IN THE COURT OF SPECIAL JUDGE::::::: BILASIPARA

Present:- Shri J. Borah, A.J.S

Special Judge,

Bilasipara

Special (POCSO) Case No- 11 of 2018

u/s 6 of Protection of Children from Sexual Offences Act

State of Assam

-Vs-

Rofiqul Islam

..... accused person

Date of framing charge :- 29-11-2018

Date of recording evidence :- 10-01-2019

01-03-2019

29-03-2019

03-05-2019

24-05-2019

25-06-2019

Date of Argument :- 05-07-2019

Date of Judgment :- 05-07-2019

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam

For the defence :- Mr. Shanti Uddin Seikh,

Ld. Advocate for the accused.

JUDGMENT

1. This case is u/s 6 of Protection of Children from Sexual Offences Act,

in short POCSO Act. So, the name of the victim is not mentioned here and she is referred to, hereinafter, as 'x'.

2. The prosecution case, in brief, is that 'x', the informant lodged an ejahar with the Bilasipara police station on 10-09-2018 informing that she had love affair with the accused Rofiqul Islam. The accused Rofiqul Islam assured her to marry. With such promise to marry, he induced her to do sexual act with him. Accused had done voluptuous act with her many times. On 08-09-2018 at about 01.30 P.M, the accused Rofiqul Islam took her to 'dhoonsa' field and committed sexual intercourse with her. The informant's mother Bahaton Nessa saw the occurrence.

So, the informant prayed for taking necessary action against the accused Rofigul Islam.

- 3. The Bilasipara police station received the ejahar and registered as Bilasipara police station case no. 1114/18 u/s 376 Indian Penal Code, in short I.P.C r/w section 6 of POCSO Act. The case was investigated and having found prima facie u/s 376 I.P.C and section 6 of POCSO Act against the accused Rofiqul Islam, prepared the chargesheet and laid the same before the court for trial.
- 4. The accused Rofiqul Islam, hereinafter called the accused, appeared in this court and he was furnished copy. Charge was framed u/s 6 of POCSO Act against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 10 (ten) witnesses, namely-

1.	'x'/ the victim	PW-1
2.	Hazarat Ali Choudhury	PW-2
3.	Sadakkas Ali	PW-3
4.	Bahaton Nessa	PW-4
5.	Abdul Mannan Miah	P.W-5
6.	Dr. Aruna Saikia	P.W-6
7.	Jerina Khatun	P.W-7
8.	Sorbesh Ali	P.W-8
9.	Dr. Laskar Ali	P.W-9
10.	Ashis Kr. Sengupta	P.W-10

- 6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations leveled against him in the evidence adduced by the prosecution witnesses and also declined to adduce evidence in defence.
- 7. Heard argument for both sides.

8. **POINTS FOR DETERMINATION**

i. Whether accused since 3 (three) months prior to lodging of ejahar on several occasions and on 08-09-18 at about 01.30 P.M at different places committed penetrative sexual assault on 'x', aged about 16 years old repeatedly?

DECISION AND REASONS THERE OF

- 9. Since P.W-1 'x' is the informant as well as alleged victim, so, she is the prime witness in this case. Now, let's see the evidence of this witness at first.
- 10. P.W-1 'x' has stated in her evidence that she is the informant in this case. The accused hails from her village. She had love affair with the accused. One day when she was standing behind their house, the accused went there, took her inside the compound to their house and committed sexual intercourse with her. Another day, when she was going to tuition, the accused took her to a field where he committed sexual intercourse on her. Another day the accused took her to a 'dhoonsa' field where the accused committed sexual intercourse on her. The said occurrence was behold by her mother. Accordingly, she lodged the ejahar Ext-1 against the accused, Ext-1(1) is her signature. She also gave her statement before the Magistrate.

In her cross P.W-1 has stated that the accused had committed sexual intercourse on her in the compound, jute field and 'dhoonsa' field. She did not lodge separate ejahar for separate occurrence. She lodged this case against the accused as he did not marry her. At the time of committing sexual intercourse on her by the accused in the field of 'dhoonsa', she raised hue and cry but the same was not audible to her mother. But her mother saw her when the accused was taking her to 'dhoonsa' field.

11. Thus, meticulous scrutiny of evidence of P.W-1 'x' shows that she had love affair with the accused. According to P.W-1 'x', the accused had committed sexual intercourse on her three times. First in their household compound, second time in the jute field and in the third time in the

'dhoonsa' field. The said sexual intercourses were committed on 'x' on different days. According to P.W-1, she did not disclose to her parents' or others about such incident of committing rape on her. According to P.W-1, her mother saw the third occurrence. Accordingly, she lodged the ejahar against the accused.

If it is accepted that the accused had committed sexual intercourse on her three times and on several occasions and in the different places. Then question arises, whether 'x' was a consenting party to sexual acts by the accused.

