IN THE COURT OF SPECIAL JUDGE ::::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 08 of 2015, U/S 4 of POCSO Act 2012

(Arising out of Sivasagar P.S. Case No. 334/2015)

State of Assam

-Vs-

1. Sri Pranjal Bora

2. Sri Pankaj Kumar Phukan Accused persons

<u>APPEARANCE:</u>

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. P.K. Borah, Advocate

Date of framing Charge : 20.06.2015

Dates of Evidence : 31.07.2015, 17.09.2015, 27.01.2016,

07.03.2018, 09.04.2018.

 Date of S/D
 : 27.06.2018

 Date of Argument
 : 16.11.2018

 Date of Judgment
 : 28.11.2018

J<u>UDGMENT</u>

1. Prosecution case in brief is that on 08.04.2015, informant Sri Abhijit Konwar lodged a complaint before District Magistrate Sivasagar, alleging, inter alia, that the accused persons named in the FIR, by taking advantage of absence of other family members of the informant in the house, came to the house of the informant and by showing criminal intimidation committed rape on his 13 years old physically challenge daughter victim 'D' (name withheld). It is also mentioned that out of fear, the victim kept the fact concealed. However, after few days, due to detoriation of her physical condition, on asking the victim told the informant and her mother about the incident of 20.02.2015 done by the accused persons. As such, there was delay in lodging the FIR.

- 2. Above complaint was forwarded to I/C Joysagar OP for necessary action. On receipt of the FIR, Sivasagar P.S. Case No. 334/2015, U/S 448/376(i)(L)/506/34 IPC r/w Section 4 of Pocso Act was registered and started investigation. During investigation, victim was recovered from Margherita and sent for medical examination, but she refused to undergo medical examination. However victim was sent to Court for recording her statement U/S 164 Cr.P.C. Accused was arrested and produced before the court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the above named accused persons U/S 448/376(i)(L)/506/34 IPC r/w Section 4 of Pocso Act
- 3. On receipt of the charge sheet, copies of relevant papers were furnished to the accused persons and vide order dated 16.02.2016, my learned predecessor in office has framed the charge U/S 4 of POCSO Act, 2012 against accused persons to which they pleaded not guilty and claimed to stand trial. During trial, prosecution has examined 7 witnesses including victim and I.O. One Medical Officer was also examined as CW 1 to proof the Hospital admission register.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when they were called upon to enter into defence.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. Ravi Dutta, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 6. (I) What was the age of the victim 'D' on the date of incident?
 - (II) Whether victim 'D' was subjected to penetrative sexual assault on 20.02.2015 by the accused persons?

DECISION AND REASONS THEREOF

7. PW-1 Dr. Prasanta Pratim Sarma in his evidence deposed that on Spl. (P) Case No. 8/2015 Page 2 of 11

10.04.2015 he examined victim D in-connection with Joysagar Out Post G.D. Entry No. 173 dated 10.04.2015. The victim has slurred speech and upon examination his of the opinion that the victim is above 16 years but below 18 years and there was no marks of violence on her person and does not have any sign of recent sexual intercourse. He proved his report as Ext. 1.

- 8. PW-2 Sri Abhijit Konwar, father of the victim in his evidence deposed that in the month of February, 2015 while victim D was alone in the house and he and his wife returned from fishing, his daughter informed them that both the accused persons have committed rape on her. They saw bleeding injuries. They brought victim D to hospital and filed the FIR vide Ext. 2. At that time victim D was aged about 13 years. In his cross-examination, he denied the defence suggestion that before police, he has not stated that on seeing bleeding, victim D was taken to Sivasagar Civil Hospital at Joysagar. He admitted that on 19.03.2015 victim D was brought to Joysagar Civil Hospital. The FIR was lodged on 05.04.2015. Prior to this occurrence, accused Pranjal @ Babu Borah stayed near to his house and Babu Bora has bamboo orchard near to his land. He used to sell trees of his land in which accused Babu @ Pranjal helped him. However, after half finish, Babu did not come. He denied that as he cut some trees belongs to Babu, there was a quarrel between them. He also used to sell fish and people used to visit his house for purchasing fishes. He admitted that his wife filed FIR against his father for committing rape on her and trial of that case was finished.
- 9. PW 3 victim D in her evidence stated that on the date of occurrence the accused persons after lying her, committed misdeed. In her cross-examination she stated that on that day after closing the door the accused persons make fun. She denied to have deposed falsely on being tutored by her parents.
- 10. PW 4 Sri Padmeswar Konwar, grand-father of the victim in his evidence deposed that in the month of Bohag on knowing regarding admission of victim D in hospital he went to the hospital and on asking, the victim told him

that accused persons grabbed her. In his cross-examination, he stated that as he has difference of opinion with the father of the victim, he used to reside separately. He admitted that his daughter-in-law filed one false case alleging rape against him.

- 11. PW 5 Smti. Aiti Konwar, grand-mother of the victim, in her evidence deposed that on knowing information of bleeding of her grand-daughter, she sent her husband to meet her at hospital. In her cross she also stated that she lived separately.
- 12. PW 6 Smti. Ritamoni Konwar, mother of the victim, in her evidence deposed that while she along with her husband and other two daughters went for fishing by keeping victim D alone in the house, both the accused persons came and after committing physical relation, make the victim D pregnant. On stopping of menstruation, on being asked victim D reported to her that accused Pranjal Borah and Kulati Phukan @ Pankaj has committed sexual relation with her and made her pregnant. On this incident her husband lodged FIR. In her cross-examination, she stated that she could not say about the date of birth of the victim. Victim D told them that the incident took place on 20.02.2015. FIR was lodged on 08.04.2015. She was taken to hospital on 19.03.2015 on suspicion of menstrual bleeding. She was present while statement of victim D was recorded by Magistrate during investigation. She also admitted that Kulati Phukon has an orchard near their land. She denied that due to cutting of trees in the orchard of Kulati Phukon a guarrel took place between her husband and the accused. She also lodged an FIR against her father-in-law Padmeswar Konwar alleging rape on her.
- 13. PW 7 SI Satyajeet Borah in her evidence deposed that, during investigation of Sivasagar PS case No. 334/15 victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. He went to the place of occurrence i.e. residence of informant and take photograph of the PO. Exbt. 3(i) and 3(ii) are the photographs of the residence of the victim and the campus. FIR named accused Sri Pankaj Kumar Phukan

and Pranjal Bora were apprehended. He collected the medical report and statement given by victim in court. Exbt. 4 is the statement of the victim given in court u/s 164 Cr.P.C. On completion of investigation, he submitted charge sheet against the accused persons. Exbt. 5 is the charge sheet. In his crossexamination the I/O has affirmed that witness Abhijeet Konwar in his statement before police did not state that on seeing bleeding injury, he took the victim to Joysagar Hospital. In the FIR there was mention that the delay in FIR was due to remain busy in treatment of the victim. However no document of medical treatment was given to him. He did not seize wearing apparel of the victim. In the medical report, no pregnancy was found. Except parents and grandparents, he did not examine any independent person as witness as none was found there. In Exbt. 4 there was mention of accused as Babu and Kulati. There was no mention of Pankaj Kr. Phukan and Pranjal Bora. In Exbt. 3 photographs there was no mention of neighbours as no residence was found nearby. In the medical examination report, there was no mention of mental of physical disability of the victim. He did not collect any other certificate showing disability of the victim.

14. CW - 1 Dr. Pradeep Mili in his evidence deposed that on being authorised by Superintendent of Sivasagar Civil Hospital he appeared with the called for OPD patient register of 19.03.2015. As per the records, victim D appeared at Sivasagar Civil Hospital OPD on 19.03.2015 at about 11.10 am and after examination, he got her admitted at M & G ward. She appeared at the OPD with history of bleeding per vagina. On clinical examination, he found pallor +++ (sever Anaemia). However no active bleeding was seen per vagina. As per record, she remained in hospital ward from 19.03.2015 till 22.03.2015 and she got discharged on 22.03.2015 against medical advice. Exbt. X is the OPD register. Exbt. X(i) is the relevant entry dated 19.03.2015. (proved in original). He has also brought the OPD and Emergency register of 20.02.2015. From said register, it appears that victim D did not appear on that day either at OPD or at Emergency after closing of OPD. Exbt. Y is the OPD register

containing entries of 20.02.2015. Exbt. Y(i) is the entries showing details of patient examined on that day. Exbt. Z is the Emergency register containing entries of 20.02.2015. Exbt. Z(i) is the entries showing details of patient examined on that day. In his cross-examination, CW 1 deposed that some time bleeding per vagina may be a Gynological problem. On 19.03.2015 the victim did not give any history of rape with her or the cause of bleeding per vagina. If forcible sex is made by two persons with girl, normally injury in vagina should occur and hymen got torn.

- 15. On the basis of above evidence, let me discuss the points formulated to decide the fate of this case.
- 16. Point No.1: So far age of the victim is concerned, from the medical evidence, it appears that on the date of examination, the victim was found above the age of 16 years but below the age of 18 years. The informant in his evidence as PW 2 claimed that at the time of incident the victim was aged about 13 years. In the FIR also age of the victim was mentioned as 13 years. PW 3 the victim while adducing evidence (deposing on 17.09.2015) claimed her age as 13 years. PW 4 & PW 5 the grandparents and PW 6, the mother of the victim are totally silent on age of the victim. From the evidence of PW 7, the I.O. it appears that he did not collect any document relating to age of the victim. However, during cross examination defence did not challenge on age of the victim that at the time of alleged incident victim was below the age of 18 years but above 12 years of age. As such, I have no hesitation to hold that on the date of alleged incident the victim was aged about 13 years.
- 17. <u>Point No. II:</u> So far allegation of penetrative sexual assault on the victim on 20.02.2015 by the accused persons is concerned, in the course of argument hearing, learned Advocate for the accused has submitted that there was abnormal delay in filing the FIR and explanation given in the FIR was totally contradicting the evidence of the informant. It is further argued that though the allegation of rape was mentioned in the FIR and during evidence the allegation of pregnancy was brought, but during evidence, the victim simply

stated about committing misdeed without explaining the detail meaning of terminal misdeed; rather in her cross the victim has admitted that the accused persons were make fun with her only. It is further argued that medical report shows that hymen of the victim was present and no injury mark was found on the private parts of the victim. Even the medical report shows that while recording the brief history of the alleged incident, only the term sexual assault was mentioned which does not mean rape. It is further argued that as per the evidence of the informant, on the date of incident itself, they came to know about the alleged incident of rape from the victim and immediately she was taken to Hospital on finding some bleeding injuries. However PW 6 gave a different version and stated that on stopping menstruation, on 19.03.2018 victim was taken to hospital. CW 1, the M.O. who came to court with the medical record shows that the victim was taken to Sivasagar Civil Hospital OPD on 19.03.2015 due to her bleeding per vagina and upon clinical examination, the victim was found suffering from severe anemia and on that day no allegation of rape was made while giving brief history of ailments. Basing on this, learned Advocate for the accused has submitted that the allegations as brought in the FIR are concocted, baseless and fabricated just to harass the accused persons out of previous grudge. Learned Advocate for the accused has also referred about of lodging false case by the mother of the victim against her father-in-law. On the other hand, learned Special P.P. has argued that delay in lodging the FIR should not be treated as fatal because in such nature of cases, it is quite possible that victim might not disclose such type of incident. Learned Special P.P. has also submitted that though the victim did not narrate about the details of the misdeed on her, but her evidence may be treated for committing sexual assault though not penetrative sexual assault. I have considered the submission of both the sides.

18. From the evidence of PW 2, it appears that on returning from fishing, he and his wife came to know that accused persons has committed rape on the victim. They also found bleeding injury and immediately victim was

brought to Sivasagar Civil Hospital. In his cross though he denied that before police he has not stated about finding bleeding injury and taking the victim to Sivasagar Civil Hospital at Joysagar, but this fact was confirmed by the I.O. In his cross PW 2 admitted that victim was taken to Sivasagar Civil Hospital on 19.03.2015 which was however duly corroborated by CW 1, the M.O. who proved the medical examination record of the victim. From the evidence of PW 3 the victim, it appears that she is totally silent regarding rape on her, rather in her cross she stated that accused persons committed fun with her. PW 6, the mother of the victim however told a different story. She has stated that on knowing about bleeding of the menstruation, on asking the victim informed her that the accused persons by committing rape on her, made her pregnant. On this, the victim was taken to Hospital and case was lodged. PW 4 and PW 5, the grand-parents of the victim simply stated that on knowing about hospitalization of the victim, PW 5 the grand-mother sent her husband PW 4 to Hospital and on going to Hospital PW 4 came to know from the victim that accused persons grabbed the victim.

19. From the above evidence on record, it appears that three different version came out through victim, her father, her mother and grand-father of the victim who all came to know about the incident from the victim. As per the PW 2 he came to know about the incident on the same day, whereas PW 6 came to know about the incident of rape on victim only on stopping of menstrual period of the victim; whereas PW 4 is silent regarding rape on victim and only stated about grabbing of the victim while she was hospitalized. From the evidence of CW 1, the M.O. of Sivasagar Civil Hospital, who came to court with hospital record of OPD Register dated 19.03.2015 shows that the victim was brought to hospital with a history of bleeding per vagina and upon clinical examination, the victim was found suffering from severe anemia and she was hospitalized for three days and was discharged against medical advice. The said CW 1 in his evidence specifically stated that neither in the OPD Register nor in the Emergency Register of the hospital there was no entry to show that on

20.02.2015, the victim was brought to Sivasagar Civil Hospital either at OPD or at Emergency. From the cross examination of CW 1, it appears that even on 19.03.2015 the victim did not give any history of rape on her by the accused persons or cause of bleeding per vagina. Thus the evidence of PW 2 and PW did not find any corroboration and contradicting each other.

- Apart from above, the delay aspect in filing the FIR appears to be fatal under the facts and circumstances of the case as discussed above. Even if knowing the incident of rape either on 20.02.2015 by the PW 2 or on 19.03.2015 by the PW 6, no FIR was lodged instantly. Thus, it makes a huge doubt on the allegation as brought against the accused persons.
- 21. So far possibility of false implications as argued by defence, it is in the cross examination of PW 2 that they have some dispute regarding cutting of bamboo in the orchard of PW 2. PW 6 has also corroborated this. As such, in view of above fact, I am of the opinion that it is not a fit case for invoking Section 29 of POCSO Act 2012 to draw presumption on the allegation brought against the accused persons.
- Moreover the victim is totally silent regarding rape on her. Though she stated about some misdeeds with her by the accused persons but in her cross examination she totally turned aside and stated about making fun with her by the accused persons. As such, it cannot be said that on the alleged date of incident, i.e. on 20.02.2015, the victim was subjected to penetrative sexual assault by the accused persons.
- 23. In absence of any convincing evidence, the argument of learned Special P.P. regarding relying on the evidence of victim for sexual assault on her is also found not reliable and convincing.
- 24. From the above discussions, it appears that prosecution has miserably failed to prove the allegation of penetrative sexual assault or any other minor offence on the victim on 20.02.2015 by the accused persons beyond all reasonable doubt.

- 25. Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of charge u/s 4 of POCSO Act, 2012 against the accused persons. As such, accused Sri Pranjal Bora and Sri Pankaj Kumar Phukan are acquitted from the charge u/s 4 of POCSO Act, 2012 and set at liberty forthwith.
- 26. Bail bond executed by the accused persons and their sureties are extended for another six months from today U/S 437-A Cr.P.C.
- 27. Considering the nature of the case, I am of the opinion that it is not a fit case for referring the matter to DLSA for granting compensation U/S 357-A Cr.P.C.
- 28. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 29. Judgment is pronounced in open court. The case is disposed of on contest.
- 30. Given under my hand & Seal of this Court on this the, 28th day of November 2018 at Sivasagar.

Special Judge, Sivasagar:

<u>APPENDIX</u>

1. Prosecution witnesses:

- PW 1 Dr. Prasanta Pratim Sarma (M.O.)
- PW 2 Sri Abhijit Konwar (Informant)
- PW 3 Victim 'D'
- PW 4 Sri Padmeswar Konwar
- PW 5 Smt. Aiti Konwar
- PW 6 Smt. Ritamoni Konwar
- PW 7 SI Satyajeet Borah (I.O.)

2. Defence witnesses - None

3. Court witnesses

CW 1 – Dr. Pradeep Mili

4. Exhibits by prosecution -

- Exbt.1 Medical report
- Exbt.2 FIR
- Exbt.3 Photographs of p/o.
- Exbt.4 Statement of the victim given u/s 164 Cr.P.C.
- Exbt.5 Charge-Sheet
- Exbt. X OPD Registered
- Exbt. X(i) Relevant Entry dated 19.03.2015
- Exbt. Y OPD Register containing entries of 20.02.15.
- Exbt. Z Emergency Register containing entries of 20.02.15.

Special Judge, Sivasagar: