## IN THE COURT OF SPECIAL JUDGE :: KOKRAJHAR

Present :- Sri C. Chaturvedy, AJS

## SPECIAL CASE NO.27/2017

U/S.376 IPC, R/W Sec.4 of POCSO Act

STATE OF ASSAM

Vs

Sri Dhananjoy Roy S/O Sri Sukumar Roy village Pachim Dangarkuthi P.S.Dotma District- Kokrajhar

...... Accused person.

Appearance: -

Learned Counsel for the State Mr. Manjit Ghose, Special P.P.

Learned Counsel for the defence Mr. A.K. Miah

Charge framed on 08.01.2018

Evidence recorded on 16.07.2019; 16.08.2019;

26.09.2019; 14.11.2019

Argument heard on 28.02.2020

Judgment pronounced on 04.03.2020

## **JUDGMENT**

1. The case of the prosecution is that on 11.10.2017 one Smti xxx, the mother of the victim, xxx, lodged a writen FIR at Gossaigaon Police Station alleging that accused Sri Dhananjay Ray came in contact with her when she had visited Kokrajhar Civil Hospital for the treatment of victim daughter. On 6.10.2017, accused came to their residence and stayed as guest for about 5 days. Later she came to know from her daughter, the victim, that accused has forcefully committed sexual intercourse

with her and threatened her not to disclose the matter to any one.

- 2. On receipt of the FIR, a case under Section 376 IPC read with Section 4 of the POCSO Act was registered and after completion of the investigation, a charge sheet was laid against the accused Sri Dhananjay Ray for commission of offence U/S 376/506 IPC read with Section 4 of the POCSO Act.
- 3. The accused person was summoned and on his appearance, copies of the relevant documents were furnished to him. After hearing both the sides, charges U/S 376 IPC, R/W Section 4 of the POCSO Act were framed against the accused to which he pleaded not guilty and claimed to trial. The case was later, transferred to this Court for disposal.
- 4. In the course of trial, prosecution examined 8 (eight) witnesses. At the closure of prosecution evidence, the accused person was examined U/S 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

#### **POINTS FOR DETERMINATION:**

- (i) Whether the accused committed sexual intercourse with the victim, a minor ?
- (ii) Whether the accused committed sexual intercoursw with the victim against her will or consent?

#### **DECISION AND REASONS:**

5. Pw1, xxx, the victim, deposed that the incident took place about 2 years ago. During that period she was suffering from illness and she had visited RNB Civil hospital, Kokrajhar, where she met accused Dhananjay Ray and he also came to the hospital as an attendant of a patient. After introduction with the accused, accused took the contact number of her father. After taking contact number of her father, one day he contacted her mother over telephone that he is coming to their house as a guest. Accordingly, he came and stayed 3 days in their house. While he was staying in their house, one day, while she was busy in arranging clothes, inside her room, accused came to her room and gagged her mouth and throwing her on the bed opened her Dhokhona and he also opened his gamosa and committed rape on her. She tried to resist him, but he forcibly committed rape on her. Pw 1 deposed that at that time she was alone in her house. At night when her parents returned from Lakhipuja mela, she told them everything. At night, her parents did not do anything but on the next morning they called for a village meeting. In the village

meeting, the accused was enquired by the villagers, but he did not disclose his full address before the villagers. Thereafter, her mother lodged the FIR before the police. She deposed that there was no bleeding in her private parts.

