IN THE COURT OF SPECIAL JUDGE :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, Sivasagar.

Spl. (P) Case No. 34 of 2014, U/S 6 of POCSO Act 2012 (Arising out of Sapekhati P.S. Case No. 66/2014)

State of Assam

-Vs-

Sri Mineswar Borgohain Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. Prafulla Duarah, Advocate

Date of framing Charge : 02.02.2015

Dates of Evidence : 29.05.2015, 21.07.2016, 15.09.2016,

19.11.2016, 20.05.2017.

Date of S/D : 13.06.2017

Date of Argument : 19.07.2018

Date of Judgment : 02.08.2018

JUDGMENT

1. Prosecution case, in brief, is that on 11.11.2014, informant Sri A. Phukan lodged an FIR with O/C, Sapekhati P.S. alleging, inter alia, that about six months back while his minor daughter victim 'B' (name withheld) was alone in her house, accused Mineswar Borgohain came to his house and giving promise to marry, committed rape with the victim. It is alleged that after committing rape accused also restrained the victim from not to disclose the incident to others. After this incident, on two other occasions, while the victim was alone in her house, accused again made physical relation with her. About a week before filing of the FIR, on finding symptom of pregnancy, while the victim was brought to Sapekhati Hospital, it was detected that she was pregnant for about six months and on asking, the victim disclosed that she was approached with the villagers, but he refused to take the responsibility.

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- 2. On receipt of the FIR, Sapekhati P.S. Case No. 66/2014, U/S 493/376 IPC read with Section 4/6 of POCSO Act, 2012 was registered and started investigation. During investigation, victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C. Accused was arrested and produced him before this court for judicial custody.
- 3. On completion of investigation, I.O. has submitted Charge-Sheet against the above named accused person U/S 493/376 IPC, read with Section 4/5 (j) (ii)/6 of POCSO Act, 2012.
- 4. On being produced the accused person before this court, copy was furnished to him, and after hearing both the sides, vide order dated 02.02.2015, the then learned presiding office has framed charge U/S 6 of POCSO Act, 2012 against the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined nine witnesses including M.O. and I.O. Defence cross-examined the said P.Ws but adduced no evidence.
- 5. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- 6. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. Prafulla Duarah, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 7. (I) What was the age of the victim on the date of alleged crime?
 - (II) Whether the victim 'B' was subjected to penetrative sexual assault by the accused and thereby she became pregnant through the accused?

DECISION AND REASONS THEREOF

8. P.W. 1 Shri A. Phukan, the father of the victim B, in his evidence deposed that at that time of incident victim aged about 14 years. He lived with

the victim B and while going to work, victim remains alone in the house. Taken this scope accused committed misdeed with her and made her pregnant. On seeing her health condition, she was taken to doctor and he came to know that victim was pregnant of 4 months. He informed the matter to VDP secretary and on asking, victim informed to all that accused committed physical relation with her on 4 occasions for which she became pregnant. On this incident he lodged an FIR as Ext. 1. In due time victim B delivered one child. In his cross examination P.W. 1 stated that he has not submitted any age prove documents in court. After death of her mother, victim B sometimes stayed at the residence of her Uncle. She also frequently visits the residence of his other daughter. One Utpal Gogoi has the residence near her house, who has used to visit his residence. Accused also used to take Ganja with him. He has no knowledge about the matter of water supply Scheme and any quarrel with the accused. On 01.12.2014, victim B delivered one child. He denied that victim B was not pregnant through the accused.

- 9. P.W. 2 Tarun Phukan, in his evidence deposed that one evening Shri Ajay Phukan came to his house and informed him that by committing misdeed, accused made the victim pregnant. On this he requested him to arrange a village meeting. Accordingly, as per the decision of the meeting, matter was informed to police. In the meeting victim B disclosed that while she was alone in the house, accused used to come to her residence and made her pregnant. In his cross, he stated that he came to know about the incident only from the father of the victim. He denied that the victim did not disclose before him that she was got pregnant through the accused.
- 10. P.W. 3. Dr. Diganta Chetia, in his evidence deposed that on 12.11.2014, he examined victim B, in connection with Sapekhati P.S. Case No. 66/14, U/S 493/376 IPC. Upon examination, he is the opinion that her age is below 18 years and above 15 years. No mark of violence detected on her body including private parts at the time of the examination, no spermatozoa was found in her vaginal smear examination. she is carrying 35 weeks 1 day single

viable intra-uterine foetus at the time of examination. Ext.2 is the medical examination report and Ext. 2 (1) is his signature. In his cross examination P.W. 3 deposed that alleged history of sexual assault took place in the month of Ahar 2014, whereas he examined the victim B in the month of November 2014.

- 11. P.W. 4 the victim in her evidence deposed that while she was a student of class 7 and aged about 14 years, she remaining alone in the house. Accused Mineswar Borgohain, friend of her father came to her house and cohabited with her on 4 occasions and she becomes pregnant. She has examined by doctors and she gave birth one child. Presently the age of her son is 1½ years. She also told the matter to the Nurse. Accused restrained her to inform the matter to others. She did not disclose the same to his father. She gave her statement in court by vide Ext.3. In her cross examination, she stated that her mother died while she was aged about 14 years. She brought up at the house of her Uncle. She also used to stay at the residence of her sister at Longpotia. She had good relation with Shri Utpal Gogoi, near her house. Accused has a water supple scheme in the village and for which accused had sour relation with some villagers. Her child born on December 2014. She denied the defence suggestion that she was not pregnant by the accused.
- 12. P.W. 5. Shri Khagen Phukon, in his evidence deposed that he has seen the accused, while coming to the house of victim, while his wife took victim B to Nurse, she reported to his wife that she got pregnant through the accused. In his cross examination, he stated that after the death of her mother, victim B staying at his residence. Sometimes victim B also went to the residence of her sister, victim B did not inform him about the incident.
- 13. P.W. 6 Shri Giris Kakoty, in his evidence deposed that on being requested by one Ajoy Phukan, he wrote the FIR as Ext. 1.
- P.W. 7 Smti Bitumoni Phukan, in her evidence deposed that about 2 years back Ajoy Phukan informed her that victim B was pregnant and a meeting was organized. At that time victim B was pregnant of 5 months. In her cross examination, she deposed that at that time of incident victim B was

studying in class 7. She also used to visit the residence of her sister at Longpotia. Prior of the incident she also went to Longpotia. She denied that the victim did not pregnant through the accused.

- 15. P.W. 8 Bubu Phukan, in his evidence deposed that on seeing the pregnancy symptoms, his mother Seuti Phukan asked the victim to which she disclosed the fact that she was pregnant through the accused. On asking by him, victim B reported that she was pregnant through the accused. In village meeting the accused refused to accept the allegation. In his cross examination he deposed that at that time of incident, victim B was aged about 13 years and she was the student of class 7. He has not submitted any age prove documents in court. After death of her mother, victim B sometimes stay at the residence of her Uncle. She also frequently visited the residence of her sister at Longpotia. One Utpal Gogoi has the residence near her house who used to visit her residence. Accused also used to take Ganja with the father of the victim. He has no knowledge about the matter of water supply scheme. Locals have some quarrel with the accused for this.
- 16. PW-9 SI Dilip Kumar Chutia in his evidence deposed that during investigation of Sapekhati PS case No. 66/2014 he went to the residence of informant at Boroh Gaon and drawn a sketch map of the PO. Exbt. 4 is the said sketch map. Victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. During investigation, accused Mineswar Borgohain was arrested and forwarded to Court. On completion of investigation, the then O/C Sapekhati PS has submitted charge sheet against the accused u/s 493/376 IPC r/w section 4/5(j)(ii)/6 of Pocso Act. Exbt. 5 is the charge sheet. In his cross, he admitted that FIR was received on 11.11.2014. In the FIR the age of the victim was mentioned as 14 years and that she was a student of class VII. He has not collected the age proof document of the victim. He denied that he did not investigate the case properly.
- 17. <u>Point No. I:</u> So far age of the victim is concerned, P.W.1 the informant in his evidence stated that at the time of filing the FIR the victim was

aged about 14 years. In his cross he admitted that at the time of death of his wife, victim was aged about 13 years and was a student of Class-VII. P.W.3 the M.O. in his report Exbt. 2 has mentioned that on examination of the victim on 12.11.2014, the victim was found to be above 15 years but below 18 years of age. P.W.4, the victim in her evidence claimed that at the time of incident she was aged about 14 years. The above evidence on age of the victim more or less remains unchallenged by the defence. As such, it can safely be held that at the time of alleged incident victim was aged about 15 years.

