IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>65 OF 2017</u>

(Under Section 493 of the IPC read with section u/s 4 of the POCSO Act, arising

out of G.R. Case No. 3955/2017)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor State of Assam

-vs-

Accused :- Md. Sadiqul Islam @ Sahidul.

Son of Md. Abdul Rajek Resident of Akabasti Police Station – Chariduar Dist:- Sonitpur, Assam

Date of framing Charge :- 02/01/2018

Date of Recording Evidence :- 06/04/2018, 27/04/2018,

14/05/2018, 05/07/2018, 04/08/2018 & 06/08/2018.

Date of examination of accused u/s 31:- 14/08/2018

Cr.P.C.

Date of Argument :- 06/09/2018

Date of Judgment :- 07/09/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. B.K. Basumatary, Advocate.

<u>JUDGMENT</u>

- **1.** In this case accused Md. Sadikul Islam is put for trial for allegation of charge under Section 493 of the IPC read with section 4 of the POCSO Act, 2012.
- 2. The prosecution case according to the FIR in brief is that for last 6 months from the date of filing of the ejahar, accused Sadikul has love affairs with informant's daughter, Miss X and they have thereafter physical relation for many times. It is stated that Sabikul with a lure to marry her indulged in sexual activities with the daughter of the informant. At present informant's daughter became pregnant. When he was asked to marry her, Sadikul threatened her with dire consequences. Hence, this prosecution case.
- 3. The ejahar was filed by the informant Abdul Hasim before the O/C of Chariduar police station on 11-10-2017. On receipt the ejahar, the Officer-In-Charge of Chariduar Police Station registered the case vide Chariduar P.S. Case No. 231/17 u/s 376/506/493 of IPC. After completion of usual investigation, the O/C Chariduar Police Station filed charge sheet u/s 376(2)(i)/506/493 of the IPC read with section 6 of POCSO Act against the accused Md. Sadikul Islam.
- 4. On being appeared the accused before this Court, after hearing both parties, I framed charge u/s 493 of the IPC read with section 4 of the POCSO Act, against the accused Md. Sadikul 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 has examined as many as 8 (eight) witnesses. After completion of prosecution evidence, accused was 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 allegation and evidence and declined to give defence evidence.

Page 2

- **6.** I have heard arguments put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -
 - (1) "Whether on or about 11-10-2017, at about 5 p.m., at Akabasti gaon under Chariduar Police station, the accused by practicing deceit, caused a certain woman, to wit Miss X, who was not lawfully married to the accused to believe that she was lawfully married to the accused and in that belief, cohabit or have sexual intercourse with the accused and that the accused thereby committed an offence punishable U/S 493 of the IPC?
 - (3) "Whether on the same, date time and place the accused committed penetrative sexual assault on "Miss X" (victim) and thereby committed an offence punishable under section 4 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.
- PW 1 Md. Abdul Hasim, the complainant of this case, stated that the incident took place about 6 months ago in the year 2017. Victim is his daughter. On the day of incident, his daughter went to the house of her elder sister and on the way accused met her and he dragged her towards the jungle and raped her. Then, he lodged the ejahar before Chariduar police station regarding this incident, where he put thumb impression. Police took his daughter for medical examination and then to the Court for recording her statement under Section 164 CrPC. Police recorded his statement.

In cross-examination, he admitted that he does not know the date of birth of his victim daughter. He has three daughters and three

sons. Osman Ali is his eldest son. Sadir Ali next to him, Kitab Ali next to Sadir. Osman is aged about 25/26 years old. Sadir Ali one year Junior to Osman, Kitab Ali is also one year Junior to Sadir. His victim daughter is next to Kitab Ali. Victim is two years junior to Kitab Ali.

10. PW 2, Musstt Firoja Khatoon, stated before this court that she knows the accused. Abdul Hasim is her husband and the victim is her daughter. The incident took place about 6 months ago in the year 2017. At the time of incident, her daughter was 15 years old. On the day of incident, when her victim daughter was returning from her elder sister's house, on the way, accused dragged her towards the jungle and committed rape on her. After that, the accused made her belief that he will marry her. She came to know about the incident from her daughter. After that her daughter become pregnant.

