IN THE COURT OF THE SESSIONS JUDGE, KARIMGANJ AT KARIMGANJ

Present: Utpal Prasad. AJS

Sessions Judge

Karimganj at Karimganj.

SPECIAL SESSIONS CASE NO. 30 OF 2016 u/s. 458/376 of the Indian Penal Code, 1860; under section 4 of the Protection of Children from Sexual Offences Act, 2012

State of Assam

-Vs-

Emad Uddin

S/o Khalilur Rahman

R/o Village Basirgram

P.S. Badarpur

Date of framing of charge : 29.04.2017

Dates of recording of

Prosecution's evidence : 24.07.2017, 25.07.2017, 19.09.2017,

20.09.2017.

Date of examination of the

accused u/s 313 of Cr. P. C. : 14.12.2017.

Dates of recording of

defence evidence : 09.07.2018.

Date of hearing of argument : 29.09.2019.

Date of judgement : 15.10.2018.

LEARNED ADVOCATES WHO APPEARED FOR THE PARTIES

For the State : Mr. B. Deb, Public Prosecutor

For the accused : Mr. S. Chakraborty, Advocate.

JUDGEMENT

1. The accused Emad Uddin is facing trial on charges of having committed offences u/ss. 458/376 of the Indian Penal Code, 1860 and under section 4 of the Protection of Children from Sexual Offences Act, 2012. 1st information was lodged by the prosecution witness number 1, against him, alleging that on 27.05.2016, at around 1 AM, the aforesaid accused had committed housebreaking by night in the house of the informant and had committed rape on her minor female relative staying with her. She had alleged that while the accused was committing rape on the minor victim, on hearing some sound, she had woken up and had seen, in the light of the lamp, that the accused was committing rape on her whereafter, she had objected by shouting and the accused had fled away after threatening her to remain silent by showing a scimitar. She states that immediately the father of the accused, who was known to the informant, was informed by her husband but on the following day, at around 10 PM, the accused, his father and several others came to her house, used filthy language against them and threatened them not to make the aforesaid incident and issue. Badarpur police station case number 156 of 2016 was registered under sections 448/376/294/506 of the Indian Penal Code and under section 4 of the Protection of Children from Sexual Offences Act, 2012 and investigation was begun. After investigation, the accused was charge sheeted of having committed offences under sections 448/376 of the Indian Penal Code and, eventually, charges as aforesaid were framed against the accused. The accused denied the charges and claimed to stand trial. Thereafter, the prosecution examined all the 6 witnesses listed in the charge sheet and all of them were cross-examined on behalf of the accused. Thereafter, the accused was examined under section 313 of the Code of Criminal Procedure, 1973. Throughout, the accused took the stand that the informant had sent a proposal of victim's marriage with

- him and as he and his family members had rejected the proposal, out of grudge, they have falsely implicated him in the case. Thereafter, the accused also examined two witnesses in his defence and they were cross-examined on behalf of the prosecution. In the end arguments were heard.
- 2. Learned that Public Prosecutor has argued that the testimonies of the prosecution witness numbers 1, 2 and 4, who are, respectively, the informant, her husband, and the victim, are in tandem and corroborate one another and therefore, the prosecution must be declared to have proved the case against the accused beyond all reasonable doubt. He has submitted that the medical opinion cannot be given credence over the ocular evidence, more particularly, over the evidence of the prosecutrix when the said evidence is clear and corroborated. On the other hand, learned Counsel for the accused has submitted that the claim of the prosecutrix and her family members that after commission of rape by the accused, in the midnight, the prosecution witness number 2 has taken the accused's father's phone number from someone else without informing him the reason therefor and the conduct of the said witness in not informing his immediate neighbour, who also happens to be his brother, makes it clear that the case of the prosecution bases itself on falsity. It has been further argued that to cover up the case against the medical finding, the victim and the informant have levelled false allegations against the Doctor who had conducted victim's medico-legal examination stating that the said Doctor had not actually examined the victim. He has stated that had the same been true, in the same way they have complained during the evidence in Court, the victim, at least, could have brought the same to the notice of the learned and Judicial Magistrate who had recorded the statement under section 164 of the Code of Criminal Procedure, 1973 immediately after the medical examination. He has submitted that the accused, in view of the same, is entitled to acquittal.
- 3. Based on the materials on record and the arguments advanced by the rival

sides, the following points for determination arise for a decision by this court:

- i. Whether the victim was a minor at the time of the alleged incident?
- ii. Whether the aforesaid accused committed rape on the victim after committing housebreaking by night in her residence and whether after committing rape, he had made his exit from the place of occurrence possible by threatening the informant with scimitar?
- 4. The Doctor, who had conducted medico-legal examination of the victim, has given the opinion that the victim was above 18 years of age at the time of her examination. Date of examination is said to be 30.05.2016 whereas the date of the alleged offence is said to be 27.05.2016. He has stated that on radiological examination, epiphysis of the lower end of radius and ulna was found fused, epiphysis of the elbow joint was found fused, epiphysis around knee joint was found fused and the epiphysis of the Iliac crest was also found fused. She has stated that in the upper jaw of the victim, there were 14 teeth and in the lower jaw, there were 15 teeth. The aforesaid has been made the basis of assessment of the age of the victim as aforesaid. Her testimony and opinion were not questioned by the prosecution.
- 5. The victim, though, has stated her age to be 17 years while introducing her to the Court, on oath she has not made any statement as to her age. The informant has also stated that the victim was 16 at the relevant time but has not produced any document to support that. In cross-examination, she has stated that it was possible that the victim was 18 at the time of the incident. The informant's husband has not made any statement as to age of the victim. The investigating officer and has not stated that he made any enquiry as to the age of the victim and collected any documentary evidence of the said regard for the same. In their examinations in chief, both the informant and the victim have alleged that the Doctor conducting medico-legal examination of the victim had actually not examined her and had simply

given the medical report. However, it is seen from their testimonies that after medical examination, the victim was taken to Judicial Magistrate where she had given her statement in respect of the case. The said statement has been perused by this Court and it is seen that no such allegation was levelled by the victim when she had made the said statement. None of them has stated that they had pointed this out to the investigating officer and had requested for proper medico-legal examination of the victim. The investigating officer has confirmed this. Clearly, their stand during the evidence before the Court cannot be said to be having any credibility. In view of the above, it is held that the prosecution could not show that the victim was less than 18 years of age at the time the alleged incident took place. 1st of the question is answered accordingly.

- 6. In view of the above, that the accused cannot be made liable for having committed an office under section 4 of the Protection of Children from Sexual Offences Act, 2012 and, therefore, he is acquitted of the said charge.
- 7. The Doctor has also given her opinion that on examination she had not found any sign of recent sexual intercourse with the victim and that she had not found any injury on her body or on her private part. She has also stated that the vaginal swab of the victim had given negative results on microscopic examination. The prosecution's case is that the incident had taken place in the initial hours of 28.5.2016. Exhibit 3 medical report shows that the victim was examined on 20.05.2016 at 4:30 PM. In such a situation, any injuries suffered by the victim, during the alleged rape on her, could not have so healed at the time of her medicolegal examination as not to leave a remark.
- 8. The informant, in her evidence, has stated that at the time of the incident at 1 AM on 27.05.2016, her husband, who is a driver by profession, had gone out of his residence and the victim, then aged 16 years, was sleeping in another room of her house and suddenly, she had woken up on hearing a thud and had gone into the room of the victim to find that the accused was

sleeping over the body of the victim on the ground and that he was committing rape on the victim. She has stated that thereafter, she had shouted and the accused had taken up the scimitar in his hand and had tried to give a blow on her threatening her not to raise any hue and cry; that in the meantime, her two other little daughters had also woken up from sleep and had started crying and that thereafter, the accused had opened the door and had gone away. She has stated that she had seen that the entire clothes of the victim were torn. She claims that the victim told the informant that while she (the victim) was sleeping, the accused had caught hold of her and had pressed her mouth and had put the scimitar on her neck threatening that in the event she raised any alarm, who would kill her and that thereafter, the accused had brought the victim down on the ground and had committed rape on her. The informant has stated that the accused had broken the window of the kitchen made of bamboo and had entered into the house at night. She has also stated that the victim did not know the accused till then as she had come to the informant's house only 5 days prior to the incident. The informant has also stated that about an hour of the incident, her husband had reached the residence and was informed about the same whereafter, he had taken phone number of the accused's father from someone and had called him (the accused's father) informing him about the incident and that the accused's father had told her husband that he (the accused's father) would come in the morning and that indeed, in the next morning he had come to the informant's residence, with his wife, and after knowing about the incident, had told the informant and other family members that he would look into the matter. The informant went on to allege that on the same day, at 10 PM, in absence of her husband, the accused, his father and several other persons had come to her residence and had threatened the inmates of killing in the event they made and issue out of the incident and alleged that the informant and her family members were making false allegations against the accused. According to the informant, after some time, her husband had

come and she had informed her husband about the 2nd incident whereafter, she had lodged Exhibit 1 1st information with Badarpur police station. She has further stated that after lodgement of the 1st information the police had taken the victim to Srigouri Primary Health Centre but after knowing that the incident had taken place 2 days prior to that, the Doctor at the said hospital had not examined the victim and then, the informant and the victim had informed the police about the same whereafter, on the following Monday, the police had taken the victim to Karimganj Civil Hospital but the Doctor at the said hospital also had not examined the victim and had kept the victim seated. She states that thereafter victim's statement was recorded in Court. She has stated that they had given the torn her clothes of the victim to the police, but the police did not seize the same stating that there was no machine in Karimganj District by which the same could be tested and that the clothes were still lying in her residence. It is to be noted that the investigating officer has denied that the informant, or the victim, had told him that the Doctor at Srigouri Primary Health Centre had not examined the victim. Similarly, he has also stated neither the victim nor the informant had stated to him that the Doctor at Karimganj Civil Hospital had not examined the victim. The Exhibit 3 medico-legal injury report shows that a woman home guard had accompanied the victim to the informant to Karimganj Civil Hospital. It is seen that when the medico-legal examination was done, a staff nurse was also present as seen from Exhibit 3. It has already been mentioned above that even though it is the consistent statement on both the informant and the victim that straight away, after medico-legal examination, the victim was taken to Judicial Magistrate and her statement was recorded, the statement does not show that victim had made any complaint against the Doctors. Even though the informant and the victim both have stated in their evidences that the Doctors had not examined the victim, the prosecution has not challenged/questioned the findings recorded in the medico legal injury report or any part thereof. Clearly, the aforesaid allegations cannot be

believed. Likewise, the investigating officer has denied that any wearing apparel was produced by the victim or the informant. The informant's husband, examined as prosecution witness number 2, has stated that he had taken phone number of the accused's father from one Habibur Rahman of his village over phone but had not told him the reason for taking the accused's father's phone number. He has stated in his examination in chief that at around 1 AM at night, he had come back to his residence whereafter he was informed of the incident. The informant has stated that the incident had taken place at around 1 AM and after about one hour, the prosecution witness number 2 had arrived at the residence. So, it was between 1 AM to 2:30 AM that the informant's husband had taken the accused's father's phone number from Habibur Rahman. However, this person was not examined by the prosecution side. It does not seem usual that the informant's husband took the accused's father's phone number from Habibur Rahman at the dead hour of the night and he gave him the phone number without asking the reason thereof. As such, this part of the testimony of the informant, her husband and the victim have to be taken with a pinch of salt.

9. The informant has stated in her cross-examination that the residences of Basit, Faijul, Shafiqur, Isak Ali, Manik Uddn, Saraf Ahmed, Sumon Ahmed, Samsul Haque and Tabarak Ali are near her husband. However, she has not disclosed if any of them is related to her or to her husband. Prosecution witness number 2 has stated that Basit, his next door neighbour, is his brother. The informant's husband has not stated that the said brother was informed of the incident or that the said brother had come to his residence immediately after the incident. This becomes significant in view of the statement of prosecution witness number 3 that in the next morning, at 7 AM, while this witness was going to shop, he had met one Abdul Hamid who had told him that the accused had come to his house and had committed rape on some of his relative. The informant or her husband did not disclose

that they have any relative named Abdul Hamid. His testimony shows that he was living in the same house the victim and the informant were living in. As such, he could have been witness to more developments than he has testified for as he must have woken up immediately after the incident and must have seen all the following events like the informant's husband arriving at the residence, the incident been narrated to him, the informant's husband calling Habibur Rahman over phone and taking the accused's father's phone number, the accused's father and mother coming in the next morning et cetera. It also raises an eyebrow that he did not know anything more. The investigating officer has stated that Abdul Basit and another neighbour of the informant, namely, Faizur Rahman had refused to give evidence in the case. This also raises an eyebrow. The investigating officer has confirmed that the informant had stated to him that she was sleeping on another bed adjacent to that of the victim whereas in Court she has stated that she was sleeping in another room. The investigating officer has also confirmed, at the instance of the defence, that the informant had not stated to him that on hearing thud, she had gone into the room of the victim, had seen the accused lying over the body of the victim with the victim on the ground and that after the incident, her two little daughters had started crying. The investigating officer has stated that stating that she had washed the wearing apparels of the victim, the informant had refused to give the said clothes to him. The investigating officer has also stated that the informant had not told him that her husband had informed the accused's father about the incident immediately after the incident and that on the next day, the accused, his father and two more persons had come to her residence and had threatened them and that while managing his escape after committing rape on the victim, the accused had tried to give a blow of scimitar to her. This shows that there are material contradictions in the stands taken by the informant during investigation and during trial.

- 10. In his evidence, the informant's husband has stated that when the accused's father had come to his house in the morning after the incident, he had shown the torn clothes of the victim to him and that the accused's father had assured him of finding a solution to the issue whereas the investigating officer has stated that this witness had not made any such statements before him. The investigating officer has also confirmed that the victim had not stated to him that the accused had kept any dagger near her at the time of committing rape. It is also seen that unlike she did in Court, the victim did not state to the investigating officer that the accused's father had come with his wife the following morning and had assured the informant and her husband of finding a solution to the incident and that on the next day, at around 8 PM to 9 PM, the accused, his father and 2 others had come to her house in absence of the informant's husband and had threatened her and other family members not to mention about the incident to anyone else.
- 11. There is no seizure of broken window or any part thereof to show that the accused had committed housebreaking. Testimony of the investigating officer is silent on this. So are the testimonies of the prosecution witness numbers 1, 2 and 4. Medicolegal report of the victim from Srigouri Primary Health Centre was not collected by the police and the prosecution did not make any effort to bring the same.
- 12. The above shows that not only that the investigation into the case is faulty, the testimonies of the victim, the informant and other witnesses are also doubtful. The contradictions and blemishes as noticed above do not inspire confidence in the case of the prosecution. Even the medical report does not support the same. All the persons shown to be present in the house, the place of occurrence, were not examined as witnesses. Own brother of the informant's husband, who is also the next door neighbour, also did not support the case of the prosecution by refusing to be a witness in the case. As such, it is held that the prosecution has not been able to prove that the

accused had committed housebreaking by night into the house of the informant and had committed rape on the victim.

- 13. In the result, the accused is also acquitted of the charges under sections 458/376 of the Indian Penal Code and is set at liberty forthwith. However, his bail bond and surety shall stand extended till the next 6 months.
- 14. The instant case, therefore, stands dismissed on contest.
- 15. As no one has been shown to be the victim of any offence, no occasion for award of compensation under Victim Compensation Scheme of the State of Assam arises. As such, no order was passed in the said regard.
- 16. Send a copy of this judgment to the learned District Magistrate, Karimgani District and to The Superintendent of Police, Karimganj.

Given under my hand and seal of this Court in presence of the learned that Public Prosecutor, the accused and his learned counsel on this the 15th day of October 2018.

> Sessions Judge Karimganj at Karimganj.

APPENDIX

Prosecution Witnesses: --

P. W. 1 : Shrimati Rafia Begum P. W. 2 : Shri Abdul Hamid P. W. 3 P. W. 4 P. W. 5 : Shri Abdul Jabbar

: Victim (name not disclosed)

: Dr. Suparna Paul : Shrimati Anjali Das P. W. 6

Prosecution Exhibits: -

: First Information. Exhibit 1

Exhibit 2 : Printed form of the first information report. Exhibit 3 : Medical Report of the victim.

Exhibit 4 : Sketch map of the place of occurrence.

Procedure, 1973.

Exhibit 5 : Charge-sheet.

Material Exhibits: - NIL

Defence Witness: -

D. W. 1 : Shri Ainul Haque D W. 2 : Shri Khalilur Rahman

Defence Exhibit:- NIL.

Court Witness: - NIL.

Sessions Judge Karimganj at Karimganj.