IN THE COURT OF THE SPECIAL JUDGE, UDALGURI, ASSAM

SPI. (<u>POCSO</u>) Case No.7/2016

(U/S: 363 IPC R/W Sec.4 of POCSO Act)

State
Versus
Suraj Newar,
S/O- Late Khagen Newar,
Vill- No.1 Kadabil,
PS-Mazbat, Dist-Udalguri.

PRESENT: Sri P.Saikia, A.J.S.,

Special Judge, Udalguri.

APPEARANCE:

For the Prosecution: Sri M.Khaklary, Addl. P.P., Udalguri

AND

For the accused: Sri M.C. Narzary, Advocate.

Evidence recorded on: 17.7.17, 4.6.18, 28.6.18, 6.12.18, 3.1.19.

Argument heard on: 7.3.2019.

Judgment delivered on: 20.3.2019.

JUDGMENT

1. The prosecution case unveils with the FIR lodged by one Smti. Salami Munda Tapno with the Officer-in-charge of Mazbat PS on 7.2.2016 alleging, interalia, that on 30.4.2015 the accused Suraj Newar had taken her minor daughter (real name is withheld, henceforth referred as the victim) as a maid servant to look after his children. Subsequently, the accused without his knowledge took her to Tamilnadu where the accused committed rape upon her by showing threat to

her life. After coming to know about the incident she brought her daughter to her own home.

- 2. Pursuant to the FIR, the Officer In-charge, Mazbat Police Station registered a case vide Mazbat P.S. case No.7/16 U/S 363 IPC R/W Sec. 4 of POCSO Act and endorsed the case for investigation to ASI J.C. Deka for preliminary step and SI B. Bora to complete the investigation of the case. On conclusion of as usual investigation the police laid the charge-sheet against the accused U/S 363 IPC R/W Sec. 4 of POCSO Act to face trial in the court of law.
- 3. On receipt of the charge sheet process was issued to the accused to procure his attendance. The accused entered his appearance and he was supplied with the copies of the documents supplied U/S 173 Cr.P.C.
- 4. On scanning of the entire materials on the record my learned predecessor in office having found a prima-facie case made out against the accused to frame charge U/S 363 IPC R/W Sec. 4 of POCSO Act framed formal charges thereunder and the same on being read over and explained to him to which the accused pleaded not guilty and claimed to stand trial.
- 5. In order to bring home the charges the prosecution has examined in all seven witnesses including the informant, victim and I.O. of the case and also relied on certain documents mark as exhibits.
- 6. On closure of the prosecution evidence the accused was examined U/S 313 Cr.P.C. His case was of total denial and pleaded innocence. However, no evidence has been adduced in support of his defence.
- 7. In the light of the above perspective, the points for determination in the present case are set up and framed as:-
- (i) Whether the accused on or after 30.4.2015 kidnapped the victim, aged about 16 years to Tamilnadu from her lawful guardian and thereby committed an offence punishable U/S 363 IPC?

- (ii) Whether the accused on the same day, time and place committed penetrative sexual assault upon the victim, aged 16 years as alleged under Section 4 of POCSO Act?
- 8. I have heard argument advanced by the learned counsel of both the sides and also carefully gone through the evidence on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 9. PW1 is Jaekel Bhengra @ Jowel Bhengra. His evidence demonstrates that he is the VDP secretary of Santi Bhagalpur village. The occurrence took place in the year 2015. On the day of occurrence the accused had taken away the complainant's daughter to Tamilnadu for providing her job in Tamilnadu. He knew that the owner of the company informed the village people to take the girl back because the accused raped her. Thereafter, they came back to Mazbat. A meeting was held in their village. Accused confessed his guilt in presence of village people in the meeting. As the matter was not settled in the Mel the informant lodged the FIR in the police station.
- 10. In cross-examination he has stated that accused is a married person and has a minor child. The victim was taken with him to Tamilnadu to look after his minor child. Consent was taken from the mother of the victim before taking her to Tamilnadu. In Tamilnadu the victim, accused, his wife and child were staying together. The incident of rape took place in Tamilnadu. He did not go to Tamilnadu to take the girl back. Resolution was taken in the meeting which was sent to police.
- 11. PW2, Salmi Munda is the first informant of the case and the mother of the victim. According to her evidence at the material time one day the accused had taken her daughter to Tamilnadu to look after a child. The accused had committed rape on her daughter. At the time of occurrence the age of her daughter was 13 years. She got information from the owner of the house that her daughter was raped by the accused. She went with the village people to Tamilnadu and brought her daughter back home. Thereafter, a meeting was held in the village where the

accused confessed before the meeting. Thereafter, she lodged the ejahar. Magistrate recorded her statement. She put thumb impression in the FIR.

- 12. In cross-examination she has stated that the house of the accused is situated near her house. The accused took her daughter to Tamilnadu after taking permission from her. Before taking my daughter the accused with his family stayed in Tamilnadu. Before taking her daughter the accused stayed in Tamilnadu with his family. She did not raise objection at the time of taking her daughter to Tamilnadu. She did not lodge FIR in Tamilnadu though rape was committed in Tamilnadu. She was only reported that rape was committed on her daughter. She denied the defence suggestion that accused did not commit rape on her daughter and that no meeting was held in the village and accused did not make confession.
- 13. PW3, Petrosh Kongadi has deposed to the effect that the victim after returning from Tamilnadu one day went to their house and told him that accused committed rape on her in Tamilnadu. A meeting was held in the village and both the parties were present. On being asked the accused confessed. Since the matter was not settled so FIR was lodged.
- 14. In cross-examination, he has stated that informant and accused hailed from their village. He does not know when the accused had taken the victim girl to Tamilnadu. One Sunu Tudu was present in the meeting. He does not remember the date of the meeting. When the accused confessed resolution was taken in writing which was submitted in the police station. He has not seen the copy of resolution before the court. Alleged rape was committed in Tamilnadu. The victim girl reported him.
- 15. PW4, Dr. Bhadra Kanta Sarma is the Sr. M & HO of Udalguri Civil Hospital who examined the victim on 8.2.16 and found the following:-

Physical examination:-

Height- 142 cm, weight- 33 Kg, teeth- 28 Nos., axillary hair- present, pubic hairnormal, breast- normal, hymen- present with tear, vaginal injury not seen, marks of violence not seen, clothing normal, LMP 2.1.16 Vaginal swab examination for spermatozoa:- no spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray for age determination: - Approximate age 16-17 years.

- (1) Right wrist joint union not completed.
- (2) Right elbow joint union completed.
- (3) Right iliac crest union not completed.

Urine for pregnancy test on 9.2.16 reported by Mangaldai Clinical Laboratory shows negative.

Ultrasonography of abdomen on 9.2.16 reported as normal study.

The doctor opined that (1) Radiological age 16-17. (2) Hymen present but tear, (3) Menstruating. Ext.1 is his report and Ext.1(1) is his signature.

- 16. PW5 is the victim. Her testimony reveals that about two years ago the accused took her alongwith him to look after his female baby as a maid servant in Tamilnadu. While she was staying in the house of the accused to look after the baby, the accused started to commit sexual intercourse with her for about 4 to 5 days against her will and consent. Then she informed the incident to her mother. Her mother came to Tamilnadu and brought her back home to Udalguri. She narrated about the incident of rape committed by the accused before her mother. After reaching their home her mother lodged an FIR with the police. Her statement was got recorded before the Magistrate U/S 164 Cr.P.C. where she put her thumb impression. She was also examined by doctor.
- 17. In cross-examination she has stated that she was taken to Tamilnadu by the accused on taking permission from her mother. When she went alongwith the accused to Tamilnadu his wife was also accompanied with them alongwith the female baby. The accused resided in quarter of the company where he worked. There were other adjacent quarters near the quarter where she did not narrate about the incident to the neighbours. Though the accused committed rape upon

her in Tamilnadu at his quarter but in this regard herself not her mother lodged FIR before the Tamilnadu police. She stayed in the quarter of the accused in Tamilnadu for about 8/9 months. The accused started to commit sexual intercourse with her after 7 days of staying at the company quarter of the accused in Tamilnadu. Though the accused had committed sexual intercourse with her against her will and consent immediately after 7 days of staying at the company quarter of the accused but she did not inform the matter to her parents till the laps of 7/8 months. She informed about the incident to her parents by the mobile phone of the accused after 7/8 months of the incident. The accused committed sexual intercourse with her during day time during the absence of his wife who used to go for work in day time. The accused was working during night shift. While she was staying with the accused in the company quarter one day the accused and his wife assaulted her for not properly caring their baby. She has denied the defence suggestion that accused has not committed sexual intercourse with her but when the accused one day assaulted her for not properly caring the baby she lodge a false case against the accused out of grudge.

- 18. PW6, Dipu Bora is one of the investigating officers of the case. His evidence displays that on 29-02-16 he was posted as second officer at Mazbat PS. After completion of the preliminary investigation SI Jeevan Chandra Deka handed over the case diary to him and, accordingly, he had done thorough the case dairy and having found prima-facial material well established he laid the charge-sheet against the accused U/S 363 IPC R/W Sec 4 of POCSO Act. Ext. 2 is the charge-sheet wherein Ext. 2(1) is his signature.
- 19. In cross-examination he has disclosed that he did not record the statement of witnesses in connection with this case except submitting the charge sheet.
- 20. PW7, Jiban Ch. Deka is the other investigating officer of the case. It is his evidence that on 07-02-16 he was posted as ASI of Police at Mazbat PS. On that day the informant Salmani Munda lodged an FIR with the O/C Mazbat PS. On the basis thereof Mazbat PS case No. 06/16 U/S 366 IPC R/W Section 4 of POCSO Act was registered and he was entrusted to take preliminary investigation of the case.

During the course of investigation he recorded the statement of the first informant as well as the victim U/S 161 CrPC, visited the place of occurrence, recorded the statement of other available witnesses U/S 161 CrPC, prepared sketch map of the place of occurrence and sent the victim to get her statement recorded before the magistrate U/S 164 CrPC. The victim was sent for medical examination. The accused was arrested and forwarded him to the court. On completion of the investigation he handed over the case diary to the O/C, Dipu Bora of Mazbat PS who later submitted the charge sheet against the accused Suraj Newar U/S 366 IPC R/W Sec 4 of POCSO Act. Ext. 3 is the FIR. Ext. 3(1) is the signature of the O/C, Durga Kingkar Sarmah which is known to him. Ext. 4 is the sketch map wherein Ext. 4(1) is his signature.

- 21. In his cross-examination he stated that the incident occurred in Tamil Nadu on 30-04-15 and the FIR was lodged on 07-02-16 before the OC Mazbat PS.
- 22. On marshaling and evaluating the evidences on record as discussed above in its entirety, what has emerged that this being a case of sexual assault the evidence of the victim (PW5) is the most crucial to romp home the charge leveled against the accused.
- 23. On close analysis of the testimony of victim (PW5) its exhibits that when the allege sexual assault committed by the accused she was a minor and there were no eyewitness to the incident.
- 24. At this stage in the light of facts and circumstances of this case, it is apposite to mention that it has been firmly settled in a catena of decisions rendered by the apex court that there is no rule or law of practice that the evidence of the victim of sexual assault cannot be relied upon without corroboration and as such it has been laid down that the corroboration is not a sine qua non for a conviction in a case of rape. If the evidence of the victim does not suffer from a basic infirmity and the "probability factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case medical evidence can be accepted to the forthcoming.

- 25. It is also equally important to point out that in a case of rape, the onus is always of prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the prosecution and other witnesses have falsely implicated the accused. However, grave the suspicion against the accused and however strong the moral belief and conviction of the judge, unless the offence against the accused is established beyond reasonable doubt or beyond possibility of reasonable doubt, on the basis of legal evidence and material on the record, he cannot be convicted for such an offence. There is an initial presumption of innocence of the accused that the prosecution as to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.
- 26. In the light of the settled position of law so far as to proof of a case of rape is concerned, if we assess the evidence of the victim (PW5), it would transpire that the accused took her alongwith him to look after his female baby as a maid servant in Tamil Nadu. While she was staying in the house of the accused to look after the baby, the accused started to commit sexual intercourse with her for about 4 to 5 days against her will and consent. Then she reported the matter to her mother and her mother came to Tamil Nadu and brought her back home to Udalguri. After reaching her home her mother lodged the FIR with the police at Udalguri Police Station. However, in cross-examination she has stated that her mother after coming to know about committing of penetrative sexual assault by the accused came to Tamil Nadu to bring her back. Her mother did not lodge any FIR in Tamil Nadu. She has also admitted that though the accused committed sexual assault on her, but she did not inform anyone though there were many other persons residing in the company quarters near the quarter of the accused in Tamil Nadu. She has also admitted that while she was staying with the accused in the company quarter one day accused and his wife assaulted her for not properly caring their baby. It appears from the testimony of the victim (PW5) that her evidence is not specific and cogent enough as to when the accused committed sexual assault on her while she was in Tamil Nadu to look after the baby of the

accused where she stayed for about 8/9 months. Furthermore, the victim (PW5) has also admitted that she did not inform the matter of committing sexual assault by the accused to her parents till after lapse of 7/8 months. It is beyond comprehension as to why the victim remained silent without informing her parents after committing sexual intercourse by the accused on the pretext of taking her to look after the baby by the accused. That apart, the victim informed about the incident to her parents by the mobile phone of the accused after 7/8 months of the incident. Her evidence does not have a ring of truth as to her veracity so much so that had she been sexually exploited by the accused, then he would not have shared his mobile phone to talk with her parents. If there had been sexual assault committed by the accused frequently in Tamil Nadu she would have complained about the incident either to the wife of the accused who was staying together or to the other neighbourhood persons of the company quarters in Tamil Nadu where the accused was working. Thus, it is evident that there are notable material discrepancies and embellishments in her testimony to accept her testimony as wholly reliable in absence of corroboration from independent sources. It also appears from the record that the victim (PW5) was taken to Tamil Nadu as a maid servant by the accused with the consent of the informant (PW2).

- 27. It is also evident from the testimony of the Doctor (PW4), and his report Ext.-1 that on examination of the victim on 08-02-16, he did not find sign of any recent sexual intercourse with the victim nor did he find any sign of pregnancy after urine and and ultrasonography test done on 09-02-16. Furthermore as per radiological test the age of victim was found 16-17 years.
- 28. It is obvious that considering the peculiarity of the facts and circumstances of the case as regards the commission of penetrative sexual assault on the victim which alleged to have occurred about 8/9 months ago from the date of her examination by the Doctor (PW4), it was natural in not finding any sign of recent sexual intercourse with the accused by him. On the other hand, if there had been sexual assault committed by the accused about 8/9 months ago from the date of her medical examination the Doctor(PW4) would have found sign of pregnancy on the victim when the victim was around 16-17 years at the time of incident. Thus,

the evidence of doctor (PW4) and his report (Ext-1) do not support the prosecution case so far as the commission of sexual assault upon the victim by the accused. Due to lack of support from the medical evidence so far as commission of sexual assault by the accused the discrepant and contradictory evidence of the victim is of not sterling quality to sustain the charge of committing sexual assault by the accused on the victim when she was at Tamil Nadu. When the medical evidence of PW4 has failed to bolster the prosecution case in the backdrop of lackluster testimony of the victim (PW5), it would appear from the evidence of other witnesses PW1, PW2(informant) and PW3 that they are merely hearsay witnesses. There is nothing in their evidence to lend credence to the prosecution story on account of various contradictions and infirmities in the testimony of the victim (PW5) as her evidence is so artificial to say that it cannot be accepted and the possibility of making false allegation against the accused is not unusual and cannot be relied out.

- 29. On cumulative consideration of the evidences on record, particularly the evidence of the victim(PW5) whose evidence has been found artificial, unreliable and inconsistent as per the settled position of law, raises a strong doubt which overshadows the genuineness of the prosecution case and, therefore, the prosecution case is disbelieved. Hence, the accused is entitled to benefit of doubt.
- 30. In summing up, I come to the conclusion that prosecution case failed to prove its case to the hilt and therefore the accused Suraj Newar is held not guilty under Section 363 IPC R/W Section 4 of POCSO Act. Set him at liberty forthwith.
- 31. Bail bond executed by the accused person and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.

32. Judgment signed, delivered and pronounced in the open court today the 20th day of March, 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 Jaekel Bhengra @ Jowel Bhengra.

ii)PW2 Salmi Munda.

iii)PW3 Petrosh Kongadi.

iv)PW4 Dr. Bhadra Kanta Sarma.

v)PW5 Victim

vi)PW6 Dipu Bora.

vii)PW7 Jiban Ch. Deka.

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 Medical report.

ii) Ext.2 Charge-sheet.

iii) Ext.-3 FIR.

iv)Ext.4 Sketch Map.

Dictated and corrected by me.

Sessions Judge, Udalguri.