IN THE COURT OF THE SPECIAL JUDGE ::::::: NALBARI

Present: Smti S. Bhuyan Special Judge

Nalbari.

Special (P) Case No: 40/17 u/s- 4 and 6 of the POCSO Act.

State of Assam

-Vs-

Umakanta Barman

S/O-Late Padma Ram Barman

R/o, Vill-Ponar Kaunia

PS-Ghograpar, Dist-NalbariAccused person

Appearance :-

For the prosecution : Mr. K. Sarma, Special PP For the defence : Mrs. D. Baruah, Advocate.

Date of evidence : 21/08/19, 30/10/18, 31/10/18,

13/12/18, 22/01/19, 11/09/19

Statement of accused recorded: 24/10/19 Date of Argument : 28/11/19 Judgment Delivered : 12/12/19

JUDGMENT

- The case of the prosecution as revealed from the ejahar 1. lodged by informant vide Ext- 2 is that on 05/08/17 at about 9 pm, accused persons gave chocolate to his minor daughter Miss 'X' victim of the case (name changed as the case has been registered under POCSO Act) and then in way of making love he her dress and bite on her chest and sexually assaulted the victim.
- 2. O/C Ghograpar PS on receipt of the ejahar, registered Ghograpar PS case vide Ghograpar PS case No. 135/17 u/s-376(2) (i) IPC read with section-4 of the POCSO Act and lynched

Special (P) Case No:40/17

investigation. He recorded the statement of victim and informant 1 of 11

at the police station. Thereafter, he sent the victim to SMK Civil Hospital for her medical examination and IO of the case visit place of occurrence, drawn sketch map of the place of occurrence, recorded statement of other witnesses, seized birth certificate of the victim girl and then produced her before the court to record her statement u/s-164 Cr.P.C, arrested the accused, collected the medical report of victim and after completion of investigation submitted charge sheet against the accused Umakanta Barman u/s-376(2)(i) IPC and section 4 of the POCSO Act vide Ext-5.

- 3. On receipt of the charge sheet my then learned predecessor took cognizance and after furnishing copies to the accused, framed charge u/s-4 and 6 of the POCSO Act against the accused Umakanta Barman and when charges are read over and explained to the accused he pleaded not guilty and stood for trial and granted bail.
- 4. In order to prove the charge against the accused person, prosecution altogether adduces evidence of 9 no's of witnesses including the informant, victim, M/O and I/O of the case and exhibited 6 no's of documents. PW-1, Jonali Barman, PW-2, Miss 'X' (victim), PW-3, Dilip Barman, PW-4, Sukra Barman, PW-5 Dharma Barman, PW-6, Junu Barman, PW-7, Minati Hazarika Das, PW-8, Dr. Doli Gogoi (M/O) and PW-9, Babul Kr. Medhi (I/O). Ext-1, seizure list, Ext-2, Ejahar, Ext-3 Medical Report, Ext-4 radiological report, Ext-5 charge-sheet, Ext-6 sketch map of the place of occurrence. After closures of the evidence of the prosecution, statement of the accused Umakanta Barman recorded u/s-313 Cr.P.C and accused plea is of total denial however, he declined to adduce evidence in support of his plea of denial.

POINTS FOR DETERMINATIONS ARE:-

(i) Whether accused Umakanta Barman committed penetrative sexual assault upon Miss 'X'?

(ii) Whether accused committed aggravated penetrative sexual assault upon Miss 'X', as defined under section 5 (I) of the POCSO Act?

Argument

- 5. I have heard argument of learned counsel for both sides. It has been argued by learned Special PP that prosecution beyond all reasonable doubt established the case of the prosecution and minor contradiction available in the testimonies of PWs which is ignorable and submitted that in offence of rape and sexual assault on woman and child there may be delay in lodging the ejahar but that does not defect and damage the prosecution case.
- 6. Refuting the same learned defence counsel submission that there is major contradiction in the statement of PW-1, mother; PW-5, father with victim of the case and there is sharp contradiction in the statement of mother and father of the child with regard to presence of the accused at the house of the informant. It is stated by PW-1 when her daughter disclosed the incident, her husband not present but PW-5 her husband stated victim disclosed incident to him and accused left his house after he enters in the house. But wife evidence is that she enter into the room after washing the utensils and asked her daughter if anything happened to her daughter and her victim daughter disclosed the incident and at that time her husband was not present and this is a major contradiction in the statement of PW-1 and PW-5. Learned counsel further submitted section 6 of the POCSO Act is not at all attracted as accused is not the relative of victim. Learned counsel further submitted if accused has inserted his penis into the vagina of victim and the victim who stated to be 5 years old girl would have sustained some type of injury but medical report does not shown any injury of her private parts and therefore section 4 and 6 of the POCSO Act does not attract and this is a false case lodged against the accused after hatching a plan for which there was delay in lodging the ejahar and ejahar Special (P) Case No:40/17 3 of 11