- 18. <u>Point No. II:</u> So far the pregnancy of the victim on the date of filing the FIR, from the evidence of P.W.3, the M.O. it appears that on 12.11.2014, he examined the victim and found that she was carrying a single viable intra-uterine foetus of 35 weeks 1 day. The victim in her evidence stated that after filing of this case, she delivered one male child. The other witnesses have also corroborated the fact that at the time of filing the FIR the victim was pregnant and subsequently she delivered one male child.
- 19. Now coming to the role of the accused in making the victim pregnant, in the course of argument hearing, Mr. Prafulla Duarah, learned advocate appearing for the accused has argued that the FIR was lodged on 11.11.2014 with an allegation that six months back the first incident of rape happened. As such, if that fact is taken to be true then it appears that the incident of rape must happen in the month of May 2014. However, by referring to the medical report as proved by the prosecution vide Exbt. 2 it appears that on 26.11.2014 the victim undergone ultra sonography and on that day the Doctor has found pregnancy of 35 weeks 1 day single viable intra-uterine foetus. As such, if the above fact is taken then the incident must happen at the end of February or early March 2014. By referring to the evidence of victim (P.W.4) and her father (P.W.1) learned advocate for the accused has pointed out that about seven months back of filing the FIR, the victim was at the residence of her sister and also by referring to the evidence of other witnesses, it is argued that as there is enmity between the accused and the father of the victim, there

was every possibility of false implication. It is further argued that admittedly the incident of alleged rape was revealed after nine months of pregnancy and non-disclosure of fact of pregnancy in time creates a huge suspicion on the truthfulness of the victim. On the other hand, learned Special P.P. in his argument has submitted that as the fact that the victim was a minor and she was pregnant are not in dispute, merely the fact that she disclosed the incident after six or nine months cannot be treated as sufficient to create doubt on the evidence of the victim. By referring to Section 29 of POCSO Act 2012, learned Special P.P. has submitted that the statement of the victim should be taken as true and believable. I have considered the submission of both the sides.

20. So far the argument regarding probable date of pregnancy, from the FIR as well as in the evidence it appears that P.W. 1 has admitted to have taken the victim before Doctor and confirmed that she was pregnant for about four months. However in the FIR, P.W.1 mentioned that when the victim was taken to Doctor, then only he came to know that victim was pregnant for about six months. P.W. 1 in his cross admitted that his daughter victim 'B' delivered a male child in the month of December 2014. From the evidence of P.W. 3, the M.O. it appears that on 26.11.2014 victim was found carrying pregnancy of 35 weeks 1 day. Thus the fact that victim delivered the child on 01.12.2014 corroborates with the medical evidence showing the period of pregnancy. So taking the date of birth as 01.12.2014 and the medical report of 35 weeks 1 day pregnancy, I found force on the argument that the victim must have conceived in the month of February last or early March of 2014. On looking at the Exbt. 2 medical report it also appears that while giving history of the case, the victim has mentioned that incident of sexual assault took place in the month of Ahar (third month of Assamese calendar) which normally starts from 15th of June to 14th of July. This fact that the incident happened in the month of Ahar contradicts the findings of the M.O. (P.W. 3) that the victim must have conceived in the month of February or March 2014. Thus a great suspicion arose so far the period of alleged incident of rape on the victim in the month of Ahar i.e. June-July of 2014. On the basis of Exbt.2, the medical report, I am bound to take the view that the victim got conceived within the month of February-March 2014 and thus, it creates a huge doubt on the allegation of the informant and the victim that about six months back prior to filing of FIR victim was subjected to rape by the accused.

