

# **BEFORE THE SPECIAL JUDGE ::::: DHUBRI**

## **Special Case No.3/2014**

U/s. 457 IPC R/W Sec. 8/12 of POCSO Act, 2012

## **G.R (GKJ) 440/2013**

**State of Assam**

**- Vs -**

**Haidar Ali**

Present : Sri Rajib Goswami, AJS  
Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor, Dhubri for the State.  
Sri R.K. Jain, Advocate for the defence.

Date of Evidence : 31-05-2014, 23-06-2014, 18-09-2014, 01-11-2014,  
19-11-2014, 10-02-2016 and 21-03-2016

Argument Heard : 27-04-2016  
Date of Judgment : 11-05-2016

## **J U D G M E N T**

The prosecution case in brief is that one Dilbar Ali had lodged the FIR at Golakganj P.S. to the effect that on 13-06-2013 at around 9 p.m. her daughter aged 18 years was busy in the kitchen preparing meals, the accused Haidar Ali followed his daughter into the kitchen, caught hold of her from behind with sexual intent. His daughter cried out for help and hearing her cry his wife came running to the kitchen and got her daughter freed from the embrace of the accused.

2. Upon the FIR a case was registered by the O.C, Golakganj Police Station on 17-06-2013 U/s.376/511 of IPC against the accused. The case was investigated into by the I.O. and after completion of investigation I.O. had filed charge sheet against accused Haidar Ali u/s.457 of IPC and Sec. 8/12 of POCSO Act.

3. Accused person appeared before the Court. Charges u/s.457 of IPC, R/W Sec. 8/12 of POCSO Act had been framed against the accused Haidar Ali. Charges had been read over, explained and interpreted to accused to which the accused pleaded not guilty and claimed to be tried.

4. The prosecution had examined as many as 7 (seven) witnesses and one C.W. Accused person was examined on the circumstances coming up against him in the evidence of P.Ws. The defence adduced two DWs in evidence.

#### **POINTS FOR DETERMINATION**

1. Whether the accused on 13-06-2013 at around 9 p.m. committed lurking house trespass by night in order to commit sexual assault upon Maleka Khatun, the minor daughter of informant?
2. Whether on the same day, time and place the accused committed sexual assault on the victim?
3. Whether the accused had committed sexual harassment on the victim?

#### **DECISIONS AND REASONS THEREON**

5. PW-1, Dilbar Ali the informant and father of the victim had been to Kokrajhar to attend a marriage ceremony on 13-06-2013. While at Kokrajhar he had been informed by his wife that the accused had entered into their kitchen and had held her daughter in embrace from behind. His daughter had raised alarm. The accused on seeing the people coming to the spot hearing his daughter's panick alarm had fled away.

In his cross-examination, the PW-1 reiterated not having seen the incident. On 15-06-2013, two days following the alleged occurrence, in presence of Atul Sarkar, Jahir Master, Amzad Ali, Taiyab Ali, a 'BICHAR' was called in which the father of the accused was present but he did not mention about it in the FIR. PW-1 denied his daughter having visiting terms with the family members of the accused.

6. PW-2 Mohijan Bibi, the mother of the victim was not present when the accused had entered into their house. All of a sudden having heard her daughter crying out for help, she came running into the house and found the accused embracing her daughter and her daughter struggling to get herself freed. The PW-2 also caught hold of the accused and started crying out for help. The accused, on seeing the people coming in to her house on hearing her alarm, had fled away.

In her cross-examination the PW-2 had stated the time of the alleged occurrence to be around 9 p.m. and presence of number of people at her house following the incident.

7. PW-3, Hazarat Ali, a neighbour of the informant had come to the house of the informant on hearing cries of the victim Maleka Khatun. According to him the time was 9 p.m. On his arrival along with other residents of the locality, he had found Mohijan Bibi, the mother of the victim, getting into a scuffle with the accused in her attempt to hold the accused back. Accused managed to get himself freed and had fled away. The matter was taken up at a sitting of village elders later. However, the matter remained undecided.

In his cross-examination the PW-3 stated about the presence of Ijzat Ali, Jaharuddin, Amzad and Atul at the "village bichar". The "village bichar" had taken place around three days after the alleged occurrence.

8. PW-4 Anowar Hussain one of the neighbours stated that having heard cries coming from the house of the informant, Dilbor, he had gone there and had seen the accused running away from the house. On being asked both Mohijan and Maleka, the mother and the victim respectively had told him that accused had entered into their house and embraced Maleka from behind and had gagged her mouth. PW-4 had sent one Hazarat to report the alleged incident to the father of the accused.

In the cross-examination PW-4 reiterated what he had in his examination-in-chief.

9. PW-5 Maleka Khatun corroborated PW-2 Mohijan Bibi, her mother on all material particulars and had also related that her father was not present at the time of the alleged occurrence. According to PW-5 the incident had taken place between 9 p.m. to 10 p.m. and at the relevant point of time she was busy cooking meals. The accused had suddenly entered into the kitchen, held her in a embrace from behind and gagged her mouth. She somehow managed remove the gag and raised alarm. On hearing her cries her mother had arrived at the kitchen and attempted to catch hold of the accused, however the accused managed to get himself freed and had fled away. Police got her statement recorded in the Court before the Magistrate. Ext1 is the said statement bearing his signatures ext-1 (1) and ext-1 (2).

In her cross-examination stated about the accused being a married man. Samida being the name of the accused's wife. At the relevant point of time the accused was wearing a loin cloth covering his lower part. His upper body being completely bare. Around 30 to 40 persons were present at their house immediately following the alleged occurrence and due to darkness she could not recognize any of them.

10. PW-6, Hamidur Rahman another neighbour of informant had also known the accused. He came to know about the alleged occurrence following day of the incident. He had heard that the accused had gone to the house of Dilbor.

In his cross-examination, the PW-6 had stated about Maleka being a college going student and about both houses having visiting terms with each other. Few days before the alleged occurrence accused had married another girl.

11. PW-7 is the I.O. S.I. Charan Mohan Singh Chetia had stated that at he was posted at Golakganj P.S. as SI of Police. He had got the statement of the victim recorded u/s.164 of Cr.P.C and also had examined witnesses at the place of occurrence. Thereafter, he had filed the charge sheet, ext-5 bearing his signature ext-5 (1).

In his cross-examination he stated the place of occurrence to be the kitchen of the house. He had seized the original copy of the admit card of the victim. PW-7 denied having been told by Musst. Mohijan Bibi with regard to absence of her husband on the day of the alleged occurrence and she having come back to her house on hearing cries of her daughter. The PW-7 denied having been told by PW-3 during investigation about going to the house of the informant on hearing cries and about having seen, Mohijan Bibi catching hold of the accused. PW-7, he denied having been told by PW-3 that on being asked Mohijan had told him that accused had attempted to commit rape on her daughter and that is why she was holding the accused.

During re-examination, the PW-7 had stated that FIR had been received from Md. Dilbor Ali on 17-06-2013 and on 30-08-2013 the father of the victim had submitted the Photostat copy of the Admit Card and he did not seize

the admit card. Later on, on production of original document on 10-10-2013 he had seized the same vide ext-3, seizure list and left the original in the custody of the victim. As per the admit card the age of the victim was below 18 years.

In his cross examination, PW-7 stated that ext-3, seizure list does not bear his signature and it was not produced before this Court earlier. He had not examined the victim in connection with the admit card.

Above is the threadbare discussion of prosecution evidence on record.

12. Now coming to the evidence on record, I find that the victim Maleka Khatun while giving her evidence in the Court on 31-05-2014 she had stated her age to be 18 years and considering the incident had taken place on 13-06-2013 the victim was less than 18 years of age. In the re-examination of the I.O. he had stated that on 10-10-2013 he had seized the admit card of the victim. As per the admit card the age of the victim was below 18 years on the day of the alleged occurrence. The victim had been examined on the admit card as CW-1 and as per the evidence of the victim, her date of birth is 18-05-1996 as per her admit card, ext-6, produced in original.

