IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 73 of 2018
(Arising out of Barpeta P.S. Case No.1364/2017)
U/S 12 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on:- 28.03.2019

State of Assam

- Vs -

1. Salim Uddin Ahmed &

2. Sofikul Islam.....Accused persons.

Date of Recording Evidence on – 20.05.2019, 18.06.2019, 11.09.2019

Date of Hearing Argument on – 11.09.2019

Date of Delivering the Judgment on - 20.09.2019

Appearance:

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

Advocate for the Accused------Mr. Motiur Rahman, Ld Advocates.

JUDGMENT

FACTS OF THE CASE

- 1. The prosecution case, in brief, is that on 07.08.2017 one Jahidul Islam lodged an FIR in Barpeta police station alleging inter-alia that accused persons named in the FIR allegedly gave sexual comment and hurled abusive language towards the minor daughter of the informant aged about 11 years and this fact has been intimated to the guardian of the accused persons but no response has been forthcoming from their end.
- 2. It is alleged that, on 07.08.2017 while the daughter of informant was returning home from Jyogirpam Nabajyoti M.E. Madrassa school on her bicycle in front of the house of accused No.1, both accused No.1 and 2 restrained her on her way and accused No.1 touching her breast, pulled her down from her bicycle and trying to kidnap her. But when she made hue and cry accused persons threatened her to kill and in the milee accused persons caused injuries on the body of the girl by pulling her

down on the ground from her bicycle. In the mean time, one Kanchan Mala of the village came forward and having seen them both the accused persons fled away. But the modesty of the girl has been robed. Hence the case.

INVESTIGATION

- 3. Following the information as above, Barpeta police station registered a case being Barpeta PS case No.1364/17 u/s 366/511/34 IPC and Section 8/12 of Protection of Children from Sexual Offences Act, 2012 and took up investigation.
- 4. During the course of investigation, police visited the place of occurrence, recorded the statement of the witnesses including the victim u/s 161 Cr.P.C. drew sketch map, forwarded the victim girl to court for recording her statement u/s 164 Cr.P.C. and on completion of investigation finally laid the charge sheet against accused Salim Uddin Ahmed and Sofikul Islam u/s 366/511/34 IPC and Section 8/12 of POCSO Act, 2012 with a view to stand trial.

APPEARANCE

5. During the course of time, when accused entered their appearance in court, the then learned Special Judge, Barpeta vide order dated 14.09.2018 took cognizance of the offences u/s 366/511/34 IPC and Section 8/12 of POCSO Act and transferred the case record to this court for trial.

CHARGE

6. Having received the case record on transfer, all the particulars of the case have been furnished to accused as provided u/s 207 Cr.P.C. Thereafter, vide order dated 28.03.2019 charge u/s 12 of POCSO Act was framed on perusing the materials available on record. The particulars of the offence on being read over and explained accused persons pleaded not guilty and claimed trial.

EVIDENCE

7. During the course of trial, the prosecution, in order to substantiate its case examined as many as 5 witnesses including the informant as PW-1, the alleged victim girl as PW-2, Kanchan Mala as PW-3, Hakemuddin as PW-4 as well as the investigating officer as PW-5 and also exhibited the FIR as Ext.1, signature of informant as Ext.1(1) and 1(2), the statement of the victim girl u/s 164 Cr.P.C. as Ext.2 and signatures as Ext.2(1) and 2(2), the sketch map as Ext.3 and signature of I/O as Ext.3(1), charge sheet as Ext.4, signature of I/O as Ext.4(1) and birth certificate of the victim girl as Ext.A(1) compared with the original.

EXAMINATION OF ACCUSED U/S 313 Cr.P.C.

8. Concluding prosecution evidence, accused were examined u/s 313 Cr.P.C. but both the accused denied their involvement in the case.

DEFENCE PLEA

9. The defence plea is total denial of the prosecution case. As such, on being asked accused persons declined to adduce defence evidence.

10. Now point for determination ;-

1. Whether on 07.08.2017 at about 3 pm and prior thereto accused Salim Uddin Ahmed and Sofikul Islam repeatedly and constantly follows or watches or contacts the victim girl and also threatens her to fall on the ground from her bicycle by pulling her down while returning home from school as alleged?

11. Discussion, Decision and reasons for such decision:

I have heard the arduous contention of the learned lawyers appearing for both sides.

- 12. Now, let me first apprise the evidence of the prosecution witnesses. On perusal of the evidence of the victim girl (PW-2) it appears that on 07.08.2017 at about 2/3 pm while she have been returning home from school in her bicycle, in front of the house of Salim Uddin Ahmed all of a sudden she was stopped by Salim Uddin Ahmed by holding her bicycle. As a result, she fell on the ground and suffered injuries on her head and leg. While she got up, accused Salim Uddin Ahmed and Sofikul Islam told her that she should love Salim and then tried to forcefully took her and then touched her body and told that they will not leave her to go. Then she told that she is still minor and cannot love Salim and shouted out of fear, hearing her cry Kanchan Mala, her grand mother, came forward and having seen her, both the accused persons fled away. Then her grand mother took her to the house and she narrated the story to her father. Then her father filed the case regarding the incident. She was also examined by doctor and forwarded her to court for recording her statement. Ext.2 is her statement u/s 164 Cr.P.C. and Ext.2(1) and 2(2) are her signatures.
- 13. In her cross examination however, she stated that she used to go to school alone but police did not seize her bicycle. She also stated that she did not depose evidence in court as tutored by her father and did not state before police that accused touch her body and hold her bicycle behind her back.

- 14. On the other hand, PW-1 Jahidul Islam, who is the informant cum father of the victim girl deposed that the incident occurred on 07.08.2017 while she have been returning home from her school. According to him, accused Salimuddin and Sofikul frequently disturbed her by hurling sexually coloured abusive language towards her. He further deposed that in order to ascertain the fact one day he followed his daughter without her knowledge and noticed that both the accused Salimuddin and Sofikul Islam also forced her to do so. Having seen the incident from his own eyes he immediately informed the parents of the Salimuddin and asked him not to indulge such activities by his son in future. His wife also approached the wife of Safikul and told her that they are disturbing and causing harassment to her daughter and also asked her not to indulge such act in future. After about one month of the incident while his daughter had been returning home from school in her bicycle, in front of the house of Salimuddin she was stopped and touched her body by Salimuddin by force and out of fear when she made hue and cry her maternal grand mother came forward and having seen her accused rushed away. Regarding the incident he filed the FIR (Ext.1) and Ext.1(1) and 1(2) are his signatures. During investigation, police recorded his statement and produced his daughter in court before Magistrate for recording her statement. During investigation, police also collected her birth certificate and to-day he brought the original to the court. Ext.A is the original birth certificate and Ext.A(1) is the photocopy of the birth certificate compared with the original.
- 15. In his cross examination he stated that both the accused are co-villagers and he lodged the FIR after knowing everything about the incident from his daughter. He denied the defence suggestion that he did not state before police that accused persons coming behind his daughter pulled her bicycle. His daughter was also treated as FAAMCH, Barpeta. His daughter sustained injuries on her leg and head. He denied that he gave false statement in the FIR. He also denied the defence suggestion that he did not narrate in the FIR as well as before police that accused subjected torture on his daughter with sexual intent on her way back home from school and in order to ascertain this fact he followed his daughter one day and having found the fact true informed the father of accused Salimuddin not to indulge such activities by his son in future. He also denied the defence suggestion that during investigation police did not collect the photocopy of birth certificate of his daughter and he deposed totally false evidence.
- 16. PW-3 Kanchan Mala also deposed that the incident occurred about two years back around 2/3 pm while hearing the cry of victim girl nearby the house of Salimuddin she rushed to the spot and save her and having seen her, accused Salimuddin and Sofikul ran away. When asked her, she told her that accused persons pull and push her on her way back home from school. Then she took her to the house.

- 17. In her cross examination she stated that at the time of incident she was in her residence and hearing the shout of victim she rushed to the spot and stated that she do not know the reason of the accused persons doing so with the victim girl.
- 18. PW-4 Hakimuddin also deposed that incident occurred about 2 years back while his niece/victim girl have been returning from school accused persons restrained her in front of the house of accused and pull and push her.
- 19. In his cross examination he stated that he did not discuss the matter with the victim.
- 20. PW-5 Hrishikesh Thakuria, the I/O who deposed that on 07.08.2017 acting on the FIR lodged by one Jahidul Islam a case was registered being Barpeta P.S. case No.1364/17 u/s 366/511/34 IPC and Section 8/12 of POCSO Act and entrusted him to investigate the case. Accordingly, he visited the place of occurrence, drew sketch map, recorded the statement of the witnesses, sent the victim girl to court for recording her statement u/s 164 Cr.P.C. send the victim for medical examination and collected the medical examination report and finally having found a prima facie case charge sheet u/s 366/511/34 IPC and Section 8/12 of POCSO Act was laid.
- 21. In his cross examination he stated that the victim did not state before him that accused attempted to kidnap her and in her statement u/s 164 Cr.P.C. also she did not state that accused persons touched her body and sexually abused her. As per medical report there was no injury on the body of victim. He has collected the age certificate of victim during investigation. PW-1 Jahidul Islam did not state before him that accused persons subjected torture on his daughter with sexual intent and in order to ascertain this fact he followed his daughter one day and found the fact true and informed the father of accused Salimuddin not to indulge such activities in future and his wife also told the wife of Sofikul not to indulge such activities by her husband with his daughter. PW-2 the victim girl stated before him that accused hold her bicycle behind her back and PW-3 Kanchan Mala did not state before him that victim shouted "save me"," save me".
- 22. During the course of argument, the learned counsel for the state submitted that there is sufficient materials against the accused persons subjecting sexual torture on the victim girl on her way back home from school on number of occasion and this fact has been corroborated by the evidence of PW-1, PW-2 and PW-3 and even the evidence of I/O confirmed this fact. Therefore, the learned Addl. P.P. submitted that it is a fit case to record conviction u/s 12 of POCSO Act and punish the accused persons adequately.
- 23. On the other hand, the learned counsel appearing for the accused Motiur Rahman submitted that a false case has been lodged against the accused persons due to personal grudge by using the victim girl by her parents. In fact, no such incident ever took place. The fact that the informant and victim deposed false evidence has been confirmed by the

evidence of the I/O that during investigation he found no injury on the victim. Moreover, all the witnesses namely-PW-1, PW-2, PW-3 and PW-4 are family members and they naturally give evidence in unison to punish the accused. They took the shelter of falsehood only to bring out a case against the accused persons which is not worthy of credit in the absence of evidence of any independent witnesses. But in the present case, prosecution miserably failed to examine any of the independent witnesses. Therefore, the learned counsel vehemently contended that no reliance can be placed on the evidence of the prosecution witnesses. Therefore, he submitted that it is a fit case to record judgment of acquittal.

24. Before deliberating on the arguments of the learned lawyers appearing for both sides and evaluating the evidence on record it is apposite to refer Section 11 & 12 of POCSO Act.

<u>"Section 11 Sexual harassment.-</u> A person is said to commit sexual harassment upon a child when such person with sexual intent-

- (I) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child;
- (II) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (III) shows any object to a child in any form or media for pornographic purposes; or
- (IV) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (V) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (VI) entices a child for pornographic purposes or gives gratification thereof".

Explanation- Any question which involves "sexual intent" shall be a question of fact.

"Section 12 Punishment for sexual harassment.- Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine".

25. On perusal of the definition of offence of sexual harassment as define u/s 11 of POCSO Act it appears that utterance of any word or making a sound or any gesture or

exhibition of any object or part of body with the intention that such word or sound is heard, or such gesture or object or part of body shall be seen by the child; or repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or touches any part of the body of the child or the involvement of the child in sexual act etc constitute the offence of sexual harassment.

- 26. Now, having taken into consideration the arguments put forth by the learned counsels appearing for the state as well as for the defence and the evidence available on record, this court has found force in the contention of the learned counsel appearing for the state. On perusal of Ext.1 it is seen that accused persons harassed the victim girl aged about 11 years with sexual intent on her way to school on regular basis for which a complaint had already been lodged by the guardian of the accused persons. Subsequently, on 07.08.2017 while the victim girl had been returning home from school alone, in front of the house of accused No.1 Salimuddin she was stopped by accused Salimuddin and Sofikul Islam and accused Sofikul Islam touched her breast, pulled her down from the bicycle on the road and then tried to kidnap her. Then they tried to outrage her modesty but when she made hue and cry, hearing her cry Kanchan Mala came forward. Then accused persons fled away. The averments made in the FIR (Ext.1) has been fully corroborated by the victim girl in her statement before Magistrate u/s 164 Cr.P.C. (Ext.2) and also reiterated by her in her evidence in court on affidavit. In her evidence in court, victim girl in no uncertain terms reiterated almost the same facts narrated in the FIR. She also deposed that accused Salimuddin and Sofikul Islam forced her to love Salim. When she refused to oblige, both the accused persons touched her body and restrained her to proceed. Then she shouted and hearing her Kanchan Mala, her grand mother came forward and having seen Kanchan Mala both the accused fled away. Thereafter, she was brought to the house by Kanchan Mala and she then narrated her ordeal to her father. The act of the accused persons shows that they were creating obstruction and causing harassment which clearly constitute a case for sexual harassment as the act of the accused persons are predominantly pressure on a minor girl which cannot be thrown out in a pedantic manner.
- 27. Now, prosecution examined both the informant Jahidul Islam, father of victim girl and Kanchan Mala and they have corroborated the fact narrated by victim PW-2. Though the learned counsel appearing for the accused contended that there is no independent witnesses and the prosecution examined only the family members and their evidence are exaggerated, concocted and therefore cannot be relied on has no force because the case of this nature it is hard to find independent witnesses and no one is supposed to be waiting on the road to see the incident. The family members is the natural person who came to rescue the victim since the incident in question took place nearby the house of informant. So

coming forward by her grand mother hearing the cry of victim girl cannot be doubted in any manner. The only care the court of law need to taken is to ascertain the truthfulness of the witnesses.

- In the present case, the PW-1, PW-2, PW-3 and PW-4 are all family members. But 28. in the considered estimation of this court this will not any way discredit the otherwise trustworthy evidence of the prosecution witnesses merely because they are family members. After careful appraisal of the evidence of the victim girl supported by the evidence of PW-1 and PW-3 this court finds that the evidence of victim is very natural and trustworthy because harassing minor girl with sexual intent on the road or any other place by hooligan become common place incident. The victim girl in her evidence narrated the conduct of the accused in a lucid manner and she also narrated the same fact in her statement u/s 164 Cr.P.C. (Ext.2) baring few minor discrepancies which is bound to occur in any criminal case as no one can reproduce the facts after considerable gap in cinematographic manner because of human frailty. It is not expected that a minor girl can memorize everything and reproduce the same in court. The way in which the incident was narrated in the FIR (Ext.1) and the statement u/s 164 Cr.P.C (Ext.2) and her evidence in court, it lend credence in the mind of the court regarding its truthfulness. Therefore, this court believe the trustworthiness of the evidence of the victim corroborated by PW-1, PW-2 and PW-3 in material particulars.
- 29. As contended by the learned counsel there was no delay in lodging the FIR. The informant promptly lodged the FIR on the day of incident itself narrating the earlier incident also. Therefore, there is no reason to discredit the facts of the case on the ground of delay in lodging the FIR. The evidence of PW-1, PW-2, PW-3 and PW-4 are fully consistent, credible and trustworthy because as deposed by them accused persons stopped the minor girl on her way back home from school and hurled abusive and colored language against her and touched her body with sexual intent. In her deposition the victim girl clearly stated that accused spelt uot bad language and forced her to love Salimuddin and threatened her and restrained her from proceeding but she was rescued providentially by her grand mother Kanchan Mala from the spot.
- 30. The words uttered by the accused persons such as they will do "Baya kam" with her which in colloquial language means sexual act squrely attracts the ingredients of the offence defined in section 11(i) and (iv) of POCSO Act as they uttered this words or makes the gestures in such a manner that the victim girl heard it and they did the same thing on earlier occasion by harassing her repeatedly on her way to school and back home. The act/acts indulged by both the accused with the victim girl to restrain her from moving and holding back her bicycle on her way back home from school also involves physical contract

with sexual intent as per explanation of Section 11 of POCSO Act and the activities of accused described in Section 11 attracts punishment in Section 12 of POCSO Act. The minor contradiction here and there as pointed out by the defence counsel in the course of cross examination of the investigating officer do not any way weaken the prosecution case. Doctor having found no injury on the victim girl on the day of examination also do not negate the prosecution case as the victim has not stated in her evidence that she suffered major injury. Therefore, having not seen any injury mark on the body of victim do not suggest that the evidence of the victim girl is false and unworthy of credit.

