# IN THE COURT OF THE SPECIAL JUDGE, UDALGURI, ASSAM

SPI. (POCSO) Case No.11/2016 (U/S :4 of POCSO Act)

State Versus Khubraj Kherua S/O Lt. Dindayal Kherua Vill- Panery Tea Garden, PS-Panery, Dist-Udalguri.

PRESENT: Sri P.Saikia,A.J.S., Special Judge, Udalguri.

## **APPERANCE:**

For the Prosecution: Sri P. Baskey, P.P., Udalguri

AND

For the accused: Sri. J.K. Brahma, Advocate.

Evidence recorded on :30.6.16, 14.9.16, 15.11.16,5.6.17,

27.7.17, 21.11.17, 16.12.17.

Argument heard on: 10.7.2018.

Judgment delivered on: 24.7.2018.

#### **JUDGMENT**

The prosecution case shorn of unnecessary details is that on 4.12.15 the informant Smti. Ganga Munda lodged an FIR with the O/C, Panery P.S. stating amongst others that her younger daughter (real name is withheld, henceforth referred as the victim) aged about 11 years had been compelled to have sexual intercourse with the accused Khubraj kherua after enticing her to visit his house when the informant had to leave her house for work alongwith her husband. As result of such sexual intercourse her victim daughter had to under go medical treatment and it was also detected that she was carrying 6 months pregnancy. When the victim was asked about this she told before her

that she did not inform her regarding her sexual intercourse with the accused out of fear as the accused threatened her with dire consequences if she revealed about such affairs.

- 2. On receipt of the FIR the Officer In-charge, Panery Police Station registered a case vide Panery P.S. case No.89/15 dated 4.12.15 U/S 4 of the POCSO Act and entrusted the case for investigation to S.I. Prabin Ch. Deka. During the course of investigation I.O. visited the place of occurrence, recorded the statement of available witnesses U/S 161 Cr.P.C., arrested the accused and also got the statement of the victim recorded U/S 164 Cr.P.C. The I.O. prepared the sketch map of the place of occurrence and procured the medical examination report of the victim. On completion of the investigation the I.O. laid the charge-sheet against the accused Khubraj Kherua U/S 6 of POCSO Act to face trial in the court of law.
- 3. On receipt of the charge sheet alongwith the case diary a Special (POCSO) case No. 11/2016 was registered and the presence of the accused was ensured by the profess of the court. On due appearance of the accused copy of the police documents supplied U/S 173 Cr.P.C. furnished to him.
- 4. Whereupon on assessing relevant papers including the case diary and having heard learned counsel of both sides my learned predecessor in office having found a prima-facie case and sufficient ground for presuming that the accused had committed the offence U/S 4 of POCSO Act a formal charge thereunder was framed against the accused and the same on being read over and explained to him to which the accused pleaded not guilty and claimed to stand trial.
- 5. In order to romp home the charge the prosecution has examined as many as 8 witnesses including the informant, victim, M.O and I.O. of the case.
- 6. The defence of the accused is of complete denial. The accused has pleaded in his statement U/S 313 Cr.P.C. that he is totally innocent and he has

been falsely implicated. However, no evidence has been adduced in support of his defence.

- 7. In the light of the above perspective, the point for determination in the present case is set up and framed as:
- (i)Whether the accused on or about 6 months prior to lodging the FIR dated 8.12.15 committed penetrative sexual assault upon the victim, aged about 11 years as alleged U/S 4 of POCSO Act?
- 8. I have heard argument advanced by the learned counsel of both the sides and also carefully gone through the evidence on record in its entirety.

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

9. PW1, Dr. Chandan Kumar Saha is the Medical Officer of this case. According to his evidence on 7.12.15, while was serving as M. & H.O.1 at Udalguri Civil Hospital he examined the victim in reference to Panery P.S. case No.89/15 U/S 4 of POCSO Act and found as follows:-

Identification mark:- two moles on the forehead and cheek, one on forehead and one on the neck.

# Physical examination:-

Height- 143 cm, weight- 40 Kg, teeth- 28, axillary hair- present, pubic hairpresent, breast- developed, hymen- absent, vaginal injury- none, marks of violence- none, clothing- Shuridar

Smear examination vide Regd. No.37856 Report No.203/15 reported by pathologist Mangaldai Civil Hospital shows no spermatozoa.

X-ray examination of the right wrist, elbow and iliac crest vide plate No.RXIC-3754 dated 8.12.15 reported by Radiologist Dr. A.K.Bora shows radiological age 16-17 years.

- (1) Right wrist joint epiphyseal union not completed.
- (2) Right elbow joints epiphyseal union completed.
- (3) Right iliac crest epiphyseal union completed.

Urine for pregnancy test on 8.12.15 reported by Ultrasonography of abdomen on 8.12.15 by Sinologist Dr. A.Deka reveals single live fetus of 26 weeks +- 1 week.

As per his opinion:-

- (1) No sign of injury over the private parts..
- (2) No sign of recent sexual coitus.
- (3) Pregnancy positive.
- (4) Approximate age in between 16 to 17 years

Ext.1 is his report. Ext.1(1) is his signature.

- 10. His cross-examination was declined by the defence.
- 11. PW2 is Nila Singh Tanti. He has testified to the effect that accused as well as the informant Smti. Ganga Munda are his neighbours. One day informant came to his house and informed him that accused had sexual intercourse with her daughter as a result of which she became pregnant. At the time of occurrence the victim was about 14 years old. On the day of lodging the FIR, the accused absconded from his house. He has also stated that police seized one birth certificate of the victim vide Ext.1 wherein Ext.1(1) is his signature.
- 12. In cross-examination he has disclosed that only after the victim was pregnant the matter was divulged by the informant to him. The informant produced the birth certificate of the victim. However, he does not know the contents of the Ext1.
- 13. PW3 is Budhuwa Munda, who is the husband of the informant. It is in his evidence that victim is his daughter who is about14 years old. The accused is known to him as being his neighbour. He is a permanent garden labourer of Panery Tea Estate and his wife also works in the same garden. They used to come out of home in the morning and return home in the evening after doing their work in the garden leaving their daughter at home. During their absence at home accused used to come to their house and induced their victim

daughter to go to his house. Thereafter, the accused had sexual intercourse with their daughter on several occasions resulting her pregnancy. Around 7 months after the occurrence their daughter complained stomach pain to her mother whereupon her mother took her to hospital. Then doctor declared that she was carrying pregnancy of seven months. On being asked his daughter told him that she did not disclose the fact of pregnancy to anybody else because the accused threatened her with dire consequences if she would disclose the pregnancy to anybody else. Thereafter the matter was informed to All Adivashi Students' Association and asked them to lodge FIR with the police. Accordingly his wife lodged FIR before Panery PS.

- 14. In cross-examination he has stated that accused at the time of commission of the offence was a married person which was also known to his victim daughter. Prior to detection of pregnancy his daughter did not disclose her pregnancy to anybody else. He has denied the defence suggestion that his daughter was aged 16-17 years at the time of occurrence and the accused did not have sexual intercourse with her.
- 15. PW4 is Smti. Samni Munda. Her evidence is found to be simple in nature. It is her evidence that the victim is her cousin sister. The accused is also known to her. The incident took place one year ago. One day the mother of victim informed her that accused had grown sexual relationship with the victim girl. In connection with this incident though a meeting was held in their village but she did not attend the meeting.
- 16. In cross-examination she has divulged that she does not know what resolution was taken place.
- 17. PW5 Smti Ganga Munda is the mother of the victim. She has deposed to the effect that the incident took place about 2 years ago. She used to work in the tea garden and as such, during day time neither her husband nor herself stay at their house except their victim daughter. During their absence the accused used to come to their house and had sexual intercourse with her

daughter. As a result she became pregnant. When their daughter was pregnant for 7 months then the fact came to their knowledge. They took her to a doctor and it was confirmed that she was carrying pregnancy. In this regard she lodged an FIR with the police by putting her thumb impression thereon. Subsequently a child was born who died after two days. Her victim daughter was around 13/14 years at the time of occurrence.

- 18. In cross-examination she has revealed that her victim daughter did not disclose about the occurrence prior to detection of her pregnancy. She does not know the actual date of birth of her daughter. The house of accused is situated in the vicinity of their house intervening by a road.
- 19. PW6 is Smti. Shanti Lagun. Her evidence discloses that before 2 years ago she heard that victim girl was carrying pregnancy. The victim girl disclosed that accused had sexual intercourse with her as a consequence of which she became pregnant. When the victim girl disclosed her pregnancy she was carrying pregnancy of 6/7 months pregnancy. Later on a baby was born and died thereafter.
- 20. In cross-examination she had revealed that before detection of pregnancy the victim girl did not divulge about the incident.
- 21. PW7 is the victim girl herself. She has stated to the effect that the accused belongs to her village. The incident occurred 2 years ago. Accused had taken her to his house forcibly from the road when none was present at his house. The accused thereafter gagged her mouth and committed sexual intercourse with her. Accused told her not to disclose about the incident. After 4 days of incident accused again did sexual intercourse with her under threat. Then again after 4 days accused did sexual relationship with her. Out of fear she could not disclose to any one about the incident. As a result of sexual relation with the accused she became pregnant. Eventually a baby was born but died after 2 days. She was produced before the Magistrate and her

statement was recorded before the Magistrate U/S 164 Cr.P.C. She put her thumb impression in her statement.

- 22. In cross-examination she has disclosed that the house of accused is situated in front of their house. She did not disclose to any one about the incident. She could not resist the accused because he gagged her mouth. She knew that the accused is a married person and has children when he committed sexual intercourse with her.
- 23. PW8 Prabin Ch. Deka is the Investigating Officer in this case. As per his evidence on 4.12.15 he was posted at Panery PS as second officer. On that day informant Smti. Ganga Munda lodged an FIR before the O/C, Panery PS and after registering a case u/s 4 of POCSO Act he was entrusted with the investigation of the case. He has proved and marked the FIR as Ext.2 wherein Ext.2(1) is the endorsement note of the then Inspector of police Sohrab Ali which is known to him on correspondence. During investigation, he recorded the statement of six witnesses including the victim and complainant in the police station. Since it was 10 PM so on the next day he visited the place of occurrence where he recorded the statement of some other witnesses. HeI sent the victim for medical examination and also produced her before the Magistrate for recording her statement, prepared sketch map of the place of occurrence and also seized one birth certificate of the victim. He has proved and marked the sketch map as Ext.3 and Ext.3(1) is his signature. Ext.1 is the seizure list. Ext. Ka is the birth certificate of the victim wherein Ext.1(2) is his signature. He also collected the medical report. In the midst of investigation he was transferred and as such he handed over the case diary to the O/C SI Naren Swargiary for completion of remaining part of the investigation of the case. On completion of investigation SI Naren Swargiary filed the charge-sheet. He has proved and marked the charge-sheet asExt.4. Ext.4(1) is the signature of SI Naren Swargiary which is known to him on correspondence.
- 24. In cross-examination he has stated that the occurrence took place on 4.12.16 prior to 6 months of the lodging of ejahar. They did not get

information regarding the occurrence before lodgment of the FIR. The birth certificate of victim was issued by the hospital of tea garden.

- 25. Before analyzing the evidence on record in its entirety what is immensely important to note at this stage is that this being an allegation of rape by the victim brought against the accused and as such, it is obvious that the main evidence in all such case is of prosecutrix herself. In practice a conviction of rape almost entirely depends on the credibility of the prosecutrix so far as the essential ingredients are concerned, the other evidence being merely corroborative. It is not necessary that there should be independent corroboration of every material circumstances in the sense that the independent evidence in this case apart from the testimony of the victim should in itself be sufficient to sustain conviction. It is well settled by catena of decisions of the Hon'ble Apex Court that there is no rule of law or practice that the evidence of prosecutrix can not be relied upon without corroboration and as such, it has been laid down that corroboration is not sine qua non for conviction in a rape case if the evidence of the victim does not suffer from "any basic infirmity and probabilities factor" does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence.", where having regard to the facts and circumstances of the case or medical evidence can be expected to be forthcoming.
- 26. In fact, for this very purpose as to how indeed the evidence of victim of rape is required to be appreciated, we are quite aware of the illuminating Apex Court judgment rendered in the case of B.B. Hiraji Bhai VS Gujarat (AIR) 1983 S.C. 753. The quintessence of the judgment is that even on an uncorroborated testimony of the victim of sexual assault accused can be convicted but ultimately that does not dispense with the overall intrinsic credibility and consequential dependability of such a witness. In other words, if the evidence of the victim girl/woman is found to be starling quality and fully reliable without any reproach there is indeed no requirement of law to seek for further corroboration.

