IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

SPECIAL POCSO CASE NO. 23 of 2016

Under section 4 of POCSO Act.

(Arising out of Jamuguri PS Case No. 98 of 2016)

State of Assam

-Vs-

Sri Bogai Das and Sri Srimanta Das

Accused Persosn

Present: Smti I. Barman, AJS

Special Judge, Sonitpur, Tezpur.

For the State : Mr. Munin Chandra Baruah, Spl.P.P.

For the accused : Md. I. Ansari, Advocate

Date of Argument : 07-09-2019

Date of Judgment : 21-09-2019.

JUDGMENT

1. The prosecution case against the accused person as projected in the FIR (Ext. 2), in brief, is that Srimanta Das had love affairs with the informant's 15 years old victim daughter and due to having physical relation, she carried pregnancy. When it comes to the knowledge of accused Srimanta Das that the victim would be examined by doctor to confirm her pregnancy, on 28-06-2016, at around 6 p.m. he took the victim to his house and keeping her in the room of his father Bogai Das, he fled away. Then taking advantage of absence of Srimanta Das, accused Bogai Das by gagging mouth of the victim, rapped her inspite of being resisted by her and

asked her to get marry with him. It is further alleged that the accused Bogai Das also threatened the victim to kill if she would not marry him.

- 2. Upon receipt of the ejahar from the informant (PW 1), the O/C registered the case being Jamuguri P.S. Case No. 98/16 u/s 366 (A)/376(2) (i) IPC, read with section 4 of POCSO Act and launched investigation. The Investigating Officer (PW 9) recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C. arrested the accused persons Srimanta Das and Bogai Das and on completion of investigation, having found materials, PW 8 SI Keshab Ranjan Choudhury submitted the charge-sheet against the accused Srimanta Das and Bogai Das u/s 4 of POCSO Act.
- 3. On being appeared the accused persons before this Court, my learned predecessor, after hearing both parties, framed charge u/s 4 of POCSO Act against the accused Srimanta Das and Bogai Das and particulars of the charge on being read over and explained to the accused persons, they pleaded not guilty and claimed to be tried.
- **4.** To substantiate the case, prosecution examined as many as nine witnesses. In statement recorded u/s 313 Cr.P.C, the accused denied all the allegations leveled against them and taking the plea of total denial, accused Srimanta Das stated that the victim's mother took the victim to his house but as his father did not allow them to enter into their house, a quarrel took place and thereafter falsely implicated them with a concocted story.
- I have 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 Srimanta Das on several occasions prior to 28-06-2016 and accused Bogai Das on 28-06-2016, at Panpur, Chengelimara, under Jamuguri 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.** In order to appreciate the argument advanced on behalf of both the sides, it is considered next to outline a sketch of the evidence on record.
- 8. PW1, the mother of the victim, stated that on the day at around 6 p.m. when her victim daughter, aged about 15 years was near the gate, accused Srimanta Das took her daughter by holding her hands to his house. Knowing from Nabajyoti Das and Radhika Das that accused Srimanta Das took her daughter to his house, they went to the house of Srimanta Das but Gopal Das, elder brother of Srimanta Das did not allow them to enter into the house. She informed the matter to the Village head man Prabhat Das (PW 3) and called him to the house of Bogai Das to rescue her daughter. They hearing commotion inside the house, suspected that Bogai Das might be inside the house. Then he along with Gaonburah and one Jewel Das went to the house of Bogai Das and knocked at the door of Bogai Das and accordingly on opening the door, they rescued the victim from the clutches of Bogai Das. They noticed some marks on the face of the victim. She further stated that the village headman Prabhat Das asking her to put signature on a paper, forced her not to file any case. Thereafter, they brought back the victim home and on being asked the victim reported her that accused Bogai Das committed her rape. As it was night, hence, on the next day she filed the FIR, Ext. 2. According to her, her daughter had love with accused Simanta Das and through him she carried pregnancy of three months at the time of incident.

During cross she asserted that at the time of incident, the victim was pregnant of three months from the side of Srimanta Das but they did not file any case for pregnancy of her daughter and after the day of incident only, she came to know about the pregnancy of her daughter.

9. PW 2 is the victim. She testified that she used to go to the house of Srimanta Das three days in a week for tuition. On the day of incident also at around 6 p.m., she went to the house of Srimanta Das for tuition. She

admitted that she had love affairs with the accused Srimanta Das and for having physical relation with her consent, she carried pregnancy through him. She further stated that after carrying pregnancy, one day when Srimanta Das came to her house, she reported him about her pregnancy. Then his mother gave her six pills for causing miscarriage, out of which she consumed four pills and finding the remaining two pills under her bed, her mother confirmed that those tablets are used for causing abortion. When she informed Srimanta Das that her mother came to know about her pregnancy, on the very day, at around 6 p.m. Srimanta Das took her to his house and keeping her in his house, he went away. At that time, the parents of Srimanta were present at home. Thereafter, accused Bogai Das, father of accused Srimanta Das taking her to his room, raped her forcefully. She stated that when her family members came to the house of Bogai Das in search of her, he denied her presence in his house. At that time, accused Bogai was gagging her mouth so that she could not raise alarm and asked her to say to the villagers or Gaonburah, if they come, that she got married with Bogai Das. She further stated that at night when her family members along with Gaonburah came to the house of Bogai Das to take her, then accused Bogai Das asked to give a writing that no case would be filed. Finding no other alternative, her mother gave a writing to the Goanburah. According to her, after consuming pill, miscarriage was caused to her. At that time she was reading in class IX and 15 years old. She proved her statement u/s 164 Cr.P.C. as Ext. 3. She denied the suggestion that she did not carry pregnancy. According to her, after 2/3 days of consuming pill, miscarriage was caused to her and she suffered from bleeding for two to three months. She admitted that she did not produce any document regarding abortion. She further stated that when Bogai Das committed her rape she sustained injury on her private parts and had shown the same to the doctor.

10. PW 3 Prabhat Chandra Das, the village headman, turned hostile. He testified that on 28-06-2016, mother of the victim coming to his house informed him that her daughter went on missing since 7 p.m. She also told her that her daughter sometimes visited the house of Srimanta Das, S/O

Bogai Das, so she suspected that victim might be in the house of Bogai Das. Thereafter, he along with Shyam Das (PW 4) proceeded to the house of Bogai Das and met the victim there along with Srimanta Das. They also found Bagai Das in the court yard of his house.

During cross by defence he stated that the mother of the victim wanted to give marriage her daughter with Srimanta Das. He stated that as the accused Bogai Das restrained the victim from entering into his house being accused Srimanta Das was a student, they handed over the girl to her mother. According to him, Bogai Das did not allow the victim to marry his son Srimanta Das, hence the case was filed falsely. He further stated that on being asked, the victim reported that at her own will, she went to the house of Bogai Das.

11. PW 4 Shyam Das, related brother of the accused Bogai Das, also turned hostile. He accompanied the village head man PW 3 to the house of the accused after being informed by the victim's mother about missing of the girl. He stated that on the day of incident, the victim went to the house of Srimanta Das but his father Bogai Das driven her out from his house regarding which a quarrel took place and on arrival of village head man, the girl was handed over to her mother.

This witness also in the same tune with PW 3 stated that intending to give marriage of the victim with Srimanta Das, the mother of the victim sent her to the house of Bogai Das but Bogai Das vehemently opposed being his son was a student and thereafter the village headman handed over the girl to her mother.

12. PW 5 Jewel Das testified that victim's mother informing him that Srimanta Das had taken her daughter to his house, asked him to bring back her daughter. Then he went to the house of the accused and found accused Bogai Das sitting in the court yard but on being asked Bogai Das as to whether his son had brought the victim, he denied. Then he advising the victim's mother to inform village headman, returned home. In the next day

from the victim's mother he heard that victim was recovered from the house of the accused persons.

- 13. PW 6 Dr. Tutumoni Handique, the Medical Officer deposed that on 30-06-2016 she examined the victim and found hymen absent but found no injury mark on her body or private part and as per X-ray report victim was above 18 years. There was no sign of recent sexual intercourse and victim was pregnant of one and half month. She proved the report as Ext.3.
- PW 7 Biswajyoti Hazarika, the Head Master of Panpur High School, proved the School Admission Register of Panpur High School as Ext. 9 wherein the victim was reading in class VIII at the time of incident. According to him, as per admission register, the date of birth of the girl was 31-12-1999. He proved the attendance Register of class VIII of Section A as Ext. 10 which disclosed her attendance till 26-11-2015. He also proved the counterfoil of School certificate as Ext. 11 as per which her age was 16 years 5 months 28 days on 28-06-2016.

During cross he stated that on 01-01-2013 the victim got admitted in class VI in Panpur High School but at the time of admission no birth certificate was produced. He stated that the date of birth in Ext.11 was entered as per school certificate submitted at the time of admission but he had not produced the said school certificate. He admitted that they issued Ext. 11 as a Reading certificate.

15. PW 9, ASI Phanidhar Hazarika, the Investigating Officer visited the place of occurrence, prepared the sketch map of the place of occurrence, Ext. 13 and recorded the statement of the victim and the informant at the police station. He also recorded the statement of other witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C. and also arrested the accused Bogai Das and Srimanta Das. He confirmed the statement of hostile witness PW 3 Prabhat Das and PW 4 Shyam Das made before him u/s 161 Cr.P.C.

During cross he stated that no DNA test was conducted. He confirmed that as per the medical report that age of the victim is above 18 years.

PW 8 SI Keshab Ranjan Chowdhury, another Investigating Officer submitted the charge sheet, Ext. 12, against the accused persons u/s 4 of POCSO Act.

16. In the case, regarding age of the victim girl, prosecution examined PW 7 Biswajyoti Hazarika, the head master of Panpur High School. He produced the Admission Register of the school proved as Ext.9 wherein the date of birth of the victim is mentioned as 31-12-1999. According to him, at the relevant time she was a student of class VIII, Section A. This witness proved the Student Attendance Register as Ext. 10 in which her attendance had shown till 26-11-2015. He proved the counter foil of Reading certificate of the victim as Ext.11, as per which the victim was 16 years, 5 months 28 days on 28-06-2016. During cross, he stated that on 01-01-2013 the victim got admitted in their school in class VI but at that time no birth certificate was produced and they mentioned her date of birth in the counterfoil as per school certificate submitted at the time of admission but the said school certificate is not produced. He admitted that the basis of date of birth mentioned in the LP school certificate only can say by LP School authority and they issued Ext. 11 as a reading certificate. Though PW 7 during cross stated that as per the school certificate submitted at the time of admission, the date of birth of the victim is 31-12-1999 but the said certificate is not produced in the court. Prosecution also failed to produce any document or register wherein the victim was admitted first. On the other hand, the medical report, Ext. 3 reveals that the victim is above 18 years. Though in oral evidence, the victim and her mother claimed her age as 15 years at the time of incident but it is not supported by Admission Register of the Panpur High School wherein her date of birth was entered as 31-12-1999 and in that case she was 16 years 6 months 27 days old on the day of incident i.e. on 28-06-2019. So, the evidence of the victim and her mother that she was 15 years old is not acceptable. The victim's mother PW 1 who is the best person to say the age of her daughter remained silent regarding date of birth of the child. Though the prosecution side by examining PW 7 proved the reading certificate but it was not seized during investigation, it was produced in court during trial. Furthermore, for non proving the LP School

certificate of the girl where she was first admitted, the reading certificate of Panpur High School cannot be accepted to be authentic age proof certificate confirming the age of the girl as minor. That being the position coupled with the medical evidence, I am of the view that the prosecution failed to prove that the victim was below 18 years of age at the relevant time.

- **17.** In the above, now, let us see other facts and circumstances of the case. The prosecution story of this case is that out of love affairs accused Srimanta Das did have physical relation with the victim, as a result of which she carried pregnancy of three months at the time of filing the FIR dated 29-06-2016 and knowing that her pregnancy came to the knowledge of victim's mother, accused Srimanta Das took the victim girl on 28-06-2016 at around 6 p.m. to his house and keeping her in his house, he fled away and then accused Bogai Das, father of Srimanta Das committed her rape. In this respect, the most material witness, the victim PW 2, admitting her love affairs with accused Srimanta Das, stated that the accused Srimanta Das did have physical relation with her consent, as a result of which she carried pregnancy through him and when she informed the matter to Srimanta Das, his mother gave her six numbers of tablets to consume, out of which she consumed four tablets and kept the remaining two tablets under her bed but finding the said two tablets, her mother when got confirmed that the tablets were for causing abortion, she informed Srimanta Das that her mother came to know about her pregnancy and then on the very day i.e. on 28-06-2016, at around 6 p.m. he took her to his house but thereafter he went out from home. At that time the mother of Srimanta and father accused Bogai Das were present. She further alleged that after Srimanta Das left his house, his father accused Bogai Das taking her to his room raped her. It is unbelievable that when the wife of accused Bogai Das was very much present at home, he would commit rape to a girl. She being a major or in the verge of majority can resist the accused or raise alarm to draw attention the wife of the accused but she did nothing.
- **18.** Further the alleged incident occurred in the evening after 6 p.m. of 28-06-2016 at 1.35 p.m. i.e. within less then 48 hours but no injury was found on her body or on private part though she alleged that due to

rape by accused Bogai Das, she sustained injury on her private part and had shown the same to doctor. Though the victim's mother stated that on the day, when they went to the house of the accused in search of the victim they noticed some marks over the face of the victim but the medical evidence does not suggestive of any injury on her person.

19. The victim alleged that after committing rape, Bogai Das asked her to say the villagers or Gaonburah that she entered into the marriage with Bogai Das and when her mother along with Gaonburah came to the house of the accused to bring back her, accused Bogai Das did not allow to send her back instead her mother had to give a writing that no case would be filed but PW 5 Jewel Das, the neighbour stated that when they went to the house of Bogai Das they found him in the court yard. Hostile witness PW 3 Prabhat Das, the village headman also stated that when he went to the house of Bogai Das along with Shyam Das (PW 4) met the victim and Srimanta Das there when Bogai Das was in the court yard. PW 4 Shyam Das who accompanied PW 3 to the house of Bogai Das also corroborated the version of PW 3. So PW 3 to PW 5 categorically stated that hearing about the incident, when they immediately went to the house of the accused, found accused Bogai Das in his court yard. So, the evidence of PW 1 that on opening the door of the house of accused Bogai Das they rescued the victim from the clutches of Bogai Das or the evidence of the victim that when her family members came to the house of the accused in search of her, accused Bogai Das was gagging her mouth cannot be acceptable to be reliable and believed. Further, the evidence of the victim that on that evening accused Srimanta Das keeping her in his house, he went away negates by the evidence of PW 3, the hostile witness who stated that when they went to the house of the accused found the victim along with Srimanta Das. They made different version in that respect. In the case, the testimony of the witnesses particularly the testimony of the prosecutrix, the associated circumstances and the medical evidence leave a mark of doubt to treat the testimony of the prosecutrix as truthful to inspire confidence regarding rape by accused Bogai Das and he cannot be held guilty of alleged rape on the victim.

- 20. With regard to allegation of penetrative sexual assault against accused Srimanta Das, the victim in evidence admitted her love with the accused Srimanta Das. She also admitted that the accused Srimanta Das did have physical relation with her consent. She nowhere stated that accused Srimanta Das did have physical relation with her forcefully or under coercion or threat. Rather she submitted herself to accused Srimanta Das. Other witnesses remained totally silent with regard to physical relation between the victim and accused Srimanta Das. The evidence of the victim clearly indicates that she being a major one or in the verge of majority was a consenting party in having physical relation with accused Srimanta Das, as a result of which she carried pregnancy and lateron after filing the FIR, miscarriage was caused to her for consuming pills for abortion. In the case prosecution also failed to prove that the victim was below the age of 18 years as discussed above, therefore, it cannot be safely held that the alleged offence attracted the provision under POCSO Act for holding 'consent' in having sexual relation with Srimanta Das as immaterial.
- 21. On a consideration of the entire evidence in this case, I am of the view that the prosecution did not succeed to establish the charge u/s 4 of POCSO Act or rape against accused Srimanta Das and Bogai Das beyond all reasonable doubt. Consequently accused Srimanta Das and Bogai Das are acquitted from the charge u/s 4 of POCSO Act on benefit of doubt and set them at liberty forthwith. Their bail bonds shall remain in force till next six months.
- 22. Given under my Hand and Seal of this Court on this the 21st day of September, 2019.

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

Dictated and corrected by me.

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

APPENDIX

Prosecution Witness

Prosecution Witness No.1 Mother of the victim 1. Prosecution Witness No.2 Victim 2. 3. Prosecution Witness No.3 Sri Prabhat Ch. Das, 4. Prosecution Witness No.4 Shyam Das 5. Prosecution Witness No.5 Jewel Das Prosecution Witness No.6 Dr. Tutumoni Handique, M.O. 6. 7. Prosecution Witness No.7 Sri Biswajit Hazarika. Prosecution Witness No.8 8. SI keshab Ranjan Choudhury, I.O. 9. ASI Phanidhar Hazarika, I.O. Prosecution Witness No.9

EXHIBITS.

Exhibit 2 : FIR.

Exhibit 3 : 164 Cr.P.C. statement of the victim.

Exhibit 3 : Medical report

Exhibit 4 : X-ray plates

Exhibit 5 : vaginal smear report

Exhibit 6 : HCG report

Exhibit 7 : Advice slip

Exhibit 8 : Police requisition

Exhibit 9 : School admission register

Exhibit 10 : student attendance register

Exhibit 11 : counter foil of transfer/reading/leaving

certificate of Marami Das

Exhibit 12 : Charge sheet

Exhibit 14 : CD of Jamuguri PS Case No. 98/16.

(I.Barman)
SESSIONS JUDGE,

SONITPUR: TEZPUR

SONIFIPURDISTRICTION