

IN THE COURT OF SPECIAL JUDGE (POCSO)
NALBARI

SPL. (P) CASE NO. 17/2018

*U/s 8 Protection of Children from Sexual Offences Act, 2012
r/w Sec. 448/354/506 Indian Penal Code*

State of Assam

- Vs -

Debajit Barman Accused

Present

Smti. Munmun B. Sarma

Special Judge (POCSO)

Nalbari

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

Counsel for Defence : Sri Sonapati Sarma, Advocate

Evidence : 11/04/2019, 13/09/2019, 12/02/2020, 12/02/2021

Argument : 20/08/2021

Judgment : 16/10/2021 (*re-fixed from 03/09/2021 as accused absconded*)

JUDGMENT

1) On 23/04/2018 informant Nilima Barman lodged an FIR before the O/C, Nalbari PS, stating inter alia that, on

22/04/2018 at about 10:00 PM the accused Debajit Barman entered into her house and touched the breast of her 16-year-old daughter (hereinafter referred as victim or 'X'). The victim called-out to her mother & when the informant scolded the accused for such an act, he rebuked her back in slang language, and also, threatened her & the victim with dire consequences, and that, he will kidnap the victim. Hence, this FIR was filed.

2) On receipt of the FIR, police registered the case as Nalbari PS Case No. 268/2018 u/s 448/354/294/506 of Indian Penal Code (hereinafter referred to as IPC) r/w s.8 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. Victim was sent for medical examination but the victim and her guardian did not give consent for medical examination. Statement of the victim 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 Debajit Barman, the Investigating Officer (herein after referred to as I/O) submitted charge-sheet against accused Debajit Barman u/s 448/354/506 r/w s.8 POCSO Act.

3) Cognizance was taken u/s 448/354/506 IPC r/w Sec. 8 of POCSO Act, and on receiving summon, accused Debajit Barman 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 448/354/506 IPC r/w Sec. 8 POCSO Act, charges were framed and the content of the charge were read over and explained to accused Debajit Barman, to which he pleaded not guilty and claimed to be tried.

4) To prove the offence u/s 448/354/506 IPC r/w s.8 POCSO Act against the accused, the prosecution examined 2 witnesses, same being the informant & the victim. Prosecution exhibited no documents. Prosecution evidence was closed as it was seen that further witnesses cannot help prosecution case. 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** are -

- a) Whether 22/04/2018 at about 10:00 PM at Balikaria, accused Debajit Barman committed house-trespass by entering into the house of Nilima Barman with intent to commit rape

upon her daughter/ victim, thus, committing **offence u/s 448 IPC?**

b) Whether the accused Debajit Barman, on the same date, time and place, used criminal forces upon the victim 'X' with intent to outrage her modesty, thus, committing **offence u/s 354 IPC?**

c) Whether the accused Debajit Barman, on the same date, time and place committed criminal intimidation by threatening Nilima Barman and her daughter/ victim with injury & kidnapping, with intent to cause alarm to them, thus committing **offence u/s 506 IPC?**

d) Whether the accused Debajit Barman, on the same date, time and place, committed sexual assault upon the minor victim 'X', thus, committing **offence u/s 8 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 u/s 448/354/506 r/w s.8 POCSO Act are analyzed herein below individually in light of

the materials available on record and the argument forwarded by both sides. Before proceeding with the appreciation of evidence I deem it necessary to put on record that the MO PW-7 Dr. Dhritishree Barman has placed the age of the victim as above 16 years and below 18 years. This has not been challenged by the defence. Thus, it is accepted that the victim is a minor.

Charge U/s 8 POCSO Act

7) To be convicted u/s 8 POCSO Act it must be proved that the accused Debajit Barman committed sexual assault upon the minor victim 'X'. 'Sexual assault' has been defined in s.7 POCSO Act as follows –

“Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

S.30 POCSO Act is regarding presumption of culpable mental state of the accused, and it reads as follows –

“(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."

Thus, to be convicted u/s 8 POCSO Act, if the prosecution succeeds to prove the allegation that the accused touched the vagina, penis, anus or breast, then a presumption will be drawn that it was done with a sexual intent by the accused, and the burden will be on the accused to prove that there was no sexual intent in the act.

