# **:: IN THE COURT OF THE SESSIONS JUDGE, AT DIBRUGARH ::**

Present: Mrs. S.P. Khaund,

Sessions Judge,

Dibrugarh.

# PCSO Case No.53 of 2016

Under Section 8 of PCSO Act.

#### **State**

#### -Versus-

Jakrius Barla.....Accused person.

### **Appearance:**

For the State: Smti. S. Akhtar, Ld. Addl. P.P.

For the accused: Sri Uttam Kumar Routh Ld. Defence Counsel.

Date of evidence recorded: 21.03.17, 18.04.17, 27.06.17.

Date of argument heard : 27.06.17.

Date of judgment : 17.07.17.

### **JUDGMENT**

- 1. The brief account of this case is that on 23.5.16 at about 9.00 p.m, when the victim 'X' was alone at home, Jakrius Barla @ Joy Mongal (hereinafter the accused) entered into the house and attempted to commit rape on the minor victim who was 11 years at that time. When the victim's mother reached her house, the accused failed in his attempt. An ejahar regarding this incident was lodged by the victim's brother Johan Kanduna (hereinafter the complainant).
- 2. The Police registered a Naharkatia P.S Case No. 42/16 under Section 448 IPC read with Section 11 PCSO Act and S.I Saroj Doley was

entrusted with the investigation. The Investigating Officer (I.O in short) embarked upon the investigation and he went to the place occurrence. He forwarded the victim to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (Cr.P.C in short). He prepared the sketch map of the place of occurrence and seized one school certificate regarding the date of birth of the victim. He recorded the statements of the witnesses and on finding prima-facie materials, he submitted charge-sheet against the accused under Section 448 IPC read with Section 11 PCSO Act.

- 3. On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 10 read with Section 9(m) of the PCSO was framed which read over and explained to the accused person. The accused abjured his guilt and claimed innocence.
- 4. To substantiate the stance, the prosecution adduced the evidence of six(6) witnesses and the defence cross-examined the witnesses to refute the charges.
- 5. The answers of the accused person to the questions under Section 313 Cr.P.C depicts the plea of total denial.
- 6. I have heard the arguments forwarded by the Learned Counsel for both the sides.

### **Points for Determination:**

I. Whether on 23.5.16 at about 9.00 p.m, the accused committed aggravated sexual assault upon 11 years old victim 'X'?

#### **Decision thereon and the Reasons for the Decision:**

7. The victim 'X' gave her evidence as P.W.1. As she was under 12 years of age oath was not administered. Severals questions were asked to the victim to ascertain her rationality and her answers were apparent that the victim could give rational answers. The victim stated as P.W.1 that the

accused person is known to her. The incident took place in the month of May. On the day of the incident, she was at home lying on the bed. At that time, the accused came in and laid down beside her and touched her underwear. At that time, her mother reached home and called her and the accused unlatched the door and fled. The door was locked from inside at that time. The accused went towards the kitchen. On the next morning, when she informed her mother about the incident, her mother rebuked her, so she cried and went out. Then, her sister-in-law asked her why she was crying and she informed her about the incident. Her sister-in-law informed her brother Johan Kanduna about the incident, and he had a discussion with her mother about the incident. The, she went to Mikhel to inform him about the incident. On the next day, she went to the Police Station along with Johan, Mikhel, accused Joy Mongal and her mother. The Police recorded her statement and forwarded her to the Magistrate to record her statement. Exhibit 1 is the statement and Exhibit 1(1), 1(2) and 1(3) are her signatures.

In her cross-examination she stated that the accused had been staying in their house prior to the alleged incident. The accused had a dispute with his relatives and so he was allowed to stay in their house. On the day of the incident the accused unlatched the door because on that night he was in their house and her mother called from outside to open the door. The I.O has affirmed in his cross-examination as P.W.6 that the victim did not state before him that the accused touched her panty at the time of the alleged incident.

