IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.13/2016

U/S- 6 of the POCSO Act, 2012

State of Assam

-Versus-

Sri Lohit Kumar

s/o-Lt. Sukhuna Kumar

Resident of vill -Srihati

P.S.-Sualkuchi

Dist- Kamrup

-----Accused

Appearance:

Mr. A.K. Baruah. Addl. Public Prosecutor ------for the State

Md. Jeherul Islam, Advocate ------for the accused

 $\ \, \text{Date} \ \ \, \text{of} \ \ \, \text{evidence:} 18.05.2017, \ \ \, 17.07.2017, \ \ \, 27.11.2017, \ \ \, 01.02.2019 \ \ \, \text{and} \\$

14.03.2019.

Date of Argument: 28.03.2019,11.04.2019

Date of Judgment: 24.04.2019

JUDGMENT

- 1. The Prosecution case in brief is that—on 02.03.2015 the complainant Smti. Binima Barman lodged an ejahar alleging that on she brought her minor daughter to Sualkuchi hospital due to her stomach pain, where the doctor told her that her daughter was six months pregnant. After enquiry, her minor daughter told her that the accused Lohit Kumar forcibly committed sexual intercourse with her since 6 months ago by taking her forcibly in his bicycle to Hajomari field. Hence, this case.
- 2. On the basis of the said ejahar, Sualkuchi P.S Case No. 16/2015 U/S- 4 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S- 4 of the POCSO Act, 2012.
- 3. The case was duly committed and the Court after hearing both the parties, framed charges U/S- 4 of the POCSO Act, 2012 against accused— Lohit Kumar. The aforesaid charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Before pronouncement of judgment, upon going through the materials on record, prima facie case was found against the accused U/S-6 of the POCSO Act. Accordingly, after hearing both sides, the charge was altered and reframed U/S-6 of the POCSO Act, 2012 and the said charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. After the charge was altered, both sides declined to adduce any evidence.
- 4. During the trial, the Prosecution side examined as many as six (6) numbers of witnesses including the informant, the victim girl, I/O and M.O. Statement of the accused person U/S-313 Cr. P.C is recorded. He has denied committing the offence and declined to adduce evidence.

5. **POINT FOR DETERMINATION:**

(I) Whether the accused person on or about 6 months prior to 02.03.2015, committed penetrative sexual assault U/S 5 (j) (ii) on the minor female child of the informant at Kajomari Pathar under Sualkuchi P.S and made the child pregnant as a

consequence of sexual assault and, thereby, committed an offence of aggravated penetrative sexual assault, punishable U/S 6 of the POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined as many as 6 (six) numbers of witnesses.
- 7. P.W.1, Smti. Binima Barman is the informant of this case. She knows the accused as he is her neighbour. She stated that on several occasions, the accused used to call and take her daughter (prosecutrix) with a promise of giving her sugarcane and 'Mah'. He would take her to the field on his bicycle when she used to go to school. Initially, P.W.1 did not know about this fact. After few months, prosecutrix attained menarche (first occurrence of menstruation). P.W.1 stated that on several occasions, the accused used to have sexual intercourse with the prosecutrix. Subsequently, her menstruation period stopped for about 6 months. In this regard, P.W.1 consulted many people and she was told that sometimes it happens. Later, when the prosecutrix had stomach pain, she took her to the doctor and doctor after examining her told them that she was 6 months pregnant. At that time, the age of the prosecutrix was 13 years. On enquiry, the prosecutrix told her that she had became pregnant by the accused. Thereafter, P.W.1 lodged the ejahar. After lodging of the ejahar, women group on behalf of the Government took her daughter (prosecutrix) to State Home, where she gave birth to a male child. At present, prosecutrix and her child are in the State Home. After lodging of the case, police examined P.W.1 and recorded her statement. This witness stated further that in her childhood days, the prosecutrix was not in a position to walk, for, which she was provided a wheelchair from the Government and she used to move around in that chair. But subsequently, after treatment she developed ability to walk. And at the time of the incident, prosecutrix was in a position to walk.
- 8. P.W.2, is Urmila Barman. She has stated in her evidence that she knows both the parties as they are her neighbours. P.W.2 stated that she heard from the mother of the prosecutrix that one day, when prosecutrix reported her about her stomach pain, she was taken to doctor at Sualkuchi. On examining, the doctor reported

the fact that the prosecutrix at that time has carrying six months pregnancy. On hearing this, the informant (P.W.1) became very upset and she started crying. P.W.2 then stated that P.W.1 told her that her daughter (prosecutrix) was in advance stage of pregnancy. Then, P.W.1, P.W.2 and Savitri Barman (P.W.3) enquired the incident from the prosecutrix. Prosecutrix told them that accused—Lohit Kumar induced her to go to nearby field at Sajomari and there he committed rape upon her. According to P.W.2, the accused committed such act on her return back from school on 3 to 4 occasions. At that time, the age of the prosecutrix was about 12 years 9 months. After that, P.W.1 lodged the ejahar. Prosecutrix was taken to GMCH after lodging the ejahar and thereafter, she was kept in State Home for Women at Jalukbari. She gave birth to a child. And at present, they are staying in the State Home for Women, Jalukbari. P.W.3 further stated that the prosecutrix was earlier differently abled and she was provided with an Artificial chair and with that support, she used to move. Later on, she became capable of walking. This witness disclosed that at the time of occurrence, prosecutrix was studying at Semora Vidyapith at Srihati while the accused is a married man having son, daughter and grandson.

In her cross-examination, P.W.2 has stated that she did not tell before the I/O that the prosecutrix was induced to go to the field by providing sugarcane and 'mah' (cereals) and thereafter he committed rape upon her.

9. P.W.3, Smti. Savitri Barman. She has stated in her evidence that she knows both the parties. P.W.3 stated that about 2/3 years ago, the prosecutrix reported her mother (P.W.1) that she had abdomen pain. At this, P.W.1 took her to the hospital. After returning from the hospital, the mother of the prosecutrix was crying and P.W.3 rushed near her. On enquiry, she told P.W.3 that her daughter (prosecutrix) is carrying pregnancy of 6 months. The prosecutrix told them that accused—Lohit Kumar had a sexual intercourse with her at Sajomari. Prosecutrix also told P.W.3 that while she was returning from school the accused took her to a field in Sajomari in different occassions. Thereafter, the ejahar was lodged.

In her cross-examination, P.W.3 has stated that the prosecutrix was mentally a little retarded and not at all intelligent to explain the happenings.

10. P.W.4, is the prosecutrix. She has stated in her evidence that she knows the accused—Lohit Kumar. She stated that the incident took place more than 2 years ago. She stated that one day when she was playing with her friend after returning from school, the accused picked her up on his bicycle and took her to the sugarcane cultivation and laid her near a tree and there he committed rape on her. P.W.4 stated that such type of bad act has been committed on her by the accused on three occasions. She did not inform the matter to anybody else as the accused threatened her. Subsequently P.W.4 was suffered from abdomen pain and one day after returning from school she told her mother (P.W.1) about her pain and her mother took her to Sualkuchi doctor. The doctor told her that she was pregnant. On hearing this news, her mother enquired from her as to how it happened. Thereafter, she told her mother about the incident and her mother lodged the ejahar. Police produced her before a Magistrate for recording her statement and took her to a doctor. She was examined at GMCH. Ext.1 is the statement recorded U/S-164 CR. P.C. Ext. 1 (1) is her signature. Ext.2 is the medical report. Ext. 2 (1) is her signature. This witness disclosed that she has been admitted in State Home for Women at Jalukbari and there she given birth to a child. At present, she staying at State Home for Women at Jalukbari. P.W.4 disclosed her age as 13 years and was studying in class-V at the time of incident.

In her cross-examination, P.W.4 has disclosed that the accused raped her continuously for three days at the same place. She could not stated the exact name of the place where she was subjected to rape.

11. P.W.5, is the M/O, Dr. Sainjalee Haflongbar. She has deposed in her evidence that on 03.03.2015 she was working as PG on duty, Department of Forensic Medicine at GMCH. On that day, one Smti. Mital Barman, female, 13 years of age was brought to her for medical examination by WHG Gita Bhuyan with reference to Sualkuchi P.S Case No. 16/2015, U/S-4 of the POCSO Act, 2012. The victim stated before P.W.5 that one Lohit had sexual intercourse with her several times on different dates and she was pregnant.

12. On the physical examination of the victim P.W.5 found---

Her height—134 cm, weight—30 kg, chest girth—75 cm, abdominal girth—71 cm, total 26 teeth were present and all were permanent. She had adequate space for 3rdmoller in the lower 2 of mouth. Scalp hair-23-24 cm in length. Axillary hair 1-2 cm and pubic hair 1-2 cm was

black, her breast were pendulous in shape, soft in consistency, nipples and areola dark brown in colour. Montgomely tubercles are present in areola and superficial veins are prominent in 60^{th} breast. White colored discharge is present from breast on gentle squeezing of 60^{th} breast. Menarche—when she was 12 years old, regular, 28 ± 3 days, duration—5 to 6 days. Last menstrual period— 10^{th} Oct, 2014.

On genital examination:-

Genital organs—Developed, vulva—labia minora and clitoris are exposed in lithotomy position, Hymen –Old tears seen at 3 o'clock, 6 o'clock and 8 o'clock positions, vagina—Healthy, Cervix—healthy, Uterus—Fundus is palpable 5 cm above umbilicus, evidence of venereal disease –not detected clinically, vaginal swabs collected from – lateral fornix and posterior fornix, injury on the body—Not detected, her mental condition at the time of examination—No abnormality detected, co-operation and behavior—Co-operative and good.

Radiological investigations:-

- 1. X-ray of wrist and shoulder joint –Epiphyseal union of bones are not completed.
- 2. X-ray of elbow joint –Epiphyseal union of bones are completed.

USG investigation:-

Single live intrauterine pregnancy of approximate gestational age 25 weeks 3 days in cephalic presentation.

Laboratory investigation:-

Microscopic examination of vaginal smears did not show any presence of spermatozoa or gonococcus.

<u>Opinion:</u> On the basis of physical examination, radiological and laboratory investigations done, P.W.5 opined that:-

- 1. She is pregnant with Single live intrauterine pregnancy of approximate gestational age 25 weeks 3 days in cephalic presentation.
- 2. There is no evidence of injury detected on her person.
- 3. There is no evidence of recent sexual intercourse detected on her person.
- 4. Her age is above 14 (fourteen) years and below 16 (sixteen) years.

5. She is referred to obstetric and gynaecology department, GMCH for DNA Test (for collection of necessary sample) as the victim is pregnant at the time of examination. Ext. 2 is the medical report. Ext. 2 (3 to 5) signatures of P.W.5.

In her cross-examination P.W.5 has deposed that the history of the case (Ext. 'A') is noted by her as per the version of the victim girl. P.W.5 did not receive any DNA test report.

13. P.W.6, SI, Sri Balan Kalita, is the I/O of this case, who has investigated the case. In his deposition, he has stated that on 02.03.2015, he was serving as i/c Women Cell of Kamrup district. On that day at about 7.00 p.m an ejahar was lodged by one Smti. Binima Barman. And O/C, Sualkuchi P.S—Sri Partha Pratim Gogoi, registered a case bearing Sualkuchi P.S Case No. 16/2015 U/S-4 of POCSO Act, 2012 and directed him to investigate the case. And accordingly, P.W.6 recorded the statement of the complainant and the victim in civil dress. The O/C went to the spot and arrested the accused—Lohit Kumar. Next morning at 10.15 a.m, he send the victim along with WHG, Gitamoni Bhuyan for her medical examination to GMCH. The accused was produced before the court and prayer was made for one day police custody, which was allowed by the court. Again on 04.03.2015 the victim was sent for medical examination as she was pregnant. The accused was also sent to GMCH for his DNA test. But the doctor refused to do the DNA test as the victim was pregnant and her blood sample was not taken. P.W.6 sent the victim to the Court for getting her statement recorded U/S-164 Cr. P.C before the Magistrate. Victim was sent to the State Home Jalukbari by the Court. On that day P.W.6 also examined one witness-Urmila Barman. On 06.04.2015, P.W.6 visited the place of occurrence along with the victim girl. She showed her the spot where the incident took place. It is an open grazing ground. P.W.6 recorded the statement of other witnesses also. Victim told P.W.6 that the accused raped her on four occasions in the same spot. P.W.6 also prepared the sketch map. Ext.3 is the sketch-map and Ext. 3(1) is her signature. The victim was produced before CWC, Kamrup, Amingaon. Thereafter, she was again sent to State Home Jalukbari. P.W.6 collected the medical certificate of the victim. Thereafter, P.W.6 completed the investigation and on finding, sufficient materials against the accused, he submitted charge sheet against the accused-Lohit Kumar U/S-4 of POCSO Act. Ext.4 is the charge-sheet and Ext. 4 (1) is his signature.

In his Cross-examination, P.W.6 deposed that the victim was already 6 months pregnant while lodging the ejahar. The victim was sick and she behaved like a small child.

- 14. Perused the evidences on record. Heard the arguments of the Learned Counsels for both sides.
- 15. On perusal of the evidences on record, prima facie case is found against the accused U/S-6 of POCSO Act. Charge is altered against the accused to Section 6 of POCSO Act. The charge is read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 16. **Section 5 of the POCSO Act** deals with aggravated penetrative sexual assault.
 - (j) Whoever commits penetrative sexual assault on a child, which—
 - (ii) In the case of female child, makes the child pregnant as a consequence of sexual assault.
- 17. Now **Section 6 of the POCSO Act** deals with punishment for aggravated penetrative sexual assault.—"Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine".
- 18. In this instant case, the victim has stated her age to be 13 years in her statement u/s 164 Cr. P.C as well as in her evidence before the court. Reliance can be placed on the report of the doctor (Pw-5), according to which, the age of the victim is above 14 (fourteen) years and below 16 (sixteen) years. As per Section 2 (d) of the POCSO Act, the victim is found to be below 18 years of age at the time of the incident. So, it is clear that the victim is a child.
- 19. A close scrutiny of the evidences of the witnesses reveals that there is no any eye-witness other than the victim. So, we are to see whether on the solitary statement of the victim, the accused can be convicted in this case.

- 20. It is well settled that conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and court after careful scrutiny of its evidence finds the witness to be reliable and trustworthy. The main evidence in all such cases of penetrative sexual assault, is that, of the victim herself. Pw-5 (M.O) on examining Pw-4 (victim) confirmed that no abnormality detected.
- 21. Coming to the present case, evidence of the victim (pw-4) reveals that one day when she was playing with her friends after returning from school, the accused picked her up in his bicycle and took her to the sugarcane cultivation field . She has disclosed that the accused laid her near a tree and there he committed rape upon her. It further comes out from the evidence of pw-4 that the accused committed rape upon her on three occasions but she did not inform the incident to any body as the accused threatened her. It was only when she had stomach pain that she informed her mother (pw-1) and on being examined by the doctor, she came to know about her pregnancy. Pw-4, then revealed the incident to her mother. Thereafter, pw-4 was kept in the State Home for Women at Jalukbari and she gave birth to a child and at present she is staying there. Pw-1 has testified that on several occasions the accused used to call and take her daughter (pw-4) on his bicycle to the field with the offer of sugarcane and 'Mah'. This witness disclosed that the accused had sexual intercourse with pw-1 on several occasions. From her evidence, it has come out that when she took pw-4 to the doctor for her medical examination as she complained of stomach pain and her menstruation period had stopped , then the doctor disclose to her that pw-4 was 6 months' pregnant. It was from pw-4 that pw-1 got to know that she became pregnant from the accused person and pw-4 was kept in the State Home for Women, Jalukbari, where she gave birth to a male child. I/O (pw.6) made it clear that the DNA test could not be done as the victim was pregnant and so her blood sample could not be taken.
- 22. In the present case, the victim is consistent on the material particulars with regard to the incident which is supported by the independent witnesses, namely, pw-2 and pw-3. They have clearly disclosed in their evidence that they heard that prosecutrix (pw-4) was 6 months' pregnant and she told them that the accused —Lohit Kumar had sexual intercourse with her on 3-4 occasions by taking her to a field on her return from school. The victim in her statement before the court as pw-4 and her statement recorded under Section 164 Crpc (Ext-1) and U/S-161 Cr.P.C is found to be consistent and there is no material to disbelieve her version. The accused in his statement u/s 313 Crpc merely stated that he has been falsely implicated in this instant case by the victim and her family members.

- 23. In the light of the evidence of the victim (pw-4) as well as the independent witnesses of the instant case (pw-2 and pw-3) , it is presumed as per section 30 of the POCSO Act that the accused had culpable mental state as he committed penetrative sexual assault on the victim on 3-4 occasions, whereby she became pregnant. The accused did not rebut the presumption. Further , this court can presume under Section 29 of the POCSO Act , 2012 that it was the accused, who had committed penetrative sexual assault upon the victim and thereafter, made her pregnant which also finds force from the testimony of the M.O (PW-5) . It was for the accused to rebut the presumption that he had not committed the offence by proving to the contrary. No evidence was led by the accused in his defence to prove his innocence.
- 24. Clause (j) (ii) of Section 5 of the POCSO Act defines that whoever commits penetrative sexual assault on a child , making the child pregnant as a consequence of sexual assault , is punishable under section 6 of the POCSO Act, which shall not be less than ten years of rigorous imprisonment but which may extend to imprisonment for life and shall also be liable to fine. So, the offence U/S-6 of the POCSO Act is attracted in this case.
- 25. In view of the above facts and circumstances of the case, it is held that the prosecution has succeeded in bringing home the charge u/s 6 POCSO Act against the accused Lohit Kumar beyond all reasonable doubt. Hence, the accused is held guilty of committing the offence under Section 5 (j) (ii) of the POCSO Act ,2012 which is punishable under Section 6 of the POCSO Act and he is , hereby, convicted.
- 26. The minimum punishment prescribed under Section 6 of the POCSO Act is rigorous imprisonment for 10 (ten) years which cannot be modified or altered. Therefore, keeping in view the serious nature of the offence, the Probation of Offenders Act is not applicable in this instant case, As, such, the accused is not entitled to get the benefit under the said Act.
- 27. Heard the Learned Additional Public Prosecutor on the point of sentence. He submitted that the accused—Lohit Kumar earlier committed an offence under the POCSO Act and he has been previously convicted in Spl. Sessions (P) Case No. 20/2018. He further submitted that the accused does not deserve to be given lesser punishment. On the other hand, he should be given higher punishment. Also, heard the Learned Defence Counsel. He submitted that the accused has been falsely implicated in this case. Perused the certified copy

of the earlier Judgment dated 12.11.2018 passed by this Court in Spl. Sessions (P) Case No. 20/2018, produced in this regard.

28. **SENTENCE**

Heard the accused—Lohit Kumar on the point of sentence. The accused has submitted that he is innocent and he has a family to look after. He has pleaded for leniency in punishment. The accused has admitted that he has been previously convicted in another POCSO case by this court.

- 29. Considering the serious nature of the offence, facts and circumstances of the case, the mental agony suffered by the child victim in view of the penetrative sexual assault committed on her, who became pregnant and she, subsequently, delivered a male child, her status and future life in the society, and also keeping in view the fact that the accused the accused is 58 years old and that he has been previously convicted, the accused does not deserve any leniency in punishment. On the other hand, he deserves a higher punishment. Moreover, it is seen that the penal provisions of the POCSO Act is stringent in nature, which shall have to be imposed in case a person is found guilty.
- 30. Having regard to the entire aspect of the case and that the serious nature of the offence, the accused-Lohit Kumar is sentenced to undergo rigorous imprisonment for 15 (fifteen) years and also to pay a fine of Rs. 20,000/- (Rupees twenty thousand) only, in default of fine ,to suffer further rigorous imprisonment for 10(ten) months under Section 6 of the POCSO Act, 2012.
- 31. The period of detention already undergone by the accused shall be set-off from the period of imprisonment imposed on him.
- Now , coming to the aspect of compensation to the victim , it is found that in this instant case, the victim, who is a child became pregnant and she delivered a male child. She alongwith the minor child are taking shelter in State Home for Women, Jalukbari. Moreover, she is unmarried. The victim has suffered tremendous mental agony as a result of the act committed upon her. Therefore, the Learned Secretary, District Legal Services Authority, Kamrup, Amingaon is, hereby, directed to assess and grant adequate compensation to the victim. The said compensation amount shall be used by the victim to meet her needs and for her child's welfare.

- 33. Issue Jail Warrant.
- 34. Let a free copy of the judgment be furnished to the accused person.
- 35. Send a copy of this judgment to the Learned Secretary, District Legal Services Authority, Kamrup, Amingaon for determination of the quantum of compensation under Victim compensation scheme as provided under section 357 A Cr. P.C.
- 36. Send a copy of the judgment to the Learned District Magistrate, Kamrup, Amingaon under the provision of Section 365 Crpc.
- 37. Judgment is pronounced and delivered in open court under the hand and seal of this court on this 24th day of April, 2019.

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Smti. Binima Barman

P.W.2, is Urmila Barman

P.W.3, Smti. Savitri Barman

P.W.4, is the prosecutrix

P.W.5, is the M/O, Dr. Sainjalee Haflongbar

P.W.6, SI, Sri Balan Kalita

Prosecution Exhibit

Ext.1 is the statement of the victim girl recorded U/S-164 CR. P.C.

Ext.2 is the medical report.

Ext.3 is the sketch-map

Ext.4 is the charge-sheet

Special Judge, Kamrup, Amingaon