IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 07/2019 U/S 120(B) IPC and section 4 of POCSO Act

PRESENT: Sri Chatra Bhukhan Gogoi, AJS,

Special Judge, Barpeta.

Charge framed on:-08.03.2019

State of Assam

- Vs -

Abdul Badsha @ Abul Badsha Rehena Begum

..... Accused

Date of Recording Evidence on – 07.05.2019, 06.08.2019, 02.09.2019

& 21.09.2019

Date of Hearing Argument on – 21.09.2019

Date of Delivering the Judgment on – 03.10.2019.

Appearance:

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

JUDGMENT

- 1. The brief fact, of the prosecution case, is that on 14.04.2018 the victim (X real name with held) lodged an FIR in Tarabari P.S. stating inter alia that on 12.04.2018 while her parents were away from residence in connection with NRC hearing accused No 2 named in the FIR invited her to her residence and at about 9 pm she was allowed to sleep in the bed room. Thereafter, at about 12 at night accused No 2 wrapped her mouth with a cloth and allowed accused No 1 to commit rape on her for about 30 minutes and threatened her not to disclose to any one, else to end her life and then she was thrown out from their house. Hence the case.
- 2. Following the information a case being Tarabari P.S. case No 94/18 u/s 120(B) IPC and section 4 of POCSO Act was registered and investigated the case. During the course of investigation police recorded the statement of the

witnesses u/s 161 Cr.P.C., drew sketch map, sent the victim for medical examination, also forwarded the victim to court for recording her statement before Magistrate u/s 164 Cr.P.C. and on completion of investigation police laid the charge sheet against accused u/s 120(B) IPC and section 4 of POCSO Act.

- 3. During the course of time, when accused persons entered their appearance in court after due compliance of section 207 Cr.P.C. and on perusal of the materials on record and hearing the parties having found a prima facie case formal charges u/s 120(B) IPC and section 4 of POCSO Act were framed. The particulars of the offences on being read over and explained, accused pleaded not guilty and claimed trial.
- 4. During the course of trial, the prosecution examined only 5 witnesses namely-Fajar Ali as PW-1, Haidar Ali as PW-2, the alleged victim as PW-3, Dr. Anima Boro as PW-4 and the I.O. Hussain Ali Ahmed as PW-5. After exhausting the evidence of all the prosecution witnesses giving an opportunity of hearing to learned Addl. P.P. further prosecution evidence stands closed.
- 5. Concluding prosecution evidence accused are examined u/s 313 Cr.P.C. but they denied the prosecution evidence as false and concocted. On being asked, they however, declined to adduce defence evidence. Their plea is total denial of the prosecution case.

6. Now point for determination ;-

- 1. Whether on 12.04.2018 at about 12 at night accused with their common intention agreed between them to do an illegal act of rape)penetrating sexual assault) on the victim girl age 12 years and in pursuance of the said conspiracy and common intention committed rape on the victim by the accused Abdul Badsha and thereby committed offence punishable u/s 120(B) IPC as alleged?
- 2. Whether on the same day and time accused Abdu Badsha committed penetrating sexual assault on the victim girl as alleged?

7. <u>Discussion, Decision and reasons for such decision</u> :-

I have heard the learned lawyers appearing for both sides and also carefully scanned the entire prosecution evidence on record.

8. Before going to evaluate the evidence on record, it would be in the

fitness of things to refer first the panel provisions of section 120-B IPC and section 3 and 4 of POCSO Act.

"Section 120-B IPC: Punishment of criminal conspiracy:-

- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, (imprisonment for life) or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
- (2) Whoever is a party to criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punishable with imprisonment of either description for a term not exceeding six months, or with fine or with both."
- <u>"3. Penetrative sexual assault</u>. A person is said to commit "penetrative sexual assault" if -
- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- "4. **Punishment for penetrative sexual assault**. Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less then 7 years but which may extend to imprisonment for life, and shall also be liable to fine."
- 9. Now, let me examined the evidence available on record. On perusal of the evidence of the PW-1 Fajar Ali, PW-2 Haidar Ali @ Haidar Bhuyan it appears that their evidence bears no significants as they heard about the incident of alleged rape from the police personal of Tarabari P.S. only. They do not have any personal knowledge about the offence. So, there remains only three witnesses namely the victim, the medical officer and the investigating officer. It is seen

that during investigation police did not record the statement of the parents of the alleged victim girl and they were also not examined by prosecution as witnesses in court.