21. Now coming on the other parts of the evidence, it is the case of the victim that accused caused physical relation with her on four occasions by coming to her house while she was alone in her house. Admittedly the accused was a friend of the father of the victim. P.W. 1 has admitted that accused some time used to come to his house and consumes 'Bhang' with him. The evidence of P.W. 5 Sri Khagen Phukan that he saw the accused in coming to the house of the victim cannot be taken otherwise against the accused. In his cross examination P.W. 1, the informant admitted that victim some time used to stay at the residence of her uncle where she attained puberty. He also admitted that victim also used to visit the residence of her elder sister at Lonpotia. One Utpal Gogoi has his residence near to his house and he also used to come to his house. The victim in her cross examination admitted that she used to say at the residence of her elder sister. About seven months back of this incident, she also went to her sister's house. Several persons have their residence near to her house. She maintained a good relation with Utpal Gogoi. She further admitted that due to one Water Supply Scheme, there was a strain relation between the accused and the villagers. As villagers dislike the accused, his visit to her house is reduced. The other witnesses are the hearsay witnesses from the victim. P.W. 8, a close relative of the victim in his cross has also admitted that few days back of the alleged incident, victim went to the house of her sister and stayed there. He also confirmed that due to the Water Supply Scheme there was a strain relation between the accused Mineswar and the villagers. The accused in his 313 Cr.P.C. examination has categorically stated that the instant case was filed at the instigation of Tarun Phukan as the Water Supply Scheme in the village was set up on his land and said Tarun Phukan failed to bring the Water Supply Scheme to his land and as such he concocted this story and falsely implicated him. Under these factual aspects so far

admitted position of the enmity between the accused and the villagers, the character of the victim of staying at her sister's house just prior to the alleged incident and the medical report as discussed earlier showing discrepancy on the probable date of conceive of the victim, I am of the opinion that the presumption u/s 29 of POCSO Act 2012 stands rebutted.

- Now having no presumption of law in favour of the prosecution, if we independently look at the evidence on record, it appears that non-disclosing of fact of pregnancy for about 8-9 months by the victim in spite of alleged forcible sexual relation with her by the accused and that irreconcilable date of alleged incident of rape i.e month of Ahar as disclosed before the medical officer casts a serious doubt on the trustworthiness of the victim and her evidence. As such, under the given facts and circumstances the statement of the victim cannot be relied upon to hold the accused guilty. The evidence of victim is found doubtful, untrustworthy and as such accused is entitled for the benefit of doubt.
- Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of offence U/S 6 of POCSO Act or any other minor offence against the accused Sri Mineswar Borgohain. As such, accused Sri Mineswar Borgohain is acquitted from the charges U/S 6 of POCSO Act, 2012 and set at liberty forthwith.
- Bail bond executed by the accused and his surety stand extended for another six months from today U/S 437-A Cr.P.C.
- 25. Considering the nature of the case, the matter is not referred to DLSA for granting compensation U/S 357 (A) Cr.P.C.
- 26. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 27. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 2nd day of August, Spl. (P) Case No. 34/2014 Page 9 of 10

Special Judge, Sivasagar:

<u>APPENDIX</u>

- 1. <u>Prosecution witnesses</u>:
 - P.W.1 Sri Ajoy Phukan (Informant)
 - P.W.2 Sri Tarun Phukan
 - P.W.3 Dr. Diganta Chetia (M.O.)
 - P.W.4 Smt. Bhanima Phukan (victim)
 - P.W.5 Sri Khagen Phukan
 - P.W.6 Sri Girish Kakoty
 - P.W.7 Smt. Bitumoni Phukan
 - P.W.8 Sri Bubu Phukan
 - P.W.9 SI Dilip Kumar Chutia (I.O.)
- 2. <u>Defence witnesses</u> None
- 3. Court witnesses None
- 4. Exhibits by prosecution -
 - Exbt.1 FIR
 - Exbt.2 Medical report
 - Exbt.3 164 Cr.P.C. statement of the victim 'B'
 - Exbt.4 Sketch map
 - Exbt.5 Charge-Sheet

Special Judge, Sivasagar