IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>27 OF 2015</u>

(Under Section 4 of the POCSO Act, arising out of G.R. Case No. 2007 of

2015)

Present :- Mridul Kumar Kalita, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Gobinda Sarkar,

Son of Sri Sajal Sarkar, Resident of Missamari, Police Station – Missamari, Dist:- Sonitpur, Assam

Date of framing Charge :- 15/10/2015.

Date of Recording Evidence :- 09/12/2015 & 19/01/2016

Date of examination of accused u/s

313 Cr.P.C

Date of Argument

:- 27/01/2016.

27/01/2016.

:-

Date of Judgment :- 30/01/2016.

Counsel for the Prosecution :- Mr. Hari Prasad Sedai

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. S. Das and Mr. A. Das, Advocate.

JUDGMENT

1. On 03-08-2015, the Officer-In-charge of Missamari Police Station received an FIR (First Information Report) from one girl, who is herein after referred to as "the Victim", wherein it was alleged, inter alia, that on 02-08-2015 at about 4.00 p.m. the accused Sri Gobinda Sarkar, by promising the victim that he will marry her, took her along with him on a bicycle. However, after going a little distance the accused, instead of taking her to his home took her to somewhere else by threatening her with a dagger. It is also alleged that in that place they stayed one night and the accused forcibly committed sexual

intercourse with her and on the next day she was left by the accused near her house.

- **2.** On receipt of the aforementioned FIR, the Officer-In-Charge of Missamari Police Station registered Missamari P.S. Case No. 56/15 u/s 120B)/406/376 of IPC, and entrusted Sri Jyotish Gayary, Sub-Inspector of Police to investigate the case. After completion of the investigation formal charge sheet was laid U/s 406 of IPC r/w section 6 of the POCSO Act against the accused Gobinda Sarkar in the Court of Chief Judicial Magistrate, Sonitpur and the case was transferred to the Court of Smt. J. Borah, learned Judicial Magistrate, 1st class, Tezpur for disposal. On 29-08-2015 the G.R. Case No.2007/15 was sent to this Court as per Govt. Notification No. JDJ 220/2013/43 dated 12-07-2013, by Smt. J. Borah, learned 1st class Judicial Magistrate, Soniptur, Tezpur as the case is registered under the provisions of POCSO Act, and as such the same is required to tried by Special POCSO Court. The accused was in judicial custody at the time of transferring this case to this Court.
- **3.** After receipt of the case record and after hearing the accused as well as the learned Addl. Public Prosecutor and after going through the materials on record, charge u/s 4 of POCSO Act, 2012, was framed against the accused Gobinda Sarkar. The charge was read over and explained to the accused and on being asked, he refused to plead guilty and claimed to be tried. During trial, prosecution side examined 4 (four) witnesses. The accused was examined u/s 313 Cr.P.C. during which he denied the truthfulness of the testimony of the prosecution witnesses and pleaded innocence. The accused declined to adduce any evidence in defence.
- **4.** The point to be determined in this case is as follows:-

"Whether the accused on, 02/08/2015, at about 4.00 p.m., at Lohadang under Missamari police Station, committed penetrative sexual assault on "the Victim" (16 years of age) and thereby committed an offence punishable under section 4 of the Protection of Child from Sexual Offences Act?

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- I have gone through the entire materials on record, including the oral testimonies of the witnesses and the statement of the accused recorded under section 313 Cr.P.C, very carefully as well as heard argument advanced by Ld. Public Prosecutor and learned Defence counsel, at length.
- **6.** Let me, at the very beginning scrutinise the evidence adduced by the prosecution witnesses.
- P.W-1 Dr. Nibedita Baruah, has deposed that on 04-08-2015 she was working as Sr. Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day she was on emergency duty and at about 3 p.m. in the labour room complex of KCH, she examined Smt. Pirsila Topno, D/O Nowas Topno of after getting police requisition, on being escorted and identified by Woman police constable Prava Narzary, in reference to Missamari PS case No. 56/15 u/s 120(B)/406/376 of IPC. She was examined in presence of staff nurse on duty after taking consent.

History – staying together with one boy named Gobinda two days back and had sexual intercourse with him three times at a place few kms away from her home.

On examination she found the following:

Height - 149 cm., Weight - 37 Kg, Teeth - 8/8, 7/8. Breast well developed, no injury. Axillary hair present. Pubic hair present not matted. Vulva, vagina healthy. Hymen old tear present. No bleeding from hymen and it admits one finger easily. Uterus is in normal size. Built of the patient was average.

Vaginal smear taken, - no spermatozoa seen.

X-ray report done by Dr. P.K. Barman, Radiologist with plates submitted. Age of the person below 18 years.

External injury – not seen.

Under clothing blood stained. She is menstruating today.

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OPINION:

Age of the lady is below 18 years. She is not pregnant at this stage. There is no sign of recent sexual intercourse and no sign of violence on the body or her private parts.

She has exhibited the medical report as Ext. 1 and Ext. 1(1) is her signature. Ext. 2 is the advice slip and Ext. 2(1) is her signature. Ext. 3 is the X-ray report along with plates and Ext. 3(1) is the signature of Dr. P.K. Barman, Radiologist, which is known to her. Ext. 4 is the laboratory report.

- 8. PW 2, the victim of this case, has stated that she knew accused Gobinda Sarkar. The incident occurred in the last year during the cultivation season, about three months back. On the day of the incident she was at her home. In the evening the accused Gobinda came to our house and asked her to elope with him. Earlier he also uses to come to her house. The accused told her that he will marry her. Thereafter, she eloped with the accused to a newly constructed house and stayed there with the accused for that night and the accused committed bad acts with her. She has also stated that she has not objected it. On the next day, her father found her there with the accused. Lateron, she lodged Ejahar before Missamari Police Station. The ejahar was written as per her instruction. Ext. 5 is the ejahar and Ext. 5 (1) is her signature. She was medically examined and brought to the Court for recording her statement. Ext. 6 is her statement and Ext. 6(1) to 6(4) are her signatures. During cross-examination, she has stated that she had love affairs with the accused and she eloped with the accused on her own to marry him. At the time of the incident, her age was above 18 years.
- **9.** PW 3, Smt. Siblina Topno, the mother of the victim, has stated that the occurrence took place about 4 months ago. On the day of the occurrence, she went to the field and her daughter was alone in the house. When she came back she came to know that her daughter is not there in their house. They searched their daughter. On the next day they found their daughter along with the accused. Her daughter told before her that she went along with the accused as he told her that he will marry her. Her daughter also told her that she was raped by the accused. Later on, her daughter lodged FIR. At the time of the incident, the age of her daughter was 18 years.

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During her cross-examination, she stated that at the time of the incident, the age of her daughter was 18 years.

10. PW 4, Sri Nowas Topno, the father of the victim, has stated that he knew the accused Gobinda Sarkar. The occurrence took place about 3/4 months ago. On the day of the occurrence, he went to the field and his daughter was alone in the house. When he came back he came to know that his daughter is not there in his house. They searched for their daughter. On the next day they found her on the road. His daughter told him that she went along with the accused as he told her that he will marry her. His daughter also told him that she was love affairs with the accused. At the time of the incident, the age of his daughter was 16 years of age.

During her cross-examination, se stated that at the time of the incident, his daughter had completed 18 years of age.

- **11.** During examination under section 313 Cr.P.C the accused pleaded his innocence and has stated that victim accompanied him on her own and she has lodged false case against him.
- **12.** The Offence under section 4 of the Protection of Child from Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault and Section 3 of the POCSO Act defines penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that matter other offences also under this Act can be committed only on the child. The definition of child u/s 2 (d) of the POCSO Act is as follows:-

"Child" means any person below the age of 18 years.

Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years. In the instant case, let us see as to whether the victim was a child, at the time of commission of offence, or not.

13. If we peruse the testimony of the victim in this case, it appears that the victim has mentioned her age as 19 years at the time of deposing before this Court. She has also stated in her cross examination that she had a love affair with the accused and she eloped with the accused on her own. It also appears

from the testimony of victim that she lodged the FIR as she was asked to do so by the villagers. She has gone to the extent of stating that she stated her age as 16 years at that time as the police tutored her to say so. She has also stated that actually her age was more than 18 years at the time of the incident. She has also stated that the incident happened as she had consented to it. In the instant case, though PW 1, who is the doctor, who examined the victim has opined that the age of the victim at the time of her examination was below 18 years, however learned counsel for defence has argued that in light of the categorical statement of the victim as well her both the parents that she was 18 years of age at the time of incident, the opinion of the doctor can be ignored by this Court as there is a probability of percentage of error in assessment of the age of the victim by radiological examination. Ld. Defence Counsel has also cited a ruling of Hon'ble Supreme Court of India in "Jaya Mala vs- Home Secretary, Government of Jammu and Kashmir & Ors." reported in (1982) 2 SCC 538 wherein Hon'ble Supreme Court of India dealing with a case were question of determination of the age was involved observed that :-"one can take judicial notice that the margin of error in age ascertained by radiological examination is 2 years on either side." In the instant case also in view of the aforesaid ruling of Hon'ble Supreme Court of India and also in view of the categorical testimony of the victim and her parents who deposed as PW 2,3 and 4 respectively that the victim was above 18 years of age at the time of the incident, it can be inferred that the age ascertained by Doctor in the instant case is not the conclusive determination of age of the victim but it is to be accepted that an error of 2(two) years in determining the age, through medical examination, is possible in the instant case also. Thus, for the said reasons, this Court holds that the victim was not below the age of 18 years when the incident occurred. As the victim was not below the age of 18 years as per definition of child as provided in Section 2(d) of the Protection of Child from Sexual Offences Act, 2012, Moreover, the evidence of discussed hereinabove clearly reveales that the victim was a consenting party to whatever has happened with her as she had love affair with the accused. Therefore, this Court is constrained to hold that no offence against her has committed u/s 4 of the POCSO Act. In view of the above discussion and reasoning, this Court is of

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considered opinion that prosecution side has miserably failed to prove the

charge u/s 4 of the POCSO Act against the accused. This Court is therefore left

with no other option but to acquit the accused of the charge u/s 4 of the

POCSO Act.

14. For the reasons stated above, the accused Gobinda Sarkar is acquitted

of the charge u/s 4 of the POCSO Act.

15. Let also a copy of this order be forwarded to the District Magistrate,

Sonitpur, Tezpur u/s 365 Cr.P.C.

Given under my Hand and Seal of this Court on this the 30th day of

January, 2016

(Mridul Kumar Kalita) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Mridul Kumar Kalita) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Dr. Nibedita Baruah, M.O.,

2. Prosecution Witness No.2 :- Victim/complainant

3. Prosecution Witness No.3 :- Sri Siblina Topno

4. Prosecution Witness No.4 :- Sri Nowas Topno

EXHIBITS.

Exhibit 1 :- Medical report

Exhibit 1(1) & 2(1) :- signatures of the M.O.

Exhibit 3 & 4 :- X-ray and laboratory reports.

Exhibit 3(1) :- Signature Doctor P.K. Barman

Ext. 5 :- Ejahar

Ext. 6 :- Statement of the victim

Exhibit 5(1), 6(1) to 6(4) :- Signatures of the victim

(M. K. Kalita) SPECIAL JUDGE SONITPUR : TEZPUR

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