#### **HEADING OF JUDGEMENT IN SPECIAL CASES:**

**DISTRICT: DHUBRI.** 

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 39/2017

UNDER SECTION: 376 IPC

READ WITH SECTION 8 OF THE POCSO ACT.

STATE OF ASSAM VS. MUKESH KUMAR

PRESENT:- DIPAK THAKURIA, B.A., LL.M., AJS
SPECIAL JUDGE,
DHUBRI.

## **APPEARANCES:-**

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE. Y. A. BEPARI, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 10-11-2017, 20-12-2017,

06-03-2018, 03-05-2018,

05-07-2018, 14-09-2018,

15-03-2019, 05-10-2019.

**DATE OF ARGUMENT:- 05-07-2019.** 

**DATE OF JUDGMENT :- 19-07-2019.** 

# J U D G E M E N T

- **1.** Accused Mukesh Kumar stands trial for the offences punishable under sections 376 IPC read with section 8 of the POCSO Act.
- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 12-

03-2017 the complainant lodged a written ejahar before the Officer-in-charge of Agomoni police station with an allegation that on that day at about 1 p.m. his 16 year 3 months old daughter was going to the house of the president of Panchayat and than taking the advantage that no one was on road the employee of No. 16<sup>th</sup> Railway gate Mukesh Kumar with the help of one Manoj Kumar by force dragged his minor daughter to the room constructed for railway employees and accused Mukesh Kumar attempted to commit rape on her. While his daughter raised alarm, then the people of surrounding areas gathered and saved his daughter. The matter was informed to the president of Panchayat who informed the incident to police and police brought his daughter and accused Mukesh Kumar to police station.

- **3.** After receiving the ejahar a case at Agomoni police station was registered as Agomoni P. S. Case No. 68/2017 under sections 376/511/34 IPC. Subsequently section 8 of the POCSO Act was added.
- **4.** The investigating officer arrested the accused, produced him before the Court and the Court remanded him to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C. By completing the investigation, I. O. has submitted charge sheet against the accused person to prosecute him under sections 376/511 IPC read with section 8 of POCSO Act.
- **5.** During investigation the accused was released on bail.
- **6.** Cognizance of the case was taken in charge sheeted sections. Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under section 376/511 IPC read with section 8 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **7.** The prosecution examined nine witnesses including investigating officer and closed the evidence.
- **8.** Dipak Das, Officer-in-charge of Agomoni police station was examined as Court witness.
- **9.** After completion of the prosecution evidence and recording the statement of Court witness the statement of the accused was recorded u/s 313 Cr. P. C. by putting

questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.

**10.**Heard learned counsels appearing for the parties and perused the evidence on record.

## FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 12-03-2017 at about 1 p.m. near the Belguri Railway Gate under Agomoni police station attempted to commit rape to the minor daughter of the complainant and thereby accused is liable to be punished under section 376/511 IPC?

Whether the accused on the same day time and place sexually assaulted the minor daughter of the complainant and thereby accused is liable to be punished under section 8 of POCSO Act?

# DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

- **11.**In order to establish the charges framed against the accused, the prosecution has examined nine witnesses. Among them P. W. 1 is the complainant and the father of the victim girl. P. W. 2 is the victim girl, P. W. 3 Jarina Bibi, P. W. 4 Romisa Bibi, P. W. 5 Moynal Haque, P. W. 6 Jahan Uddin Sarkar, P. W. 7 Abdul Latif Sheikh and P. W. 8 Jaybar Ali are independent witnesses. P. W. 9 Shah Alom Azad is the investigating officer.
- **12.**The prosecution has exhibited the Ejahar as Ext. 1, statement of the victim as Ext. 2, seizure list as Ext. 3, sketch map of place of occurrence as Ext. 4 and charge sheet as Ext. 5. The prosecution has exhibited the birth certificate of the victim girl as M. Ext. 1.
- **13.** Dipak Das is the Court witness who exhibited the Extract Copy of G. D. Entry No. 288 dated 12-03-2017 as Ext. I.

- **14.** The defence examined none. Plea of the defence is total denial of the case.
- **15.**Learned Special Public Prosecutor B. Basumatary has submitted that the prosecution examined all together nine witnesses to establish the charges framed against the accused and the Court examined one witness as Court witness. The main witness for the prosecution is the complainant and the victim. The victim girl has depicted entire story and her deposition has been corroborated by her father and other independent witnesses. There is nothing to disbelieve the prosecution witnesses. The prosecution is able to establish the charges against the accused beyond all reasonable doubt. So, has prayed to hold the accused guilty under framed charges and impose adequate punishment to him.
- that the prosecution has failed to establish that the victim is a minor. The birth certificate seized by the I. O. subsequently proved as forged. The accused is an employee of Railway Department. The local persons were not happy that an outsider was appointed in the Belguri Rail Gate. The alleged victim at her own will went to meet the accused and then some villagers with ulterior motive apprehended them and compelled the complainant to file a false case against him. The evidences led by the prosecution are not sufficient to constitute the charges framed against the accused. The prosecution has failed to establish the charges against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.
- **17.**Before we proceed, let us reproduce the material parts of the witnesses examined by the prosecution during trial.
  - 17.1 P. W. 1 is the complainant and the father of the victim girl. He has deposed that 12-03-2017, at around 01:00 p.m., while his daughter was proceeding to the house of the Panchayat President Aminur Rahman to collect a certificate, at the No.16 Rail gate at village Belguri, Part-I, the accused forcibly took her to the room of the Rail gate and attempted to commit rape on her. His daughter then shouted for help at which, the nearby people arrived at the place of occurrence and apprehended the accused. Thereafter, the people informed the Panchayat President and he arrived at the place of occurrence and handed over the accused to the Agomoni Police. At the time of the alleged occurrence, the age of his daughter was about 15 years. Thereafter

- he filed the ejahar (Ext-1). Exhibit-1 (1) is his signature.
- 17.2 In cross-examination he has stated that the Rail gate is situated at a distance of about 2 k. ms. away from his house. There were several houses near the Rail gate but, he does not know the names of house owners. He did not see the incident. He has denied the suggestion of the defence that he did not tell the police that when the victim girl shouted for help, the nearby people arrived at the place of occurrence and apprehended the accused. He has also denied the suggestion of the defence that the nearby people of the Rail gate, including him, wanted the Railway authority to appoint a person of their locality at the Rail gate, but the railway authority appointed the accused instead, who did not belong to their place; So they falsely implicated the accused in this case to remove him from the service. He has further denied the suggestion of the defence that at the time of the alleged occurrence, the age of the victim girl was more than 18 years.
- **17.3** P. W. 2 is the alleged victim. She has deposed that she knows the accused. On 12-03-2017, at around 01:00 p.m., while she was proceeding to the house of the Panchayat President Aminur Rahman to collect a certificate, at the Rail gate No.16, the accused Mukesh Kumar called her at which, she went towards him. At that time, no other person was present there. As soon as she reached near the accused, he grabbed her and took her inside the room of the Rail gate and attempted to commit rape on her. She then shouted for help at which, the nearby people arrived at the place of occurrence and apprehended the accused and assaulted him. Thereafter, the people informed the Panchayat President and he arrived at the place of occurrence and informed Agomoni police about the incident. The police from the Agomoni Police Station arrived at the place of occurrence and took away the accused. Thereafter, her father filed the FIR of the instant case against the accused. The police took her to the court and the Magistrate recorded her statement. Ext-2 is her said statement and ext-2 (1) and ext-2 (2) are her signatures therein.
- 17.4 In cross-examination she has deposed that at the time of the occurrence, the accused was discharging his duty at the Rail gate. The house of the Panchayat President Aminur Rahman is situated at a distance of about 2/3 k.m. away from her house. There were several houses near the Rail gate but, she does not know the names of the house owners. She has denied the

