IN THE COURT OF THE SPECIAL JUDGE::::UDALGURI

Present : Sri. P. Saikia, Special Judge, Udalguri.

SPL (POCSO) 19/2016

State of Assam

-Vs-

Deben Boro.....Accused.

For the Prosecution: Mr. M. Khaklari, Addl. Public Prosecutor.
For the Accused: Mr. Tarun Ch. Boro, Learned Advocate.

Evidence recorded on : 18-06-15: 26-06-15: 04-07-15:

24-07-15: 30-07-15.

Argument heard on : 03-05-19. Judgment delivered on : 17-05-19

JUDGMENT

1. The prosecution case as presented is traceable from the first information report dated 19-09-15, lodged with the Officer-in-Charge Kalaigaon Police Station by the informant Aharu Boro alleging to the effect that on 17-09-15, at about 01.00 pm accused Deben Boro called his minor daughter aged around four and half years (real name is withheld and henceforth referred to as the victim) to his house. Thereafter, the accused offering biscuit to her committed rape on her. After commission of rape by the accused his granddaughter's condition became serious and she refused to take food. On being enquired his granddaughter informed him that accused committed penetrative sexual intercourse with her.

Then they immediately admitted his minor victim granddaughter in the hospital for treatment. Seeing her serious health condition the doctor referred her to Mangaldai Civil Hospital for better treatment and she was still under treatment. As the victim did not reveal about the incident immediately and as such the FIR could not be lodged promptly.

- 2. On receipt of the FIR, the Officer in Charge Kalaigaon P.S. registered a case vide Kalaigaon P.S. case no. 191/15 under Section 7/8 of POCSO Act and launched the investigation of the case. On completion of the investigation of the case the police laid the charge sheet against the accused Deben Boro for the offence under Section 5/6 of the POCSO Act to face trial.
- 3. On acceptance of the Charge sheet cognizance of the offence was taken. The Court process was issued to ensure presence of the accused and the accused duly appeared before this Court. Thereupon, he was furnished with the copies of documents under Section 173 Cr.P.C. Whereupon my learned predecessor-in-office having perused the entire materials on record found a prima facie case having been made out against the accused to frame charge under Section 6 of the POCSO Act. On framing of the formal charge thereunder the same was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 4. To buttress the charge, the prosecution has examined as many as nine(9) witnesses. That apart, prosecution has also relied on some documents annexed with the case record in support of its case.
- 5. On closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C. He took a plea of complete denial and pleaded his innocence. Further, no evidence was led on behalf of the defence.
- 6. In the light of the facts and circumstances, the point for determination is set forth hereunder:-

- (I). Whether accused on 17-09-15, at about 01 pm at village Hatibandha under Kalaigaon P.S. committed aggravated penetrative sexual assault upon the victim, aged about 05 years, and thereby committed an offence punishable under Section 06 of POCSO Act.?
- 7. I have heard arguments rendered by the learned counsel for both the sides and also meticulously assess the evidences on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

8. PW1, Aharu Boro, is the first informant who set the criminal law in motion. His evidence discloses that the victim girl is his granddaughter and she was around 4 ½ years at the time of occurrence. Accused is his neighbor and his house is adjacent to his house. The occurrence took place at about 3 pm. At the time of occurrence he was working in a garden within his house compound. After 3 days of the occurrence his son Biju Boro came to him at his work place and informed him that his granddaughter (Victim) was suffering from fever. On getting the information he came home. Then the elder sister, Juli Boro, of the victim told him that the accused person had a sexual intercourse with the victim girl. He found the vaginal part of the victim swelling and she was finding difficult to pass her urine. She could not pass urine for three days. He came to know from Juli Boro that at the material time accused asked the victim girl to visit his house to have biscuit and accordingly victim went to the house of the accused. Later on his son and other villagers went to the paddy field where accused was harvesting paddy and asked the accused to come to their house. Accused refused to go with a plea that he was busy in harvesting paddy. Then his son along with another villager took the accused to their house in a bike. On being asked by him and other villagers accused admitted to have sexual intercourse with the victim. He alongwith Govinda Daimary took the victim girl to Tangla Hospital. The condition of the victim being found serious Tangla Hospital asked them to take the victim to Mangaldai Civil Hospital for proper medical treatment. The Doctor of the Mangaldai Civil Hospital asked him to lodge an FIR with the police and only thereafter, they would treat the victim. Keeping the victim girl at Mangaldai Civil Hospital in the custody of her maternal aunt he alongwith Gobinda Daimary came to Kalaigaon Police Station and lodged an FIR in this regard. Ext-1 is the FIR and Ext-1(1) is his signature. On the next morning he again went to Mangaldai Civil Hospital. The victim was treated in the Mangaldai Civil Hospital as an indoor patient for six days. His wife died about 6 years ago. The father of the victim expired before her birth. Mother of the victim stays in Kerela in connection with her livelihood.

- 9. In cross-examination he has stated that he did not ask the victim about the occurrence as she was unable to speak at that time. Subsequently, after her recovery he did not ask her about the incident. While taking the accused to their house from the paddy field some of the villagers might have assaulted him. He has denied the defence suggestion that being beaten by the villagers accused confessed his guilt to have had sexual intercourse with the victim. House of one Aharul Boro is situated to the adjacent southern side of his house. In his house his two sons, his mother and one deaf and dumb sister and his daughter-in-law reside. He has denied the defence suggestion that the victim was suffering from some other ailment not related to any sexual intercourse. The younger brother of accused already expired and the wife of younger brother of the accused resides in the same house where the accused resides. Two sons of the deceased brother of the accused reside with the accused.
- 10. PW2, Gobinda Daimary. In his testification he has revealed that he knows the informant as well as the accused who are his co-villager. The informant resides adjacent to his house. The occurrence took place about 1 year ago. After 3 days of the occurrence, family members of the victim asked him to visit their house and accordingly he went to their house. The elder sister of the victim told them that the accused committed rape upon the victim. He alongwith other villagers took the accused to the house of the informant. Some of the villagers gave the accused 2/3 slaps when the accused confessed that he committed rape upon the victim. He alongwith informant and other family members of the

informant took the victim to Tangla Hospital. But Tangla Hospital asked them to take the victim to Mangaldai Civil Hospital for proper treatment. Accordingly, they took the victim to Mangaldai Civil Hospital. Doctor of Mangaldai Civil Hospital refused to start treatment without lodging of any police case. Then he alongwith the informant came to Kalaigaon police station and informant lodged the FIR. Police of Kalaigaon PS gave him a paper and with that paper he went back to Mangaldai Civil Hospital and thereafter doctor of Mangaldai Civil Hospital started treatment of the victim.

- 11. In cross-examination he has stated that he did not ask the victim about the occurrence. He has denied the defence suggestion that the accused did not commit any sexual intercourse with the victim and that the accused did not confess his guilt before them. He has further denied the defence suggestion that the victim was suffering from some ailment for which the victim could not pass urine.
- 12. PW3 is Sudarshan Nath. He has deposed that incident took place on 17-9-15. On the day of occurrence accused Deben Boro called the victim to his residence to provide chocolate and biscuit. She went to the house of accused for having chocolate and biscuit. Then the accused committed rape on her. On being asked the victim told in presence of him that accused committed rape upon her. The village people went to the paddy field where the accused was harvesting paddy and asked the accused to come to the house of victim. On being asked by Gobinda Boro, Sarat Boro, Biju Boro, Namal Boro, Balen Boro and others accused admitted to have sexual intercourse with the girl. The condition of the victim girl being found serious, so they took her to Tangla hospital. Doctor of Tangla hospital referred the victim to Mangaldai Civil Hospital. But the doctor refused to provide treatment to the victim as no ejahar was lodged. Accordingly, the grandfather of the victim, lodged FIR before Kalaigaon PS. Thereafter the doctor of Mangaldai Civil Hospital provided treatment to the victim.

- 13. In cross-examination he has stated that his house is situated at a distance of 50 meters from the house of the informant. The house of Balen Boro, Ratneswar Boro, another Aharu Boro and Deben Boro are situated near the house of the accused. The accused has two sons and sister-in-law. Informant has family consisting of 6 members. He came to know about the incident on the next day. Accused after bringing from paddy field was assaulted by the villagers. He has denied the defence suggestion that the accused did not confessed before them about the incident and that the village people falsely implicated the accused by assaulting him. While the accused was brought from the paddy field about 30 villagers were present and amongst them were Balen Boro, Sarat Boro, Biju Boro, Gobinda Daimary, Namal Boro etc. He has denied the defence suggestion that no incident took place and he has deposed falsely.
- 14. PW4, Dr. Tapan Kr. Das, he is one of the doctors who examined the victim on 20-09-15, inconnection with this case being Kalaigaon P.S. Case no. 191/15 dated 20-09-15 and his findings are as follows:

Per vagina examination no bleeding was seen and Valve normal. No external injury was seen during inspection of valve. Ext.-2 is his report and Ext.-2(1) is his signature.

His cross-examination was declined by the defence.

- 15. PW5, Kamaleswar Boro is a hearsay witness. According to his evidence the accused one day called the victim to his residence to provide chocolate and biscuit and committed rape on her.
- 16. In cross-examination he has admitted that he did not see the incident. He has denied the defence suggestion that accused did not commit rape on the victim and he was falsely implicated. He did not hear when the accused called the victim to his house.
- 17. PW6, Dr. Sangita Das is the other doctor who examined the victim on 20-09-15, in connection with this case and found the followings:

The age of the victim girl is 5-6 years.

No comment could be given regarding recent sexual intercourse. There were no injury or violence marks found in her private parts. Ext.3 is her report and Ext.3(1) is her signature.

- 18. In cross-examination she has disclosed that Hymen may disappear if a girl plays or jump. There is no hard and fast rule that if hymen is absent sexual intercourse may occur.
- 19. PW7 is the victim. Being a child witness of 6 ½ years her evidence was recorded after certifying that she is a competent witness to testify. In her examination in chief she has stated that she knows the accused. The occurrence took place before 3 years back. At that time she was a student of nursery. My medium is Bodo and she understands Assamese language. The incident took place in the evening time. On the day of occurrence she went to the house of the accused for playing with a girl child. The accused gave him biscuit and called her to go inside the house. She entered the house then the accused opened her panty and did sexual intercourse with her. Thereafter, she fled away from the house of the accused. After taking dinner she dozed off. Her grandfather lodged the FIR. On being produced her statement was recorded before the Court.
- 20. In cross-examination she has disclosed that the girl child with whom she went to play was with her mother. The family members of the accused were not present at the time of occurrence. She denied the defence suggestion that she had deposed falsely.
- 21. PW8, Madan Deka is the Investigating Officer of the case. In his evidence it has been disclosed that on 19-09-15, he was serving as attached officer in the Kalaigaon P.S. On that day one Aharu Boro lodged an FIR with the O/C of Kalaigaon P.S. On the basis of the FIR the O/C, Kalaigaon PS registered a case being Kalaigaon PS case No.191/15 under Section 7/8 of POCSO Act and endorsed in his name for investigation into it. In course of investigation, I visited the place of occurrence where he found the accused was detained by the village

people by tying his hands and legs in the house of one neighbouring person and accordingly he was taken into custody. At the place of occurrence he came to know that the incident occurred on 17.9.15 and the victim was a girl child who was taken to medical by her maternal aunt for treatment at Tangla hospital and, thereafter, she was again taken to the Mangaldai Civil Hospital for her treatment. He got the statement of the victim recorded before the Magistrate U/S 164 Cr.P.C. and collected the medical examination report of the victim. He prepared the sketch map of the place of occurrence. Ext.4 is the sketch map wherein Ext.4(1) is his signature. Owing to his transfer in the midst of the investigation he handed over the case diary to the O/C, Kalaigaon PS for further investigation of the case.

His cross-examination was declined by the defence.

- 22. PW9, Nagar Ali Sarkar is the other Investigating Officer of the case. It is his evidence that on 11-03-16, he was acting as attached officer in the Kalaigaon P.S. On that day the O/C, Kalaigaon PS handed over him the case diary of Kalaigaon PS case No.191/15 U/S 7/8 of POCSO Act which was previously investigated by SI Madan Deka but on account of his transfer and in order to complete the further investigation of the case. After receiving the case diary, he perused the same and it was found that the predecessor I.O. of the case had completed the entire investigation of the case and only the charge-sheet had remained to be submitted. After examining the case diary he found a prima-facie material against the accused Deben Boro and accordingly laid charge-sheet U/S 5/6 of the POCSO Act. Ext.5 is the charge-sheet. Ext.5(1) is his signature. Cross was declined by the defence.
- 23. In the light of the foregoing analysis on the evidences on record, it is amply evident that the accused has been charged for committing aggravated penetrative sexual assault upon the victim(PW7).
- 24. The victim (PW7) was examined by the doctor PW4 after the alleged rape had been committed by the accused. The victim was examined by two doctors

namely PW4 and PW6 on two different timings. PW4 was the first doctor who examined the victim in connection with this case on 29-09-15, and as per his findings vide Ext.-2 no bleeding was seen in her vagina and valve was normal and no external injury noticed during inspection of valve.

- 25. Subsequently, the victim (PW7) was examined by another doctor PW6 on 20-09-15 and she found that the age of the victim was 5-6 years and there were no injury or violence marks on the private parts and therefore no comment could be given regarding recent sexual intercourse and on that basis she submitted her report vide Ext.-3.
- 26. According to M.O. PW6, victim was a tender aged girl of 5/6 year at the time of the alleged commission of penetrative sexual assault on her. But both the doctors PW4 and PW6 did not find any sign of recent sexual intercourse with the victim nor injury of violence marks found in her private parts nor any other external injury was seen during inspection of valve.
- 27. Though medical evidences of PW4 and PW6 are not supporting the prosecution case as to the commission of penetrative sexual assault on the victim (PW7). It is no longer res integra that in a case of rape there is no rule of law that the testimony of the victim cannot be acted without corroboration in material particular even from the medical evidence. In the instant case the victim is a child of tender age who was aged around 5/6 years at the commission of alleged offence. The Supreme Court has held in a catena of decisions that a woman who has been raped is not an accomplice. After she is ravished, she is a victim of outrage. In the case of a girl below age of consent her consent will not matter so far as the offence of rape is concerned. Therefore, the evidence of a victim of a sex offence is entitled to great weight. Absence of corroboration notwithstanding while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be accepted in sex offence, having regard to the very nature of the offence. In the present case, also except the victim there was no eye witness to the occurrence.

- 28. In the light of the principle laid down by the Apex Court so far as the evidence in the victim of rape which along is sufficient to rope the accused with the offence of rape if her evidence is wholly reliable, consistent and unimpeachable, if we analyze the evidence of the victim (PW7) who is a child of 5/6 years at the time of the commission of penetrative sexual assault by the accused as alleged by her but her version is found to be suffering from material contradictions, discrepancies and infirmities and, therefore, her evidence is not intrinsically reliable. The commission of penetrative sexual assault by the accused by offering her biscuit when she came to the house of the accused to play with a girl child is not at all tenable, when she has revealed in her cross-examination that the mother of the girl child with whom she came to the house of the accused to play was present at the time of committing penetrative sexual assault by the accused. The evidence of the victim (PW7) soon after the commission of the penetrative sexual assault by the accused she fled away from the house of the accused is highly improbable and carries no conviction inasmuch as how the victim (PW7) who was a child of 5/6 years, managed to escape to her house after commission of penetrative sexual assault by the accused who is an adult person of around 50 years at the time of alleged occurrence. The victim would have in such a situation suffered injuries on her private part which is belied by the medical evidence disclosing that at the time of the re-examination of the victim no injury of violence marks found in her private parts and no bleeding was also seen from the private parts and valve remained normal. In the event of such clinching medical evidence after the examination of the victim who was aged around 5/6 years at the time of commission of penetrative sexual assault the testimony of the victim that accused committed penetrative sexual assault on her and thereafter she fled away from the house of the accused is nothing but exaggerated make believe statement on the part of the victim (PW7).
- 29. In addition to the above statement of the victim (PW7) in the examination-in-chief itself stated that after taking dinner on the day of occurrence she doused off has rest a spell of doubt as to her veracity as how it

would be possible for her after commission of forceful penetrative sexual assault by the accused to return her home and doused off without narrating the incident to anyone. Nowhere in her evidence the victim (PW7) has stated that she divulged about the incident of forceful penetrative sexual assault committed by the accused. Hence, the evidence of the victim (PW7) has failed to satisfy the taste of unimpeachable evidence to record conviction of the accused on the basis of her sole testimony.

- 30. Turning to the testimony of first informant PW1 his evidence also does not inspire confidence to lend credence to the prosecution case so much so that his testimony is found to be in conflict with the testimony of the medical evidence of PW4 and PW6. Though the informant (PW1) has stated that he came to know after three days of the incident when the victim told that accused had sexual intercourse with her and on being examined he found vaginal part of the victim was swelling and she was finding difficult to pass her urine. It is nothing but unbelievable statement when the doctors PW4 and PW6 did not find any kind of violence mark in the private part of the victim if the accused had committed forceful penetrative sexual assault on the victim (PW7) who was a tender child, the doctors would have found marks of violence on her private part even though the victim was examined after three days of the incident. This witness again in the cross-examination has revealed that he did not ask the victim about the occurrence. He also did not ask her after her recovery about the incident.
- 31. Likewise PW2 and PW3 are not eyewitnesses to the alleged incident. They have simply stated that they did not ask the victim about the incident. So there is nothing in the testimony of PW2 and PW3 to augment the prosecution case in the face of the incoherent and exaggerated evidence adduced by the victim (PW7). Having found the evidence of the victim (PW7) unreliable and inconsistent on the material particular of the case without supported by the medical evidence and in that view of the matter the prosecution case has remained to be proved beyond all reasonable doubt and therefore the accused entitled to benefit of doubt.

- 32. To sum up in the view of cumulative consideration of the evidences on record, it can be safely be held that the accused Deben Boro is not guilty under Section 6 of POCSO Act and , thus, he is acquitted on benefit of doubt. Set him at liberty forthwith.
- 33. Judgment signed, delivered and pronounced in the open court today the 17th day of May, 2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) (P.Saikia)

Sessions Judge, Sessions Judge,

Udalguri. Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Aharu Boro.

ii)PW2 Gobinda Daimary.

iii)PW3 Sudarshan Nath.

iv)PW4 Dr. Tapan Kr. Das.

v)PW5 Kamaleswar Boro.

vi)PW6 Dr. Sangita Das.

vii)PW7 Victim.

viii)PW8 Madan Deka.

ix) PW9 Nagar Ali Sarkar.

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 FIR.

ii) Ext.2 Medical report.

iii) Ext.-3 Medical report.

iv)Ext.4 Sketch Map.

v) Ext.5 Charge-sheet.

Dictated and corrected by me.

Sessions Judge,

Udalguri.