P.W-1 has specifically stated in her evidence that she had love affair with the accused. Secondly, P.W-1 has stated that she did not divulge to anyone about the sexual intercourse on her committed by the accused. Thirdly, since her mother saw the third occurrence, so she lodged the ejahar against the accused. Another aspect is that according to P.W-1, the accused took her behind their house. The accused took her to jute field and the accused also took her to 'dhoonsa' field to commit sexual intercourse on her. The 'dhoonsa' field is 1 k.m away from their house. 'x' did not resist the accused while taking her to such places. If it is so, then it is clear that she voluntarily accompanied the accused to such places.

All these shows that 'x' was a consenting party for sexual act on her by the accused.

Now, question arises whether such consent was free from inducement, compulsion or anything else under such circumstances she had to surrender before the accused.

P.W-1 has mere stated that she had love affair with the accused. Except this no evidence adduced by the P.W-1 that she was induced, forced or compelled by the accused for such act. So, her consent was free.

Now, question is whether 'x' was minor i.e below 18 (eighteen) years old at the time of occurrence.

P.W-1 'x' has stated nothing regarding her age at the time of occurrence. P.W-1 'x' has also not exhibited any document to establish that she was a minor.

12. Now, let's see the evidence of P.W-6 Dr. Aruna Saikia, Medical & Health Officer and P.W-9 Dr. Laskar Ali, another Medical & Health Officer.

P.W-6 has stated in her evidence that she had medically examined 'x' and found as follows-

Height-5 ft. 5 inch; weight- 34 kg; chest girth- 28 inch; abdomen girth-22 inch; total number of teeth- 28; scalp heirs- present; axillary hairs-present; pubic hairs- present; breast- well developed; genital examination-normal; evidence of injury on her body or private parts- no; no spermatozoa seen in the smear supplied. According to her opinion- no evidence of recent sexual intercourse/assault found on the patient and approximate radiological age of the patient is 17-18 years. Ext-2 is the medical report.

P.W-9 Dr. Laskar Ali has stated in his evidence that he had examined x' radiologically to determine the age of x'. He did there x rays and found as follows-

Left wrist joint- lower epiphysis of radius is fused. Age is more than 16.5 years; lower epiphysis of ulna is ulna is fused. Age is equal or more than 17 years; left elbow joint- radial head epiphysis is fused. Age is more than 14 years; left iliac crest- iliac crest epiphysis is partially fused. Approximate age is 17 to 18 years. Final opinion- Approximate radiological age is 17 to 18 years. Ext-3 is the medical report.

Thus, the evidence of P.W-6 and P.W-9 shows that the approximate radiological age is between 17 to 18 years. The law is that the age may be either one year less or 1 year greater. As per evidence of P.W-6, the approximate age is 17 to 18 years. So, it be either seventeen or above eighteen. The principle is that if there found two views, it goes in favour of the accused.

The Hon'ble Apex Court in Sharad Birdhichand Sarda -vs- State of Maharashtra (1984) AIR (SC) 1622 observe as follows-

Hon'ble Gauhati High Court in Ranjit Kalita Vs. State of Assam 2017(5) GLJ 394 observed as follows-

"10......The doctor who has been examined as PW-6 stated that on Contd. to page no.-6

P.W-10 Ashis Kr. Sen Gupta, the investigating officer, seized one school certificate, M.Ext-1. This M.Ext-1 is a school certificate, given by 2197 Baghmara L.P School. This school certificate is not duly proved by the prosecution. There is no evidence adduced by the P.W-1 'x', the informant, P.W-4 Bahaton Nessa, the mother of P.W-1 'x' and P.W-8 Sarbesh Ali that 'x' was student of Baghmara L.P School and she heard in the said school.

So, the M. Ext-1 cannot be accepted to be authentic one. In the result it leads to conclusion that 'x' is of 18 years or above 18 years.

13. When a girl of eighteen or above eighteen years, does anything prior to her own consent, then her consent is considered and it is accepted.

The earlier discussion shows that 'x' went with the accused to different places voluntarily and she kept mum when the accused committed sexual intercourse on her, all this shows that she is consenting party.

- 14. Another vital point is that P.W-1 'x' has strenuously stated in her cross examination that as the accused did not marry her, so, she lodged the case against the accused. The evidence of P.W-1 'x' is clear rather fainted.
- 15. Now, let us see the evidence of other witnesses.

P.W-2 Hazarat Ali in his evidence stated that he did not see the occurrence. He got to know from 'x' that she was committed rape by the accused. Since the evidence of P.W-1 itself is not reliable to take into consideration that the accused committed rape on her. So, the evidence of P.W-2 that he got to know about the occurrence from P.W-1 cannot be accepted.

- 16. Same is the evidence of P.W-3 Sadakkas Ali who got to know about the occurrence from 'x'. So, the evidence of P.W-3 cannot be accepted.
- 17. P.W-4 Bahaton Nessa is the mother of the alleged victim 'x'. According to P.W-4 she was working at the house of Nishan Ali. She heard a cry of her daughter from 'dhoonsa' field. She went there and found the

accused above her daughter and the accused was committing sexual intercourse on 'x'. She tried to catch the accused, but failed to do so.

