IN THE COURT OF THE SPECIAL JUDGE ::::: BONGAIGAON Special (P) Case No. 1(BGN)/2018.

U/S 4 of POCSO Act.

(Bongaigaon P.S. Case No. 549 of 2017)

State of Assam

Vs.

Kolin Nath....Accused.

PRESENT :- Smti. I. Barman,
Special Judge (under POCSO Act),
Bongaigaon.

Appearance:-.

For the State

: Smti R.Choudhury, Public

Prosecutor.

For the accused

: Sri P. Sharma, Advocate.

Date of Argument: 14.08.2018.

Date of Judgment: 28.08.2018.

JUDGMENT AND ORDER

1. Prosecution case in brief is that on 25.7.2017 at around 10 P.M accused Kolin Nath entering into the house of the informant had committed sexual assault on his 17 years old daughter forcefully but hearing sound when the family members of the victim proceeded towards her room, the accused by breaking the door ran away

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therefrom.

- 2. FIR on the incident was lodged on 27.07.2017 by PW 1 the father of the victim before the Incharge Bidyapur Out Post.
- On receipt of the FIR, the Incharge Bidyapur Out Post made the GDE No. 434 dated 27.7.207 and forwarded the same to the O/C, Bongaigaon Police Station who accordingly registered a case being Bongaigaon Police Station Case No. 549/2017 U/S 8 of POCSO Act and entrusted S.I. Ajoy Kr Saha to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement U/S 164 Cr.P.C, seized a birth certificate of the victim and then on completion of investigation laid charge-sheet against the accused Kolin Nath U/S under Section 8 of POCSO Act.
- 4. On perusing police report and hearing both sides, having found a prima facie case, charge U/S 4 of POCSO Act was framed against the accused. The accused pleaded innocence when charge was read over and explained to him and claimed for trial.

Point for determination:-

- 1. Whether on 25.07.2017 at around 10.00 P.M at village Rashigaon under Bongaigaon Police station committed penetrative sexual assault on the minor victim punishable U/S 4 of POCSO Act?
- 5. In this case, to bring home the charge against the Contd....

accused, prosecution examined as many as 10 (ten) witnesses.

- 6. In statement U/S 313 Cr.P.C the accused denied all the allegations leveled against him. Defence examined none.
- 7. I have heard argument advanced by the learned counsel of both sides and also gone through the materials on record.

Discussion, decision and reasons thereof:-

- 8. Let the evidence of the witnesses be appreciated for the purpose of adjudicating the charge against the accused U/S 4 of POCSO Act.
- 9. PW 1 is the informant as well as father of the victim. He deposed that on the day of incident at night, his victim daughter was sleeping with his youngest daughter in a room and in adjacent room his nephew and son (PW 3) were sleeping while he slept in another house of the same campus. On that night at about 10.00/11.00 P.M hearing hue and cry of his son, he came out and then his son, PW 3 told him that accused Kolin Nath entered into the room of the victim. But at that time hearing hulla, accused Kolin Nath by breaking the door ran away. Then he called the neighbours. On being enquired on that night though the victim said nothing but after two days she admitted that accused had come and was with her. According to the informant, the accused married his niece . Regarding the incident he filed the FIR, Ext 1. Police seized birth certificate of the victim vide Ext 2. He admitted that after 8 years of birth, he obtained the birth certificate of the victim.

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During cross he stated that he married at the age of 22 years and after 2 years of marriage the victim was born. He admitted that at the time of incident the victim was 19 years old and at the time of obtaining birth certificate, he shows her age less than her actual age. He also admitted that as per instruction of the villagers, he lodged the FIR showing the age of the victim as 17 years.

10. PW 2 is the victim herself. She deposed that on 25.7.2017 at around 10 P.M accused Kolin Nath coming near the window of her room called her. Then on opening the door, the accused entered into her room and while she was talking with Kolin Nath, hearing voice, her brother came out, closed the door from outside and called her father. Then Kolin Nath by pushing the door bended the bolt and went out from the room. She also admitted that then on being enquired by her father, she replied that she knew nothing but on next day when her father called Mahila Samittee, she admitted that accused came to her room and did physical relation with her. She proved her statement U/S 164 Cr.P.C vide Ext 3. During cross she admitted that she had love affair with accused Kolin Nath for last $1/1\frac{1}{2}$ years. She also admitted that out of love, she did have physical relation with the accused on her own accord and at that time she was 19 years old, but in statement U/S 164 Cr.P.C, she stated her age as 15 years as tutored by police.

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11. PW 3, the brother of the victim categorically deposed that on the day of incident at night he was sleeping with his cousin brother and in the adjacent room his elder sister, the victim was sleeping. The two rooms are separated by a partition. On that night at

around 10.30 P.M, hearing talk, he switched on the light of the room and had noticed the shoe of accused Kolin Nath in the room of the victim. Then he bolted the room from outside and called his father. But then the accused kicking at the door, bended the bolt of the door and ran away. Though his father chased the accused but he fled away and on next day, on being called the women of the village, the victim admitted that the accused came. During cross he stated that he only had noticed the shoe of the accused but had not seen him in person and on next day only from the victim came to know that the accused had come.

- 12. PW 4 Nirmala Nath heard that accused Kolin Nath entered into the house of the informant and had did misdeed with victim. During cross he stated that at the time of incident the victim was above 18 years.
- 13. PW 5 Dalim Ch Nath deposed that on 25.7.2017 the incident occurred and on next day morning, the members of the Mahila Samittee asked the victim regarding entry of the accused in her room at around 10 P.M. He proved his signature in the seizure list Ext 2 by which the birth certificate of the victim was seized. During cross he stated that after the occurrence he heard about the love affairs of the victim with the accused. According to this witness at the time of incident the victim was 18 years old.

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14. PW 6 Abdus Sobahan Ahmed the Pharmacist of the Bidyapur CHC deposed that on 11.9.2017 police coming to their office verified the birth certificate of the victim and accordingly after going through the Birth and Death Register, he found that the date of birth of

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the victim was 10.2.2003. During cross examination he stated that there is every possibility to show the actual age less when one applies birth certificate after 21 days of birth.

- 15. PW 7, the grand mother of the victim testified that on that night she was not at home and on next day morning returning home found the informant asking his daughter as to who entered into her room to which the victim remained silent. Then on being called, the villagers came in whose presence on being enquired, the victim, told that at night accused Kolin Nath entered into her room and pulled her wearing apparels. During cross she stated that at the time of incident the victim was 19 years old.
- 16. PW 8 Jyotima Nath in her evidence stated that on 25.7.2017 at around 10 P.M she heard hulla in the house of the informant and on next day at 5 P.M on being called by the mother of the informant i.e P.W 7, they about 10/12 women went to the house of the informant wherein they were reported that at night at around 10 P.M one boy entered into the house of the informant and when his youngest son called him informing about entry of the boy, the accused Kolin Nath by pushing the door ran out from the room of the victim, but the victim did not admit the fact. Hearing the incident when the women enquired the victim, she admitted that the accused entered into her room. She also proved her signature in the seizure list Ext 2 by which the birth certificate was seized.

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17. PW 9 Ajay Kr Saha, the Investigating Officer deposed that on 27.07.17 while he was working as Incharge Bidyapur

Out Post, the informant lodged the FIR before the Out Post alleging that on 25.7.2017 at around 10.00 P.M accused Kolin Nath entering into his house committed sexual assault to his minor daughter. On receipt of the FIR, he made the G.D. entry and sending the FIR to O/C, Bongaigaon Police Station started investigation of the case. In course of investigation he visited the place of occurrence, prepared the sketch map of the Place of occurrence vdie Ext.5, seized the birth certificate of the victim vide Seizure list Ext 2, recorded the statement of the victim alongwith other witnesses, got recorded the statement of the victim U/S 164 CrPC, sent her for medical examination and submitted charge-sheet against the accused U/S 8 of POCSO Act. During cross he stated that though in the FIR it is alleged that the door was broken but only found the bended eldrop.

18. PW 10 Dr. Minakshi Kalita, the Medical Officer examined the victim on 29.07.17 at 1:20 PM and found as follows:-

Findings:- The brief history of sexual intercourse on 25.7.2017.

LMP- About 20 days back.

Dentition-- 14

14

No injury mark is seen on her body and private

parts.

Per vaginal examination – Hymen absent. Vagina admits two fingers easily.

Vaginal swab shows no spermatozoa.

Urine for pregnancy – Positive.

Specific Judges

X-ray of long bones to determine the age shows age is above 17 years and below 20 years.

The doctor opined that it could not be ascertained whether the victim was raped or not. The medical officer proved the report as Ext.7 and the pregnancy test report as Ext 8/ During cross-examination she stated that if the last menstruation period is 20 days back, there is less chance of pregnancy test to be positive. She stated that the victim might be 19 years 11 months at the time of examination.

19. In this case, the core witness, the victim in her evidence stated that she had love affairs with the accused who married her cousin sister. According to her on the night of incident accused coming to the window of her room called her to which she opened the door. Then, the accused entered into her room and while she was talking with accused Kolin Nath, her brother, PW 3 hearing sound, came out and closed the door from outside. She also stated that PW 3 after closing the door called their father and then accused by pushing the door bended the bolt and went out from her room, but when her father asked her as to who came she said nothing and on next day on being called when the members of Mahila Samittee came, then she admitted that accused Kolin Nath did have sexual intercourse with her. She clearly admitted that out of love she did have sexual intercourse with the accused willingly and the accused did not force her in any way. According to victim, at the time of incident she was 19 years old.

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20. PW 1 her father and PW 7 the grand mother of the victim also categorically stated that at the time of incident victim was 19

years old. As per birth certificate, M.Ext 1 the date of birth of the victim was 10.2.2003, so on the date of incident i.e 25.7.2017 she was 14 years 5 months 15 days old. But her father during cross- examination admitted that the birth was registered in the year 2011 i.e after 8 years of her birth. The victim's father admitted that at the time of obtaining birth certificate, he entered her age less than her actual age. As per medical examination also she is above 17 years and below 20 years.

21. In the above facts and circumstances of the case, when the informant, the father of the victim who is the best person to know the actual date of birth of his child, it can not be accepted that she was 14 years old at the relevant time. Victim's father during cross-examination stated that he married 22 years back and after 2 years, the victim his eldest child was born. On that count also she was above 18 years at the time of incident. All other PWs including the victim categorically stated that the victim was above 18 years at that time. The oral evidence particularly the evidence of the victim and her father coupled with the medical evidence, clearly indicates that the victim was above 18 years at the relevant time and she was not a child. Thus, it does not attract offence under POCSO Act.

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Regarding allegation of rape it is in the evidence that accused married the cousin sister of the victim. So she knew well that the accused is a married one. The victim in her evidence admitted her love affairs with the accused who is her relative being brother-in-law and on her own accord she did have physical relation with him. The medical evidence also shows hymen absent, vagina admits two fingers

easily. The medical examination done on 29.7.2017 i.e after four days of the alleged incident gave positive result for pregnancy test. As per history, last menstruation was 20 days back and as per medical officer, if last menstruation is 20 days back there is less chance of pregnancy test to be positive. The alleged incident occurred on 25.7.2017 i.e 4 days back from the date of examination. Considering the medical evidence, even it is accepted that she was pregnant on the day of incident, it was for maintaining physical relation on earlier occasions. However the victim remains silent regarding carrying pregnancy. Further, in absence of any evidence of threat or inducement, the evidence of the father of the victim, i.e PW 1 that the victim told that the accused came and was with her shows that she submitted herself in having sexual intercourse, if any. Thus, it reveals that she was a consenting party in having sexual act with the accused. This is a case of promiscuity.

- 23. In view of the above, since the victim being a major one was a consenting party in having physical relation, if any, the ingredients of offence U/S 376 IPC would also not be attracted.
- For the foregoing discussions, I am of the view that the prosecution has failed to establish the charge against the accused Kolin Nath U/S 4 of POCSO Act or of offence U/S 376 IPC. He is entitled to benefit of doubt. Accordingly, accused Kolin Nath is acquitted and set him at liberty forthwith. His bail bond shall remain in force till next six months.

Special Judge.

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| 25. | Given under my hand and seal | of this Court on the |
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| 28th day of August, | 2018. | or this Court on the |
| | | 28.8.18 |
| | | (I Rarman) |

Dictated and corrected by me,

(I. Barman)
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APPENDIX

Prosecution witness:

PW 1 – Father of the victim.

PW 2 – Victim.

PW 3 – Brother of the victim.

PW 4 – Nirmala Nath.

PW 5 – Dalim Ch Nath.

PW 6 – Abdus Sobahan Ahmed.

PW 7 – Grand mother of the victim.

PW 8 – Jyotima Nath.

PW 9-Ajoy Kr Saha, (I.O).

PW 10-Dr Minakshi Kalita, (M.O).

Defence Witness:

Nil.

Documents Exhibited by Prosecution:

Ext-1 Ejahar.

Ext-2 Seizure list.

Ext-3 Statement of the victim U/S 164 Cr.P.C.

Ext-4 Birth registration book for the year 2011.

Ext-5 Sketch map.

Ext-6 Charge-sheet.

Material Exhibited by prosecution:

M.Ext 1 – Birth certificate of the victim.

<u>Defence Exhibit:</u>

Nil.

(I. Barman)
Special Judges,
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