IN THE CHILDREN COURT :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, <u>Sivasagar</u>.

Spl. (J) Case No. 02 of 2017 u/s 4 of POCSO Act 2012 and Section 376 (2) IPC (Arising out of Simaluguri P.S. Case No. 16/2017)

State of Assam

-Vs-

Sri Bhiku Bhuyan Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P For the accused : Mr. D. K. Gohain, Advocate

Date of framing Charge : 22.06.2018

Date of Evidence : 06.09.2018, 29.10.2018, 04.01.2019,

04.02.2019

 Date of S/D
 : 08.03.2019

 Date of argument
 : 09.04.2019

 Date of Judgment
 : 24.04.2019

<u>JUDGMENT</u>

- 1. Prosecution case in brief is that on 08.02.2017 one Sri Lakhiram Bhuyan lodged an FIR with I/C, Lakuwa O.P. alleging, inter alia, that on 06.02.2017, at evening hours his daughter victim 'R' (name withheld) came out of her house and did not return. Non-finding her, they have searched for the victim. During search, on the next day, at about 5 PM, the victim returned home in weak condition and on asking she disclosed that the child in conflict with law (CCL) induced her and took her with him and kept her inside Bagan and committed sexual assault on her.
- 2. On receipt of the FIR, same was forwarded to O/C Simaluguri P.S. and accordingly Simaluguri P.S. Case No. 16/2017 u/s 4 of POCSO Act

was registered and investigated. During investigation, the boy named in the FIR was arrested and produced before this Court and was remanded to Jail. The victim was medically examined and also recorded her statement in Court u/s 164 Cr.P.C.

- 3. It may be mentioned here that at the request of the Jail authority, ossification test was conducted and finding that the said boy was a child below the age of 18 years, vide order dated 27.02.2017, the matter was referred to Juvenile Justice Board, Sivasagar. After obtaining report from psychologist about the mental and physical capacity to commit and understand the nature and consequences of the offence as alleged, learned Principal Magistrate, JJB Sivasagar has sent the case for trial to be taken up before the Children Court, Sivasagar.
- 4. After receipt of the case record from JJB, Sivasagar, vide order dated 30.05.2017, due to non-submission of F.F. in time, the elder sister of CCL was allowed to have the custody of the CCL on execution of a bond of Rs. 2,000/- (Rupees two thousand). Subsequently on 05.01.2018, Charge-Sheet was laid before this Court against the said CCL u/s 376 IPC. Accordingly attendance of the CCL was procured and vide order dated 28.02.2018, copy of relevant papers as required u/s 207 Cr.P.C were furnished to the CCL. During trial CCL was represented by Legal Aid Counsel. Upon hearing both sides, vide order dated 22.06.2018, charges u/s 376 (2) IPC and Section 4 of POCSO Act, 2012 has been framed against the CCL to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined nine witnesses including M.O. and I.O. Defence cross-examined the said P.Ws.
- 5. Upon completion of the prosecution evidence, CCL was examined u/s 313 Cr.P.C. After hearing both the sides u/s 232 Cr.P.C, and observing that it was not a case of no-evidence, CCL was called upon to enter into defence to which he declined to adduce evidence in defence. Defence case is of total denial and false implication.
- 6. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi
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and Mr. D.K. Gohain, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 7. (i) What was the age of the victim on the date of incident?
 - (ii) Whether the victim was subjected to penetrative sexual assault by the CCL?

DECISION AND REASONS THEREOF:

- 8. PW-1 Sri Lakhiram Bhuyan, the father of the victim in his evidence deposed that victim is presently aged is about 16 years. She read upto class III in 2 No. Naharhabi Bagan L P School. He had a certificate of her age. Exbt. 1 is the school certificate showing her date of Birth 29.06.2001. (proved-in-original). PW 1 further deposed that on 06.02.2017, at about 6 PM, non-finding his daughter in the house, he searched for her. On 08.02.2017, he lodged the FIR to Lakuwa out Post. After filling of the FIR, at evening hour his daughter returned home and informed him that the CCL took her with him and kept her inside Bagan. Police also interrogated him. In his cross examination, PW-1 Sri Lakhiram Bhuyan deposed that he has no knowledge about any love affairs between his daughter and the accused. About 4 years back, his wife left his home and now residing with the elder brother of the accused. For this, he is not willing to give marriage of his daughter with the accused. He is not willing to proceed further with this case.
- 9. PW-2 the victim R in her evidence deposed that the CCL is known to her being her boy friend. Her present age is about 17 years. She read upto class III in 2 No. Naharhabi Bagan L P School. She cannot say her date of birth. On 06.02.2017, the CCL took her with him and kept her inside Bagan for one night. At Bagan, the CCL committed misdeed with her. (Inspite of repeated persistence, the witnesses did not disclose as to what she meant by the term misdeed). On the next morning, CCL left the place. She also returned home and informed the matter to her father. On this, her father lodged the FIR. Police took her to medical and also to Court. She gave statement in Court. Exbt. 2 is

her statement given in court. Exbt. 2(i) and 2(ii) are her signatures. In her cross examination, PW-2 denied that on the date of incident, she was above 18 years of age. Prior to this incident, her mother left their home and now residing with the elder brother of the CCL. While she went with the CCL, her father was not present in their residence. She reside with her father and younger sister Satyabhama. At the time of going with CCL, she had love affairs with him for about one year. She denied that she went with the CCL on her own. She did not make hue and cry while CCL took her with him. She denied that CCL did not keep her in the bagan and also did not commit any misdeed with her on that night. She denied that she did not tell her father about commission of misdeed by CCL. She denied that during medical examination, she did not alleged about any misdeed by CCL. She denied that she deposed falsely.

- 10. PW-3 Sri Amit Tassa in his evidence deposed that in the year 2017, after recovery of victim by police, he was called by I/C Lakuwa OP and he came to know that the CCL kidnapped the victim. During investigation, police seized some wearing apparels of the victim. Exbt. 3 is the seizure list. In his cross examination, PW-3 deposed that he has no knowledge about the incident of elopement. On that he did not ask the victim about the incident with her and she did not even informed him anything.
- 11. PW-4 Smt. Deepa Bhumiz in her evidence deposed that on 8.02.2017, while she was crossing infront of Lakuwa OP, she was called by I/C Lakuwa OP. As requested by I/C, she helped the victim in changing her dress and she has handed over one legin and one inner bra of the victim to the I/C, Lakuwa OP. While she entered the police station from the other labours, she came to know that the CCL has committed rape on the victim. Police seized said 2 pieces of wearing apparels of the victim. Exbt. 3 is the seizure list. She did not get any chance to ask the victim about the incident with her. In her cross examination, PW 4 deposed that police did not record her statement. She has stated before police as deposed today. She has no personal knowledge about the incident of the occurrence.

- 12. PW-5 Dr. Duplay Patir, the medical officer in his evidence deposed that on 08.02.2017, he examined the victim and on examination he found Skiagram of left wrist joint and left elbow joint reveals complete fusion of epiphyses. He opined that (i) Her age is above 18 years as per radiological evidence, (ii) she does not have any sign of recent sexual intercourse, (iii) she does not have any sign of pregnancy at the time of examination, (iv) She does not have any sign of injury on her body and private part at the time of examination. Ext. 4 is the medical examination report. His opinion on age of the victim is based on radiological report of the victim which is attached with his report. Ext. 4(2) is the said radiological report. His cross examination was declined by defence.
- 13. PW-6 Sri Roushan Kayastha in his evidence deposed that on 06.02.2017, after recovery of CCL and one girl by police, he was called by I/C Lakuwa OP and from police, he came to know that the CCL has committed misdeed with girl and she was recovered with CCL from the bagan. Police seized some wearing apparels of the victim. Exbt. 3 is the seizure list. Exbt. 3 (iii) is his signature. Police also interrogated him. In his cross examination, he deposed that he has no personal knowledge about the incident. He did not ask the girl about the incident with her.
- 14. PW-7 Sri Sankar Ch. Rabha in his evidence deposed that on 18.02.2017, while he was working as Scientific Officer at Serology Division, Directorate of Forensic Science, Assam, Kahilipara, Guwahati-19, vide Memo No. SDPO/NZR/2017/51, dated 17.02.2017 advising the examination of 1 (one) parcel (s) per messenger was received in connection with Simaluguri P.S. Case No. 16/2017 U/S 4 of POCSO Act. The parcel sealed cloth covered carton box consisted of 2 (two) exhibits enclosed with a cloth cover which was sealed with the impression of a seal corresponding with the seal impression forwarded: sealed SDPO, Nazira, Sivasagar. <u>DESCRIPTION OF ARTICLES</u>

1	One sky blue coloured leggings (part) contains stain	Sero-3770/A
	of suspected blood and semen. Marked as Ex. "A"	

One light green and white coloured bra contains Sero-3770/B stain of suspected semen. Marked as Ex. "B"

2

On examination, he found that Exh. No. Sero-3770/A gave positive test for human semen and Sero-3770/B gave negative test for semen (spermatozoa). So, the question of comparison does not arise. Ext. 5 is his report. Ext. 6 is the forwarding letter of his report. (under objection). In his cross examination, PW-7 deposed that Exbt. 5 and 6 are Xerox copies of his report. He has not mentioned as to whom the articles sent belonged.

15. PW-8 Sri Manujjal Gogoi, the I/O of this case in his evidence deposed that on 08.02.2017, at about 9 AM, while he was posted as i/c Lakuwa OP, he received one written FIR from Sri Lakhi Ram Bhuyan and after entering the FIR in Lakuwa PS G/D Entry book forwarded the FIR to Simaluguri PS for registering a case. Accordingly Simaluguri PS case No. 16/2017 u/s 4 of Pocso Act was registered. Exbt. 7 is the FIR. During investigation, he examined the informant and 3 other witness at PS campus. On the same day, victim was brought to PS and her statement was recorded. Her inner garment was seized. Exbt. 3 is the seizure list. Exbt. 3(iv) is his signature. On the same day victim was sent for detail medical examination and ascertaining her age at Sivasagar Civil Hospital. Victim was also sent to Court for recording her statement u/s 164 Cr.P.C. He has also visited the place of occurrence and prepared sketch map of the PO. Exbt. 8 is the sketch map. Exbt. 8(i) is his signature. During investigation, CCL was apprehended and forwarded to Court. During investigation he has sent the seized article to FSL for examination. On 20.04.2017, on his transfer, he handed over the CD to his successor. From the CD it appears that SI Ujjal Goswami has collected the medical report, FSL report and statement given by victim in Court. On completion of investigation, SI Ujjal Goswami have submitted charge sheet against the accused u/s 376 IPC. Exbt. 9 is the charge sheet. In his cross examination, PW-8 deposed that as mentioned in the FIR, the incident was of 06.02.2017 and FIR was lodged on 08.02.2017, on return of the victim. He denied that at the time of filing of FIR, victim came to Lakuwa OP with the informant. During investigation, he has not

collected any school certificate of the victim for determining the age of the victim. He has not collected any age documents of the victim. He denied that, he has not investigated the case properly under the provision of Pocso Act.

- 16. From the above evidence on record, let me decide the points formulated above for just decision of this case.
- 17. Point No. I: So far age of the victim is concerned, the informant in his evidence as PW 1 claimed that victim was aged about 16 years and proved the school certificate as Exbt.1 in which date of birth is mentioned as 29.06.2001. While adducing evidence in Court on 06.09.2018, the victim claimed her age as 17 years and stated that she read up-to class-III but cannot say her date of birth. PW 5 Dr. Duplay Patir, the M.O. basing on the radiological report, particularly complete fusion of both wrist joint and elbow joint has opined that on the date of examination i.e. on 08.02.2017 the victim was aged above 18 years. Except this, there are no other evidence on age of the victim. Admittedly PW 8, the I.O. of this case did not collect any document on age of the victim. On looking at the Exbt. 1 the school certificate, it appears that Exbt. 1 does not bear any serial number or book number or even issue date. From Exbt. 1 school certificate, it appears that the victim left the school after passing class-IV exam. From the above, it appears that no reliance can be placed on Exbt. 1 school certificate. As such, I have no option but to look at the medical report of the victim which discloses that on the date of examination, as per radiological report, the victim was aged above 18 years. Law is well settled that when there is two sets of evidence, the evidence favouring the accused should be accepted. In this case the radiological report appears to be more convincing, the same is accepted and accordingly I hold that the on the date of incident victim was aged above 18 years.
- 18. <u>Point No. II:</u> So far role of the CCL is concerned, in her evidence the victim stated that the CCL took her with him and kept her inside Bagan for one night. On the next day morning the CCL left the place and the victim returned home and informed the matter to her father. In her cross, she admitted that

she has love affairs with the CCL for last about one year and admittedly while going with the CCL she did not make any hue and cry. From this part of admission, it appears that the victim on her own and without any inducement from the CCL went inside the jungle. Taking of the victim to the jungle however is not a crime.

- 19. The other part of this story is that as per the victim, inside Bagan the CCL has committed misdeed with her, but she did not disclose what she meant the term misdeed. On looking at the evidence of PW 1, it appears that the incident happened on 06.02.2017 and he filed the FIR on 08.02.2017 and after filing of the FIR, at evening hours the victim returned home and disclosed that the CCL took her with him and kept her inside Bagan. PW 1 is totally silent regarding reporting of the matter by the victim about commission of misdeed on her by the CCL though the victim has categorically stated that after returning home, she informed the matter to her father and thereafter her father lodged the FIR. This is a huge contradiction.
- 20. So far time of return of the victim from Jungle is concerned, in the course of argument hearing, learned Advocate has pointed out that this is a false case just to frame against the accused with a view to take revenge of previous incident in which mother of the victim left her matrimonial home and now residing with the elder brother of the accused. This part of allegation as brought by defence has admitted by the PW 1 and PW 2. In their evidence both PW 1 and PW 2 categorically admitted that prior to this incident, mother of the victim left her home and now residing with the elder brother of the accused. The other witnesses namely PW 3 and PW 4 has met the victim at the P.S. and they are seizure witnesses of the wearing apparels of the victim. PW 6 is a hearsay witness and heard the incident from police. Admittedly PW 3, PW 4 and PW 5 nowhere stated that they came to know about the incident from the victim. PW 5 the M.O. has also mentioned that he did not find any symptom of recent sexual intercourse. PW 7, the expert from FSL though stated that on the leggings sent for FSL examination get positive test of human semen, but as the victim is silent regarding physical relation with her by the CCL, it cannot be said Spl. (J) Case No. 2/2017 Page 8 of 10

with conclusive proof that the semen found on her leggings belongs to CCL. No DNA profile was done to match the semen found on the leggings. Moreover the said leggings was seized on 08.02.2017 and the sample was received by FSL Guwahati with letter dated 17.02.2017. There is nothing on record for showing delay as to where the seized leggings was kept. Though charge of rape on the victim was framed, but as the victim was totally silent about commission of any such activities on her against her will, I am of the opinion that it cannot be presumed that the victim was subjected to penetrative sexual intercourse/rape by the CCL. The victim being major and having not said about use of any force during commission of the alleged misdeed, it should be presumed that if at all there was any physical relation with the victim by the CCL the same took place with her consent.

- 21. Considering all above, I hold that prosecution has failed to prove the ingredients of charges u/s 376 (2) IPC and Section 4 of POCSO Act 2012 against the CCL. As such, the CCL is acquitted from the charges u/s 376 (2) IPC and Section 4 of POCSO Act, 2012 and set at liberty forthwith.
- 22. Bail bond executed by the accused and his surety stand extended for another six months from today u/s 437-A Cr.P.C.
- 23. Considering the nature of the case, the matter is not referred to DLSA for granting compensation u/s 357-A Cr.P.C.
- 24. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 25. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 24th day of April, 2019 at Sivasagar.

Special Judge Sivasagar

APPENDIX

1. Prosecution witnesses -

- PW 1 Sri Lakhiram Bhuyan (Informant)
- PW 2 Victim 'R'
- PW 3 Sri Amit Tassa
- PW 4 Smt. Deepa Bhumiz
- PW 5 Dr. Duplay Patir (M.O.)
- PW 6 Sri Roushan Kayastha
- PW 7 Sri Sankar Ch. Rabha
- PW 8 Sri Manujjal Gogoi (I.O.)
- 2. <u>Defence witnesses</u>: None
- 3. <u>Court witnesses</u> : None

4. Exhibits by prosecution -

- Exbt.1 School certificate
- Exbt.2 164 Cr.P.C. statement of the victim
- Exbt.3 Seizure list
- Exbt.4 Medical report
- Exbt.5 FSL report
- Exbt.6 Forwarding letter
- Exbt.7 FIR
- Exbt.8 Sketch map
- Exbt.9 Charge Sheet
- Exbt. 'A' One sky blue coloured leggings (part) contains stain of suspected blood and semen.
- Exbt. 'B' One light green and white coloured bra contains stain of suspected semen.

Special Judge Sivasagar