# IN THE COURT OF THE SPECIAL JUDGE (POCSO): KAMRUP(M), AT GUWAHATI

## **SESSIONS CASE NO.68/2016**

(Under Section u/s 6 of the POCSO Act, 2012)

Present: S.P. Moitra,

Special Judge

Kamrup(M), Guwahati

#### **State of Assam**

-Vs -

## **Kamal Biswas @ Kamal Das**

.....Accused Person

## **Appearance for the Parties:**

Advocate for the State : Smt. Deepa Bezbaruah

.....Learned Special Public Prosecutor

Advocate for the accused : Sri M.K.Das, Sri M.K Bora, Smti Jinti Das

.....Learned Defence Counsel

Date of recording evidence: 15.02.2017, 14.06.2017, 05.06.2018, 26.06.2018

Date of Argument : 04.08.2018

Date of Judgment : 08.08.2018

#### J U D G M E N T

1. The facts constituting the case of the prosecution, as emerged during trial, are that on 11.12.2015, at about 4:00 PM, while the 10 years old daughter (name withheld and herein after referred to as Miss 'X') of the informant, was playing in

the field, the accused person named above induced her and also forced her to go to the nearby house of Sabita Deb and thereafter committed penetrative sexual assault on her. On the next day, i.e, on 12.12.2015, the incident was reported to her parents.

- 2. On the basis of the written FIR (Ext.1), filed by her father (name withheld), Khetri P.S Case No. 190/15 was registered u/s 8 of the Protection of Children from Sexual Offence Act, 2012, in short, POCSO Act, 2012. During investigation of the case, I/O recorded the statements of the witnesses, including the victim. The victim was sent for medical examination and her statement was also recorded u/s 164 of the Cr.P.C. The accused person was arrested and he was forwarded to judicial custody. On completion of the investigation, the accused person was charge sheeted u/s 8 of the POCSO Act, 2012.
- 3. After filing of the charge sheet, the accused person was allowed to go on bail. Copies of the relevant documents were furnished to the accused, in compliance to the provision of Section 207 of the Cr.P.C. On consideration of charge, charge u/s 6 of the POCSO Act, 2012 was framed on 05.05.2016. Charge was read over and explained to the accused to which he pleaded not guilty and stood to face the trial.
- **4.** Since the accused turned to be a habitual defaulter in appearance and trial was affected on several dates due to absence of the accused, ultimately he was remanded to jail and the last part of the trial proceeded against him, keeping him behind the bar.
- 5. To bring home the charge, prosecution examined, as many as, 8 witnesses on its behalf including the M/O and I/O. Prosecution also exhibited some of the documents. The defence plea was of complete denial of any guilt. The statement of the accused was recorded u/s 313 of the Cr.P.C, in which too, the accused

person pleaded his innocence and stated that he was implicated falsely in this case. Defence adduced no evidence on its behalf.

**6.** I heard the argument advanced by the Learned Counsel for the parties.

### 7. <u>Points for determination</u>

Whether on 11.12.2015, the accused person committed aggravated penetrative sexual assault on the minor victim Miss X, then aged about 10/12 years?

#### **Decision and Reasons thereof**

8. I have gone carefully through the entire evidence on record and the materials placed before me. PW.2 is the victim herself (name withheld) and she is the star witness in this case. It appears from her testimony that she knew the accused person for long. She also testified that on the date of occurrence, around 4 pm, she was playing in a field, away from her house, along with her brother Utpal Sarkar, who was aged about 6 years at that time. She could not specify the month and year of the occurrence, but confirmed that it was 11th day of the month. Her testimony reveals that when she was playing in the field, the accused person came there and asked her to bring some tobacco from the shop at railway station, a little distance from the place. She also testified that the accused person gave her Rs.10/- to purchase the same. She narrated that she started towards the railway station when the accused person pulled her hand and took her to the house of one Sabita Deb (PW.6). She also testified that at that time there was none at the house of Sabita Deb and he gagged her mouth and thereafter he inserted his penis into her vagina forcibly. She further added that she shouted for help and then the accused person left her. She also testified that after a short while said Sabita Deb returned back home and then she returned to her house and narrated the incident to her mother. She also testified that her mother

informed the matter to her father and her father lodged the FIR against the accused person. She also stated that police sent her for medical examination and her statement was also recorded before the Magistrate. She proved Ext.3 as her statement and Ext.3(1), Ext.3(2) and Ext.3(3) as her signatures. During cross examination, the defence could not disprove the evidence of this vital witness. She specifically stated that earlier the accused person never had any talk with her. She also specifically stated that she did not go to the house of Sabita on her own and the accused person had taken her to said house. Her further assertion is that after the occurrence, she immediately came back to her house. She also stated that Sabita resides nearby the railway station.

- 9. Her testimony received full corroboration from her previous statement on oath before the Magistrate. It is the settled principle of law that the statement, recorded U/S 164 of the Cr.P.C. is not a substantive piece of evidence and it can only be used for corroboration and contradiction. Ext.3 is the said statement of the victim and in her statement too, she stated that while she was playing with her friend, the accused person called her 4 times. She also stated that at first she did not respond, but later on the accused person gave her Rs.10/- and dragged her to the house of Sabita. In her statement, she further stated that the accused person opened her panty and thereafter inserted his penis in her vagina. She also stated that out of fear, she cried and after going out she told the entire incident to her aunt and her aunt reported the incident to her mother. As the defence could not disprove her evidence, nor could bring anything from her mouth which can demolish the case of the prosecution, I, therefore, find her evidence believable and trustworthy.
- **10.** PW.1 is the father of the victim. Admittedly he is not an eye witness of the occurrence and his evidence reveals that the occurrence took place on 11.12.2015 in the evening hour. He testified that he heard from one Maya Kundu that the accused person had forcibly taken his daughter to the house of Sabita Deb and had committed rape on her. Maya Kundu stated him that she had seen his daughter coming out from the house of Sabita Deb. He also added that

thereafter he lodged an FIR at Khetri P.S and proved Ext.1 as the said FIR. He also reveals that police sent the victim to hospital for medical examination and added that the victim also gave her statement before the Magistrate. He further reveals that the FIR had been written by someone at the police station. He added that at the time of the occurrence, his daughter was aged about 10 years and she was a student of Class V. During cross examination, the witness stated that the accused person is his neighbour, but he never visited their house.

- at the relevant point of time. He testified before the Court that about one month back, one day he was playing cricket with his sister in the field and then the accused person went there and called his sister and asked her to bring tobacco (sada) for him. He added that his sister started towards the railway station to purchase the tobacco and then the accused took her away to the house of Sabita. He was a child witness and could not state anything about the occurrence. However, he made it clear that the accused person took his sister to the house of Sabita Deb.
- 12. PW.4 is the mother of the victim and she also knows the accused person. She testified that the occurrence took place about one year back on the 11<sup>th</sup> day of August. She further testified that at the time of occurrence she was not at home and went to attend a meeting. Her testimony further reveals that around 6 pm, she returned back home and then she saw the victim sleeping in the house. She specifically stated that on the following day, the victim went to the school and then Maya Kundu came to her house and she informed her that her daughter had been forcibly taken to the house of Sabita and thereafter the accused had committed rape on her. She testified further that then she inquired about the incident from the victim and the victim narrated the incident to her. She specifically stated that the victim was taken to the house of Sabita Deb by the accused person forcibly and he also committed rape on her. During cross examination, the witness admitted that she was not the eye witness of the

occurrence. She also corroborated the testimony of her husband by stating that accused Kamal Biswas never visited their house. She further added during cross examination that accused Kamal Biswas was a married person, but he has no children. The defence could not disprove her evidence.

**13**. The evidence of PW.6 Sabita Deb is also important, because in her house, the alleged offence had occurred. She testified that the age of the victim was 10/12 years at the time of occurrence. Her testimony reveals that in 2015, one day she went out at noon leaving her daughter in the house. She added that her daughter closed the door from outside and thereafter left the house unattended for playing games. She made it specific that her daughter did not lock the door. She also testified that she came back to the house at about 5 pm and after coming back, she called her daughter loudly. She also added that her daughter was waiting in the door of a neighbour and the woman of that house was also there. She further deposed that she entered the house for changing her clothes and saw that her bed was in disarray. Her further testimony reveals that then she asked her daughter loudly why the bed was in such a scattered and disorganized condition, but she did not enter the house and told her from outside that she had no knowledge. She deposed that as she removed her saree for wearing the nighty, she noticed that accused Kamal Biswas was seating at a corner of the door. She discloses that she could not recognize him at first in the darkness and raised alarm and then the accused person came out. She also added that she scolded the accused for keeping him concealed inside the house and forced him out of the house and thereafter changed her clothes and went to bring back the cattle. She reveals further that after bringing back the cattle, she noticed that accused Kamal Biswas was there till then and she again scolded him and thereafter the accused person left the place. She deposed further that after the accused person had left the place, the woman of the opposite house, namely, Maya Kundu told her that accused Kamal Biswas had entered into her house with the victim girl. She testified further that hurriedly she entered into the house and saw that her bed was wet and as she was changing the bed sheet, she notice that one payal of a small girl was lying there, she added that on that night she did not disclose the

incident to anyone and on the next day in the morning at about 8:30 am, she found the victim girl and asked her why she had come to her house on the previous day. She narrated that the victim girl started to cry and told her that accused Kamal had dragged her to the house. She again reveals that as she asked her whether the accused had done anything to her, she again cried and told her that the accused person had committed rape on her after removing her clothes. She further stated that on being asked, the victim also told her that she did not report anything to her mother. She added that she scolded the victim and later on Maya Kundu reported the incident to the mother of the victim. She added further that the parents of the victim filed a case against Kamal Biswas and police came to her house and recorded her statement. She also added that police also went to the house of Maya Kundu. She asserted further that she narrated the incident to police and police arrested the accused person. During cross examination, the witness stated that she had no talking terms with accused Kamal Biswas at the time of occurrence, however she stated that prior to that, accused person had a visiting terms with her house. She also stated that later on, a quarrel was picked up with Kamal Biswas and since then the accused person stopped coming to her house. She stated during cross examination that she did not see the victim in her house and only saw the accused person there to keep him concealed. She specifically stated that the payal, recovered by her, belongs to the victim girl and saw the said payal with her even before the date of incident. Her evidence is very much important for the prosecution and although she did not see the occurrence with her own eyes, she was narrated everything after the occurrence. Besides, she saw the accused person to keep him concealed inside the house after the incident. She also noticed her bed in disorganized condition and further she found the bed sheet wet after the incident. She found the payal of the victim girl in her house at the time of changing the bed sheet. She also asked the victim girl about the incident on the next day and the victim girl was seen by her crying and she narrated the entire incident to her. Defence could not disprove her evidence.

PW.7 Maya Kundu is also a vital witness in this case. According to PW.1 and 14. PW.4, she had reported the incident to them. Her testimony reveals that she knows the victim girl and the victim girl was aged about 10/11 years when the occurrence took place about 3-4 years back. She testified that on the date of occurrence, she had gone to the market at about 2 pm and when she was coming back, she heard cry of girl inside the house of Sabita Deb. She also reveals that her house is just opposite to the house of Sabita Deb and hearing the sound, she went near the house, but came back again as there was no further sound. She added that the door was closed and after sometimes, she saw the victim girl to come out from the house. She added that the victim girl was crying and she asked her about what had happened. She also testified that the victim told her that accused Kamal had committed rape on her in the house of Sabita Deb. The witness also stated that the victim had also told her that the accused person had gave her 10 rupees note and thereafter did the bad act. She further testified that she held her hand, but the victim left for her house. The witness also testified that after a little while accused Kamal tried to go out, but on seeing her, he again entered into the house and did not go out. The witness further testified that about 5/5:30 pm, Sabita Deb came to the house. She stated that on seeing her, she reported the entire incident to her and also told her that accused and the victim had done bad act in her house and further told her that she saw the incident. She further reveals that Sabita Deb also saw Kamal in her house and after entering into the house, she saw that her bed was disarrayed. She further corroborates that she also reported the incident on the next day to the mother of the victim. She added that she could not go to the house of the victim on that very day, because she was not feeling well. Her evidence remained fully unshaken and unchallenged. Her evidence clearly reflects that whatever stated by the victim was true. She heard the sound of cry from inside the house of Sabita Deb while she was coming back from the market. Thereafter she saw the victim to go out from the said house of Sabita Deb and the victim was crying at that time and on being asked she reported the incident of commission of rape on her by the accused person. She also corroborates the testimony of PW.4 that on the next day, she reported the incident to them. She also gave the clarification that on that day, she could not go to the house of the victim because she was feeling unwell. I find that her house was just opposite to the house of Sabita Deb and as such, PW.7 Maya Kundu is the most natural and probable witness in this case and although she did not see the exact occurrence of commission of rape, she saw the victim to come out from the house and she was crying at that time. She also saw the accused person inside the house and tried to go out from there. The victim also reported the incident to her. I therefore, have no hesitation to find her evidence as the most trustworthy and believable.

**15**. The ocular testimonies of the witnesses receive further corroboration from the testimony of the doctor (PW.5). Dr. Richa Pandey, Assistant Professor in the department of Forensic Medicine, GMCH, testified that on 13.12.2015, she examined the victim girl in connection with Khetri P.S Case No. 190/15 u/s 8 of the POCSO Act. Her evidence discloses that during genital examination although her hymen was found intact, redness was present in the margin, inflamed tender on touch. In her opinion, there was no evidence of recent sexual intercourse detected on her person, however, findings were suggestive of attempted forceful penetration. She also testified that injury was found on her private parts. She further testified that the age of the victim girl was above 12 years and below 14 years. Ext.4 is her report and Ext.4(1), Ext.4(2) and Ext.4(3) are her signatures. Thus, if the evidence of the victim is considered along with the medical report of the doctor, I find that there is no any contradiction or variance in between her testimony and the evidence of the doctor. Ld. Counsel stressed much on the report of the doctor that there is no evidence of recent sexual intercourse detected on her person.

# In Aman *Kumar v. State of Haryana*, reported in (2004) 4 SCC 379, the Hon'ble Supreme Court of India observed as follows:-

"Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines*, IC&K

893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212: 1979 SCC (Cri) 252].] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

- **16.** Hence Hymeneal tear is not by any means necessary to determine to constitute the offence of rape or penetrative sexual assault. Here in the present case in hand, it is to be remembered that she was examined by the doctor on 13.12.2015, whereas the occurrence took place on 11.12.2015. Thus, there was a gap of about 2 days. In between, the victim also took bath and her clothes were washed. After 2 days of occurrence, it is difficult to get the findings of recent sexual intercourse. But if the other findings of the doctor of the Forensic Medicine are considered, it will be found that there is complete corroboration of the testimony of the victim and the medical evidence. The doctor found redness in the margin of the hymen and it was found inflamed and tender on touch. The doctor specifically opined that the findings were suggestive of attempted forceful penetration. The injury at the private parts of the victim discloses that there was penetration, might not be sufficient to rupture the hymen, but it kept the marks of redness in the margin of the hymen. These findings along with the evidence of PW.2, i.e, the victim, made it abundantly clear that the accused person had committed penetrative sexual assault on the victim. The evidence of PW6 Sabita Deb that the bed sheet was found wet and disorganized, also indicates to the conclusion of the commission of rape.
- **17.** PW.8 Bhabani Kanta Deka is the investigating officer and is merely a formal witness. Of course, the I/O failed to seize the payal in question and also failed to seize the bed sheet from the house of Sabita Deb, but merely because the I/O failed to conduct the investigation properly, the case of the prosecution cannot go. There is sufficient corroboration in the testimony of the witnesses of the

prosecution side and the defence could not disprove any of the evidence of the prosecution side. The Ld. Defence Counsel pointed out that there is no other eye witness of the occurrence of actual commission of rape by the accused person, save and except, the victim girl. The Ld. Defence Counsel also submitted that the accused person is a married man and it is unbelievable that he would indulge himself in such an attempt to commit rape on the victim girl who was hardly 12/14 years old. However, since the offence had been committed against the victim, inside the four walls of the house, there can not be any witness of the occurrence, save and except the victim. It is well settled that the victim of rape cannot be considered as accomplice and therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. Her evidence needs no corroboration like that of the evidence of a injured person and can be relied upon as the basis of conviction, if found otherwise believable. In this particular case, I found no reason to disbelieve the evidence of the victim. Besides, her evidence receiveed full corroboration from the testimony of two other vital independent witnesses, namely, PW.6 Sabita Deb and PW.7 Maya Kundu. PW.7 Maya Kundu even heard the sound of cry of a girl from inside the house of Sabita Deb and later on she saw the victim girl to come out from the house and she was crying at that time. On being asked, she narrated the entire incident to Maya Kundu. There is no evidence that either the victim girl or her family or Sabita Deb or Maya Kundu had any inimical relation with the accused person for which they could be interested to see the conviction of Kamal Biswas. At this stage, the Ld. Defence Counsel further submitted that no force was applied to the victim and if there was any incident, it was with the consent of the victim. However, medical evidence shows that she was aged about hardly 12 to 14 years at the time of occurrence. All the witnesses stated that she was aged about 10/11 years of age at the time of occurrence. At that age, there is no question of giving any consent. Besides, PW.3 the younger brother of the victim girl who was aged about only 6 years at the time of occurrence, corroborated the testimony of the victim girl that she had been dragged by the accused person to the house of Sabita Deb. PW.7 Maya Kundu specifically stated that she heard the cry of a girl from inside the house and after sometimes when she saw the victim girl to come out from the house,

she was crying and she narrated the entire incident to said Maya Kundu. PW.6 Sabita Deb also corroborated by saying that on the next day, when she asked the victim girl about the incident, she started to cry and reported her the incident. All these are suggestive that she had no consent at all.

**18.** Now Section 3 of the POCSO Act, 2012 defines the term "penetrative sexual assault" as follows:

"A person is said to commit "penetrative sexual assault" if-

- a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

Section 4 of the said Act provides for punishment of the penetrative sexual assault. Section 5 of the POCSO Act, 2012 provides for the definition of "aggravated penetrative sexual assault". Section 5 (v) defines that whoever commits penetrative sexual assault on a child below 12 years, has committed the offence of aggravated penetrative sexual assault. Section 6 provides for the punishment of aggravated penetrative sexual assault. However, in this particular case, the doctor who had medically examined the victim after the occurrence

opined that her age was in between 12 years to 14 years at the time of occurrence. Thus, the case will not come u/s 6 of the POCSO Act. Of course, charge was framed in this case against the accused u/s 6 of the POCSO Act. However, Section 4 of the POCSO Act being a minor offence than Section 6 of the POCSO Act, there is no impediment in convicting the accused u/s 4 of the POCSO Act, 2012 by invoking the power conferred u/s 222 of the Cr.P.C.

- **19.** In result, accused Kamal Biswas @ Kamal Das is held guilty of offence punishable u/s 4 of the POCSO Act, 2012 and accordingly he is convicted under the said section of law.
- 20. The offence against women is rising day by day. Particularly there is speedy increase in the rate of offence against child victim which force the law makers to frame the POCSO Act, 2012. Considering the steady increase in the sexual offence against child, I find that there is need for deterrent punishment against the wrong doers and the law should deal with them heavily. In this particular case in hand, the accused person is a married man and even then, he did not spare this minor victim from being the pray of his lust. Accordingly, I do not find it a fit case, where the benefit of the provisions of the Probation of Offenders Act or the provision of Section 360 of the Cr.P.C. can be extended.
- 21. The convict is heard on the point of sentence and his statement is recorded in separate sheet attached to the CR. In his statement, the convict once again denied his involvement in the commission of the offence and further sought clemency. Considering the matter in its entirety I find that the ends of justice will be appropriately met, if the convict is sentenced to rigorous imprisonment for 10 years with a fine of Rs.20,000/-, in default, to RI for another six months. The period of imprisonment already undergone by the accused during investigation, as well as, during trial will be set off. The amount of fine, if realized will be applied in payment of compensation to the victim u/s 357 of the Cr.P.C. Besides, the DLSA is directed to consider the payment of further compensation to the

victim under the Victim Compensation Scheme as provided in Section 357(A) of the Cr.P.C.

- **22.** The convict has also been explained about his right to file appeal against the judgment of conviction and also explained his right to file jail appeal.
- **23.** Furnish copy of the judgment, free of cost to the convict immediately. Also, send a copy of the judgment of conviction and sentence to the District Magistrate, in compliance to the provisions of Section 365 of the Cr.P.C.
- **24.** Signed, sealed and delivered in the open court on this 8<sup>th</sup> day of August, 2018 at Guwahati.

(S.P. Moitra)

Special Judge, Kamrup(M), Guwahati

Dictated & corrected by me.

(S.P. Moitra)

Special Judge,

Kamrup(M), Guwahati

## **APENDIX**

(A) Prosecution Exhibits:

Ext-1: F.I.R

Ext-2: Printed form of F.I.R

Ext-3 : Statement of the victim recorded u/s 164 of the Cr.P.C.

Ext-4 : Report of the doctor

Ext-5 : Requisition for radiological investigation

Ext-6: Charge sheet

(B) Defense Exhibit : Nil

(C) Court Exhibit : Nil

(E) Prosecution Witnesses:

PW-1 : Sri Jagat Sarkar

PW-2 : Miss Sushmita Sarkar

PW-3 : Sri Utpal Sarkar

PW-4 : Smti. Pratima Sarkar

PW-5 : Dr. Richa Pandey PW-6 : Smti. Sabita Deb

PW-7 : Smti. Maya Kundu

PW-8 : Smti. Bhabani Kanta Deka

(F) Defense Witnesses : Nil

(G) Court Witnesses : Nil.

(S.P. Moitra)

Special Judge, Kamrup(M), Guwahati