

IN THE COURT OF SPECIAL JUDGE (POCSO)

NALBARI

SPL. (P) CASE NO. 18/2015

U/s 4 Protection of Children from Sexual Offences Act, 2012

State of Assam

- Vs -

Khagen Seal Accused

Present

Smti. Munmun B. Sarma

Special Judge (POCSO)

Nalbari

Counsel for Prosecution: Sri K K Sarma, Ld. Special Public
Prosecutor

Counsel for Defence : Smti. Anju Rani Das & Smti. Anjali
Barman, Adv.

Evidence : 24/08/2015, 05/09/2019, 06/09/2019,
07/11/2019, 14/02/2020

Argument : 05/04/2021

Judgment : 11/05/2021 (*Re-fixed as accused was absent*)

JUDGMENT

1) On 15/05/2020 informant Sarat Ch. Seal lodged an FIR at Mukalmua P.S., stating inter alia that, on the same day at around 11-30 AM, when his 12-years-old daughter (hereinafter referred to as victim or 'X') was alone at home, the accused Khagen Ch. Seal entered into the house and threw 'X' to the ground & onto a sack. The accused then removed her panty and touched her private parts with his fingers. The accused also clamped her mouth. Hearing the victim's shouts, the neighbours came & caught the accused. Once the informant came to know about the incident he lodged the FIR.

2) On receipt of the FIR, it was registered as Mukalmua P.S. Case No. 147/2015 u/s 376(2)(i) Indian Penal Code (hereinafter referred to as IPC) r/w s.4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act). The police went to the place of occurrence and examined the available witnesses & their statements recorded. After victim was recovered, she was sent for medical examination and her statement u/s 164 Criminal Procedure Code (hereinafter referred to as CrPC) was duly recorded. On completion of the investigation, a prima facie case having appeared against the accused Khagen Ch. Seal, the Investigating Officer (herein after referred to as I/O)

submitted charge sheet against him u/s 376(2)(i) IPC r/w s.4 POCSO Act.

3) Cognizance was taken u/s 376(2)(i) IPC r/w s.4 POCSO Act and on receiving summon, the accused Khagen Seal appeared before the court to face trial. Necessary copies were furnished to him. After considering the materials available on case record and case diary and prima facie case having appeared u/s 4 POCSO Act, charge was framed and content of the charge was read over and explained to accused Khagen Seal, to which he pleaded not guilty and claimed to be tried.

4) To prove the offence u/s 4 POCSO Act against the accused, the prosecution side examined 7 witnesses & exhibited 6 documents. The accused person's case, as could be ascertained from cross-examination of the prosecution witnesses & his statement u/s 313 CrPC, was that of total denial.

5) The **points for determination** is, whether on 15/05/2015 at about 11-30 AM at Pub Kalakuchi, accused Khagen Seal committed penetrative sexual assault upon the victim 'X', thus, committing offence u/s **4 POCSO Act?**

DISCUSSION, DECISION AND REASONS THEREOF

6) I heard the arguments forwarded by the Ld. Special Public Prosecutor and the Id. counsel for the accused. I have also gone through the materials available in the Case Record & the Case Diary. The charge is analysed herein below in light of the materials available on record and the argument forwarded by both sides.

7) To be convicted u/s 4 POCSO Act it must be proved that the accused Khagen Seal committed 'penetrative sexual assault' on the victim 'X'. **S.3 POCSO Act** defines 'Penetrative sexual assault' as follows –

"A person is said to commit "penetrative sexual assault" if -

- a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- c. he manipulates any part of the body of the child so as to cause penetration into*

the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

My Decision & Reasons Thereof:

8) Before proceeding further with the discussion, I deem it essential to point out that the defence-side never questioned the prosecution claim that the victim is a minor. As regards the **age of the victim**, the prosecution produced the Medical Officer of the case **PW-1 Dr. Doli Gogoi (Medical Officer)**. She deposed that radiological evidence puts the age of the victim/PW-3 below 14 years. Thus, if we consider the age of the victim as ± 2 years, the victim is still a minor at the time of the incident.

9) Another important point to remember is that, in a case under POCSO Act there is a **reverse burden on the accused**. **S.29 POCSO Act** casts a reverse burden upon the accused to prove that he didn't commit the said offence & **s.30 POCSO Act** deems the existence of the culpable mental state of the accused to do the said crime, and it is upon to disprove the same.

"29. Presumption as to certain offences –

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

"30. Presumption of culpable mental state

–

1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

10) Now, to the evidences of the witnesses, **PW-3/ victim** deposed that she was studying in Class-III when the incident,

and that the accused is a relative. She was on her way to a neighbour's house when the accused lifted her and took her to an abandoned house, and after that PW-3 doesn't remember anything else. During cross-examination she denied the suggestion that, even though the accused called her she didn't go, and that, the accused didn't take her to the abandoned house. PW-3 recognized her signature in her statement before the magistrate. Perusal of the statement of the victim u/s 164 CrPC (Ext.4) reveals that PW-3/victim stated that she was on her way to a friend's house when the accused caught hold of her and took her to the cowshed of one Upen. The accused then laid her on a sack & removed her pants and touched her urethra with his fingers. When PW-3/victim raise *hulla*, the accused laid on top of her and clamped her mouth with his other hand and asked her not to raise *hulla*. People gathered and saved PW3/victim. However, during cross-examination of PW-3/victim she stated that whatever she stated in her statement u/s 164 CrPC was as per tutoring of her brother. Thus, this nullifies whatever the victim stated in her statement u/s 164 CrPC as her statement was not made with free-mind but was as per tutoring. Thus, when read in whole, the evidence of the victim/PW-3 failed to bring out any material against the accused person.

11) Now, coming to the evidence of the next most important witness of the prosecution, and who is apparently an eye-witness. **PW-4 Mrigen Bezbaruah** deposed that he saw that the accused laid the victim on a gunny bag in the cowshed of Upen, and that, the accused was kneeling in front of her and 'X' legs were draped over the accused's shoulder, and that, with one hand the accused gagged the victim. Though defence suggested that PW-4 never stated all this before the I/O, however, during his evidence the **PW-7 Sri Ajit Das (I/O)** confirmed that PW-4 did state all these things, and that, PW-4 saw the accused touch vagina of 'X'. During his evidence PW-4 also deposed that seeing the incident immediately called Nirmali & Alaka, and that, they raised alert.

12) Thus, evidence of PW-4 Mrigen Bezbaruah reveal that PW-5 Nirmali Bezbaruah @ Seal & PW-6 Alaka Bezbaruah are eye-witnesses to the incident and were the ones who raise alert. **PW-5 Nirmali Bezbaruah @ Seal** deposed that PW-4 Mrigen called her and few other ladies & told that the accused and the victim was found in the abandoned house of Upen. When she went to the abandoned however, she didn't find the accused or 'X'. On the other hand, **PW-6 Alaka Bezbaruah** deposed that PW-4 Mrigen called her Nirmali repeatedly from the compound of Upen Seal, but she didn't

notice anything. Both these witnesses were declared 'hostile' by the prosecution. They denied that they stated before the I/O that on being informed by PW-4 Mrigen, they went to the cowshed of Upen Seal & saw the victim lying on a gunny bag and the accused was touching her vagina with one hand and gagging with another. The I/O was asked about this, and he deposed that, both PW-5 & PW-6 did tell him that, on being informed by PW-4 Mrigen, they went to the cowshed of Upen Seal & saw the victim lying on a gunny bag and the accused was touching her vagina with one hand and gagging with another.

13) This brings us to the question, how much of the evidence of a witness declared 'hostile' by the prosecution, can be accepted. In the case of **State of U.P. Vs. Ramesh Mishra, AIR 1996 SC 2766**, the Hon'ble Supreme Court held that –

"It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted."

Similarly, in the case of **Anbazhagan Vs. Superintendent of Police, AIR 2004 SC 524**, it was held that -

"If the judge finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it."

In the case of **Koli Lakhman Bhai Chanabhai Vs. State of Gujarat, (1999) 8 SCC 624**, a Division Bench of Hon'ble Apex Court held that –

"It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence."

14) Thus, guided by the above observations of Hon'ble Supreme Court, the evidence of PW-5 Nirmali Bezbaruah @

Seal & PW-6 Alaka Bezbaruah is scrutinized. Though both these witnesses claimed that they didn't see the incident, and that, they didn't see the victim & the accused in the compound of Upen Seal, however, what they did admit and became admissible as evidence, is that, PW-4 Mrigen called them to the compound of Upen and told them that the accused & victim were found there. Thus, both PW-5 & PW-6 supported PW-4 Mrigen's evidence that he called PW-5 Nirmali Bezbaruah & PW-6 Alaka Bezbaruah.

15) Thus, above discussions reveal that, except for the evidence of PW-4 Mrigen Bezbaruah, there is no other witness who supported the prosecution claim that the accused had taken the victim to cowshed of Upen and touched her private parts. Even the victim/PW-3 herself doesn't remember what happened at that time, and she also admitted that her statement u/s 164 CrPC was tutored by her brother. Pertinent to mention that the informant/PW-2 didn't see the incident & nor was present when the public apparently caught hold of the accused in the act. It is also important to note that, not only did PW-5 Nirmali Bezbaruah @ Seal & PW-6 Alaka Bezbaruah deposed that they saw no one at the place of incident, the prosecution also failed to produce any other member of the public who apparently caught hold of the accused after alert was raised. Thus, I am of the considered opinion that prosecution failed to establish

the foundational facts against the accused Khagen Seal u/s 4 POCSO Act or any other sections.

ORDER

16) In view of the discussions in the prior paragraphs & reasons thereof, **accused Khagen Seal is found not guilty and acquitted from the charge u/s 4 POCSO Act.** The accused person is set free at his liberty forthwith. Bail bond furnished by the accused shall stand cancelled after period of 6 months & bailor accordingly discharge.

Any seizure made be disposed of as per law.

Given under my hand and seal of this court on this the **11th day of May'2021.**

(Smti. Munmun B. Sarma)

Special Judge (POCSO)

Nalbari

APPENDIX

(A) Prosecution witnesses:

- i. PW-1 : Dr. (Mrs) Doli Gogoi (Medical Officer)
- ii. PW-2 : Sarat Ch. Seal (Informant)
- iii. PW-3 : 'X' (Victim)
- iv. PW-4 : Mrigen Bezbaruah
- v. PW-5 : Smti Nirmali Bezbaruah
- vi. PW-6 : Alaka Bezbaruah
- vii. PW-7 : Sri Ajit Das (Investigating Officer)

(B) Prosecution exhibited documents:

- i. Ext 1 : Medical Examination Report
- ii. Ext 1(2) : Signature of PW-1 (M/O)
- iii. Ext 2 : X-Ray Report
- iv. Ext 2(1) : Signature of Dr. Prabodh Kr. Sarma
- v. Ext 2 : FIR
- vi. Ext 2(1) : Signature of PW-2 (Informant)
- vii. Ext 3 : Seizure list
- viii. Ext 3(1) : Signature of PW-2 Sarat Ch. Seal
- ix. Ext 4 : Statement of Victim u/s 164 CrPC
- x. Ext 4(1)&(2) : Signatures of victim/ PW-3
- xi. Ext 6 : Charge-Sheet
- xii. Ext 6(1) : Signature of PW-7 Sri Ajit Das

(C) **Defence witnesses** : Nil

(D) **Defence exhibited document** : Nil

(Smti. Munmun B. Sarma)

Special Judge (POCSO)

Nalbari

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