8. Mikhel Purti testified as P.W.2 that on the night of the 23.5.16 the incident took place and on 24.5.16 and the alleged victim, who was crying, came and informed him about the incident. The victim informed him that on the night of 23.5.16 while she was at home, laying on the bed and sleeping, the accused tried to molest her forcefully. At that time her mother who was not at home reached home. The victim also stated before him that when she informed her mother about the incident, her mother did not respond. Mikehl Purti further testified that a few days prior to the incident the victim's father died and after the death of the victim's father the accused started residing in the victim's house and so her mother did

not respond when the victim 'X' informed her mother about the incident. The victim also informed him(P.W.2) about the incident. When he sent the victim to her house she was unwilling to return to her house. Then, he called the victim's brother Johan Kanduna over phone because Johan resides in a different place. He informed Johan about the incident and then the victim also informed her brother about the incident. Then he went to the Police Station along with Johan and the victim. Johan lodged the FIR with the Police and the Police recorded their statements. He further stated that the victim was 11 years at the time of the incident.

His cross-examination will be discussed at the appropriate stage.

- 9. Nipu Saikia testified as P.W. 3 that both the accused person and the complainant are known to him. The accused used to reside in his brother-in-law's house in their village. He heard from the villagers that the accused misbehaved with the victim 'X'.
- 10. Smti. Junuka Induwar testified as P.W.4 that the accused is her neighbour. The informant Johan Kanduna also known to her. The incident took place on the previous year. On the following day of the incident, victim 'X' went to her residence and informed her that the accused touched her body at night while she was sleeping. She learnt later that a case was lodged against the accused person.
- 11. Smti. Chesila Kanduna has testified as P.W.5 that the accused is her neighbour. The informant is her son and the victim is her daughter. The accused used to stay in her house after his elder sister's death. On the night of the incident, when her daughter was sleeping after having food, the accused came and brought some vegetables and asked her to cook, but she went to a nearby house to attend a party and after returning home she saw that the accused was sleeping with her daughter. Her daughter informed her that the accused touched her. Then this case was lodged against the accused.

In her cross-examination she stated that this case was lodged because the villagers assaulted the accused who had been staying in her house for a

long time. On the night of the incident when she returned from her neighbour's house the accused opened the door for her. She did not see the bed on which the accused was sleeping before opening the door. She also never heard any complaint against the accused and so she allowed him to stay in her house. She suggested her son to lodge a case against the accused lest the villagers may assault the accused.

- 11. The I.O testified as P.W.6 that on 24.5.16 he was posted in Naharkatia P.S as second officer and on that day an FIR was lodged by Johan Kanduna which was registered as Naharkatia P.S Case No. 42/16, under Section 448 read with Section 11 of PCSO Act. Exhibit 2 is the FIR. He was entrusted with the investigation by A.S.I Prasanta Borah. Exhibit 2(1) is the signature of A.S.I Prasanta Borah with regard to the endorsement and the signature is familiar to him. He embarked upon the investigation, and recorded the statement of the complainant in the Police Station and went to the place of occurrence on the following morning, as it was late at night that day. The accused was already apprehended and assaulted by public and he took custody of the accused. He prepared the sketch map and recorded the statements of the witnesses including the victim. He forwarded the victim for medical examination and to the Magistrate for registering her statement. He obtained the birth certificate of the victim. Exhibit 4 is the seizure list and Exhibit 4(1) is his signature. Exhibit 3 is the sketch map and Exhibit 3(1) is his signature. After completion of the investigation he submitted charge-sheet under Section 448 of IPC read with Section 11 of PCSO Act. Exhibit 5 is the charge-sheet and 5(1) is his signature. Exhibit 6 is the medico legal report and the medical examination of the victim was conducted by Dr. J. Shyam, SDMNHO- DTC, attached to Naharkatia CHC.
- 12. On analysing the evidence it is clear that the accused committed sexual harassment on the victim. The accused has been staying in the victim's house after his sister's death. The victim's mother Smti. Chesila Kanduna stated as P.W.5 that the accused has been staying in her house for a long time. P.W.4 Smti. Junuka Induwar also testified in her cross-examination that the accused has been staying in the victim's house for a long time. P.W.2 Mikhel Purti has also stated that since the death of the

victim's father the accused has been staying in the victim's house for a long time. The victim also stated that, the accused has been staying in their house. Thus, the question of committing house trespass does not arise. The accused has been allowed by the victim's mother to stay in their house. The I.O had admitted in his cross-examination that Mikhel Purti(P.W.2) has not stated in his statement under Section 161 of Cr.P.C that "on the morning of the 24.5.16 the victim came tearfully and informed him that on 23.5.16, in her mother absence at night while she was sleeping the accused came and forcefully tried to molest her. On the following day i.e. o 24.5.16 the victim came and informed him about the incident. The victim also informed him that on the night of 23.5.16 while she was sleeping at home, lying on the bed, and sleeping at night, the accused came and tried to forcefully molest her. At that time, her mother reached home. Then he (P.W.2) asked him whether she informed her mother about the incident, then she replied that when she informed her mother about the incident her mother did not respond."

- 13. Thus, the cross-examination of the I.O and the cross-examination of the P.W.2 depicts that, a substantial part of the evidence was not referred to the I.O by the witnesses while his statement under Section 161 of Cr.P.C was recorded. It is true that Mikhel Purti has omitted the substantial part of the incident, yet this contradiction does not cause a dent to the prosecution case. The victim has categorically stated that the accused laid down beside her and touched her underwear.
- 14. The victim's statement under Section 164 of Cr.P.C was recorded by the Magistrate and her statement is consistent and corroborates her testimony.
- 15. All the witnesses have stated that the victim was a minor at that time of the incident. The Magistrate did not administer oath while recording her statement under Section 164 of Cr.P.C with the observation that the victim was below 12 years when her statement was recorded. Exhibit 1 is the statement of the victim under Section 164 of Cr.P.C. When the victim gave her evidence in the court she stated that she was 11 years of age and so did Mikhel as P.W.2. There is not an iota of doubt that the

victim was a minor at the time of the incident.

- 16. There is edict of presumption under the POCSO Act qua the offence. The victim is not only a minor but she is the sole witness. The presumption under Section 29 of the Act is that whether a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 band 9 of this Act, the Special Court shall presume that such person has committed the offence, unless the contrary is proved. In the instant case the victim's evidence inspires confidence that the accused is complicit.
- 17. There is clinching evidence that the accused committed sexual assault on the victim. At the same time, it has been held that, the accused has not committed aggravated sexual assault on the victim.
- 18. The age of the victim could not be ascertained although there is doubt that the victim was a minor at the time of the incident. So, instead of holding the accused guilty of offence under Section 10 of the Act, he is held guilty of offence under Section 7 of the PSCO Act by virtue of Section 222(2) of the Cr.P.C.
- 19. Section 7 of the PCSO Act, defines sexual assault, "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.
- 20. Reverting back to this case, it is held that the prosecution was able to prove beyond all reasonable doubt that the accused committed sexual assault on the victim 'X'.
- 21. Considering the diabolical nature of this offence the punishment warrants, deterrent and exemplary punishment which will discourage the accused from acting in this manner any further.
- 22. I have heard the accused on the point of sentence and he has

answered that he will suffer immensely if he is confined for such long time behind the bars.

23. Considering the facts and circumstances of the case and considering the nature of offence, I believe that punishment to rigorous imprisonment for 3 years will serve the interest of justice.

#### **Sentence:**

- 24. The accused Jagrius Barla @ Joy Mongal is convicted under Section 8 of the PCSO act to suffer rigorous imprisonment for 3 years and pay a fine of Rs.1000/- and in default of payment of fine to undergo rigorous imprisonment for one month. The period of detention of the accused during the investigation and trial is set of with the custodial sentence. The fine realize will be paid as compensation to the victim.
- 25. In my opinion this case is not required to be recommended for compensation to the victim, under the Victim's Compensation Scheme.
- 26. Judgment is signed, sealed and delivered in the open court on the 17<sup>th</sup> day of July, 2017.
- 27. Furnish a copy of the judgment to the accused and the District Magistrate.

(Smti.S.P. Khaund), Sessions Judge, Dibrugarh

# **APPENDIX**

# **Prosecution witnesses**

PW-1 :- Smti. Juspina Kanduna(victim).

PW-2 :- Sri Mikhel Purti.

PW-3:- Sri. Nipu Saikia.

PW-4 :- Smti. Junuka Induwar.

PW-5: - Smti. Chesila Kanduna.

PW-6 :- S.I Saroj Doley.

## **Defence witnesses**

Nil.

# **Court witnesses**

Nil.

### **Exhibits**

Ext.-1 :-Exhibit 1 is the statement of the victim before the Magistrate and Exhibit 1(1), 1(2) and 1(3) are her signatures.

Ext.-2 :- FIR.

Ext.-3: Sketch map.

Ext.-4 :- Seizure list.

Ext.-5:- Charge-sheet.

Ext. 6:- Medical report.

(Smti.S.P. Khaund), Sessions Judge, Dibrugarh.