IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

SPECIAL POCSO CASE NO. 57 of 2017

Under section 4 of POCSO Act.
(Arising out of G. R Case No. 3552 of 2017)

State of Assam

-Vs-

Md. Inamul Hussain @ Inamul Mandal ... Accused Person

Present: Smti I. Barman, AJS

Sessions Judge, Sonitpur, Tezpur.

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

And Mr. N. Misra, Addl. P.P.

For the accused : Mr. Chiranjit Pradhan, Advocate

Date of Argument : 04-02-2019

Date of Judgment : 18-02-2019.

JUDGMENT

The prosecution case against the accused person as projected in the FIR (Ext. 1), in brief, is that on 10-09-2017 at around 10:30 p.m. when the informant's 16 years old victim daughter was sleeping with a girl, accused Inamul Mandal who had love affairs with the victim, took her to his house and committed her rape which was informed by the girl sleeping with the victim over phone No. 8486790116. In the incident, the accused was caught red handed by one Monowara Khatoon but on raising hullah when the villagers came there, the accused fled away therefrom.

- 2. On receipt the ejahar from the informant (PW 1), the O/C Sootea PS registered the case on 15-09-2017 vide Sootea P.S. Case No. 125/17 u/s 4 of POCSO Act. During investigation, the Investigating Officer (PW 8) recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C. and on completion of investigation having found materials submitted chargesheet against the accused Md. Inamul Mandal u/s 4 of POCSO Act.
- 3. On being appeared the accused person before this Court, my learned predecessor, after hearing both parties, framed charge u/s 4 of POCSO Act against the accused Md. Inamul Hussain @ Inamul Mandal and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed to be tried.
- **4.** To substantiate the case, prosecution examined as many as nine number of witnesses. In statement recorded u/s 313 Cr.P.C, the accused denied all the allegations leveled against him and taking the plea of total denial, examined two witnesses.
- **5.** I have also heard the argument of learned counsel of both sides and also have gone through the evidence on record.
- **6.** The point for decision in this case is that -

(1) "Whether the accused Md. Inamul Hussain @ Inamul Mandal on 10-09-2017 at around 10.30 p.m. at village Koroiyani No. 2 Adaveti under Sootea Police Station committed penetrative sexual assault on the victim Miss "X" and thereby committed an offence punishable under section 4 of POCSO Act.

Reasons, Decisions and reason for decision.

- **7.** In order to appreciate the argument advanced on behalf of both the sides, it is considered next to outline a sketch of the evidence on record.
- **8.** PW 1, the informant as well as the father of the victim. He deposed that on the night at around 11 p.m. when he got up, noticing the door of the room open, where his victim daughter was sleeping with his wife's niece, he entered into the room and in the light of torch though had

seen the niece upon the bed but had not found his daughter. Then on being enquired his niece whereabout of his daughter, she replied that she was in deep sleep. Then he informed the matter to the maternal uncle(PW 2) of his daughter who resided in a different house of the same compound. They all searched for the victim and during that time one villager informed them that somebody had gone through their village in the night. Then on suspicion he along with his wife, PW 2's wife and one another woman proceeded to the house of the accused in search of the victim and calling accused's father when they enquired about the victim, the father of the accused scolded them. Thereafter, his wife and aunty of the victim went inside the house and found the accused with the victim in a compromising position. On the next day morning he along with police went there and brought back the victim home, but before arrival of the police, accused fled away. Then he lodged the FIR, Ext.1. He further stated that after recovery, the victim reported him that the accused had taken her forcefully and committed misdeed to her.

During cross, he stated that at the time of birth of the victim, they were in Dimapur, Nagaland. Again he stated that the victim was born in Sibsagar but the birth certificate of the victim was obtained from Dimapur. He cannot say the exact age of the victim daughter. He admitted that though the birth certificate of the victim was at home but he had not submitted the same to the police. He further stated that his victim daughter was admitted at Dimapur Don Bosco HS School in class A when she was 7 years old and she read there upto class V but after coming from Dimapur, he did not admit his daughter in school for almost one year. He further stated that the house of the accused is situated just five minutes walking distance from his house and they reached the house of the accused at about 11.30 p.m. He also admitted that they proposed the accused and his family members to marry his daughter and had the accused married his daughter, he would not file the case. He admitted that lateron he came to know about love affairs between the accused and the victim. He admitted that in the FIR he mentioned that he came to know about the incident from the niece of his wife who on that night was sleeping with the victim and the cell number written in the FIR belongs to the said niece.

9. PW 2, the uncle of the victim, deposed that on the day of incident, at around 11 p.m., the informant and his wife calling him informed that their victim daughter is missing from bed. At that time one person informed the mother of the victim that the victim went with a boy. Then, on suspicion he along with his wife and victim's mother went to the house of the accused in search of the victim and on calling the father of the accused when asked whereabout of the victim, he had shown a separate room but they find none there. At that time his wife and victim's mother finding the victim along with the accused in a room in indecent condition, brought out the victim. Then on calling, village headmen, Md. Majid Ali, Md. Madan Ali, Md. Taher Ali came and said that the father of the accused would pay money and asked them (PW2) to give marriage of the girl to someone but they did not agree. He further stated that after about 20 days, police sent the victim for medical examination.

During cross, he stated that he cannot say the date of birth of the victim. He further stated that since 10/11 years last prior to his marriage, he and the informant resided in the same campus. He further stated that he called the headmen of the village to give marriage of the victim to the accused but headmen asked to settle the matter by paying money to the victim's father. He further stated that he did not find the victim in indecent condition.

10. PW 3, the mother of the victim, testified that on the day of incident, the accused took her daughter, aged about 16 years, to his house and committed her rape there. She further stated that in course of search, they recovered the girl from the house of the accused Inamul Mandal. She stated that though at first the family members of the accused denied the existence of the victim in their house but lateron they found the victim in the house of the accused and then her husband lodged the FIR.

During cross, she stated that the victim was born at Koroiyani, Sootea and after birth of the victim they have been shifted to Sibsagar for three years wherefrom they again shifted to Koroiyani, Sootea and then to Dimapur where victim was admitted at Don Bosco School at class A when

she was 7 years old. She admitted that they obtained the birth certificate of the victim from Dimapur by showing her age as five years, as the school authority refused to get her admission at 7 years. She denied her knowledge regarding love affairs between the accused and the victim. She stated that on the night at 11/11.30 p.m., her niece informed them that the victim was missing from bed and Salimuddin informed them that one boy holding hand of the victim was going on foot and entered into the house of the accused. Then she along with victim's uncle and aunty and her husband went to the house of the accused and on calling the victim by her name repeatedly, the accused's father came out and asked not to disturb them and that her (PW's) daughter is not in his house. The victim did not come out and silently remained in the house of the accused. She also stated that in presence of villagers and neighbours, they proposed to the accused's parents to marry the victim to the accused but they refused. Thereafter, the FIR was filed with Sootea Police station. She stated that in the next morning police took the victim to the police station and at about 12 noon she was taken to Biswanath Civil Hospital for medical examination. Thereafter again the victim was taken to JK CT Scan & X-ray and after about one week the statement of the victim was recorded u/s 164 Cr.P.C

11. PW 4, Monowara Khatoon, the neighbour of the informant, deposed that on the day of incident at 12 mid night finding the victim missing from home, when she along with PW 1, PW 2, and PW 3 searched the victim, they met one person namely Salimuddin who informed them that the accused taking the victim, entered into his (accused) house. At first two male persons entered into the house of the accused, but the father of the accused denied the existence of the victim in his house. Then she along with PW 3 entered into his house and found the accused in his room with the victim in naked condition. They found the "churni" and half pant of the victim in the room.

In cross, she stated that 15 years back she married with PW 2. When victim can walk and run and since then they are residing in the same campus with the informant. She stated that after recovery of the victim, she

did not tell that she was aware about their presence at the house of the accused and when the mother of the accused knocked the door of the room of the accused, the door opened automatically and they found the victim and the accused. She further stated that seeing them, victim put Paijama keeping the panty in the bed and accused also put on his clothes immediately. Then they proposed to marry the victim to the accused but the accused's family did not agree, hence, thereafter, FIR was lodged.

12. PW 5 is the victim herself. She deposed that on the night at around 10.30 p.m. accused making a call, asked her to come infront of her house for conversation but as she refused due to night, accused again called her from the front side of gate of her house. Then she opening the door had seen the accused but at that time the accused took her to his room forcefully and committed her rape. Though at first she resisted him but he committed her rape forcefully. On the very night she stayed in the room of the accused. After some time her mother came there and PW 4 brought out her from the room of the accused. Many persons gathered there before whom she narrated the incident. She stated that as they were poor whereas the accused was rich, hence, none said in favour of her family member. Lateron, her father filed the case. She proved her statement u/s 164 Cr.P.C. as Ext. 2.

During cross, she stated that she got admitted in a school at Dimapur at the age of 7 years. Thereafter they coming to Sootea got admitted at Sishu Bidyapith after one year. She admitted that since two years last she developed love with the accused and they also used to talk over telephone, even when she used to go for tuition, she met him. She stated that accused had taken her by holding her hands but her mouth was not gagged. She admitted that in statement u/s 164 Cr.P.C., she stated that out of love she went with the accused voluntarily and no force was used. She stated that when the accused had taken her, Salimuddin had seen them. She admitted that they silently entered into the room of the accused when the parents and elder brother of the accused were in other rooms of the house of the accused. At that time, there was disruption of electricity. She

stated that accused told her that as they are going to be married, hence he should be permitted to did misdeed. She denied the suggestion that in statement u/s 164 Cr.P.C., she stated that she allowed the accused to have sexual relation. She further stated that near the room of the accused, his elder brother and sister-in-law resided. She denied the suggestion that as the family members of the accused refused to marry her with the accused, hence, on the next day, her father filed the case. She also admitted that from the police station she was taken to hospital wherefrom she was taken to JK CT Scan. She also admitted that at the time of incident she loves the accused and prior to the incident the accused did no misdeed to her. She further stated that after about half hour, her mother and PW 4 came but she did not hear their sound.

- 13. PW 6, Smti J. Gogoi, the then learned Judicial Magistrate, 1st class, Tezpur, deposed that on 19-09-2017 she recorded the statement of the victim (Ext.2) in reference to Sootea PS Case No. 125/17 u/s 4 of POCSO Act in her court chamber and after read over the same, the victim put her signature on it. She proved her signature in the statement of the victim u/s 164 CR.P.C. as Ext. 2(4).
- **14.** PW 7 Dr. Jonali Gogoi, the Medical Officer deposed that on 11-09-2017 she examined the victim and on examination found hymen absent and as per X-ray report she is 17 years old but no any injury mark was found on her body or on private parts. There was no sign of recent sexual intercourse.

During cross, she stated that in case of a sexually assaulted girl, symptom is found when the girl is examined within 24 hours. She denied the suggestion that on the very day of report made by Radiologist, the victim was 18 years old and so far her knowledge as one report came wrongly in the name of Sachina Begum, hence she returned the said report and called for victim's report.

15. PW 8 Sri Madharam Gogoi, the Investigating Officer, deposed that on being entrusted to investigate the case, he visited the place of occurrence, prepared the sketch map of the place of occurrence, recorded the statement of witnesses including the victim and informant, sent the

victim to KCH for medical examination, got recorded her statement u/s 164 Cr.P.C. and on completion of investigation, submitted the chargesheet against the accused Inamul Mandal u/s 4 of POCSO Act vide Ext. 6.

During cross, he stated that on 10-09-2017, Imran Hussain, elder brother of the accused informed him over phone about the incident and on the next day morning he visited the place of occurrence and finding the victim out side the house of the accused brought her to the police station. He further stated that he did not seize the mobile bearing SIM No. 8486790116 mentioned in the FIR. He admitted that the girl with whom the victim slept on the night was not examined by him. He denied the suggestion that victim was again sent to JK CT Scan , X-ray and US Clinic, Biswanath Chariali on 23-09-2017 for redetermination of age. He further stated that though he asked the guardian of the victim to produce the school certificate or age certificate of the victim but they did not produce the same. He admitted that at the time of recovery, he found the victim normal.

16. Defence took the plea of total denial and examined two witnesses to establish the plea.

Nek Jamal Mandal, the father of the accused, examined as DW 1, deposed that on 10-09-2017 at around 10.30 p.m. when he along with his son Imran Hussain and Ikramul Hussain were watching TV, hearing dog's bark, he came out and seeing a girl standing infront of his house, advised the girl to go home. In the mean time, father, maternal uncle of the victim and some villagers reached there and told that his son loved the victim girl and so marriage between them should be performed but he refused as his son is a student. At that time they pushed the victim girl inside his house but he resisted. Regarding this, a village meeting was held wherein it was decided that in case of not marrying the victim, her father would lodge a case, and also threatened to kill the victim, if she return back home, which matter was informed to police by his son Imran Hussain. He further stated that the whole night, the victim girl, her family members and other villagers remained infront of their house and next day morning police took the victim girl to the police station.

During cross, he stated that victim's house is situated at a distance of about 200 meter away from his house. He further stated that he did not know about any relation between victim and his accused son. He also did not know whether the accused loves somebody and wants to marry her. He stated that in statement u/s 313 Cr.P.C. accused did not state that at the relevant time his son Imran and Ikramul were watching TV.

17. DW 2, Imran Hussain, the elder brother of the accused categorically deposed that on 10-09-2017 when he along with his father and Ikramul Hussain were watching TV, hearing dog's bark, he came out and seeing a girl standing infront of their house, asked the girl to go home. In the mean time, parents and maternal uncle, aunty of the victim gathered there and told that his brother Inamul loved the victim girl and so marriage between them should be performed and also threatened that they have to go to the police station if the accused did not marry the girl but they refused. They also threatened the victim girl to kill, if she came out. Then he informed the matter to the police station.

During cross, he stated that when they were watching TV, they supposed that the accused is at home. He did not know if accused had love affairs with the victim and proposed to marry her. He denied the suggestion that the accused taking the victim did have sexual intercourse with her but after arrival of the public including the quardian of the victim, he fled away.

18. In the case, regarding age, PW 1, the victim's father in examination-in-chief, stated that at the time of incident victim was 16 years old and attended upto class VII. Victim's mother, PW 3, also mentioned the victim's age as 16 years. The victim at the time of recording deposition mentioned her age as 16 years. On the other hand, PW 2 victim's uncle, deposed that so far his knowledge, at the time of incident victim was 17 years old but he did not know when and where the victim was born. The medical report, Ext. 4 also shows that the victim was 17 years old. Though the victim was reading in school and her birth certificate was obtained but the Investigating Officer did not seize any school certificate or birth certificate to ascertain the age of the victim, the best reason known to him.

- 19. Learned defence counsel producing a zerox copy of medical report vide SI. 5683 dated 11-09-2017 vehemently argued that at the time of furnishing the copy u/s 207 of Cr.P.C., two medical reports were furnished and as per one medical report vide SI. No. 5683 dated 11-09-2017, the victim was 18 years old and another medical report vide SI. No. 6042 dated 23-09-2017, the victim was 17 years old and as such, it creates a doubt regarding the age of the victim.
- 20. On careful perusal of the case diary though no note was found regarding the medical report as per which the victim was 18 years old furnished to the accused but the anticipatory bail order granted by the Hon'ble High Court also reflects about two medical reports, one is 17 years and another is 18 years. Moreover, as per evidence of PW 2, the uncle of the victim, she was sent for medical examination after about 10 days. Even if the medical report as per which the victim was 17 years, is accepted, but it is well settled that margin of error in age ascertained by Radiological in two years on either side (Jayamala Vs. Home Secretary reported in AIR 1982 SC 1297).
- 21. Further as per evidence of the parents of the victim, she was admitted in school at the age of 7 years. The victim's father, once stated that she was born in Dimapur but again stated that she was born in Sibsagar. On the other hand, victim's mother deposed that victim was born in Koroiani, Sootea, so regarding the place of birth of the victim they gave different version. Moreover, it is also admitted that the birth certificate of the victim was obtained from Dimapur mentioning her age as 5 years to get admission in school when she was actually 7 years old.
- 22. In view of the evidence of the parents and uncle of the victim coupled with medical evidence, I unhesitatingly hold that the prosecution failed to prove conclusively that the victim is under the age of 18 years.
- 23. Now, let us see other facts and circumstances of the case. The star witness i.e. the victim (PW 5) in her evidence stated that on the day, at around 10.30 p.m., the accused Inamul Mandal over phone called her to

come infront of her house for conversation but due to night when she expressed her inability to come out, accused Inamul again rang her from the front of gate of her house and then opening the door when she came out, accused had taken her forcefully to his room and raped her there. She further stated that at first though she resisted but the accused did not pay any heed and raped her forcefully. On the night she stayed in his room and after sometime her mother came there and Monowara Khatoon (PW 4) brought her out. Her father (PW 1) stated that on the night at around 11 p.m. when he got up, he noticed the door of the room open where his victim daughter was sleeping with his wife's niece. Seeing the open door, he entered into the room and in the light of torch, though he found his wife's niece but had not found his daughter upon the bed. Hence he called his wife's niece and asked where about his daughter to which she replied that she was in deep sleep, so she did not know. So, as per his evidence, seeing the opened door when he entered into the room of his daughter, then he came to know that his victim daughter was not upon the bed whereas in the FIR he stated that his niece over telephone informed him that the accused calling the victim took to his house. The material witness, the cousin sister of the victim who was sleeping on that night with the victim was not examined by prosecution. Moreover, the informant gave two different versions in the FIR and in deposition as discussed above. Further, as per evidence of the father of the victim, when his wife (PW3) and wife of PW 2 i.e. PW 4 went inside the house of the accused, found the victim in the room of the accused in a compromising position. PW 2 also categorically stated that PW 3 and PW 4 found both the accused and the victim in indecent condition in a room but PW 3, mother of the victim did not state that the victim was found with the accused in indecent or compromising position. She only stated that they found the victim in the room of the accused. PW 5, the victim herself stated that the accused on that night called her over phone for conversation and when she refused, then again he called her from the front of gate of her house. During cross, victim admitted her love affairs with the accused since last two years and that they used to talk over phone. She admitted that when she used to go for tuition, she met him. She also admitted that the

accused holding her hands had taken her but her mouth was not gagged. She also admitted in her statement u/s 164 Cr.P.C. that out of love she voluntarily went with the accused and no any force was used to her. The medical evidence also does not suggestive of any recent sexual intercourse or any injury on her body or private part though she was examined on very next day of the alleged incident. Absence of injuries on the person of the prosecutrix was a material fact not excluding the possibility of prosecutrix having been a consenting party. Though as per evidence of the parents, the victim and PW 4 one Salimuddin had seen them but said Salimuddin was also not examined by the prosecution side. Taking the evidence of the victim it is found that if the victim herself seen Salimuddin, she could easily raise alarm or resist the accused when he had taken her at night but she did not do so. Her evidence clearly shows that she voluntarily went with the accused. She also admitted during cross that she and the accused silently entered into the room of the accused when there was interruption of electricity. Her evidence also reveals that at that time, the parents and the accused's elder brother with wife were in the same house. Had the accused committed her rape forcefully, she could raise alarm and in that case the other occupants of the house would hear her sound but she did not raise any hulla. PW 4 deposed that when along with PW 1, PW 2 and PW 3 went to the house of the accused in search of the victim, they met Salimuddin who told them that accused taking the victim entered into his room and thereafter coming to the room of the accused, found the accused and the victim nude. During cross he stated that when the mother of the accused knocked the door of the room of the accused, the door opened automatically. So, the room was not bolted and she can easily came out. This witness also deposed that they did not found the accused and the victim in compromising position. Her evidence indicates that they only found the victim in the room of the accused, not in any compromising position. Moreover, PW 1 to PW 4, the parents, uncle and aunty of the victim in their statement u/s 161 Cr.P.C. only stated that the victim was found with the accused in one room. They before police did not stated that the victim was found in compromising or indecent position. The victim's mother also stated

that they reaching the house of the accused called the victim by name repeatedly but the victim remained silent in the house of the accused and did not come out.

- 24. On the other hand, the defence side by adducing evidence categorically deposed that on the day when the father of the accused and brother were watching TV, they seeing the victim infront of their house, asked her to return home but she did not go out and thereafter her family members came there and claimed that accused loved her, so marriage should be performed between them. Then DW 2 informed the matter to the police station which is supported by I.O. PW 8 saying that on 10-09-2017 at night DW 2 Imran Hussain informed over phone about the incident. Moreover, though the victim was found on the very night and FIR was lodged on the next day but statement of the victim was recorded u/s 164 Cr.P.C. after 9 days i.e. on 19th September, 2017, wherein she said that the accused wanted to have sexual intercourse with her and though at first she opposed saying that they should not get closed before marriage but he said that he will marry her and there is no harm in physical relation and then she allowed him to do sexual intercourse. Though she claimed that the accused inducing her to get marry did have sexual intercourse with her on that night but it was recorded after 9 days of the incident. So, there is every possibility of exaggerating the fact after the incident when the accused did not marry her. There is also no iota of evidence that the accused with promise to marry, did have sexual intercourse with the victim. The evidence of the victim and her close relative coupled with medical evidence clearly indicates that she entered into the room of the accused on her own accord and even if she was found having physical relation with the accused, it is a case of promiscuity.
- **25.** From all the attending facts and circumstances of the case discussed above, I held and decide that the prosecution failed to prove it's case beyond all reasonable doubt.

- **26.** Accordingly, accused Md. Inamul Hussain @ Inamul Mandal is acquitted from the charge u/s 4 of POCSO Act and set him at liberty forthwith. His bail bond shall remain in force till next six months.
- 27. Given under my Hand and Seal of this Court on this the 18th day of February, 2019.

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

Dictated and corrected by me.

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

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno.

APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 Father of the victim 2. Prosecution Witness No.2 Uncle of the victim 3. Prosecution Witness No.3 Mother of the victim 4. Prosecution Witness No.4 Manowara Khatoon 5. Prosecution Witness No.5 victim Smti J. Gogoi, JM,1st class, Prosecution Witness No.6 6.

7. Prosecution Witness No.7 :- Sri Madharam Gogoi, I.Q.

8. Defence Witness No.1 :- Father of the accused

9. Defence Witness No. 2 :- Elder brother of the accused.

EXHIBITS.

Exhibit 1 : FIR.

Exhibit 2 : 164 Cr.P.C. statement of the victim.

Exhibit 3 : order dated 19-06-2017.

Exhibit 4 : Medical report.

Exhibit 5 : sketch map

Exhibit 6 : Chargesheet.

(I.Barman)
SESSIONS JUDGE,
SONITPUR: TEZPUR