IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- **21 OF 2016**

(Under Section 6 of the POCSO Act, arising out of G.R. Case No. 1788 of

2016)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Rafiqui Islam

Son of Late Piru Seikh, Resident of Kamarchuburi Police Station – Thelamara Dist:- Sonitpur, Assam

Date of framing Charge :- 12/07/2016

Date of Recording Evidence :- 18/08/2016, 20/01/2017,

22/03/2017 & 10/07/2017.

Date of examination of accused u/s

313 Cr.P.C

19/12/2017.

Date of Argument :- 16/11/2018

Date of Judgment :- 22/11/2018.

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Public prosecutor

Sonitpur.

Counsel for Accused :- Smti Dulumoni Sinha, Advocate.

JUDGMENT

- **1.** In this case accused Rafiqul Islam is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.
- 2. The factual matrix of the case according to the FIR is that on or about 11 a.m. of 07-06-16 informant's minor daughter Miss X went to a Mango tree to collect mango situated near the house of the informant, while she was busy in collecting mango accused person suddenly appeared before her, gagged her mouth and forcefully took her to a nearby jute cultivation area and there he committed rape on her. She was also threatened by accused not to disclose the matter to anybody. Hence, this prosecution case. The ejahar was filed by Musstt Kariman Nessa before the O/C of Thelamara Police Station on 07-06-2016.
- **3.** On receipt of the ejahar, the Officer-In-Charge of Thelamara Police Station registered a case being Thelamara P.S. Case No. 44/16 u/s 341/506 of the IPC read with section 6 of the POCSO Act. After completion of usual investigation, the O/C Thelamara Police Station sent up the accused for trial by filing charge sheet u/s 341/506 of the IPC read with section 6 of the POCSO Act against the accused Rafiqul Islam.
- **4.** On being appeared the accused before this Court, after hearing both parties, my learned predecessor-in-court framed charge under section 6 of the POCSO Act, 2012 against the accused Rafiqul Islam and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- 5. To substantiate the case prosecution examined as many as nine numbers of witnesses. After completion of prosecution evidence, accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the allegations and declined to adduce defence evidence.

- **6.** I have heard the arguments put forwarded by the learned counsel of both the sides.
- **7.** The point for decision in this case is that -
 - (1) "Whether on or about 11 a.m. of 07-06-2016, at Kamarchuburi under Thelamara Police Station, the accused committed aggravated penetrative sexual assault on the victim (12 years of age) and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

Reasons, Decisions and reason for decision.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- 9. PW 1 Musstt Kariman Nessa, complainant of this case, has deposed that she knows the accused Rafigul Islam. Victim is her daughter. The incident occurred about two months 10/15 days ago, at about 11 a.m. At the time of incident, her daughter was a minor about 12 years and she was a student of class V standard. At the time of incident, she has been tethering cattle. After about one hour she returned to her home as because there was a rain. On arrival at her home, she saw her daughter/victim was crying. her daughter/victim told her that when she went to search Mango under the Mango tree, then accused Rafigul gagged her mouth, forcefully took her through a jute plantation to a place which is back side of her sister's house. Accused took her under a Jack fruit tree, opened her panty and committed rape on her. Then she informed this matter to her husband after his arrival. On that very day, she went to the police station along with her daughter/victim and filed an ejahar before the O/C Thelamara Police station. The ejahar was written by one Raju Sarkar as per her instruction. Then she put thumb impression thereon. Police recorded her statement at the Police station. In the next day, the I.O. sent her daughter to Tezpur Kanaklata Hospital for medical examination and after that she was produced before the learned Magistrate and accordingly, recorded her statement u/s 164 Cr.P.C.

In cross-examination, she admitted that before putting thumb impression the scribe has read over the ejahar to her. She has noticed reddish on the face of the victim but no rupture or injury found on her body. She has also noticed blood injury on her right thigh. At the time of writing ejahar, she told the scribe that she has been to tether the cattle and after one hour she has arrived at her home when the rain is over. She has also told the scribe that on arrival at home, she has seen her daughter/victim was crying, her daughter told her that when she went to search Mango under the Mango tree, accused Rafiqul gagged her mouth, forcefully took her through a jute plantation to a place which is back side of her sister's house, accused took her under a Jack fruit tree, opened her panty and committed rape on her. Jarina is her elder daughter. She has filed a case against one Maharuddin as the accused has found them in the back side of the accused's house in talking each other at dark night before two years of the incident of this case. In that case, accused was cited as a witness from their side.

PW 2, the Victim Miss X has deposed that the incident took place 10. about two months ago at about 11 a.m. At the relevant time she was 12 years old. On that day she was alone at her home. Her mother went to paddy field to tether cattle. Her father went to his work. She went to a nearby Mango tree to collect mango. During that time accused came, gagged her mouth, took to the back side of her aunty's house through jute plantation and under a jack fruit tree he committed rape on her by opening her pant she raised alarm. She called her cousin sister Sabikun Nehar. Then the accused fled away. She herself went to home. At home she was crying. While her mother enquired, she reported the incident to her mother then her mother filed the ejahar. Police recorded her statement. In the next day, she was examined through the doctor. Thereafter, her statement was recorded through the learned Magistrate. Ext. 1 is her statement and Ext. 1(1) is her signature. She stated before the Magistrate what she has stated today.

In cross-examination, she admitted that on the day of incident her school was open but she did not go to school. She has two elder brothers and one elder sister. While she was taken through jute plantation area the jute trees are long. In the midst of the jute plantation there was some water. The mango tree from where she went to collect mango was situated near the jute plantation. There was no fencing in the jute plantation. The area of jute cultivation is about one bighta. Rafigul gagged her mouth and dragged her by holding both of her hands. In the jute cultivation there is many thorns. As a result of dragging she sustained injury in her hands and legs. At the relevant time she was wearing churidar, her churidar was torn and blood stained was in her clothes. When she was committed rape under a jack fruit tree she sustained pain in her back. Accused committed rape on her for about half an hour. She raised alarm for half an hour. In the place of occurrence there are many persons reside in addition to her aunty. She also sustained injury in her private parts during rape.

11. PW 3 Dr. Tutumoni Handique, stated that On 08-06-2016 she was posted as working as Medical & Health Officer-1 in the Kanaklata Civil Hospital, Tezpur and on that day at about 1.50 p.m. in the labour room complex of KCH, she examined Sahanara Khatoon, 12 years, female, D/O Md. Nur Ali of Komarchuburi, PS Thelamara, in reference to Thelamara PS Case NO. 44/16 u/s 341/506 of IPC r/w Section 6 of the Special POCSO Act, 2012, on being escorted and identified by Woman Police Constable Ainup Begum of Thelamara PS vide Hospital emergency registration No. 59500. She was examined in presence of GNM Anna Merry. On examination she found the following:

Identification mark – mole on right cheek. Mentrual history-regular. LMP – 23-05-2016. Exposure history- on 7^{th} June 2016. As per victim she was sexually assaulted by known person at day time. Height – 147 cm., Weight – 40 Kg, Teeth – 7 in all four quadrants. Average built, normal gait. Neat and tidy. Secondary sexual characters were developing. No injury seen on her body as well as on her private parts. Hymen absent.

Investigations advised and reports-

1.Vaginal smear for spermatozoa – no sperm. Done at KCH Laboratory, Lab No. 56/16.

2.X-ray for age determination – Age of the person under investigation appears to be just below 18 years. Done at Assam X-ray Clinical & Laboratory, Patient ID AXE 485, Radiologist – Dr. P. K. Barman.

OPINION:

- 1. No sign and symptom suggestive of sexual intercourse.
- 2. No injury observed.
- 3. Age of the victim is just below 18 years.

Enclosures:

Advice slip, vaginal smear report and X-ray report and plates.

Secondary sexual characters starts from 12 years completed at 18 years. Ossification test is the surer test to determine the age.

Ext. 2 is the Medical Report and Ext. 2 (1) is his signature. Ext. 3 is the advice slip and Ext. 3(1) is his signature. Ext. 4 is the laboratory report. Ext. 5 is the X-ray report and Ext.5 (1) is the signature of Dr. P.K. Barman, Radiologist, which is known to her.

In cross-examination, the doctor admitted that though she has opined that the patient was just below 18 years but her age may be very two years on either side. If a girl is forcefully raped by somebody there must have been some injury upon the body of the said girl. But in this case she has not found any injury upon the patient.

12. PW 4 Musstt Asmina Khatoon stated that she knows the accused Rafiqul @ Rabikul Islam. Victim is her sister-in-law (Nanad). The incident occurred about nine months ago, at about 11 a.m. At that time she was not at home. She went to a neihbour house. When she returned to her home, he saw many people gathered. The victim Miss X

was crying and she reported to her that while she collecting Mango, accused gagging her mouth and committed rape on her in the jute field under a Jackfruit tree.

In cross-examination, she admitted that at the time of occurrence she was sitting in the house of Suraj Ali. The distance between the house of Suraj Ali and from where she collected Mango is about 100 yards. The mango tree is situated on the land of her grand mother Amina. Near the mango tree there are houses of many people. The Mango tree is situated on the back side of grand-mother's house and infront of other people's house. She heard commotion in her home. During that time it was raining. There were many persons present there including Anowar Hussain, Khitab Ali, Noor Ali etc. Amina Khatoon during that time was at her house. He saw mud in the clothes of the victim. She saw some torn on her top. She did not wear pant. Accused resides at a house which is just near the house of Abdul Malek, her maternal uncle. Jute field is situated adjacent to Mango tree. The distance between jute field and jack fruit tree is about 20 ft. Jack fruit tree is owned by her aunty "Mahi" Rumeja khatoon and it is situated in the house of Rumeja Khatoon. At about 3 / 4 p.m. police arrived.

13. PW 5 Md. Noor Ali stated that he knows the accused Rafiqul @ Rabikul Islam. Victim is his daughter. The incident occurred about nine months ago, at about 11 a.m. On that day he was not at home. He went to work at about 6.30 a.m. he was informed by one boy of his village then he returned home at about 12 O' clock. He found people gathering at his house. He saw his daughter with mud in her clothes. She reported her that the accused has committed misdeed to her. Accused forcefully dragged his daughter by gagging her mouth and committed misdeed on her at Jute field. Thereafter, his wife filed the case against the accused.

In Cross- examination he admitted that he has not seen the incident himself. He cannot recall the name of the boy who has informed him. He was working at village Nalaniduba along with two

persons. One is Idrish and he cannot recall the name of other person. When the said little boy informed him about the incident, the other two men also heard about the incident.

14. PW 6 Amina Khatoon stated before the court that she knows the accused Rafiqul @ Rabikul Islam. Victim is her grand-daughter. The incident occurred on 07-06-2016, at about 11 a.m. At the time of the incident, the age of the victim was 12 years. At the relevant time she was at home. While her grand daughter Miss X collecting mango, accused Robikul took her to the jute field and committed bad act (Galat kam) on her. On hearing alarm of Sabikun she rushed to the place of occurrence. The incident was witnessed by Sabikun who is standing with a baby. Thereafter, she went to the house of accused Robikul and informed the matter to his mother and wife of Rabikul. Rabikul was not at home. Thereafter, the mother of the victim lodged the case.

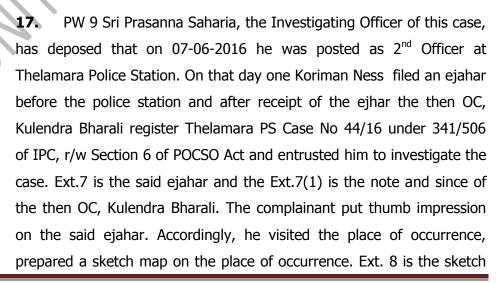
In cross- examination she admitted that at the relevant time she was sleeping in the house. When she rushed to the place of occurrence she saw mother of Sahanara, aunty of Sahanara and other relatives. After the incident the victim went to her aunty's house Rumeja Khotton, where she was crying.

Rafiqul @ Rabikul Islam. Victim is her sister. The incident occurred on 06-07-2016, at about 11 a.m. At the relevant time she was at home. Rabikul standing at the verendah of her Nani Amina as it was raining. The victim went to collect Mango. Rabikul came, gagged the mouth of victim and took her towards Jute field and jack fruit tree and committed misdeed (galat kam) on her. Galat kam means Sahanara lying down and upon her Rabikul was sleeping which acts are doing by husband and wife. During that time she has a baby of three days, so she was at her home. On hearing alarm of victim, she saw them through window. There was a raining. On hearing her alarm Rabikul fled away. After that the victim came to their home and told her that Rabikul committed mis deed (galat kam) on her.

In cross- examination, she admitted that the mango tree, jute field and jackfruit tree standing just near our house.

working as Additional Chief Judicial Magistrate, Sonitpur, Tezpur, and on that day in reference to Thelmara PS Case No. 44/16 u/s 341/506 of the IPC r/w section 6 of the POCSO Act he has recorded the statement of witness namely, Miss X, 12 years, D/O Md. Noor Ali u/s 164 Cr.P.C. at his court chamber. The said witness was escorted and identified by WPC 02 A Begum. The witness gives statement voluntarily. After recording her statement she has read over the contents of the statement and on satisfaction said witness Miss X put her signature in the statement in his presence. Ext. 1(3) is her signature. Ext. 6 is the GR Case record being GR Case No.1788/16 and Ext. 6(1) is his order dated 08-06-2016 and Ext. 6(2) is his signature.

In cross-examination, he admitted that as the witness is 12 years of age so he did not test her intelligence by enquiry. Therefore, he has recorded her statement on oath. He has stated the age of the witness as 12 years as per forwarding report and as per her statement. On perusal of the record it appears that the witness was not accompanied by her parents hence, he directed the I.O. to hand over the victim to her parents with proper escort after recording her statement.



map and Ext. 8(1) is his signature. Thereafter, he examined the witnesses and recorded their statement under Section 161 of the CrPC. Then, he arrested the accused and forwarded him before the Court. The victim was sent for medical examination and thereafter, the victim was produced before the Court for recording her statement under Section 164 CrPC. He also collected the medical certificate along the required document in connection with this case. On completion of investigation, finding prima facie materials against the accused he has filed charge sheet against the accused under Section 341/506 of IPC, r/w Section 6 of POCSO Act. After discussion of the superior officer, he submitted the charge sheet before the Court for trial. Ext. 9 is the charge sheet and Ext. 9(1) is his signature.

In cross-examination, he admitted that he has recorded the statement of victim on the police station at an isolated room. At the time of interrogation, he was in uniform. The woman police present with him was also in uniform. During that time the victim girl was accompanied by her guardian who is her mother. However, he has not mentioned in the said mater the CD. He has not examined the scribe who wrote the ejahar. In Ext.7 it is not mentioned who has taken the thumb impression of the informant. They have not sent the wearing apparels of the victim to FSL for examination. They have also not sent the wearing apparels of the accused for FSL examination. He has sent the victim before the Court on 08-06-2016 for recording her statement under Section 164 CrPC. From the date of filing ejahar and sending the victim to learned Magistrate for recording her statement under Section 164 CrPC, the victim was with woman constable Ainu Begum. They do not have any specific chamber to keep vulnerable woman or children in their police station. Therefore, if such person is kept in the police station, any person can meet him/her at their room. At that time, the victim was accompanied by her mother as a guardian. The victim was medically examined on 08-06-2016.

- **18.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- **19.** I have heard arguments put forwarded by learned counsel for both the parties.
- 20. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, there are wide contradictions in between the statement of victim and other witnesses. According to the victim she was committed rape by accused under a Jack fruit tree but according to the prosecution story she was committed rape by accused under a Mango tree. Secondly, she consistently admitted that she was forcefully dragged through the jute plantation where there were many thorns and the place was muddied as a result, she sustained injury on her legs and hands but doctor did not find any injury on her body. The doctor examined her on 08-06-2016 i.e. in the next day of occurrence but doctor did not find any injury at the time of examination. The victim also stated that she sustained pain on her private parts and back but the doctor did not find any such injury on her body at the time of examination. Besides, the victim did not report to her mother or any person that due to such act of the accused she sustained injury on her legs and hands even on her churidar was blood stained. Besides, the I.O. has failed seize any such blood stained clothes. Thirdly, there is an ample opportunity to flee away from the clutches of the accused but she did not avail so. **Fourthly,** there is an ample evidence that complainant and accused has an enmity for which the complainant has filed this false case against the accused. Lastly, but not least according to the doctor there were no signs and symptoms of suggestive sexual intercourse. Had the victim be really committed rape by the accused on the previous day of examination, the doctor must found some injury or atleast the symptoms of such ravishness. Under such circumstances, the accused is entitled to get acquittal.

- **21.** On the other hand, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt, as such accused is required to be convicted under the charged section of law.
- **22.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- 23. A close scrutiny of the record, it appears that to substantiate the case, the prosecution examined as many as 9 numbers of witnesses. Out of 9 numbers of witnesses, 3 are official witnesses and remaining 6 numbers of witnesses are non official witnesses. It is a fact that here in this case there is only one eye witness who is the victim of this case, Other witness PW. 1 is the mother of the victim and PW 5 is the father of the victim, PW 4 is a close relative of the victim, PW 6 is the grand mother of the victim, PW 7 is the elder sister of the elder sister of the victim. Therefore, all the unofficial witnesses are close relatives of each other. Since there is no any other eye witness other than the victim so we have to scrutinize the statement of the victim to see how far the prosecution case relied upon her statement. According to the victim at the relevant time when she went to collect mango from the mango tree suddenly accused appeared, gagged her mouth, took her under a jack fruit free by dragging her through jute plantation and thereafter raped on her. She raised alarm and called her causin then accused fled away. She admitted in cross-examination that while she was taken by holding both of her hands dragging through jute plantation where there are many thorn she sustained injury even blood was oozing, thereby stained her churiddar. She also admitted that during forceful rape she sustained injury on her private parts but it is interesting to note that in the next day of the incident the doctor has examined her but the doctor did not find any injury. After examination, the doctor opined that no sign and symptoms of recent sexual intercourse and injury was observed. Besides that, sustaining of injury caused by dragging her through the jute

plantation was not reported neither to her mother nor to her father or any of the family members. Had she been really sustained injury it is expected she could she could atleast reported the matter to her mother but she did not do it. Secondly, according to her in the forceful commission of rape she sustained injury in her private parts and also sustained pain on her back but she did not find any such injury nor she even reported the matter to the doctor about the sufferings of pain on her back. Besides that, there is an enmity appears in between the accused and the family of the complainant. It is PW 1, the complainant of this case who admitted that she has filed a case against one Maharuddin as the accused has found them in the back side of accused's house in talking each other at dark night before two years of the incident of this case. In that case, accused was cited as a witness from their side. Thirdly, as stated above all the non official witnesses are related to each other and there is an evidence that there were many people resides in an around the place of occurrence but the prosecution has failed to examine any of the other independent witnesses. It is not only these non official witnesses are only residents of place of occurrence. There is a clear evidence that there are many other independent persons were reside. Had such a hatred incident took place in a village like Kamarchuburi of Thelamara, local people must have known about the incident. Non examination of any other independent witnesses also cast a doubt to the alleged occurrence. Fourthly, it appears that according to the FIR accused committed rape on the jute plantation by taking the victim by gagging her mouth but victim clearly stated that she was committed rape by the accused under a jack fruit tree from the place where she was collecting mango. Therefore, the place of occurrence as stated in the FIR is contradictory with the place of occurrence as mentioned by the victim and other witnesses.

24. The main evidence in all such cases is that of the victim herself. In practice a conviction for rape almost entirely depends on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. It is not

necessary that there should be independent corroboration of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe to act upon it.

Besides that, law is also well settled by a catena of decisions of the Supreme Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a *sine qua non* for a conviction in a rape case.

In the instant case, as discussed details above, the only witness i.e. the victim cannot be reliable, convincing and trust worthy to convict the accused as the statement of the said victim cannot inspire confidence in my mind.

- **25.** Under such circumstances, the accused Rafiqul Islam is entitled to get the benefit of doubt. Hence, acquit him on benefit of doubt and set him at liberty forthwith.
- **26.** The liability of the bailor is hereby discharged.

Given under my Hand and Seal of this Court on this the 22nd day of November, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Muss Kariman Nessa, complainant.

2. Prosecution Witness No.2 :- Victim.

3. Prosecution Witness No.3 :- Dr. Tutumoni Handique, M.O.

4. Prosecution Witness No.4 :- Musstt Asmina Khatoon

5. Prosecution Witness No.5 :- Md. Noor Ali 6. Prosecution Witness No.6 :- Amina Khatoon

7. Prosecution Witness No.7 :- Musstt Sabikun Nehar

8. Prosecution Witness No.8 :- Mr. K.K. Sharma, Addl.CJM.Sonitpur.

9. Prosecution Witness No.9 :- Sri Prasanna Saharia, I.O.

EXHIBITS.

Exhibit 1 : 164 Cr.P.C. statement of the victim.

Ext. 1(1) & 1(2): Signatures of the victim.

Ext. 2,3, 4 & 5: Medical report, Advice slip, laboratory report, x-ray

report.

Ext. 2(1) and 3(1): signatures of the Doctor.

Ext. 5(1) : Signature of Dr. P.K. Barman.

Ext. 6 : GR case No. 1788/16

Ext. 6(2), 1(3): Signatures of learned CJM, Mr. K.K. Sharma.

Ext. 6(1) : order dated 08-06-2016.

Ext. 7 : Ejahar.

Ext.. 8 : Sketch map.

Ext. 9 : Chargesheet.

Ext. 7(1), 8(1) & 9(1): Signatures of the I.O.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR