IN THE COURT OF SESSIONS JUDGE, SIVASAGAR

Present:- Sri S. K. Poddar, AJS

Sessions Judge,

Sivasagar.

Special (P) Case No. 31 of 2014 U/S 6 of POCSO Act (Arising out of Sapekhati P.S. Case No. 47/2014)

State of Assam

-Vs-

Sri Rohini Borah Accused

<u>APPEARANCE</u>:

For the prosecution : Sri A. K. Bora, P.P.

For the accused : Mr. Sk. Shamsher, Advocate

Date of framing Charge : 10.07.2015

Dates of Evidence : 01.12.1015, 17.03.2016, 08.07.2016,

01.09.2016, 08.02.2017, 12.06.2017.

 Date of S/D
 :
 10.07.2017

 Date of Argument
 :
 30.08.2017

 Date of Judgment
 :
 12.09.2017

J U D G M E N T

1. Prosecution case, in brief, is that on 03.09.2014 one Sri Jadab Baruah lodged an FIR with O/C Sapekhati Police Station alleging inter alia that about 4 (four) months back while his minor daughter victim 'P' (name withheld), a student of Class IX, was alone in the house, accused Rohini Borah by enticing her to marry and also under threat, committed rape on her. It is also mentioned in the FIR that on the date of FIR, the victim was pregnant of 4 (four) months. Due to her abnormal behaviour on 29.08.2014, the victim was shown to Doctor and the fact of pregnancy was detected. On asking the victim, she revealed the truth and on 30.08.2014, during communication with the family members of the accused, he confessed his guilt in presence of his family members. Thereafter on spreading of the news of the incident in the village, on 30.08.2014 accused fled away with another girl.

- 2. On this FIR, Sapekhati P.S. Case No. 47/14 U/S 493/376 IPC R/W Section 4/6 of POCSO Act was registered and investigated into. During investigation, accused was arrested and was remanded to judicial custody. The victim was medically examined and her statement was recorded in Court U/S 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet against the accused U/S 493/376 IPC R/W Section 6 of POCSO Act.
- 3. On receipt of the charge-sheet and upon appearance of the accused, vide order dated 10.07.2015, my learned predecessor in office has framed the charge U/S 6 of POCSO Act against the above named accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined as many as eight witnesses including 1.0.
- 4. 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.
- 5. I have heard argument of learned P.P. Mr. A.K. Bora and Mr. Sk. Shamsher, learned defence counsel and gone through the evidence and documents. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 6. (I) What was the age of the victim 'P' on the date of the alleged occurrence?
 - (II) Whether prior to 4 (four) months of filing of the FIR the accused has committed aggravated penetrative sexual assault on the victim 'P'?

DECISION AND REASONS THEREOF:

7. PW 1 the victim in her evidence deposed that about 8 months ago one day at around 2.30 pm while she was sitting alone in her house, the accused came to her house and commit rape upon her. Due to misdeed by the accused, she became pregnant. At that time, she was the student of class IX. Subsequently, she gave birth to a female child who is presently 7 months old. During her cross-examination, she replied that she stated before the police that

one day while her parents are absent Rohini came to her house. She did not say anything to the police about her brother and brother's wife. She further replied that the age of the female child was 7 months and the incident took place around 8 months ago. She denied the defence suggestion that the incident is false for which there is no similarity in her statement given before police and in the court. She further denied the defence suggestion that at the time of incident she was 19 years old and she deposed falsely that she was reading in class IX. She admitted that prior to the incident, she dance with the accused together. Accused used to come to her house as he was the friend of her brother.

- 8. PW 2 Jadav Baruah deposed that there was physical relation between the accused and victim and as a result she gave birth of a female child. The age of the child is 6½ months. During his cross he replied that victim did not tell anybody regarding the incident till she was 8 months pregnant. He admitted that at the time of marriage, his son Biswajit was 21 years old. Victim was born after 1½ year of the birth of Biswajit.
- 9. PW 3 Nirupoma Konwar deposed that about 2 years ago she heard that victim became pregnant. She along with other women of the village went to the house of victim and on being asked victim replied that accused raped her and make her pregnant. During her cross she replied that her house is about 1½ km far from the house of victim.
- 10. PW 4 Sashiprova Baruah deposed that the incident took place about two years ago when victim was reading in class IX. During their absence, accused came to her house while victim was alone and established physical relationship with her by giving her false promise of marriage. Victim became pregnant. After 3 months, when Victim was taken to doctor, the doctor declared that she was pregnant. Subsequently, Victim giving birth of a child. The age of the child was 1 month. Her husband lodged an ejahar. During her cross, she replied that his son's name is Biswajit. She denied the suggestion of the defence that one Bharat Saikia was the friend of her son and he used to come to the house regularly. She also denied that at the time of incident,

victim was 20 years old. She further replied that Biswajit married her sister's daughter for which the society abandoned her family and in this process, father of the accused played a major role.

- 11. PW 5 Mokendra Konwar deposed that at the time of incident the father of Victim informed him that there was a love affair between the accused and victim and there was physical relationship between them for which Victim became pregnant. He further deposed that he asked the victim about the incident and Victim replied that accused give her assurance to marry and established physical relationship for which she became 3-4 months pregnant. He decided to handover victim to the accused but the accused eloped with another girl. During his cross, he replied that he has not stated before police that there was love affair between them and was physical relationship was established for which she became pregnant.
- 12. PW 6 John Kr.Gogoi deposed that father of Victim told him that there was love affair between the accused and Victim and due to physical relationship between them Victim became pregnant. He further stated that Victim has one year old female child. The accused did not marry the victim. During his cross he replied that the statement he made in court is hearsay. He also denied the suggestion of defence that he did not state before the police that the father of victim told him that there was love affair between accused and Victim and due to physical relationship Victim became pregnant.
- 13. PW 7 Dr. Diganta Chetia, in his evidence deposed that on 04.09.2014, he examined the victim P in connection with Sapekhati P.S. Case No. 47/14, U/S 493/376 IPC r/w Sec. 4/6 of Pocso Act and upon examination, he is the opinion that her age is below 18 years and above 15 years at the time of the examination. PW 7 also deposed that on the date of examination, victim was carrying 8 weeks 3 days pregnancy. Ext. 3 is the medical reprot.
- 14. PW 8 Sri Dipen Patar, i/o of this case, in his evidence deposed that during investigation, he went to the place of occurrence i.e. residence of informant at Ujanrikuri 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, he has collected the medical report and statement given by victim in court. On 14.09.2014, accused Rohini Bora ahs surrendered at Sapekhati PS. He was arrested and forwarded to Court for judicial custody. On completion of investigation, he has submitted charge sheet against the accused u/s 493/376 IPC r/w sec 4 of POCSO Act. Exbt. 5 is the charge sheet. In his crossexamination the I/O admitted that as per FIR victim was a student of class IX of Baregaon High School. He did not collect the age proof document from her school or did not collect her birth certificate. Victim in her statement before him did not state that rape was committed at 2.30 pm. However, she stated before him that accused committed physical relation with her while she was alone. Witness Jan Kr. Gogoi in his statement did not state that from father of the victim he came to know about love affairs and physical relationship but said witness stated that for physical relationship accused her daughter become pregnant.

15. In the course of argument hearing learned P.P. has submitted that the sole evidence of the victim is sufficient to hold the accused guilty. He also pointed out that as the fact of pregnancy is proved by the medical evidence, so there is no doubt on the point of penetrative sexual assault upon the victim and hence case should be treated as proved against the accused. On the other hand Mr. Sk. Shamsher, learned Advocate appearing for the accused by pointing out the evidence on record, has submitted that on the alleged date of occurrence apparently the victim was above the age of 18 years as admitted by her father. Moreover, by referring the medical evidence and the contents of the FIR and the evidence of the victim, it is pointed out that there is no possibility of having committed rape prior to 4 (four) months of filing the FIR and finding on the age of the foetus at the womb of the victim as admitted by P.W. 7 Medical Officer. Learned defence counsel has also argued that from the evidence of Medical Officer, it is clear that the victim has not implicated the accused at the earliest point of time and even she did not disclose the name of the accused before her

mother. It is further argued that admittedly, there is apparent cause of false implication as father of the accused has taken lead to socially boycott the family of the informant/victim due to marriage of the brother of the victim with her first cousin. It is also pointed out that the evidence is the self contradictory and as such the evidence of the victim alone cannot be relied upon to hold the accused guilty. Learned Advocate of the defence has placed reliance on the reported case of 2008 (Suppl) GLT 138. I have considered the submissions of learned Advocate of both the sides.

- 16. <u>Point I:</u> So far, age of the victim is concerned, the prosecution did not prove any document on the age of the victim though she was a student of Class IX. From the evidence of P.W. 7 Medical Officer, it appears that upon radiological examination, he has opined the age of victim in between 15 years to 18 years. The victim in her evidence as P.W. 1 has stated that at the time of incident she was a student of Class IX. However, P.W. 2 the father of the victim, in his cross-examination stated that his son Biswajit who was married at that time, was aged about 21 years and the victim born after 1½ years of Biswajit. By this calculation, on the date of alleged incident, the victim was aged about 19½ years.
- 17. Hon'ble Gauhati High Court in the case of 2008 (Suppl) GLT 138 Tazuddin Laskar-Vs- State of Assam as relied by the learned defence counsel, has held that ...
 - "(5) The prosecution came up with the plea that at the relevant point of time the victim was a student of class IX but surprisingly the prosecution has not produced any school certificate or birth certificate in support of the age of the victim. PW 1 was examined by the doctor and on the basis of the ossification test the doctor opined that the girl is above 16 years and below 17 years of age. The result of such ossification test may vary by two years on either side and thus the benefit of this must go to the accused and we hold that the girl was about 18 years of age."
- 18. The above case appears to be fully applicable in this case. It may be mentioned here that though some argument has been advanced regarding age of the victim but to my mind the age of the victim is irrelevant in this case because as the fact that there was a allegation of rape under threat and under

assurance of marriage. So, apparently it was not a case of consenting sex. However, for academic purpose I hold that age of the victim is above 18 years of age.

- 19. <u>Point No. II:-</u> The fact that on the date of FIR victim was pregnant was not under challenge or denial. As such court has to look as to whether, it was accused who made the victim pregnant. Admittedly the FIR was filed after 4(four) months of occurrence. There was no eye-witness of the occurrence, so far seeing the accused in committing rape with the victim or even seeing the accused coming to the house of the victim or going out of the house of the victim on the relevant day. As such, the whole case is based on the evidence/ statement of the victim and the circumstances brought by prosecution.
- 20. If we look at the evidence of the victim as narrated by her, it is clear that about 8 months back i.e. from the date of deposition, on the date of incident while she was alone in her house about 2-30 pm, accused entered her house from back side door and committed rape on her. Accused did the misdeed for two days, for which she got pregnant. Subsequently she delivered one child presently aged about 7 (seven) months. In her cross-examination she admitted that on the date of incident her brother Biswajit Baruah, his wife Mridula Baruah and other family members are present in their house. But subsequently she denied about their presence. She denied that accused did not commit rape on her. She further admitted that prior to this incident accused and she performed Bihu dance and accused being a friend of her brother came to her house. Inspite of stopping her menstrual period, for 4(four) months she did not inform her family members.
- 21. The P.W. 2 father of the victim simply stated that his daughter became pregnant due to physical co-habitation by the accused with her. He admitted that till 4 (four) months of her pregnancy she has not stated the fact to them. From the evidence of P.W. 3 it appears that she came to know from the victim that the accused has committed rape on her and caused her pregnant. From the evidence of P.W. 4, mother of the victim a new story developed. She deposed that physical co-habitation was done on the assurance

of marriage. P.W. 5 and 6 went ahead and deposed that having love affairs the physical relationship was established between the accused and the victim. On being asked the victim stated her that on the assurance of marriage accused has established the physical relationship.

- 22. From the above evidence as available in the record adduced by the prosecution during trial shows that two different versions came out. One is of rape without anything else and other version is assurance of marriage and then physical co-habitation was done. If we look at the statement of the victim given u/s 164 Cr.P.C, (Ext.1) she stated that accused came to her house on two occasions and committed sex against her will and threatened her that if she disclosed it, she will be killed. The second part of her evidence regarding commission of rape under threat is missing while given statement in Court. The evidence of having physical relationship by the accused after assurance of marriage has not stated by the victim in her evidence during trial. But PW 4, 5 & 6 has stated the same which they heard from the victim and her father. So there is apparently a discrepancy of the stand taken by the victim at different point of time.
- The P.W. 7, Medical Officer in his cross-examination admitted that patient told the history before him and while giving history the patient did not give him details regarding the sexual assault or the person involved causing the sexual assault. From the evidence of P.W. 4, mother of the victim in her cross admitted that initially on being asked how she became pregnant, the victim did not disclose anything to her. So, from the above it creates a doubt regarding the involvement of the accused as same was not disclosed at earliest.
- Apart from above, the other prime aspect is time of pregnancy. According to the victim and the other witnesses the incident of rape took place about 4 (four) months back on the date of filing of the FIR. However, while medically examining the victim, P.W. 7, the medical officer has categorically opined that the victim is carrying early pregnancy of 8 weeks 3 days as per sonography report. The Medical Officer in his cross-examination has specifically stated that no connection was possible for a sexual assault prior to four months

and pregnancy of 8 weeks 3 days. Thus the medical opinion clearly rules out that the pregnancy was caused for the alleged rape done on the victim four months back.

- I found force on the submissions of learned counsel for the defence that there cannot be any casual connection between the alleged rape prior to four months of filing of the FIR and foetus found on the womb of the victim on the date of medical examination.
- 26. It may be pointed out in the argument hearing of the learned defence counsel put much stretch on the evidence of the victim by referring the decision that while adducing evidence on 01.12.2015 she stated that the incident took place about 8 months back and the later stage she deposed that age of the child delivered by her was 7 (seven) months. I am not inclining to put much importance to this simply because this may arose due to miscalculation of period. It may be recalled that FIR was lodged on 3.9.2014 while the victim was four months pregnant and she was medically examined on 4.9.2014 and ultra-sonography was done on 10.9.2014. So the mention of the period of incident might be due to lack of knowledge of the victim as long period was passed.
- Now the other aspect as argued to disbelieve the evidence of the victim and other witnesses so far implication of the accused is concerned, is previous animosity between the family members of the victim and the father of the accused. Admittedly Biswajit Baruah married one Mridula Baruah who happens to be his cousin and for this marriage, the family of the victim was socially boycotted. It is admitted by the victim and her father that, in isolating them from the society, father of the accused has taken lead and therefore some grudge against the family of the accused. Though P.W. 1 and 2 denied to have filed this false case out of that grudge, the evidence as narrated above, particularly the evidence of medical officer clearly ruled out any possibility of rape and pregnancy.
- 28. Allegation of rape prior to four months and existence of a fetus of

8 weeks 3 days has clearly lead me to draw a presumption of the fact that there is every possibility of false implication of the accused with the alleged incident of rape. The evidence of the victim for the discrepancies mentioned above cannot be relied upon without corroboration on material points.

- Non disclosure of the vital fact of rape soon after the occurrence appears to be fatal in this case because in her evidence in Court, neither she has stated about any promise to marry her nor she deposed about any threat given by the accused for not divulging the fact of rape before her parents. Keeping mum for four months till the date of detection of pregnancy and then implicating the accused with her pregnancy creates a suspicion on reliability of her evidence to implicate the accused with the alleged incident of rape and responsibility for causing her pregnant.
- 30. In view of above finding, I hold that the prosecution has failed to prove the case beyond reasonable doubt and accordingly accused Rohini Borah is acquitted from the charge U/S 6 of POCSO Act on benefit of doubt and set at liberty forthwith.
- 31. The bail bonds executed by the accused and his surety stand extended for another six months from today.
- 32. Considering the fact and circumstances of the case, the matter is not referred to DLSA for granting compensation U/S 357(A) Cr.P.C.
- 33. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 34. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 12th day of September, 2017 at Sivasagar.

APPENDIX

1. Prosecution witnesses:

- P.W.1 Victim P
- P.W.2 Sri Jadav Baruah
- P.W.3 Smti. Niropoma Konwar
- P.W.4 Smt. Sashiprobha Baruah
- P.W.5 Sri Mokendra Konwar
- P.W.6 Sri Jan Kr. Gogoi
- P.W.7 Dr. Pranjal Kumar Gogoi
- P.W.8 Sri Dipen Patar (I.O.)
- 2. Defence witnesses Nil.
- 3. Court witnesses Nil.

4. Exhibits by prosecution -

- Exbt.1 164 Cr.P.C. statement of victim
- Exbt.2 FIR
- Exbt.3 Medical report
- Exbt.4 Sketch map
- Exbt.5 Charge-Sheet

Sessions Judge Sivasagar