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

Present:- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 12 of 2017, U/S 6 of Pocso Act & Section 376(2) IPC (Arising out of Sivasagar P.S. Case No. 186/2017)

State of Assam

-Vs-

Sri Dulumoni Bordoloi Accused

APPEARANCE:

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

For the accused : Mr. D.K. Gohain, Advocate

(Legal Aid Counsel)

Date of framing Charge : 15.12.2017 & 24.05.2018

Dates of Evidence : 21.02.2018, 10.05.2018, 24.05.2018,

21.06.2018, 14.09.2018

Date of S/D : 28.09.2018

Date of Argument : 02.11.2018 & 29.11.2018

Date of Judgment : 12.12.2018

JUDGMENT

1. Prosecution case in brief is that on 19.03.2017, informant Sri Prasiddha Kumar Bora lodged an FIR with O/C, Sivasagar P.S. alleging, inter alia, that on the previous night, at about 12 midnight, the accused person named in the FIR, entered into his house campus without any permission and remained in the room of the victim 'K' (named withheld), aged about 15 years, who works in his house as domestic help. On getting information, when he went to her room, accused fled away. On asking, the victim told him that in spite of her resistance, accused made cohabitation with her for about 4-5 times. She also informed him that accused restrained her from disclosing the fact of cohabitation to others. It is further alleged that accused has inquired in detail Spl. (P) Case No. 8/2015

about his house from the victim and on this he suspect that accused might commit dacoity in his house.

- 2. On this FIR, Sivasagar P.S. Case No. 186/2017, u/s 448 IPC and Section 4 of POCSO Act 2012 was registered. It may be noted here that on the date of filing FIR, the informant handed over the accused and the victim at the P.S. and accordingly on that day, I.O. recorded the statement of the informant and the victim at the P.S. During investigation, the victim was medically examined and also got her statement recorded in court u/s 164 Cr.P.C. Accused was arrested and forwarded to judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 448/376/420 IPC.
- 3. Upon taking cognizance on the Charge-Sheet and after furnishing copy to the accused, vide order dated 15.12.2017, charge u/s 6 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial. However, in addition to earlier charge of Section 6 of POCSO Act 2012, vide order dated 24.05.2018, after hearing both the sides, alternative charge u/s 376 (2) IPC was also framed and explained to accused to which he again pleaded not guilty and claimed to stand trial. During trial, prosecution has examined seven witnesses including M.O. and I.O.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Accused declined to adduce evidence when he was called upon to enter into defence. Defence case is of total denial and false implication.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D.K. Gohain, learned Legal Aid 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 on the date of incident?
 - (II) Whether since last one year of filing FIR on 19.03.2017, accused has committed aggravated penetrative sexual assault/rape on the victim?

DECISION AND REASONS THEREOF

- 7. PW-1 Sri Prasiddha Kumar Bora in his evidence deposed that victim K is known to him being worked in his house as domestic help. Her age was about 15 years. On 18.03.2017, at about 12 midnight, on getting noise in the room of victim, when he went to her room, he saw that accused Dulumani Bordoloi in going out of her room. On his asking, victim informed him that in spite of her resistance, accused cohabitated with her on 4-5 occasions. Accused entered in his house campus without any permission though gates were locked. Victim also revealed that accused restrained her from disclosing the fact of cohabitation with her. Victim also revealed that accused has enquired in detail about his house and his timing of coming house. On this, he suspect that accused might commit dacoity in his house. On the next day i.e. 19.03.2017, he lodged an FIR at Sivasagar P.S. Exbt. 1 is the FIR. In his cross examination, PW-1 deposed that he has stated the age of the victim on assumption and being reported by her father. She was at his house for last 2-3 years. He has not submitted any document relating to her age. He has no knowledge about victim's educational qualification. PW-1 denied the suggestion made by defence that he lodged the FIR on the suspicion of dacoity.
- 8. PW-2 Smt. Rupali Bora Hazarika in her evidence deposed that while residing as tenant at the house of Advocate Prasiddha Kr. Bora, victim worked at the residence of their landlord as domestic help. On the next day of the incident, wife of Prasiddha Kr. Bora rang her and informed that on the previous night one boy came to the room of victim and someone from her family seen the said boy. During discussion, victim disclosed that the said boy came to her on earlier occasions too. Except this, she has no knowledge about any other incident with victim. She personally did not ask victim on this matter. In her cross examination, PW 2 admitted that she informed her husband about the matter. She has no personal knowledge about this incident.
- 9. PW-3 Sri Arup Jyoti Hazarika in his evidence deposed that on the next day of the incident, wife of Prasiddha Kr. Bora rang to his wife and

informed that on the previous night one boy came to the room of victim and someone from her family seen the said boy. Except this, he has no knowledge about any other incident with victim. He personally did not ask victim on this matter.

10. PW-4 the victim K, in her evidence deposed that accused Dulumani Bordoloi is known to her being resident of a nearby place where she worked earlier. Her age is about 18 years. On 18.03.2017, she was worked as domestic help at the residence of advocate Prasiddha Kumar Bora. During her stay there, accused came in her touch. She used to reside on the ground floor in a separate room. Mother of Prassidha Kr. Bora also used to stay in a different room at the ground floor. While she stayed in their house, accused used to meet her while she go to nearby market. Accused also used to come to her room at night hours. On three occasions, accused established physical relation with her. He did not care for her resistance and threatened her for not to disclose the incident to others. On the last occasion, while accused was returning after committing misdeed with her, mother of Prassidha Kr. Bora saw the accused in the veranda of drawing room. Immediately accused flew away therefrom. She informed the matter of physical relation with her by the accused to Prassidha Bora and his mother. Prasidha Bora searched for the accused and after apprehending him, handed over to police. Police took her for medical examination. Police also brought her to Court, where she gave her statement on similar lines. She cannot say her date of birth. She never go to school. She has no birth certificate. In her cross examination, PW-4 deposed that she worked at the residence of Prassidha Bora for about 2 years prior to this incident. She never go to nearby shops for marketing, though sometime she went to outside the gate. For about one year, accused told her that he loves her. However, she did not respond and refused his offer to love him. Except the last day incident, when accused was seen in the varanda, she did not inform the matter of coming of the accused to her room and establishing physical relation with her against her will to her employer. On all the three occasions, when accused came to her room, and made physical relation, she did not made any hue and cry. She used to sleep by closing the door and window from inside. No one can enter the room through the door without opening from inside. She has 2 brothers and 4 sisters. Her 2 brothers and 2 sisters performed marriage. She has not submitted any document of her age. She denied the suggestion that on the date of indent, she was above 18 years old. She also denied the suggestion that accused never committed any physical relation with her. Doctor got her medically checked on the next day of the last occurrence. She denied the suggestion that she was in deep love with the accused and wanted to marry the accused but her employer did not agree and sent back her to her paternal home. She further denied the suggestion that a false case was lodged against the accused.

- 11. PW-5 Smt. Sushila Bala Bora in her evidence deposed that on 18.03.2017, at midnight hours, on getting noise of knocking on the door of her nearby room, where victim was sleeping, she informed her son over phone, who used to sleep in the first floor of the house. Before arrival of her son Prasiddha, one person flee away over the boundary wall. On their asking victim informed them that the boy staying at the residence of Mukul Bora as tenant, came to her room and wanted to sleep with her. In her cross examination PW-5 denied that while giving statement to police, she has not stated that "the boy residing at the tenanted premises of Mukul Bora came to her house."
- 12. PW-6 Dr. Duplay Patir in his evidence deposed that on 20.03.2017, at 01.00 P.M., on police requisition, he examined the victim K and on examination he found that her age is above 18 years as per radiological examination. She does not have any sign of recent sexual intercourse. She does not have any sign of pregnancy at the time of examination. She does not have any sign of injury on her body and private part at the time of examination. Ext. 2 is the medical examination report and Ext. 2(1) is his signature.
- 13. PW-7 ASI Loknath Basumatary, the I/O of this case in his evidence deposed that on 19.03.2017, while at about 04.00 PM, the then O/C has received one written FIR from Sri Prasiddha Kumar Bora and registered

Sivasagar P.S. case No. 186/2017 U/S 448 IPC and Section 4 of POCSO Act and entrusted him to investigate the Case. During investigation, he went to the place of occurrence and drawn a sketch map of the PO. Exbt. 3 is the said sketch map. On the same day victim was sent for medical examination. On 20.03.2018, accused was arrested and forwarded to Judicial Custody. On 20.03.2018 the victim was again sent to Sivasagar Civil Hospital for detail medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. During investigation, 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 u/s 448/376/ 420 IPC. Exbt. 5 is the charge sheet. In his cross examination, PW-7 deposed that witness Sushila Bora in her statement before him did not state that "the boy residing at the tenanted premises of Mukul Bora came to her house." But she stated that from victim she came to know that the boy residing in the nearby tenanted premises came to her house. As per medical report age of the victim was shown as above 18 years. PW-7 denied that he has not investigated the case properly and submitted charge sheet without proper materials against the accused.

14. Point No. I: So far age of the victim is concerned, from the evidence of PW 4 the victim, it appears that while deposing evidence on 24.05.2018, she claimed her age as 18 years. In her cross examination she admitted that she has not submitted any document on her age and denied that she was above the age of 18 years. PW 1, the informant in his evidence stated that age of the victim was aged about 15 years. In his cross examination he also admitted that he has not submitted any document relating to her age and has no knowledge about her educational qualification. PW 6, the M.O. in his evidence admitted that during examination of the victim on 20.03.2017, as per the radiological evidence which shows complete fusion of both the wrist joint and elbow joint he opined that age of the victim is above 18 years and proved his report as Exbt.2. PW 7, the I.O. in his evidence admitted that basing on the medical evidence on age of the victim, he has submitted the Charge Sheet for

the offence u/s 376 IPC along with other offences. So from the above materials on record, it appears that the victim have no birth certificate and admittedly she did not go to school and has not document on her age. Though she claimed her age as 17 years at the relevant time of incident, but from the medical opinion, which is found more reliable being based on radiological evidence which shows complete fusion of both the wrist joint and elbow joint, it appears that the victim was aged above the age of 18 years. As such, under these circumstances I hold that on the date of occurrence the victim was aged above the age of 18 years.

- 15. Now coming on the point No. II, in view of Point No. II: determination of age of the victim as above 18 years, so the instant case certainly comes under the purview of Section 376 IPC and hence the provision of POCSO Act is not applicable in this case. On looking at the evidence of PW 4 as narrated herein before, it appears that she works as domestic help at the residence of PW 1 and used to stay in a different room on the ground floor and PW 5, the mother of the informant also used to reside in a different room at the ground floor. The victim admitted that accused used to meet her while she went to nearby market and he also used to come to her room at night hours. PW 4 deposed regarding coming of the accused on three occasions and making physical relation with her and on the last occasion while the accused was returning after committing misdeed with her, PW 5 mother of the informant has seen the accused and there from accused manage to flee away. On the next day accused was apprehended and handed over to police.
- 16. However PW 5 has stated a different story that for the date of incident, i.e. on hearing noise of knocking on the door of the room where the victim used to sleep, she informed the matter to her son over phone and before arrival of her son, accused manage to flee away there from. Thereafter on being asked, the victim disclosed that accused came there with an intention to sleep with her and disclosed the identity of the accused.
- 17. PW 1 the informant in his evidence has disclosed that on

18.03.2017, at 12 mid-night, on getting noise in the room of the victim when he came down he saw the accused in going out of her room. It is the victim who has informed him about physical relation by the accused by coming on her room at night hours. PW 2 and PW 3 are the tenants under the PW 1 and they have simply deposed that they have heard the matter from their landlord.

- 18. PW 4, the victim is silent that the informant has seen the accused. In her cross examination, the victim further admitted that except on the last day incident the accused was seen at the veranda and she did not inform the matter of coming of the accused to her room and establishing physical relation with her. She further admitted that she used to sleep by closing the door and window from inside and no one can enter the room through the window without opening from inside. This part of the admission of the victim clearly indicates that in the event of arrival of the accused to her room she used to open the door and had some illicit relation with the accused, but she did not disclose the incident except on the last occasion when the matter came to the notice of the informant. The victim being major in age and having prior acquaintance with the accused, the conduct of the victim shows that she is a consenting party in the physical relation with the accused. Non-disclosing of the fact immediately after the first incident of physical relation with the accused under threat clearly shows her contenting character.
- 19. Under the above facts and circumstances the evidence of the victim that she was subjected to rape by the accused against her will appears to be unbelievable and untrustworthy without any further corroboration. On looking at the medical evidence, it appears that on the very next day, i.e. within 16 hours the victim was examined by the M.O. but no injury marks or no symptom of any physical relation was found on her person, which also negates the theory of allegation of rape on the victim on the particular days. As discussed earlier, the evidence of the PW 5 also negates the story of physical relation on 18.03.2017 simply on the ground that upon hearing the sound of knocking on the door of the room of the victim she informed the matter to her

son who immediately came down and accused managed to flee away. As such, no incident of rape apparently visible on 18.03.2017.

- 20. Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of charge u/s 6 of POCSO Act, 2012 and Section 376 (2) IPC against the accused. As such, accused Sri Dulumoni Bordoloi is acquitted from the charge u/s 6 of POCSO Act, 2012 and Section 376 (2) IPC and set at liberty forthwith.
- 21. Issue release order to the Superintendent, District Jail, Sivasagar accordingly.
- 22. As the accused is in Jail, no order is passed U/S 437 A Cr.P.C.
- 23. Considering the nature of the case, the matter is not referred to DLSA for granting compensation U/S 357 A Cr.P.C.
- 24. Judgment is pronounced in open Court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 12th day of December 2018 at Sivasagar.

Special Judge, <u>Sivasagar</u>:

APPENDIX

- 1. <u>Prosecution witnesses</u>:
 - PW 1 Sri Prasiddha Kumar Bora (Informant)
 - PW 2 Smt. Rupali Bora Hazarika
 - PW 3 Sri Arup Jyoti Hazarika
 - PW 4 (Victim 'K')
 - PW 5 Smt. Sushila Bala Bora
 - PW 6 Dr. Duplay Patir (M.O.)
 - PW 7 ASI Loknath Basumatary (I.O.)
- 2. <u>Defence witnesses</u> None
- 3. <u>Court witnesses</u> None
- 4. Exhibits by prosecution -
 - Exbt.1 FIR
 - Exbt.2 Medical examination report
 - Exbt.3 Sketch map
 - Exbt.4 Statement of the victim given u/s 164 Cr.P.C.
 - Exbt.5 Charge-Sheet

Special Judge, Sivasagar