#### **IN THE COURT OF THE SPECIAL JUDGE AT JORHAT**

Present: Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS

**Special Judge, Jorhat** 

# **JUDGMENT IN SPECIAL CASE NO. 57 OF 2016**

(G.R. Case No. 418 of 2016) Borholla P.S. Case No. 69 of 2016

#### **Committing Magistrate:-**

Sri N.J. Sarma, Sub-Divisional Judicial Magistrate, Titabar Sub-Division, Jorhat District

State of Assam

**Versus** 

Sri Jems Bhangra, Son of Late Estu Bhangra, Resident of Chereli Gohain Gaon, P.S. Borholla, District-Jorhat.

.... Accused

# **APPEARANCES:**

For the State: Sri M.R. Barooah,

Senior Advocate-cum-Special Public Prosecutor, Jorhat

For the Accused: Sri Subhir Ranjan Bharadwaj,

**Learned State Defence Counsel, Jorhat** 

# CHARGE FRAMED UNDER SECTION 376 [1] OF INDIAN PENAL CODE READ WITH SECTION 6 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 16-11-2016

Date of prosecution evidence: 29-11-2016; 05-01-2017; 20-01-2017;

& 17-02-2017

**Statement of Accused** 

Recorded on : 06-03-2017

Date of Argument : 09-03-2017 & 01-04-2017

Date of Judgment : 10-04-2017

#### JUDGMENT

1). Thumbnail sketch of prosecution story, is that Borholla P.S. Case No. 69/2016 under Section 376 of IPC read with Section 6 of The Protection of Children from Sexual Offences Act, 2012, was registered on the basis of an F.I.R. lodged by Sri Jakariyas Topno, the father of the victim girl [hereinafter referred to as 'X'].

Sri Jakariyas Topno, who is the father of victim girl, lodged ejahar before police stating inter-alia, that on 17/08/2016 at about 8.00 P.M. while he was absent in his house, the accused came there and took his daughter towards shop after telling the same to his wife. On the way, near an isolated place, the above named accused, committed rape upon his daughter.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Borholla P.S., the same was registered as Borholla P.S. Case No. 69/2016 under Section 376 of IPC read with Section 6 of The Protection of Children from Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor. The statement of the victim girl was recorded by the learned Magistrate under Section 164 of Cr.P.C. Police on completion of investigation filed charge-sheet in the case against the above named accused Jems Bhangra u/S. 376 IPC as well as u/S. 6 of the Protection of Children From Sexual Offences Act, 2012 vide Charge-sheet No. 51/2016 dated 29-09-2016.

- **2).** The learned Sub-Divisional Judicial Magistrate, Titabar Sub-Division, Jorhat, transmitted the case to this Court for trial. Copy was furnished to the accused in due course.
- **3).** As accused was unable to engage any counsel to defend him so Sri Subhir Ranjan Bharadwaj, was appointed as defence counsel, on State expenses, to defend the accused.

Upon consideration of the record of the case and the documents submitted therewith and after hearing the submission of the accused and the prosecution in this behalf, I found ground for presuming that the accused has

committed offences under Section 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012. Accordingly, the charges were framed, read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

**4).** During the course of trial, **06** [six] witnesses including the victim, the informant, Medical Officer and the I.O. were examined on behalf of the prosecution to prove the charge u/S. 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. the accused stated that he has been falsely implicated in the case. The accused further stated that informant had lodged false case against him through the victim. No witness was adduced by the accused in his defence.

- I have heard Sri Mukti Ranjan Barooah, learned Senior Advocate-cum-Special Public Prosecutor for the State as well as Sri Subhir Ranjan Bharadwaj, learned State Defence Counsel for the accused, who is facing trial for commission of offence u/S. 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012.
- **6).** Now the points for determination before this Court are as follows:-
  - 1) Whether on 17/08/2016 at about 07.00 P.M. at Gorajan Gaon under Borholla P.S., the accused named above committed rape on the victim girl, aged about nine years and below eighteen years, and thereby committed an offence punishable under Section 376 [1] of IPC?
  - 2) Whether on the same day, time and place the accused named above committed penetrative sexual assault upon the victim girl aged above ten years but below eighteen years and thereby committed an offence punishable under Section 6 of The Protection of Children From Sexual Offences Act, 2012?

#### **DISCUSSION, DECISIONS AND REASONS THEREOF:**

7). **PW-1** is the victim girl who during her deposition in Court stated that she knows the accused from before the incident. On the relevant day she was witnessing television in the house alongwith her elder brother. Her mother was also present in the house at that time. At that time accused arrived at her house and requested her to come out of the house in search of her father but she refused. However, as per direction of her mother she came out of the house in search of her father. The accused took her to a little distance and committed rape upon her near a bamboo groove. She felt pain in her private part and cried out of pain. Thereafter, the accused took her to her house. The accused also stated to her not to divulge the incident to anyone. It is her further version that the accused left her on the road near her residence and she proceeded towards her residence. She then disclosed the incident to her mother. She also deposed that she gave statement before the Magistrate and she marked Exhibit-1 to be her statement and her signature thereon as Exhibit-1 [1] and Exhibit- 1[2]. It is her further version that police also produced her before a doctor for medico-legal check-up.

During cross-examination, she stated that her house is situated in the basti. No one can hear anything if somebody shouts from the place of occurrence as it is a bamboo groove. She further stated that there were some houses near the place of occurrence. When she cried out of pain at that time two persons came near the place of occurrence but she did not tell them anything. She also denied all the defence suggestions put to her during cross-examination, more particularly, that accused did not commit rape upon her on the date of incident.

**8). PW-2** is **Smt. Kerolina Topno** who is the mother of the victim. This witness during her testimony divulged that on the relevant day the accused arrived at her residence. Thereafter, the accused took her daughter out of the house in search of her husband. Half an hour elapsed and her daughter returned back home and went backside of the house for washing her feet. It is further stated by this witness that her daughter narrated the incident to her in crying

condition. She noticed the private part of her daughter in torn condition and also noticed bleeding injury in her private part. She then took her daughter to the house of accused and questioned him [accused] about the incident. The accused confessed his guilt before her. Then she took her daughter before a doctor for medico legal check-up at Titabar but not a single doctor was found at Titabar. On the next day her daughter was examined by Dr. Marak. She then informed the incident to her husband who in turn lodged ejahar before police. The victim gave statement before the Magistrate and she was also produced before a doctor for medico legal check-up.

During cross-examination, she denied that she did not state before police that she witnessed bleeding injury on the private part of her daughter. It is further disclosed by her that Dr. Marak gave them prescription which was handed over to police by her. She did not disclose the fact to her guest Robin. But aforesaid Robin came to know about the incident when she went to the house of accused alongwith her daughter. She also denied that she wanted to borrow money from the accused but as the accused refused to give her money hence with the help of her daughter she had lodged false case against the accused.

**9). Sri Jakriyas Topno [PW-3]** who is the father of victim girl-cuminformant of the case stated that he came to know about the incident from his wife when he returned back home from the shop. He then lodged ejahar before police which he exhibited as Exhibit-2 and his signature as Exhibit-2 [1]. Police recorded their statement, took his daughter before a doctor for medico legal check-up and thereafter before the learned Magistrate for recording statement under Section 164 Cr.P.C.

During cross-examination, he denied that he did not state before police that he also came to know about the incident from his daughter after the same was narrated before him by his wife [PW-2].

**10). Dr. Throphilus K. Marak [PW-4]** stated that on 19/08/2016 he was present in his chamber at Pragati Medical Store which is situated at Borholla Chari-Ali. At that time one girl accompanied by her mother arrived at his chamber. The mother of the victim girl stated before him that the victim had

been sexually exploited. He medically examined the victim and advised both of them to go to government hospital.

During cross-examination, he stated that he did not physically examine the victim. he advised both of them to visit government hospital.

11). Sri Hari Kanta Tamuli [PW-5] is the I.O. of the case. On 20/08/2016 he was entrusted with the investigation of the case by the then Officer-in-charge, Borholla P.S. after ejahar was lodged by the informant at Borholla P.S. He exhibited the ejahar as Exhibit-2 and the signature of the then Officer-in-charge, Borholla P.S. as Exhibit-2 [1]. He further stated that he examined the victim as well as informant of the case. Victim girl was medico legally examined by a doctor. She was also produced before the learned Magistrate for recording statement under Section 164 Cr.P.C. During investigation, he prepared Sketch Map of the place of occurrence with index vide Exhibit-3 wherein Exhibit-3 [1] is his signature. He also arrested the accused on the next day. After collecting the medico legal report of the victim from the concerned doctor as well as her statement from the learned Magistrate, he filed charge-sheet against the accused under the relevant provisions of law. He confirmed that Smt. Kerolina Topno [PW-2] did not state before him that she witnessed blood coming out from the private part of the victim. He further confirmed that Jekriyas Topno [PW-3] did not state before him that he came to know about the incident from the mother of the victim.

Defence declined to cross-examine the I.O.

**12). Dr. Amrita Nath [PW-6]** who was the then Medical Officer on duty, Jorhat Medical College & Hospital examined the victim girl on 23/08/2016 and opined that the victim is between [09] nine years to [12] twelve years; evidence of recent sexual intercourse was not detected on her person and further that there was no evidence of violence/injury mark detected on her person at the time of examination. This witness exhibited her medical report [Exhibit-4] and her signatures thereon as Exhibit-4 [1] to Exhibit-4 [3].

The doctor during cross-examination stated that as per version of the victim she has narrated the incident in her report.

- **13).** From a close perusal of the evidence on record it is seen that the whole case rests upon the testimony of the victim [PW-1] who is the daughter of accused and her mother [PW-2]. The victim during her evidence as well as cross-examination categorically stated that she was raped by the accused on the relevant day. Moreover, the cross-examination of Smt. Kerolina Topno [PW-2], mother of the victim, shows that she stated before police that she witnessed bleeding injury on the private part of her daughter.
- 14). The accused during his statement under Section 313 Cr.P.C. simply stated that he had been falsely implicated by the informant [PW-3]. From other material point, all the mitigating circumstances were put to him but he could not explain the circumstances but remained mum. False explanation or no explanation by the accused, provides the missing link, if any, in the prosecution case. [Relied on State of Maharashtra-versus-Suresh, reported in (2000) 1 SCC 471 (Para No-27)]
- **15).** It is an admitted fact that the investigating officer of the instant case has not seized any birth certificate or school certificate of the victim from her parent to show that the victim is a child/minor less than 18 [eighteen] years as on the date of commission of offence.
- 16). In the present case, since date of birth certificate or matriculation certificate from the school or birth certificate are not available, the prosecution has relied upon Exhibit-4, the report of doctor Amrita Nath [PW-6], according to which, the age of the victim is between 09 years to 12 years. There is nothing on record to create a doubt about the bone/medical age of the victim child as determined by the Medical Officer. The doctor was not even cross-examined by the defence to show that the opinion regarding age of the victim was not a conclusive report. So, as per Section 2 (d) of The Protection of Children From Sexual offences Act, 2012, the victim is found to be below 18 [eighteen] years of age at the time of incident. In this connection, it is also seen that victim in her statement under Section 164 Cr.P.C. (recorded on 21/08/2016) stated her age to be 9 ½ years and she also declared her age to be ten years at the time of

deposing evidence in this court on 29/11/2016. So, there is consistency in her statement regarding her age. Hence, the age of the victim can be safely assumed to be below eighteen years at the time of incident.

**17).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of *Datttu Ramrao Sakhare-versus-State of Maharashtra*, reported in [1997] 5 SCC 341, the Hon'ble Apex Court has held that — "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

**18).** The ration as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent.

In the present case, the victim has been consistent on the material particulars with regard to the incident which is supported by her mother [PW-2] as well as other witnesses. Moreover, victim [PW-1] remained consistent in her statement recorded by the I.O. under Section 161 Cr.P.C. as well as statement recorded by the learned Magistrate under Section 164 Cr.P.C. that it was accused who committed penetrative sexual assault upon her at the time of incident.

**19).** In the light of the evidence of the victim [PW-1] as well as her mother [PW-2], this court can presume under Section 29 of The Prevention of

Children From Sexual Offences Act, 2012 that it was the accused, who had committed aggravated penetrative sexual assault upon the victim. It was for the accused to rebut the presumption that he had not committed the offence by proving to the contrary. No evidence was led by the accused in his defence to prove his innocence. On the contrary, the defence put forwarded by the accused in this case is not consistent and therefore, same is required to be disbelieved.

**20).** The accused was charged under Section 376 [1] IPC. From the facts and circumstances as narrated hereinabove I am of the constrained view that accused committed rape upon the victim girl on the date of incident. Hence accused is convicted under the aforesaid section of law in the instant case.

However, in view of the above discussion, I am of the considered view that prosecution has been able to prove that accused committed penetrative sexual assault on the victim which is punishable under Section 6 of The Protection of Children from Sexual Offences Act, 2012. Hence the accused is found guilty for committing offence under Section 5 [m] read with Section 5 [n] of POCSO Act, 2012 as victim happened to be below 12 years of age at the time of incident and accused had domestic relationship with the parent of the child.

Thus the act/offence committed by the accused constitutes an offence punishable under the Prevention of Children from Sexual Offences Act, 2012 as well as under Section 376 of Indian Penal Code.

In this connection it is pertinent to mention herein that Section 42 of The Protection of Children from Sexual Offences Act, 2012 provides and read as follows:

**Section-42. Alternate punishment**—Where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

In view of the above, I find it expedient to convict the accused for the offence committed under Section 5 [m] & 5 [n] of The Protection of Children

from Sexual Offences Act, 2012 which is punishable under Section 6 of the POCSO Act.

- **21).** Accused Sri Jems Bhangra is heard on the point of sentence. The accused has submitted that he has his wife and a minor child and there is none to look after them in his absence. He further submitted that if he is sent to jail hajot, then his family will face great financial hardship as he is the sole bread earner of his family. Further, he was not convicted for any criminal case, prior to this case. Hence, the accused prayed for leniency.
- **22).** I have heard Sri Subhir Ranjan Bharadwaj, learned State Defence Counsel for the accused as well as Sri Mukti Ranjan Barooah, learned Senior Advocate-cum-Special Public Prosecutor, Jorhat.

Considering the nature of offence the accused **Sri Jems Bhangra** is sentenced to undergo **RIGOROUS IMPRISONMENT** for **10** [ten] years and also to pay a fine of **Rs. 15,000/-** [Rupees Fifteen Thousand], in-default of payment of fine, to suffer further **RIGOROUS IMPRISONMENT** for **6** [six] months under Section 6 of The Protection of Children From Sexual Offences Act, 2012.

The period of detention already undergone by the accused during investigation and trial shall be set off from the period of imprisonment imposed on him under Section 428 Cr.P.C.

**23).** Now coming to the aspect of compensation to the victim, who is a minor girl, the Hon'ble Apex Court has time to time observed that subordinate courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victims being an offence against the basic human right and violative of Article 21 of the Indian Constitution.

In the case of **Bodhisattwa Gautam –versus- Subhra Chakraborty, AIR 1996 SC 922,** it has been held by the Hon'ble Apex Court that the jurisdiction to pay compensation has to be treated to be a part of the overall jurisdiction of the courts trying the offences of rape, which is an offence

against basic human rights as also the Fundamental Rights of Personal Liberty & Life.

24). Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the learned **Secretary, District Legal Services Authority, Jorhat,** to assess and grant adequate compensation to the victim [PW-1]. The said compensation amount shall be used by the parent of the victim for her welfare and rehabilitation.

**25).** Free copy of the judgment be furnished to the accused immediately. Another copy of this judgment be sent to the learned District Magistrate, Jorhat, as well as to the learned Secretary, D.L.S.A., Jorhat, for information.

**26).** Given under my hand and seal of this Court on this **10th** day of **April 2017**.

**Special Judge, Jorhat** 

**Continued to Page No:-12** 

## **ANNEXURES:-**

## **PROSECUTION WITNESSES:-**

PW-1	Victim girl.
PW-2	Smt. Kerolina Topno, mother of the victim girl.
PW-3	Sri Jekriyas Topno, father of the victim girl-cum- informant of the case.
PW-4	Dr. Theophilus K. Morak.
PW-5	Sri Hari Kanta Tamuli, I.O. of the case.
PW-6	Dr. Amrita Nath, who examined the victim.

**COURT WITNESS:- NIL** 

# **EXHIBITS FOR THE PROSECUTION:-**

Exhibit-1	Statement of the victim under Section 164 Cr.P.C.
Exhibit-2	Ejahar
Exhibit-3	Sketch Map of the place of occurrence with index
Exhibit-4	Medico legal report of victim

**MATERIAL EXHIBIT:- NIL.** 

**DEFENCE WITNESSES:-** NONE

Special Judge, Jorhat.

# **Typed & transcribed by:**

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)