- 31. As per explanation to section 11 of POCSO Act any question involves "sexual intent" shall be a question of fact.
- 32. In the present case, the words uttered by accused and gesture exhibited by them clearly shows that accused have culpable mental state at the relevant time otherwise they would not have caused disturbance or harassment to a minor girl returning home from school alone in her bicycle.
- 33. On perusal of the evidence of victim and her cross examination it is seen that defence has not put any question to her that accused did not harass her with sexual intent or did not utter any sexually colourds words against her with criminal intent. Rather, the victim girl in her cross examination stated that her father did not taught her to depose anything in court. Therefore, in the considered estimation, this court can very well presume as per section 29 of POCSO Act that accused persons committed the offence of sexual harassment on the victim girl punishable u/s 12 of POCSO Act.
- 34. If the act/acts of the accused as outline above do not fall within the parameters of section 11(i)(iv) and the explanation of section 11 then what constitute the offence u/s 11 of POCSO Act punishable u/s 12 of POCSO Act.
- 35. It is to be noted that the special legislation of POCSO Act has been brought to contain ever increasing sexual offences against woman irrespective of age when it is felt that existing penal laws appears inadequate to deal with the increasing offences against woman. Recently the Parliament also brought amendment to the POCSO Act with a view to adequately punish the criminals who have been committing the most heinous crime of sexual offences against the minors. Therefore, every legislation has its specific objective to deal with the situation prevalent in the country and in the present case, the act of the accused if ignored merely on some minor technicalities or inconsistencies here and there which is bound to occur in every criminal trial, the very objective of legislation would be frustrated. Even otherwise, as discussed above, in the considered estimation of this court the prosecution has been successful in proving the case against the accused persons of harassing a tender aged girl while going to school and returning home with filthy and sexual

language which has a deep impact on the virgin mind of tender aged girl unless and until such criminals are dealt with adequately criminal will continue to commit such offences making life of minor girls unsafe, insecure and put in perpetual catastrophe. Therefore, this court comes to definite findings that the act of the accused persons certainly fall within the parameters of section 11 of POCSO Act punishable u/s 12 of the said Act. So, both the accused are found guilty u/s 12 of POCSO Act. Accordingly, they are convicted.

36. I have considered the provision of section 360 Cr.P.C. but after due consideration of the attending facts and circumstances of the case and the age of the accused persons namely accused Sofikul Islam 33 years and accused Slim Uddin 25 years of age and the nature of the offence committed by them to a tender age girl, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of accused persons.

SENTENCE HEARING

- 37. I have heard the accused persons on the point of sentence as provided u/s 235(2) Cr.P.C. It is submitted that accused Sofikul Islam is a married person having his wife and children and accused Salim Uddin being a young unmarried person if they are sent to jail their innocent family members will suffer for no fault of them. Hence they pleaded to take a lenient view while awarding sentence.
- 38. Heaving considered all the attending facts and circumstances of the case, particularly the extenuating and mitigating circumstances of the case and the punishment prescribed in section 12 of POCSO Act, 2012 both the accused are convicted and sentenced to undergo rigorous imprisonment for a term of 2 (two) years and fine of Rs.2000/- (two thousand) i/d S/I for another 3 (three) months each. The fine amount if deposited be paid to the victim girl as compensation as provided in section 357 (3) Cr.P.C.
- 39. The period of detention, if any, undergone by accused persons during the course of investigation, enquiry or trial shall be set off against the term of imprisonment as provided u/s 428 Cr.P.C.
- 40. Let a copy of the judgment be furnished to accused persons free of cost as provided in section 363 Cr.P.C.
- 41. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.

- 42. Let the case record be consigned to record room after completing the formalities.
- 43. Given under my hand and seal of this Court on this 20th day of September, 2019 at Barpeta.

Dictated & Corrected my me

Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta

APPENDIX

1. The prosecution has examined the following 5 nos. of witnesses:-

PW-1 = Jahidul Islam, the informant.

PW-2 = Victim girl (X).

PW-3 = Kanchan Mala.

PW-4 = Hakimuddin.

PW-5 = Hrishikesh Takhuria.

2. The prosecution has exhibited following document:

Ext. 1 = is FIR.

Ext.= 1(1) & 1(2) = are the signatures of informant Jahidul Islam.

Ext.2 = is the statement of victim u/s 164 Cr.P.C.

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

Ext.3-= is the sketch map.

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

Ext.4 = is the charge sheet.

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

Ext.A(1)= is the birth certificate of victim girl.

Sd/-

(Sri C. B. Gogoi) Special Judge, Barpeta.