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

Present: N.U. Ahmed,

Addl. Special Judge,

Bijni.

Special (P) Case No. 6(B)/19
U/s. 376(2)(i) of the IPC R/W Sec. 6 of POCSO Act.

THE STATE OF ASSAM

-VS -

Living Marak Accused.

APPEARANCE:

Advocate for the prosecution

: Mr. P. Dev Ray, Addl. P.P.

Advocate for the defence

: Sri Swapan Kr. Das, Ld. Legal Aid counsel.

Date of charge

: 24.04.19

Date of evidence

: 21.05.19, 04-06-19, 01-07-19 & 10.07.19.

Date of Argument

: 11.09.19

Date of Judgment

: 18.09.19

JUDGMENT

- 1. The prosecution case, in brief, is that 29-01-19, the informant Monju Marak lodged an FIR with the I.C Ballamguri Police outpost alleging inter-alia that on 25-01-13 at about 6 p.m. accused took her 10 years old daughter (name withheld herein after known as victim "X") from road on inducement and kept her in his house and committed penetrative sexual assault on her three times. Her daughter unable to discharge her urine on 29-01-2019 and she asked her and she disclosed the fact to her. Hence, the present case.
- 2. On receipt of the FIR, I/C Ballamguri O.P enter the same in the General Diary as G.D. E No. 394 dated 229-01-19 and forwarded the same to O/C Bijni P.S. to register a case and the I.C himself took the charge of investigation. On received of the FIR O.C Bijni P.S registered the same as Bijni P.S. Case No. 31/19, u/s 376(2)(i) of the IPC read with section 6 of POCSO Act, 2012 and started investigation. After completion of investigation I.O submitted charge-sheet against accused Living Marak u/s 376(AB) read with section 6

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of the POCSO Act, 2012. On received of the charge-sheet cognizance was taken u/s 376(i) of the IPC read with section 6 of the POCSO Act against the accused person. The accused was unable to engaged advocate and as such Mr. Swapan Kr. Das, Ld. Advocate is appointed as Legal Aid Counsel to defend the case of accused. Copy of the relevant documents furnished to the accused as per provision of sec. 207 of the Cr. P. C.

- 3. Heard both the sides learned Advocate on the point of framing of charge and after perusal of case diary, case record and the documents submitted along with the charge-sheet, charge has been framed u/s 376(2)(i) of the IPC read with section 6 of the POCSO Act and the contents of Charge read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During trial the prosecution examined as many as 5 witnesses including the victim and informant. After closing the evidence of prosecution accused was examined u/s 313 of the Cr. P. C. and recorded his statement in separate sheet attached to the case record. The defense case was of complete denial and the defense side has not adduced any defense evidence.

5. I have heard argument put forwarded by learned Addl. P. P. and learned legal aid counsel. I have gone through the case record as well as evidence on record.

POINT FOT DETERMINATION

- 6. (i) What was the age of the victim "X" at the time of occurrence?
- (ii) Whether the accused on 25.01.19 at night at village no. 12, Natunmati under Bijni P.S committed rape on victim "X" a minor girl aged below 16 years?
- (iii) Whether the accused on the aforesaid date, time and place, committed aggravated penetrative sexual assault on victim "X"?

:DISCUSSION, DECISION AND REASON THEREOF:

7. In this case to bring home the charges the prosecution all together examined five witnesses including the informant. Let me scrutinize the evidence on record to decide the point.

PW1 is the victim "X". PW1 in her deposition has deposed that the informant is her mother and accused Living Marak is her grandfather. She further stated that one day evening while she was crying on the road then her grandfather Living Marak took her to

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his house. Accused put off the light of the house and removed his cloths and also removed her cloths. Thereafter, accused Living Marak entered his penis into her vagina and she got pain. She further stated that the accused kept her whole night and three times committed the same incident. On the next morning Living Marak left her in her house. Accused Living Marak asked her not to disclose the matter to anybody as because if she would disclose the matter then he would go to jail and assured her to give money. But the accused person did not pay money. She further stated that she reported the incident to her mother and thereafter, her mother filed this case. Police brought her in the court and Magistrate recorded her statement. She proved her statement u/s 164 Cr. P. C. as Ext.1 and Ext.1(1) and Ext.1(2) are her signatures.

During her cross-examination, she stated that in the house of Living Marak there are three rooms. The daughter of Living Marak namely Biju also reside in the same house. On the night of occurrence Biju was staying in another room. She also stated that at the time of committing the misdeed she was crying and blood was oozing from her vagina and the same was smear on her cloth. Police has not taken her blood stain cloths. She also stated that nobody seen the incidents of Living Marak took her and Living Marak left her in her house. Living Marak took her by taking alcohol and at that time his daughter Biju was sleeping. There was a quarrel between her mother and accused Living Marak regarding goat since before the occurrence. Defence side put suggestion to her that accused Living Marak did not took her and has not committed any misdeed with her which she denied. Defence side also put suggestion to her that accused has not put his penis into her vagina which she denied. Defence side also put suggestion to her that as there is a quarrel between her mother and accused she deposed falsely which she denied.

PW2, Monju Marak is the informant of this case. PW2 in her evidence stated that 9. about 3 $\frac{1}{2}$ or 4 months ago one night she came from her work place and saw that her 2 daughters were quarreling with curry and they were crying. At that time Living Marak came to their house and took victim "X" to sleep with Biju. On the next morning Living Marak left her daughter in her house. After 2 days her daughter's feeling unwell and on being interrogation by her she told that Living by gagging her mouth with cloth committed three times penetrative sexual, accused asked her not to disclose the matter to anybody and also assured her to give money. Thereafter, she lodged the FIR. She prove the FIR as Ext.2 and Ext.2(1) is her signature. She further stated that at the time of occurrence the age of victim "X" was 10 years. She proved the birth certificate of victim as material Ext.-A.

During her cross-examination, she stated that the FIR was not read over to her. She further stated that she has not seen that Living Marak took her daughter in his house. She also stated that she presumed that victim "X" was sleeping along with her

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grandmother and as such she did not inquire about her on that night. For two days they did not get any information about the incident. They brought the victim in the hospital in an unwell condition. Defence side put suggestion to her that no blood was oozing from the vagina of her daughter and accused has not committed any misdeed with her daughter which she denied. Defence side also put suggestion to her that accused did not took her daughter to his house which she denied. She admitted that since before the incident she has quarrel with accused regarding goat. Defence side put suggestion to her that as there was quarrel with the accused so she deposed falsely. She also stated that she had given the blood smear cloth to the police. Defence side also put suggestion to her that she deposed falsely, which she denied.

P.W.3, Dr. Kukumoni Basumatary, is the M.O. of this case. P.W.3 in her deposition 10. as deposed that on 30.01.19, he was working at JSB Civil Hospital as Medical & Health ricer-1. On that day around 10.25 AM, she examined victim "X", in connection with Bijni case No. 31/19, u/s 376(2) of the IPC R/W Sec. 6 of POCSO Act, The victim was escorted by UBC/51 Gopinath Basumatary and mother of the victim. On examination she found the followings:-

Physical Examination:

Height 126 cm, weight 22 kg, chest girth 59 cm, abdominal girth 52 cm and teeth 6/6, 6/6. Scalp hairs present, auxiliary hairs absent, pubic hairs absent, Menarche not attained.

Genital Examination:

Genital organs_ no abnormality detected. Vulva- no abnormality detected. Hymennot raptured. Vagina- no abnormality detected. Cervic-no abnormality detected. Uterusno abnormality detected. Evidence of venereal disease absent. Vaginal smears taken on glass slides for laboratory investigation-not done.

Mental condition:

Memory and intelligence intact. Co-operation and behavior co-operative and conscious.

X-Ray for Age Determination.

Right elbow epiphysis of ulnar olecranon and radial head are not fused. Epiphysis of medical and lateral epicondyles appeared but not fused.

Right wrist- Epiphysis of lower end of radius and ulna are appeared but not fused. Epiphysis (base) of 1st metacarpal is appeared but not fused.

All carpal bones are visualized however pisiform is faintly visible.

Right shoulder-Epiphysis of acromion and glenoid are not visualized. Epiphysis of coracoid is faintly visible. Epiphysis of humeral head and tuberosity's are partially fused.

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Conjoint epiphysis of humeral head and tuberosity's are not fused with the shaft.

Opinion:

As per radio-logical examination the age is above 10 and below 12 years. From the above points it could not be ascertained whether she was raped or not. She proved the medical report as Ext.2 and Ext.2(1) is her signature.

P.W.4, Smt. Tupuri Roy, in her deposition has deposed that she knows the 11. informant, victim and the accused person. She further stated that about 3 months ago one evening at about 5 p.m. she saw that victim "X" was crying in the courtyard. Thereafter, she came to know from victim "X" that accused was took her and kept her in his house on that night and by putting of the light committed bad things with her. Thereafter, mother of victim "X" filed this case. She went to hospital along with mother of victim.

During her cross-examination, she stated that after 2/3 days of the incident victim "X" reported the incident to them. After the incident, 2/3 days victim "X" was working in There is no door inside the eeping. Five persons were staying in the house of accused. There is no door inside the house of accused and there is only thin wall. In the house of accused there are 3 rooms. After they got the information they immediately took the victim "X" to hospital. Defence side put suggestion to her that accused did not took victim "X" to his house and committed any misdeed with her which she denied. Defence side also put suggestion to her that she in collusion with mother of "X" lodged the FIR, which she denied.

P.W.5, Banajit Uzir, is the I.O. of this case. PW5, in his deposition has deposed on 12. 29.01.19, he was working at Ballamguri outpost as I.C. On that day, he had received one FIR, from one Manju Marak. On receiving the FIR he made a GD Entry No. 39, dated-29.01.19 and forwarded the FIR to O.C Bijni Police Station to register a case and he took the charge of investigation. O.C Bijni P.S registered the same as Bijni police station case No. 31/19 and entrusted him for investigation. At the time of filing the FIR on the basis of GD entry, he recorded the statement of informant and the victim girl in the out-post. The victim was produced before court to record her statement u/s 164 Cr. P. C. and Magistrate recorded her statement u/s 164 Cr. P. C. and Magistrate recorded her statement u/s 164 Cr. P. C. and Magistrate recorded her statement u/s 164 Cr.PC. He sent the victim girl for medical examination to statement of the witnesses. He draw the statement of the witnesses. statement of the witnesses. He drew the sketch map of the place of occurrence. he proved the sketch map as Ext.4. Thereafter, on finding evidence against Living Marak, he arrested the accused Living Marak and forwarded him to court. During investigation, he seized one birth certificate of the victim girl vide Ext.3 seizer list and Ext.3(1) is his signature. He collected the medical report of the victim girl. On 28.02.19, he had submitted charge sheet

against the accused Living Marak, U/s 376(AB) of the IPC and R/W Sec. 6 of the POCSO Act. He proved the charge sheet as Ext.5 and Ext.5(1) is his signature.

During his cross-examination, he stated that he visited the place of occurrence on the basis of GD entry. After registration of the case he had not recorded the statement of victim girl again. On 29.01.19, while he visited the place of occurrence. He had not recorded the statement of the witnesses except the informant and the victim. He drew the sketch map of the place of occurrence after registration of the case. Later on, stated that on the basis of GD entry he prepared the sketch map of the place of occurrence. He had not put any signature in the sketch map. In the house of Living Marak one daughter of Living Marak is living with him. He had not met daughter of the accused in the place of occurrence in spite of several attempt. Near the place of occurrence there is no other residential house except the house of accused and informant. He had not seized any wearing garments of the victim girl. The house of other people is about half a kilometer away from the place of occurrence. Defence side put suggestion to him that there are residential houses of other people around the place of occurrence but he willfully had not recorded their statement as witnesses, which he denied. Defence side also put suggestion him that while he found the victim girl she was sound health, which she denied. The FIR was written by a writer of the out-post campus. In the FIR there is no signature of the writer. Informant Manju Marak signed but the signature was not legible and for this reason he had written her name within bracket. Defence side also put suggestion to him that he prepared a case and lodged the FIR through informant, which he denied. Defence side also put suggestion to him that he had not properly investigate the case and filled false charge sheet against the accused, which he denied.

13. Learned Addl. P. P. submitted that this is a case u/s 6 of the POCSO Act and as per provision of section 29 of the POCSO Act, court shall presume that accused has committed the offence as alleged in the FIR. The victim "X" in her evidence categorically stated that accused committed penetrative sexual assault on her three times in a night and the age of the victim girl is below 12 years and as such the prosecution able to prove the offence u/s 6 of the POCSO Act against the accused beyond all reasonable doubt and this is a fit case to convict the accused u/s 6 of the POCSO Act.

dispute regarding age of the victim girl. The age of the victim girl is 10 years as stated by PW2 i.e. the mother of the victim girl. PW1 i.e. victim girl in her evidence stated that one evening accused took her into his house and committed penetrative sexual assault on three times. The age of the victim girl is only 10 years but the doctors found have into

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and there is no raptured in the hymen of the victim girl. The medical evidence negated any penetrative sexual assault on the victim girl. So, doubt creates on the prosecution case and as such the prosecution shall prove the case beyond all reasonable doubt. But, the prosecution failed to prove this case against the accused beyond all reasonable doubt and this is a fit case to acquit the accused person.

15. In this case the defence side has not disputed the age of the victim girl. From the medical evidence it reveals that the age of the victim "X" was above 10 years and below 12 years at the time of occurrence. PW2 mother of the victim girl in her evidence stated that at the time of occurrence age of victim "X" was 10 years. Material exhibit-A is the birth certificate of the victim "X". From material exhibit-A it reveals that her date of birth is 15-02-2008. The occurrence took place on 25-01-2019. So, as per birth certificate age of the victim "X" was 10 years 11 months 10 days at the time of occurrence. Defence side has not disputed the birth certificate. Hence, I have nothing to hesitate to hold that at the time of occurrence age of victim "X" was 10 years 11 months and 10 days and she was noinor and child.

To consider the submission of both the sides Ld. Advocate let me scrutinize the idence on record. From the evidence on record it reveals that except PW1 there is no eye witness. PW2 and PW4 are the reported witness. PW3 is the Medical Officer and PW5 is the I.O of the case. So, PW3 and PW5 are official witness. PW2 and PW4 had not seen the incident. So, in this case the entire case based on the evidence of PW1. It is settled law that on the basis of sole testimonial of the rape victim conviction can be sustained if the evidence of victim is probable and trustworthy. Ongoing through the evidence of PW1, it reveals that at the time of occurrence her age was 10 years. PW1 in her evidence stated that accused took her in his house put off the light of his house, removed his cloth and the cloth of the victim and, thereafter, committed penetrative sexual assault on her for 3 times. PW1 remain in the house of accused whole night. The age of PW1 is 10 years. The age of the accused is 59 years. If a man of the age of 59 years committed 3 times penetrative sexual assault on a minor girl of the age of 10 years then there must be some injuries and the hymen would be torn and raptured and there would be bleeding. But, from the evidence of PW3, it reveals that she found hymen of the victim "X" was not raptured. There is no injury mark on the body or private parts of the victim girl. So, the medical evidence belie the prosecution case of penetrative sexual assault on the victim "X". From the evidence on record, it reveals that after 3 days of the occurrence the viction "X" was unable to discharge her urine as a result of sexual assault and then she reported the matter to her mother. If a full grown male person committed penetrative sexual on a minor girl of 10 years then obviously there must be some raptured on the

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the hymen would be torn. But here in this case, the hymen of the victim "X" was remained intact and there is no raptured. The PW1 is a child witness, child witness is a most dangerous witness as because he or she can be motivated or induce by any person to depose falsely or she may be tutored witness. There is a quarrel going on between the mother of the victim and the accused prior to the incident. So, it cannot be totally rule out that for the previous enmity accused maybe falsely implicated in this case. Though the provision of section 29 of the POCSO Act, cast duty on the court to presume the allegation true but this provision also rebuttable. In a criminal case the burden of prove always lies on the prosecution to prove the case against the accused beyond reasonable doubt.

17. As per allegation the incident took place on the night of 25-01-19 and informant lodged the FIR on 29-01-2019. From the evidence of PW2 it reveals that since 26-01-19 till 29-01-19 she has not seen any abnormality of victim "X". PW4 in her evidence also stated that after the incident victim "X" worked in his nouse ior two and the ported her about the incident. From the evidence of PW2 it reveals that after two days """ hoosme unwell and she asked her and she reported to her that accused committed penetrative assault on her. As per allegation the incident took place on the night of 25-01-2019. So, it appears that PW1 reported the incident to PW2 on 27-01-2019. But PW2 lodged the FIR on 29-01-2019 stating that she came to know about the incident on 29-01-2019. Therefore, I find that there is no corroboration between the statement of FIR and evidence of PW2. Ongoing through the FIR it reveals that after four days of the incident victim could not able to discharge her urine and she disclose the matter to informant. But PW1 in her evidence nowhere stated that she was unwell after three days of the incident. From the evidence of PW3 doctor it reveals that victim "X" not attained the menarche and the hymen was not raptured and she found no abnormality of the vagina of the victim "X". Doctor also found no injury mark on the private part of the victim "X". If a full adult person committed penetrative sexual assault on a girl of 10 years old who had not attained menarche then obviously the girl would got injury on her private part and her hymen would be raptured and torn and there would be abnormality on her vagina. But here in this case the age of the victim "X" was 10 years 11 months and 10 days at the time of occurrence. She has not attained the menarche. Doctor found no Addl. Special Judgbody of victim "X" and on her private part. If the accused would committed thrice penetrative sexual assault on PM1 there hymen would be raptured. The medical evidence totally belie the allegation of rape on the victim "X". For a girl of aged 10 years it is not bearable of force full thrice penetrative

sexual assault and she remain silent for three/ four days and normally she peruse her day

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to day work and other family member has not notice any abnormality. Hence, I find that the evidence of PW1 is most improbable and most untrustworthiness. Therefore, I find that it is not safe to rely on the evidence of PW1. Hence, I have nothing to hesitate to hold that prosecution failed to prove the charges against the accused beyond all reasonable doubt.

- 18. From the discussion made above, I find that the prosecution side failed to prove the charges against the accused person beyond all reasonable doubt. Hence, accused Living Marak is found not guilty u/s 376(2)(i) of the IPC, R/W section 6 of the Protection of Children from Sexual Offences Act, 2012 and he is acquitted from the charges and set him free at his liberty forthwith.
- 19. Send a copy of the judgment and order to the District Magistrate, Chirang as per provision of section 365 of the Cr. P. C.
- 20. Considering the fact and circumstance of the case, I find that this is not a fit case to recommend the DLSA, Chirang for victim compensation u/s 357-A Cr. P. C.
- 21. The seized birth certificate be returned to the informant in due course of time. Given under my hand and seal of this court on this the 18th day of September, 2019.

Dictated and corrected by me,

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APPENDIX

(A) Prosecution witnesses:

P.W.1- Victim "X"

P.W.2-Monju Marak

P.W.3- Dr. Kukumoni Basumatary

P.W.4- Smti Tupuri Roy

P.W.5- Banajit Uzir

(B) Prosecution exhibit-

Ext.1- Statement of the Victim.

Ext.2- FIR.

Ext.3- Seizure List.

Ext.4- Sketch Map.

Ext.5- Charge-sheet.

(C) Material exhibit(A)- Birth Certificate.

(C) Defence witnesses- Nil.

(D) Defence exhibit- Nil.

Additional Special Judge,

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