

IN THE COURT OF THE SPECIAL JUDGE ::::: BONGAIGAON

Special (P) Case No. 11 (M)/2018.

U/S 8 of POCSO Act.

(Arising out of Bongaigaon P.S Case No. 224/2017)

State of Assam

Vs.

Raizuddin Ali....Accused.



PRESENT :- Sri Binod Kr Chetri,
Special Judge (under POCSO Act),
Bongaigaon.

Appearance :-

For the State : Smti R. Choudhury, Special Public
Prosecutor.

For the accused: Sri M.Islam, advocate for the accused.

Date of Argument : 27.06.2019.

Date of Judgment : 20.07.2019.

JUDGMENT AND ORDER

1. The prosecution case, in short, as per FIR dated 07.06.2017 of informant, Smti Nilima Ray is that on that day at about 12.30 P.M the accused Raizuddin came to her house in the pretext of selling fish and finding her daughter Bhanita Ray, aged 15 years alone embraced her forcefully and touched her private part and tried to rape her. Hearing the screaming of her victim daughter villager caught hold the accused and handed over to Police.

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2. On receipt of the FIR from the informant, the O/C, Manikpur Police Station, registered a case being Manikpur Police Station Case No. 224/2017 under section 376/511 IPC read with section 8 of POCSO Act and entrusted SI, Uttam Kr Brahma to investigate the case. Accordingly, the Investigating Officer recorded the statement of the witnesses and on completion of investigation, laid charge-sheet against the accused Raizuddin under section 376/511 IPC read with section 8 of POCSO Act.
3. On perusing police report and hearing both sides, having found a prima facie case, charge under section 8 of POCSO Act was framed against the accused. The accused pleaded innocence when charge was read over and explained to him and claimed for trial.

Point for determination:-

Whether on 07.06.2017 at about 12.30 P.M at village Adlaguri under Manikpur Police Station committed sexual assault on the child victim Bhanita Ray and thereby committed an offence punishable under section u/s 8 of POCSO Act ?

4. In this case, to bring home the charge against the accused, prosecution has examined as many as 13 (thirteen) witnesses. Statement of the accused was recorded u/s 313 Cr.P.C in which, he denied all the allegations levelled against him and pleaded innocence.
5. Heard the learned counsels of both sides.

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Discussion, decision and reasons there of:-

6. Before proceeding further let me apprise the evidence on record to arrive at a just decision of the case.

7. PW 1 (Nilima Ray) deposed in her evidence that on the day of the incident at about 12.30 P.M the accused came to her house to sell fish and not having the change he left. She deposed that after that she went to a nearby house and in her absence the accused came to her house to take the money and at that time her victim daughter was alone in the house and when her victim daughter was giving the money to the accused, the accused embraced her for which she screamed and hearing the screaming the informant and nearby people came and the accused fled away. She deposed that the villagers chased the accused and caught hold of him and the accused admitted that he embraced the victim girl and admitted his guilt before the public. She deposed that at that time her daughter was 15 years old and was reading in class X. She lodged the ejahar (Ext 1).

During cross-examination she stated that she does not know her exact age, may be 35 or 40 years and after one year of her marriage her elder daughter was born. She stated that Police did not seize the birth certificate of her victim daughter and she did not remember the year of birth of her victim daughter. She denied the suggestion that she told her victim's daughter age as 15 years on guess. She denied the suggestion that at the time of selling fish in her house her husband without paying the money took big fishes and when the accused protested he beat the accused and she filed the false case. She denied the suggestion that presuming the accused may file case against them due

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to assault on the accused they filed this false case.

8. PW 2 (the victim girl), deposed that the informant is her mother and on 07.06.2017 at about 12.30 P.M the accused came to sell fish to her house and they purchased fish worth of Rs.15.00 and she gave note of Rs. 100.00, the accused said that he did not have change and told that after selling remaining fish he will come to take the money. At the time of purchase of fish, the informant was present in the house. Her mother told her to give the money when the accused would come and went to nearby uncle's house. At about 1.00 P.M the accused came with change then she gave the note of Rs. 100.00 and at the time of returning the change the accused pressed her left breast, then she screamed and hearing the screaming her mother came and the accused fled running. Seeing the accused running away, her mother and the villagers chased him and caught hold of him and the accused admitted his guilt and beg pardon. The father of the accused was informed and Police came and took the accused, her mother lodged the ejahar and her statement (Ext 2) was recorded in the Court. At the time of incident she was reading in class IX and aged 15 years.