suggestion of the defence that she did not tell the police that at the time of the occurrence, no other person was present at the place of occurrence. She has denied the suggestion of the defence that she did not tell the police that when the accused attempted to commit rape on her, she shouted for help at which, the nearby people arrived at the place of occurrence and apprehended the accused. She has denied another suggestion of the defence that she did not tell the police that the people informed the Panchayat President and he arrived at the place of occurrence and informed the Agomoni police about the incident and the police from the Agomoni Police Station arrived at the place of occurrence and took away the accused. She has denied the suggestion of the defence that the accused Mukesh Kumar did not call her and she did not go towards him and he did not grab her and did not take her to the room of the Rail gate and did not attempt to commit rape on her. She has denied the suggestion of the defence that the accused has not committed the alleged offence and with intent to remove him from his service at the Rail gate, in collusion with the president of the Gaon Panchayat and her father, they had manufactured this case against him.

- 17.5 P. W. 3 Jarina Bibi is an independent witness. She has deposed that about nine months back, one day, at about 01:30 p.m., one boy and a girl entered into a railway crossing room situated at Belguri. One boy named Joybor Ali called us and informed about the incident. Then we noticed the door of the room was locked from inside. Then we knocked the door. Accused opened the door. We noticed the victim was inside the room. On being asked, she told us that the accused brought her to the room and tortured her. Thereafter, someone informed to police. Police came and had taken away both the accused and the girl.
- 17.6 In cross-examination she has deposed that she had not seen the entry into the room by anyone. Before entry into the room, she could not say where the girl and accused were. When the accused opened the door, they noticed the girl was hiding herself under a table. She was wearing her dress. The girl talked to them normally. The accused was a railway guard hailing from Bihar. There is no person belongs to the community of accused in their village. She does not know from how many days the accused had been working as railway guard at Belguri post. Before the incident, she had not seen the girl around the place of occurrence. Before the incident she does not know the

- girl. Before the incident, she does not know the name of the accused. She has denied the suggestion of the defence that there was a public demand to appoint a local boy in the railway crossing gate, as Govt. engaged the accused who is an outsider; so, to drive the accused from the place, the complainant filed a false case against the accused and she also cooperate with him.
- 17.7 P. W. 4 Romisa Bibi has deposed that about nine months back, one day, at about 01:30 p.m., one boy and a girl entered into a railway crossing room situated at Belguri. One boy named Joybor Ali called us and informed about the incident. Then they noticed the door of the room was locked from inside. Then they knocked the door. Accused opened the door. They noticed the victim was inside the room. On being asked, she told them that the accused brought her to the room. Thereafter, someone informed to police. Police came and had taken away both the accused and the girl.
- 17.8 In cross-examination she has deposed that she had not seen the entry into the room by anyone. When the accused opened the door they noticed that the girl was hiding herself under a table. She was wearing her dress. She talked to them normally. The accused was hailing from Bihar. She does not know many days the accused had been working as Railway guard at Belguri. Before the incident she did not see the girl around the place of occurrence. She has denied the suggestion of the defence that there was a public demand to appoint a local boy in the railway crossing gate, as Govt. engaged the accused who is an outsider; so, to drive the accused from the place, the complainant filed a false case against the accused and she also cooperate with him.
- **17.9** P. W. 5 Moynal Hague knows nothing about the subject matter of the case.
- **17.10** P. W. 6 Jahanuddin Sheikh has deposed that he knows the complainant; but does not know the accused. One day he was asked to put his signature in a seizure list at Agomoni police station and he put his signature. Ext. 3 is the seizure list and Ext. 3 (1) is his signature.
- **17.11** P. W. 7 Abdul Latif Sheikh is another seizure witness. He knows both the complainant and the accused. About one year back he was working as home guard at Agomoni police station and one day I. O. asked him to put his signature in the seizure list. Accordingly he put his signature in Ext. 3 seizure list. Ext. 3 (2) is his signature.

- **17.12** P. W. 8 Joybar Ali has not supported the case of the prosecution; so, the prosecution declared him hostile and he denied the suggestion of the prosecution that he disclosed that on 12-03-2017 he was working in a field near his house. In the meantime a girl was crossing rail gate. At that time, Mukesh Kumar was working at railway gate and he was inside the room of railway crossing gate. The girl entered into the room and Mukesh Kumar closed the door from inside and then he informed the matter to Jorina Bibi and Romisa Bibi. They asked accused to open the door of the room and found that the girl was hiding under a table. They informed the matter to police. From the girl he came to know that Mukesh attempted to rape her. In cross-examination by defence he has stated that I. O. did not record his statement.
- 17.13 P. W. 9 Shah Alom Azad has deposed that on 12-03-2017, he was working at Agomoni P.S. On that day the complainant lodged a written ejahar before the O/C, Agomoni P.S. and a case u/s 376/511/34 IPC was registered. He was entrusted to investigate the case. On that day, at about 02:00 pm he visited the place of occurrence, inspected the place of occurrence and prepared a sketch map of place of occurrence. He recorded the statements of witnesses u/s 161 Cr.P.C. The victim was sent to hospital for medical examination and she refused to get herself medically examined. The victim was sent to the court for recording her statement u/s 164 Cr.P.C. Thereafter, he filed an application in the court for adding section 8 of POCSO Act. Birth certificate of the victim girl was seized by him and the same has given jimmah to her father. On 13-03-2017 the accused was arrested and subsequently he was produced in the court. After completing the investigation, he submitted charge sheet against the accused u/s 376/511 IPC, r/w section 4 of POCSO Act. He has exhibited the seizure list as Ext-3. Ext-3(3) is his signature. Ext-4 is the sketch map and ext-4(1) is his signature. Ext-5 is the charge sheet and ext-5(1) is his signature. He examined witness Joybar Ali during investigation and recorded his statement u/s 161 Cr.P.C. Witness Joybar Ali disclosed before him that on 12-03-2017 he was working in a field near his house. In the meantime a girl was crossing rail gate. At that time, Mukesh Kumar was working at railway gate and he was inside the room of railway crossing gate. The girl entered into the room and Mukesh Kumar closed the door from inside and then he informed the matter to Jorina Bibi and Romisa Bibi. They

- asked accused to open the door of the room and found that the girl was hiding under a table. They informed the matter to police. From the girl he came to know that Mukesh attempted to rape her. He has exhibited the seized birth certificate as M. Ext. 1.
- 17.14 In cross-examination he has stated that the complainant did not disclose before him that the victim girl shouted for help, the nearby people arrived at the place of occurrence and apprehended the accused. The alleged victim did not disclose before him that at the time of the occurrence no other person was present at the place of occurrence, when accused attempted to commit rape on her she shouted for help at which the nearby people arrived at the place of occurrence and apprehended the accused and people informed Panchayat President who arrived at Place of occurrence and informed the incident to Agomoni P.S. and police took away the accused. Witness Jarina Bibi did not disclose before him that the victim girl informed her that accused brought her to the room. Witness Romisa Bibi did not disclose before him that the victim girl informed her that accused brought her to the room. Before filing the ejahar O/C, Agomoni P.S. received information that one boy and one girl were confined at Belguri by public. Then O/C, Agomoni P.S. opened GDE no. 258 dated 12-03-2017 and he with O/C, Agomoni P.S. and police staff rushed to the place of occurrence. He has not verified the authenticity of the M. Ext. 1 in the Office of the Registrar of Birth and Death.
- Witness (C. W. 1). He has deposed that as per direction of the court, he brought Extract copy of G.D. Entry No. 258 dated 12-03-2017 of Agomoni P.S. On 12-03-2017, Biswajit Bhadra was working as Officer-In-charge of Agomoni P.S. From the G.D. Entry no. 258 dated 12-03-2017 it appears that on that day at about 01:30 p.m. the then O/C, Agomoni P.S. received a phone call from Aminur Rahman who was the President of Sindurai Gaon Panchayat. It was informed that at Belguri Rail Gate (TRMTR-4) one Mukhesh Kumar was on duty. He and one girl aged about 17 years, D/o- Abdul Rahim of village Belguri 2<sup>nd</sup> part were apprehended by the villagers and confined them and also physically assaulted them when they were found in a compromising position in the Rail Gate house. After receiving the information, then O/C, Agomoni P.S. visited the P.O. He has exhibited the Extract copy of G.D. Entry no. 258 dated 12-03-2017 as Ext. I and Ext-I(1) is his signature.

