

CAUSE TITLE

SPECIAL (POCSO) CASE NO.16/ 2015.

Informant : 'Y', the mother of the victim 'X'.

Accused : Md. Mainul Islam @ Haque.
S/o Md. Sultan Ali.
Vill. Gohain Pukhuri.
P.S. Bihpuria.
Dist. Lakhimpur.

ADVOCATES :

For the State : Mr. Madhab Gogoi, the learned Spl. Public Prosecutor.

For the Defence : Mr. Eunus Ali, the learned Advocate.

**IN THE COURT OF SPECIAL JUDGE : LAKHIMPUR :
AT NORTH LAKHIMPUR.**

P R E S E N T - S.P. Khaund, (MA Economics, LLB),
Special Judge,
Lakhimpur, North Lakhimpur.

SPECIAL (POCSO) CASE NO.16/ 2015.

GR Case No.80 of 2018.

State of Assam.

-versus-

Md. Mainul Islam @ Haque.

Charges : Under Section 6 of the POCSO Act.

Date of evidence. : 05.10.2015, 05.04.2016, 27.09.2016, 09.01.2017,
21.02.2017, 17.05.2017, 12.12.2018 and
22.08.2019.

Date of argument. : 17.12.2020.

Date of Judgment. : 17.12.2020.

J U D G M E N T

1) The prosecution case in a nutshell is that on 06.08.2015 at about 2 pm, the accused committed aggravated penetrative sexual assault on the minor victim 'X'. An ejarah regarding this incident was lodged by the victim's mother, 'Y'. A Bangalmara OP GD Entry No.167 dtd. 11.08.2015 was registered and the FIR was forwarded to the

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Bihpuria P.S., and registered as Bihpuria P.S. Case No.280/2015 u/s 448/ 376(2)(f) of the IPC RW Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act in short).

2) The Investigating Officer (I.O. in short) embarked upon the investigation. He forwarded the victim and her mother to the Magistrate, who recorded their statements u/s 164 of the Code of Criminal Procedure (CrPC in short). The I.O. forwarded the victim for medical examination. He went to the place of occurrence, prepared the sketch map and recorded the statements of the witnesses. On finding prima facie materials, the I.O. submitted charge-sheet against the accused u/s 448/ 376(2)(f) IPC RW Section 4 of the POCSO Act.

3) On appearance of the accused, copies were furnished, and after hearing both the sides, a formal charge u/s 448/ 376(2)(f) IPC RW Section 4 of the POCSO Act was framed, read over and explained to the accused. The accused abjured his guilt and claimed innocence. On a later date, the charges were altered and a formal charge u/s 6 of the POCSO Act was framed, read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

4) To substantiate the stance, prosecution adduced evidence of eight witnesses including the Medical Officer (M.O. for short) and the I.O.

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The defence cross-examined the witnesses to refute the charges. On a later date, the defence further cross-examined the witnesses on the strength of a petition No.796/2018 dtd. 14.05.2018 filed by the learned defence counsel with prayer for re-crossexamination of the prosecution witnesses.

5) I have heard arguments forwarded by the learned counsel of both the sides.

6) **POINTS FOR DETERMINATION :**

Whether on 06.08.2018 at about 2 pm, the accused committed aggravated penetrative sexual assault on the minor victim 'X'?

DECISION THEREON AND THE REASONS FOR THE DECISION :

7) To decide the case in its proper perspective, it is necessary to delve into the evidence.

8) The informant testified as PW.1 that the accused is her husband's cousin. The incident occurred about 1 ½ months back (from 05.10.2015), at about 2 pm. When she returned from her neighbour's house, she found her daughter on the accused person's lap. The accused person's 'lungi' was raised and her daughter's panty was removed. On seeing both her daughter and the accused person in such a position, she raised alarm, and the accused person

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lowered his 'lungi' and fled. She pursued the accused and caught him and slapped him with a 'sandal' Then, she asked her daughter, who told her that the accused removed her panty and touched her vagina with his penis. Then, she informed the matter to the villagers, who assured her that a 'bichar' will be held. They waited for five days for the result of the 'bichar'. Then, she lodged the ejahar. She noticed that her daughter's vagina was wet on examination. Her sister, Sadika Begum also arrived. She lodged the ejahar, Ext.1, wherein Ext.1(1) is her signature. Her statement was recorded by the Magistrate. Ext.2 is her statement, wherein Ext.2(1), 2(2) and 2(3) are her signatures.

9) I have perused the statement of this witness u/s 164 CrPC, which is consistent to her testimony in the court. But, the irony is that on re-examination by the defence, this witness retracted her evidence. On re-examination, this witness PW.1 testified that she lodged the case against the accused on misconception. At the time of the incident, she was not in the house. She did not witness the incident. As soon as she entered into the house, the accused left the house. The statement of PW.1 and her evidence in chief is contrary to her cross-examination, which was recorded on later date.

10) SI Nabajit Nath is the I.O. who testified as PW.8 in his cross-examination that PW.1 did not state u/s 161 CrPC that her daughter told that the accused touched her vagina with his penis.

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11) Thus, the evidence of PW.1 does not inspire confidence. She has retracted her own evidence in chief.

12) The victim was mum in the court. The victim was only six years old at the time when her evidence was recorded as PW.2. My learned predecessor has made a note while recording the victim's statement that the victim was silent. Several questions were asked to the victim and after ascertaining that the victim was capable to give rational answers, my learned predecessor proceeded to record the victim's evidence. She failed to open her mouth. The victim only stated that at the time of the incident, she was playing in her house. Her younger sister was also present, and then the accused came to her house, and thereafter, the victim remained mum. When her demeanour was noted, she appeared to be terrified and she did not answer the questions asked by my learned predecessor while recording her evidence. Thus, the silence of the victim, exonerates the accused.

13) However, we have the statement of the victim u/s 164 CrPC, which also does have evidentiary value. Several questions were asked by the Magistrate while recording the victim's statement u/s 164 CrPC. The victim could affix her signature and she had legible handwriting and her intelligence can be deciphered thus. The victim's statement u/s 164 CrPC clearly depicts that the accused

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committed aggravated penetrative sexual assault on the victim. The irony is that the victim was silent when her evidence was recorded. So, at this juncture, I would like to highlight the doctor's evidence. Dr. Bharati Gogoi testified as PW.4 that on 12.08.2015, while serving as Sr. Medical & Health Officer at North Lakhimpur Civil Hospital, she examined the victim 'X' and found the following :

“ Identification mark : Nil.

Height : 110 cm. Weight : 15 kg.

General configuration : Teeth - 24 nos.

Breast -Not developed.

Axillary and pubic hair - absent.

Private parts - Vulva : Healthy and no sign of injury.

Hymen - Intact.

Laboratory examination for spermatozoa detection : No spermatozoa seen. Age of the victim was below 8 years. Ossification test was done on 12.08.2015. No external injury was found.

The M.O. opined that no recent evidence of sexual intercourse, could be detected. No external as well as private part's injury found. Age of the girl was below 8 years.”

14) Now, coming back to the victim's evidence, it can be held that as the victim did not reveal the truth, the accused gets the benefit of doubt. No evidence of recent sexual intercourse was detected by the doctor. No spermatozoa or injury on private part were detected on

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the examination of the victim, despite the fact that the victim was examined by the doctor immediately, after the alleged incident. Due to lack of evidence, the accused gets the benefit of doubt. Moreover, the victim's mother on a later date, appeared before the court, in her eagerness to shield the accused from any legal action. She exonerates the accused by stating that this case was launched on the basis of some misconception. As per tenets of the criminal jurisprudence, a serious offence of this nature, which will affect the life and liberty of a person, has to be proved beyond reasonable doubts. When the victim and the informant themselves choose to shield the accused, the prosecution is helpless.

15) 'Z' testified as PW.3 that the accused is his cousin and the victim is his daughter. His daughter was about 5 years old and she was a student of class-I when the incident occurred. At that time, he was in Sahamot's house and he reached home after 1 ½ hours after the incident. His wife informed him that the accused committed rape on his daughter, and then he went to the accused person's house and demanded a 'bichar' relating to the incident. The accused person's father assured him that a 'bichar' would be held. As no 'bichar' was held, his wife lodged the ejahar.

16) This witness also appeared on a later date for re-cross-examination and he testified in his re-cross-examination that this

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case was launched against the accused person on the background of misconception. Although this witness testified in his cross-examination that this case was launched against the accused on the basis of misconception, yet he did not state with clarity that the accused did not commit rape on his daughter. But, as he stated that the misconception led to this case against the accused, the benefit of doubt goes to the accused person. It appears that the accused is PW.3's cousin. They may have privately settled their dispute between themselves.

17) Md. Abdul Kalam testified as PW.3 that he scribed the ejahar, Ext.1, wherein Ext.1(1) is his signature.

18) Thus, it can be safely held that the informant, Abdul Kalam did not implicate the accused. The evidence of PW.5, Abdul Kadir also did not implicate that the accused is complicit. He testified that he heard that the accused took the victim on his lap and he was playing with the victim as paternal uncle. Then, the victim's mother lodged this case against the accused.

19) The evidence of Smti Sajida Begum depicts that the victim's mother informed her that the accused did shameful acts with the victim. This evidence of Sajida Begum cannot be accepted because

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the victim's mother herself testified on a later date that this case was launched against the accused on misconception and she did not witness the incident.

20) The PW.7, Mustt. Khudeja Begum turned to be a hostile witness. She is also the accused person's cousin. When the prosecution was allowed to cross-examine its own witness, this witness denied that she stated u/s 164 CrPC that “ *on 06.08.2015 at about 3 pm, hearing hue and cry towards the house of ‘Y’, I went there and saw ‘Y’ chasing Mainul with a ‘sandal’ in her hand. ‘Y’ told me that Mainul was doing bad acts with her daughter ‘X’ by lifting her on his lap, and ‘Y’ had seen with her own eyes, and when I enquired the matter to ‘Y’, then ‘Y’ told me that during absence of her mother in the house, Mainul used to come to their house and they was sitting on a chair in the verandah of his house, and by taking her on his lap, he used to touch her vagina by hand and penis after removing her pant.*”

21) This statement of Khudeja Begum u/s 161 CrPC was affirmed by the I.O. SI Nabajit Nath, who testified as PW.8.

22) The I.O. is a formal witness. He undertook the duty of an Investigating Officer and performed his duty with great conviction. He finally submitted the charge-sheet against the accused after

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recording the statements of the witnesses and on finding prima facie materials against the accused. However, as the evidence of the witnesses does not inspire confidence, the accused gets the benefit of doubt. The evidence of the witnesses appears to be shaky as they have retracted their testimonies on a later date. Both the parties are from the same family and being relatives, the aggrieved party appears to be empathetic towards the accused.

23) The defence also examined two witnesses to refute the charges. Abdul Kadir testified as DW.1 that Mainul Haque is his cousin. He came across the victim after this case was lodged. Several meetings were held in their village, where the accused was asked to vacate his house. He also gave false evidence against the accused. The accused did not sexually assault the victim. Now, this witness testified as PW.5, but his evidence does not appear to be false because he testified as PW.5 that the accused took the victim on his lap, and played with the victim as he is the victim's paternal uncle. There is not much deviation from the testimonies of PW.5 when he also testified as DW.1, lest he would have been liable of perjury.

24) Md. Idrish Ali testified as DW.2 that the accused married the informant, but after having three or four children, the informant often used to escape from the matrimonial home. Several meetings were held in this regard and the informant was ostracized from the

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society. So, to wreak vengeance, the informant slammed this case against the accused. The informant's husband was not aware of this case, and now, he has abandoned her. The accused did not commit any offence. It is apt to mention at this juncture that the evidence of Idrish Ali and Abdul Kadir was recorded twice as DW.1, which is more or less similar.

25) In view of my foregoing discussions, it is thereby held that the prosecution failed to prove beyond reasonable doubt that the accused committed aggravated penetrative sexual assault on the minor victim 'X'. The victim's parents retracted their own testimonies on a later date when they were again cross-examined for the second time. This way, the lacunae was filled up by the defence. The statement of the victim u/s 164 CrPC depicts that the accused is complicit, but as the victim did not implicate the accused while deposing her evidence in the court, the accused gets the benefit of doubt, more so, when the Medical Officer's evidence does not support the fact that the victim was violated. The Medical Officer's evidence depicts that no injuries were detected on the private parts of the victim and no spermatozoa was detected. There was no evidence of any sexual assault. In this manner, the accused gets the benefit of doubt.

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26) The accused, Mainul Islam @ Haque is, thereby, acquitted from the charges u/s 6 of the POCSO Act on benefit of doubt and is set at liberty forthwith.

27) The bailbond stands discharged.

Judgment is signed, sealed and delivered in the open Court on the 17th day of December, 2020.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

Certified that the Judgment is typed to my dictation and corrected by me and each page bears my signature.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

A P P E N D I X

Special (POCSO) Case No.16/ 2015.

LIST OF WITNESSES FOR PROSECUTION :

1. PW.1 - 'Y', the mother of the victim.
2. PW.2 - 'X', the victim.
3. PW.3 - 'Z', the father of the victim.
4. PW.3 - Md. Abdul Kalam.
5. PW.4 - Dr. Bharati Gogoi, M.O.
6. PW.5 - Md. Abdul Kadir.
7. PW.6 - Mustt. Sajida Begum.
8. PW.7 - SI Nabajit Nath, I.O.

LIST OF COURT WITNESS :

LIST OF EXHIBITS FOR PROSECUTION :

1. Ext.1 - F.I.R.
2. Ext.2 - Statement of the victim's mother.
3. Ext.3 - Statement of the victim.
4. Ext.4 - Medical Report.
5. Ext.5 - G.D. Entry.
6. Ext.6 - Sketch map.
7. Ext.7 - Charge-sheet.

LIST OF MATERIAL EXHIBITS FOR PROSECUTION :

Nil.

LIST OF WITNESSES FOR DEFENCE :

1. DW.1 - Md. Abdul Kadir.
2. DW.2 - Md. Jakir Ali.
3. DW.3 - Md. Idrish Ali.

LIST OF EXHIBITS FOR DEFENCE :

Nil.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

Transcribed and typed by :

Sri Satyabrata Kshattri, Stenographer.