- 27. The evidence of the victim of rape having attuned and so cause ourselves to the guiding principle as to how indeed we are to evaluate the evidence of the prosecutrix (victim), we straightway now proceed to appreciate the evidence of prosecutrix (victim) before proceeding to sift other evidence on record. According to her, the incident in question, wherein she came to be raped had occurred at about 2 years ago on the date of occurrence of the first incident of rape the accused who resides adjacent to her house across the road forcibly took her to his house when none was present in his house. The accused thereafter gagged her mouth and committed sexual intercourse with her. In this way in frequent interval the accused used to commit sexual relationship with her by gagging her mouth. As the accused threatened her not to disclose about the sexual intercourse with him and as such out of fear she could not disclose the incident before any one including her parents. As a result of sexual cohabitation with the accused she became pregnant. Eventually a baby was born but died after two days. However, in crossexamination she has admitted that when she had sexual intercourse with the accused from time to time till her pregnancy she knew that the accused is a married person having his own children. She has further claimed in her statement that that at the time of rape on her by the accused she was below 13 years.
- 28. So far as the evidence of PW7 is concerned it is easily demonstrable that though the victim PW7 has claimed that she was subjected to sexual intercourse by the accused at the age of her minority but she had not made a whisper even before her parents that she was subjected to forceful intercourse by the accused from time to time during the absence of her parents. Had she been forcefully raped by the accused from time to time till her detection of pregnancy before the doctor she would have definitely narrated the incident before her parents after their return from work. That aside the victim PW7 also knew prior to the incident that accused was married who resides adjacent to their house across the road. It is beyond comprehensible as to what prevented her from disclosing about commission of rape by the accused person time to time against her will or consent. Rather she had kept mum till her pregnancy

was detected after 6 months from the first day of occurrence of sexual intercourse with the accused. As regards the statement of victim U/S 164 Cr.P.C. it appears that she stated what has been reiterated in her evidence in the case and at the time of the commission of the offence she was around 13 to 14 years. But in order to buttress the claim of the victim as regards of minority at the time of commission of rape no age certificate or school certificate have been produced to conclusively to determine the age of the victim at the time of the commission of the offence of rape by the accused.

- 29. In this context, it is also pertinent to mention that the Investigating Officer of the case PW8 appears to have seized one birth certificate vide Ext.1 as disclosed by him in his evidence. But on scrutiny of Ext.1 it is seen that only the report of seizure of one birth certificate issued by medical of Panery TE on 20.8.15. It is mentioned there that the date of birth of the victim as 16.1.11. Surprisingly the said medical birth certificate purported to have been seized vide Ext.1 is not available on the record to prove of its authenticity. That besides the date of birth is also mentioned in the seizure list as 16.1.11 which even does not support the evidence of the victim PW7 who has claimed by herself that she was between 13 to 14 years at the time of the commission of the alleged rape by the accused. Having found no intrinsic value of the seizure list Ext.1 in absence of the birth certificate that too issued on 21.8.15 the same cannot be acted upon to establish that the victim was a minor at the time of occurrence.
- 30. Now, turning to the testimony of PW1, who examined the victim on 7.12.15 found no sign of injury on the private part as well as no sign of recent sexual coitus except positive pregnancy. The M.O. PW1 also opined that approximate age of the victim as per the radiological was between 16-17 years. While appreciating the medical evidence of the PW 1 it is amply evident at the time of examination and this is also admitted by the victim PW7 herself that as a result of frequent sexual intercourse with the accused she became pregnant and eventually gave birth a child who died after two days.