- **18** In a case under the provision of POCSO Act the age of the victim girl is very crucial and the prosecution has to establish that at the time of the alleged incident the victim girl was a child as defined under section 2 (d) of the POCSO Act. In this case the complainant in his ejahar stated that his daughter was 16 years old and the victim girl disclosed before the Judicial Magistrate while recording her statement under section 164 Cr. P. C. that she was 17 years old. From the evidence of the investigating officer it appears that after the incident the victim girl was sent to Dhubri Civil Hospital for medical examination; but she refused to get medically examined. So, there is no medical evidence regarding her age. From the evidence of the investigating officer (P. W. 9) it appears that vide Ext. 3 seizure list he seized the birth certificate of the victim girl. As per birth certificate (M. Ext. 1) the date of birth of the victim was 15-02-2000. The alleged incident took place on 12-03-2017. Arithmetical calculation shows that at the time of the incident the age of the victim was below 18 year if the birth certificate is genuine. During trial the investigating officer was directed to submit a report regarding genuineness of the seized birth certificate and accordingly the investigating officer submitted his report. The investigating officer wrote a letter to the Sub-Divisional Medical and Health Officer Halakura BPHC, Halakura from where the M. Ext. 1 was shown issued. Registrar of Birth and Death, Halakura BPHC has reported that the birth certificate was not genuine as it was not issued from their end.
- 19 The victim girl refused to get medically examined; so, there is no ossification test regarding her age. The investigating officer has not collected school certificate of the victim girl to ascertain her age. The birth certificate of the alleged victim collected by I. O. is also not genuine. As the seized birth certificate of the victim girl is not genuine and there is no other documentary evidence to determine the actual age of the victim girl; so, it will not be safe to hold that at the time of the alleged incident the victim was a child as defined under section 2 (d) of the POCSO Act.
- 20 The allegation against the accused is that he attempted to commit rape on the victim girl. From the evidence on record it transpires that the alleged incident took place inside a railway gate room at Belguri Railway gate. As per oral testimonies of Jarina Bibi and Romisa Bibi one person named Joybar Ali informed them about the incident. Said Joybar Ali was examined in the Court as P. W. 8; but he has not supported the

version of Jarina Bibi and Romisa Bibi. Ultimately the prosecution declared him as hostile witness and cross-examined him.

21 From the evidence on record it clears that at the time of the alleged incident the complainant was not present on spot. Only the independent witness Jarina Bibi and Romisa Bibi were on spot. According to them on the day of the incident they were informed about the incident and they went to the spot. They found that the room was locked from inside and while they knocked the door; the accused opened the same. They found the girl who was hiding herself under a table. The girl talked then normally and she was wearing her dress. From the evidence of Jarina Bibi and Romisa Bibi it is clear that at the time of the alleged incident the alleged victim and the accused were inside the room. Now the moot question arises whether the accused attempted to commit rape on the alleged victim girl as alleged or not. In this regard the evidence of the alleged victim and her subsequent behavior and the condition of the room are very important. As per the alleged victim, when she reached the room, the accused grabbed her and took her inside of the room and attempted to rape on her. She shouted for help and then nearby people arrived at the place and apprehended the accused. Though the victim girl stated that she shouted; but Jarina Bibi and Romisa Bibi who arrived at the place of occurrence have not stated anything that they heard scream of the girl. According to them the girl talked to them normally and she was wearing her dress. If the accused was trying to commit rape on her definitely she would have been resist and under such situation it was not possible to talk anyone normally. Her dress either be torn or damaged. But Jarina Bibi and Romisa Bibi found the girl under a table as she was hiding herself. If the accused attempted to commit rape on her and then two women arrived at the spot, the first reaction of the alleged victim would have been attempt to run away from the room as soon as the door of the room was opened and second she being a threatened girl tried to disclose the facts to Jarina and Romisa. Instead of saying anything to them the victim girl tried to hide herself under a table. From the evidence on record it transpires that after the incident several persons gathered at the place of occurrence and someone informed about the incident to police. The information was jotted down by Officer-in-charge of Agomoni Police Station by opening G. D. Entry No. 258 dated 12-03-2017 (Ext. I). The contents of the Extract copy of said G. D. Entry is important as it was the first information received by police. On perusal the contents of Ext. I it appears that the villagers apprehended

- both the boys and the girl, physically assaulted them and confined them as they were found in compromising position.
- 22 An attempt is an overt act immediately connected with the commission of an offence and forming part of a series of acts which, if not interrupted or frustrated or abandoned, would result the commission of the completed offence. In the case in hand if the accused attempted to commit rape on the alleged victim he had to use force to her and the alleged victim would have been raised alarm for help. The wearing apparel of the alleged victim either was damaged or torn and her mental condition would not have been normal. But the evidence on record shows that at the time of the alleged incident the alleged victim girl did not raise alarm for help, she was in normal condition, her dress was proper and she tried to hide herself under a table while the independent witnesses found them inside the room. After the incident the alleged victim refused to get her medically examined. If there was any violence on her body, the doctor could have been detected the same. The conduct of the alleged victim that she refused to get medically examined creates doubt.
- 23 After considering the entire situation it appears to me that the alleged victim was a consenting party and she at her own will entered into the room of the accused and in the mean time Jarina and Romisa arrived at the place and seeing them she tried to conceal her from them. Thereafter the villagers gathered there and confined both of them also physically assaulted them and ultimately handed them over to police.
- 24 The Hon'ble Supreme Court in **Digambar Vaishnav and another vs. State of Chhattisgarh 2019 Cri. L. J. 1901** has opined one of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rest on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion however grave it may be. Strong suspicion, strong coincidence and grave doubt cannot take place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the accused not falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.
- 25 In view of the above discussion and observation it is safely concluded that the

prosecution has failed to establish the charges framed against the accused person beyond all reasonable doubt. Hence, the accused deserves the benefit of doubt and accordingly the accused is acquitted of the charges on benefit of doubt and he is set at liberty.

- **26** Let the seized article be destroyed after expiry of appeal or revision period.
- 27 The liability of the bailor will remain in force for next six months as per law.
- **28** Given under my hand and seal of this Court this the 19<sup>th</sup> day of July 2019.

(D. Thakuria) Special Judge, Dhubri.

## IN THE COURT OF SPECIAL JUDGE: DHUBRI.

# SPECIAL CASE NO: 39/2017

## **UNDER SECTION: 376 IPC READ WITH SECTION 4 OF THE POCSO ACT.**

## **STATE OF ASSAM**

VS.

## **MUKESH KUMAR**

## <u>APPENDIX</u>

A. Prosecution exhibits:

Ext. 1 : Ejahar.

Ext. 2 : Statement of the victim.

Ext. 3 : Seizure list.

Ext. 4 : Sketch map.

Ext. 5 : Charge sheet.

B. Defence Exhibits: Nil.

C. Court Exhibits :

Ext. I : Extract copy of G. D. Entry.

D. Prosecution Witnesses:

P. W. 1: Complainant,

P. W.2: The Victim,

P. W.3: Jarina Bibi,

P. W.4: Romisa Bibi,

P. W.5: Moinal Haque,

P. W.6: Jahanuddin Sarkar,

P. W.7: Abdul Latif Sheikh,

P. W.8: Joybar Ali &

P. W.9: Shah Alom Azad.

E. Defence Witness: Nil.

F. Court Witness:

C. W. 1: Dipak Das.

(D. Thakuria)

Special Judge, Dhubri.