In her cross P.W-4 has stated that the distance between the place of occurrence and the place where she was working is 4/5 bigha of land and it take 30 minutes to reach the place of occurrence. One Moinuddin, aged about 12 years was with 'x' when 'x' went to tethering the goat.

18. Thus, scrutiny of evidence of P.W-4 Bahaton Nessa shows that while she was working at the house of Nishan, she heard the cry of her daughter 'x'. The distance between the place of working at the house of Nishan and the field of 'dhoonsa' is 4/5 bigha of land. According to P.W-4 it took 30 minutes time to reach the 'dhoonsa' field from the hosue of Nishan. 4/5 bigha of land is not a little distance. It is something difficult to hear a sound from such distance. So, the evidence of P.W-4 cannot be accepted easily.

Another aspect is that according to P.W-4 one boy named Moinuddin saw 'x' when she was taken to 'dhoonsa' field. Moinuddin is of 12 years old. So, he is a competent witness. But the prosecution did not examine Moinuddin. So, it is a vital lapse on the part of the prosecution.

Another aspect is that the defence has suggested to P.W-4 that she wanted marriage of her daughter with the accused, but the accused refused it. This suggestion was denied by P.W-4. But P.W-1 'x' has specifically stated in her evidence in cross that she lodged the case against the accused, as he did not marry her. In such a situation, the suggestion raised by the defence cannot be discarded.

- 19. P.W-5 Abdul Mannan Miah has stated in his evidence that he got to know about the occurrence from P.W-4 Bahaton Nessa. Since the evidence of P.W-4 is itself not trustworthy. So, the evidence of P.W-5 cannot be accepted to be reliable.
- 20. P.W-7 Jerina Khatun has stated in her evidence that on the day of occurrence, Bahaton Nessa worked at her house. When Bahaton Nessa went to 'dhoonsa' field, she accompanied her. She saw 'x' lying in the 'dhoonsa' field and the accused was running away from 'dhoonsa' field.

There found corroboration in the evidence of P.W-4 Bahaton Nessa and the evidence of P.W-7 Jerina Khatun in respect that both of them went to 'dhoonsa' field together. But at the same time, there found gulf in their evidence in respect that when P.W-4 has stated in her evidence that she saw

the accused above 'x' and committing rape, P.W-7 has stated that she saw 'x' lying on the field and the accused was running away from 'dhoonsa' field. So, there is distinct gulf in the evidence of P.W-4 and P.W-7. This non-corroborated evidence may affect the prosecution case.

21. P.W-8 Sarbesh Ali is the father of 'x'. He has stated in his evidence that he saw the accused to come out from the 'dhoonsa' field and when he went to the place of occurrence, his daughter told him that the accused committed rape on her.

In his cross P.W-8 has stated that the 'dhoonsa field' is 4/5 'rachi' (one 'rachi' is equal to 80 hand) from his house.

Thus the evidence of P.W-8 that he saw the accused to come out from 'dhoonsa' field from a distance 4/5 'rachi' is not reliable and convincing. Since, the evidence of P.W-1 'x' itself is not reliable. So, the evidence of P.W-8 who got to know about the occurrence from P.W-1 'x' cannot be accepted.

- 22. The evidence of PW-10 Ashis Kr. Sengupta, the investigating officer is mere official. He investigated the case and prepared the charge sheet Ext-5. The evidence of P.W-10 does not meliorate the prosecution case.
- 23. Considering all aspects, it leads to conclusion that the prosecution evidence is not sufficient and reliable to prove the offences as alleged against the accused. The prosecution evidence is found dearth of merit.
- 24. The prosecution, thereby, failed to prove its case u/s 6 POCSO Act against the accused beyond all reasonable doubt.
- 25. Held, the accused is not guilty u/s 6 POCSO Act.
- 26. Accordingly, the accused is acquitted and set at liberty.

The bail bond of accused stands cancelled and bailor is discharged from liabilities.

The case is disposed of.

Given under my hand and seal by this court on this 05th day of July 2019 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by,

S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

PW-1 'x'/ the victim

PW-2 Hazarat Ali Choudhury

PW-3 Sadakkas Ali

PW-4 Bahaton Nessa

P.W-5 Abdul Mannan Miah

P.W-6 Dr. Aruna Saikia

P.W-7 Jerina Khatun

P.W-8 Sorbesh Ali

P.W-9 Dr. Laskar Ali

P.W-10 Ashis Kr. Sengupta

PROSECUTION EXHIBIT:-

Ext-1 Ejahar,

Ext-2 Medical Examination report,

Ext-3 Radiological report,

Ext-4 Sketch Map,

Ext-4 Charge sheet and

Ext-5 Seizure list.

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- NIL

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara