### IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>27 OF 2016</u>

(Under Section 6 of the POCSO Act, arising

out of GR Case No 2505 of 2016)

Present :- Sri Ashok Kumar Borah, AJS

Sessions Judge, Sonitpur, Tezpur.

Prosecutor :- State of Assam

-Vs-

Accused :- 1.Sri Emil Herenj,

S/o Late Atowa Herenj, Vill – Chopai TE ( No 5 line).

P.S. – Dhekiajuli, Dist- Sonitpur.

Date of framing charge 25-10-2017

Date of Recording Evidence :- 13-11-2017,08-12-2017.

Date of examination of accused u/s :- 08-12-2017.

313 of Cr.P.C.

Date of Argument :- 08-12-2017.

Date of Judgment :- **08-12-2017.** 

Counsel of the Prosecution :- Mr Munindra Ch Baruah,

Public Proecutor,

Sonitpur.

Counsel for Accused :- Mr B Borthakur, Advocate.

#### JUDGMENT

- 1. In this case accused Emil Herenj is put for trial for the allegation of charge under Section 6 of the POCSO Act.
- 2. The factual matrix according to the FIR in brief is that on or about 2.30 PM of 04-06-2016, accused Emil Herenj committed rape on informant's minor sister and then accused fled away from the house. The accused is the husband of informant. On 05-08-2016, local public caught the accused and handed him over to police. Hence, this prosecution case.
- 3. The ejahar was filed by the complainant Smti Sabina Herenj before the i/c Rakhasmari Out Post on 05-08-2016.
- 4. On receipt of the ejahar, I/C Rakhasmari Out Post by giving a GD Entry NO 77 dated 05-08-2016 and forwarded the same to OC, Dhekiajuli PS. Upon receipt of the ejahar, OC, Dhekiajuli Police Station registered the case vide Dhekiajuli Police Station Case No 532/16 under Section 376(2)(1) of IPC, r/w Section 4 of POCSO Act. After completion of investigation, O/C, Dhekiajuli Police Station sent up the case against the accused under Section 4 of POCSO Act.
- 5. On being appeared the accused before this Court, after hearing both the parties, charge framed under Section 6 of POCSO Act. Particulars of the charge were read over, explained to the accused to which he pleaded not guilty and claimed to be tried.
- To substantiate the case, prosecution examined as many as three witnesses i.e. the complainant, victim and other most material witness. After examination of the victim, learned Counsel for the accused submitted to close the prosecution evidence on the ground that neither the complainant nor the victim could reveals any materials as to any of the alleged offence. I have also heard the learned Special PP.
- 7. I have thoroughly perused the statement of PW1, PW2-the complainant and PW3-the victim. It appears that neither the complainant nor the

victim or other independent witness supported the prosecution case in any way. Therefore, I think that it would be futile to examine the other witnesses. Even if examined the other witnesses, prosecution case would not develop. Speedy trial is the right of the accused person. Considering these all, prosecution evidence is closed.

- 8. Accused is examined under Section 313 CrPC and the evidence appears against the accused person and the allegations made against the accused person are put before me for his explanation where they denied the allegations and declined to give defence evidence.
- 9. I have also heard argument put forward by the learned Counsel for both the sides.
- 10. The point for decision in this case is that
  - (1) "Whether on 04-08-2016, at about 3.30 PM, at Line NO 5 of Chapai Tea Estate, under Dhekiajuli PS, accused committed penetrative sexual assault on Miss "X" (aged about 8 years) and thereby committed an offence punishable under Section 6 of POCSO Act?

# Reasons, Decisions and reason for decision:

- 11. To arrive at the judicial decision, let me appreciate the evidences on record.
- PW1 Sri Phagu Kerketa @ Fagu deposed that he knows the accused Emil Herenj. The incident occurred on 04-08-2016 in the evening time. Victim was about eight years old. There was a hue and cry when accused fled away after committing rape on the victim. Victim is the sister-in-law of the accused. Then they took victim along with the accused who was caught by local public to the police station. The wife of accused Sabina Herenj filed ejahar before police. The victim was medically examine by doctor and sent to the Court for recording her statement.

In cross-examination he stated that he does not have any personal

knowledge about the incident. He has not asked the victim about the incident. He does not know if accused bath the victim by opening her clothes as a brother-in-law.

13. PW2 Smti Sabina Herenj is the complainant of this case. She deposed that the accused is her husband. The incident occurred on 04-08-2016 in the evening time. Victim "X" is her sister. At the relevant time she was about eight years old. At the relevant time, accused put off the clothes of her sister "X" but, he did not commit any rape. Then local public caught accused. For that incident, a 'Hulasthul' took place. Thereafter, he filed the ejahar before police on the allegation that accused after committing rape to her sister fled away from the house. In the said ejahar he put her thumb impression. The victim was medically examined by doctor and sent to the Court for recording her statement. The victim girl made statement before the local public that accused committed rape on her by putting off her clothes. I accompanied the victim to the Court. Her mother took zimma of her victim sister.

In cross-examination, she stated that the ejahar was written by one police of Rakshasmari Police Out Post as per direction of police of Rakshasmari Police out post. He does not know the contents of the ejahar. She admitted that she did not state before the police that "the victim girl made statement before local public that accused committed rape on her by putting off her clothes". She further added that at the pressure of local public, she had to file the ejahar before the police. In fact accused did not do any such act to her sister as alleged in the ejahar.

14. PW3 – Smti "X" the victim of this case is examined after making enquiry to justify her intelligence and ability to rational understanding. She stated that the accused I s her brother-in-law. They called them as a "Bhatu". "Bhatu" did not commit any "Khed". "Khed" means rape. He also did not rape her. At the time of incident, he went to her sister's house to play with the baby of her sister. After filing the case, she was examined and also sent her to learned Magistrate to record her statement.

In cross-examination, he admitted that she cannot say whether she went to the Court to give statement or not.

15. These much is the prosecution evidence.

- 16. The accused pleaded total denial while his statement was recorded under Section 313 of the CrPC.
- The accused persons are charged under Section 6 of POCSO Act. The law is well settled that in this type of case, statement of victim is much more important when the victim is an extreme minor, then, the statement of her guardian is also taken into consideration including the evidence of doctor. Here in the present case, the accused is charged under Section 6 of POCSO Act. Prosecution must prove that accused committed "aggravated penetrative sexual assault to the victim". Again, to prove charge under Section 6 of POCSO Act, prosecution must prove the ingredients as defined in Section 5(u) of POCSO Act. According to 5(u) of POCSO Act, "aggravated penetrative sexual assault comes when accused committed penetrative sexual assault on a child below 12 years".
- 18. Coming to the present case, in the instant case, no doubt according to prosecution story, victim's age is eight years. According to doctor, who gives findings after thorough examination of victim, the victim was below eight years. So, apparently in this case, the victim is only eight years old i.e. below twelve years.
- 19. Now let us seen how the evidence of prosecution could convict the accused in the alleged charge. According to complainant, at the relevant time, accused put off the clothe of her sister(PW2-victim), but, he did not commit any rape. Then local public caught accused, for that incident, a 'Hulasthul' took place. Thereafter, she filed the ejahar before the police on the allegation that accused after committing rape to her sister fled away from the house. In cross-examination, she admitted that though she filed the ejahar, but, she does not know the contents of the ejahar. She also admitted that she did not state before police that "the victim girl made statement before local public that accused committed rape on her by putting off her clothes". Therefore, the aforesaid statement is a contradictory. Secondly, the complainant again admitted that on the day of incident, her husband(accused) took her victim sister to the side of Tube well to bath her by putting off her clothes. At the pressure of local public, she has to file the ejahar before the police. In fact accused did not do any such act.
- 20. Next, come to the deposition of victim-PW2. The victim stated that

accused is her brother-in-law. They called brother-in-law as "Bhatu". Her brother-in-law i.e. accused never commits any rape. At the relevant time, she was taken to the house of her sister to look after the baby of her sister. She again reiterated that her "Bhatu" did not do any misdeed to her. These much is the evidence of complainant and victim.

- 21. From the statement of any of the witnesses it could be understood that accused committed penetrative sexual assault to the victim. Statement of none of the witnesses have been whisper any material of penetrative sexual assault. Under such circumstances, the charge under Section 6 of POCSO Act as alleged in the case against the accused is failed. Therefore, I have no option, but, acquit the accused Emil Herenj from the alleged charge and set him at liberty forthwith.
- 23. The liability of the bailor is hereby discharged.
- 24. Send back the LCR.

Given under my Hand and Seal of this Court on this the 8<sup>th</sup> day of Deceber, 2017.

(A. K. Borah) Sessions Judge, Sonitpur, Tezpur.

Dictated and corrected by me.

(A. K. Borah) Sessions Judge, Sonitpur, Tezpur.

Dictation taken and transcribed by me:

Smt. Pori Das, Steno.

### **APPENDIX**

### Witnesses examined by the prosecution:

- 1.PW1 Sri Phagu Kerketa @ Fagu,
- 2.PW2 Smti Sabina Herenj- complainant &
- 3.PW3 Smti "X" (victim).

# Documents exhibited by the prosecution:

1. Nil.

(A. K. Borah)
Sessions Judge
Sonitpur, Tezpur.