# BEFORE THE SPECIAL JUDGE ::::: DHUBRI

## Special Case No.45/2015

U/s.4 of POCSO Act, 2012

### G.R 4622/2014

State of Assam

- Vs –

**Jahirul Hoque** 

Present : Sri Rajib Goswami, AJS

Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor, Dhubri for the State.

Sri Moktadir Mondal, Advocate for the defence.

Date of Evidence : 18-02-2016 & 26-02-2016

Argument Heard : 21-03-2016 Date of Judgment : 31-03-2016

# **JUDGMENT**

The prosecution case in the FIR in brief is that one Ahima Bibi had lodged the FIR at Gauripur Police Station to the effect that on 05-11-2014 at around 9:30 a.m. the accused Jahirul Hoque was caught in the act of committing penetrative sexual assault on her minor daughter who is said to have been enticed away by the accused to his house from the courtyard of the informant's house where the victim was playing with her brother immediately before the alleged occurrence.

- 2. Upon the FIR a case was registered by the O.C, Gauripur Police Station U/s. 4 of Protection of Children from Sexual Offence Act against the accused Jahirul Hoque. The case was investigated into by the I.O. and after completion of investigation, charge sheet against the accused Jahirul Hoque was filed in the Court u/s.4 of POCSO Act.
- 3. Accused person appeared before the Court. Charge u/s.4 of POCSO Act had been framed against the accused Jahirul Hoque. Charge had been read over, explained and interpreted to accused to which accused pleaded not guilty and claimed to be tried.

4. The prosecution had examined as many as 7 (seven) witnesses including the I.O. & M.O. Accused person was examined generally on the circumstances coming up against him in the evidence of P.Ws. Accused person pleaded total denial and declined to adduce any evidence in his defence.

## 5. **POINT FOR DETERMINATION**

Whether the accused Jahirul Hoque on 05-11-2015 at around 9:30 a.m. at village Dumardoha Pt-IV under Gauripur P.S. committed penetrative sexual assault on the minor, daughter of the informant Ahima Bibi and as such had committed an offence u/s.4 of the POCSO Act, 2012?

### **DECISIONS AND REASONS THEREON**

- 6. PW-1, the victim who stated to be 6 years old on the day her evidence had been recorded was able to give rational answer to the questions put to her to ascertain whether she was in a position to give rational answer to the questions put to her while she was examined on camera. PW-1 had stated that on the date of the alleged occurrence she was playing at the courtyard of her house when she was enticed by accused Johirul to accompany him to his house and then at his house the accused stripped her of her undergarments. Her grand-mother, brother and sister came and had seen the accused in the said act and thereafter she was taken to her house.
- 7. PW-2, Musstt. Ahima Bibi not finding her daughter at school time, had asked her mother to search for her. In the mean time, one of her sons came running to her and informed her that her daughter was inside the house of accused Johirul Hoque @ Raju. PW-2 had immediately rushed to the house of accused Johirul @ Raju and had found her daughter lying on the ground and the accused was on top of her daughter. Her daughter's undergarment was found removed from her body. On seeing PW-2 Johirul had fled away. PW-2 had lodged the FIR bearing her thumb impression.

In her cross-examination PW-2 had reiterated about staying at her father's house. It is also revealed from the cross-examination of PW-2 the house of the accused is located opposite her father's house. According to PW-2, the accused has three sisters, two brothers and his parents. They all live in the same house. Adjacent west of her house is the Madrassa where around 100 to 200 pupils attend classes regularly. According to PW-2, father of the accused Johirul and her father are step brothers and she was aware that her father had initiated criminal proceedings against the father of Johirul three times. PW-2 had denied the suggestion with regard to not having stated to the I.O. about seeing accused on the top of her daughter and also about seeing her daughter with her undergarment removed from her body.

8. PW-3 Md. Azizur Rahman, the father of the victim on his return from his work had been told by his wife about Johirul attempting to commit sexual assault on his daughter.

In his cross-examination he had stated that he had not seen the alleged occurrence and he also failed to recollect the date of birth of his daughter.

