

BEFORE THE JUVENILE JUSTICE BOARD, BONGAIGAION

**PRESENT: S. HANDIQUE, PRINCIPAL MAGISTRATE, JJB,
BONGAIGAON**

MEMBERS:

**Mr. D. C. Basak
Mrs. R. Choudhury**

N.G.R Case no. 148/12

(JJB Case)

Mererchar P.S. Case no. 25/12

(u/s 447/354/323/427/384/34 IPC r.w. Sec. 4 of POCSO Act))

State

v.

Jahirul Islam

For prosecution: Mr. T. Bhowmik, APP

For defence: Mr. S. Alam

Evidence recorded on: 11-9-14, 23-9-14, 21-10-14

Juvenile examined u/s 313 Cr. P.C on: 28-10-14

Arguments heard on: 18-11-14

Judgment delivered on: 25-11-14

JUDGMENT

1. The prosecution case as revealed from the FIR lodged by Jahirul Islam, s/o late Abdur Rashid, r/o Sikatary under Mererchar P.S. is that on 5-3-12 at 2 P.M. accused named Jahirul Islam, s/o Abu Sama enticed his nephew Rakibul Hussain and took him to a nearby highland whereupon he indulged in forceful sexual intercourse with Rakibul Hussain. The informant alleged that he arrived at the spot hearing the cries of his nephew and saw the incident with his own

- eyes. Seeing him, the accused fled and he took his nephew home. Thereafter, he went to the house of the accused to seek justice from his father, but accused no. 2 Abu Sama abused him and his companion and drove them away. On that very day, in the evening hours, the complainant and his sister –in- law were attacked by accused Jahirul, Abu Sama, Sahabulla, Sukur Ali and Jahanara Khatun while they were plucking chilly in their garden. He further alleged that the accused assaulted his sister –in- law when she tried to stop them from beating him and the accused pulled off her clothes and outraged her modesty. It is also alleged that accused Sahabulla snatched away the silver chain from the neck of his sister –in- law and they were somehow saved when the witnesses arrived. According to the informant, the accused left with a warning and also destroyed his chilly plants. The FIR was registered as Mererchar P.S. Case no. 25/12 and after investigation the charge sheet was filed against Abdul Karim, Abdur Rashid, Abu Sama u/s 447/354/341/323/427/384/34 and separate charge sheet has been filed against juvenile Jahirul Islam u/s 377 IPC and his case was forwarded to the JJB, Bongaigaon.
2. The juvenile had meanwhile taken bail during investigation and after filing of the charge sheet he was summoned and necessary copies were furnished to him. The particulars of offence u/s 447/354/341/323/427/384/34 IPC were explained to the juvenile to which he pleaded not guilty and claimed trial. However, during enquiry it transpired that there are materials u/s 4 of the Protection of Children from Sexual Offences Act, 2012 also. Hence, the particulars of the offence u/s 4 of the POCSO Act were explained to him, to which he pleaded not guilty and claimed trial.
 3. During enquiry six witnesses were examined including the investigating officer. The juvenile was examined u/s 313 Cr. P.C. wherein he denied the incriminating materials put to him. No defence evidence is adduced. Heard arguments from both the sides.
 4. The following points for determination have been framed:

POINTS FOR DETERMINATION:

1. *Whether the juvenile committed penetrative sexual assault upon the minor victim named Rakibul Hussain and thereby committed an offence punishable u/s 4 of the POCSO Act ?*
2. *Whether the juvenile in furtherance of common intention with the other accused committed criminal trespass 5-3-12 at 4 P.M. in the chilly garden of the complainant and thereby committed an offence punishable u/s 447/34 IPC?*
3. *Whether the juvenile in furtherance of common intention with the other accused assaulted Aklima Khatun in order to outrage her modesty on 5-3-12 at 4 P.M. and thereby committed an offence punishable u/s 354/34 IPC?*
4. *Whether the juvenile in furtherance of common intention with the other accused wrongfully restrained the complainant and his sister-in-law on 5-3-12 at 4 P.M. and thereby committed an offence punishable u/s 341/34 IPC?*

5. *Whether the juvenile in furtherance of common intention with the other accused voluntarily caused hurt to the complainant and thereby committed an offence punishable u/s 323/34 IPC?*
6. *Whether the juvenile in furtherance of common intention with the other accused caused mischief by destroying the chilly plants of the complainant on 5-3-12 at 4 P.M. and thereby committed an offence punishable u/s 427/34 IPC?*
7. *Whether the juvenile in furtherance of common intention with the other accused dishonestly snatched away the earring of Aklima Khatun by using force and putting her under fear of injury on 5-3-12 at 4 P.M. and thereby committed an offence punishable u/s 384/34 IPC?*

DISCUSSIONS, DECISIONS AND REASONS THEREOF

DECISION ON POINT NO. 1:

5. The main allegation against the juvenile is that he committed penetrative sexual assault upon the nephew of the complainant. Let us first peruse the FIR. The FIR mentions that the juvenile enticed his nephew Rakibul Hussain and took him to a nearby highland and committed sexual intercourse with him forcefully. It also mentions that the complainant arrived at the spot hearing hue and cry of his nephew and on his arrival the juvenile fled.
6. During enquiry, complainant ***Jahirul Islam as PW1*** deposed that he had gone to plough his land when he saw that the juvenile was indulged in sexual intercourse with Akib (victim). According to him, he also saw that Akib was bleeding from his anus. He stated that he took both Akib and the juvenile to Abu Sama's house but Abu Sama and Jahirul assaulted him. He further deposed that the juvenile and Abu Sama assaulted the mother of Akib when she arrived there. He exhibited the FIR as Ext. 1. During cross examination he could not say the date of the incident. He denied that he lodged the case in reciprocation of the case filed against him.
7. ***PW2 Akilma Khatun*** deposed that she heard that the juvenile called her son Rakibul to the highland and sexually assaulted him. She testified during cross examination that they filed the case after the father of the juvenile lodged a case against them.
8. ***PW3 Rakibul Islam*** is the victim. He is about eight years old. He deposed that Jahirul had called him to the highland on the pretext of giving him a playing wheel (Sokori). He deposed that the juvenile pulled off his pant and inserted his penis into his anus. He stated that he did not scream. He stated that his uncle saw them and slapped both of them. During cross examination he stated that the juvenile dragged him to the highland which is very near to his house. He also stated that the juvenile gave him a 'sokori' which he kept in his house. He testified that his uncle slapped him for going to the jungle as there may be serpents. He stated that he did not get hurt, nor was he bleeding.

9. **PW4 Jhaner Khatun** is a neighbour. She deposed that she has not heard if the juvenile had committed any bad work with complainant's son or not.
10. **PW5 Abdul Mannan** is also a fellow villager. He deposed that the juvenile had kidnapped complainant's son on the pretext of giving him something and committed sexual assault upon the victim. He stated that the juvenile fled from the clutch of the complainant. During cross examination he stated that the victim is his son.
11. **PW6 Darbesh Ali Ahmed** is the investigating officer. He deposed that he registered the case after receiving the FIR filed through the court. He exhibited the charge sheet as Ext. 2. He stated that he filed charge sheet against the juvenile u/s 377 IPC and the other accused were charge sheeted under various sections. He could not say if there is a cross case against the complainant.
12. The juvenile was examined u/s 313 Cr. P.C. wherein he admitted that he was sitting on the highland playing with his 'sokori' and Rakibul watched him playing from a distance. After some time Jahirul Islam (complainant) came and asked him if he was doing any bad work with Rakibul. When he replied in the negative, Jahirul beat him up with a stick. He stated that Jahirul chased him up to a shop and asked him to do sit ups for ten times. But he refused to do so and came back home. According to him, his father had gone to Jahirul's house seeking justice but no bichar was held. So his father lodged a case against Jahirul after which Jahirul filed this case.
13. Although the juvenile has not denied his presence at the place of occurrence but he has denied to have committed any sexual assault upon the victim. Therefore, we have to examine the evidence of the child victim and other witnesses carefully.
14. The complainant and the victim are the two star witnesses in this case. Other witnesses are only reported witnesses. The complainant stated that the victim was bleeding from his anus. But the victim has denied it. He has also testified that he did not feel any pain. Although the medical officer has not been examined in this case but it is seen that the medical report is also silent on it. Moreover, the victim was medically examined on 16-3-12 whereas the alleged occurrence took place on 5-3-12. Even though the medical report is not a conclusive proof of evidence, but, to base convictions the ocular evidence has to be unflinching and reliable. The victim has deposed during examination- in- chief that the juvenile took him to the highland on the pretext of giving him a 'sokori'. However during cross examination he stated that the juvenile dragged him to the highland. He further testified that he did not cry or scream. He stated that his uncle slapped him for going to the jungle as there may be serpents. In this respect we find that there are vital contradictions between their testimonies. The victim is only eight years old. So his testimony is to be scrutinised carefully. The hon'ble Supreme Court in the case of **State of Rajasthan Vs. Om Prakash, AIR2002SC2235** held as follows:

“The evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of child witness must find adequate corroboration

before it is relied on {*State of U.P. v. Ashok Dixit and Anr. MANU/SC/0090/2000 : 2000CriLJ1436* }. We have already held that in the present case we have carefully examined the evidence of the child and other evidence. We find the reasons given by the High court for rejecting the said evidence wholly unconvincing. It is unfortunate that what to talk of considering, the High Court has not even noticed the testimony of the prosecutrix in the judgment under appeal.

Learned counsel for the respondent contended that if there was any forcible sexual intercourse, it could have resulted in some injuries upon the prosecutrix and in support relied upon *Joseph s/o Kooveli Poulo v. State of Kerala MANU/SC/0313/2000 : 2000CriLJ2467* . This decision has no relevance. As observed therein, the injuries are not always a sine qua non to prove a charge of rape. Let us not be forgotten that we are considering the case of a rape on a girl child aged eight years and not on a grown up woman.

Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been sleep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well considered and well analyzed judgment of the trial court on the grounds like non-examination of other witnesses, when the case against the respondent otherwise stood established, beyond any reasonable doubt was not called for. The minor contradiction of recovery of one or two underwear was wholly insignificant.”

15. In *Shivasharanappa and Ors. Vs. State of Karnataka & Jagadevappa and Ors. Vs. State of Karnataka and Ors., MANU/SC/0470/2013* (Equivalent Citation: AIR2013SC2144) the hon'ble Supreme Court discussed several case laws and held :

“Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be

discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable.”

16. Following the guidelines laid down in the above precedents, we have noticed that the complainant and the victim of this case have contradicted each other in material particulars and the testimony of the child victim is not beyond suspicion. He seems to be a tutored witness.
17. Moreover, the FIR was lodged after two days. Apparently, the father of the juvenile had lodged a case against the complainant and the present case is filed after lodging of that case. In the case of ***Raghunath V. State of Haryana, 2003 SCC(Crl.) 326*** the hon'ble Supreme Court found no mitigating circumstances for not reporting to the police at the first hour especially when the police stations are on the way to the hospital. In the above cited case the FIR was lodged on 19-12-1994 at 2.30 a.m for the incident said to have taken place on 18-12-1994 at about 9.30 p.m. The Sadar police station was 14 k.m away from the place of occurrence and two police stations fell on the way to the hospital. But the complainant party did not stop at two police stations but proceeded straight to the general hospital. The hon'ble Apex court found that it was imperative that the complainant party could have stopped at the police station, sought necessary help from the police and also given first hand information to the police.
18. In the case of ***Dilawar Singh vs State Of Delhi, 2007 Cr. L.J. 4709***, the hon'ble Apex Court held as follows :

*In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case. In ***Thulia Kali v. The State of Tamil Nadu (AIR 1973 SC 501)***, it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. In ***Ram Jag and others v. The State of U.P. (AIR 1974 SC 606)*** the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.*

17. Now coming to the present case it is seen that the complainant mentioned in his FIR that he was awaiting compromise. During trial he stated that he filed the case the same day. However, the record states otherwise. The complainant did not file the case in the police station. He lodged the complaint in the court which was forwarded to the police for investigation, although the police station is not so far from his house. If the victim (Rakibul) was bleeding after the sexual assault then he ought to have been taken to the hospital first and then the matter ought to have been reported to the police. But the complainant waited for two days and lodged the complaint only after the opposite party lodged a case against him. So we find that the delay is not satisfactorily explained and it casts serious doubts on the prosecution case.
18. Hence, we find that the evidence on record does not prove beyond reasonable doubt the offence of sexual assault against the juvenile. Point no. 1 is decided in the negative.

DECISION ON POINT NO. 2-7

19. As regards the allegations u/s 447/354/384/427/341/323 IPC are concerned, it is pertinent to note that the I/O did not charge the juvenile with the above offences. Therefore, let us examine what the witnesses say about it. PW1 has deposed that the juvenile and his father assaulted him when he had gone to their house. He also stated that the juvenile assaulted the mother of the victim when she came there. He has denied that he has filed the case in order to absolve himself from the cross case filed by the father of the juvenile. PW2 stated that the juvenile and the others assaulted her. She deposed that Abu Sama snatched her chain and pulled off her clothes. As regards the allegation u/s 354/384 IPC she has not implicated the juvenile. She testified that the father of the juvenile had lodged a case against them prior to the incident and the instant case has been filed after that case. PW4 has stated that Abu Sama and Karim had assaulted Mannan's wife. He has not implicated the juvenile. PW5 is the father of the victim. He deposed that the juvenile and the others assaulted his wife in the chilly garden. He denied during cross examination that he was not present during the alleged occurrence. In fact the defence raised objections as to his testimony on the ground that he is not a listed witness. PW5 was not examined by the investigating officer, however he seems to be a vital witness as he is the father of the child victim and husband of victim Aklima. Hence, he was examined u/s 311 IPC. However, it is seen that victim Aklima (PW2) has not stated anything as to the presence of her husband in the chilly garden. On the other hand PW1 stated that Aklima was assaulted when she came to the house of the juvenile. So the testimony of PW5 is a bit doubtful.
20. Now coming to the allegation of trespass and causing mischief it is seen that the complainant has not supported his own version. In his FIR he alleged that the juvenile and the other accused came to his chilly plantation and destroyed his chilly plants. But during enquiry he did not state anything about it. In fact Aklima Khatun (PW2) has not

incriminated the juvenile in this respect. Thus in our view the offence u/s 447/341/354/323/384/427 IPC are not proved against the juvenile. Hence, point no. 2-7 are decided in the negative.

ORDER

21. After going through all the above we hold that the juvenile is not guilty u/s 447/341/323/354/384/427 IPC and he is acquitted. He is set at liberty forthwith. Bailbond stands discharged. Given under the hand and seal of the Board on 25-11-14.

**S. Handique,
Principal Magistrate, JJB, Bongaigaon**

Sri. D.C. Basak, Member, JJB, Bongaigaon

Smti. R. Choudhury, Member, JJB, Bongaigaon