

BEFORE THE SPECIAL JUDGE ::::: DHUBRI

Special Case No.25/2015

U/s. 376 of IPC & Section 4 of POCSO Act, 2012

G.R 621/2015

State of Assam

- Vs -

Shajahan Sk.

Present : Sri Rajib Goswami, AJS
Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor, Dhubri for the State.
Sri Jamsher Talukdar, Advocate for the defence.

Date of Evidence : 17-03-2016, 26-05-2016, 21-06-2016 & 02-07-2016

Argument Heard : 04-08-2016

Date of Judgment : 18-08-2016

J U D G M E N T

The prosecution case in brief is that the accused Shajahan Ali with whom the informant had an affair for a year, had on 9-2-2015 at around 9 p.m. had taken the informant to his house promising to marry her and had intercourse with her against her will. Later family members of the accused had thrown her out of their house. Following which sitting of the village elders had been held in order to amicably settle the matter and the informant had been asked to stay with the village head. However, the village elders having failed to bring about a settlement, the informant was forced to report the case to the police.

2. The FIR had been lodged at Tamarhat P.S. and a case was registered by the O.C, Tamarhat Police Station U/s.376/323/34 of IPC R/W Sec. 4 of the POCSO Act, 2012 against the accused persons namely Shajahan Sk., Saidul Ali, Nurbhanu Khatun and Saheja Bibi. The case was investigated into by the I.O. and after completion of investigation, charge sheet had been filed against accused Shajahan Sk. only u/s.376 of IPC & under Section 4 of the POCSO Act, 2012.

3. Accused person appeared before the Court. Charges u/s.376 of IPC & Section 4 of POCSO Act, 2012 had been framed against the accused person. Charges had been read over, explained and interpreted to accused person to which, he pleaded not guilty and claimed to be tried.

4. The prosecution had examined as many as 8 (eight) witnesses including the I.O. & M.O. Accused person was generally examined on incriminating circumstances coming up in the evidence of PWs against him u/s-313 of Cr.P.C. Accused pleaded total denial and declined to adduce any evidence.

5. POINTS FOR DETERMINATION

1. Whether the accused person on 09-02-2015 at around 9 p.m. at the house of victim at Kacharigaon under Tamarhat P.S committed rape on the victim?

2. Whether the accused person on the same day time and place committed penetrative sexual assault on the victim?

DECISIONS AND REASONS THEREON

6. P.W-1, Musstt. Kulsuma Khatun, the victim in the case deposed that on the day of alleged occurrence, at around 7 p.m. Shajahan Sk. had come to her house. At the relevant point of time her parents were not present at the house. Shajahan Sk. had taken her to his house and had sexual intercourse with her against her will. His parents had beaten her and had then driven her out of their house. Later she had called for a salish in the presence of village elders. But the accused refused to obey the terms of the bichar. She had been advised to approach the Court. Thereafter, she had filed a case at the police station. Ext-1 is the FIR bearing her signature ext-1 (1). Later the I.O. had got her statement recorded in the presence of Judicial Magistrate. Ext-2 is the said statement bearing her signatures ext-2 (1) and ext-2 (2). In her cross examination PW-1 stated about there being five members in her family. Two brothers and one sister. Her sister Rezi is the eldest. Zakir is younger to her and she is younger to Zakir. Zakir is married. He lives with his family. Zakir has a

child. Zakir and his wife Rokia and his child and her parents live at the same house. Police did not seize any of her wearing apparel that she had worn at the time of alleged incident. She had been examined by Doctor. Baser Uddin, Bhelua and Ujir Ali are her immediate neighbours. The M.O. did not find any external injury on her body during examination. She had been examined by the I.O. at the police station. She was not accompanied by Woman Police personnel. Shajahan is not her relative. She had asked Shajahan to marry her and Shajahan had refused to marry her. The Dewani had suggested that she should report the matter to police. On being asked by Dewani, she had filed the FIR at the police station. Police had collected her school certificate and birth certificate. Apart from the witness Abu Bakkar, all are her closed relatives. She denied the suggestion that she is above 18 years of age.

7. PW-2 Zakir Hussain had known the accused Shajahan Sk. The victim Kulsuma Khatun is his sister. On the date of alleged occurrence he was not at home. His father was also not present at the house. On the date of the alleged occurrence, he had been informed over phone by the village head to come home along with his father as some incident had taken place. Having arrived at his village he had found his sister in the custody of village head and he had been asked to invite people from the village for salish. However, the accused refused to appear for the salish. Father of the accused was present at village salish.