- 10. In her evidence the alleged victim PW-3 deposed that about 8/9 months back from the date of her deposition she was alone in the house accused Rehena Begum came to her house and took her to their house. As on that day her parents had gone to Dhuburi in connection with NRC hearing. It is further deposed that she was allowed to sleep on the ground, but at night accused Rehena Begum shut her mouth closed with cloth allowed her husband Abul Badsha to commit rape on her and thereafter she was thrown out from their house by both of them. Then she cried and hearing her, her aunt came and took her. The mater was also informed to her father over phone and on his return case was filed in the Tarabari P.S. Exhibit 1 is the FIR but she put thumb impression there. She also stated that police got her statement recorded before Magistrate u/s 164 Cr.P.C. and sent her for medical examination. In her cross examination she however, denied the defence suggestion that she was 17 years old and also denied that she had illicit relation with many other persons and she also denied that on that day she spent the night in the house of accused but before they got up from sleep, she left their house by committing theft of six pieces of egg and a pair of chappal and a mobile phone and on being charged she filed this false case.
- 11. PW-4 Dr. Anima Boro deposed that on 17.04.2018 she examined the victim (X real name with held) in connection with Tarabari P.S. case No 94/18 u/s 120(B) IPC and section 4 of POCSO Act and found the hymen of the girl torn, but no recent sign of sexual intercourse. But she is found accustom to sexual intercourse. As per radiological examination report her age is above 12 and below 14 years. Exhibit 3 is the medical report and Exhibit 3(1) is the signature of doctor.
- 12. PW-5 Hussain Ali Ahmed deposed that on being entrusted, he visited the place of occurrence drew sketch map, recorded the statement of the witnesses u/s 161 Cr.P.C. sent the victim for medical examination, forwarded her to court for recording her statement u/s 164 Cr.P.C. and finally having found a prima facie case submitted charge sheet u/s 120(B) IPC and section 4 of POCSO Act. In his cross examination the I.O. stated that there was delay of 2 days in lodging the FIR, but the delay was not explained. He did not record the statement of the

father of the victim and her aunt u/s 161 Cr.P.C. and neighboring witnesses. He did not seize any wearing clothes of the victim girl and did not specify in the sketch map where the accused exactly committed the penetrating sexual assault on the victim. But he stated that he sent the victim for medical examination and doctor also did radiological test to determine her age.

- 13. Based on the evidence on record learned additional PP submitted that it is a fit case to convict the accused persons u/s 120(B) IPC and section 4 of POCSO Act as both the husband and wife committed the crime against a minor girl in a cool and pre-planned conspiracy.
- 14. On the other hand, learned counsel appearing for the accused submitted that there is absolutely no evidence from prosecution side to support the version of the alleged victim which was also afflicted with falsehood. Out of five witnesses, evidence of two are totally unsupportive in nature. The sole evidence of the victim cannot be relied on in the absence of any corroboration from other prosecution witnesses. It is hard to believe that wife hold the victim by allowing her husband to commit rape on a girl right in front of her. It is unbelievable. The medical evidence also cannot be said to be corroborative of the evidence of victim merely because doctor opined that the victim was exposed to sexual intercourse. Since the parents of the victim has not been examined the evidence of alleged victim remained under the cloud of doubt. The evidence of I.O. also formal in nature. Therefore, the learned counsel contended that it is fit case to record judgment of acquittal.
- 15. Having heard the contention of the learned lawyers appearing for both sides and on dispassionate examination of the evidence on record, this court found force in the contention of the learned counsel appearing for the accused persons.
- 16. On perusal of the evidence of the victim girl, it appears that, the accused Rehena Begum called her to her house at night while her parents went to Dhuburi in connection with NRC and allowed her to stay in their house. But at night she hold her mouth shut and allowed her husband Abdul Badsha to commit rape on her and after the offence she was thrown out. She then cried out of pain and hearing her cry, her aunt Monowara came to whom she told about the incident. When her father came home on the next day, she narrated him to the story. However, surprisingly the prosecution neither examine her father as witness nor her aunt Monowara to substantiate the version of the