- 6. In cross examination, Pw1 deposed that she got married about one year ago. She admitted that her parents were present when the accused first visited their house. During stay in their house, the accused took lunch and dinner in their house and her mother served food. When the accused first hugged her, she shouted but then he gagged her mouth. She admitted that she does not exactly remember for how many days the accused stayed in their house. After the incident, on the next morning, there was a meeting and about 50 people were present in the meeting and she herself alongwith her parents were also present. She deposed that the incident took place in the house where her grand-mother used to sleep, but at the time of incident she was not present in their house. She deposed that they have 6 numbers of family members including her. On that day, she had also visited to Lakhipuja mela and the incident occurred after returning. She admitted that her brother Fwilao also met accused Dhananjay when he was staying in their house and met at the time of lunch and dinner. Pw 1 deposed that she has read Class V.
- 7. Pw2 xxx, the mother of victim, deposed that the incident took place around 2 years ago. During that period her daughter was suffering from illness and she had visited to the RNB Civil Hospital, Kokrajhar where she met the accused Dhananjay Ray and he also came to the hospital as an attendant of a patient. After introduction with the accused, accused took the contact number of her husband. After taking contact number of her husband, one day he contacted her over telephone that he is coming to their house as a guest. He stayed in their house to enjoy Lakhi Puja mela. On the next day, the accused also visited to enjoy Lakhi Puja mela and they were all busy in that mela. After enjoying mela, her daughter alongwith her friends and others returned to their house and at that time she was alone in the house alongwith the accused Dhananjay. On that night her daughter and the accused stayed together and on the next day morning, accused told them that he wants to marry her daughter and also wants to take her to his house. As they wanted to make enquiry about the accused, they called the villagers and a village meeting was held and the villagers wanted to enquire, but the accused did not disclose his proper identity and he told that he is unmarried. He expressed his willingness to marry the victim, but during the village bichar one master told that he knows the accused and that he is a married man. Thereafter, she lodged the FIR. In the said night she slapt her daughter and enquired the matter when she told that she had sexual intercourse

with the accused. .

- 8. In cross examination Pw2 deposed that they would give marriage of her daughter with accused had he been an unmarried person. She deposed that accused stayed in their house for 3 nights. Pw 2 deposed that they had allowed the accused to came and stay in their house as he had helped them in the hospital and he addressed them uncle and aunt.
- 9. Pw3 Saben Narzary deposed that that the accused committed rape on the victim. Thereafter, his sister-in-law lodged the FIR and police arrested the accused. In cross examination, Pw3 deposed that he had heard about the incident of rape from the villager, but he had not heard it from the victim.
- 10. Pw4 Ripon Mushahary also deposed that he had heard about the incident form his wife and that he had not seen the accused and has no personal knowledge about the matter.
- 11. Pw5 Dr. Monisha Boro Phukan deposed age of the victim would be 16-17 years old, but below 18 years and in her opinion sexual contact might or might not have taken place. In cross examinationm Pw5 deposed that history of the victim is that the victim reported that she had love affairs with the accused one year prior to the occurrence.
- 12. Pw7 Anjali Basumatary and Pw7 Jarow Narzary have no personal knowledge about the matter hence their evidence is of no utility to the prosecution case.
- 13. Pw8 Sri Meloram Basumatary, the Investigating Officer deposed about the usual steps of investigation in his examination in chief.
- 14. In cross examination, Pw8 deposed that he had not seized any educational document or birth certificate of the victim. As per statement of the victim recorded U/S 164 of CrPC as well as U/S 161 of CrPC, it is seen that she alleged that accused committed rape on her for two days ie 6.10.2017 and 7.10.2017. But the FIR is lodged only on 11.10.2017 and there is no explanation of delay neither in the statement or the victim nor in the statement made by her in the case. As per the statement of the victim, at the time of incident her grand-mother was present though she was not in a position to give statement.
- 15. Learned defence Counsel has argued that the even if there was sexual intercourse by the accused, the facts and circumstances indicate that it was consensual in nature. Secondly, the medical officer has opined that sexual contact might or might not have taken place. The learned defence Counsel has further

argued that the age of victim has been suppressed and such suppression is because of the fact that victim had attained the age of 18 years at the time of incident.

- 16. Coming to the arguments on age of the vicitm, admittedly, in the present case, there is no documentary evidence which could substantiate the proper age of the victim. The only reference to age of the victim is found in the medical opinion which states that the age of the victim would be less than 18 years.
- 17. The learned defence Counsel has relied on the case of *Md. Firoz Ahmed Vs State of Assam in Criminal Appeal No.328 of 2016*, wherein the Hob'ble High Court has held that if the age of the victim has been determined by the Doctor medically then 3 years have been added to such case. In this regard reliance have been placed on the case of *Jaya Mala v. Home Secretary AIR 1982 SC 1397*.
- 18. In her cross examination, the victim admitted that she married about one year ago. As on the date of deposition, on 16.7.2019, the victim stated her age to be 18 years. Thus, seen from the perspective of victim's deposition, she married during her minority which appears very unlikely. The fact that victim has married hence, I believe in the absence of any documentary evidence, showing precise the age of the victim, the victim cannot be treated as minor without any reasonable doubt with respect to her age moreso when a better evidence in the form of school certificate could have been adduced in this case. The likelihood of victim being a major at the time of incident cannot be ruled out.
- 19. Coming now to the argument that the relationship between the victim and the accused was consensual in nature, the victim in her statement U/S 164 of CrPC took a stand that she did not know the accused and he forcefully committed sexual intercourse with her and the same person again committed sexual intercourse with her on the following day. However, in the evidence of Pw1 and Pw2 it has become clear that accused was invited to the residence of Pw1 as guest and he stayed in the residence of Pw1 for about 3 days. It is also revealed from the evidence that during the period of stay the mother of victim had served food to the accused and the brother of the accused had also met the accused. The evidence further reveals that there was a marriage discussion between the accused and the victim but the proposal could not be materialized as it came to light the accused is already a married person. These circumstances do not indicate that accused was a stranger to the victim rather these circumstances indicate that their relationship has all elements of a love affair.

- 20. Coming now to the charge under Section 4 of the POCSO Act, I would like to point that Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.
- 21. The Hon'ble Supreme Court in the case of **Noor Aga v. State of Punjab**, (2008) 16 SCC 417, held that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused.
- 22. In the present case, the initial burden was placed on the prosecution to convincingly establish the age of the victim to be less than 18 years on the date of incident which I believe has not been established convincingly. Thus, the charge under Section 4 of the POCSO fails on this count alone.
- 23. So far as the charge under Section 376 IPC is concerned, I have reminded myself of the law as laid down in the case of *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 wherein it was held that while evaluating evidence, a Court must remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.
- 24. In the present case, though the pw 1 can be believed that accused and she had sexual relationship but it cannot be said with equal certainty that such a relationship was without the will and consent of the victim. The stay of the accused for three consecutive days in the residence of pw 1 and the talks of marriage between the accused and the victim does probabilise that there was a love afffair between the accused and the victim. In these circumstances, it cannot be said with certainty that the accused committed sexual intercourse with the victim forcefully.

- 25. Considering all aspects I believe prosecution has not been able to establish the charges beyond all reasonable doubt.
- 26. The point for determination is answered in negative.

## <u>ORDER</u>

Accused Dhanonjoy Roy is acquitted of the charge under Section 4 of the POCSO Act read with Section 376 IPC and set at liberty forthwith.

His bail bonds shall remain valid for six months.

Given under the hand and seal of this Court on this

 $4^{\text{th}}$  day of March,2020.

Dictated by

Special Judge Kokrajhar Special Judge Kokrajhar

## <u>Appendix</u>

1. <u>Prosecution Exhibits :-</u>
Exhibit-1 Statement u/s 164 CrPC
Exhibit-2 Medical report
Exhibit-3 FIR

Exhibit-4 Charge sheet

2. <u>Defence Exhibit</u> Nil

# 3. Prosecution Witness

P.W.1 xxx victim

P.W.2 xxx, Mother of the victim

P.W.3 Sri Saben Narzary

P.W.4 Sri Ripon Mushahary

P.W.5 Dr. Monisha Boro Phukan

P.W.6 Sri Sri Anjali Basumatary

P.W.7 Sri Jarow Narzary

P.W.8 Sri Meloram Basumatary

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4.<u>Defence Witness</u> Nil

5. <u>Court witness</u> Nil

Special Judge Kokrajhar