# CAUSE TITLE POCSO Case No. 31/16

Informant: Sri Bohuram Boraik,

S/o- Late Mukunda Boraik, R/o- Ghutung Bongali Gaon,

PS- Tengakhat, District- Dibrugarh.

Accused: Sri Abed Kashyap,

S/o- Late Arbin Kashyap,

R/o- Ikorani Gaon, PS- Tengakhat, District- Dibrugarh.

# ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor. Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor.

For the Defence: Mr. Biswajit Singha, learned legal aid counsel.

#### IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 31/16 G.R. Case No. 306/16

> > State of Assam

-Vs-

Sri Abed Kashyap

Charges: Under Sections 6, read with Section 5(I) POCSO Act.

Date of evidence on : 21-11-16, 06-02-17, 04-05-17, 01-06-17, 22-12-17,

06-02-18 & 19-04-18.

Date of argument : 17-05-18. Date of Judgment : 14-06-18.

# **JUDGMENT**

- 1) The prosecution case in a narrow compass is that Sri Abed Kashyap (hereinafter the accused) committed rape on the thirteen year old victim 'X' and impregnated her. An ejahar regarding this incident was lodged on 01-02-16 when it was discovered that the victim was pregnant. The FIR was registered as Tengakhat PS Case No. 8/16 under Sections 376(2)(f) of the Indian Penal Code (IPC in short), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act in short) and SI Numal Bora was entrusted with the investigation.
- 2) The investigating officer (IO in short) embarked upon the investigation and he recorded the statement of the victim and forwarded her to the Magistrate who recorded her statement under Section 164 of the Code of Criminal Procedure (CrPC in short). He went to the place of occurrence and prepared the Sketch-Map and recorded the statement of the victim and forwarded her to the medical officer. On finding prima facie materials, the IO submitted Charge-Sheet under Section 376 IPC, read with Section 8 POCSO Act.
- 3) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 6 POCSO Act was framed, read over and explained to the accused. The accused abjured his guilt and claimed

innocence.

4) To substantiate the stance, the prosecution adduced the evidence of eleven witnesses including the MO (medical officer) and the IO, while the accused cross-examined the witnesses to refute the charges.

### **SUBMISSIONS:**

5) The learned Public Prosecutor Smti. Runumi Devi and learned Addl. Public Prosecutor Mrs. Sahnaz Akhtar emphatically submitted that this is an open and shut case and the accused deserve stringent punishment. On the contrary, the learned defence counsel laid stress in his argument that this case is replete with contradictions and the accused deserve acquittal with a clean sheet.

### **POINTS FOR DETERMINATION:**

- 6) To decide the case in its proper perspective, the following points are apposite for proper adjudication of this case:
  - i. Whether the accused committed penetrative sexual assault on the victim 'X'?

# **DECISION THEREON AND THE REASONS FOR THE DECISION:**

- 7) To decide the case in its proper perspective, it is necessary to delve into the evidence.
- 8) The victim 'X' testified as PW-2 that the accused is her neighbour. The incident occurred about a year ago. On the day of the incident, while she was proceeding towards the school, the accused gagged her and took her to his house ad asked her to disrobe. When she refused, the accused threatened to kill her. As she was terrified, she did not inform her parents about the incident. The accused committed rape on her in a similar manner three or four times. Whenever she used to return from her school, the accused used to take her forcefully to his house pushing away her cycle. She concealed about the incident, but her physical appearance was detected by her sister who learnt that she was pregnant. Her elder sister asked her why her tummy was swollen and then she informed her sister about the incident and her sister in turn informed her father. Her father rebuked her, because she never informed him earlier.
- 9) The victim 'X' further testified that she informed her father that the accused committed rape on her and as she was terrified by the accused, she did not inform about the incident. Her father then informed the villagers about the

incident and a meeting was arranged. The meeting was arranged by the villagers and the accused was also present. It was decided in the meeting to inform the police about the incident. She also informed the police about the incident. During investigation, the police recorded her statement and forwarded her to the Magistrate for recording her statement. Ext. 1 is her statement and Ext. 1(1) is her signature. She also affixed her thumb impression on her statement. She was also forwarded to the doctor for medical examination. She gave birth to a girl, but at present, she does not know where her daughter is.

- 10) In her cross-examination, she denied about her omission to state before the police that while she was proceeding towards the school, the accused forcefully gagged her and took her inside his house. This contradiction has been affirmed by the IO, who has testified in his cross-examination as PW-11 that the victim 'X' did not state under Section 161 CrPC that while she was proceeding to the school, the accused forcefully gagged her and took her to his house and committed rape on her. This is indeed a major contradiction. The evidence of the victim that the accused impregnated her, remained uncontradicted and uncontroverted. If the victim had consensual sexual relationship with the accused, can the accused be exonerated? Was the victim a minor? The IO is SI Numal Chandra Bora and he testified as PW-11. The victim was cross-examined regarding her omission to state before the IO that the accused committed rape on her in a similar manner, three or four times. This contradiction culled out by the cross-examination of the victim, was not affirmed by the cross-examination of the IO/PW-11. This implies that the accused indeed had sexual intercourse with the victim in the similar manner three or four times.
- 11) The evidence of PW-2 is supported and corroborated by the evidence of her mother Smti. Mariam Kashyap. She testified as PW-1 that the victim 'X' is her step daughter. Her blood mother died few years ago. After the death of the victim's mother, she got married to Akub Kashyap, i.e., the victim's father. One day, she went to the accused person's house and noticed that her daughter was in a compromising position with the accused person. Then she confronted her daughter about the incident and she also informed her husband what she had seen in the accused person's house, but her husband did not pay heed to her information. Then her husband narrated the incident

- to the villagers and an FIR was lodged against the accused.
- 12) In her cross-examination, she testified that the age of the new born baby was about six months. Her evidence depicts that she caught the victim 'X' red handed when she was in a compromising position with the accused. Her evidence belies the victim 'X's evidence.
- 13) The evidence of the PW-1 and 2 is supported and corroborated by the evidence of Sri Akub Kashyap who testified as PW-3 that the victim is his daughter and the accused is his nephew. The accused person's house is adjacent to his house. The incident took place about a year ago. His elder daughter Krishika Kashyap noticed the changing appearance of the victim while the victim was changing her clothes. His daughter informed him about the physical appearance of his daughter and then he confronted the victim. She informed him that the accused impregnated her. As soon as he asked her, she was terrified and she tried to conceal about the incident, but his elder son pressurized and asked her and she tearfully informed them about her condition. Then he informed the villagers about the incident and there was a 'Bichar' held by the villagers. The accused was also present in the meeting and he admitted that he impregnated his daughter. The villagers advised him to inform the police. He went to the police with the Gaonburah Bheem Rao Boraik and lodged the ejahar. At present, the Gaonburah is no more. The police recorded the statement of his daughter. His daughter was forwarded by the police to the medical officer for her examination. Later, she gave birth to a baby girl.
- 14) The learned defence counsel cross-examined the witness, but he could not be contradicted. However, he testified in his cross-examination that there are about eight or nine houses near Darad's shop. The residences of Dhana Suren, Bigra Suren, Pawan Suren and Mangra Suren are also near the place of occurrence. Darad's shop is about 50 metres away from his house.
- 15) The victim also testified in her cross-examination that the incident took place in front of the shop of Darad. The learned defence counsel tried to transpire that the victim was a consenting party, as it is not possible to commit rape in a thickly populated area where there are about eight or nine houses near the shop, near which the incident of rape took place.
- 16) It can be culled out from the evidence that indeed the victim may have been a consenting party, but does this exonerate the accused person?

17) The MO Dr. Nibedita Shyam testified as PW-7 that on 02-02-16, when she was the MO on duty, she examined the victim 'X' in connection with this case and found the following:

On genital examination:

Genital organs well developed. Vulva- healthy. Hymen: Old tears at 1, 5 and 8 O' clock position. Vagina is healthy. Cervix: healthy, OS closed. Uterus: Enlarged with fundal height at 28 weeks of gestation approximately. Foetal parts palpable with feeble heart rate 13. Bpm. Linea nigra present. Vaginal smears were taken on glass slides from posterior fornix of vagina and around the cervix the result of which does not show any spermatozoa.

