she was minor at the relevant time. As candidly admitted by the I/O he did not seize any school certificate or birth certificate of the victim girl during the course of investigation. Therefore, the age of the girl remained under the cloud of doubt. Under such a situation, it is totally unsafe to hold the accused guilty u/s 366(S)/376 IPC or for that matter u/s 4 of POCSO Act.
- 25. In view of the foregoing discussion and reason, this court has no option but to acquit the accused from the charges u/s 366(A)/376 IPC and section 4 of POCSO Act on the ground of benefit of doubt and set him at liberty forthwith.
- 26. The terms of bail bond of accused person is extended for a period of 6 (six) months from to-day as provided U/S 437(A) Cr.P.C.
- 27. Let a copy of the judgment be sent to the learned District Magistrate, Barpeta for his information as provided in section 365 Cr.P.C.

28. Given under my hand and seal of this Court on this 25th day of April 2019, at Barpeta.

Dictated & Corrected my me

Sd/-

Sd/-

(Sri C.B. Gogoi)

(Sri C.B. Gogoi)

Special Judge, Barpeta.

Special Judge, Barpeta.

APPENDIX

1. The prosecution has examined the following 6 nos. of witnesses :-

PW-1 = is Dr. Anima Boro, the M/O.

PW-2 = is Saiful Islam.

PW-3 = is Bahadur Ali, the informant.

PW-4 = is victim(X).

PW-5 = is Nureda Khatun.

PW-6 = is Pabitra Bhuyan, the I/O.

2. The prosecution has exhibited following document :-

Ext.1 = is the FIR.

Ext. 1(1) = is the signatures informant.

Ext.2 = is 164 Cr.P.C. statement of victim (X).

Ext.2(1) & 2(2)= are the signature of victim (X).

Ext.3 = is the seizure list.

Ext.3(1)= is the signature of I/O.

Ext.4= is the zimma nama.

Ext.4(1)= is the signature of I/O.

Ext.5= is the charge sheet.

Ext.5(1)= is the signature of I/O.

Sd/-

(Sri C.B. Gogoi)

Special Judge, Barpeta.