IN THE COURT OF ADDITIONAL SPECIAL JUDGE..... BIJNI.

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Present: N.U. Ahmed, Additional Special Judge, Bijni.

SPECIAL (P) CASE NO. 40 (B)/2018 (Under section 376 of the IPC, R/W Section 6 of the POCSO Act, 2012.)



THE STATE OF ASSAM

-VS -

Md. Mominul Hussain @ Moinul Hoque Accused.

APPEARANCE:

Advocate for the prosecution

Mr. P. Dev Ray, Ld. Addl. P.P.

Advocate for the defence

: Mr. Giash Uddin Ahmed,

Mr. S. Sarkar, learned Advocates.

Date of framing charge

: 09-11-2018

Date of evidence

: 04-12-18, 14-12-18, 05-01-19, 22-02-19 & 06-03-19.

Date of Argument

: 03-05-2019.

Date of Judgment

: 17-05-2019.

JUDGMENT

The prosecution case, in brief, is that on 09-04-18, one Jabeda Khatun lodged an F.I.R. with the O/C, Bijni P.S. alleging inter alia that her 15 years old daughter 'X' (name withheld herein after known as victim 'X') had love affair with the accused Moinul Hoque for last one year and about three months ago accused with a promise to marry "X" committed penetrative sexual assault in the house of maternal uncle of "X" namely Abdul Malek of village- Dhakhin Kajdhaha against her will. Victim "X" was not informed the said fact due to fear. Thereafter, the accused person on several occasion on different places committed penetrative sexual assault on victim "X". On 03-03-2018 victim went to Religious meeting at Bagmara Madrass and at night at about 10 PM she came out from the meeting to discharge her nature call. Then accused by forced took the victim "X" on the western side and took her on the North of the road in a lonely place and by forced, while he was committing penetrative sexual assault on her, she raised hue and cry and local people caught hold the accused and confined him in house of brother-in-law of "X" namely Jiarul Islam. Thereafter, guardian of the accused came there and gave an assurance to settle the matter socially and took the accused therefrom. But the matter was not settled. In the FIR it is further stated that she was waited for social settlement and for this reason there was delay in lodging the FIR. Hence, the present case.

On receipt of the FIR, O/C Bijni P. S. registered the same as Bijni P.S Case No. 93/18, under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (herein after known as POCSO Act) and started investigation. During investigation I. O. visited the place of occurrence, recorded the statement of witnesses, medically examined the victim girl and collected report, got her statement recorded under section 164 of the Cr. P. C. and after completion of investigation I.O. submitted charge sheet against the accused Md. Mominul Hussain @ Md. Moinul Hoque under section 376 of the IPC, R/W Section 6 of the Protection of Children from Sexual Offences Act, 2012 (herein after known as POCSO Act).

3. After receiving the charge sheet, cognizance was taken u/s 376 of the IPC ,R/W Section 6 of the POCSO Act, 2012, against the accused Md. Mominul Hussain @ Moinul Hoque and started a Special(P) case. Copies of the relevant documents was furnished to the accused person as per provision of section 207 of the Cr. P. C. After hearing both the sides learned Advocate and on perusal of case record charge was framed u/s 376 of the IPC, R/W Section 6 of the POCSO Act, 2012 and the contents of charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

During trial prosecution side examined as many as eight witnesses including informant and victim. Accused was examined u/s 313 of Cr. P. C and recorded his statement in separate sheets attached to the case record. The defence case was of complete denial and the defence

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side has not adduced any defence evidence.

5. I have heard argument put forwarded by learned advocates of both sides. I have gone through the case record as well as evidence on record.

POINT FOT DETERMINATION

- 6. (i) What was the age of victim "X" at the time of occurrence?
 - (ii) Whether the accused Md. Mominul Hussain @ Md. Moinul on 03-03-2018 at about 10.00 pm at village-Baghmara, under Bijni committed rape on victim "X" and also committed rape on her at Dhakhin Kajdaha and different places on several occasion against her will?
 - Whether the accused on 03-03-18 at night at Bagmara under Bijni P. S. and on different dates on several occasion committed penetrative sexual assault on victim "X" who is a minor girl below 16 years of age?



:DISCUSSION, DECISION AND REASON THEREOF:

- 7. To bring home the charge the prosecution examined eight(8) witnesses including the informant and victim. Let me scrutinize the evidence on record to decide the point.
- 8. Learned Addl. P. P. submitted that at the time of occurrence the age of the victim "X" was 15 years and as such she was child as per provision of section 2(d) of the POCSO Act, 2012 and the accused person committed penetrative sexual assault on her and this fact proved by the prosecution beyond all reasonable doubt and this is fit case for conviction of the accused under section 6 of the POCSO Act.
- 9. On the contrary, learned Advocate for the accused submitted that the prosecution to prove the age of the victim "X" exhibited one school certificate but the prosecution failed to prove the school certificate as per provision of law and as such the school certificate is not admissible in evidence. Learned advocate further submitted that the radiologist opined as regard as of the wictim girl above 17 years but below 19 years. Learned advocate further submitted that the medical evidence regarding age is not conclusive and it may vary two years on either side and if

two years added from lower side then the age of the victim girl was 19 years at the time of occurrence. Learned advocate also submitted that the prosecution failed to prove that the victim girl was child at the time of occurrence and as such the POCSO Act is not applicable in this case.

- 10. I have dully considered the submission of both the sides learned advocate. This is a case relating to offence under the POCSO Act. Age of the victim girl is prime consideration to determine the offence under POCSO Act. Hence, point No.6(i) is taken first for discussion and decision.
- Ongoing through the evidence on record it reveals that PW1 informant in her evidence stated that at present age of her daughter is 15 years. PW1 proved the school certificate of the victim girl as exhibit-3. From the evidence of PW1 it reveals that the victim "X" has no birth certificate. PW1 in her evidence has not stated the date of birth of her daughter. So, it appears that he stated the age of victim girl on the basis of school certificate. The defence counsel submitted that the school certificate is not proved as per provision of law and as such the same is not admissible in evidence. So, we should see whether exhibit-3 is proved as per provision of law or not.

Regarding admissibility of admission register and school certificate Hon'ble Supreme Court in a decision reported in AIR 2004 SC 230, Sushil Kumar Vs Rakesh Kumar has held as follows:

- "33. Under section 35 of the Indian Evidence Act, a register maintain in terms of a statute or by a statutory authority in regular course of business would be relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.
- 34. In the aforementioned backdrop the evidence brought on record are required to be considered. The admission registered or a Transfer certificate issued by a primary school do not satisfy the requirement of section 35 of the Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any responsible person."
- 13. Hon'ble Supreme Court in another judgment reported in AIR 1988 SC 1796, Birad Mal Singhvi Vs Anand Purohit has held that- to render a document admissible under section 35 of the Evidence Act, three condition must be satisfied –firstly, the entry that is relied on must be done in public or other official work, register or record, secondly, it must be an entry stating the fact in issue or relevant fact and thirdly, it must be made by any public servant in discharge of his official duty or any other person in performance of a duty specially enjoyed by the law. An entry relating to the date of birth made in

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the school register is relevant and admissible under section 35 of the Act, but the entry regarding age of a person in school register is not of much evidentiary value to prove the age of the person in absence of material on which the age was recorded.

- 14. The victim girl's first attended school is Kasdaha Dhakhinpara L.P. School. From the evidence of PW1, it reveals that at the time of admission of PW1, she has not filed any application or birth certificate of the "X". Exhibit-3, issued by Head Master Kasdaha Dhakhinpar L. P. School. The prosecution neither called for the school admission registered nor examined Head Master Kasdaha Dhakhinpara L. P. School to prove the exhibit-3. The issuing authority of exhibit-3 was not examined. It is settled law that mere marking a document as exhibit does not dispensed with to prove the genuineness of the document. There is no birth certificate of the victim girl. So, the prosecution should prove on what basis the date of birth of PW2 has been written in the exhibit-3. Considering all aspect 1 find that the exhibit-3 is not dully proved and the same is not admissible in evidence.
- 15. So, the next we should see whether the medical evidence of victim as regard to her age is reliable or not. During investigation the Investigating Officer examined the victim "X" by a doctor. It is settled law that medical evidence is not conclusive evidence to determine the age and there is possibility of marginal error of 2(two) years on either side. PW5 Dr. Mina Hazarika in her evidence stated that from physical examination the age of the victim "X" is seems to be above 17 years and below 19 years. She proved the medical report as exhibit-4. Ongoing through exhibit-4 it reveals that she opined that as per radiological examination the age of the victim girl is above 17 years and below 19 years. Regarding medical evidence to ascertain the age of victim girl our Hon'ble Gauhati High Court in a judgment reported in 2007 Cri LJ 1615, Md. Jakir Hussain Vs The State of Assam has held as follows:-
 - "7. In the opinion of the doctor (PW 4), age of the girl (AB) was above 18 years with 20 weeks of single viable intra-uterine pregnancy.
 - 8. The evidence given by PW 1 has remained completely unchallenged by the prosecution as well as the defence and his evidence clearly shows that according to the radiological examination of AB, her age was above 18 years at the time, when she was medically examined. Though the medical opinion with regard to age may vary by two years on either side, the fact remains that when the evidence could have been adduced, but has not been adduced by the prosecution by producing necessary materials from the school, where AB had studied, to show her age, the medical evidence on record, which goes in favour of the accused, cannot be ignored. Situated thus, one has no option, but to proceed on the premises that AB was above 18 years of age at the time, when she allegedly had sexual intercourse

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with the accused."

16. It is also settled law that if there is 2(two) sets of evidence and one goes in favour of accused and another goes in favour of the prosecution then the evidence which goes in favour of the accused should be considered. From the evidence of PW5, it reveals that at the time of occurrence, the age of victim girl was above 17 years and below 19 years. The medical evidence as regard age may vary 2(two) years on either side. So, if we see on upper side of the age of the victim girl then her age was 19 years by adding 2(two) years on upper side from lower side. As there is no other reliable evidence as regard age of the victim girl, so, there is no other option then to rely on the medical evidence. Therefore, I am compelled to hold that at the time of occurrence the age of the victim girl was above 18 years.

- To attract the provision of offence under the POCSO Act, the victim must be a child. A child is defined u/s 2(d) of the POCSO Act. From the definition of child, it appears that a child means any person below the age of 18 years. From the discussion made above, it appears that the age of victim girl was above 18 years at the time of occurrence and as such the provision of the POCSO Act is not applicable in this case and accused is not found guilty u/s 6 of the POCSO Act.
- The next question arises whether the accused committed rape on the victim "X" or not. 18. PW1 in the FIR elaborately stated that three months before the incident accused with a promise to marry "X" committed sexual intercourse on her in the house of her maternal uncle and thereafter on several occasion committed sexual intercourse with her at different places and on 3-3-2018 while the accused was committing sexual intercourse on victim "X" at Bagmara near road then the public caught red handed the accused. But PW1 nowhere in her evidence stated that accused person committed sexual intercourse with the victim "X". The victim "X" examined as PW2. PW2 also in her evidence nowhere stated that accused has committed sexual intercourse with her at any point time. During investigation the statement of the PW2 was recorded u/s 164 of the Cr. P. C. Exhibit-4 is the statement of PW2 recorded u/s 164 of the Cr. P. C. Ongoing through the exhibit-4 it reveals that PW2 in her statement u/s 164 of the Cr. P. C. stated that on 03-03-2018 she went Bagmara Madrassa to attend a religious meeting and while she was at 10 PM returning from meeting then accused pulled her on the north side and want to commit rape on her and she raised hue and cry and the public save her, thereafter father of Moinul came and gave assurance for village settlement and also told that her marriage would be solemnize with Moinul, but father of Moinul had done nothing and before that incident accused also committed

sexual intercourse with her three months back, saying that he loves her and he would marry her. But PW2 in her evidence simply stated that on the night of occurrence at about 10 PM while she went to outside of the pendal of the meeting to discharge her nature's call then accused gagged her mouth and tried to get up her on his vehicle and then public caught him and brought them to her brother-in-law's house. In this case except PW2 there is no eye witness. Hence, the evidence of PW2 is very much important. It is settled law that on the basis of sole testimony of the rape victim conviction can be sustained if the evidence of victim is trustworthy and her evidence is free from embellishment. Ongoing going through the evidence of PW2 it reveals that there is no consistency in her evidence. Moreover, PW2 in her evidence nowhere stated that accused committed sexual intercourse with her or tried to commit sexual intercourse with her. The prosecution also failed to examine the public who caught hold the accused and victim in the place of occurrence. Therefore, I find that it is not safe at all to rely on the inconsistence evidence of the PW2. Hence, I find that the evidence of PW2 is not trustworthy and her evidence is not free from embellishment. Moreover, as per allegation the incident took place on 03-03-2018 and the informant lodged the FIR on 09-04-2018 i.e after one month 6 days of the incident. It is settled law that delay always not fatal to the prosecution case if the prosecution able to explain the reason of delay. In this case the informant in her FIR and evidence stated that she was waited for village settlement but no settlement arrived and as such she filed the FIR. There is no evidence to show that any meeting for settlement was held in the village. Then why the informant waited for 36 days and thereafter she filed the FIR. So, the reason of delay is not believable at all. So, I find that 36 days delay in lodging the FIR is fatal to the prosecution case and the FIR is afterthought and the prosecution case is doubtful. Hence, I have nothing to hesitate to hold that prosecution failed to prove the charges against the accused beyond all reasonable doubt.

- 19. From the discussion made above, I find that the prosecution side miserably failed to prove the case against the accused beyond all reasonable doubt. Hence, accused Md. Mominul Hussain @ Moinul Hoque is found not guilty u/s 376 of the IPC, R/W section 6 of the POCSO Act and he is acquitted from the charge of offence u/s 376 of the IPC, R/W section 6 of the POCSO Act and set him free at his liberty forthwith.
- 20. Send a copy of the judgment to the District Magistrate, Chirang as per provision of Section 365 of the Cr.P.C.
- 21. Considering the facts and circumstances of the case I find that this is not a fit case to recommend DLSA, Chirang for victim compensation u/s 357-A of the Cr. P. C.

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22. The seized school certificate be returned to the informant in due course of time. The seized vehicle be returned to the registered owner of the vehicle in due course of time.

Given under my hand & seal of this court the 17^{th} day of May, 2019.

Addl. Special Judge, Addl. Shimial Judge

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Typed by myself.

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Addi, Special Judge

APPENDIX

(A) Prosecution witnesses:

PW1- Musstt. Jabeda Khatun

PW2- victim "X".

PW3- Md. Anowar Hussain

PW4- Md. Nur Mohamad Ali

PW5-Dr. Mina Hazarika

PW6- Musstt. Joygun Nessa

PW7- Md. Matin Ali

PW8- Sri Sailen Deori

(B) Prosecution exhibit;

Exhibit-1, FIR.

Exhibit-2, seizer list.

Exhibit-3, School Certificate.

Exhibit-4, statement u/s 164 of the Cr. P. C.

Exhibit-4, Medical report.

Exhibit-5 & 6, sketch map of the P. O.

Exhibit-7, seizer list of vehicle.

Exhibit-8, charge sheet.

- (C) Defence witnesses- Nil.
- (D) Defence exhibit- Nil.

Additional Special Judge,

Addl. Special Judge Bijni.