In her cross-examination she had admitted that she was a student of 245 Lakhimari LP School and after completion of admission in 245 Lakhimari LP School, she was admitted into pre-senior Madrassa. The Headmaster of the school at the relevant point of time was Fazlur Rahman. Ext-X is the certificate that was given to her by Headmaster of the said school. Ext -Y is the admission register. As per ext-X at the time she had passed class-IV from 245 Lakhimari LP School, her age was shown as 13 years 7 months 20 days as on 1<sup>st</sup> January, 2005. Ext-6 certificate was issued on 11-02-2016. She was not aware how her date of birth happened to be mentioned as 18-05-1996 in spite of ext-X and ext-Y. She had not given ext-6 to the I.O. at the time of investigation. The victim had not been examined by the Doctor and there is no report from the Radiologist on record. Further DW-1 Md Fazlur Rahman, Head Master, Lakhimari Pre Senior Madrassa had been in the said post since 1996 had brought the admission register of the school and the LP school pass certificate of Maleka Khatun, ext-x is the original of the LP pass certificate of Maleka Khatun

on basis of which she was admitted to DW-1's school. Ext-y is the admission register proved in original, ext-y(1) is the relevant entry and ext-y (2) proved in original is the signature of DW-1. As per L.P. pass certificate of Maleka Khatun her date of birth was 11-05-1991.

In her cross examination the DW-1 had reiterated with regard to Y-1 entry having been made on the basis of ext-X.

13. DW-2, Amal Karmakar had been the Head Master of 245 Lakhimari L.P.School. The DW-2 had produced the counter foil, ext-z, proved in original of ext-x. Ext-x was issued by him. Ext-z bears the date of birth of Maleka Khatun i.e. 11-5-1991. Maleka Khatun as C.W. in her evidence had admitted not being aware on basis of what document her date of birth in ext-6 admit card had been changed.

14. Now in the premises, it is evident from the very definition of sexual assault as enumerated in Sec.7 and 8 that no medical expertise is required as is evident from Sec.7 of the Act to ascertain the offence of sexual assault. In the present case coming to the evidence of PW-2, Mohijan Bibi, the mother of the victim Maleka Khatun, it appears that after her arrival on having heard cries of her daughter she had seen the accused, who was known to her, holding PW-5 in his embrace from behind tightly and her daughter was struggling to get herself freed from the embrace of the accused. In the deposition of PW-5, the victim Maleka Khatun had alleged that the accused had entered into the kitchen at around 9 p.m. to 10 p.m. and all of a sudden held her in his embrace from behind and gagged her mouth with both his hands. PW-5 managed to get the gag on her mouth removed and cried out for help. Hearing her alarm her mother had come to the place of occurrence and caught hold of the accused. However, the accused managed to flee the place of occurrence. The evidence of PW-1 clearly indicates that the accused failed to go beyond the act of embracing the victim with sexual intent though failed in his attempt. PW-2 Mohijan Bibi, the mother of the victim had immediately come to the place of occurrence and had seen her daughter struggling to get herself freed from the embrace of the accused. PW-2 had also tried to intervene and managed to catch hold of accused but accused had managed to flee the place of occurrence.

15. Now coming to the reliability of evidence of PW-2 and PW-5 and had corroborated each other with minor variations and had supported the FIR and as such a little variation of the evidence of PW-2 and PW-5 when compared with their statements before the I.O. is inevitable and is not sufficient to ignore their evidence as not reliable. Further, PW-5, the victim in her statement u/s.164 of Cr.PC had also implicated the accused except for the fact that in her statement u/s.164 of Cr.PC she had stated the time of occurrence to be around 7 p.m. but then this variance with regard to the time of occurrence that has come to light can easily be ignored considering the PW-5 supporting her 164 Cr. PC statement in her evidence also and as such the evidence of PW-5 can be accepted as wholly reliable, being the evidence of the victim. Coming to other witnesses all of them had come to the place of occurrence when the occurrence was already over. PW-4, Anowar Ali and PW-3 Hazarat Ali, immediate neighbours of PW-2 and PW-5 had seen the accused fleeing the place of occurrence. The evidence of these four witnesses come within the ambit of being wholly reliable since in the cross-examination of these witnesses did not shift their stand. The evidence of PW-1, informant was hear say. The act of the present accused holding the victim, PW-5 in his embrace with sexual intent constitute an offence of sexual assault u/s. 7 of the Act and as such, the accused is proved to have committed an offence u/s. 8 of the Act. However, I have found no evidence on record in support of the offence of sexual harassment alleged to have been committed by the accused. Thus the accused is acquitted of charge u/s.12 of the Act.

16. Now coming to the offence u/s.457 of IPC, Sec. 444 IPC defines the offence of lurking house trespass as whoever commits lurking house trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night". The essential ingredients of the offence u/s.457 of IPC is that the accused did lurking house-trespass by night or house-breaking by night and it was done in order to commit an offence punishable with imprisonment.

17. Now PW-5 had stated that the incident had taken place between 9 p.m. to 10 p.m. and no one was there inside the house. Her father had gone to the Kokrajhar to the house of his brother-in-law and her mother had gone out of her house when the accused had entered and had suddenly held her in embrace with sexual intent. The PW-5, the victim in her statement u/s.164 of

Cr.P.C had also stated about the incident having taken place at around 7 p.m. when the accused had come to their house held her in tight embrace from behind and gagging her mouth with a sexual intent. In the cross-examination also the PW-5 did not shift her stand in this regard and all the other PWs had corroborated her. PW-2 Mohijan Bibi in her cross-examination had reiterated about the incident having taken place at around 9 p.m. The PW-4 Anowar Ali, a immediate neighbour of the victim who had been present in the place of occurrence immediately after the incident had stated that the incident had taken place at around 9 p.m. Thus from the evidence on record, it is evident that the accused had entered the house of the victim with intention to commit an offence which is punishable with imprisonment. Thus the offence u/s.457 of IPC stands proved against the accused.

18. PW-7, I.O. is on record to have stated that he had seized ext-6, admit card of the victim. But he had left the admit card in the custody of victim after seizure and as per the admit card the age of the victim was below 18 years on the day of the alleged occurrence. PW-5 Maleka Khatun on being examined as C.W-1 had produced the original admit card before the Court and ext-6 is the said admit card issued by the State Madrassa Education Board, Assam Guwahati. It is a public document. Ext-6 reflected the date of birth of the victim to be 18-05-1996. The admit card being a public document can be accepted u/s.78 of the Evidence Act as genuine proof of age and ext-6 reveals that the victim on the day of the alleged occurrence was below 18 years.

19. Thus summing up the discussion of entire evidence, I hold that the prosecution has been able to establish the offences u/s.457 R/W 8 of POCSO Act against the accused beyond all reasonable doubt.

20. Accused is heard on point of sentence. Accused person pleaded for leniency. Considering minimum punishment provided for the offence u/s.8 of the POCSO Act being R.I. for 3 (three) years and fine and considering plea of leniency, I am inclined to pass sentence of minimum punishment of R.I. for 3 (three) years under Sec. 8 of POCSO Act and a fine of Rs.2,000/- in default to S.I. for 3 (three) months. R.I. for 1 (one) year and a fine of Rs.1,000/-, in default to S.I. for 1(one) month u/s.457 of IPC. Sentences of imprisonment to run concurrently. The earlier detention, if any of the accused be set off against the sentence of imprisonment.

21. Accused be given a free copy of the judgment immediately. A copy of the judgment be furnished to the D.M, Dhubri u/s.365 of Cr.PC. The victim is recommended for compensation u/s.357 (A) of Cr.PC. The Secretary, DLSA, Dhubri to determine the quantum of compensation to be paid to the victim u/s.357 (A) of IPC. Send a copy of the judgment to the DLSA, Dhubri.

Given under my hand and seal of the Court on this 11<sup>th</sup> day of May, 2016.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.

## **APPENDIX**

A. **Prosecution Witness.**

P.W-1 - Md. Dilbor Ali  
P.W-2 - Mustt. Mohijan Bibi.  
P.W-3 - Md. Hazarat Ali  
P.W-4 - Md. Anowar Ali  
PW-5 - Musst. Maleka Khatun  
PW-6 - Md. Hamidur Rahman  
PW-7 - S.I. Charan Mohan Singha Chetia

B. **Court Witness**

CW-1 - Miss Maleka Khatun

C. **Defence Witness**

D.W-1 Md. Fazlur Rahman  
D.W-2 Amal Karmakar

D. **Prosecution Exhibits.**

Ext-1 - Statement of victim u/s.164 of Cr.P.C.  
Ext-2 - Sketch Map  
Ext-3 - Seizure list.  
Ext-4 - FIR  
Ext-5 - Charge sheet  
Ext-6 - Admit Card of victim

D. **Defence Exhibit**

Ext-X - L.P. School Certificate  
Ext-Y - Admission Register  
Ext-Z - Counter Foil

Special Judge, Dhubri