8) In view of the above legal position under the POCSO Act, I now proceed to appreciate the evidence of the witnesses. I first take-up the evidence of the most important witness, the victim herself. The **victim/PW-3** deposed that, at the time of the incident she was sleeping and the accused came to her house and pressed her knee & left, and after sometime he returned back & pressed her vagina. The accused also pressed her breast. PW-3 immediately ran out & informed her mother, who was at her uncle's house nearby. When the PW-3's mother charged the accused about his action, he rebuked her back with slang language. After that the accused left. During cross-examination PW-3 deposed that at the time of the incident she, her father & her

brother was sleeping. She denied the suggestion that she deposed falsely as she have to pay money to the accused. She also denied the suggestion that she didn't tell the I/O that, when she was sleeping the accused came to her house and pinched her knee & left, and after sometime he returned back & pinched her vagina.

9) In view of the above evidence of the victim & the suggestions given by the defence-side, I went through the evidence of the I/O as regards the statement of the victim u/s 161 CrPC. The **IO/ PW-9 SI Ali Kumar Dusad** stated that the victim didn't tell him that the accused came to her house and pinched her knee & left, and after sometime he returned back & pinched her vagina. Thus, it is seen that during investigation the victim didn't tell the I/O this relevant fact that the accused pinched her vagina, and thus, it appears that victim stated this for the 1st time in the Court. Pertinent to mention that prosecution neither asked her anything about her statement u/s 164 CrPC, nor brought it into record. However, victim was consistent about the fact that the accused entered her house when she was sleeping and pressed her breast.

10) At this point I deem it essential to discuss what is the value of the evidence of the victim when she modified the story during trial, and whether, this omission is fatal to the

prosecution case. In the case of **Narayan Chetanram Chaudhary Vs. State of Maharashtra, (2000) 8 SCC 457**, it was held that –

“Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person.”

Similarly, a Division Bench of Hon'ble Supreme Court in the case of **Sampath Kumar Vs. Inspector of Police, (2012) 4 SCC 124 21**. It was observed that, while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not.

Thus, we see that, the evidence of the victim might contain discrepancies, however, they don't amount to

contradictions and doesn't change the syntax of the prosecution case itself.

11) I now take-up the evidence of **informant Nilima Barman (PW-1)**. She deposed that, at the time of the incident the victim was sleeping and the accused came and pressed the breast and private parts of the victim. Victim immediately ran out & informed her mother, who was at her uncle's house nearby. When the PW-1 came home she saw the accused going out from our house. When PW-1 charged the accused why he came to their house, the replied that what if he touches the private parts of the victim. The accused also threatened her with dire consequences. Thereafter he went to his house and came back with a *dao* and threatened that he will commit *beya kaam* (bad deed) to the victim. About his action, he rebuked her back with slang language. After that the accused left. During cross-examination PW-1 denied the suggestion that she didn't tell the I/O that at the time of the incident the victim was sleeping, or that, she came to her uncle's house & informed. PW-1 stated that at time of the incident the victim, PW-1's husband & PW-1's son Abhilash were in the house. She admitted that she told the I/O that sometimes the accused used to come to their house consumes *ganja* with PW-1's husband. From the cross-examination of PW-1 it appears that

Jiten Barman Dibakar Barman, Bhaben Barman, Bijay Barman, Dipak, Bimal Barman, Ratne Barman, Aniruddha Barman, Ganesh Barman, Mahananda Barman, Dhiren Saloi & Biananda Barman reside near the house of the informant. PW-1 answered during cross-examination that initially other people did not come to the PO but when the accused threw stone at the house of Bhaben Barman people gathered. PW-1 denied the suggestion that the accused lend them money & a false case is lodged to escape from returning the money.

12) In view of the above evidence of informant/PW-1 & the suggestions given by the defence-side, I went through the FIR closely & also evidence of the I/O as regards the statement of the informant u/s 161 CrPC. The IO/ PW-9 SI Ali Kumar Dusad stated that PW-1 didn't tell him that at the time of the incident the victim was sleeping, or that, she came to her uncle's house & informed PW-1. However, perusal of the FIR reveals that the informant did mention there that at the time of the incident the victim was sleeping and the accused came and pressed her breast, and that, the victim immediately ran out & and informed PW-1. Thus, I am of the opinion that the evidence of the PW-1 is consistent with her FIR & her statement during investigation that the victim came to her immediately after the incident and informed that the accused sexually assaulted her.

13) Before going further with the evidence of the independent witnesses, I deem it essential to reflect the evidence of victim's father Bijay Barman, who was at home at the time of the incident. **PW-2 Bijay Barman** deposed that he was sleeping at the time of the incident & his daughter (victim) was also sleeping in another bed. He woke-up hearing hue and cry in the road in front of his house & came to know that his wife (PW-1) along with Bhaben Barman went to the police station. He heard that the accused caught hold of his daughter (victim) while she was sleeping. Thus, his evidence reveals that he is not an eye-witness and has no direct knowledge about the incident.

14) Now, I take-up the appreciation of evidence of the independent witnesses Bhaben Barman, Utpal Barman & Chandan Haloi. **PW-4 Bhaben Barman** deposed that, the accused was pelting stone at his house & PW-4 came out from his house to apprehend accused. Then he heard hue and cry in the house of informant Nilima and she too came out from her house & told that accused had entered her house and touched the victim's breast. People gathered & police was informed. Police arrived and took the accused. During cross-examination PW-4 denied the suggestion that he didn't tell the I/O that the informant told him that the accused touched the victim's breast. When I/O was asked

regarding the same, he stated that PW-4 didn't tell him that the informant told him that the accused touched the victim's breast.

15) **PW-5 Utpal Barman** deposed that, hearing hue and cry outside his house, PW-5 came out & saw that villagers have gathered. He heard from them that the accused touched the body of victim girl by entering into her house. On the other hand, **PW-6 Chandan Haloi** deposed that, he was having dinner when he heard a quarrel on the road. He went out and saw that informant Nilima Barman was rebuking accused. PW-6 came to know that the accused had touched the body of the victim. Several villagers gathered, including Bhaben Barman. During cross-examination PW-6 stated that he heard from his uncle that the accused had touched the body of the victim. Thus, we see that both PW-5 & PW-6 is hearsay witness as regards to what the accused allegedly did to the victim, because they neither saw the incident, nor confirmed to be told by someone who has seen.

16) Thus, all the evidences above strings together the incident mentioned in the FIR. Both victim/PW-3 & informant/PW-1 Nilima Barman are clear in their evidence that the accused entered their house and pressed the victim's breast. At the time of the incident PW-1 was in a nearby home and the victim immediately rushed there and told PW-1 about the

incident. Both PW-1 & PW-3 also corroborates the fact that, hearing about the incident PW-1 charged the accused about his action, however, he rebuked her back with slang language. This incident of the altercation between PW-1 & the accused was witnessed by PW-6 Chandan Haloi. He clearly deposed that he saw that informant Nilima Barman was rebuking accused. Another relevant piece of evidence is that of presence of PW-4 Bhaben Barman. He deposed that, the accused was pelting stone at his house & he came out from his house to apprehend accused. This evidence find support in the evidence of PW-1, who during cross-examination mentioned the same.

17) Before parting with the discussion on the charge u/s 8 PCOS Act, I deem it essential to point out that no evidence appeared that showed that there could be a reason for a minor girl to falsely allege that the accused has sexually assaulted her. Though, the defence claimed that the victim borrowed money from the accused, and therefore, this false case was narrated, however, defence failed to lead any evidence in this regard or bring out any evidence during cross-examination. Rather, cross-examination of PW-1/ informant revealed that the accused used to frequent their house and used to have *bhang* along with PW-2. Thus, in the absence of any existing enmity between the parties there

exists no ground to question the veracity of a victim of sexual assault, when her evidence was otherwise found reliable.

18) Thus, I am of the judicious opinion that prosecution succeeded to prove to the degree of preponderance of probability that the accused touched the breast of the victim. However, the defence failed to discharge their burden to disprove the same. Hence, it is held that **prosecution succeeded to prove to the degree of probability that the accused Debajit Barman committed offence u/s 8 POCSO Act.**

Charge u/s 354 IPC

19) To be convicted u/s 354 IPC it must be proved that the accused Debajit Barman used criminal force upon the victim 'X' with intent to outrage her modesty. 'Criminal force' has been defined in s.350 IPC as follows –

“Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.”

20) As seen while discussing the prior charge u/s 8 POCSO Act, the prosecution succeeded to prove that that the accused touched the breast of the victim. Though under the POCSO Act prosecution only needs to prove the charge to the degree of probability, however, the evidence of the victim & her mother/informant was compelling enough to prove beyond all reasonable doubt that the accused touched the breast of the victim. What we now have to consider for conviction u/s 354 IPC is –

- a. Whether modesty of the victim was outraged by the accused, and
- b. Whether criminal force was used to commit the offence.

'Modesty' has not been defined anywhere in IPC or other relevant Acts or provision of law. However, we can turn to the decision of a Division Bench of the Apex Court in the case of **Raju Pandurang Mahale Vs. State of Maharashtra, (2004) 4 SCC 371**. It was observed as follows –

"Modesty is defined as the quality of being modest; and in relation to a woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions..... What constitutes an outrage to female modesty

is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object."

21) In light of the above discussion, when the evidence of the witnesses is appreciated, it is seen that, when the accused pressed the breast of the victim, it definitely outraged her modesty. However, the question is also whether the accused used criminal force during the incident. From the evidence of the victim (PW-3) it is seen that she was sleeping when the accused pressed her breast, however, her evidence is silent regarding any force being used upon her by the accused to commit the offence. Thus, I am of the opinion that **prosecution failed to make out an offence u/s 354 IPC.**

22) So, the question that now arises is whether the accused is guilty of any other offence under IPC for outraging the modesty of the victim, though without use of force. Perusal of IPC reveals that **s.354-A IPC** deals with a similar situation when criminal force is not used. It reads as follows –

1) A man committing any of the following acts -
(i) physical contact and advances involving unwelcome and explicit sexual overtures; or
(ii) a demand or request for sexual favours; or
(iii) showing pornography against the will of a woman; or
(iv) making sexually coloured remarks,
shall be guilty of the offence of sexual harassment."

In light s.354-A IPC, the evidence of the victim is re-visited, and it is seen that, the accused pressed her breast while she was sleeping. Thus, this act of pressing the breast of the victim is covered u/s 354-A (1) (i) IPC.

23) Thus, in view of the above discussions, and empowered u/s 222 CrPC, I hereby hold that **prosecution succeeded to prove beyond all reasonable doubt that the accused Debajit Barman committed offence u/s 354-A IPC.**

Charge U/s 448 IPC

24) To be convicted u/s 448 IPC it must be proved that the accused Debajit Barman committed house-trespass by

entering into the house of Nilima Barman with intent to commit sexual offence upon informant's daughter (victim).

25) As seen while discussing the charge u/s 8 POCSO Act, PW-3/victim clearly deposed that the accused entered into her house and pressed her breast. Her evidence was supported by the informant Nilima Barman (PW-1). She clearly mentioned that the victim came running to her and told her the incident. PW-4 Bhaben Barman, who shares the same courtyard as the informant, deposed that he came out of his house and saw the accused in the campus. Even PW-6 Chandan Haloi deposed that he saw the accused in an altercation at the time of the incident. Interestingly, PW-2 Bijoy Barman was present in the house at the time of the incident, however, he showed total ignorance of the incident when it happened. He claimed that he was ill and therefore asleep. Pertinent to mention that, PW-2 generally used *bhang* along with the accused in informant's house. Thus, his PW-2's ignorance at the time of the incident can be attributed to is *bhang* consumption.

26) Thus, in view of the above discussions, I hereby hold that **prosecution succeeded to prove beyond all reasonable doubt that the accused Debajit Barman committed offence u/s 448 IPC.**

Charge U/s 506 IPC

27) To be convicted u/s 506 IPC it must be proved that the accused Debajit Barman criminally intimidated the victim and/or the informant with the intent to cause alarm to them.

28) I have closely gone through the evidences of informant/PW-1 & victim/PW-3. The informant/PW-1 deposed during evidence that the accused threatened her with dire consequences, and also that, he returned to his house and came back with a *dao* and threatened that he will commit *beya kaam* (bad deed) to the victim. However, I/O evidence revealed that the informant/PW-1 didn't tell him that, the accused returned from his house with a *dao* and threatened PW-1. Furthermore, no further evidence appeared on record to prove that the accused did cause criminal intimidation on the victim or the informant. Thus, is held that **prosecution failed to prove beyond all reasonable doubt that the accused Debajit Barman committed offence u/s 506 IPC Act.**

29) Thus, in view of the discussion made above, it is held that **prosecution failed to prove beyond all reasonable doubt the charge u/s 506 IPC against the accused Debajit Barman.** However, the **prosecution was successful in proving the guilt of the accused u/s 448/354-A IPC beyond all reasonable doubt, and to**

the degree of preponderance of probability, the charge u/s 8 POCSO Act.