9. PW-4, Musstt. Omarjan Bibi, the grandmother of the victim had known accused Jahirul Hoque. On the day of the alleged occurrence she had gone in search for her granddaughter and came to know that she was in the house of Jahirul. Having arrived at the house of Jahirul she had seen the accused atop her granddaughter, pinning her granddaughter to the ground with the weight of his body. On seeing her accused had fled away from the place of occurrence and she had brought back the victim to the house.

In her cross-examination she had admitted to Grand-father of Johirul and her husband being step brothers. PW had also admitted to criminal proceedings pending in the Court, having been initiated by her family and family of accused persons against each other. According to PW-4 they have no visiting terms with the accused person.

10. PW-5, Md. Ahammed Ali, the grandfather of the victim had stated about accused Johirul Hoque being his immediate neighbour and about accused Jahirul Hoque taking his granddaughter to his house and attempted to commit sexual assault upon her. PW-5 admitted not having seen the alleged occurrence. He had heard about the alleged occurrence from his family.

In his cross-examination PW-5 had admitted to accused being the son of his step brother. According to PW-5 his step brother had sold his share of ancestral property to Madrassa. PW-5 also admitted to a criminal case pending against him having been brought by the father of the accused.

- 11. PW-7 Dr. (Mrs) Rinku Ahmed had stated that on 06-11-2012 she was posted at, Dhubri Health & Maternity Centre. On that day she had examined the victim, Sarjina Khatun, D/o. Azizur Rahman of village Dumardaha, Dist. Dhubri and had found on external examination that the victim was normal, no external injury was noticed. According to Pw-7, PV examination could not be done as the orifice was very small and there was no mark of injury seen around her private parts. According to PW-7 her findings are not consistent with recent sexual intercourse and assault. Ext-5 is her report bearing her signature ext-5 (1).
- 12. PW-6 S.I. Sahab Uddin Ahmed had stated that 05-11-2014 he was working as i/c. Balajan Police Outpost when he had received a written FIR from one Ahima Bibi. The FIR had been received after same being registered at Gauripur P.S. On 06-11-2014 at around 1 p.m. he had visited the place of occurrence, Dumordoha Part-IV. Then he had forwarded the victim to Civil Hospital, Dhubri for examination. He had also got the statement of the victim recorded u/s.164 of Cr.PC before the Magistrate. Despite having made several attempts to arrest the accused he had failed to do so. On 17-11-2014 he had collected the medical report of the victim. Ext-3 is the seizure list bearing his signature, ext-3 (1) through which he had seized the undergarment of the victim on 06-11-2014.

In his cross-examination PW-6 on his attention having been drawn to the statement of PW-2, Ahima Bibi u/s. 161 of Cr.PC, PW-6 had denied having been told by the said witness that not finding her daughter during school time, she had sent her mother to search for her daughter. The said PW had also not told him about her son coming to her and informing her that the victim was seen at the house of the accused. The said PW had not disclosed to him that on being informed by her son she had gone to the house of the accused and had seen the accused on the top of her daughter and about having seen the undergarment of her daughter removed. PW-2, Ahima Bibi is the mother of the victim. PW-3 is the father of the victim, PW-4 Amorjan Bibi is the grandmother of the victim. PW-5 is the victims' grandfather. Apart from these witnesses he had not examined any independent witnesses. The undergarment he had seized of the victim had been handed over by the mother of the victim.

Above is the threadbare discussion of evidence on record.

- 13. Now coming to the evidence of the victim, PW-1, she had only related about accused stripping her of her undergarment and she had said nothing beyond this. PW-2, the mother of the victim stated to have seen the accused on the top of her daughter with her daughter's undergarment removed. PW-3, Azizur Rahman stated to have heard from his wife about the accused trying to sexually assault his daughter. PW-4, Omarjan Bibi, the grandmother of the victim stated to have seen the accused pinning her granddaughter to the ground with the weight of his body. On seeing her, the accused had fled away. PW-5, Ahmed Ali, the grandfather of the victim denied having seen the alleged occurrence and he had heard about the alleged occurrence from his family.
- 14. Learned defence counsel had submitted before the Court that evidence of PW-1 to PW-4, in support of the prosecution case is the evidence of near relatives of the victim and as such there evidence has to be looked into as to its reliability in the light of evidence of independent witnesses.
- 15. Now having taken into consideration submission of the learned counsels for both sides, I however am inclined to agree with learned P.P. since the victim has implicated the accused of stripping of her under garments and her grandmother, her brother and her sister had caught the accused in the act.

Considering the victim was only six years old on the day of the alleged occurrence and the evidence of the M.O. with regard to findings during her examination supporting the tender age of the victim, her evidence inspires confidence and as such I am inclined to hold the evidence of PW-1 being wholly reliable. Further, I am inclined to rely upon the evidence of PW-4 Omarjan Bibi, the grandmother of the victim as wholly reliable since she had seen the accused pinning the victim to the ground by the weight of his body and PW-4'S presence at the place of occurrence and catching the victim in the act had also been related to by the victim in her evidence. The defence failed to assail the evidence of PW-4. Though as per the evidence discussed above and in view of the evidence of the M.O. the offence of penetrative sexual assault as provided in Section 4 of the POCSO Act is not attracted as against the accused but then there is sufficient evidence supporting the prosecution version holding the accused guilty of having committed sexual assault for the purpose of offence punishable u/s 8 of POCSO Act.

16. In order to bring home charge u/s.8 of POCSO Act, the victim should be a minor. Considering the appearance of the victim supported by the evidence of M.O. that the PV examination could not be done as introit-us of the victim is very small, the fact that she was below 18 years was not required to be substantiated separately. This piece of evidence is remained uncontroverted since in her statement u/s.164 of Cr.PC she had stated her age to be 6 years. The PW-1 being herself the victim is not free of apprehension and may not be able to disclose the entire occurrence and there may be some minor contradiction with regard to her explanation of the alleged occurrence. However, the evidence of the victim with regard to the accused having stripped her of her undergarments and the evidence of PW-4, the grandmother, having caught the accused in the act immediately thereafter are circumstances which remained uncontroverted, consistent with the offence of sexual assault as enumerated u/s.7 of POCSO Act. Section 7 of the POCSO Act envisages that "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

17. Thus the prosecution has been able to establish in the light of the evidence above the offence u/s. 8 of the POCSO Act beyond all reasonable doubt against the accused. The accused is convicted accordingly u/s.8 of POCSO Act in the light of S-222 of Cr.P.C. instead of for offence under Sec. 4 of POCSO Act, for which the accused was charged.

18. Accused is heard on point of sentence. Accused person pleaded for leniency. Considering the nature of offence proved to have been committed by the accused I do not find it a fit case for rendering the benefit of release on Probation of Good Conduct under Probation of offenders act 1958. Considering minimum punishment provided for the offence u/s.8 of the POCSO Act being R.I. for 3 (three) years and fine, I am inclined to provide minimum punishment to the accused. The accused is sentenced to R.I. for 3 (three) years and a fine of Rs.1,000/- in default to S.I. for 2 (two) months. I am also inclined to recommend the victim for compensation u/s.356 (A) of Cr.PC to be received by her mother. Accordingly a copy of the judgment be sent to DLSA, Dhubri for ascertaining the quantum of compensation to be paid.

19. Accused be given a free copy of the judgment free of cost immediately u/s 363 (1) of Cr. PC. Earlier detention of the accused Jahirul Hoque, if any is to be set off as against the sentence of imprisonment u/s.428 of Cr.PC.

20. A copy of the judgment be furnished to the D.M, Dhubri u/s.365 of Cr.PC.

Given under my hand and seal of the Court on this  $31^{\text{st}}$  day of March, 2016.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.

## **APPENDIX**

### A. **Prosecution Witness.**

P.W-1 -Musstt. Sarjina Khatun P.W-2 -Musstt. Ahima Bibi P.W-3 -Md. Azizur Rahman P.W-4 -Musstt. Omarjan Bibi PW-5 -Md. Ahammed Ali PW-6 -S.I. Sahab Uddin Ahmed

PW-7 -Dr. (Mrs.) Rinku Ahmed

### В. **Court Witness**

Nil

### C. **Defence Witness**

### D. **Prosecution Exhibits.**

Ext-1 -**FIR** 

Ext-2 -Sketch Map Ext-3 -Seizure-list. Ext-4 -Charge sheet. Ext-5 -Medical Report.

### D. **Defence Exhibit**

Nil

Special Judge, Dhubri