IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

SPECIAL POCSO CASE NO. 42 of 2017

Under section 4 of POCSO Act.
(Arising out of G. R Case No. 3066 of 2017)

State of Assam

-Vs-

Sri Jogeswar Orang @ Pilu Orang ... Accused Person

Present: Smti I. Barman, AJS

Sessions Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah, Public Prosecutor

For the accused : Mr. A.K. Mahanta, Advocate

Date of Argument : 02-03-2019 &16-03-2019.

Date of Judgment : 20-03-2019.

JUDGMENT

1. The factual matrix of the prosecution case as projected in the FIR (Ext. 1), in brief, is that about one year back from filing the FIR, taking the advantage of absence of other family members, accused Jogeswar Orang @ Pilu Orang committed rape on the victim (PW 3) and since then on several occasions he by enticing in various ways and by threatening to disclose her chastity to the villagers, used to do bad act on her near bank of pond, jungle and under bamboo trees and thus tortured her both physically and mentally. It is further alleged that some days prior to filing the FIR, when the accused was committing bad act with her in her house, her uncle

caught the accused red handed and lateron though the villagers assured to settle the matter but the accused fled away.

- 2. On receipt of the ejahar on 11-08-2017 from the informant/victim (PW 3) the O/C Dhekiajuli PS registered the case vide Dhekiajuli P.S. Case No. 724/17 u/s 4/6 of POCSO Act. During investigation, the Investigating Officer (PW 8) recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C. and on completion of investigation having found materials laid chargesheet against the accused Jogeswar Orang u/s 4/6 of POCSO Act.
- 3. On being appeared the accused person, before this Court, my learned predecessor, after hearing both sides, framed charge u/s 4 of POCSO Act against the accused Jogeswar Orang and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed to be tried.
- **4.** To substantiate the case, prosecution examined as many as eight number of witnesses. In statement recorded u/s 313 Cr.P.C, the accused denied all the allegations leveled against him and took the plea of total denial. Defence examined none.
- **5.** I have also heard the argument of learned counsel of both sides and also have gone through the evidence on record.
- **6.** The point for decision in this case is that -
 - (1) "Whether the accused Jogeswar Orang @ Pilu Orang prior to one year from lodging the FIR on 11-08-2017 on several occasions at Singimari Koch gaon under Dhekiajuli Police Station committed penetrative sexual assault on the child victim Miss "X" and thereby committed an offence punishable under section 4 of POCSO Act.

Reasons, Decisions and reason for decision.

7. At the outset, in will be appropriate to have a look at the evidence on record in order to appreciate the contentions raised by the learned counsel for the parties.

8. PW 1, the mother of the victim deposed that on the day of incident when she went to Rangapara, her victim daughter, aged about 16 years, was with her uncle (PW2). On that day, at evening time she heard that accused coming to her house forcefully committed rape on the victim. Then on being enquired the matter, the victim narrated that when she was alone, the accused came to her house and by threatening raped her. Regarding the incident, she called a village meeting where the villagers advised her to file the case. Accordingly, her victim daughter lodged the FIR.

During cross she stated that she had not seen the incident. She came to know about the incident from PW 2 first. She admitted that before police she stated that PW 2 told her that he had seen the accused Jogeswar Orang with the victim in compromising position in the jungle at the side of the tank. She admitted that they reside in the land of the accused who asked them to vacate the land but as they did not vacate, hence strange relation had grown up between them. Defence suggested that as the accused asked them to vacate his land, hence they filed the case falsely which she denied. She further admitted that they did not produce any school or birth certificate regarding age of the victim.

9. PW 2, the uncle of the victim, deposed that on the day of incident from work when he reached home, he asked his wife whereabout of the victim and during search, he had seen the victim with the accused going to the side of the tank where the accused committed rape on the victim. He further stated that at that time mother of the victim was in Rangapara and on her arrival at home, he reported the whole incident to the victim's mother. Regarding this incident, they convened a village meeting but then the accused fled away. He also stated that at the time of incident, the victim was reading in class IX.

During cross, he stated that rape means bad act. He testified that he had seen the accused lying upon the victim. At that time, the victim was completely naked while the accused was wearing a shirt but without pant. He further stated that before doing the bad act, he had seen the victim proceeding towards tank following the accused person. He stated that at

first the accused reached the place of occurrence and then victim reached there. He admitted that witnessing the accused and the victim, he did not raise any alarm and on suspicion, he observed them secretly. He saw that the victim undressed herself first and became naked and thereafter, the victim girl herself laid upon the ground. Then the accused laid upon her body but till then he did not raise any alarm. He observed them for about 5/10 minutes. Thereafter, he informed the matter to his wife and then to the mother of the victim. He admitted about dispute between the accused and the family of the victim.

10. PW 3 is the victim herself. She deposed that on the day of incident when she was alone at home, accused came to her house and threatened that he would spoil her life. Thus the accused quite off and on used to threaten her. Thereafter, the accused took her to the side of the tank and committed her rape by removing her clothes. At that time her uncle PW 2 witnessed the occurrence. On the next day, a village meeting was convened but the accused did not come. Thereafter, she lodged the FIR. She proved the FIR as Ext.1 and her statement u/s 164 Cr.P.C. as Ext.2 and FIR as Ext.1.

During cross she stated that rape means "beyakam". She admitted that it is only the day when her uncle saw the incident, she indulged in such activities and other than that day, she never indulged such sexual activities with any person. She further stated that at the time of incident it was dark. She had not noticed the arrival of her uncle and that he followed them. She came to know that her uncle witnessed them at the place of occurrence. Thereafter on raising alarm by her uncle, 4/5 persons gathered there. During cross, the victim also admitted that in her statement u/s 164 Cr.P.C. she stated that she indulged in such type of activities for last one year and it was only the day when seeing the incident, her uncle raised alarm.

11. PW 4, the then Judicial Magistrate, 1st class, Tezpur deposed that on 12-08-2017 she recorded the statement of the victim u/s 164 Cr.P.C. vide Ext.2. She proved her order dated 12-08-2017 as Ext.3.

In cross-examination, she denied the suggestion that the victim did not speak the word rape before her.

12. PW 6, Rika Engtipi, the Medical & Health Officer of TMCH, deposed that on 14-08-2017 on examination of the victim, found old healed tear at 9 and 3 O' clock position in hymen and as per X-ray report she is above 16 years and below 18 years of age but no any injury mark was seen on her body and private part. She proved the report as Ext. 4.

During cross, she stated that the girl was habituated with sexual intercourse. Therefore, consensus of the girl cannot be ruled out.

13. PW 6 Sri Jogeswar Orang who turned hostile deposed that a village meeting was held on allegation of rape on the victim by the accused and he was also present in the said meeting where he came to know that after the incident, accused fled away from his house.

During cross by defence, he admitted that before police he stated that he came to know from PW 2 that accused was caught red handed while he committed misdeed to the victim at the site of a tank.

14. Evidence of PW 7 Makon Orang, the elder brother of the accused shows that he heard about the incident of rape on the victim by the accused. He also heard that PW 2 saw the incident and caught the accused red handed.

During cross, he stated that he heard about the incident from the villagers, not from PW 2.

15. PW 8 Sri Surachandra Doley, the Investigating Officer, deposed that on 11-08-2017 on receipt of an FIR, he made the GD entry being Borsola OP GDE NO. 167 dated 11-08-2017 and forwarding the same to O/C Dhekiajuli PS, himself started investigation of the case. He recorded the statement of the victim and as it was night, so he sent the victim for medical examination on the next day. He also visited the place of occurrence, drew the sketch map of the place of occurrence vide Ext.5, recorded the

statement of other witnesses, got recorded the statement of the victim u/s 164 Cr.P.C. and on completion of investigation, submitted the chargesheet against the accused Jogeswar Orang u/s 4/6 of POCSO Act vide Ext. 6. He confirmed the statement of hostile witness Durgeswar Orang @ Jogeswar Orang and proved the said portion as Ext. 7.

During cross, he stated that while recording statement of witness Durgeswar Orang, he did not state before him that he is also known as Jogeswar Orang. He had not recorded the statement of one Jogeswar Orang as witness. He further stated that from the investigation he came to know that there is abuse of sex for about one year. He admitted that in medico legal report, no where stated that the victim was sexually abused or assaulted.

16. In this case, the victim (PW3) and her mother (PW 1) claimed the age of the victim as 16 years. Though as per the FIR and the evidence of the victim's uncle (PW 2), at the time of incident, the victim was reading in class IX but the best evidence (School Certificate) with regard to the age of the victim was not produced or seized by the Investigating Officer to ascertain her age. The victim's mother during evidence admitted that they had not submitted any birth certificate or school certificate to the Investigating Officer regarding the age of the victim. The victim in her statement recorded on 12-08-2017 mentioned her age as 16 years and after elapse of two years also she mentioned her age as 16 years. Thus no reliance can be placed on the statement of the prosecturix regarding age. There is also no cogent evidence on the part of victim's mother to indicate that she was a minor and the other witnesses are silent regarding age of the victim girl. In the FIR also, age of the victim was not mentioned. It is found that the evidence that have been brought on record to prove the age of the victim is scanty and consists only on radiological evidence (Ext.4) as per which the victim was above 16 and below 18 years of age. Having regard to such material on record regarding age of the victim, the contention urged by Mr. Mahanta is that the prosecution has not been able to prove satisfactorily the age of the victim girl to be below 18 years on the date of occurrence.

17. According to an observation in Modi's Text Book of Medical Jurisprudence and Toxicology, 20th Edition, radiological examination merely indicates an average age and such age is likely to very in individual cases even of the same province owing to eccentricities of development. Referring to this observation, the Division Bench of Hon'ble Madras High Court in Shanmughan Vs. The state reported in 1984 Cr.L.J. 1081 has observed that the determination of age on the basis of radiological examination can only be an approximate faster and it cannot be taken as a decisive and incontrovertible feature and observed as follows:

"Courts have taken judicial notice of this facts and have always held that evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person, but the evidence is not a conclusive and incontrovertible nature and is subject to a margin of error." As regards the margin of error, the Apex Court in Jayamala Vs. Home Secretary, Govt. of J.K. reported in AIR 1982 SC 1297 also observed that margin of error in age ascertained by radiological examination is two years on either side."

- 18. In Samsul Hoque @ Samsul Haque @ Samsul Alam vs. State of Assam, reported in 2005(3) GLT 105, the doctor who had held the ossification test, had opined that the age of the victim was above 16 years and below 18 years and holding that there is a margin of error of two years on either side in an ossification test, held that the victim was not a minor girl and the case being voluntary elopement, the benefit must go to the accused.
- In the above circumstances, the age of the victim having not been satisfactorily proved to be below 18 years, let us see, the other factual aspect of the case. The victim who is the star witness of the case, in deposition, stated that on the relevant day when none was present in her house, accused coming there threatened her to spoil her life who used to threaten her quite off and on. Thereafter, the accused took her to the side of tank in the jungle and committed her rape by opening her clothes. Her uncle PW 2 witnessed the said incident and a village meeting was called on

the next day. So, in this case PW 2, the victim's uncle is the eye witness and his evidence is of paramount importance to analysis the credence of the statement of the victim. Taking the evidence of PW 2 in it's entirety, it is found that on that day he observed the victim while she proceeded towards tank following the accused person. According to him, accused reached the place of occurrence first and then the victim reached there. Seeing them, he observed secretly so that they could not see him. His evidence also reveals that the victim herself undressed first and then she laid upon ground and thereafter, accused laid upon her body and till then inspite of seeing the incident, he (PW 2) did not raise any alarm and observed for about 5/10 minutes and thereafter, informed the matter to his wife and then to the victim's mother. His evidence clearly indicates that she on her own followed the accused towards the tank and submitted herself to the accused. Being a girl in the verge of majority, she can resist the accused or raise alarm but she did nothing. PW 2 is none other than the uncle of the victim. I find nothing to disbelieve his evidence. Further, the victim also testified that she had not noticed the arrival of her uncle who followed them, and lateron, she came to know that her uncle had seen them at the place of occurrence. Witnessing the incident by PW 2 is admitted by the victim herself. Victim's mother PW 1 also admitted that in statement before police she stated that the victim's uncle (PW 2) reported her that he had seen the accused and the victim in compromising position. The evidence of the victim that she had not noticed arrival of her uncle (PW 2) that he followed them clearly indicates that she voluntarily followed the accused and indulged in sexual act, if any on the day of incident.

Cr.P.C. alleged that besides the day of incident, since one year the accused on several occasions committed her rape in several places but during deposition she stated about only one day's incident except that the accused quite off and on threatened to spoil her life. In cross-examination, she clearly negates of indulging such type of act with the accused for last one year. Again she stated that it was only the day when PW 2 saw her indulging sexual activities. In the same breath she further stated that other than the

day of incident she never indulged sexual activities with any person. She made different version as to whether on one day or on several days she was sexually assaulted. Though she negates habituated in sexual relation but as per medical evidence, old healed hymeneal tear was found and doctor opined that she was habituated in sexual intercourse. Thus appears sharp contradiction in the evidence of the victim herself. The victim alleged that for about one year on several occasions the accused did have sexual intercourse with her but till it was noticed by her uncle she remained silent. The evidence of the eye witness PW 2 also reveals that on the day when PW 2 witnessed the incident, neither the victim raised alarm nor resisted the accused rather it was the PW 2 who after observing them for 5/10 minutes to see what was going on, raised arlam. She did not raise alarm when she was committed rape. Victim's story coupled with the evidence of the eye witness PW 2 is bound to turn the evidence of the victim, doubtful.

- 21. In the case, the FIR indicates that the incident occurred prior to some days of filing the FIR. The PWs remained silent about the day of incident. Prosecution also remains silent for causing delay in lodging the FIR. When the accused was caught red handed while committing physical relation , the testimony of the victim, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the victim regarding rape as truthful to inspire confidence.
- took the plea of land dispute between the accused and the victim's family but it is not acceptable in heinous crime such as rape. It is a cardinal principle of law that the prosecution is to prove the charge beyond all reasonable doubt by producing credible evidence against the accused and the prosecution is to stood on it's own legs, not on the lapse of defence story. Though law permits that testimony of the prosecturix can be accepted without any corroboration, for she has to be placed on a higher pedestals that one injured witness but on studied scrutiny of the evidence of the victim in this case, it is difficult to accept her version. Her evidence does not inspire confidence of this court. The evidence of the victim suffer from

inconsistencies on material particulars and the same is not found of sterling quality. The prosecution case being clouded with shadow of doubt, has lost the authenticity as regards the charge. The cumulative effects of all evidence on record is that the prosecution case remain doubtful.

- 23. While absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of the prosecutrix in view of statutory presumption u/s 114 A of the Evidence Act but if such statement creates doubt, the same may not be acted upon. I am conscious of the sensitivity with which heinous offence of rape has to be treated but in the present case when prosecution failed to prove that the victim is below 18 years of age, the evidence of the victim and her uncle, the eye witness (PW 2) taken as a whole coupled with the medical evidence create doubt about the correctness of prosecution version regarding rape, rather it shows that she indulged into consensus sexual conduct and it cannot be said as a case of rape. Therefore, I am of the opinion that the accused is entitled to benefit of doubt.
- **24.** Accordingly, accused Jugeswar Orang is acquitted from the charge u/s 4 of POCSO Act and set him at liberty forthwith. His bail bond shall remain in force till next six months.
- **25.** Given under my Hand and Seal of this Court on this the **20**th **day of March, 2019.**

(I.Barman) Sessions Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Sessions Judge, Sonitpur,Tezpur.

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno.

APPENDIX

Prosecution Witness

1.	Prosecution Witness No.1	:-	Mother of the victim
2.	Prosecution Witness No.2	:-	Uncle of the victim
3.	Prosecution Witness No.3	:	Victim
4.	Prosecution Witness No.4	:-	Smti B. Khakhlary, JM,1 st class
			Magistrate.
5.	Prosecution Witness No.5	:-	Dr. Rika Engtipi.
6.	Prosecution Witness No.6	:-	Sri Jogeswar Orang.
7.	Prosecution Witness No.7	:-	Makon Orang,
8.	Prosecution Witness No.8	:-	Sri Surchandra Doley, I.O.

EXHIBITS.

Exhibit 1 : FIR.

Exhibit 2 : 164 Cr.P.C. statement of the victim.

Exhibit 3 : order dated 12-08-2017.

Exhibit 4 : Medical report.

Exhibit 5 : sketch map

Exhibit 6 : Chargesheet.

Exhibit 7: Relevant portion of statement of

witness Durgeswar Orang @ Jugeswar Orang.

(I.Barman)
SESSIONS JUDGE,
SONITPUR: TEZPUR