- 31. Now the moot question hinges in the facts and circumstances of the case as to whether the victim was minor when the alleged occurrence of rape was committed by the accused and impregnated her as a result of which she gave birth a male child who died after two days of birth.
- 32. From the foregoing appreciation of evidence of victim PW7 and PW8 Investigating Officer of the case it transpires that though the victim has claimed that she was minor and that the Investigating Officer has stated that he submitted birth certificate of the victim but there is no birth certificate or school certificate available on the record to ascertain the actual age of the victim inasmuch as the mere bald statement of the victim that she was around 13-14 years at the material point of time on the face of the evidence of the M.O. that the victim at the time of examination was found 16-17 years cannot be accepted to hold that the victim was minor at the time of the alleged incident. It is settled principle of Medical Jurisprudence that in absence of any cogent, conclusive and reliable evidence as to the actual age of the victim in the instant case, the medical examination of the victim will prevail in the given facts and circumstances of the case.
- 33. This is what has been held in the case of Jayamala v. Home Secretary, Govt. of J & K, AIR 1982 SC 1297. In the said judgment the Hon'ble Apex Court has held that the margin of error in age ascertain by radiological examination is two years either on the side.
- 34. Here in this case there is no dispute that the victim PW7 became pregnant as a result of cohabitation with the accused and ultimately she gave birth a child who died immediately after 2 days. Though the accused has denied his involvement in the offence but it is already seen from the testimony of the PW7 that when she was having frequent sexual intercourse with the accused she did not inform her parents for the reason best known to her. As she had voluntarily consented for sexual intercourse with the accused without any misconception of fact in her mind of not marrying her by the accused when she knew prior to her cohabitation with the accused being a married

person with two children who resides contiguous to her house situated across the road. However, she remained silent till her pregnancy was detected by the doctor. Furthermore, there is no conclusive evidence to establish that the victim was a minor at the time of commission of sexual intercourse with the accused. Therefore, it can be safely inferred that the victim had consequal sexual intercourse with the accused which she concealed from her parents as a consequence thereof she became pregnant and only then her parents came to know about her illicit affairs with the accused. In addition to that in absence of birth certificate or school certificate from the competent authority the radiological report of the Medical Officer (PW1) showing her age at the time of examination between 16 to 17 years has to be relied on to infer that the victim was a major girl about 18 years as the benefit of margin of error ascertained by the radiological test by the Medical Officer is two years on either side is, therefore, accorded in favour of the accused in the back drop of the incoherent and un inspiring evidence adduced by the victim PW7 herself which also does not get corroboration from medical and other independent evidence on record to establish the age of the victim and therefore, the accused is entitled to get the benefit of doubt.

- 35. In the result, I am constrained to hold that the accused Khubraj Kherua is not guilty U/S 4 of the POCSO Act. Therefore, he is acquitted thereunder on benefit of doubt and set him at liberty forthwith.
- Bail bond executed by the accused and the surety shall remain in force for another six months under the purview of Section 437(A) Cr.P.C.

Given under my hand and seal of this Court this 24<sup>th</sup> day of July,2018.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Special Judge, Udalguri.

Sessions Judge, Udalguri.

## APPENDIX:

# A)Prosecution witnesses:

i) PW1 Dr. Chandan Kr. Saha ii)PW2 Nila Singh Tanti iii)PW3 Budhuwa Munda iv)PW4 Smti. Samni Munda v)PW5 Smti. Ganga Munda vi)PW6 Smti. Shanti Lagun vii)PW7 Miss Rupali Munda. viii) PW8 Prabin Ch. Deka

B)Defence witness: Nil.

# C)Exhibits:

i)Ext.1 Medical report.

ii)Ext.2 FIR.

iii)Ext.3 Sketch map iv)Ext.4 Charge sheet.

Dictated and corrected by me.

Special Judge, Udalguri