In cross-examination she admitted that there is a distance of about 1½ km from their house and the house of accused. She has three daughters. One of her daughters Rabia Khatoon was married to one Asgar Ali who is resided near her house. Sadiqul used to go outside for his works. Prior to the incident, he was at Bangalore. Few days prior to the incident, he came to his house, but, she cannot recall how many days before he came. Her victim daughter reported that before one month of the day of incident, her Menstrual Cycle was closed. She does not know if her victim daughter has love affairs with the accused. About 30/35 years ago, she has married to her husband Abdul Hasim. She cannot recall when the victim girl was born after her marriage. Victim is her own daughter and she is her first child. She cannot say the exact age of her victim daughter.

11. PW 3 Miss X, the victim, stated that she knows accused Sadiqul Islam. The incident took place about 7 months ago. At the relevant time she went to her elder sister Rabia Khatoon's house. Then, accused took her towards the jungle from the road and committed rape on her. Accused by opening her clothes and committed bad act (rape) on her. Thereafter, her menstrual cycle has stopped for two months. Then, she

reported about the incident to her mother. Her mother reported the matter to her father. Thereafter, her father filed this case. After instituting the case, police examined her medically, recorded her statement and also sent to the learned Magistrate for recording her statement under Section 164 CrPC. Then, she narrated the whole incident to the learned Magistrate. Ext. 1 is her statement under Section 164 CrPC and Ext. 1(1) and Ext.1(2) are her signatures. I.O has collected her birth certificate where the date of birth is written as 15-05-2013.

In cross-examination, she admitted that acused loved her, but, she did not love him. Her elder sister got married long back. She read up to class-V. She has given up school four years ago. Before the incident took place, she has given up school. The distance between the place of occurrence and her elder sister's house is about 1 km. There are many people resides near the place of occurrence. As they love each other, so, according to her will, the accused meets her. Accused had physical relation with her twice. Prior to incident of this case, there were other such incident took place earlier. After two months of the incident, her menstrual cycle stopped. As they have loved each other, so, accused proposed to marry her. After the incident, they convened a village meeting. In the said meeting, the villagers advised her to compromise the matter. Accordingly, they have compromised the case. She does not have any grievances against the accused Sadigul. She does not have any objection, if the accused is enlarged on acquittal from this case.

12. PW 4 Musstt Ayesa Khatoon deposed that she knows the accused. The incident took place about 6 months ago. She also knows the victim. At the time of incident, she is 15/16 years old. She came to know from the mother of victim Firoza that the menstrual cycle of her daughter was stopped. On being asked the victim girl by her mother, she told that accused Sadiqul committed rape on her. So, her menstrual cycle was stopped. Then, mother of the victim informed her about the

incident. She knows that there is a relation over phone in between the accused and victim. She met the victim along with the accused in her house. On being asked, victim told that out of fear she did not disclose about the affairs with the accused. Thereafter, Firoza the mother of the victim has filed the case.

In cross-examination she stated that victim is her adjacent neighbor. Sadiqul was at Banglore prior to one month of filing of this case. She heard about the incident from the mother of the victim after 20 days of filing of the case. Victim girl used to visit her house quite off and on. Prior to that day, she never disclosed about the said affairs she has with the accused. She does not have any personal knowledge about the incident.

- **13.** PW 5 Mustt Rosida Begum stated that she knows accused Sadiqul Islam. She also knows the complainant Firoza and her daughter. At the time of incident, victim was 16 years old. One day victim came to the house and charged her mobile phone and thereafter she called someone from her mobile. She does not know to whom she ring from her mobile phone.
- **14. PW 6** Dr. Amarjit Kaur stated that on 13-10-2017 she was posted as working as Sub-Divisional Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day at about 1.45 p.m. in the labour room complex of KCH, she examined Hasina Khatoon, 15 years, D/O Abdul Hasim of Akabasti gaon, PS Chariduar, in reference to Chariduar PS Case NO. 231/17 u/s 376/506/493 of the IPC, on being escorted and identified by WHG Jamini Das, vide Hospital Registration No. 78779/E/17. She was examined in presence of GNM Manika Dutta. On examination he found the following:

Identification mark: a black spot on the plam on the base of the thumb.

Menstrual history: regular cycle, LMP 12-09-2017

History of sexual exposure: present.

At the time of examination, she was well dressed, neat and tidy with average built. Young girl. Her gait was normal. Her Secondary sexual characters were well developed. Vulva, vagina healthy. No mark of injury seen on her body as well as on her private parts. Hymen absent. Height -144 cm, Weight -42 kg, Teeth -14/14.

Vaginal smear was taken and sent for examination.

Investigation advised and report:

- Vaginal smear report sperm not seen. KCH lab No. 136/17 dated 13-10-2017.
- 2. Urine for HCG report not received till date.
- 3. X-ray for left elbow joint, wrist joint and Iliac crest.

Inference: Age of the person under investigation appears to be below 18 years.

4. USG Pelvis – normal pelvic organ with non gravid uterus.

X-ray and USG done at AXCAL, Patient ID AXC 941 dt. 17-10-2017, Radiologist Dr. P.K. Barman.

- **OPINION:** 1. There was no signs and symptoms of recent sexual intercourse.
- 2. No mark of violence was seen on her body as well as in her private parts.
 - 3. Actual Age of the victim under investigation appears to be below 18 years.
 - 4. Victim girl was not pregnant.

Enclos: 1. vaginal smear report, 2. USG flims and report,

3. X-ray plates and reports and 4. Advice Slip.

Ext. 2 is the Medical Report and Ext. 2(1) is her signature. Ext. 3 is the Advice slip and Ext. 3(1) is her signature. Ext. 4 is the X-ray report and plates and USG report with films and Ext. 4(1) is the signature of Dr. P.K. Barman, Radiologist. Ext. 5 is the vaginal smear report of KCH and Ext. 5(1) is the signature of technician of KCH, Tezpur. Generally spermatozoa may be found in sexually intercoursed case is upto 48 hours from the time of intercourse.

15. PW 7 Sri Dwijumoni Sarmah stated that on 11-10-2017 he was posted as SI of police at Chariduar Police station and on that day one Abdul Hasim filed one written ejahar. The said ejahar was registered by the then O/C Chariduar PS being Chariduar PS Case No. 231/17 u/s 376/506/493 of the IPC. After registering the case he was entrusted to investigate the case. In the said ejahar the complainant put thumb impression. Ext. 6 is the said ejahar and Ext. 6(1) is the signature of then O/C Satish Sahoo which is known to him. On that very day he has recorded the statement of the complainant at the police station and in the next day he has visited the place of occurrence. He has also prepared the sketch map of the place of occurrence and recorded the statement of witnesses, namely, Firoja Khatoon, Rashida Khatoon, Ayesha Khatoon and victim Hasina Khatoon. At the relevant time the victim was a minor. Ext. 7 is the sketch map and Ext. 7(1) is his signature. He has also collected one school certificate of the victim where it is stated that her date of birth was on 15-05-2003. On 13-10-2017 the victim was sent to KCH, Tezpur for medical examination and she was also sent to the learned court for recording her 164 Cr. P.C. statement. On 23-10-2017 the accused Sadiqul Islam surrendered before the police station. He has also collected the medical report, statement u/s 164 Cr.P.C. of the victim and on completion of usual investigation he has filed chargesheet vide chargesheet No. 149/17 dated 30-11-2017 against the accused Sadigul Islam u/s 376(2) (i)/506/493 of IPC read with section 6 of the POCSO Act. Ext. 8 is the charge sheet and Ext. 8(1) is his signature.

In cross-examination, he stated that in the First Information Report was registered by the O/C wherein in 3 No. point (B) occurrence of offence/date is mentioned as before 6 months, time – not noted. The victim stated that the occurrence took place before 6 months from the date of filing of the FIR.Ext. 6 is silent about the cause of delay in filing the ejahar. The victim was accompanied with her mother to the court for recording her statement u/s 164 Cr.P.C. After receipt of ejahar, he did not visit the place of occurrence. He has not recorded the statement

of the officer who issued the school certificate of the victim. According to school certificate seized, the date of birth of the victim is 15-05-2003. The statement of Abdul Hasim was recorded in the police station.

- **16.** PW 8 Smt. A. Rahman, stated that On 13-10-2017 she was posted as Sub-Divisional Judicial Magistrate, Sonitpur, Tezpur and on that day in reference to Chariduar PS Case No. 231/17 u/s 376/506/493 of the IPC one girl namely, Miss X, aged about 16 years, D/O Abdul Hasim of Akabasti Bengali gaon, PS Chariduar was produced before her for recording her statement u/s 164 Cr.P.C.. She has recorded the statement of said girl at the court chamber. The victim girl made statement voluntarily. At the time of recording her statement there was none other than her and the victim witness. The victim was identified and escorted by woman Home Guard Jamini Das. After recording her statement she read over the contents of statement to the victim and on acceptance, she put signature thereon. Ext. 1 is the said statement of victim girl and Ext. 1(3) is her signature.
- **17.** These much is the evidence of the prosecution.
- **18.** The accused pleads total denial while his statement was recorded u/s 313 Cr.P.C. he also denied to give defence evidence.
- **19.** I have heard the arguments put forwarded by learned counsel of both sides.
- **20.** Here in this case, the charge is framed u/s 493 of the IPC read with section 4 of POCSO Act against the accused. To prove the charge u/s 493 of the IPC, the prosecution must prove –
- (i) that the accused caused the woman in question to believe that she was lawfully married to him;
- (ii) that he induced that woman to cohabit with him under that belief:
 - (iii) that he caused such belief by deceit.

- 21. Law is well settled that the offence u/s 493 consists in giving a false assurance of the marriage to the girl and thereby procuring sexual intercourse with her, but here in this case according to the victim who admitted in her cross-examination that they have loved each other so according to her own will accused met her and had physical relation with her. Even prior to the incident, there are other incident took place. She even admitted that she does not have any grievances against the accused and she has no any objection, if the accused is enlarged on acquittal. Therefore, the victim herself gives good bye to the prosecution case, as such, the allegation of charge u/s 493 of the IPC is failed.
- **22.** Similarly, to bring the charge under section 4 of the Protection of Child from Sexual Offences (POCSO) Act, prosecution must prove the ingredients mentioned in section 3 of the POCSO Act.

Section 3 of the POCSO Act quoted as follows:

<u>Section 3. Penetrative Sexual</u> <u>assault,</u> - A person is said to commit "pemetrative sexual assault" if -

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body o the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- **23.** But in this case as stated above, the victim admitted in cross-examination that before the incident she had given up the school and

she also admitted that they love each other so according to her own will accused met her and accused had physical relation with her twice. Even prior to the incident, there are other incident took place. She even admitted that she does not have any grievances against the accused and she has no any objection, if the accused is enlarged on acquittal, by stating gives good bye to the prosecution she 24. Learned Public Prosecutor submitted that victim being minor, her consent is no consent at all. On the other hand, learned counsel for the accused submitted that prosecution has failed to examine the Officer who has issued birth certificate as seized by prosecution, therefore, prosecution has failed to prove the documents which is required to be proved by the person who issued it, as such, there is no evidentiary value of the alleged certificate. On the other hand, doctor opined that the victim was below 18 years. Learned counsel for the accused relying upon the Judgment of Hon'ble Supreme Court titled as Jai Mala Vs. Home Secretary, Govt. of Jammu and Kashmir and others AIR 1982 SC 1297 wherein it has been observed by Hon'ble Supreme Court that margin of error in age ascertained by radiological examination two years on either side. Relying on the said Judgment learned counsel for the accused argued that if the margin of + 2 years

Keeping in mind the arguments advanced by the learned counsel for both the parties and the documents as submitted by prosecution, the victim's age cannot be proved as below 18 years.

is taken in case of prosecutrix, certainly it cannot be said that she was minor on the date of the alleged incident, as such, case cannot fall

25. In view of the aforesaid discussions, I am bound to hold that the prosecution has failed to prove any of the charge levelled against the accused person beyond any reasonable doubt. As such, the accused Md. Sadikul Islam is entitled to get acquittal on benefit of doubt. Hence, accused Md. Sadikul Islam is acquitted and set him at liberty forthwith.

under the POCSO Act.

- **26.** The liability of the bailor is hereby discharged.
- **27.** Send back the GR Case record being No.3955/17 to the learned committal court along with a copy of this order.

Given under my Hand and Seal of this Court on this the 7^{th} day of September, 2018.

(A.K. Borah) Special Judge, Sonitpur, Tezpur.

Dictated and corrected by me.

(A.K. Borah) Special Judge, Sonitpur, Tezpur.

Transcribed and typed by me.

(R. Hazarika)Steno.

APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Sri Abdul Hasim

2. Prosecution Witness No.2 :- Musstt Firoja Khatoon

Prosecution Witness No.3 :- Victim

Prosecution Witness No.4 :- Musstt Ayesha Khatoon

Prosecution Witness No.5 :- Musstt Rosida Begum

Prosecution Witness No.6 :- Dr. Amarjit Kaur

Prosecution Witness No.7 :- SI Dwijumoni Sarmah I.O.

Prosecution Witness No.8 :- Smti A. Rahman, SDJM, Sonitpur,

EXHIBIT

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

Ext. 2-5 : Medical reports.

Ext. 6 : ejahar

Ext. 7 sketch map

Ext. 8 : Chargesheet.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR.