

IN THE SPECIAL COURT ::::::::::::::: BAKSA AT MUSHALPUR

Present : Shri C. Das,
Judge, Special Court,
Baksa, Moshalpur

JUDGMENT IN SPECAIL POCO CASE NO.05/2018(old No.28/16)

U/S 4 OF POCO ACT.

State

-versus-

Sri Madhab Deka
..... Accused

Appearance :

For the State : Mr. B. Chetry, Public Prosecutor, Baksa

For the accused : Mr. A. Medhi, P. Gogoi, M. Murmu, S. Kachary, Advocates

Date of recording evidence : 03/4/17, 11/5/17, 7/6/17, 14/7/17, 20/11/17

Date of argument : 05/10/18, 12/10/18, 30/10/18, 14/11/18

Date of judgment : 20/11/18

JUDGMENT

1. The case of the prosecution briefly, is that on 31/3/15, the complainant Sri Deben Kalita lodged the ejahar before the Officer-in-charge of Goreswar police station, alleging inter-alia that taking advantage of his absence in his house, the accused committed rape on his 11 years old grand-daughter. His wife died before 6 months back after suffering from serious illness and since then, he is living with the victim girl. The accused is an Assistant Teacher of Simla Bapuji M.E. School.

2. On receiving the said ejahar from the complainant, the police registered the Goreswar PS. Case No.24/15 and swung into its investigation. During the investigation, the I/O visited the place of occurrence, prepared its sketch map

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and recorded the statement of the witnesses. The I/O also, sent the victim girl for medical examination and collected the report. At the end of the investigation, the I/O having found a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

3. After appearance of the accused in the court, he was furnished with the relevant copy of the case immediately. Accordingly, both the parties were heard and after perusing the material on record, the charge u/s 4 of Protection of Children from Sexual Offences Act, 2012 (in short; the POCSO Act) was framed against the accused. The charge so framed, was read over and explained to the accused who pleaded not guilty and claimed to be tried.
4. The prosecution during the trial, examined as many as, ten(10) witnesses including the I/O and M/O to support its case. In the statement recorded u/s 313 CrPC., the accused took the plea of total denial. But the accused declined to adduce any evidence. The argument of the parties was heard at length.

POINT FOR DETERMINATION :

5. Whether on 31/3/15, at Pukhuripar under Goreswar police station, the accused committed penetrative sexual assault in his house and at the house of the informant upon the victim girl, grand daughter of the informant Sri Deben Kalita ;

DICISION AND REASON THEREFORE :

6. Learned Public Prosecutor, Baksa during his argument in support of the prosecution, submitted that the prosecution altogether examined ten witnesses and on the strength of their evidence particularly the evidence of the evidence of the victim girl aged below 18 years and a minor with the support of medical evidence, it is proved that the accused committed the offence which attracts the provisions u/s 4 of POCSO Act and therefore, the accused is liable for punishment as provided under the law. It is submitted that there cannot be any dispute over the age of the victim in the light of findings of medical officer in respect of her age since admittedly, the victim is found to be below 18 years of age and comes within the purview of POCSO Act. He relied the decision of **Hon'ble Gauhati High Court in Criminal Appeal (J) No.90 of 2015 Sri Jawngblam Narzary vs. State of Assam**, wherein, it was held as regards to age of the victim that she

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herself stated that she is a student of Class-V and is 12 years of age, which is supported by PW2, her father, but the medical evidence shows that she is either 14 years or above 14 years, but below 18 years of age. In any case, there is no dispute that she is below 18 years of age.

7. Counteracting the above submissions, learned counsel for the accused submitted that PW1 lodged the FIR but from his evidence, it is clear that it is not proved as per provisions of law since he admittedly did not sign the same and as such, the case is come under of doubt. According to him, the occurrence took place on 31/3/15 as per version of the FIR, but the medical evidence does not support the same. He submitted that the case was filed through PW1 by one Dilip Mahanta who signed the FIR on behalf of PW1 and all the prosecution witnesses particularly, PW2, 3 and 5 are related witnesses and interested persons. It is submitted that if the occurrence took place on 31/3/15 as stated in the FIR, is accepted, then there was no offence was committed by the accused as per versions of the prosecution witnesses. Moreover, there are severe discrepancies appears in the evidence of the prosecution witnesses, particularly, if the evidence of the victim is taken into consideration, it would disclose that she could not say what was happened to her or caused by the accused. She could not narrate the actual occurrence which leads to believe that she was tutored by some others to speak against the accused. Since there is no consistency in the evidence on record, it creates doubt and under such circumstances, the accused cannot be held guilty for committing any offence. Hence, he urged to acquit the accused by giving the benefit of doubt.

8. After hearing the above submissions, it is pertinent to go through the evidence on record to arrive at a conclusion. The prosecution examined the informant of the case Sri Deben Kalita as PW1. The victim girl is his grand daughter. His evidence discloses that the accused is his closed neighbour. On the fateful day, he was working at some distance from his house. The brother of Smriti Kalita (PW5) told him at about 4:30 pm., on the same day over phone that the accused committed sexual assault upon the victim girl. Accordingly, he returned to home but he did not find the accused. The women nearby, were raising hue and cry. Later on, the victim told him that the accused by offering her Rs.5/- to her, committed sexual assault upon her for three/ four days. The accused was working as teacher of school namely; Bapuji ME. School where the victim was also, studying. He was not informed by the victim if the accused committed sexual assault upon her on the fateful day. The accused is a married person having a son of 30/32 years of age. The victim was medically examined. He filed the ejahar vide Ext.1.

9. In the cross-examination, PW1 stated that the ejahar was written by one Dilip Mahanta but the signature thereon in the ejahar, is not belonged to him. He could not say the contents in Ext.1. An Anganbadi Centre was run in the house of the accused where the wife of the accused was a teacher. There was a protest particularly, by local women with a view that the said Anganbadi Centre should be held at public land and the said women were led by Dilip Mahanta. The local women namely ; Daymati Kalita(PW2), Niroda Das(PW3), Smriti Kalita(PW5) and Doibaki Kalita protested over establishment of said Anganbadi Centre in the house of the accused. According to him, PW5 is his daughter-in-law but he did not take his food with her since she did not show him respect. PW5 did not like him for the reason of maintaining the victim girl in his house. The victim has no good terms with PW5. Apparently, PW1 is the reported witness of the occurrence. The defence raised some socially related issues against him in the cross-examination.

10. PW2 Smti. Joymati Kalita stated that the mother of the victim was married off to another man. The wife of PW1 already pre-deceased him. The victim was a student of Class-VI standard. She was informed by PW5 that the accused offered money to the victim. Later on, the victim told that the accused offered money. The victim told that the accused committed sexual assault upon her after giving her money for several times. According, she contacted local women and came to the police station.

11. In the cross-examination, PW2 stated that initially the Anganbadi Centre was run from the house of the accused. Hence, local women raised protest for shifting of the said Centre to a public place. She could not say if the said protest was initiated at the advice of Dilip Mahanta. According to her, PW5 used to misbehave the victim girl. It appears that PW2 is also, a reported witness of the occurrence and PW2 narrated the same story about the victim in support of PW1.

12. PW3 Smti. Niroda Das deposed in the court that the victim was studying in school while the accused is a school master. On hearing hue and cry, she came and she was told by the victim that the accused committed sexual assault upon her for 2/ 3 times. On the fateful day, the accused came to take advantage of sexual favour from the victim but it was seen by PW5. The accused used to visit the house of PW1. There was no quarrel between the accused and PW1. The victim was medically examined. It appears from PW3 that the accused came but he could not commit sexual assault upon the victim girl due to perhaps, presence of PW5 in the

house. It shows that the evidence of PW3 corroborates the version of PW1 and 2.

13. The evidence of PW4 Smti. Doibaki Kalita is that the occurrence took place at about 1 pm., at the house of PW1. She heard hue and cry in the house of PW1 from her home and as such, she rushed to the spot and saw that the accused was going out from the house of PW5 by his bicycle. She was reported by PW5 that the accused was showing money to the victim and as such, on inquiry, the victim told that the accused committed sexual assault upon the victim earlier when the victim went to collect flowers as many as, three days. The victim told that the accused committed sexual assault upon the victim once in her home and twice in the house of the accused. Later on, after discussing locally, the case was filed.

14. PW4 in her cross-examination, stated that the ejahar was filed in terms her dictation. She deposed according to what was told to her by PW5. She heard the incident from the victim. Thus, the evidence of PW4 narrated the story as told to her by the victim as well as, PW5 and she claims that she saw the accused leaving the house of PW1 on the fateful day on a bicycle. Her evidence also, supports the version of PW1, 2 and 3. However, it shows that the ejahar was written in terms of her dictation.

15. It is the evidence of PW5 Smti. Smriti Kalita that the victim is resided in her house since her father died while her mother married to another person. According to PW5, on the fateful day during noon, the victim was cleaning utensils while she was in the house. At that time, the accused was calling the victim to offer Rs.5/- only. On hearing the call of the accused, she came out. Having seen her, the accused left away therefrom on a bicycle. On her inquiry, the victim told her that the accused committed sexual assault upon her when she went to collect flowers. Later on, the accused came to offer money to the victim. PW5 stated that the accused committed sexual assault upon the victim once in the house of the accused and twice in her house. Later on, she informed the local public about the incident. PW1 filed the ejahar after coming back from his work. The victim was subjected to medical examination. She tendered her statement before the court vide Ext.2. She proved the Ext.2.

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16. In the cross-examination, PW5 disclosed that she along with PW1 live together in the same compound. While she used to have her food separately, PW1 lives with the victim. On the day of filing of the case, the accused did not

commit any offence. From the evidence of PW5, it appears that she could able to detect the fact that the accused was offering money to the victim secretly which was not disclosed by the victim earlier.

17. Further, the evidence of PW6 Smti. Anu Kalita discloses that when she saw gathering of people at the house of the victim, she went there and saw that the victim was weeping. She was informed by the relatives of the victim that the accused committed rape on the victim.

18. In the cross-examination, PW6 stated that she deposed in the court in terms of what was told to her about the incident by the relatives of the victim. Thus, the evidence of PW6 discloses what she saw and heard from others about the incident.

19. PW7 Sri Amrit Das stated in his testimony that he heard that the accused committed sexual assault upon the victim. Apparently, PW7 heard about the incident like other witnesses.

20. PW8 is the victim of the alleged occurrence. Her name is withheld. Her evidence is important for the prosecution case. She is admittedly the grand daughter of PW1. She stated that she was a student of Class-VI at the relevant time. According to her, in the year 2015, one day, the accused called her to collect flowers in his house. The accused then, called her inside of his house to clean utensils. At that time, there was none present in the house of the accused. Thereafter, the accused committed sexual intercourse with her on the bed of the elder son of the accused. Later on, one day, the accused committed same act against her in the house of PW1. The accused showed her a knife and lured her to improve her grade marks in the examination and committed such act against her. Initially for two times she did not disclose the incident as the accused told her that he will not pass her in the examination. On third occasion, when she was cleaning utensils after her attending her school, the accused offered her money. One day, the accused gave her Rs.30/- and another day, the accused gave her Rs.20/- only. By such money, she purchased books and pen. When she was cleaning utensils, the accused was calling for her by showing Rs.50/- on his hand. She told the accused that she will go after sometime later while PW5 was sleeping at that time. When the accused saw PW5, he changed his topic and asked her if she had meal and left away therefrom by her bicycle. Thereafter, PW5 inquired about the incident and she

told PW5 the entire story. According to her, the accused committed sexual assault on her for two times but the accused could not do so for third time. PW5 reported the incident to all. PW1 came and filed the case. She tendered her statement vide Ext.3 with her signatures.

21. In the cross-examination, PW8 stated that she has been living with PW1 since she was one year old. Her study expenses are not born by her uncle and aunt and they used to misbehaved her. Now, she changed her school and lives with her another relative after the incident. She came to the court with PW5. She further replied to the question of the court that the accused put his finger into her vagina. Apparently, what was stated by PW8, is corroborated by other prosecution witnesses. However, her version to the question of the court is different from what she stated with other witnesses of the prosecution.

22. The prosecution examined the medical officer who examined the victim girl medically as PW9 Dr. Urmi Devi Choudhury. PW9 stated that on 01/04/15 at SMK Civil Hospital, Nalbari, she examined the victim girl on police requisition and she received a history of the victim girl and her aunt that the victim was sexually assaulted by a known person for about 4/5 months back and always tried to assault in school and at home also. PW9 on physical examination of the victim girl, found as;

PHYSICAL EXAMINATION OF THE BODY :

External genitalia were found to be healthy;

Hymen was intact, no finger can be introduced to vagina; vagina was not torn and healthy;

Vaginal swabs were taken from perineal region to see the sperm ;

On examination, no sperm was seen.

No injury mark was seen on the private part of the victim.

RADILOGICAL EXAMINATION :

Radiological evidence estimated the age of the victim below 14 years and above 12 years of age ;

OPINION :

On the basis of physical examination and radiological investigation done on the person of the victim girl, it was of the opinion of the medical officer that :-

There was no sign of sexual intercourse or assault.

23. Accordingly, PW9 submitted and proved the medical report of the victim girl as Ext.2 with her signatures. There is no dispute over finding so given by

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PW9 on the person of the victim girl. Hence, it is clear from the medical evidence of PW9 that the victim was not subjected to any penetrative sexual assault as her hymen was intact and no finger can be introduced into her private part. As regards to age, the medical evidence confirms that the victim was minor and was below 18 years of age at the relevant time of occurrence. In any view of matter and following the law laid in **Jawngblam Narzary case (supra)**, it cannot be disputed that the victim is a child within the meaning of POCSO Act.

24. The evidence of PW10 Abdul Kader Ali who was the I/O of the case, is that on 31/3/15, on the basis of the ejahar lodged by PW1, he started the investigation of the case. During the investigation, he visited the place of occurrence as the house of PW1 and examined the victim girl. She stated that her age was 12 years and he collected the medical report but he did not collect her school or birth certificate. He prepared the sketch map of the place of occurrence vide Ext.4 and at the end of the investigation, he filed charge-sheet against the accused vide Ext.5.

25. In the cross-examination, the I/O stated that there was no mention of rape on 31/3/15 in the ejahar. According to the I/O, PW4 did not say earlier before him that the victim did not report that previously call was made by offering Rs.50/- to her and the accused when the victim went to pick up flowers, committed sexual assault by calling the victim girl into his house. But such omission of PW4 is not significant since PW4 is not an eye-witness of the occurrence. The I/O stated that PW5 earlier did not state to him that previously the accused called her niece(PW8) to his house by offering Rs.5/- and when her niece(PW8) went to collect flowers, sexual assault was committed and she scolded the teacher(accused) who took away the bicycle of the victim by speaking so many things. As regards to the statement of the victim(PW8), the I/O stated that the victim did not state to him earlier that the accused called her to pick up flowers and took her inside the house on the plea to clean up utensils and committed sexual assault on the bed of son of the accused and the accused threatened her by showing a knife for which she did not disclose the incident to others and the accused called her by offering Rs.50/- to her and in reply she said that she will go later on and the accused took away her bicycle. Apparently, such omission is vital and is significant to discredit the version of the victim.

26. From the above discussion of the evidence of the prosecution


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witnesses, it appears that there cannot be any dispute that no incident of sexual assault of any kind, took place on the day of filing the ejahar. All the incidents narrated by the witnesses including the victim, relates to incidents happened earlier. In other words, the discovery of the incident was first unearthed on last occasion by PW5 which was the day of filing of ejahar by PW1. It is admitted fact that except the victim, all the other prosecution witnesses are reported witnesses of the occurrence when it was discovered by PW5. It is not disputed that the accused was a teacher of the school where the victim was studying. So it cannot be ruled out that the accused was known to the victim since before. From the evidence of the witnesses of the prosecution, it is clear that after discovery of such incidents between the accused and the victim by PW5, the case was filed by PW1.

27. But from the evidence of PW1, it shows that the ejahar was signed by someone else and not by him. Thus, it is clear that the ejahar was written by some other person perhaps, at the dictation of PW4 who admitted the same and signed by someone else. From such evidence, it makes clear that PW1 was only made the informant of the case by name since he is the grand-father of the victim. He was not aware of the incidents and he could not dictate the story of the case to the writer of ejahar. However, the above defect in filing the case does not take away the credibility of the prosecution case immediately.

28. As far as the evidence of PW5 is concerned, it appears that she is the aunt of the victim. The evidence on record shows that she had no good terms with the victim girl. PW5 admittedly in her house when the accused was found lastly to have called the victim to his house by showing a currency-note. PW5 did not see any act of the accused which amount to penetrative sexual assault to PW8. But after knowing the facts from PW8, she came to the conclusion that the accused committed penetrative sexual assault on PW8. It appears that PW5 disclosed the incident to other witnesses like PW2, 4, 6 and so, they all are reported witnesses of the occurrence and their evidence is not direct to the occurrence. However, they lend support to the prosecution story. On the other hand, the evidence of PW3 shows that she came to know the incident from PW8. PW7 is only a hearsay witness. But PW4 saw some part of the incident like she saw the accused leaving the house of PW1 by a bicycle. Therefore, it can be held that since the evidence of PW2, 3, 6 and 7 is not direct, their testimony cannot be used solely to prove the facts of the case. However, their evidence may be useful for corroborate the testimony of other important witnesses like the victim girl and also, PW4 and 5.

29. Similarly, the evidence of PW5 is also found not direct. However, her evidence makes it clear that the accused came to her home and left her home immediately after her query with the bicycle of PW8. PW4 also, corroborates the said version of PW5. This piece of evidence of PW4 and 5 is direct though other part of evidence relating to sexual assault upon PW8 is not direct. Thus it shows that the accused came to the house of PW1. Further on careful observation of the evidence of PW8, it appears that she narrated the story to PW4 and 5. Accordingly, PW5 as well as, PW4 came to know that the accused committed penetrative sexual assault upon PW8 on two times prior to that day. Apparently, the evidence of PW8 is very clear that the accused committed penetrative sexual assault upon her. To get such favour, the accused even gave her money. Since PW4 and 5 corroborates the version of PW8, it means that PW8 narrated them that the accused committed penetrative sexual assault upon her. But her medical report and doctor examined her, does not support the claim of PW8. On the basis of medical evidence, it cannot be held under any circumstances that PW8 was subjected to penetrative sexual assault prior to her medical examination. Moreover, the evidence of PW8 further discloses a contradictory evidence that she admitted that the accused only put his finger one her private part. This means that there was no penetrative sexual assault on PW8. Hence, it can be held that what is narrated by PW8 against the accused is not correct. Since PW4 and 5 was told same story, they alleged that the accused committed sexual assault on her. Thus, the evidence of PW8 is not consistent enough to repose confidence on her. As far as, other part of the incident that the accused paid money to PW8, it would go to disclose from the evidence of PW8 and PW5 that PW8 was called by the accused to pick up flower, the accused asked PW8 after taking her inside his house, to wash his utensils and then committed penetrative sexual assault upon her once in his house and the other, in the house of PW1. But the I/O in his cross-examination, controverted the version of PW5 that in her previous statement before him, PW5 never said that the accused called PW8 to his house by offering Rs.5/- and when PW8 went to pick up flowers, the accused committed sexual assault upon PW8. Thus, such omission is significant since it is main part of the case of the prosecution. Hence, such omission erodes substantial credibility of the claim of PW5.

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30. The I/O further controverted the version of PW8 that she in her previous statement before him, did not state that the accused called her to pick up flowers and took her insides his house on the plea to clean up utensils and then committed sexual assault upon her on the bed of his son and the accused threatened her by showing knife for which she did not disclose the incident to

others and again PW8 did not state that the accused called her by offering Rs.5/- to her and in reply she said that she would go later on and the accused took away her bicycle. As far as the accused taking away bicycle of PW8 is concerned, it cannot be disputed since PW4 and 5 consistently gave testimony on the said fact. But on the other aspect of the incident, it appears that PW8 omitted to disclose vital part of the facts of the sequences of event which tenders her evidence unreliable with PW5. Hence, the evidence of important witnesses like PW5 and 8, it casts serious doubt over the version of the prosecution against the accused. Under such circumstances, it can be said that the accused could have offered money to PW8 to clean his utensils only. Such view also, goes in favour of the accused. Moreover, it shows from the evidence on record that PW1 admittedly did not file the ejahar of the case. This means that some third person is interested in the case for which it lacks in the consistency of the evidence of the prosecution witnesses. It would also, probable from such inconsistent evidence on record that PW8 being minor, might have been tutored by PW5 or other persons to speak against the accused for some undue gain. Hence, such inconsistent version of the prosecution witnesses cannot be relied upon and it shrewed with doubt that if the accused is involved in the crime as alleged by the prosecution. The accused is therefore, entitled to get the benefit of such doubt. Accordingly, the accused is given the benefit of doubt.

31. Under the above facts and circumstances of the case, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s 4 of POCOS Act and he is acquitted and set at liberty. His bail bond shall be remain in force for another 6 months u/s 437-A CrPC. This court however, recommends for payment of compensation to the victim by the District Legal Services Authority, Muzalpur as per rules. Forward a copy of judgment to the District Magistrate, Baksa, Muzalpur immediately.

32. Given under the hand and seal of this court on this 20th day of November 2018.

Dictated and corrected by ;


 C. Das,
 Judge, Special Court
 Baksa, Muzalpur


 Judge, Special Court
 Baksa, Muzalpur

Typed by :
P. Deka, Comp. Typist

↑
Judge Spd Court
Raksa, Muzalpur

ANNEXURE :**List of prosecution witness :**

PW1 ... Sri Deben Kalita ... informant
 PW2 ... Smti. Jaymati Kalita
 PW3 ... Smti. Niroda Das
 PW4 ... Smti. Daibaki Kalita
 PW5 ... Smti. Smriti Kalita
 PW6 ... Smti. Anu Kalita
 PW7 ... Sri Amrit Das
 PW8 ... the victim girl
 PW9 ... Dr. Urmi Devi Choudhury ... m/o
 PW10 ... Md. Abdul Kader Ali ... l/o

List of defence witness :

Nil

List of documents exhibited :

Ext.1 ... FIR
 Ext.2 ... statement of PW5 u/s 164 CrPC
 Ext.2-A ... medical report
 Ext.3 ... statement of victim u/s 164 CrPC
 Ext.4 ... sketch map
 Ext.5 ... charge-sheet

[Handwritten signature]
 Judge, Special Court 20/11/18
 Judge, Special Court
 Baksa, Muzalpur
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