IN THE COURT OF THE SPECIAL JUDGE AT JORHAT

Present:- Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS Special Judge, Jorhat

JUDGMENT IN SPECIAL CASE NO. 06 OF 2018 (G.R. Case No. 24 of 2018) Borholla P.S. Case No. 07 of 2018

Transmitting Magistrate:-

Sri Debasish Bora, In-charge, Sub-Divisional Judicial Magistrate, Titabar Sub-Division, Jorhat District

State of Assam

-Versus-

Sri Motilal Mala, Son of Late Manglo Mala, Resident of Mukti Nagar, P.S. Borholla, District-Jorhat.

.... Accused

APPEARANCES:

For the State : Sri Muhidhar Dutta, Learned Special P.P., Jorhat For the Accused: Sri Deep Ranjan Chetia, Learned Advocate, Jorhat

CHARGE FRAMED UNDER SECTION 354 [A] OF INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 29-03-2018

Date of prosecution evidence: 23-04-2018; 16-05-2018; 12-06-2018;

& 21-07-2018

Statement of Accused

Recorded on : 29-10-2018

Date of Argument : 27-12-2018 & 19-01-2019

Date of Judgment : 21-01-2019

<u>JUDGMENT</u>

1). The prosecution story, in brief, is that Borholla P.S. Case No. 07/2018 under Section 354 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012 was registered on the basis of an F.I.R. lodged by Sri Keshab Gogoi, father of the victim girl, hereinafter to be referred as [X].

In the aforesaid **F.I.R.** dated 16/01/2018 **[Exhibit-3]** the informant Sri Keshab Gogoi [PW-3] who is the father of the victim girl [X] alleged, *inter-alia*, that on the same day at about 2.00 P.M. while his daughter who was aged about 11 years was residing alone in the house at that time the accused arrived at his house compound and showed his private part after undressing his pant to the victim. It is further alleged by the informant that the accused also touched her private part with his hand, for which, she felt pain.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Borholla P.S., the same was registered as **Borholla P.S. Case No. 07/2018** under Section 354 [A] of IPC read with Section 4 of The Protection of Children from Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under Section 164 of Cr.P.C. was also recorded by the learned Magistrate. Police, on completion of investigation, filed charge-sheet in the case against the above named accused Motilal Mala u/S. 354 [A] of IPC read with Section 4 of The Protection of Children from Sexual Offences Act, 2012 vide Charge-sheet No. 08/2018 dated 31/01/2018.

- **2).** The In-charge Sub-Divisional Judicial Magistrate, Titabar Sub-Division, District-Jorhat, transmitted the case to this Court for trial. Copy was furnished to the accused, in due course.
- **3).** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submission of the learned counsel for the accused and the prosecution in this behalf, I found sufficient ground to frame charge against the accused under Section 354 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012, which were read

over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4). During the course of trial, **08 [eight]** numbers of witnesses including the victim, her parent, the Medical Officer and the I.O. were examined, on behalf of the prosecution, to prove the charge u/S. 354 [A] of IPC read with Section 4 of The Protection of Children from Sexual Offences Act, 2012 against the accused.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. and the accused stated that the victim, on the date of incident visited his house premise and watched television. When he witnessed the victim watching television in his residence he told the victim to go for her study and not to watch television. The informant had lodged false against him through his daughter. The accused pleaded innocence. One witness was adduced by the accused in his defence to substantiate his claim.

- I have heard Sri Muhidhar Dutta, learned Special Public Prosecutor for the State as well as Sri Deep Ranjan Chetia, learned Defence Counsel for the accused, who is facing trial, for commission of offence u/S. 354 [A] of IPC read with Section 4 of The Protection of Children from Sexual Offences Act. 2012.
- **6).** Now the points for determination before this Court are as follows:-
 - 1) Whether on 16/01/2018 the accused, in absence of the family members of informant arrived at his residence and showed his penis to the minor daughter of the informant and thereafter touched her private part with his hand with the intent of outraging or knowing it to be likely that he will outrage her modesty and thereby committed an offence punishable under Section 354 [A] IPC?
 - 2) Whether on the date of occurrence the accused, committed penetrative sexual assault upon the daughter of informant and thereby committed an offence punishable under Section 4 of The Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF:

7). First of all, let me examine, analyze and appreciate the evidence of the witnesses along with the relevant documents.

[PW-1] is the victim [X] of the instant case who is the star witness to the incident. She deposed in her testimony that on the date of incident she visited accused's house to watch television. At that time the accused was residing alone in the house. It is further version of the victim that the accused grabbed her hair and, in turn, she told before the later that she arrived at his house to watch television. At that time the accused slapped her for not studying in her house. Further version of the victim is that she gave statement before the Magistrate vide Exhibit-1 wherein Exhibit-1 [1] and Exhibit-1 [2] are her signatures. The victim stated that she gave statement before the Magistrate where she disclosed that on the relevant day the accused arrived at her residence to return back the loan amount which he [accused] took from her father. Thereafter, the accused showed her private part and also pressed her buttock. When she cried then the accused fled away from her residence. She was produced before a doctor for medical check-up.

This witness during cross-examination by defence side stated that she narrated the incident before her mother about the misbehavior of the accused done to her after twenty minutes of the incident. The victim further stated that she did not tell before her mother that accused grabbed her hair and also slapped her for visiting his house to watch television and for not studying.

8). PW-2 is **Smt. Niru Gogoi** who is the mother of victim [PW-1]. This witness during her deposition in Court stated that on the date of incident she came out of her house. After twenty minutes she returned back home. She came to know from her daughter that the accused visited their house to return back the loan amount. Thereafter, the later showed his private part to the victim and also pressed her buttocks, for which, she cried and then accused fled away from their house. It is further version of this witness that during investigation police seized one school certificate of her minor daughter vide Exhibit-2 wherein Exhibit-2 [1] is her signature.

During cross-examination, this witness stated that her daughter [PW-1] stated before her that prior to the incident when she went to the house of accused to watch television the accused grabbed her hair and slapped her for only watching television and not studying. She denied defence suggestion that later part of the story has been falsely alleged by her. She categorically stated that there was no quarrel with the accused prior to the incident.

9). The evidence of **Sri Keshab Gogoi** [**PW-3**] who is the father of victim-cum-informant of the case is in the same line as that of his ejahar [Exhibit-3] wherein Exhibit-3 [1] is his signature. This witness further stated that during investigation police seized the school certificate of his daughter vide seizure-list [Exhibit-2] wherein Exhibit-2 [2] is his signature. Exhibit-4 is the Zimmanama wherein Exhibit-4 [1] is his relevant signature.

During cross-examination by defence side, this witness categorically stated that he did not ask anything about the incident and also did not ask his daughter whether she told the ejahar writer as per the statement written in the ejahar.

10). The evidence of **Smt. Joymati Bharali [PW-4]** who is neighbour of the informant as well as accused is to the effect that on the next day of incident she came to know that the accused was taken to the police station. She came to know from the villagers that the later had committed rape upon the victim on the previous day.

During cross-examination, she stated that accused used to reside with his son and wife. This witness categorically stated that she does not know anything about the incident.

11). PW-5 is Dr. Amrita Nath. Her evidence is to the effect that on 17/01/2018 while she was posted at Jorhat Medical College & Hospital as Lady Medical Officer on duty, at that time she examined the victim on police requisition in connection with Borholla P.S. Case No. 07/2018 under Section 354-A of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012. On examination, she found the victim to be above 10 years and below

12 years; evidence of recent sexual intercourse not detected over her body and there was no evidence of injury on the body of victim. She exhibited her report as Exhibit-5 and her signatures thereon as Exhibit-5 [1] to Exhibit-5 [3].

This witness during cross-examination stated that on the basis of radiological report she had determined the age of victim. She confirmed that as per physical, dental, laboratory and radiological examination they can detect the age of victim. The doctor denied that her report is not a conclusive report.

12). Sri Nagen Mala [PW-6] who is the son of accused Motilal Mala stated that on the date of incident the victim girl was watching television at their house. His father, i.e., the accused, told them to go to their home and study. After sometime the father of victim came in a drunken condition and threatened them that he will lodge case against the accused.

This witness during cross-examination by defence side admitted that he was present in his residence and was chewing pan leaves and he found the victim present in his house watching television with two of his nephews. His father, i.e., the accused touched the hair of victim and asked her to leave their house.

13). Evidence of **Sri Chiran Jyoti Gogoi [PW-7]** neighbour of victim, is to the effect that after the incident police visited his house and asked him whether he knows anything about the incident. To the query of police, he stated that he does not know anything about the incident. Further, he does not have any personal knowledge about the incident.

Defence side declined to cross-examine this witness in all material particular.

14). PW-8 is **Sri Deba Jyoti Phukan** who is the investigating officer of the instant case. This witness deposed about the routine steps taken by him during investigation of the case. This witness further stated that he visited the place of occurrence and drew Sketch Map of the place of occurrence with index vide Exhibit-6 wherein Exhibit-6 [1] is his signature. Accused was arrested in connection with the case. He also seized the school certificate of the victim from

her parent vide seizure-list [Exhibit-2] wherein Exhibit-2 [2] is his signature. The I.O. stated that victim was sent to the court for recording statement by the learned Magistrate under Section 164 Cr.P.C. as well as before the doctor for her medico legal check-up.

This witness during cross-examination by defence side stated that at the police station he examined the victim of the case.

- **15).** The accused during his statement under Section 161 Cr.P.C. took plea that instant case has been filed by the father of victim due to misunderstanding of fact. As per his version, on the date of incident the victim came to his house in order to watch television and he instructed the victim to go to her house for study and not to watch television in his residence.
- **16).** From a close perusal of the evidence on record it is seen that the victim [PW-1] and Sri Nagen Mala [PW-6] who is the son of accused are the star witnesses of the instant case.

The victim [PW-1] during her statement stated that on the date of incident she visited accused's house to watch television. At that time the accused was residing alone in the house. It is further version of the victim that the accused grabbed her hair and, in turn, she told before the later that she arrived at his house to watch television. At that time the accused slapped her for not studying in her house. Further version of the victim is that she gave statement before the Magistrate vide Exhibit-1 wherein Exhibit-1 [1] and Exhibit-1 [2] are her signatures. The victim stated that she gave statement before the Magistrate where she disclosed that on the relevant day the accused arrived at her residence to return back the loan amount which he [accused] took from her father. Thereafter, the accused showed her private part and also pressed her buttock. When she cried then the accused fled away from her residence. She was produced before a doctor for medical check-up.

This witness during cross-examination by defence side stated that she narrated the incident before her mother about the misbehavior of the accused done to her about twenty minutes of the incident. The victim further stated that she did not tell before her mother that accused grabbed her hair and also slapped her for visiting his house to watch television and for not studying.

17). Evidence of Sri Nagen Mala [PW-6] who is the son of accused Motilal Mala is to the effect that on the date of incident the victim girl [PW-1] was watching television at their house. His father, i.e., the accused, told them to go to their home and study. After sometime the father of victim came in a drunken condition and threatened them that he will lodge case against the accused.

This witness during cross-examination by defence side admitted that he was present in his residence and was chewing pan leaves and he found the victim present in his house watching television with two of his nephews. His father, i.e., the accused touched the hair of victim and asked her to leave their house.

18). Smt. Niru Gogoi [PW-2] who is the mother of victim [PW-1] gave deposition in Court that on the date of incident she came out of her house. After twenty minutes she returned back home. She came to know from her daughter that the accused visited their house to return back the loan amount. Thereafter, the later showed his private part to the victim and also pressed her buttocks, for which, she cried and then accused fled away from their house. It is further version of this witness that during investigation police seized one school certificate of her minor daughter vide Exhibit-2 wherein Exhibit-2 [1] is her signature.

During cross-examination, this witness stated that her daughter [PW-1] stated before her that prior to the incident when she went to the house of accused to watch television the accused grabbed her hair and slapped her for only watching television and not studying. She denied defence suggestion that later part of the story has been falsely alleged by her. She categorically stated that there was no quarrel with the accused prior to the incident.

19). The evidence of Sri Keshab Gogoi [PW-3] who is the father of victim-cum-informant of the case is in the same line as that of his ejahar [Exhibit-3] wherein Exhibit-3 [1] is his signature. This witness further stated that during

investigation police seized the school certificate of his daughter vide seizure-list [Exhibit-2] wherein Exhibit-2 [2] is his signature. Exhibit-4 is the Zimmanama wherein Exhibit-4 [1] is his relevant signature.

During cross-examination by defence side, this witness categorically stated that he did not ask anything about the incident and also did not ask his daughter whether she told the ejahar writer as per the statement written in the ejahar.

- **20).** Learned counsel for the accused has argued that the parent of the victim had enmity with the accused and hence they lodged false case against him. It is further contended that the victim had been tutored by her parent to depose against the accused. It is also submitted that the parent of the victim were reported witnesses and the evidence of parent of the victim [PW-2 & PW-3] varies with the evidence recorded by the I.O. during 161 Cr.P.C. statement.
- **21).** In the case of *Bipin Kumar Mondal –versus- State of West Bengal, 2010 [12] SCC 91*, the Hon'ble Apex Court reiterated the principle stating that it is not the quantity but the quality that is material. The honored principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible, trustworthy and reliable.
- **22).** From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon.
- **23).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of **Datttu Ramrao Sakhare-versus-State of Maharashtra**, reported in **[1997] 5 SCC 341**, the Hon'ble Apex Court has held that — "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other

words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

gathered that on the date of incident she visited accused's house to watch television. At that time the accused was residing alone in the house. It is further version of the victim that the accused grabbed her hair and, in turn, she told before the later that she arrived at his house to watch television. At that time the accused slapped her for not studying in her house. Further version of the victim is that she gave statement before the Magistrate vide Exhibit-1 wherein Exhibit-1 [1] and Exhibit-1 [2] are her signatures. The victim stated that she gave statement before the Magistrate where she disclosed that on the relevant day the accused arrived at her residence to return back the loan amount which he [accused] took from her father. Thereafter, the accused showed her private part and also pressed her buttock. When she cried then the accused fled away from her residence. She was produced before a doctor for medical check-up.

This witness during cross-examination by defence side stated that she narrated the incident before her mother about the misbehavior of the accused done to her about twenty minutes of the incident. The victim further stated that she did not tell before her mother that accused grabbed her hair and also slapped her for visiting his house to watch television and for not studying.

Version of victim [PW-1] gets full corroboration from the testimony of Sri Nagen Mala [W-6] who is the son of accused.

25). Flip-flop evidence has been tendered by the victim which gets no support from the evidence of her parent [PW-2 & PW-3] as father of victim-cum-

informant of the case [PW-3] during cross-examination testified that he did not ask anything about the incident and also did not ask his daughter whether she told the ejahar writer as per the statement written in the ejahar. Further, there is every possibility that false case has been lodged by the father of the victim as accused scolded her for not studying when she went to watch television in his house. Moreover, the statement of victim is not consistent and it varies from the statement given by her before the learned Magistrate [Exhibit-1] from that of the statement given before this court. Further, there is no material, at all, under Section 4 of The Protection of Children From Sexual Offences Act, 2012, as victim, at no point of time, stated that accused committed penetrative sexual assault upon her.

26). Thus, on scrutinizing the evidence on record it is seen that no case has been made out against accused Motilal Mala to warrant his conviction under Section 354-A IPC as well as under Section 4 of The Protection of Children From Sexual Offences Act, 2012 beyond all reasonable doubt, for which, I am of the opinion that the accused is entitled to acquittal under benefit of doubt which I accordingly do. Hence, accused Motilal Mala is **acquitted** from the charges under Section 354-A IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012.

27). Accused is in jail. He be released forthwith if not required to be detained in connection with any other case.

Given under my hand and seal of this Court on this **21st** day of **January 2019**.

Special Judge, Jorhat

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ANNEXURES:-

PROSECUTION WITNESSES:-

PW-1	Victim girl.
PW-2	Smt. Niru Gogoi, mother of victim
PW-3	Sri Keshab Gogoi, father of victim girl-cum-
	informant of the case.
PW-4	Smt. Joymati Bharali, housewife.
PW-5	Dr. Amrita Nath, who examined the victim girl.
PW-6	Sri Nagen Mala, son of accused Motilal Mala.
PW-7	Smt. Chiran Jyoti Gogoi, housewife.
PW-8	Sri Deba Jyoti Phukan, I.O. of the case.

COURT WITNESS:- NIL

EXHIBITS FOR THE PROSECUTION:-

Exhibit-1	Statement of victim recorded by the Magistrate under Section 164 Cr.P.C.
Exhibit-2	Seizure-list
Exhibit-3	Ejahar
Exhibit-4	Zimmanama
Exhibit-5	Medico legal report of victim
Exhibit-6	Sketch Map of the place of occurrence with index
Exhibit-7	Charge-sheet

DEFENCE WITNESSES:- NIL

Special Judge, Jorhat.

Typed & transcribed by:

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)