IN THE COURT OF THE SPECIAL JUDGE

::::::::: CHIRANG, KAJALGAON.



Special (P) Case No. 2(S)/2017

U/S 376(2)(i) IPC R/W Section 4 of POCSO Act.

State of Assam

Vs.

Sri Nagen Barman

.....Accused

PRESENT:

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Sri M. Islam, Ld. Advocate

Date of evidence

: 06.04.17, 13.07.17, 18.11.17,

11.01.18, 02.05.18, 05.06.18

Date of Argument

: 04.07.2018

Date of Judgment

: 18.07.2018

JUDGMENT AND ORDER

1. The prosecution case in brief is that on 22.12.2016, the informant Naresh Adhikary lodged an FIR before Sidli P.S. alleging that on 21.12.2016 at about 12.00 noon, while Miss 'X' (name is withheld), aged about 10 years, the daughter of the informant went to the field for feeding water to their goats, accused Nagen Barman pulled her towards jungle by holding her hand and gagging and forcefully committed rape on her. At that moment, one Keshab Basumatary at the spot and on seeing him, accused fled away leaving the victim there.

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- 2. The matter was informed to the O/C, Sidli Police Station who accordingly registered a case being Sidli P.S. Case No. 59/2016 U/S 376(2)(i) IPC read with Section 8 of POCSO Act and entrusted A.S.I. Nirmal Chanda to take pre-step and S.I. K. Simte was entrusted for completion of investigation of the case. Accordingly, the I.O. arrested the accused, visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 CrPC and after completion of investigation, submitted charge-sheet against the accused person, namely, Nagen Barman U/S 376(2)(i) IPC read with Section 8 of POCSO Act. After receiving charge sheet, copies of relevant documents were furnished to the accused person. Accused person was produced before the court from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, my learned predecessor framed charge U/S 376(2)(i) IPC read with Section 4 of POCSO Act against accused Nagen Barman. Charge was read over and explained to the accused person to which he denied to plead guilty. Later on, accused was released on bail.
- 3. In support of the case prosecution side examined as many as 11 (eleven) witnesses including the I.O. and M.O.
- Following witnesses are examined:-
 - (1) Victim as PW 1
 - (2) Sri Naresh Adhikary as PW 2
 - (3) Sri Keshab Basumatary as PW 3
 - (4) Smt. Sumitra Adhikary as PW 4
 - (5) Sri Binod Ray as PW 5
 - (6) Sri Bijoy Adhikary as PW 6
 - (7) Smt. Suku Bala Ray as PW 7
 - (8) Sri Hakim Brahma as PW 8
 - (9) ASI Nirmal Chanda as PW 9 (I.O.)
 - (10) SI Nikhil Ch. Ray as PW 10 (I.O.)
 - (11) Dr. Jili Basumatary as PW 11 (M.O.)

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- 5. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext.1. FIR was exhibited as Ext.2, sketch map was exhibited as Ext.3, Charge-sheet was exhibited as Ext.4 and medical report was exhibited as Ext.5.
- 6. Defence plea is of total denial. Defence adduced no evidence.
- Heard argument from both sides.

8. Now points for consideration:-

For the offence U/S 376(2)(i) of IPC

1. Whether on 21.12.2016, at about 12.00 noon at Pachim Padmapur under Sidli Police Station, the accused committed rape on Miss 'X' (name is withheld), a woman under age of 16 years?

For the offence U/S 4 of POCSO Act

2. Whether on the same date, time and place, the accused committed penetrative sexual assault on Miss 'X' (name is withheld) (A minor girl under the age of 18 years)?

DISCUSSION, DECISION AND REASONS THEREFOR:-

- 9. Now, I want to discuss and appreciate the prosecution evidence on record regarding both points simultaneously for the sake of convenience.
- 10. In support of the case, prosecution side examined all total 11 (eleven) witnesses including M.O. and I.O.
- 11. According to the FIR, on the date of occurrence, accused committed sexual intercourse with the minor daughter of the informant when she was going to the field to consume water for their goats. It is stated in the FIR that at the time of occurrence, victim was reading in Class IV and her age was about 10 years.

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- 12. Naresh Adhikary is the informant, who heard about the incident from his wife who was examined as PW 4. PW 2 deposed that on the date of occurrence, his daughter was reading in Class IV in L.P. School. He was returning from his work and on the way, he heard from the villagers that accused committed sexual intercourse with his daughter. When he reached his home, his wife, the PW 4 reported that accused committed sexual intercourse when their daughter went to the nearby field to consume water to their goats.
- 13. PW 4 deposed that on the date of occurrence, she was in his home. Then PW 3 reported her that accused committed sexual intercourse with their minor daughter. According to PW 4, PW 3 further reported that he noticed accused removing the wearing clothes of the victim. After sometime, victim also came home and reported the same facts. Then she informed the neighbours and ultimately when her husband, PW 2 came to their home, she reported all these facts.
- 14. PW 1 is the victim. She deposed that on the date of occurrence, she went to nearby field to consume water to their goats. At that time, accused was also went to the field and he took her to nearby jungle and removed her wearing panty and after that he committed sexual intercourse with her. At that moment, PW 3 Keshab Basumatary came to the spot. When the accused saw the PW 3, he fled away.
- 15. PW 3 deposed that on the date of occurrence, he went to the field for preying rat. He saw that accused person and the victim were removing wearing pants. Then he raised noise and accused fled away. He came to the village and informed the matter to the mother of the victim, the PW 4. This witness did not state that he noticed that accused had committed sexual intercourse with the victim.
- 16. On the other hand, during the cross-examination, victim stated that accused only put off her panty. He did not commit any sexual intercourse. According to her, the village headman tutored her to state the fact that accused had committed sexual intercourse with her. It is found from the evidence of the PW 1 that when she was asked by the Court whether she was

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tutored by her parents to depose falsely, she did not give any answer and remained mum. So, it is found from the evidence of PW 1 and PW 3 that accused put off the panty of the victim. Except this, nothing was happened. The story narrated by PW 1 that accused committed sexual intercourse is nothing but exaggeration of the matter as tutored by villagers.

- 17. PW 5, PW 6 and PW 7 came after the incident. They were reported by the mother of the victim when they went to the house of the informant and then they knew that accused committed sexual intercourse. These witnesses had no specific knowledge about the incident.
- 18. PW 8 deposed that after knowing the incident, he asked the victim about the actual fact. Then victim told him that accused tried to commit sexual intercourse for which he put off her panty. After seeing PW 3, he fled away. Accused was searched but he was not found in his home.
- 19. PW 11 is the Medical Officer, who examined the victim and sent her for radiological examination and collected radiological examination report. According to radiological report, right elbow joint AP view, all epiphyses of lower end of humerus except medial epicondyle are fused; medial epicondyle is not fused. Lateral view Epiphyses of radial head is fused, epiphysis of olecranon process is fused. Right wrist joint epiphyses of lower ends of radius and ulna are not fused. Base of first metacarpal is not fused. All carpal bones including pisiform appeared. Right ankle joint epiphyses of lower end of tibia and fibula are not fused. Epiphysis of posterior surface of calcaneum is not fused. Pelvis epiphysis of femoral head and greater trochanter are not fused. Epiphyses of iliac crest and ischial tuberosities are not appeared. The Medical Officer opined that from the clinical and radiological examination, age of the victim was above 11 years but below 15 years. There was no injury or violent mark seen on her body or private parts.
- 20. PW 9 and PW 10 are two Investigating Officers, who conducted investigation and recorded the statement of the witnesses and searched the accused. PW 9 deposed that he went to the house of the accused after the incident but he was absent. He collected original certificate but after getting

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photostat copy, same was returned to the father of the victim. As he did not seize the original certificate, so no birth certificate was exhibited in support of the age of the victim. As according to clinical and radiological examination, age of the victim was found above 11 years and below 15 years, the Investigating Officer submitted charge-sheet U/S 376(2)(i) IPC R/W Section 8 of POCSO Act.

- After going through the entire evidence on record, it is found that sexual intercourse is not proved, both from the ocular evidence as well medical evidence. On the other hand, one fact is remained intact after thorough cross-examination of the prosecution witnesses, particularly PW 1 and PW 3 that accused removed the panty of the victim. This fact was also reported to PW 8 by the victim at the time of incident. Victim clearly stated that except removal of panty, nothing was done by the accused. So, ingredient of Section U/S 376(2)(i) IPC or Section 4 of POCSO Act is not proved. On the other hand, removal of panty of the child attracts the ingredient of Section 11 of POCSO Act.
- 22. In Section 11 of POCSO Act, sexual harassment is defined as follows:

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- "11. Sexual harassment.— 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; or
 - (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

- 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 therefor."
- 23. After going through the ingredient of Section 11, I have found that in present case at hand, sub-section (ii) of Section 11 of POCSO Act is attracted against the accused. Prosecution proved the case U/S 12 of POCSO Act because it is the punitive section. As Section 12 of POCSO Act is lower in degree if we compare with Section 4 of POCSO Act, so accused can be convicted without framing separate charge. So, accused is found guilty U/S 12 of POCSO Act instead of Section 376(2)(i) IPC R/W Section 4 of POCSO Act.

ORDER

- 24. Prosecution failed to prove the case U/S 376(2)(i) IPC R/W Section 4 of POCSO Act against the accused. On the other hand, prosecution proved the case U/S 12 of POCSO Act against the accused Nagen Barman beyond all reasonable doubt. He is convicted U/S 12 of POCSO Act.
- 25. I have not considered the Section 4/5 of Probation of Offenders Act because accused being a senior person committed the offence upon a minor girl which cannot be tolerated in the eye of law. If he is allowed to be scot-free, people will lose faith upon the Court upon justice delivery system. Therefore, Section 4/5 of Probation of Offenders Act or Section 360 CrPC is not applicable in this case.
- 26. Heard the accused and his engaged counsel on point of sentence.

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- 27. Accused pleaded mercy of the Court. According to him, this is the first offence and he is the only bread earner of the family.
- I have considered all these aspects and found that this is the first offence committed by the accused as because no previous conviction of the accused was proved by the prosecution during trial. It is also found that accused is a senior person aged about 70 years. It is also found from the record that accused had been languishing in jail for more than 4 (four) months. So, he is sentenced to undergo simple imprisonment for a period which he had already undergone during the time of investigation and during trial and he is further directed to pay a fine of Rs. 5,000/- (Rupees Five Thousand), in default, 2 (two) months S.I.
- 29. A copy of this Judgment shall be furnished to the accused on free of cost. Another copy of this Judgment shall be given to the District Magistrate, Chirang for information.
- 30. Given under my sign and seal of this Court on this the 18th day of July, 2018, at Kajalgaon, Chirang.

Dictated and corrected by me,

(D.J. Mahanta) Special Yuklae,

APPENDIX

Prosecution witness:

PW 1 - Victim

PW 2 - Sri Naresh Adhikary

PW 3 - Sri Keshab Basumatary

PW 4 - Smt. Sumitra Adhikary

PW 5 - Sri Binod Ray

PW 6 - Sri Bijoy Adhikary

PW 7 - Smt. Suku Bala Ray

PW 8 - Sri Hakim Brahma

PW 9 - ASI Nirmal Chanda (I.O.)

PW 10 - SI Nikhil Ch. Ray (I.O.)

PW 11 - Dr. Jili Basumatary (M.O.)

Exhibit (Prosecution):

Ext-1 Statement of the victim U/S 164 Cr.P.C.

Ext-2 FIR

Ext-3 Sketch map Medical report

Ext-4 Charge-sheet

Ext-5 Medical report

Material Exhibit (Prosecution):

Nil

Defence Witness:

Nil

Defence Exhibit:

Nil

(D.J. Mahanta)
Special Judge.
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