30) Examining whether it is a fit case to release the accused Debajit Barman u/s 360 CrPC or under the Probation of Offender's Act. The accused person has been found guilty of sexually assaulting a minor girl within the safety of her own house. Furthermore, during trial he has shown no remorse. Thus, I'm of the opinion that this is not a fit case to released accused Debajit Barman u/s 360 CrPC or under the Probation of Offender's Act. I have heard the accused person Debajit Barman on the point of sentence & he maintained that he is innocent and that a false case has been lodged against him.

ORDER

31) Discussions made in the prior paragraphs revealed that the prosecution succeeded in proving that the accused Debajit Barman committed criminal trespass into the house of the informant & sexually assaulted the minor victim. Hence, **accused Debajit Barman is found guilty for the offence u/s 448/354-A IPC & s.8 POCSO Act.** However, prosecution failed to prove beyond all reasonable doubt that the accused caused criminal intimidation on the informant or the victim. Thus, **accused Debajit Barman is acquitted from the charge u/s 506 IPC.**

32) During the trial or while going through the evidences, I found no mitigating factor in favour of the accused Debajit Barman. The fact that the accused sexually assaulted a minor girl within the safety of her own house, is by itself, an aggravating factor against the accused Debajit Barman. Thus, considered all these facts and circumstances of the case and the nature of the offence proved, the **Rigorous Imprisonment for a term of 5 (Five years) and fine of Rs. 30,000/- (Thirty Thousand Only), and i/d of payment of the fine, S/I for 6 (Six) months for the offence u/s 8 POCSO Act.** Convicted-accused Debajit Barman is also sentenced to undergo **Rigorous Imprisonment for a term of 3 (Three years) and fine of Rs. 10,000/- (Ten Thousand Only), and i/d of payment of the fine, S/I for 2 (Two) months for the offence u/s 354-A IPC.** Furthermore, the convicted-accused Debajit Barman is also sentenced to undergo **Simple Imprisonment for a term of 1 (One year) and fine of Rs. 1,000/- (One Thousand Only), and i/d of payment of the fine, S/I for 1 (One) month for the offence u/s 448 IPC.** The period of detention undergone by accused, if any, shall be set off against the term of imprisonment awarded. The sentence will run consecutively in the order mentioned above.

33) **The minor victim 'X' is to be compensated under the Victim Compensation Scheme & the quantum shall be decided by the Secretary, District Legal Services Authority, Nalbari as per norms. The compensation's quantum & mode of dispersal shall be made keeping in mind the age of the victim, her future security & a fail-safe mechanism to ensure that the amount is utilized for the welfare of the victim only.**

Any seizure made be disposed of as per law.

A copy of the judgment be furnished to convicted-accused Debajit Barman free of cost.

A copy of the judgment be forwarded to the learned District Magistrate, Nalbari, as provided u/s 365 CrPC.

A copy of the judgment be forwarded to Secretary, District Legal Services Authority, Nalbari for necessary information & action.

Let the case record be consigned to record room after completing the formalities.

Given under my hand and seal of this court on this the **16th October'2021.**

(Smti. Munmun B. Sarma)

Special Judge (POCSO)

Nalbari

APPENDIX

(A) Prosecution Witnesses:

- i. PW-1 : Nilima Barman (Informant)
- ii. PW-2 : Bijoy Barman
- iii. PW-3 : X (Victim)
- iv. PW-4 : Bhaben Barman
- v. PW-5 : Utpal Barman
- vi. PW-6 : Chandan Haloi
- vii. PW-7 : Dr. Dhritishree Barman
- viii. PW-8 : Dimpi Barman
- ix. PW-9 : SI Ali Kumar Dusad

(B) Prosecution Exhibited Documents:

- i. Ext.1 : Ejahar
- ii. Ext.1(1) : Signature of the PW-1
- iii. Ext. 3 : Medical Report
- iv. Ext.3(1) to 3(3) : Signatures of PW-7
- v. Ext.4 : X-Ray Report
- vi. Ext.4(1) : Signature of Dr. P.K. Sarma
- vii. Ext.5 : Sketch Map
- viii. Ext.5(1) : Signature of PW-9
- ix. Ext.6 : Charge Sheet
- x. Ext.6(1) : Signature of PW-9

(C) Defence witnesses: None

(D) Defence exhibited document: None

(Smti. Munmun B. Sarma)
Special Judge (POCSO)
Nalbari