was lodged on 06/08/17 at 7.30 pm that too without any reason for causing delay and therefore, prosecution case is fatal and story narrated by the prosecution and testimonies of victim who is child witness is not believable and caste doubt in the prosecution case.

DISCUSSION, DECISION AND REASON THEREOF:

- 7. The statement of PW-1 is that accused being co-villagers, her husband called him khura. PW-2 victim deposed that accused is their neighbouring people. PW-5 informant of the case in his cross stated accused Umakanta is not his relative. PW-1 in her cross stated that accused is not their relative and he is a friend of her husband. Thus, from the statement of PW-1, PW-2 and PW-5 it is clear that accused is not their relative.
- 8. The age of the victim mentioned in the ejahar as 5 years old girl. Victim on the date of adducing her evidence stated she was 6 years old. Incident took place on 05/08/17 and her statement recorded on 21/08/18. At the time of recording statement u/s-164 CrPC, she stated her age is 5 years. PW-8, Dr Doli Gogoi examined victim on 06/08/17 and during medical examination she advised xray for age determination and as per radiological report the skeletal age of the victim is below 5 yrs. Defence declined to cross examine her. PW-9 is the I/O of the case. He deposed during investigation he seized birth certificate of the victim on being produced by informant. PW-1 & PW-5 stated police seized birth certificate of their daughter on being produced by PW-5. The copy of the birth certificate which was seized by I/O vide Ext-1 seizure list shows date of birth of victim girl as 13/09/12. Age of the victim as per her birth certificate on the date of incident is 4 years 10 months and 22 days. There is no cross on the point of date of birth mentioned in the birth certificate of the victim and age of the victim girl by the defence. Therefore, I have acted upon the age as mentioned in the date of birth certificate that corroborated radiological evidence too and from the date mentioned in the date of birth certificate and radiological evidence pointed age of the victim on the date of incident is below 5 years.

- 9. Now let me decide whether there is penetrative sexual assault upon the victim girl who is below 12 years as per section 5 clause (n) of the POCSO Act and as defined u/s-3 of the POCSO Act coming out or not from the evidence on record.
- 10. PW-1 deposed on the date of incident while she was preparing dinner at about 9 pm accused came to her house and told her that he will take dinner at their house. At that time her victim daughter was studying. She stated they have one room where one bed is present and her victim daughter was studied on the said room. Near the bed there is table, and she served dinner in the said table to the accused. After finishing of the dinner by the accused, she went to wash her hand and feet in the back side of her house at tube well and returning back to the room she asked accused to go to his home and accused left. As her daughter was sitting on the bed near the accused after finishing of dinner by the accused, so she asked her daughter after departure of accused from her house what accused was doing. To that her daughter told that accused insert his penis to her vagina, bite on her chest, kiss on her female private parts and gagged her mouth and then her husband came. After disclosure of the incident to her by her victim daughter she disclosed incident to her husband and hearing the incident from her, her husband out of anger run towards the house of accused and after sometimes her husband returned and told her that accused asked forgiveness and told that he has committed mistake. On next morning her husband lodged ejahar.
- 11. In cross stated she went with her husband to lodge the ejahar and her husband lodged the ejahar at about 9 am and police recorded statement of her and her husband at the police station. At the time of lodging the ejahar, Panikanta Barman, Lohit Barman, Ananta Kalita and Anjan Barman accompanied them to the police station. The house of accused is after 7 houses from her house. House of her 'dewar' (brother-in-law) and khura of her husband present in the same courtyard and they live with their family. She have another three years old child. They do not have Special (P) Case No:40/17

electricity connection at their house. Her husband did not reach home while accused was taking meal at her house (dinner) and the wash room is about 10 feet away from her bed room and after cleaning her hand and feet, she entered into the room after 20 minutes. They have two rooms, in one room they have a bed with table to take their food and other room is living room where guest sit and kitchen is near their bed room.

