IN THE COURT OF THE SPECIAL JUDGE, NAGAON ::: ASSAM.

Special (POCSO) Case No.-74/2018_

U/S-6 of the POCSO Act, r/w-506 IPC.

State

- Versus -

Rafique Bepari

: Accused person.

Present:

Md. A. Rahman, AJS Special Judge, Nagaon.

Appearance & particulars :-

For the State : Mr. M.J. Neog, Ld. Special Prosecutor.

For the accused person : Mr. A.H. Khandaker, Ld. Advocate.

Charge framed on : 18/09/2018.

Evidence recorded on : 12/11/2018, 14/03/2019,

15/03/2019, 30/03/2019, 25/04/2019, 26/04/2019, 11/07/2019.

Date of recording 313 Cr.P.C. statement: 15/07/2019.

Date of Argument : 08/08/2019.

Date of Judgment : 17/08/2019.

JUDGMENT

- 1. The prosecution case unfolded in the trial may be briefly stated as follows: - "Miss. X" (9 years old), daughter of the complainant (PW-2), a student of Class-IV of Kuthori Govt. L.P. School used to stay with her maternal grand-parents at Village- Najan Nizbasti. Accused Rafique Bepari is a closed neighbour of her paternal grand-parents. She used to address the accused as 'Nana' (grandfather). A few days prior to the lodging of the written Ejahar by the father of the victim, accused Rafique Bepari on the relevant evening lured her to his house in order to provide her a banana. As soon as she reached the house of the accused, he took her inside his house. Thereafter, he laid her on his bed and climbed on her body and committed bad work after removing her garment (panty). She could not shout as he gagged her mouth. He has also threatened her to kill in the event she discloses the occurrence to others. After 2 / 3 days of the occurrence, the victim disclosed to her maternal grandmother that she was not physically well. Her grandmother also noticed that she was physically unwell. On being asked, she disclosed the occurrence to her grandmother. Accordingly, she informed the same to the father of the victim who in turn lodged the Ejahar.
- 2. On receipt of the written FIR (Ext.-2) from complainant Inamul Ali (actual name withheld), PW-8 S.I. Biraj Mohan Deka, the I/C of Bagori Police Patrol Post made GDE No.-12, dated-01/07/2018. The FIR was forwarded to Jakhalabandha Police Station for registration of the case. Accordingly, Jakhalabandha P.S. Case No.-77/2018 was registered u/s-4 of the POCSO Act. He immediately visited the place of occurrence and recorded the statements of the witnesses including the victim child. She was also sent to Nagaon B.P. Civil Hospital for her

medical examination. He also got recorded her statement u/s-164 Cr.P.C. through the Judicial Magistrate at Kaliabor. The accused was arrested and forwarded to the court for judicial custody. After collecting the medical examination report, he submitted Charge Sheet against accused Rafique Bepari u/s-4 of the POCSO Act on 31/07/2018. After submission of the Charge Sheet, the instant Special (POCSO) Case was registered.

- 3. The Hon'ble Sessions Judge, Nagaon transferred the record of this case to this court for disposal. After production of the accused before this Special Court, learned Special Prosecutor as well as the learned defence counsel were heard on the point of sentence. Upon finding sufficient incriminating materials against the accused, charge u/s-6 of the POCSO Act, r/w Section-506 IPC were framed, read over and explained to the accused, to which he pleaded not guilty and claimed to be tried. As per mandate of the POCSO Act, the trial was held in camera.
- 4. Prosecution in order to substantiate the charges against the accused examined altogether 8(eight) witnesses including the doctor and the investigating Police Officer. On completion of recording evidence of the prosecution side, the accused was examined u/s-313 Cr.P.C. The defence plea is of total denial. The further plea of the accused is that the case was lodged because of land dispute. He has declined to examine the defence witness.
- 5. I have heard Mr. M. J. Neog, learned Special Prosecutor as well as Mr. A.H. Khandaker, learned counsel for the defence. I have also very meticulously and thoroughly perused the evidence.

6. Now the points for determination are as follows:-

- (i) Whether the accused committed aggravated penetrative sexual assault upon "Miss. X" and thereby committed an offence punishable u/s-6 of the POCSO Act?
- (ii) Whether the accused person, on the same date, time and place of occurrence, committed criminal intimidation by threatening PW-1 to finish her life if she would disclose the occurrence to others and thereby committed offence punishable u/s-506 IPC?

DISCUSSION, DECISIONS AND REASONS THEREOF

- 7. Both the offences were allegedly committed in the same transaction. So, both the points are being discussed together for the sake of convenience and brevity. Before entering upon analysis and appreciation of evidence to ascertain whether the accused is guilt or not, it is essential to take a glimpse of the relevant statements of the witnesses.
- 8. Prosecution examined the victim "Miss. X" as PW-1. During the camera trial, this court under provision of Section-267(2) Cr.P.C. recorded her evidence in the form of "Question-Answer". Her evidence was recorded on 12/11/2018 and she stated her age to be 9(nine) years. Hence, no oath was administered to her. Extreme care has been taken at the time of recording her evidence to ensure that prosecution could not put any leading question to her. In her evidence-in-chief, PW-1 stated that although she cannot remember the exact date, but it occurred in the current year on a certain day at about 2 p.m. Accused Rafique Bepari called her to his house telling that he would provide her a banana. Accordingly, she went to his house. The accused

made her sleep on his bad, removed her inner garment, embraced her and inserted his private part into her private part through which she passes urine. After committing bad work with her, she threatened her to leave his house. She disclosed the occurrence to her maternal grandmother at first. As the accused threatened her, so she could not disclose the occurrence to her maternal grand-parents. Police took her to the hospital accompanied by her maternal grandmother. Doctor examined her. She has also stated that she was produced before the Magistrate. Ext.-1 is her statement before the Magistrate whereon Ext.-1(1) and Ext.-1(2) are her signatures. The house of accused Rafique Bepari is nearby the house of her maternal grand-parents.

During her cross-examination, she replied that at the relevant time accused Rafique Bepari had taken her to his house, his wife was not at home as she had gone to bring cattle from the paddy field. Her grand-parents did not have visiting terms with Rafique Bepari. On the very day of occurrence, she could not disclose the occurrence to others. She denied all the relevant suggestions put by the defence.

9. PW-2 is the complainant as well as the father of PW-1. His evidence was recorded on 14/03/2019. He has testified that the occurrence took place about 8 / 9 months back and on the relevant day at about 12 noon getting a telephonic call from his mother-in-law Sahiron Nessa (PW-3), he immediately arrived at her house. She disclosed to him that accused Rafique Bepari about 14 / 15 days back lured PW-1 to his house. Thereafter, he committed rape on her. He observed his daughter (PW-1) was physically unwell. On being asked, she disclosed to him that accused Rafique Bepari had done bad work with her. He immediately went to Jakhalabandha Police Station and lodged Ext.-2 Ejahar (FIR). He has affirmed that Ext.-2(1) is his signature. At the relevant time of occurrence, PW-1 was studying in

Class-IV and she was around 9 / 10 years old.

In his cross-examination, he has stated that as soon as he could come to know about the occurrence, he disclosed it to the villagers including Ibrahim. On the same date of lodging the Ejahar, police asked him, his parents-in-law and his daughter about the occurrence. He denied all the relevant suggestions.

10. PW-3 is the maternal grandmother of PW-1. She is rustic and illiterate lady who even does not know how to put her signature. Her evidence was recorded on 15/03/2019. She has testified that about 8(eight) months back on a certain day, her granddaughter (PW-1) stated to her that she was unwell. She also observed that her granddaughter was physically unwell. PW-1 disclosed to her that the accused had called her to his house and gave a banana. Thereafter, he made her to sleep on his bad and committed bad work with her after removing her clothes. Thereafter, she immediately disclosed the occurrence to her husband. Her son-in-law (PW-2) getting a telephonic call from her immediately arrived. Then, she disclosed the occurrence to him. On being asked by her husband and PW-2, PW-1 disclosed the occurrence to them also. Her husband disclosed the occurrence to the villagers including Jamaluddin, Rafique Ali, Abdul Motin and others. As per instruction of the villagers, PW-2 lodged the FIR. She has further testified that at the relevant time of occurrence, PW-1 was 9(nine) years old and was studying in Class-IV.

In cross-examination, PW-3 replied that her house is nearby the house of accused Rafique Bepari. She has denied the suggestion that in her previous statement she did not state before the I/O that her granddaughter was unwell and accused Rafique Bepari lured her to his house on the plea of providing her a banana and thereafter committed bad work with her after removing her cloth.

11. PW-4 Rahim Ali is the maternal grandfather of PW-1. His evidence was recorded on 30/03/2019. He is also an illiterate village man and put thumb impression. According to him, the occurrence took place last year on the relevant day at around 11 / 11:30 a.m, he returned home and found his granddaughter (PW-1) was unwell. When he asked his wife (PW-3) about ailing physical condition of his granddaughter, she replied that PW-3 could not pass urine and she developed fever. Then, he asked PW-1 as to what had happened to her. She replied that accused Rafigue Bepari lured her to his house telling that he would provide a banana. Thereafter, he committed bad work with her about 15 days back. After coming to know about the occurrence from PW-3, he called Rafique Ali, Jamaluddin and Abdul Motin to his house and disclosed to them about the occurrence. When they asked about the occurrence, PW-1 disclosed to them that accused Rafique Bepari called her to his house to provide her banana and thereafter he committed bad work with her. At the relevant time, his granddaughter was 9(nine) years old and was reading in L.P. School.

In cross-examination, he has stated that the house of Rafique Bepari is nearby his house. The houses of other persons are at a certain distance away from his house. He has denied the suggestion that in his previous statement before police he did not state that PW-1 on being asked disclosed to him that the accused had called her to his house telling that he would provide a banana and thereafter committed bad work with her. He has denied all other suggestions.

12. PW-5 Rafique Ali, PW-6 Jamaluddin and PW-7 Abdul Motin are the co-villagers of PW-4 as well as the accused person. The evidence of the said three witnesses was recorded on 25/04/2019 and 26/04/2019. They have stated that they know PW-2, his daughter PW-1 and accused Rafique Bepari. They have deposed that on the relevant day

they went to the house of Ibrahim Ali accepting his invitation for the lunch. Then, PW-4 called them to his house stating that there was a talk with them. When they reached his house, he stated that accused Rafique Bepari had committed bad work with his granddaughter (PW-1) about 15(fifteen) days back. PW-6 and PW-7 stated that when they asked PW-1 about the occurrence, she stated that accused Rafique Bepari called her to his house about 15 days back and committed bad work with her. They denied all the relevant suggestions.

13. PW-8 S.I. Biraj Mohan Deka is the I/O of this case. He has given the details regarding the investigation of the case. He deposed that on 01/07/2018 at about 7:30 p.m. while working as I/C at Bagori Police Out Post, he received one written Ejahar. On the basis of the Ejahar, he made GDE No.12, dated-01/07/2018 and forwarded the same to the O/C of Jakhalabandha Police Station for registering a case and he himself took up investigation of the case. He immediately proceeded to the place of occurrence accompanied by his staff. He found the accused had been already apprehended and assaulted by public. He rescued him from the clutch of the public and sent him to the hospital for treatment. He drew Ext.-3 Sketch Map of the place of occurrence. He examined the complainant, victim and other witnesses. He brought the victim escorted by Woman Police Constable to Bagori Out Post. On the next day, the victim escorted by WPC/645 Rambha Nargery was sent to Nagaon B.P. Civil Hospital for her medical examination. The victim was also produced before the Magistrate at Kaliabor for recording her statement. He collected one birth certificate of the victim from her complainant father. He arrested and forwarded the accused to jail custody during investigation. On the conclusion of investigation, he collected the medical examination report of the victim and submitted Ext.-4 Charge Sheet against accused Rafique Bepari u/s-4 of the POCSO Act on 31/07/2016. He has confirmed that Ext.-2 is the FIR and Ext.-2(1) is his signature. He also confirmed that Ext.-3(1) is his

signature.

In cross-examination, he has denied the suggestion that he mechanically conducted investigation without following the provisions of Cr.P.C.

14. PW-9 Dr. Bhaswati Sharma has deposed that on 02/07/2018 while she was posted as M&HO.1 at Nagaon B.P. Civil Hospital at about 2 p.m, she examined PW-1, in reference to Jakhalabandha P.S. GDE No.-77/2018, u/s-4 of the POCSO Act, 2012, on being escorted by WPC/645 Rambha Nargary. Examination of the victim was done vide OPD Registration No.-13002, dated-02/07/2018.

On examination, PW-9 found the following:-

Identification Marks -

- (a) Mole on left side of left eyebrow.
- (b) Mole on left cheek.

Height - 146 Cms.

Weight - 24 Kgs.

Teeth - 11/9.

Breast - Developed.

Auxiliary Hair - Absent.

Pubic Hair - Absent.

Hymen - No recent tear.

Vaginal Injury – Vaginal opening red and inflamed.

Marks of violence - Vaginal opening red and inflamed.

Clothings - Frock.

LMP - Puberty not attained.

Smear examination vide Regd. No.13002, reported by

Pathologist Dr. J. Hussain shows - No Spermatozoa.

She has opined that she found a sign of violence mark on the vagina of the victim child because vaginal opening was found reddish and inflamed. She has confirmed that Ext.-5 is the medical examination report and Ext.-5(1) is her signature. On the query of the court as to what is meant by "Hymen – no recent tear", she categorically stated that there was tear of hymen; but it was not within 4(four) houses from the time of examination.

In cross-examination, the defence has got it clear that redness on the opening of vagina was due to violence. She denied the suggestion that she had not followed the procedure at the time of examining the patient.

15. APPRECIATION OF EVIDENCE :-

PW-1 is the victim as well as the eye-witness to the occurrence. She is the star witness of the prosecution. The most crucial point for determination is what was the actual age of PW-1 at the relevant time of occurrence. PW-2(father of PW-1) lodged Ext.-2 FIR on 01/07/2018 wherein he mentioned that the occurrence took place about a few days back. Ext.-1 proves that statement of PW-1 was recorded by Smti. P. Chakraborty, learned SDIM, Nagaon on 02/07/2018. PW-1 has stated in her Ext.-1 statement that the occurrence took place about three days back. Therefore, it can be inferred that the occurrence had taken place around 28th / 29th lune. 2018. PW-1 while deposing before this court on 12th November stated that she was 9(nine) years old and she was reading in Class-IV at Kuthori L.P. School. PW-2 has deposed that his victim daughter (PW-1) was a student of Class-IV and she was around 9 / 10 years at the relevant time of occurrence. PW-3 and PW-4 being the maternal grandparents of the victim have also deposed that she was 9(nine) years old

and was reading in Class-IV in L.P. school. The defence side did not challenge the oral testimony of the said witnesses regarding the age of PW-1 at the relevant time of occurrence. The PW-2 being the father has a fair idea about the age of his daughter (PW-1). Similarly her grandparents also have the knowledge about her age. From the evidence of PW-9 and Ext.-5, it is palpably seen that the height and weight of PW-1 was 146 cms and 24 kgs respectively on 11/07/2019 being the date of her examination. Her teeth were 11 / 9. Moreover, PW-1 also did not attain puberty. In rural area, the children are admitted in school for the first time at the age of around 5 years. Therefore, PW-1 was around 9(nine) years while reading in Class-IV at the relevant time of occurrence. From the above oral and medical evidence, it can be safely held that PW-1 was below 12 years at the relevant time of occurrence. Therefore, non-production of age-proof certificate or ossification test of PW-1 is not fatal. Even by imagination, it cannot be held that PW-1 attained the age of 12 years at the relevant time of occurrence. It is clear from the evidence of PW-1 that the accused at the relevant time of occurrence lured her to his house with a plea of providing her a banana. As soon as she arrived at his house, the accused made her sleep on the bed. Then, he removed her inner garments and inserted his private part (penis) into her vagina. She has categorically stated that at the relevant time, the wife of accused Rafique Bepari was not at home and she had gone to bring cattle from the paddy field. There is absolutely nothing in her cross-examination to suggest that she falsely implicated the accused in the heinous crime. Her testimony before this court is corroborated by her statement recorded u/s-164 Cr.P.C. (Ext.-1). PW-1 has clearly stated that immediately after committing bad work with her, the accused threatened her to leave his house. In her Ext.-1 statement, she has clearly stated that the accused threatened her if she discloses the occurrence to others. At the time of deposing before this court, PW-1 could not say the exact date of occurrence. In Ext.-1, she stated that the occurrence took place in the evening; but in her deposition before the court she stated that the occurrence took

place at around 2 p.m. The variation of the statement made vide Ext.-1 and the statement made before the court with regard to time of occurrence is not material to disbelieve her testimony to raise any doubt on the veracity of her credence. She being child has undergone horrific experience after the occurrence. Certainly, she does not want to recall each and every moment of the occurrence which makes her sadden and insecured. Certainly because of threat from the accused and her suffering from severe physical and mental trauma, shy and being disgraced, she could not disclose it to her grand-parents until PW-3 found her physically unwell. Medical evidence of PW-9 and Ext.-5 corroborates the testimony of PW-1 that on account of committing sexual intercourse upon her by the accused, she sustained injury on her vagina. PW-9 found red and inflamed opening of the vagina of PW-1 which was palpably due to violence. Moreover, there was also tear of hymen although it was not recent because PW-1 was examined after 3 / 4 days of the occurrence. PW-1 is found to be trustworthy and wholly reliable witness. Thus, prosecution by adducing oral evidence of PW-1 and medical evidence has proved that the accused committed offence of penetrative sexual assault as defined u/s-3 of the POCSO Act. It is needless to mention that as per Section-3(a) of the Act, penetration of penis to any extent into the vagina, mouth, urethra or anus of a child amounts to commission of penetrative sexual assault. It has been already ascertained and proved that PW-1 was below 12 years at the relevant time of the occurrence. Therefore, she is a child within the definition u/s-2(d) of the Act. Again as per Section-5(/) of the POCSO Act, penetrative sexual assault on a child below 12 years is aggravated penetrative sexual assault.

16. In the light of the above discussion of evidence, it is held that the prosecution has been able to prove that the accused committed offence u/s-5 of the POCSO Act. Moreover, the court is also under the duty to draw statutory presumption u/s-29 of the Act that the

accused has committed penetrative sexual assault unless the contrary is proved. Here in this case, the defence side has not adduced evidence to rebut the said statutory presumption. The accused also did not offer to adduce evidence to show that the case against him is false. The plea of the accused raised in his statement u/s-313 Cr.P.C. that he has lost sexual power due to suffering from sugar (diabetes) for last 15 years appears to be a false plea. PW-2, PW-3 and PW-4 also corroborate PW-1 that she reported the occurrence to them. Even if the evidence of PW-5, PW-6 and PW-7 is not taken into consideration, then also the case stands proved against the accused. The accused is convicted u/s-6 of the POCSO Act for committing the offence u/s-5 of the Act. He is also convicted u/s-506 IPC.

17. **Victim's compensation:**

It has been already held that PW-1 victim child has undergone severe physical and mental trauma as direct consequence of the crime. Her right to live with dignity and honour as provided under Article-21 of the Constitution of India has been infringed. Her mental agony will perpetuate till the end of her life. So, considering all the above aspects, I find that she deserves to get compensation. Accordingly, in exercise of the discretion u/s-357(A) Cr.P.C, r/w Section-33(8) of the POCSO Act and Rule-12 of the Protection of Children from Sexual Offences rules 2012, this court recommends that fair, adequate and reasonable compensation be paid to the said victim child preferably a period of four months from this date as per Notification of the Government of Assam published vide No.-PLA.524/2015/Pt/190 [ECF-38361] dated- 1st February, 2019, Dispur. The Secretary, DLSA, Nagaon, after due inquiry, shall pay the compensation amount in the account of the victim of any Nationalized Bank. Further at least 70% of compensation shall remain fixed till she attains 18 years.

- 18. A copy of this Judgment be sent each to the Secretary, District Legal Services Authority, Nagaon and the District Magistrate, Nagaon for information.
- 19. A certified copy of this Judgment be furnished forthwith free of cost to the accused immediately.
- 20. Remand the accused to jail custody till next date for hearing on sentence.
- 21. The order on sentence shall be an integral part of this Judgment.
- 22. The Special Case is disposed of accordingly.

Judgment is pronounced and delivered in the open Court under the seal of this Court and on my signature on this 17th day of August, 2019.

Dictated & corrected by me.

Special Judge, Nagaon.

Special Judge, Nagaon.

<u>APPENDIX</u>:-

Oral evidence :-

PW-1	Miss. X. (Actual name withheld)
PW-2	Md. Inamul Ali. (Actual name withheld)
PW-3	Musstt. Sahiran Nessa.
PW-4	Md. Rahim Ali.
PW-5	Md. Rafique Ali.
PW-6	Md. Abdul Motin.
PW-7	S.I. Biraj Mohan Deka.
PW-8	Dr. Bhaswati Sarma.

Documentary evidence :-

- Ext.-1 Statement of the victim recorded by Magistrate u/s-164 Cr.P.C.
- Ext.-2 Ejahar.
- Ext.-3 Sketch Map.
- Ext.-4 Charge Sheet.
- Ext.-5 Medical Report.

Defence side did not adduce any evidence.

Special Judge, Nagaon.

ORDER ON SENTENCE

Dated :-19/08/2019.

Accused Rafique Bepari who has already been convicted u/s-6 of the POCSO Act and Section-506 IPC is produced before me from jail custody for the purpose of hearing on sentence. He is heard on the quantum of sentence as per Section-235(2) Cr.P.C. Mr. M.J. Neog, Ld. Special Prosecutor submits that this is a classical case to show that even a sufficiently aged person around 70 years may also commit the heinous crime of committing sexual intercourse upon a minor innocent child to satisfy his lust. Further submission of the learned Special Prosecutor is that the accused in stead of treating the victim child like his granddaughter committed penetrative sexual assault upon her after he had lured her to his house on a plea of providing a banana. Therefore, learned Special Prosecutor submits that the accused should be given the maximum punishment prescribed u/s-6 of the POCSO Act. The accused has submitted that he is an old man of around 70 years and he has two wives, married sons and grand-children. Therefore, he has prayed for mercy.

Considering the entire facts and circumstances of the case and the age of the accused, I sentence him for undergo 12(twelve) years R.I. and fine of Rs.2000/- (Rupees two thousand), in default to undergo further R.I. for 2(two) months. He is also sentenced to undergo R.I. for 3(three) months u/s-506 IPC. Both the substantive sentences shall run concurrently. The period which the accused has already undergone in jail custody in connection with this case shall be set off from the quantum of substantive sentence.

Send back the accused to jail with necessary jail warrant for serving the sentence in jail.

Special Judge, Nagaon.