victim girl. It is to be noted that except the evidence of the victim girl there is no other evidence which corroborated her version.

- 17. True it is that now it is almost settled position of law that conviction can be sustained based on sole testimony of the prosecutrix provided the evidence of the prosecutrix must be credible and trustworthy. But in the present case, the evidence of the prosecutrix raises suspicion about the authenticity of the incident as prosecution did not examine her father and her aunt Monowara to whom she immediately disclosed about the incident. The most pertinent fact is that the incident occurred in the house of accused at night and accused Rehena helped her husband committing rape on her which appears to be something suspicious as normally no wife can allow her husband to commit rape on a girl right in front of her eyes that too; with her active assistance. The FIR reveals that the incident occurred on 12.04.2018 and victim was allegedly examined only on 17.04.2018 even though the victim girl deposed her evidence in court that immediately on the next day she was taken to hospital for medical examination. The other pertinent fact is that doctor found no recent sign of sexual intercourse or violence mark on her private part but the doctor who attended her opined that the victim was accustom to sexual intercourse. Therefore, this shows that the victim was in the habit of sexual intercourse not in one occasion but in number of occasions but she singled out only one incident that too allegedly committed by accused with the help of his wife. Since the incident alleged to have been took place at night there is no witness to the incident except the version of the victim girl. Therefore, to believe her version the circumstances narrated by her must be found to be trustworthy and credible. But non examination of her father also raises serious suspicion about the authenticity of the incident. As it appears the victim might have been exposed to sexual intercourse with some other reason but implicated accused for some other reason. She in her statement before Magistrate u/s 164 Cr.P.C. (Ext.2) also stated that after the incident in the next day morning she narrated the story to other persons but who were the other persons she did not spelt out. Therefore, the credibility of the victim girl is also highly suspicious. Since the evidence of other witnesses are not supporting the version of the victim girl this court find it very difficult to place reliance on her evidence in the absence of any corroboration in material particular.
- 18. It is true that suspicion however strong cannot take the place of evidence. In the present case, except the evidence of the alleged victim girl

there is no other corroborative evidence. Therefore, it is totally unsafe to rely on her evidence for sustaining conviction.

- 19. In view of the foregoing discussion and reasons, this court has no option but to acquit accused Abdul Badsha @ Abul Badsha and Rehena Begum from the offence u/s 120(B) IPC and section 4 of POCSO Act on the ground of insufficient evidence and set them at liberty forthwith.
- 20. The terms of bail bond of accused persons are however extended for a period of 6 (six) months from to-day as provided u/s 437(A) Cr.P.C.
- 21. Let a copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.
- 22. Let the case record be consigned to record room after completing the formalities.
- 23. Given under my hand and seal of this Court on this 3^{rd} day of October, 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 = Fajar Ali.

PW-2 = Haidar Ali @ Haidar Bhuyan.

PW-3 = Manowara Begum, the victim girl.

PW-4 = Dr. Anima Boro, the Medical officer.

PW-5 = Hussain Ali Ahmed, the I.O.

2. The prosecution has exhibited the following documents:

Ext. 1 =the FIR.

Ext. 2 = the statement recorded by Magistrate, u/s 164 Cr.P.C.

Ext.3 = the medical report

Ext.3(1) = the signature of the medical officer.

Ext.4 = the sketch map.

Ext.4(1) = the signature of the I.O.

Ext.5 = the charge sheet.

Ext.5(1) = the signature of Haridas Kalita.

Sd/-

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