- 12. PW-2 is the victim of the case. Her evidence is that on the date of incident accused came to their house. At that time she was studying. Accused have dinner at their house and her mother went to clean the utensils after accused taking dinner at their house and at that time accused did indecent work with her. She deposed accused insert his penis into her vagina, she sustained pain, he bite on her chest, kissed on her vagina, thereafter he offered her chocolate after that her mother came and accused left. She told incident to her mother when she was asked by her mother. On next day she come to the police station with her parents and police produced her before the Magistrate to record her statement u/s-164 CrPC.
- 13. In cross stated she studied up to 10 pm from evening. Her sister was also in the bed. She played while studying. Her mother served dinner to accused on the table present near the bed. Her father took rice with accused and after taking rice her father went to attend puja. All the family members take dinner when dinner served to accused. Her mother disclosed incident to her father when he came home and her father went in search of accused with a dao, thereafter, all went to bed to sleep. Her bardeuta came on next day at their house and none came at night. She denied that accused left her house after the dinner and did not kiss on her vagina, bite on her chest, offered her chocolate, insert his penis into her vagina.
- 14. Pw-5 is the informant. His evidence is that on 05/08/17 incident took place. He visited the house of Sukra Barman for Narayan puja at about 7-8 pm and returned home at about 8.10 Special (P) Case No:40/17 6 of 11

pm with his brother Dilip barman and coming home noticed accused Umakanta Barman sitting in their courtyard. He gave prasad to him and told him to have dinner at their house. Thereafter both of them take bhat (dinner). After having dinner he goes outside to urinate. On road meet Girin and talk with Girin and after 10/15 minutes he returned home and find Umakanta Barman at his house. When he entered in to his house accused came out. He deposed when he reached home, his wife was cleaning utensils at the tube well and his daughter was present inside the house and his daughter told that accused gave her chocolate and then took her on his lap and opening her dress he bites on her chest, put off her panty and insert accused penis into her vagina. At that time his wife entered into the room from tube well. Thereafter, his 'nobou' (wife of his brother) came. His daughter disclosed incident to her mother. Immediately, he went to the house of Umakanta and accused seek forgiveness and he returned home. In the next morning told incident to villagers and village people advised them to take help of law. So he lodged the ejahar. Ext-2 is the ejahar.

- 15. In cross stated incident took place within $\frac{1}{2}$ to 1 hour after his return home from the puja. They have three rooms and the room where they take food one bed is present where his daughter and wife sleeps and his younger daughter was also present in the said bed.
- 16. PW-8 M.O. stated on examination of the patient Miss 'X', she found no injury on her body and private parts, hymen was intact and in her opinion no evidence of recent sexual intercourse. She examined the patient on 06/8/17 at 9.50 pm.
- 17. Statement of PW-4 pointed the Narayan puja was performed at his house on the date of incident and he invited Dharmakanta Pw-5, and Dilip PW-3 to the puja and they came to his house at about 8-9 pm and after 1 hours returned back to their house. PW-3 Dilip and PW-5 informant stated they went to the house of PW-4 Sukra for the Narayan puja and returned home at about 10 pm. PW-1 stated that her husband went to the house of Sukra with her Special (P) Case No:40/17 7 of 11

brother in-law for Narayan puja. Pw-1 deposed at that time accused came to their house. The statement of PW-3 and Pw-5 pointed when they came to their house they noticed accused Umakanta was sitting at the courtyard of their house and they offered Prasad. Pw-5 stated he asked Umakanta to take his dinner at his house. Pw-3 stated Umakanta entered in to the house of Dharmakanta for taking dinner. The part of Umakanta taking dinner in the house of informant not denied by the accused. Pw-1 stated that it was accused who told her that he will take his dinner at their house. She stated accused take dinner alone and she went to clean herself on the backside of her house after accused finished his dinner but her daughter PW-2 the victim of the case and her husband PW-5 stated that PW-5 and accused took dinner together. PW-1 in her statement stated that her husband came home when her daughter finished disclosing incident to her. But statement of PW-2, PW-3 and PW-5 informant pointed that PW-5, returned home after puja and offered Prasad to Umakanata who was sitting in their courtyard and PW-5 and accused took dinner together at his house. The statement of PW-2 and PW-5 is that PW-5 was present when accused was taking dinner. Pw-5 stated after finishing his dinner he went to road to urinate where he meet Girin and after 10/15 minutes he came back and after his entry into the room accused came out and at that time his wife was at tube well site. But PW-1, his wife stated after washing her hands and feet she entered into the room, and she noticed accused was sitting on the bed near her daughter. But PW-5 evidence pointed when accused leave his house his wife was cleaning utensils at the tube well. PW-5 deposed when he entered into the house his daughter narrated the incident and at that time his wife came and thereafter his nobou but PW-1 stated she asked her daughter what accused was doing to that her daughter narrated the incident that accused bite on her chest, insert his penis in to her vagina and sexually assaulted her.

18. PW-6 is the wife of PW-3, nobou of PW-5. Her evidence is that on the date of incident at about 7 pm she noticed accused at their courtyard then she entered into her house and after taking dinner when she went to sleep heard some noise in the courtyard Special (P) Case No:40/17 8 of 11

of the informant then she came out and when inquired victim told her that accused did bad work with her and at that moment she went towards the road and meet Sukra Barman and she informed Sukra that accused did bad work with the victim.

- 19. The statement of PW-6 does not pointed that she entered into the house of pw-5. The statement of PW-1 and PW-5 pointed their daughter disclosed incident in their room and pw-5 evidence is while his daughter was telling incident to him his wife was in tube well cleaning utensils and wife said she entered in to the room after the work and on asking her daughter she disclosed incident and she did not state that 'nobou' PW-6 came at that time. PW-6 evidence also not pointed that she entered into the room of PW-5 and PW-1. There seems sharp conflict in the statement of PW-1 and PW-5 on the point of their presence in the room and their daughter disclosing incident to them. Pw-5 evidence pointed one thing that his daughter disclose incident to him, at that time his wife was cleaning utensils but his wife stating that daughter disclosed incident to her and her husband was absent. And In my opinion this is a major contradiction in their statement.
- 20. The victim girl is below 5 years. She stated accused insert his penis into her vagina and bite on her chest but there is no bite mark found on her chest. If a penis is inserted into the vagina of a 5 years old girl then she would have sustained injury on her private part. But this part is also missing in the case.
- 21. The statement of PW-1, PW-2, Pw-3, PW-4 and PW-5 with regard to going to the house of accused and then came to his house in calm and quite and then all goes to sleep and on next day at about 7.30 pm lodged ejahar give a fishy smell in the prosecution case which makes prosecution case unbelievable beyond all reasonable doubt together with the contradictory statement of PW-1 and PW-5 with regard to their presence and disclosure of the incident caste doubt in the prosecution case.

22. In view of the aforesaid discussion, I come to my definite

finding that prosecution evidence is not sufficient enough to hold

accused Umakanta Barman guilty of committing of offence u/s-4

and 6 of the POCSO Act and I hold prosecution failed to bring

home the charge u/s-4 and 6 of the POCSO Act beyond all

reasonable doubt and accused entitled benefit of doubt.

23. Accordingly, accused Umakanta Barman is acquitted from

the charge of section 4 and 6 of the POCSO Act and is set at

liberty.

24. However, his bail bonds remain stands for next 6 (six)

months u/s-437-A CrPC.

Judgment is given under my hand and seal of this court on

this the 12th day of December, 2019.

(Smti S. Bhuyan) Special Judge, Nalbari

Dictated & corrected by me

(Smti S. Bhuyan) Special Judge, Nalbari

Typed by: Biswajit Bhattacharjya Copyist

APPENDIX

A. <u>Prosecution witnesses</u>

PW-1, Jonali Barman,

PW-2, Miss 'X' (victim),

PW-3, Dilip Barman,

PW-4, Sukra Barman,

PW-5 Dharma Barman,

PW-6, Junu Barman,

PW-7, Minati Hazarika Das,

PW-8, Dr. Doli Gogoi (M/O)

PW-9, Babul Kr. Medhi (I/O).

B. <u>Defence witness</u>

NIL

C. Prosecution Exhibits

Ext-1, seizure list,

Ext-2, Ejahar,

Ext-3 Medical Report,

Ext-4 radiological report,

Ext-5 charge-sheet,

Ext-6 sketch map of the place of occurrence.

D. <u>Defence Exhibit</u>

Nil.

(Smti S. Bhuyan) Special Judge, Nalbari