IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 07 of 2017

(Arising out of Baghbor P.S. Case No.208/2016)

U/S 4 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on:- 06.01.2018

State of Assam

- Vs -

Asuruddin Khan.....Accused.

Date of Recording Evidence on :- 20.02.2018, 10.04.2018, 08.09.2017,

14.11.2018,05.03.2018, 27.03.2018

Date of Hearing Argument on :- 20.04.2019

Date of Delivering the Judgment on :- 30.04.2019

Appearance:

Advocate for the State-----Mrs. P. Das, Ld. Addl. P.P.

Advocate for the Accused------Mr. N. Hussain, Ld Advocates.

JUDGMENT

1. The brief fact of the prosecution case, is that on 16.08.2016, one Intaz Ali lodged an FIR in Mondia out post alleging inter-alia that accused No.1 named in the FIR took away his grand daughter (X), aged about 14 years on the promise of marriage. On 14.08.2016 at about 10 A.M. accused No.2 named in the FIR also rendered assistance to accused No.1 by calling his grand daughter to her house and allowing accused No.1 to stay in her house with his grand daughter, who committed sexual intercourse with her. But on 15.08.2016 his grand daughter somehow fled away from the house of accused No.2. Hence the case.

- 2. Following the information as above, Mondia out post entered the same in the general diary vide G.D.E. No.284 dated 16.08.2016 and forwarded the same to Baghbor police station for registering a case. Accordingly, Baghbor police station registered a case being Baghbor PS Case No.208/16 u/s 342/34 IPC and section 4 of POCSO Act and entrusted S/I Anil Kalita to investigate the case.
- 3. During the course of investigation, police visited the place of occurrence, drew sketch map, recorded the statement of the witnesses, forwarded the victim girl to court for recording her statement u/s 164 Cr.P.C., sent the victim girl for medical examination and on conclusion of investigation I/O finally laid the charge sheet against accused Asuruddin Khan and Saheda Khatun showing Saheda Khatun as absconder u/s 342/34 IPC and Section 4/17 of POCSO Act with a view to stand trial.
- 4. During the course of time, summons were issued to the accused persons to face trial. However, when presence of accused Saheda Khatun could not be secured in spite of issuance of warrant, proclamation and attachment finally the case against accused Saheda Khatun was kept filed on 08.09.2017 after examination of the executing officer. But accused Asuruddin appeared in court. Accordingly, after due compliance of section 207 Cr.P.C. the then Hon'ble Special Judge vide order dated 06.01.2018 having found a primafacie case framed charge u/s 4 of Protection of Children from Sexual Offences Act, 2012 against accused Asuruddin Khan. The particulars of the offence on being read over and explained accused pleaded not guilty and claimed trial.
- 5. During the course of trial, prosecution examined 6 witnesses in order to substantiate its case including the medical officer, the alleged victim and investigating officer.
- 6. On conclusion of investigation, accused was examined u/s 313 Cr.P.C. However, accused denied the prosecution evidence as false and misleading and expressed his intention to adduce defence evidence. Consequently, accused adduced evidence of 2 DWs. Namely-Iman Ali as DW-1 and Pashan Ali as DW-2.

7. Now point for determination ;-

1. Whether on 14.08.2016 at about 10 A.M. accused committed penetrative sexual offence against the victim girl (X) aged about 14 years and made her to so so as

alleged?

8. <u>Discussion, Decision and reasons for such decision</u>:

The learned counsel appearing for the state vehemently submitted that in this case, as many as 6 witnesses are examined including the victim girl who in her evidence categorically implicated the accused Asuruddin of committing sexual intercourse on her on the fateful night with the active assistance rendered by one Saheda Khatun by forcefully confining her in her house. The said evidence was also supported by other prosecution witnesses namely-PW-5 who is her father. It is contended that in the offence of this nature, it is very difficult to find eye witnesses. Therefore, court has to believe the version of the victim if the version of the victim inspires confidence in the mind of the court. In the instant case, the learned counsel for the state submits that the evidence of the victim is credible and trustworthy, so, reliance can be placed on her evidence for sustaining conviction.

- 9. On the other hand, the learned counsel Mr. Norain Hussain appearing on behalf of accused vehemently contended that the entire prosecution story is false and concocted. There is no credibility in the prosecution case as none of the prosecution witnesses supported the version of the alleged victim. It is contended that even the evidence of the alleged victim girl does not inspire confidence as in her cross examination she even could not say from where her birth certificate was obtained. Moreover, she also stated that she read up to class V but put her thumb impression in the statement before Magistrate. It is also stated that the prosecution failed to examine witness Rashida Khatun with whom the alleged victim revealed her story on the next day of the alleged incident. Prosecution also failed to examine the informant. The medical officer also found no recent sign of sexual intercourse. Also found no spermatozoa in the vaginal swab on microscopic examination. According to the learned defence counsel, PW-2 Abul Hussain and PW-3 Sahera Khatun also expressed their total ignorance about the alleged incident. Therefore, the learned defence counsel vehemently contended that the prosecution case is nothing but a cooked up story filed only to take revenge of existing quarrel between the accused and informant. As such, the learned counsel submits that it is a fit case to record judgment of acquittal.
- 10. Having heard the rival contention of the learned lawyers, this court has carefully perused

the evidence of all the 6 prosecution witnesses as well as 2 defence witnesses for arriving at a just decision in the case.

- 11. Now, from the evidence of the victim girl (X) PW-4 it transpires that on the day of incident while she was returning from school Sahida Begum called her to her house and asked her to stay in the house. But at night she called Asuruddin and put them in a separate room to stay with Asuruddin as a result, accused Asuruddin committed forceful sexual intercourse with her though she tried to came out of the room but accused threatened her to kill. On the next day she came home weeping and narrated her ordeal to one Rashida Begum, daughter of her paternal aunt. Then Rashida told the incident to her grand father who filed the case. Doctor examined her. Police sent her to record her statement before Magistrate and also recorded her statement by police. In her cross examination she stated that the house of Sahida is situated at a distance of 1 km from the house of her grant father. The case was lodged by hre grand father after 4 days. She did not met Asuruddin prior to the incident and she never visited the house of accused earlier. However, she knows Sahida. She also stated that incident occurred at about 7 pm. Though she read in class V but she put her thumb impression before Magistrate.
- 12. On perusal of her statement recorded by Magistrate u/s 164 Cr.P.C. (Ext.4) it is seen that the victim girl categorically stated that on the day of incident Sahida called her to her house and she stayed there on the night. She go for sleep after dinner but Sahida got her up from her sleep and told her that Asuruddin came and put her with Asuruddin with another room at night. Asuruddin committed sexual intercourse with her on the promise of marriage. On the next day morning Asuruddin leave the house. She also returned to her house. After one day she called Asuruddin over phone but he cut the phone saying that he do not know her. She also stated that she knows Asuruddin about one year back. Now, after having committed sexual intercourse with her he pretend that he do not know her.
- 13. On perusal of the statement of the victim girl recorded by police u/s 161 Cr.P.C. it is also seen that the victim girl stated before the I/O that accused had committed sexual intercourse with her in the house of Sahida Khatun on the promise of marriage. It is also stated that she knows the accused earlier but after committing the offence of sexual intercourse with her accused left her.

When she telephoned him he disconnect the telephone saying that he do not know her. It is also stated that accused had committed such sexual intercourse 2/3 times earlier.

14. In this regard, this court beg to refer a judgment of the Division Bench of the Hon'ble Apex

Court delivered in Criminal Appeal No.629 of 19 arising out of SLP (Crl No.618/19)

(Anurag Soni Vs- State of Chhattisgarh) wherein it was held -

"If it is established and proved that from the inception the accused who give the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined u/s 375 of the IPC and can be convicted for the offence u/s 376 of the IPC."

15. Now, on careful examination of the evidence of the victim girl with that of her statement before Magistrate u/s 164 Cr.P.C. and statement before police u/s 161 Cr.P.C. (Ext.4) it appears that the victim girl consistently narrated the fact that accused Asuruddin had sexual intercourse with her on the promise of marriage for 2/3 times but after committing the offence he pretends that he do not know her when she called him over phone. On conjoint reading of all the three version of the victim girl, it appears that except some minor contradiction/ discrepancies in her evidence in court there is no major contradiction regarding commission of penetrating sexual assault on her by accused Asuruddin. In her statement before Magistrate she categorically stated that apart from sexual intercourse on the day of incident accused had also physical intercourse with her on 2/3 occasion prior thereto which fact has not been stated by her in her evidence before court. Moreover, the victim girl also stated before police that she knows the accused earlier and in her statement before Magistrate u/s 164 Cr.P.C. she also stated that she knows the accused earlier. Nevertheless, in her statement before police and before Magistrate she consistently stated that

accused had physical intercourse with her on the promise of marriage which fact also clearly reiterated by her in her evidence in court. Therefore, though there is little contradiction in her evidence with that of her statement before police u/s 161 Cr.P.C. But as regards the physical intercourse with her by accused there is consistency in her evidence. As such, the evidence of the victim girl inspires confidence in the mind of the court regarding the alleged incident. Admittedly, the victim girl stated her age before Magistrate as 14 years which fact has also been stated in the FIR (Ext.2). Though prosecution did not prove the birth certificate of the victim girl in court but the evidence of doctor (PW-1) reveals that after X-Ray investigation the doctor found her age above 14 years and below 16 years on the day of examination. Therefore, the medical evidence of doctor cannot be thrown out as unworthy of credit regarding her age though prosecution did not prove her birth certificate. However, there is near consistency regarding her age with the statement of the victim girl and the medical examination report of doctor (PW-1).

- 16. In this regard, though the learned defence counsel vehemently contended that prosecution story is nothing but a concocted and cooked up story, but having assessed the evidence of the victim girl, this court do not found force in the contention of the learned defence counsel. Though accused by adducing two DW's tried to disprove the version of the victim girl but miserably failed to counter the story of the victim girl as both the DW's failed to touch upon core issue of accused committing penetrating sexual intercourse with the victim but deposed only on irrelevant facts making their evidence totally unworthy of credit.
- 17. The learned defence counsel further contended that on examination of the victim girl the doctor did not find any recent sign of sexual intercourse on the victim. But this does not made the prosecution case unbelievable as the victim girl was examined by doctor after 3 /4 days of the incident. Therefore, naturally it is difficult to get any evidence of recent sexual intercourse with the victim girl, as by this time the victim girl wash her body as well as her clothes before going to doctor. Therefore, this is not a strong ground to disbelieve the alleged sexual intercourse by accused with the victim girl.
- 18. Moreover, on close scrutiny of the evidence of doctor (PW-1) it is seen that on examination doctor found her hymen tear and vagina admits one finger. Therefore, the state of hymen of the

victim offers most significant clue regarding the sexual intercourse. It is the admitted position of law that the victim of sexual offence is not an accomplice her evidence cannot be equated with the evidence of accomplice. Though PW-2 and PW-3 have expressed their ignorance about the incident but the evidence of PW-5 corroborated the evidence of PW-4 the victim girl to the extent that on the promise of marriage accused committed sexual intercourse with her. Non examination of the informant as contended by the learned defence counsel also does not discredit the prosecution case, because as clearly deposed by PW-5 his father (informant) has been suffering from paralysis for which he could not come to court to depose evidence. In the instant case, the victim is a minor girl of tender age and accused subjected her sexual intercourse on the promise of marriage. She being a minor and her mind being vulnerable easily subject to influence, she readily believe the accused that he will marry her as promised. So, she consented sexual intercourse with accused onthe hope of marriage and false promise, duress and helpless condition, her mind and body being vulnerable to easy pray of the culprit/accused.

19. In this context, this court also beg to refer a recently delivered Division bench judgment of Hon'ble Delhi High Court delivered in Criminal Appeal No.1241/18 (Jitendra Sarma)...appellant) Vs-State of (N.C.T. of Delhi)....respondent wherein the Hon'ble Delhi High Court dealt with the question whether conviction of an accused can be based on the sole testimony of the victim in cases of sexual assault/rape. In the said judgment the Delhi High Court also discussed judgments of the Hon'ble Apex Court wherein it has been held that the sole testimony of the prosecutrix, if found reliable, can be sold ground for convicting the accused, and that the credit worthy testimony of the victim in cases of such nature deserve acceptance.

The Hon'ble Supreme Court in State of Rajasthan Vs-Omprakash reported in (2002) 5 SCC 745 dealing with a similar question in the case of a child rape while upholding conviction of the appellant therein and reversing the decision of the High Court in that behalf, relied upon earlier decision and made the following observations:

"(13). The conviction for the offence u/s 376 IPC can be based on the sole testimony of a rape victim is a well settle proposition. In State of Punjab Vs- Gurmit Singh (1996) 2 SCC 284 referring to State

of Maharastra Vs-Chandraprakash Kewalchand Jain (1990) SCC 550 this court held that it must not be overlooked that a woman or a girl subject to sexual assault is not an accomplice to the crime but a victim of another person's lust and it is improper to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand as his Lordship then was speaking for the court that the inherent basefulness of femals and the tendency to conceal outrage of sexual aggression are factors which the court should not overlooked. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitated looking for corroboration of her statement the court should find no difficulty to act on the testimony of a victim of sexual assault alone to conviction an accused where her testimony inspires confident and he is found to be reliable seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding injury.

(14). In State of H.P. Vs- Gianchand (2001) 6 SCC justice Lahoti speaking for the bench observed that the court has first to assess the trustworthy intention of the evidence adduced available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined.

The Hon'ble Apex Court again coming to the medical evidence adduced stated that the medical opinion contained in the MLC report dated 17.01.2013 (Ext.PW-9/B) qua the victim V, a finding to the effect that no such external injury mark present, Hymen is ruptured, no conclusive FSL result has been obtained.

(25). The position of law on the question whether absence of injuries found on the person of the prosecutrix, in case of rape, would be a finding of acquittal, is well settled. Dealing with this issue in a case of a children rape, a coordinate bench of this court in Lokesh Mishra Vs- State of NCT Delhi, in Criminal Appeal No.768/2010, decided on 12.03.2014 relying on earlier decision of the Apex Court, while upholding the conviction u/s 376 IPC, made the following observations......

"38".....in the case of Ranjit Hazarika Vs- State of Assam reported in (1998) 8 SCC 635 the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw overboard an otherwise cogent and trustworthy evidence of the prosecutrix.

(39). The Apex Court in B.C. Deva Vs- State of Karnataka in (2012) SCC 122 in spite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworth, tThe Apex Court uphold the conviction of the accused. The court observed thus:-

"18". the plea that no mark on rupture were found either on the person of the accused or on the person of the prosecutrix does not lead to any interference that the accused has not committed forcible sexual intercourse on the prosecutrix, though the report of the Gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse yet even in the absence of any corroboration of medical evidence the oral testimony of the prosecutrix which is found to be cogent, reliable, convincing and trustworthy is to be accepted."

- 20. Though the birth certificate of the victim is the conclusive piece of evidence regarding the age of the girl but in the absence of that, court is to base it's conclusion on the evidence of other evidence such as determination of age by ossification test. Here in the instant case, the doctor found the age of the victim girl above 14 and below 16 years so margin of error in age by radiological test is 2 years. Therefore, even this court believe the evidence of the victim girl and the evidence of doctor regarding her age the victim girl is still found to be below 18 years on the date of commission of the offence.
- 21. In the instant case, the victim girl being a minor, she become easy pray on the false promise of marriage by accused. In the backdrop from where the victim hails parents did not take much care of the girl who easily intermix with boys and move freely with each other's house and parents did not suspect at initial stage but when the offence having been committed and came to light, they become conscious about the offence and proceed to take action in accordance with law. Therefore, the delay in lodging the FIR by the grand father of the victim girl is not unusual and it does not make the prosecution case unworthy of credit to be discarded. If the court do not believe the evidence of the victim and tend to discard evidence merely on the ground of little contradiction in her evidence, citing lack of corroboration and technicalities of delay in lodging the FIR, the credibility of the victim will be undermined as the sexual offences usually take place behind close door, where the victim is often the only witness. Disbelieving the evidence of victim emboldens abusers and dissuades women from taking legitimate recourse to law making it difficult task to get justice by weak and vulnerable.
- 22. Under such backdrop, this court do not find any such reason to discard or disbelieve the prosecution evidence as untrue and unworthy of credit.
- 23. In view of the aforesaid discussion and reason the accused is found guilty and convict him for the offence u/s 4 of POCSO Act.
- 24. I have considered the provision of section 360 Cr.P.C. but after due consideration of the attending facts and circumstances of the case and the age of the accused the nature of the offence committed, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of

accused.

- 25. However, considering the nature and gravity of the offence proved, case is fixed for sentence hearing on 03.05.2019.
- 26. Given under my hand and seal of this Court on this 30th day of April 2019.

Sd/-

(Sri C. B. Gogoi) Special Judge, Barpeta.

SENTENCE HEARING

- 25. I have heard the accused person on the point of sentence as provided u/s 235(2) Cr.P.C. It is submitted that accused person hails from very poor strata of society and survives by doing cycle machenic. He is very young 30 years old and married. He was having his old parents to maintain. So, in the event he is put behind bar his innocent family members would suffer a lot. Hence, accused pleaded clemency.
- 26. Heaving considered the extenuating and mitigating circumstances of the case and the punishment prescribed in section 4 of POCSO Act, 2012 which shall be imprisonment of either description for a term which shall not be less then 7 (seven) years but which may extend to imprisonment for life, and shall also be liable to fine. Therefore, considering the nature and gravity of the offence proved and the punishment prescribed by law, accused is convicted and sentenced u/s 4 of POCSO Act to under go Rigorous imprisonment for a term of 10 years (ten years) and fine of Rs.2000/- I/d simple imprisonment for one year.
- 27. The period of detention, if any, undergone by accused during the course of investigation, enquiry or trial shall be set off against the term of imprisonment as provided u/s 428 Cr.P.C.
- 28. Let a copy of the judgment be furnished to accused person free of cost as provided in section 363 Cr.P.C.
- 29. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.

- 30. Let case record be consigned to record room after completing the formalities.
- 31. Given under my hand and seal of this Court on this 3rd day of May, 2019 at Barpeta.

Dictated & Corrected my me

Sd/-(Sri C. B. Gogoi) Special Judge, Barpeta Sd/-(Sri C. B. Gogoi) Special Judge, Barpeta

APPENDIX

1. The prosecution has examined the following 6 nos. of witnesses :-

PW-1 = is Dr. Anima Boro, the M/O.

PW-2 = is Abul Hussain.

PW-3 = is Mst. Sahara Khatun.

PW-4 = is victim(X).

PW-5 = is Kabir Ali @ Kabir Uddin.

PW-6 = is Anikanta Ray, the I/O.

2. The prosecution has exhibited following document :-

Ext.1 = is the medical examination report.

Ext.= 1(1) = is the signatures of doctor.

Ext.2 = is the FIR.

Ext.2(1)= is the signatures of Jayanta Kr. Das, In-charge Mondia out post.

Ext.3 = is the sketch map.

Ext.3(1) = is the signature of I/O.

Ext.4 = is the 164 Cr.P.C. statement of victim

Ext.4(1)= is the signature of victim.

Ext.5 = is the charge sheet.

Ext.5(1)= is the signature of I/O.

3. The defence has examined two DW's:-

DW-1 = Iman Ali.

DW-2 = Pashan Ali.

4. Exhibit= Nil.

Sd/-