## IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

## SPECIAL POCSO CASE NO. 64 of 2018

Under section 448 of IPC and Section 18 of POCSO Act.

## **State of Assam**

-Vs-

Sri Nayan Boro ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Mr. P.Singh Sethi, Legal Aid counsel.

Date of Argument : 29-05-2019 & 11-06-2019.

Date of Judgment : 14-06-2019.

#### **JUDGMENT**

1. The prosecution case as has been unfurled in the FIR, is that on 07-07-2018 at around 4 p.m. in absence of the family members of the informant, the accused Nayan Boro attempted to commit rape on his daughter "X" and also threatened to kill the whole family if she disclosed the matter to someone else.

- 2. On receipt of the FIR **(Ext.1)** on 08-07-2018 from the informant, the victim's father, the Officer-in-charge of Rangapara PS registered the case being Rangapara P.S. Case No. 119/18 u/s 448/354(A)/506 of IPC read with section 12 of POCSO Act and laid investigation of the case. During investigation, the Investigating Officer (PW 7) recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid chargesheet against the accused Nayan Boro u/s 448/354(A)/506 of IPC read with section 12 of POCSO Act.
- 3. On appearance of the accused person before this Court, after furnishing the necessary copies as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge u/s 448 of IPC read with section 18 of POCSO Act against the accused Nayan Boro and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- **4.** To substantiate the case, prosecution examined as many as seven witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and taking the plea of innocence stated that though he had gone to the house of the informant but after some time he left his house along with the son of informant and did nothing to the victim girl as alleged.
- I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.
- **6.** The points for decision in this case is that -
  - (1) Whether the accused Nayan Boro on 07-07-2018 at about 4 p.m., at Hatidubigaon Phuluguri under Rangapara police station committed house trespass by entering into the house of the informant with intent to commit an offence and thereby committed an offence punishable u/s 448 of IPC?

(ii) Whether the accused on the same date, time and place, attempted to commit any offence punishable under the POCSO Act or to cause such an offence to be committed, and in such attempt, does any Act towards the commission of the offence, on Miss "X", aged about 12 years and thereby committed an offence punishable u/s 18 of POCSO Act.

## Reasons, Decisions and reason for decision.

- **7.** Mr. M. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of house trespass and sexual assault on the victim girl child. He further submitted that the evidence of the victim child is enough to convict the accused person.
- **8.** Controverting the said argument, Mr. P.Singh Sethi, the learned legal Aid Counsel appearing for the accused, submitted that with the discrepancies in the evidence of the witnesses, prosecution failed to establish the charge against the accused beyond all reasonable doubt and as such the accused is entitled to acquittal.
- **9.** In view of the rival submissions advanced by the learned counsel appearing for the parties, let me travel through the evidence adduced by the prosecution side.
- 10. PW 1 is the informant as well as the father of the victim. He deposed that on the day of incident, at around 5 p.m. when he returned home from his work, his victim daughter, aged about 12 years, reported him that while she along with her younger sister were alone at home, the accused Nayan Boro entering into his house embraced her breast. Then on raising alarm, his elder son came out from the bath room but in the mean time, the accused fled away. He also stated that the accused threatened his daughter to kill him (PW1) if she discloses the matter to him. Hearing the incident, on the next day, he lodged the FIR ((Ext. 1) and thereafter he reported the incident to the villagers and relatives. He proved the statement of the victim made u/s 164 Cr.P.C. as Ext. 2 wherein Ext. 2(1) to 2(3) are his signatures.

During cross, he stated that his house is situated at a distance of one km away from the house of the accused. He also stated that being a near relative, the accused used to visit his house frequently. According to him, on the day of incident, his elder son, two daughters including the victim were at home and on that day the accused accompanied with his son came to his house. He stated that he cannot say if on the day accused came to his house to call his son for carrying woods from his house.

- 11. PW 2, the grand father of the victim, deposed that on 07-07-2018 at around 3/4 p.m. he heard from his victim granddaughter that while she along with her sister were taking rest at home, the accused asked the victim to open the door and after opening the door, the accused entering into the house embraced her breast from back side and also tried to commit her rape. The accused also threatened the victim not to disclose the incident to anybody, otherwise he would kill her family members. Hearing hulla, his grand son i.e. the elder brother of the victim, arrived there. During cross, he stated that he heard about the incident on the very day of incident at about 5/6 p.m.
- **12.** PW 3 Firoj Doimary deposed that on the next day of incident when he had gone to the house of the informant, he heard that the accused entering into the house of the informant, embraced the victim girl and attempted to commit misdeed on her while she was alone with her younger sister.
- 13. PW 4, the brother of the informant, deposed that on the day of incident at around 3/ 4 p.m. after coming from school while the victim was taking rest with her 6/7 years old younger sister, the accused entering into their house attempted to commit misdeed to the victim on which the victim raised alarm. Hearing hulla her elder brother who was taking bath he reached there. On the very day of incident, the victim reported him over phone about the incident and on the next day he met her physically and heard the incident.

During cross, he stated that his house is about 1 km away from the house of the informant. Near the house of the informant there are residents of Adibashi and Nepali people. He admitted that he did not inform the Goanburah about the incident. He also did not inform police on the day of incident.

- PW 5 Dr. Tutumoni Handique, the Medical Officer, deposed that on 09-07-2018 she examined the victim in connection with Rangapara PS Case No. 119/18 u/s 448/354 A/506 of the IPC read with section 12 of POCSO Act, who gave the history of sexual assault on 07-07-2018. On examination, found hymen absent but found no signs and symptoms suggesting of recent sexual intercourse and no injury on her body or private parts. As per Radiological report the Medical Officer opined that the victim is below 18 years of age. She proved the medical report as Ext.3, Vaginal smear report as Ext.4, HCG report as Ext. 5, USG report with film as Ext. 6, requisition slip as Ext. 7 and advice slip as Ext. 8.
- 15. PW 6 is the victim herself. She deposed that on the day of incident at about 2 p.m. while she was sleeping with her 6 years old younger sister at home, accused came to their house whom she called as uncle (Khura) and asked her to open the door. Accordingly, she did so. On opening the door, the accused entered into her house and attempted to touch her chest. Then on raising alarm he went out. Regarding the incident her father lodged the FIR. She proved her statement before the Magistrate as Ext. 2.

During cross she stated that the accused had the friendship with her elder brother and at the time of incident her elder brother was taking bath in the bath room which is situated near her bed room. On the very day, she reported the incident to her elder brother. She further stated that after taking bath her brother along with the accused went out and came back in the evening time.

**16.** PW 7, SI Puran Ch. Sarmah, the Investigating Officer, deposed that during investigation he recorded the statement of the witnesses

including the victim, got recorded the statement of the victim u/s 164 Cr.P.C., prepared the sketch map of the place of occurrence vide Ext. 9, arrested the accused and submitted the chargesheet against the accused Nayan Boro u/s 448/354(A)/ 506 of the IPC read with section 12 of POCSO Act vide Ext. 10.

During cross, he admitted that he did not record the statement of any independent witness. He did not record the statement of Girin Moholia and Gaonbura Sane. He also had not seized any birth certificate of the victim girl to ascertain her age. He also did not seize any wearing apparel of the victim girl.

**17.** Now, let it be seen whether the victim is a child or not as defined in section 2(d) of POCSO Act, 2012. As per the definition, the child means any person below the age of 18 years.

Here in this case, the evidence of PW 1 the father of the victim reveals that the victim was 12 years at the relevant time. According to PW 2, the grandfather, the natural witness, at that time she was 11 years old. The victim in her deposition recorded on 28-11-2018 mentioned her age as 12 years and she was reading in class VII. So as per evidence of the material witnesses PW 1, PW 2 and PW 6 she was 11/12 years old at the time of incident. The medical report, Ext. 3 also shows that the age of the victim is below 18 years at the relevant time. In this case, while considering the age, what is of paramount importance is the fact that the victim was a student of class VII at the time of alleged occurrence has not been disputed at the trial. Though the I.O. had not seized any school certificate to ascertain her age but usually a child of class VII is of 11-13 years. Moreover, in the case in hand, the age of the victim is not disputed by the defence. From the above oral evidence coupled with the medical evidence, I unhesitatingly hold that the victim is a child being under the age of 18 years.

**18.** Bearing in mind the above finding as regard the age of the victim, let me, now turn the question of alleged house trespass and

attempt to commit an offence of sexual assault as alleged. While considering this aspect of the matter, it is worth noticing that it is the victim (PW 6) around whose evidence revolves the entire case of the prosecution. Her evidence is therefore most material. Her evidence is that on the day of incident, at around 2 p.m., while she was sleeping at home with her 6 years old younger sister, the accused whom she called as uncle (khura) asked her to open the door and accordingly when she opened the door, he entered into the house and attempted to touch her chest. Then on raising alarm, he went out. During cross-examination the victim stated that at the relevant time the elder brother of the victim was taking bath in the bath room and after bath her elder brother along with the accused went out. Here the learned defence counsel vehemently argued that when the accused along with the victim's brother went out together, the commission of alleged offence is not believable one. But in my considered opinion there is every possibility that when her elder brother was taking bath, accused came, asked her to open the door, attempted to touch her chest and after bath her brother along with the accused went out. In statement u/s 164 Cr.P.C., Ext. 2 also the victim made the same version that when her elder brother was taking bath accused Nayan Boro asked her to open the door and accordingly when she opened the door, he embraced her from back side. In statement under section 164 Cr.P.C. she also stated that as the accused threatened her not to disclose the matter to others, hence she did not inform the matter to her elder brother immediately and at night when her father returned, she reported the incident. Though there are some omissions in the evidence of the victim from the statement made u/s 164 Cr.P.C. but the evidence of the victim lead assurance to the fact that the accused asked her to open the door and accordingly on opening the door, he entered into her house and attempted to touch her chest. Though during cross of the informant, defence suggested that on the day the accused came to his house to call his son for carrying wood and remained there for two hours and at that time Girin Moholia was also present there but he examined none to prove that Girin Mahalia was also present during the

time he was in the informant's house. During cross-examination defence could elicit nothing tangible to discredit her version on this material point. Probative value of her evidence remains unshaken throughout her cross. The settled law is also that for some minor discrepancy/omission, the value of the evidence of a victim of sexual offence which is otherwise remained unassailed and unshaken cannot be rendered and/or discarded. Though father (PW 1), grandfather (PW 2) and PW 3 categorically stated that the accused entering into the house of the victim, embraced her breast but the evidence of the victim shows that the accused attempted to touch her chest. PW 4, victim's uncle also categorically stated that the accused coming to the house of the victim attempted to commit misdeed to her.

**19**. In the case in hand, the cogent evidence of the victim is that the accused entering into the house of the victim attempted to touch her chest. Though the learned defence counsel urged that with the discrepancies in the evidence of the PWs, the prosecution case lacks the worthy of credence but a close and dispassionate scrutiny of the evidence of the victim shows that the crucial aspect of her evidence as mentioned above regarding entering into her house and attempting to touch her chest remains unchallenged. That apart, the defence has failed to elicit anything from her cross-examination to show that the victim deposed falsely. Nothing emerges for falsely implicating the accused in the case where the informant has no any sort of hostile relation with the accused. The FIR was also lodged on the next day of the incident. Though the learned defence counsel argued regarding delay in filing the FIR, but in a case of sexual assault or sexual harassment, this delay is not fatal to the prosecution case. I also find nothing which leads the victim to be tutored or embellished the version on material point. Her evidence appears to be guite believable. The evidence of the victim with the yardstick of probabilities and its intrinsic value I found no ground to disbelieve her. Though there are some minor contradictions and omissions as discussed above, I find no sufficient ground to disbelieve her version. It is well settled that difference in some minor detail, which does not otherwise affect the core of the prosecution case,

even if present, that itself would not prompt the court to reject the evidence on account of minor variation and discrepancies.

- 20. The act of the accused at this juncture after the above discussions, it is safely arrived that the prosecution has proved beyond all reasonable doubt that the accused asking to open the door entered into the house of the victim and attempted to touch her chest. Since the accused entered into the house of the informant and then committed the offence, the offence under section 448 of IPC is well established against the accused. Since the prosecution also established beyond doubt that the accused attempted to touch her chest, I also find him guilty of the offence punishable u/s 18 of POCSO Act. Accordingly, accused Nayan Boro is convicted u/s 448 of the IPC and section 18 of POCSO Act.
- 21. I have heard the accused Nayan Boro on the point of sentence. His statement is recorded where he stated that he is a daily wage earner and is to look after his pregnant wife and old parents out of his meagre income and prayed for leniency. In the facts and circumstances of the case and the nature of the offence committed by the accused, in my opinion, he could not be given the benefit of probation.
- I gave my anxious consideration on the aspect of quantum of sentence. In the case according to the victim the accused entering into her house attempted to touch her chest but she did not clearly state to what extent and in what manner he attempted. In the above, it cannot be said that he attempted to commit the offence of sexual assault. Considering all aspects and also considering the young age of 22 years of the convict, I sentence the convict Nayan Boro to undergo Rigorous Imprisonment for 3 (three) months for the offence punishable u/s 448 of IPC and to pay fine of Rs. 5000/-(Rupees five thousand only) in default Rigorous Imprisonment for 6 (six months) for the offence punishable u/s 18 of POCSO Act.

Accused is in hajot since 08-07-2018 till 15-10-2018.

The period of detention already undergone by the accused shall be set off against the terms of imprisonment as per provision of section 428 of Cr.P.C. The fine amount on realization be paid to the victim.

- **23.** Let a free copy of the Judgment be furnished to the convict. Also sent a copy of the Judgment to the District Magistrate, Sonitpur, Tezpur.
- 24. Given under my Hand and Seal of this Court on this the 14<sup>th</sup> day of June,2019.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

# **APPENDIX**

## **Prosecution witnesses.**

PW 1 : Informant/father of the victim
PW 2 : Grand father of the victim

3. PW 3 : Firoj Doimary4. PW 4 : Uncle of the victim

5. PW 5 : Dr. Tutumoni Handique, M.O.

6. PW 6 : victim girl

7. PW 7 : SI Puran Ch. Sharma

## **Exhibits.**

Ext. 1 : FIR

Ext. 2 : 164 CR.P.C. statement of the victim. Ext. 3 to 8 : Medical report and other reports.

Ext. 9 : Sketch map

Ext. 10 : Chargesheet.

(I.Barman) Special Judge, SONITPUR: TEZPUR