During cross she stated that she has her parents, one elder sister and one younger sister at home and on the day of the incident her sisters were in school. She did not remember her date of birth and she failed once in L.P. School and twice in class IX and she stated her age 15 years on guess. She denied the suggestion that she was 18 years at the time of incident and she gave statement as tutored by her father. She denied the suggestion that her father took big fishes from the

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container of the accused without paying money and when the accused protested her parents beat the accused and filed this false case. She stated that her father was not at home on the day of the incident. She denied the suggestion that the accused did not touch her breast and the accused did not admit his guilt and beg pardoned.

9. PW 3 (Bhupen Ray) deposed that the informant is her wife and on the day of incident he was at Guwahati where he works as security guard and on the day of the incident at about 3.00 P.M her victim daughter over phone informed him that one fish seller came and embraced her, touched her chest and attempted to rape her. He informed her that he cannot come on that day and would come on the next day and on the next day at about 8.00/8.30 A.M he came home and before his arrival ejahar was lodged. Police came and enquired him and her wife let him know about the incident. At the time of incident her daughter was 15 years old and reads in class IX.

During cross he stated that he married in the year 1985-86, may be 1985 and after two years of marriage her elder daughter was born. Later on he stated that he married in the year 1995 and he did not remember the date of birth of her victim daughter and her victim daughter may be 15 years. He denied the suggestion that when the accused was going to sell fish in front of the road of their house he took big fishes from his container without paying money and on being protested he assaulted him. He stated that he was not at home and had not seen the accused and he denied the suggestion that the accused did not commit any offence.

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PW 4 (Kandarpa Ray) deposed that the informant is

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from her own village and the incident took place about one year ago and on that day at about 2.30 P.M he heard that some incident took place with the daughter of the informant and the Muslim boy was apprehended.

During cross he stated that he do not remember the name of the person from whom he heard about the incident.

11. PW 5 (Har Kamal Ray) deposed that the informant is from their village and he does not know the accused. The incident took place about one year ago and he heard that there was some incident with the daughter of the informant.

12. PW 6 (Minu Ray) deposed that she knows the informant and saw the accused on the day of the incident and that on that day at about 12.00 P.M the informant came to her house and informant's daughter was alone in the house. The informant's house is at the back side of her house and hearing scream of the victim they ran to the informant's house and the nearby people also came and saw the victim weeping and on being asked the victim told that the fish seller, accused touched her breast. The people chased the accused and caught hold of him and the accused admitted that he touched the breast of the victim and the people handed over the accused to the Police and the mother of the victim girl filed the case.

During cross-examination she stated that she was preparing rice at that time and hearing alarm came out. There is a boundary fencing and there is provision in the back side for ingress and egress. The house of the informant is besides the road and hearing hulla reached there after a minute. The nearby people also arrived, but did not find the boy as he fled away and was caught hold from about a distance

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of one kilometer away. The informant is her sister-in-law and the victim is her niece. She denied the suggestion that on the day of the incident the victim and her father took big fishes from the container and on being protested they assaulted the accused and filed the false case. She denied the suggestion that she did not hear the alarm of the victim and that the victim did not tell her weeping that the accused touched her breast.

13. PW 7 (Himani Ray) deposed that the incident took place about one year three months ago and on the date of the incident at about 12.00/12.30 P.M hearing alarm of the victim the public alongwith she came out and went to the house of the victim where the victim said that the accused came to sell fish and having no change of Rs. 100.00 the accused said that he would come to take the money after selling the fish and came in the noon. At that time mother of the victim was not at home and when the victim went to give the money the accused touched her breast then the victim shouted 'ma-ma' and the accused fled away. The public chased the accused and caught hold of him. The accused admitted his guilt and the accused was handed over to Police.

During cross she admitted that she did not see the accused when came to sell the fish as well as when he came to collect the money and she did not find the accused when she went to the house of the victim. The victim is her niece and at that time she was preparing food. She denied the suggestion that the accused did not admit his guilt and the victim did not tell her that the accused touched her breast.

14. PW 8 (Kishori Patigiri) deposed that the house of the informant is near to his house and he knows the accused and that the incident took place in the month of June, 2007. On that day he went to

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Bijni and at 2.00/2.30 P.M the O.C of Manikpur Police Station rang him up being VDP Secretary and told that the boy who came to sell the fish touched the breast of the informant's daughter. He went to the house of the informant and on being enquired from the neighbours came to know about the incident.

During cross examination he stated that the informant has the habit of indulging in tall talk and some time tells lie also. She is also in the habit of making false allegations. Neither the informant nor the victim told him about the incident. He does not know whether the case is true or false but he has doubt.

15. PW 9 (Dwipen Ray) deposed that he knows the accused as well as the informant and about one and half year ago at noon time hearing hulla he came out and had seen many people were proceeding towards the house of the informant and from the villagers he came to know that the accused touched the body of the victim and after about two hours Police came and took the accused to Police Station.

During cross examination he stated that he did not remember from whom he heard that the accused touched the body of the victim. Neither the informant nor the victim told him about the incident and he denied the suggestion that he did not hear that the accused touched the body of the victim.

16. PW 10 (Rabin Ray) deposed that he knows the informant but did not know the accused person and on the day of the incident when he returned home he heard that one fish seller touched the body of the daughter of the informant.

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During cross examination he stated that the informant did not report him about the incident and he heard the same from his wife.

17. PW 11 (Astomi Ray) deposed that she knows the informant and the incident took place about one and half years ago and the daughter of the informant told that the accused touched her breast and after the incident the informant and one village boy caught hold the accused.

During cross-examination she stated that she did not know the village boy who caught the accused and had not seen the accused near the house of the accused. She denied the suggestion that the accused did not tell her that the accused touched her breast. She did not remember the date of incident.

18. PW 12 (Dr Hafiza Ahmed) deposed that she was working as Medical and Health Officer I on 08.06.2017 and on that day at around 2.30 P.M she examined the victim, aged 15 years and on examination found no injury and as per x-ray report the age of the victim is above 17 years and below 20 years. She proved the medical report as Ext 3.

19. PW 13 (SI, Uttam Kr Brahma) deposed that on 07.06.2017 he was posted as Attached Officer at Manikpur Police Station and on that day on receipt of an ejahar (Ext 1) filed by the informant he himself took up the investigation, recorded the statement of the informant, arrested the accused, on next day i.e on 08.06.2017 sent the

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victim at Bongaigaon Civil Hospital for medical examination and got recorded her statement u/s 164 Cr.P.C in the Court, visited the place of occurrence, prepared the sketch map of the place of occurrence (Ext-4), recorded the statement of the witnesses, collected the medical report of the victim and on completion of investigation submitted charge sheet (Ext 5) against the accused Raizuddin Ali u/s 376/511 IPC read with section 4 of POCSO Act.

During cross-examination he stated that he did not collect the birth certificate of the victim and denied the suggestion that he did not visit the place of occurrence. He denied the suggestion that he did not perform the investigation properly.

20. Learned counsel for the accused highlighted the following points:

- (i) No eye witness to support the version of PW 2 (victim) ;
- (ii) PW 1 (Informant) not reliable as reflected from the evidence of PW 8 ;
- (iii) Medical evidence regarding age of the victim girl above 17 years and below 20 years :
- (iv) Contradictions.

21. Coming to the age of the victim girl, PW 12 (doctor) examined her during investigation and opined her age as above 17 years and below 20 years. Ext 3 is the medical report and the age of the victim

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girl was ascertained after radiological examination.

22. The age of the victim girl as opined by PW 12 finds corroboration from the evidence of the victim (PW 2), informant (PW 1) and the father of the victim girl (PW 3). PW 1 while adducing evidence on 28.6.2018 mentioned her age as 35 years. The alleged incident is of 07.06.2017 and being so at the time of the incident her age was 34 years. In her cross-examination she stated that she can not say whether her age is 35 years or 40 years. After 1 $\frac{1}{2}$ years of her marriage, her first daughter was born and after one year of that she gave birth to her second daughter i.e. PW 2. She stated that PW 2 was admitted in the school at the age of 3 years and then she says she cannot say the specific age and that PW 2 failed twice in class IX. PW 2 while adducing her evidence on 28.6.2018 mentioned her age as 16 years and being so she was 15 years of age at the time of incident i.e one year back. She stated in her cross that she failed once in L.P School and twice in class IX prior to the incident.

23. PW 2 went to the school at the age of 3 years. It took 3 years to pass out the L.P school and she failed once, it took four years. It took 9 years to reach class I after L.P. school and having failed twice in class IX it took 11 years. By this calculation her age is $3+3+1+9+2 = 18$ years at the time of incident. Further more it is not specific that she went to school at the age of 3 years.

24. Going by PW 3's evidence, she stated that she got married in the year 1995 and after 2 years his first daughter was born and after two years of it his second daughter. Being so, P.W 2 was born in



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the year 1999. Even if her date of birth is taken as 01.01.2000 she was aged 18 years 05 months 06 days at the time of alleged offence on 07.06.2017.

25. PW 1 stated that the birth certificate of PW 2 are available and she cannot say the exact age of PW 2 when she joined school. If the birth certificate was available then why the Investigating Officer did not seize the same. In a case under the provision of POCSO Act, it is the duty of the prosecution to establish the age of the victim girl and without the proof of the same the provision of the POCSO Act is not applicable. In the background of the controversy of the age of the victim girl and her age found to be above 18 years from the evidence of PW 2 and her parents and PW 12 (doctor), withholding the birth certificate from being seized and brought in evidence draws presumption u/s 114(g) of the Evidence Act that the evidence which could be and is not produced would, if produced, be unfavourable to the person who holds it.

26. There are two major factors that are usually required to be proved in a POCSO trial. The first is the minority of the victim and second the actual commission of the offence. Age is the prerequisite for a charge under POCSO.

27. Prosecution has failed to establish the age of the victim girl to be below 18 years of age whereas to the contrary the evidence on record suggests the age of the victim girl to be above 18 years at the time of alleged incidence.

28. Learned defence counsel has submitted that there is no eye witness to the alleged incident to support the version of PW 2. In



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a case the quality of the evidence counts and not the quantity. Testimony of sole witness is sufficient to convict the accused if the evidence of the witness is cogent, sufficient and reliable. Further more, prosecutrix in a rape case is an injured and her evidence is not to be equated with a normal witness. In the given case the prosecutrix is the victim and she suffered the trauma of rape or molestation and her evidence is not required to be corroborated by other independent witnesses. Asking for corroboration would be an insult to her injury. Court is to see the attending circumstances under which the prosecutrix has suffered and adduced her evidence. In the given case some sort of corroboration is required.

29. This case is registered on the basis of the FIR (Ext 1) of PW 1. But the creditability of the evidence of PW 1 is put in question from the evidence of PW 8, who in his cross-examination stated that PW 1 is in the habit of making a hill out of mole and she has also in the habit of making false statement and earlier occasions she has made false allegation against others. PW 8 is the VDP secretary of the village and he has no reason to give evidence against the habit of PW 1.

30. On the day of alleged incident the accused came second time to the house of the informant to take money for the fish, purchased by PW 1 in the morning. As per prosecution version PW 2 was alone in the home at that time and when she came out of the house to give money the accused touched her breast. Ext 4 is the sketch map of the incident and the place of occurrence marked as "A" which is an open space outside the house.



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31. PW 1 in her evidence deposed that on hearing scream of her daughter she rushed home from the nearby house and on being enquired her daughter, PW 2 informed her that the accused has embraced her. She has not deposed that her daughter told her that the accused has touched or pressed her breast. In her FIR an exaggerated version has been given that the accused forcefully embraced her daughter, touched her private part and tried to rape her. Going by the version of PW 1 in her FIR (Ext 1) and her testimony as PW 1 there appears vast difference between the description of offence narrated at two different occasions. This coupled by the evidence of PW 8 as to her habit of making exaggerated and false allegation, makes the testimony of PW 1 not believable.

32. Contrary to the evidence of PW 1, PW 2 has mentioned that the accused has pressed her left breast. Her version of the incident don't find place in the FIR (Ext 1) of her mother PW 1.

33. On the foregoing discussion the prosecution evidence is not free from doubt and cannot be relied upon to bring home the charge against the accused, more so, on the background of the age of the victim girl to be above 18 years, as mentioned above.

34. Presumption u/s 29 and 30 of the POCSO Act arises only when the prosecution establishes the fundamental facts, the age is one of such fact and the other the actual commission of the offence. In a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved. In order to prove



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a contrary fact, the fact whose opposite is sought to be established must be proposed first. Having failed to do so, prosecution failed to bring home the charge u/s 8 of the POCSO Act. Hence the accused Raizuddin Ali is acquitted of the charge u/s 8 of the POCSO Act and set at liberty forthwith.

35. Given under my hand and the seal of this Court on
the 20th day of July, 2019.



Dictated and corrected by me,

Binod Kr Chetri
(Binod Kr Chetri)
Special Judge,
Bongaigaon
Special Judge
Bongaigaon

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(Binod Kr Chetri)
Special Judge
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A P P E N D I X

Prosecution witness:

PW 1 – Nilima Ray.
PW 2 – Victim.
PW 3 – Bhupen Ray.
PW 4 – Kandarpa Ray.
PW 5- Har Kamal Ray.
PW 6- Minu Ray.
PW 7- Himani Ray.
PW 8- Kishori Patgiri.
PW 9- Dwipen Ray.
PW 10- Rabin Ray.
PW 11- Astomi Ray.
PW 12-Dr Hafiza Ahmed.
PW 13- SI, Uttam Kr Brahma.



Defence Witness:

Nil.

Documents Exhibited by Prosecution:

Ext-1 Ext 1
Ext 2 Statement of the victim.
Ext 3 Medical report.
Ext 4 Sketch map of the place of occurrence.
Ext 5 Charge sheet.

Material Exhibited by prosecution:

Nil.

Defence Exhibit:

Nil.


(Binod Kr Chettri)
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