IN THE COURT OF SPECIAL JUDGE ::::::: BILASIPARA

Present:- Shri J. Borah, AJS

Special Judge, Bilasipara

Special (POCSO) Case No- 16 of 2017

u/s 447/506 Indian Penal Code & u/s 4 of Protection of Children from Sexual Offences Act

State of Assam

-Vs-

Ashok Bhaduri Ashramik

..... accused person

Date of framing charge :- 10-04-2018

Date of recording evidence :- 25-07-2018

28-08-2018

30-01-2019

02-03-2019

05-03-2019

11-06-2019

Date of Argument :- 01-08-2019

Date of Judgment :- 14-08-2019

21-08-2019

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam

For the defence :- Mr. A.M. Sarkar,

Ld. Advocate for the accused.

JUDGMENT

- 1. This case is under section 447/506 Indian Penal Code, I.P.C in short and u/s 4 of Protection of Children from Sexual Offences Act, in short POCSO Act. So, the name of the victim is not mentioned here and she is referred to, hereinafter, as 'x'.
- 2. The prosecution case, in brief, is that Smti Felani Das, the informant lodged an ejahar with the Bilasipara police station on 05-06-2017 informing that 'x' is the daughter of the informant. 'x' was 14 years old. On 27-05-2017 the informant and her husband Phani Das went for work leaving her daughter 'x' at their house alone. The accused Ashok Bhaduri Ashramik entered into her house hold compound at about 11.00 A.M. At that moment 'x' was washing utensil nearby the tube well of their house. The accused Ashok Bhaduri Ashramik embraced 'x' from her behind, gagged her mouth and took her to deserted place and committed rape on her. The accused, after committing rape on 'x', threatened 'x' not to divulge the occurrence to others. When 'x' informed the occurrence to her parents, the father of 'x' had consumed poison in order to kill himself. He was hospitalized at Dhubri Civil Hospital. So, it took time to lodge the ejahar against the accused.

So, the informant prayed for taking necessary action against the accused.

- 3. The Bilasipara police station received the ejahar and registered as Bilasipara police station case no. 534/17 u/s 447/506 I.P.C r/w section 4 of POCSO Act. The case was investigated and having found prima facie u/s 4 of POCSO Act against the accused Ashok Bhaduri Ashramik, prepared the chargesheet and laid the same before the court for trial.
- 4. The accused Ashok Bhaduri Ashramik, hereinafter called the accused, appeared in this case and he was furnished copy. Charge was framed u/s 447/506 I.P.C and section 4 of POCSO Act against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 9 (nine) witnesses, namely-

1. 'x'/ the victim PW-1

2. Felani Das PW-2

3	3. Lalita Das	PW-3
4	1. Golok Das	PW-4
5	5. Hari Das	P.W-5
6	5. Dr. Rinku Ahmed	P.W-6
7	7. Anil Kumar Singha	P.W-7
8	3. Kushi Ch. Biswas	P.W-8
g	9. S.I Muktajur Rahman	P.W-9

- 6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence adduced by the prosecution witnesses and also claimed to adduce evidence in defence.
- 7. The defence examined two witnesses in support of it's case, namely-

1. Debeswar Barman

D.W-1

2. Partha Pratim Chakrabarty

D.W-2

8. Heard argument for both sides. Learned defence advocate has submitted written argument.

9. **POINTS FOR DETERMINATION**

- i. Whether accused on 27-05-2017 at about 11.00 A.M at village Bamunigaon Pt. II under Bilasipara police station, committed criminal trespass by entering into the house of informant with intent to commit sexual assault on 'x'?
- ii. Whether accused on 27-05-2017 at about 11.00 A.M at village Bamunigaon Pt. II under Bilasipara police station, committed criminal intimidation by threatening 'x' to finish her life if she disclosed the incident to anyone?
- iii. Whether accused on 27-05-2017 at about 11.00 A.M at village Bamunigaon Pt. II under Bilasipara police station, committed penetrative sexual assault on 'x', a minor girl aged about 14 years old?

DECISION AND REASONS THERE OF

10. In this prosecution case P.W-1 'x' is the victim, P.W-2 Smti Felani Das is the informant. P.W-3 Smti Lalita Das, P.W-4 Golok Das, P.W-5 Hari Das, P.W-7 Anil Kumar Singha and P.W-8 Kushi Ch. Biswas are independent

witnesses. P.W-7 Dr. Rinku Ahmed is the Medical & Health Officer and P.W-9 Muktajur Rahman is the investigating officer.

- 11. Since P.W-1 'x' is the alleged victim and P.W-2 Felani Das is the informant, so both witnesses are prime witnesses in this prosecution case. Let's see the evidence of this witnesses at first.
- 12. P.W-2 Felani Das has stated in her evidence that she is the informant in this case. 'x' is her daughter. The accused is her neighbour. The occurrence took place one year ago (from the date of adducing her evidence on 25-07-18). It was Saturday at about 11.00 A.M. On the day of occurrence she went for her daily wage work. Her husband went to the market to sell fish and his son went to school. 'x' was alone at their house. In the evening, when she returned to their house, she found her daughter 'x' crying. On being asked, 'x' told her that the accused went to their house, he gaged her mouth, took her to nearby garden and had sexual intercourse with her. The accused also threatened 'x' not to divulge the matter. The neighbours such as Hari Das, Lalita, and Golok went to their house. She told them about the occurrence. She called upon a village meeting but the accused did not attend the meeting. Accordingly, she lodged the ejahar.

In her cross P.W-2 has stated that the accused is her neighbour. The accused performs puja. She lodged the ejahar after 3/4 days from the day of occurrence. P.W-2 has denied that she demanded Rs. 20,000/- from the accused. P.W-2 has also denied that she lodged a false case. P.W-2 has denied to depose false evidence.

13. P.W-1 'x' has stated in her evidence that the informant is her mother. The occurrence took place one year ago (from the day of adducing her evidence on 25-07-2018). On the day of occurrence her mother went to wage labour, her father went to Paglahat market and her brother went to school. She was alone at their house. After having meal, she was washing utensils. The accused went their house and asked about whereabout of parents. The accused then gagged her mouth, caught hold of her tightly and took her to nearby garden and had sexual intercourse with her. In the evening when her mother returned to their house, she told the occurrence to her mother. Her mother lodged the ejahar against the accused. Her statement was recorded by the magistrate. Ext-1 is her statement, Ext-1(1)(2) are her signatures.

In her cross P.W-1 has stated that on the day of occurrence she did not go to school. She denied that on the day of occurrence she was at school. The accused is their neighbour. She did not tell the occurrence to her 'jethu' Sachin. At the time of occurrence she was wearing skirt, top and panty. The accused removed her panty and committed sexual intercourse on her. The accused gagged her mouth with one hand and removed the cloth with other hand. The police did not seize her panty. She denied that there was family dispute with the accused. She also denied that she did not state before the Magistrate that accused committed rape on her. She also denied that she has adduced false evidence.

14. Thus, meticulous scrutiny of evidence of P.W-1 and P.W-2, it appears that P.W-2 Felani Das is the informant and P.W-1 'x' is the victim. According to P.W-2, on the day of occurrence she went to her wage labour and her husband went to the market and her only son went to school. Her daughter was alone at their house. In the evening when she returned to her house, she got to know from her daughter 'x' that the accused went to their house, gagged her mouth, took her to nearby garden where she was committed sexual intercourse by the accused. This evidence is fully corroborated by P.W-1 'x'. There found no gulf between the evidence of P.W-1 and P.W-2. P.W-1 has evinced that on the day of occurrence she was alone at her house. Her mother went to her wage labour, her father went to the market and her brother went to school. She was alone at house. Thus, there found no gulf between the evidence of P.W-1 and P.W-2 that 'x' was alone at house.

The evidence that the accused committed sexual intercourse on 'x' is also corroborated to each other. According to P.W-1, she was washing utensils and at that moment the accused went their (x's) house and gagged her mouth, caught hold of her tightly, took her to nearby garden and committed sexual intercourse with her. P.W-2 has also adduced in the same tune with P.W-1. P.W-2 has stated that she got to know from P.W-1 that the accused gagged her mouth, took her to garden where she was committed rape by the accused. So, there found no gap between the evidence of P.W-1 and P.W-2.

Moreover, P.W-1 evinced clearly that the accused removed her panty

with one hand and gagged her mouth with other hand and thereby committed sexual intercourse with her. The evidence of P.W-1 is spontaneous. There found no embellishment in her evidence to disbelieve her evidence.

The defence has failed to detract the evidence of P.W-1 and P.W-2 except some suggestions but the said suggestions were sternly denied by P.W-1 and P.W-2.

15. The defence has taken a plea that there are some vital contradictions in the evidence of prosecution particularly in the evidence of P.W-1.

The defence has suggested to P.W-1 that she did not state before the Magistrate that the accused committed rape on her.

The perusal of the statement made by x' u/s 164 Cr.P.C shows that x' stated clearly that the accused committed sexual intercourse on her in the jungle.

So, there found no contradictions between the evidence of P.W-1 and her previous statement made before the Magistrate.

In other aspects also, there found no contradictions between the evidence of P.W-1 and her previous statement given before the Magistrate.

Same in the case with P.W-2 Felani Das. The defence has failed to point out outstanding contradictions in the evidence of P.W-2. There found some minor discrepancies in the evidence of P.W-2 such as P.W-2 did not state before the police that 'x' cried and hearing her cry the villagers such as Hari Das, Lalita and Golok came. These are minor discrepancies. Such minor discrepancies cannot affect the prosecution case. The vital thing is that the accused committed rape on 'x'. This is spontaneous evidence adduced by the P.W-1 'x'. There is no help but to accept this evidence.

Accordingly, the plea of the defence, with honour, is not accepted.

16. Now, let us see the evidence of other witnesses.

P.W-3 Lalita Das has stated in her evidence that she knows nothing about the occurrence.

- 17. P.W-4 Golok Das has stated in his evidence that he knows nothing about the occurrence.
- 18. P.W-5 Hari Das stated in his evidence that he knows nothing about the occurrence. There was village meeting, but he did not know the subject matter.

19. P.W-7 Anil Kr. Singha has stated in his evidence that the informant went to his house and told about the occurrence. He suggested the informant to lodge ejahar immediately. He asked the victim girl about the incident and victim girl told him that accused had committed rape on her.

In his cross P.W-7 has stated that the informant, after discussion with him, lodged the ejahar. P.W-7 denied that the victim did not tell him about the occurrence.

- 20. P.W-8 Kushi Ch. Biswas has stated in his evidence that he did not know about the occurrence.
- 21. Thus, the evidence of P.W-3, P.W-4, P.W-5 and P.W-8 shows that they knew nothing about the occurrence. The witnesses namely P.W-3, P.W-4, P.W-5 and P.W-8 were declared hostile by the prosecution.

At the same P.W-5 Hari Das admitted that there was a village meeting in the village. P.W-7 heard about the occurrence from the victim 'x'. So, the evidence of P.W-7 has weigh and same cannot be discarded.

- 22. The offence as alleged against the accused is rape. In such offence there cannot be expected eye witness. P.W-3, P.W-4, P.W-5 and P.W-8 are villagers. They denied to know about the occurrence. Only P.W-5 admitted that there was village meeting. So, ignorance of P.W-3, P.W-4, P.W-5 and P.W-8 cannot affect the prosecution case.
- 23. Now, let us see the evidence of P.W-6 Dr. Rinku Ahmed, the Medical & Health Officer.

According to P.W-6, on 06-06-2017 she medically examined 'x' and found as follows-

General physical examination- normal; examination of injuries- no injury; external genitalia- normal; hymen- not mentioned; vagina & cervix-normal; vaginal swab sent for clinical examination. No spermatozoa was seen. Patient was not consistent with recent sexual intercourse. Ext-3 is medical report. Ext-3(1) is his signature.

The evidence of P.W-6 shows that she found the victim was not consistent with recent sexual intercourse.

The occurrence took place on 27-05-2017. P.W-6 examined 'x' on 06-06-2017. So, it is a huge gap between the date of occurrence and date of medical examination on 'x'. So, P.W-6 might not find sign of rape on 'x'.

The Hon'ble Apex court in Ram Swaroop -vs- State of Rajasthan observed in *para no. 8 and 9* as follows:

"8. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference."

"9. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eyewitnesss version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."

In this case instant, the evidence of P.W-1 'x' is spontaneous, free from all encumbrances. So, her evidence that the accused committed rape on her cannot be rejected.

Moreover, the medical report is mere an opinion. While P.W-1 categorically stated that she was raped, the medical opinion cannot discard such evidence.

24. Learned advocate has taken another plea that there was huge delay to file the ejahar. The delay is not properly explained. Such delay may create doubt in the prosecution case.

The ejahar shows that the occurrence took place on 27-05-2017 and ejahar was filed on 05-06-2017. There is an explanation in the ejahar that the father of the victim attempted to commit suicide when he heard the occurrence. He was hospitalized at Dhubri. So it took time.

In evidence P.W-2 has stated that there was village meeting. The evidence of P.W-2 is supported by P.W-5.

The place of occurrence is country side. The village people are not aware that ejahar is to be filed promptly.

The Hon'ble Supreme Court in Sone Lal and others -vs- State of U.P, AIR 1978 SC 1142 observed as follows:

"It depends upon various factors which may vary from case to case and even long delay can be condoned. If it found that the informant has no motive to falsely implicate the accused person."

Apex court has also observed that "even prompt filing of FIR is not a guarantee of truthfulness of the prosecution version."

In this prosecution case, there is no doubt that there was delay to lodge the ejahar. The explanation shows by P.W-2 is reasonable. So, such delay cannot affect the prosecution case.

25. Regarding the age of the victim, P.W-2 has stated in the ejahar that 'x' was 14 years old at the time of occurrence. In her evidence P.W-1 'x' has stated that she was 15 years on the date of adducing her evidence. P.W-9 the investigating officer has stated that he collected school certificate of the victim. This school certificate shows that the date of birth of 'x' is 31-02-2002.

All this shows that the age of the victim, at the time of occurrence was below 16 years. The defence has not disputed this age of the victim 'x'.

Accordingly, it is accepted.

26. P.W-9 S.I Muktajur Rahman is the investigating officer. He investigated the case. He drew a sketch map, Ext-5, recorded the statement of the witnesses and prepared the charge sheet. Ext-4 is the chargesheet, Ext-4(1) is his signature.

The defence has failed to detract the evidence of P.W-9.

27. D.W-1 Debeswar Barman has stated in his evidence that on the day of occurrence he along with the accused went to the house of Partha Pratim Chakrabarty to perform puja.

In his cross D.W-1 has denied that the accused was at his house on the date of occurrence and he committed rape on 'x'.

28. D.W-2 Partha Pratim Chakrabarty has stated in his evidence that on the day of occurrence the accused came to his house to perform puja.

In his cross D.W-2 has stated that he got married the sister of the accused. He failed to recollect the date of performing puja at his house.

- 29. The evidence of D.W-1 and D.W-2 shows that DW-1 is the assistant of the accused while performing puja. He is not a Brahmin. D.W-2 is the relative of the accused. So, their evidence is not free and fair. So, there evidence cannot be accepted.
- 30. Now, let us see the section 3 & 4 of the POCSO Act. Section 3 read as follows:

"3. Penetrative sexual assault.-

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.

Section 4 read as follows:

"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 than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

Section 2(d) is read as follows:

- "(d) 'child' means any person below the age of eighteen years"
- 31. Considering above all aspects, it leads to conclusion that the prosecution evidence is sufficient that 'x' was below 18 years at the time of

occurrence. The accused had committed penetrative sexual assault on 'x'. The ingredients as required u/s 4 POCSO Act are found in this prosecution case. The prosecution proved the offence u/s 4 of POCSO Act against the accused beyond all reasonable doubt. At the same time, it is also found sufficient that the accused committed trespass in to the house of the informant which attracts section 447 of I.P.C.

The defence case is found without merit.

- 32. Held, the accused is guilty u/s 447 I.P.C and section 4 of POCSO Act. Accused is not found guilty u/s 506 I.P.C.
- 33. Now, let us see whether the accused is entitled to benefit u/s 360 of Cr.P.C or Sec. 3/4 of Probation of Offenders' Act.

The offence as perpetrated by the accused is of heinous nature. The offence is against a minor and a school girl. The accused is a major one. If the accused is given such benefit, the administration of justice would be severely affected and the offender will be encouraged.

Taking such view, the accused is not given such benefit.

34. Heard the accused on the point of sentence u/s 235(2) of Cr.P.C.

The accused has submitted that he has aged ailing mother to look after and he is the sole bread earner, so prayed for taking lenient view.

35. Taken all into consideration, it would be justified and reasonable if the accused is given a reasonable penalty.

Accordingly, the accused is convicted and sentenced to R.I for 7 years with fine Rs. 3000/- in default of fine he shall undergo R.I for another period for 2 (two) months u/s 4 of POCSO Act. Accused is further sentenced to pay fine Rs. 500/- in default of fine he shall undergo R.I for another 15 days u/s 447 I.P.C.

- 36. Set off the previous hazotee period, if any.
- 37. Since 'x' is the victim of heinous crime. A school girl suffered in the hand of evil, so, she entitled to compensation u/s 357(1) Cr.P.C.

The District Legal Service Authority is informed to pay compensation to the victim 'x'.

38. Let a free copy of Judgment & order be given to the accused.

The case is disposed of.

Given under my hand and seal by this court on this 21st day of August 2019 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by, S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESSES:-

PW-1 'x'/ the victim

PW-2 Felani Das

PW-3 Lalita Das

PW-4 Golok Das

P.W-5 Hari Das

P.W-6 Dr. Rinku Ahmed

P.W-7 Anil Kumar Singha

P.W-8 Kushi Ch. Biswas

P.W-9 S.I Muktajur Rahman

PROSECUTION EXHIBITS:-

Ext-1 Statement of 'x' recorded u/s 164 Cr.P.C,

Ext-2 Ejahar,

Ext-3 Medical Examination report,

Ext-4 Charge sheet,

Ext-5 Sketch Map

DEFENCE WITNESSES:-

D.W-1 Debeswar Barman

D.W-2 Partha Pratim Chakrabarty

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- NIL

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara