IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.08/2018

U/S-342 of IPC R/W Section 8 of POCSO Act, 2012

State of Assam

-Versus-

Mijanur Ali

s/o-Kamal Ali

Resident of vill -Bihapara

P.S.-Chhaygaon

Dist- Kamrup

-----Accused

Appearance:

Mr. A.K. Baruah. Ld. Addl. Public Prosecutor -----for the State

Mr. F. Hoque, Ld. Advocate ------for the accused

Date of evidence: 19.05.2018, 08.08.2018, 29.09.2018, 03.01.2019,

Date of Argument:16.02.2019, 11.03.2019

Date of Judgment:14.03.2019

JUDGEMENT

- 1. The Prosecution case in brief is that—on 17.10.2017 the informant—Md. Golam Hussain lodged an ejahar alleging that on 02.09.2017 at about 8.00p.mthe accused Mijanur Ali had forcibly taken away his minor daughter near the bank of the pond located at the backyard of one-Momin Ali and tried to commit rape upon her. But the family members of Momin Ali caught them red handed. Thereafter, village mel were held on 2/3 occasions regarding the incident. And hence, this FIR.
- 2. On the basis of the said ejahar, Chhaygaon P.S Case No. 879/2017 U/S-342 of IPC R/W section 8 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S-342 of IPC R/W section 8 of the POCSO Act, 2012.
- 3. The case was duly committed and this Court after hearing both the parties, framed charges U/S- 342 of IPC R/W section 8 of the POCSO Act, 2012 against accused—Mijanur Ali. The aforesaid charges were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined as many as eight (8) numbers of witnesses including the informant and victim. Statement of the accused person U/S-313 Cr. P.C is recorded. He has denied committing the offence and expressed his desire to adduce evidence.

5. **POINTS FOR DETERMINATION**

- (I) Whether the accused person on 02.09.2017 at about 8.00 p.m at village Bihpara under Chhaygaon P.S wrongfully confined the minor daughter of the informant and, thereby, committed an offence punishable U/S 342 of IPC?
- (II) Whether the accused on the same date, time and place tried to commit rape on the victim by taking her forcibly from near her house

to the backside of the house of one Momin Ali and thereby, committed sexual assault within the meaning of section 7 of the POCSO Act, 2012 which is punishable U/S-8 of the POCSO Act, 2012 ?

6. **DISCUSSION, DECISION AND REASONS THEREOF:-**

Perused the record. Prosecution examined eight(8) witnesses. Let us go through the evidences available on record.

- 7. P.w.1 is the prosecutrix of this instant case. She has deposed in her evidence that she knows the accused person. On the day of the incident at around 8 p.m, when she was proceeding to her grandmother's house from a shop to bring back her younger brother, then on that way accused—Mizanur caught hold of her hand and dragged her to the bank of the fishery of one Momin. There, he committed bad act (rape) upon her forcibly and she was not allowed to scream as he gagged her mouth with gamosha. Her both hands were tied with handkerchief. At that moment, one Rofigul saw the incident. He assaulted both of them and took pw-1 and the accused to the house of one Giasuddin. There, Giasuddin tried to settle the dispute. The accused was asked to marry PW-1 but he refused to marry her. Pw-1 further stated that a village mel was held in presence of her father and the accused paid some amount of money as fine to Giasuddin but she did not receive any payment. Her father came and took her back home. After one month of this incident, her father lodged the ejahar. Police took P.W.1 for medical examination and also brought her before the Magistrate for recording her statement U/S-164 Cr. P.C. She put thumb impression in her statement. Pw-1 revealed that she was 16 years old at the time of occurrence and was studying in class-VI.
- 8. In her cross-examination, P.W.1 has stated that she had love affairs with the accused—Mizanur and he used to visit her house. But her parents did not know about the love affairs. P.W.1 further stated that she did not know the date of filing the ejahar lodged by her father.
- 9. P.W.2, Golam Hussain is the informant and father of the prosecutrix. He has deposed in his evidence that he knows the accused person. The incident took place about 7 months ago. On the day of incident when his daughter (pw-1) was proceeding

to her grand-mother's house, on the way accused caught hold of her and dragged her by gagging her mouth with a gamosa (towel) to the bank of fishery belonging to Momin. There, the accused committed rape upon her there. Pw-2 revealed that at the time of incident, his daughter was 16 years. P.W.2 further deposed that accused was caught hold by one Rofique Ali, son of Momin Ali. And his daughter disclosed the incident to him. The villagers told him that they would settle the matter for which there was delay in lodging the ejahar. After one month, PW-2 lodged the ejahar.

- 10. In his cross-examination, P.W.2 has stated that the incident took place when his daughter was going to the house of his father-in-law (to her grand-mother's) house. The road leading to his father-in-law's house is through a populated area having houses on both sides of the road. P.W.2 admitted that he has not mentioned in his ejahar about the village mel which was held after one week of the incident.
- 11. P.W.3, Dr. Oli Goswami has deposed in her evidence that on 21.10.2017 she was on PG duty, department of Forensic Medicine at GMCH and on that day she examined one—Abeda Khatun in connection with Chhaygaon P.S being Chhaygaon P.S Case No.879/17 U/S-342 of IPC R/W Section 8 of the POCSO Act, 2012. P.W.3 further disclosed that on physical examination of the victim, she found that—"one black mole of size 2.5 cm on left side of face 2 cm away from outer canthus of left eye and 1 cm below left eye. One black mole on left side of face 3.5 cm away from midlips and 4 cm below from canthus of left eye. Her height—143 cm, weight—30 kg, chest girth—77 cm, abdominal girth—66 cm, total 28 teeth were present and all were permanent. Space for teeth are adequate. Scalp hair-35 cm in length, black, well developed, Axillary hair 1-2 cm and pubic hair 1-2 cm was black, her breast were well developed. On genital examination:- Genital organs—Well Developed, vulva—healthy, vagina—Healthy, Uterus—Not palpable per abdomenally, No injuries were found in the body. Her mental condition at the time of examination is normal.
- 12. P.W.3 further disclosed that on the basis of physical examination, radiological and laboratory investigations done, she opined that:- 1. There was no evidence of recent sexual intercourse found on her person, 2. Her age is above 15 years and below 16 years, 3. No violation mark is seen on her private parts. Ext.1 is the medical report. Ext. 1 (1 to 3) are her signatures.

- 13. In her cross-examination, P.W.3 disclosed that no physical deformity was found on the victim at the time of examination. Mentally also she was found to be stable and also no physical violation detected on her person.
- 14. P.W.4 is Musstt Aziran Nessa has deposed in her evidence that informant of this case is her husband. She knows the accused person. She deposed in his evidence that the incident took place 8/9 months ago at about 7.00 p.m. On the day of incident when her daughter (pw-1) was proceeding to her grand-mother's house to bring back her brother, then on the way accused caught hold of her and dragged her by gagging her mouth with a gamosa (towel) to the bank of fishery belonging to Momin. Then, the accused committed rape upon her. P.W.4 further deposed that accused was caught hold by one Rofique Ali. Village mel was held after one week regarding the incident. In that village mel, accused was fined of Rs.20,000/-. Pw-4 disclosed that the accused deposited the fine amount but the said fine amount was not received by them. Thereafter, her husband lodged the case.
- 15. In her cross-examination, P.W.4 has stated that she did not know after how many days of the incident, police interrogated her. There are 100 houses in between her house and her mother's house. P.W.4 further stated that she did not know after how many days of the incident, her husband lodged the case.
- 16. P.W.5 Rafiqul Islam has deposed in his evidence that he knows both the parties. The incident took place about a year ago at about 10.30 p.m. P.W.5 further deposed that he has a fishery in his house campus. At the relevant time, when he was returning home from work, he heard some people murmuring near his fishery. Then, he saw the accused and the prosecutrix sitting under a tree and chatting. He enquires the reason for sitting in his fishery at late night. Then, the prosecutrix fled away. P.W.5 rang and called the father of the accused person. He arrived and took away the accused person.
- 17. In his cross-examination, P.W.5 has deposed that he did not know if there is any love affairs between the accused and the victim. P.W.5 also did not know if the accused was pressurized by the victim's family to marry her. P.W.5 also did not know if the victim's father demanded Rs.50,000/- for not lodging the ejahar. Police enquired

about the incident from him over phone as he was not present at home. P.W.5 also did not know who gave the ejahar and when it was given.

- 18. P.W.6 Malek Ali has deposed in his evidence that he knows both the parties. The incident took place about a year ago at about 8.00 p.m. P.W.6 deposed that on the relevant day at about 7.00 p.m, the victim came to his house along with her brother. Thereafter, she alone left for her house. After some time, pw-6 came to the house of the victim. He came to know from his sister (pw-3) that her daughter (victim) did not return home from his house. Then, P.W.6 returned back to search for her. Thereafter, he heard some 'hullah' in the house of Rafiqul (pw-5). He saw that Rafiqul catching hold of the accused and bringing him to his brother's house. P.W.6 heard from Rafiqul that accused and the victim were sitting near his fishery and talking. And when he enquired the incident from the victim, she told him that the accused gagged her mouth with a 'gamosha' and forcibly took her to the fishery of P.W.5.
- 19. In his cross-examination, P.W.6 has deposed that he did not see the incident by herself. P.W.6 did not know of any theft in the house of P.W.5. P.W.6 further deposed that he did not know if there is any love affairs between the accused and the victim and that if they were sitting together on the night of occurrence as they were in festive mood ('Bakri Idd').
- 20. P.W.7 Nurul Islam has deposed in his evidence that he knows both the parties. The incident took place about a year ago at about 8.00/8.30p.m at the backyard of the house of Momin Ali. P.W.7 further deposed that he heard from the victim that while she was returning from her Uncle's house, then the accused restrained her on her way and pulled her and took her to the fishery. The victim also told him that the accused tried to have sexual intercourse forcibly but at the arrival of Rafiqul he failed to do such act. P.W.7 stated further that accused was brought to the house of one Giasuddin and the village people gathered there and he came to know about the incident.
- 21. In his cross-examination, P.W.7 has deposed that the place of occurrence is about 300 mtrs from his house. P.W.7 did not know when and against whom the ejahar was lodged.P.W.7 further deposed that he did not know if there was any love affairs between the accused and the victim. P.W.7 did not know if the parents of the victim

pressurized the accused to marry her. A village mel took place regarding the incident on the very night and more than hundred persons were present in the meeting in the house of Giasuddin. In the village mel, the accused was imposed a fine of Rs.28,000/- as he did not agree to marry the victim and asked to pay the same to the father of the victim. P.W.7 did not know if the said fine amount paid to the informant or not.

- 22. P.W.8 Sri Mohit Sarmah is the I/O of this case. He deposed in his evidence that on 17.10.2017, he was serving as i/c Goromari O.P under Chhaygaon P.S. On that day after receiving an ejahar lodged by one GulamHussain, he gave a G.D. Entry being No. 233/17 and forwarded the said ejahar to O/C, Chhaygaon P.S—Sri B.M Patowary, who registered a case bearing Chhaygaon P.S Case No. 879/2017 U/S-342 IPC R/W Section 8 of POCSO Act, 2012 and directed him to investigate the case. After the G. D. Entry, he visited the place of occurrence along with other staffs and recorded the statements of the witnesses including the victim girl. He also prepared the sketch map.Ext.2 is the sketch-map and Ext. 2 (1) is his signature. The accused could not be arrested as he had fled away from the place of occurrence. P.W.8 send the victim for her medical examination. P.W.8 sent the victim to the Court for getting her statement recorded U/S-164 Cr. P.C before the Magistrate. The victim was allowed to go in the zimma of her guardian after her statement was recorded. The accused was later surrendered before police on 11.11.2017. He was arrested and produced before the Court. Thereafter, P.W.8 collected the medical report and completed the investigation. On finding sufficient materials against the accused—Mijanur Ali, P.W.8 submitted charge sheet against him U/S-342 of IPC R/W section 8 of POCSO Act. Ext.3 is the chargesheet and Ext. 3 (1) is his signature.
- 23. In his Cross-examination, P.W.8 deposed that he did not collect any age related documents of the victim. P.W.8 did not mention in the charge sheet regarding preparation of the sketch map. P.W.8 further revealed that the reason of delay in lodging the ejahar has been stated by the informant during investigation stage and the same has been mentioned in the ejahar.
- 24. At the close of the prosecution evidence, statement of the accused person U/S 313Crpc has been recorded. He denied committing the offence and desired to adduce evidence.

- D.W.1, Md. Mijanur Ali, who is the accused of this instant case. He deposed in his evidence that he knows the victim girl. They had love affair. D.W.1 further revealed that on the date of occurrence, it was BakhriIdd. Victim came to his house. Then, his father informed the victim's father to take her away. Her father came and took her away. D.W.1 further stated that their marriage could not be performed as they both did not attain marriageable age. A village mel was held regarding their marriage and he was ordered to pay a fine of Rs.20,000/- to the victim. The fine amount was given to the village elders who conducted the village mel. But he did not know if the fine amount was received by the victim or not. The case has been given as he did not marry the victim. D.W.1 revealed that he did not do any bad act with the victim and that the victim's father lodged a false case against him.
- 26. In his Cross-Examination, D.W.1 has deposed that the house of the victim is situated at the distance of ½ km far away from his house.
- D.W.2, Md. Ainuddin Ali has deposed in his evidence that he know the victim girl and also the accused. They are hisneighbours. D.W.2 deposed that they had love affairs. On the date of occurrence, it was BakhriIdd. Victim came to the house of the accused. Then, his father informed the victim's father to take her away. Her father came and took her away. A village mel was held regarding the incident and performing the marriage of both. The marriage could not take place as the victim and the accused were not marriageable age. The accused was ordered to pay a fine of Rs.20,000/- to the victim. The fine amount was not received by the victim. Thereafter, the false case was given to harass the accused. D.W.2 was present in the village meeting.
- 28. In his cross-examination, D.W.2 has deposed that accused is his relative. Victim is also related to him.
- 29. D.W.3, Md. Sukur Ali has deposed in his evidence that he knows the victim girl and also the accused. They are his neighbours. On the date of occurrence, it was Bakhri Idd. Victim came to the house of the accused. Then, his father informed the victim's father to take her away. Her father came and took her away. A village mel was held regarding the incident and performing of their marriage. The marriage could not take place as the victim and the accused were not of marriageable age. The accused was ordered to pay a fine of Rs.20,000/- to the victim. The fine amount was not received by the victim. Thereafter, the false case was given to harass the accused. D.W.3 was not present in the village meeting.

- 30. I have heard the arguments of both the sides. Perused the evidences on record.
- 31. Section 8 of the POCSO Act deals with sexual assault. Now, **Sexual Assault** is defined **U/S 7 of POCSO Act**as "Whoever, with sexual intent touches the vagina, penis , anus or breast of the child or makes the child touch the vagina , penis ,anus or breast of such person or any other person , or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."
- Now, in this instant case, it has come out from the evidence of pw-1 (victim) that while she was going to her grandmother's house, then on the way the accused caught hold of her and he dragged her to the bank of the fishery of one Momin. Then, the accused forcibly raped her by gagging her mouth and tying her hands with a handkerchief. According to pw-1, the incident was witnessed by pw-5, who caught them both and brought them to the house of one—Giasuddin. But, from the cross-examination of pw-1, it reveals that there was love affair between both of them and the accused was a frequent visitor to their house. She made it clear that her parents did not know about it. Pw-4 (mother of the victim) alleged that the accused gagged the mouth of the prosecutrix and dragged her to the fishery and had sexual intercourse with her. It is in her evidence that while the accused was having sexual intercourse with P.W.1, P.w.5 saw them and he informed the villagers.
- 33. Now, Pw -5 is the vital witness in this instant case. His evidence reveals that at the time of occurrence, he was returning home from work. Then, he heard from some murmuring sound near his fishery. According to this witness, he saw the accused and the victim sitting under a tree and chatting. It is in his evidence that when he caught them and enquired the reason for sitting in his fishery at late night, then the prosecutrix fled away. Thereafter, pw-5 rang and called the father of the accused, who arrived and took him away.P.W.2 (victim's father) in his evidence before the court deposed that the accused committed rape upon her. But in his cross examination, P.W.2 revealed that in the ejahar he has alleged that the accused tried to commit rape on the victim and he did not mention therein about the village mel being held. Furthermore, it appears from the evidence of P.W.2 that the ejahar was lodged after one month of the occurrence.

- 34. Therefore, it is found that the evidence of pw-1 is not supported by pw-5 at all. According to pw-1, the accused person dragged her to the fishery of pw-5, there he raped her by gagging her mouth and tying her hands with handkerchief. But P.W.5 testified that on the relevant night, he found both the accused and the victim sitting under a tree near his fishery and they were chatting. His evidence makes it clear that he did not see any incident of rape and he also did not find the victim which her mouth gagged with gamocha and hands tied with handkerchief. When he reached the spot P.W.5 made it clear that victim (P.W.2) ran away when he enquired the reason for sitting near the fishery at late night. Therefore, the evidence of the victim (P.W.1) not inspire confidence at all and cannot be relied upon sole. She is not found to be trustworthy.
- 35. Evidence of P.W.5 is fully corroborated by P.W.6, who is the maternal Uncle of P.W.1. It is in his evidence that when he went to the house of P.W.1 and got to know from her mother that she did not return home from his house, then he went searching for her. Evidence of P.W.6 reveals that he saw P.W.5 catching hold of the accused and bringing him to his brother's house. According to the P.W.6, he heard from P.W.5 that accused and victim were sitting near his fishery and chatting. But the victim (P.W.1) told him that the accused gagged her mouth with a gamocha and he forcibly took her to the fishery of P.W.5. Evidence of P.W.6 makes it clear that P.W.1 did not give allegation of rape upon her by the accused.
- 36. Again, from the evidence of P.W.7, it comes out that P.W.1 told him that the accused tried to have sexual intercourse with her forcibly but on the arrival of P.W.5, he failed to do the act. This witness further stated that P.W.5 had gone to the fishery on the relevant night for some work and on hearing some murmuring sound, he went near the fishery and found the accused and the victim and he caught them both. The accused was brought to the house of one Giasuddin.
- 37. Furthermore, M.O (P.W.3) confirms on examining P.W.1 did not find any evidence of recent sexual intercourse on her person and any violation mark on her private parts.
- 38. From the evidence of the D.Ws, it is found that it was 'Bakri Idd' on the date of occurrence and P.W.1 had come to the house of the accused as there was love affair

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between them. But, their marriage could not be performed as they both did not attain

marriageable age.

39. From the careful perusal of the evidence in entirety, it comes out clearly that

the evidence of P.W.1 is not at all supported to any other P.Ws. There are some major

contradictions in the evidence of P.W.1, which creates a doubt regarding the alleged

incident. So, the accused is entitled to get the benefit of doubt.

40. In the result, the prosecution has miserably failed to prove the case beyond

all reasonable doubt against the accused person-Mijanur Ali. Accordingly, the accused

is held not guilty and he is hereby acquitted of the offence U/S-342 of IPC R/W Section

8 of the POCSO Act, and set at liberty forthwith.

41. His bail bond stands cancelled.

42. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 14th day of March, 2019.

Special Judge,

Kamrup, Amingaon

APPENDIX

Prosecution Witnesses:

P.w.1 is the prosecutrix

P.W.2, Golam Hussain

P.W.3, Dr. Oli Goswami

P.W.4 is Musstt Aziran Nessa

P.W.5 Rafiqul Islam

P.W.6 Malek Ali

P.W.7 Nurul Islam

P.W.8 Sri Mohit Sarmah

Defence Witnesses:-

D.W.1, Md. Mijanur Ali

D.W.2, Md. Ainuddin Ali

D.W.3, Md. Sukur Ali

Prosecution Exhibit

Ext.1 is the medical report

Ext.2 is the sketch-map

Ext.3 is the charge-sheet

Defence Exhibit

Nil.