In his cross PW-2 admitted to the victim being two years younger to him and he stated his present age to be 24 years. The victim, had not confided in him anything about the alleged occurrence. He had filed this case on being asked by Dewani who is also the village head of their village.

8. PW-3, Md. Abu Bakkar Bepari is known to both accused Shajahan Sk. as well as victim Kulsuma Khatun. He is the village head (Gaon Bura) and he had been asked to come to the house of the accused by the father of victim. Having arrived at the house of accused Shajahan he had seen the victim present at his house. On seeing the victim, he had asked the victim why she was there. The victim had told him that Shajahan had brought her to his house. On being asked the accused denied any incident as told by the victim having taken place. He had advised for a salish. Next day we had sat for salish. The accused did not come to the Salish. Father of the accused had come but the

father of the accused had expressed helplessness in arriving at any settlement in absence of the accused. Thereafter, he had advised the victim to approach the police.

In his cross examination PW-3 had said that he was aware that both parents of Kulsuma Khatun had been present at her house. Kusulma Khatun and Shajahan are neighbours. They had visiting terms. He was not aware if Kulsuma's father had given any marriage proposal to the accused. No salish had taken place.

9. P.W-4, Musstt. Meherjan Bibi had known both accused and the victim. Kulsuma is her daughter. On the day of the alleged occurrence she was offering prayer in the night. After completion of her prayer, she had found her daughter Kulsuma missing and later she was recovered from the house of the accused. Thereafter, she was brought to the house of Gaonbura and there, village Salish was held. Since the accused did not appear they had filed a case against the accused in the police station.

In her cross PW-4 had stated that accused being her brother-in-law in relation. They are around 10 members in their family. All of them were present in the house at the time of alleged occurrence. Both families had visiting terms. The case had been filed on the suggestion of the Dewani. I.O. did not seize any apparel of the victim. The I.O. who had interrogated her was male. The victim was examined at the police station and she was examined by male police officer. She had asked the accused to marry her daughter and accused refused. Following refusal by accused she had decided to report the case to the police.

10. PW-5 Md Jalal Uddin Sk. used to know the accused and the victim, Kulsuma being his niece. PW-5 further deposed that his sister –in-law had gone to offer the night prayer at her own room. None was there at the house. Accused Shajahan had come unnoticed. The mother of the victim having finished her prayer found that her daughter missing. His niece at the time of alleged occurrence was only 14 years old. The victim had been recovered from the house of the accused. On being asked she had stated that since the accused had physical relation with her, she was not willing to leave the house of the accused.

In his cross-examination PW-5 stated about the house of the accused being located adjacent to his house. At the time of alleged occurrence he was at the daily market. They are seven members in his family. Kulsuma's brothers and sisters are already married. They have children. PW-5 denied the suggestion that Kulsuma was above 18 years on the day of the alleged occurrence.

11. PW-6 Md. Abdul Rahman Sk. used to know both the accused and the victim. The victim being his cousin sister. He had heard that Kulsuma had gone with Shajahan to his house. Shajahan's mother persuaded Kulsuma to go back to her house. After return to her house Kulsuma was again sent back to the house of Sajahan. On being asked the victim had told them that she wanted to get married to the accused since she had affair with him. Sajahan was also asked to come home. Shajahan outright denied his affair with the victim. Since the accused Sajahan declined to accept the victim, PW-6 suggested that the victim should file a case before the police.

In his cross-examination PW-6 had admitted Kulsuma being major and the case was filed since the accused had declined to accept the victim. The parents of the victim had decided to file this case.

12. P.W-7 Dr (Mrs) Rinku Ahmed on 13-02-2015 had examined the victim, Kulsuma Khatun at Dhubri Health & Maternity Centre. On general physical examination PW-7 had found the victim normal. PW-7 had not found any mark of injury. Pathological report revealed absence of spermatozoa. In her opinion her findings are not consistent with recent sexual intercourse/assault. Ext-3 is her report bearing her signature ext- 3 (1).

In her cross-examination she had stated not having received any radiological report as to the age of the victim.

13. PW-8 S.I. Abdul Goni on 12-02-2015 was posted at Tamarhat P.S. and is the I.O. of the case. He had visited the place of occurrence and prepared the sketch map. Ext-4 is the sketch Map bearing his signature ext-4 (1). He had examined witnesses at the place of occurrence u/s.161 of Cr.PC and got the statement of the victim recorded u/s.164 of Cr.PC. by Magistrate. Thereafter, he had filed the charge sheet against the accused Shajahan. Ext-5 is the charge sheet bearing his signature ext-5 (1).

In his cross-examination PW-8 stated not having made any seizure during investigation. He further deposed having not having seized any school certificate with regard to the age of the victim and also deposed not having done any investigation for determination of the age of the victim. He had not examined Kobad Ali as witness. He was aware that there had been a proposal for a marriage from the victim to the accused and the accused refused the proposal.

The above is the threadbare discussion of the evidence on record.

14. Now learned defence counsel in course of his argument had put reliance on law points with regard to Sec.376 of IPC laid down in decision in **2003 SCC (Cri) 775** . The Apex Court in Uday Vs. State of Karnataka in para-21 of the decision held that *there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. The court must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.*

The consensus of judicial opinion is in favour of the view that consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact."

15. Now coming to the evidence on record that the victim herself as PW-1 admitted to a yearlong courtship with the accused Shajahan and also in her statement u/s.164 of Cr.PC she had stated the same and she had been taken by the accused to his house on the day of the alleged occurrence with a promise to marry her and had sex with her against her will and later refused to marry her. Now PW-1 in her evidence had stated that no one was there at her

house when the accused had come and had taken her to his house. However, the mother of the victim, PW-4, Meherjan had stated that they are ten members in her family and all of them had been present on the day of the alleged occurrence and her family members and the family members of the accused are on visiting terms since accused is her relative, her brother-in-law. They had asked the accused to marry their daughter but the accused did not relent and this resulted in reporting the case to the police. Thus considering the law point discussed with regard to the consent of the victim u/s.376 of Cr.PC, it is evident that the PW-1 had willingly accompanied the accused to his house or it would not have been possible for the accused to force the victim to his house considering the evidence of PW-4 the mother of the victim that 10 members of her family had been present on the day of the alleged occurrence. Now coming to the age of the victim, PW-2, Zakir Hussain her elder brother had stated in his evidence that his present age is 24 years and the victim was two years younger to him. PW-6, Abdul Rahman Sk, a cousin brother of the victim had stated that the victim is major on the day of the alleged occurrence. PW-7, the Medical Officer had stated that she had not received any radiological test report with regard to the age of the victim. The I.O, PW-8 had not seized any documents, certificates from the school she had last attended as proof of age of the victim. Thus, except for the statement of the victim that she is below 18 years there is no iota of evidence. Thus it will not be safe to rely on the evidence of PW-1 when her own brother had said that she was above 18 years and as such offence under Section 4 of the POCSO Act is not attracted in the facts and circumstances of the case. However, this cannot undo the offence u/s.376 of IPC the accused had been charged with.

16. Now admittedly by the victim herself that there had been an affair between the accused and the victim. Thus in the light of the law laid down in the decision with regard to proving "consent" for the prosecution to bring home the charge u/s.376 of IPC, the consensus of judicial opinion is in favour of the view that consent given by the prosecutrix to sexual intercourse with a persons with whom she is in deeply love on a promise that he would marry her on later date, cannot be given under misconception of a fact. In the present case also the accused had promised to marry her when he had taken her to his

house and evidently when she had the discretion to decline the offer of the accused but she had accompanied the accused to his house and had sexual intercourse and as such the consent given by her could not have given under misconception of fact. Thus circumstances coming up in the evidence show that she freely, voluntary and consciously consented to having sexual intercourse with the accused the accused is entitled to benefit of doubt.

17. Thus in the light of the evidence discussed above, it is evident that the prosecution has failed to establish the charge u/s.376 of IPC and Section 4 of the POCSO Act against the accused beyond all reasonable doubt. Accordingly accused is acquitted and set at liberty forthwith.

18. However, I am inclined to recommend the victim for compensation u/s.357 (A) of Cr.PC. The Secretary, DLSA, Dhubri to assess the quantum of compensation to be paid after due inquiry. The copy of the judgment be sent to the Secretary, DLSA, Dhubri.

Given under my hand and seal of the Court on this 18th day of August, 2016.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.

APPENDIX

A. **Prosecution Witness.**

P.W-1 - Musstt. Kulsuma Khatun
P.W-2 - Md. Zakir Hussain
P.W-3 - Md. Abu Bakkar Bepari
P.W-4 - Mustt. Meherjan Bibi
PW-5 - Md. Jalal uddin Sk
PW-6 - Md. Abdul Rahman Sk.
PW-7 - Dr. (Mrs) Rinku Ahmed
PW-8 - SI Abdul Ghoni

B. **Court Witness**

Nil

C. **Defence Witness**

Nil

D. **Prosecution Exhibits.**

Ext-1 - FIR
Ext-2 - Statement u/s.164 of Cr.PC
Ext-3 - Medical report.
Ext-4 - Sketch map
Ext-5 - Charge sheet.

D. **Defence Exhibit**

Nil

Special Judge, Dhubri