- 18) On the basis of physical examination, radiological and laboratory investigation, the MO was of the opinion that:
  - i. Her age was sixteen years and below eighteen years;
  - ii. Evidence of recent sexual intercourse not detected on her person;
  - iii. Evidence of pregnancy detected on her person
- 19) It is clear from the opinion of the doctor that the victim was above sixteen years and below eighteen years. Thus, the accused gets a benefit of two years on the higher side. If the victim is around sixteen years, then the accused should be given the benefit of two years on the higher side, because it is clear from the evidence of all the witnesses that the victim was a consenting party. She has concealed about the incident until her body showing tell tale signs.
- 20) It can be deduced from the evidence of the MO that the victim was above sixteen years and below eighteen years. On the basis of Medical Jurisprudence, the accused gets the benefit of two years on the higher side. The victim's age is thereby considered to be two years on the higher side of more than sixteen years which renders the victim's age to be above eighteen years. It is clear from the evidence and from my foregoing discussions that the victim had consensual sexual intercourse with the accused person. She revealed about her relationship with the accused person only when her body started showing tell tale signs. She was caught red handed in a compromising position by her step mother Smti. Mariam Kashyap. Her evidence has been contradicted by the evidence of the IO and by her own cross-examination.

- 21) The IO SI Nomal Chandra Bora testified as PW-11 that on 31-01-16, he was posted as ASI at Tengakhat Police Station. On that day, an information was received from the VDP member Sri Radheshyam Sharma regarding sexual assault by the accused on a minor girl. A GD Entry No. 695 dtd. 31-01-16 was registered and he proceeded to the place of occurrence. He took custody of the accused and recorded the statement of the accused. On the next day, he recorded the statement of the victim and forwarded her to the Magistrate to record her statement. She was also forwarded for medical examination. On 01-02-16, an FIR was lodged by the Gaonburah Sri Bihuram Boraik at Tengakhat Police Station and the officer-in-charge (OC in short) registered a Tengakhat PS Case No. 8/16 under Sections 376(2)(f) IPC, read with Section 4 POCSO Act and he was entrusted with the investigation. Ext. 3 is the FIR and Ext. 3(1) is the signature of the OC endorsing him with the investigation. Ext. 3(A) is the printed Proforma of the FIR and Ext. 3(A-1) is the signature of the OC which is familiar to him. He submitted Charge-Sheet against the accused. Ext. 4 is the Charge-Sheet and Ext. 4(1) is his signature.
- 22) The IO testified in his cross-examination that the victim did not state before him that while she was proceeding to the school, the accused forcefully gagged her and took her into his house and committed rape on her.
- 23) Thus, it is clear from the cross-examination of the victim and the cross-examination of the IO that the victim failed to mention in her statement under Section 161 CrPC that the accused forcefully committed rape on her. This major contradiction extends a benefit of doubt to the accused, because this is the prime allegation against the accused. The evidence of the witnesses also does not implicate that the accused committed rape on the victim. However, there is evidence that the accused impregnated the victim. The evidence of PW-3 also clearly reveals that the victim tried to conceal that the accused impregnated her when he (PW-3) confronted his daughter.
- 24) Smti. Sushila Purty testified as PW-4 that the informant Sri Bihuram Boraik is the Gaonburah and he died about three months back. The incident took place in the month of January of the previous year. Teresa Kashyap went and informed her that the victim was pregnant and the accused impregnated her and so a meeting was called. The victim was about six months pregnant at that time. She did not attend the meeting.
- 25) In her cross-examination, she denied any knowledge about the incident.

- 26) Similarly, Smti. Sita Newar testified as PW-5 that the informant Bihuran Boraik died about three months ago. On 02-02-16, there was a meeting regarding a rape case. In the meeting, the accused admitted that he was the father of the child. The victim was present at that time. She did not know about the decision taken in the meeting.
- 27) Similarly, Sri Kiran Ekka Bhengra testified as PW-6 that on 30-01-16, a meeting was held when the victim became pregnant. The victim apprised the members present in the meeting that the accused impregnated her. When the accused was confronted, he died, but after being assaulted, he admitted that he impregnated the victim.
- 28) Smti. Veronika Tirki testified as PW-8 that the accused is her cousin and so is the victim. The incident occurred about 1 ½ year ago. One day, she noticed that the victim's tummy was bulging out and she confronted the victim and then the victim informed her that the accused impregnated her. Thereafter, she informed the member of the Mahila Samiti and called a meeting where the accused was present. The accused admitted that he impregnated the victim and thereafter, they lodged the ejahar.
- 29) Smti. Teresa Kashyap testified as PW-9 that the victim 'X' is her sister-in-law. The incident occurred about two years ago. One day, the victim came to their residence and she noticed that her stomach was bulging out. When she confronted the victim about her bulging tummy, the victim informed her that the accused impregnated her. Then she informed the Gaonburah and a meeting was held and the members of the VDP and Mahila Samiti were present. The victim apprised the members present in the meeting that the accused impregnated her and the accused also confessed his guilt.
- 30) Smti. Manju Horo testified as PW-10 that the victim was a child under the UNICEF Project Club where she was working as Coordinator. The victim became pregnant and she was informed by Kiran Ekka who was SAG Nominee of the Club. The Gaonburah lodged an ejahar regarding the incident. The victim informed her that the accused impregnated her. She was about thirteen years at that time.
- 31) If we carefully scrutinize the evidence of the witnesses PW-4, 5, 6, 8, 9 and 10, it is clear that the victim informed the witnesses about her pregnancy after pregnancy was detected by her changing physical appearance. Prior to this, she kept mum about her pregnancy. She even tried to conceal as far as

possible. After she was confronted, she admitted that the accused impregnated her. A meeting was called and the witnesses mentioned that the accused confessed that he impregnated the victim in the meeting. However, this has been contradicted by the cross-examination of PW-4, 5, 6, 8 and 9. The IO has also admitted in his cross-examination as PW-11 that Veronika Tirki, Manju Horo and Teresa Kashyap have not stated before him that the accused confessed his guilt.

- 32) In view of my foregoing discussions, it is thereby held that there is no evidence that the accused forcefully committed rape on the victim. There is also no evidence that the accused forcefully committed penetrative sexual assault on the victim. The prosecution failed to prove beyond reasonable doubt that the accused committed aggravated penetrative sexual assault on the victim.
- 33) The age of the victim is taken to be two years on the higher side of more than sixteen years, purporting her age to be above eighteen years.
- 34) This case is replete with contradictions and the accused gets the benefit of doubt. It is true that the victim was pregnant and she was blessed with a child. Further, there is no evidence where the child is at present. It appears that the witnesses are not aware about the whereabouts of the child or it may be so that the witnesses are willing to conceal about the whereabouts of the child. It is held that the victim had consensual sexual relation with the accused. It is also clear that the victim is a major and the marital status of the accused was not in the fore. Thereby, the accused is acquitted from the charges under Sections 6, read with Section 5(I) POCSO Act and he is set at liberty forthwith.

Judgment is signed, sealed and delivered in the open Court on the 14<sup>th</sup> day of June, 2018.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

#### **APPENDIX**

#### List of witnesses:

- 1. PW-1 Smti. Mariam Kashyap;
- 2. PW-2 The victim 'X';
- 3. PW-3 Sri Akub Kashyap;
- 4. PW-4 Smti. Sushila Purty;
- 5. PW-5 Smti. Sita Newar;
- 6. PW-6 Sri Kiran Ekka Bhengra;
- 7. PW-7 Dr. Nibedita Shyam;
- 8. PW-8 Smti. Veronika Tirki;
- 9. PW-9 Smti. Teresa Kashyap;
- 10. PW-10 Smti. Manju Horo;
- 11. PW-11 SI Nomal Chandra Bora.

#### List of Exhibits:

- 1. Ext. 1 Statement of the victim recorded under Section 164 CrPC;
- 2. Ext. 2 Medico-legal Report;
- 3. Ext. 3 Ejahar;
- 4. Ext. 3(A) Printed Proforma of FIR; and
- 5. Ext. 4 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

*Transcribed and typed by:*-Bhaskar Jyoti Bora, Steno.