DISTRICT- Charaideo.

IN THE COURT OF ADDITIONAL SESSIONS JUDGE: CHARAIDEO: SONARI

Present:- Syed Imdadur Rahman, AJS.

ADDITIONAL SESSIONS JUDGE

The 26th day of April, 2019.

SPECIAL (POCSO) NO: 23 OF 2014 Under Section 6 of the POCSO Act r/w 376(2)(i) IPC

State of Assam

-Versus-

Jay Chandra Gogoi

..... Accused person

(The case was committed by the ld. Judicial Magistrate 1st Class, Charaideo, vide order dated 07-07-2014 passed in connection with G.R. Case no. 233/14)

This case was taken up for final hearing on 17-12-2018 & 24-04-2019 in the presence of

Mr. Basanta Gogoi..... Advocate for prosecution side.

Mr. Utpal Chutia Advocate of the accused.

F.I.R was lodged on ::::::::: 16-04-2014

Charge framed on ::::::::::: 28-08-2014 & 31-10-2018

Argument Heard on :::::::::: 17-12-2018 & 24-04-2019

Judgment Delivered on :::::::::: 26-04-2019

<u>J U D G M E N T</u>

In this case the accused is facing trial under section 6 of the Protection of Children from Sexual Offences Act, 2012 and sec. 376 (2)(i) of Indian Penal Code.

- 1. In this case the informant *i.e.* Shri Tuleswar Phukan lodged an FIR before the Sapekhati Police Station on 16-04-2014, alleging that the accused Sri Jay Chandra Gogoi used to come to their house and prior to 5 months, one night, established sexual relation with his 16 years old daughter, namely "A" (name not mentioned) after inducing her of marriage, resulting her pregnancy.
- 2. After the incident the informant lodged an F.I.R. before the Sapekhati Police Station which registered its P.S. case no. 19/14. Police after investigation forwarded charge-sheet against the accused u/s 6 of Protection of Children from Sexual Offences Act r/w sec. 493/376 IPC. Thereafter, case was committed and charge u/s 6 of the Protection of Children from Sexual Offences act was framed against the accused person. At a later stage in compliance with sec. 42 of the Protection of Children from Sexual Offences Act charge was reframed. The charge u/s 6 of P.O.C.S.O Act and sec. 376(2)(i) IPC was framed again. The charge was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried. After this, both side submitted before court that they will rely on the evidences on record and will not adduce either further evidence or further cross-examine any PWs. In this regard defense side filed petition no. 1034/18.
- 3. Accused person was examined u/s 313 Cr.P.C., where he denied the case of the prosecution. The prosecution examined nine witnesses. The accused person examined no witness. I have heard arguments put forwarded by both sides.

4. **Points For Determination in this case are:**

A) Whether, the accused committed aggravated penetrative sexual assault against the minor daughter of the informant?

Or, alternatively,

B) Whether the accused committed rape upon the minor daughter of the informant, who was below the age of 16 years at that time?

5. **DISCUSSION, DECISION AND REASONS FOR THE DECISION**

6. Before discussing of the evidences on record and before arriving at a decision, let us now look in to two vital legal aspect connected to this case. Here in this case the accused is facing trial primarily under the Protection of children from Sexual Offences Act 2012.

Section 29 of the act is as follows:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 3,5,7 and Section 9 of this act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. Here as per the procedural law the trial court shall presume the accused guilty of the offence he is facing trial, unless disproved by him.

Section 4 of the Indian Evidence Act 1872 defines the term "shall Presume" as follows: - Whenever it is directed by this act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

Now, behind this background, we have to come to a conclusion in this case.

Direct Evidence:

7. In this case the alleged victim was examined as PW 1 and she in her evidence deposed that she knows the accused as he is the son of her father's friend. That, the accused used to come to their house. That, from 2013 the incident started. That, at that time she was reading in class- X. That, at the night of the incident while she was studying, accused came to their house. On that day accused stayed in their house. On that night accused came to her bed and raped

her. That, accused asked her not tell it to anybody and also told her that if she tells it, then he will assault her. That, again accused committed the same action in the month of 'Aghun'. That, she objected but accused did not listen to it. That, while she was five months pregnant her aunt Mini Phukan knowing about the incident called for a meeting. That, she became pregnant due to the accused. In the meeting it was decided that she will be handed over to the accused. That, her family members went to hand over her to the accused but the sister-in-law of the accused threatened them. That, she was examined by doctor and her statement was recorded before the Magistrate.

- 8. In the cross-examination this PW deposed that the accused from the month of 'Aghun' 2013 used to come to their house. That, she and her sister used to sleep together after closing the door, and then none can open it from outside.
- 9. I have considered the evidence of this vital PW and found that her evidence is clear and specific that, accused had, one night in the year 2013, entered into her living room and thereafter, had raped her. Further, the evidence of this PW is also clear that she became pregnant due to her physical relation with the accused. Another vital aspect revealed through the evidence of the PW 1 is that at the time of the incident she was reading in class X. I have considered the cross-examination portion of the PW 1 and found that the cross-examination failed to yield anything which may straightaway negates the evidence of the alleged victim/PW 1.

Other material witness:

10. The PW 2 is the informant of this case. He in evidence deposed that, Pompi Phukan is his daughter. That, the incident occurred on the month of last "Aghon". That, at that time Pompi was 16 years old. That, when the abdomen of Pompi became big in size, then the local ladies asked the matter to her and then she told that accused committed misdeed with her. That, when village people asked the matter to the accused, then he consented to take Pompi. That, later on the girl was not accepted for which he lodged the 'ejahar'. That, after 4 months she gave birth to a child.

In the cross examination this P.W deposed that, after 5 months pregnancy of his daughter, he came to know about the incident. That, no document concerning the age of the girl has been placed. That, Pompi and her sister sleeps together. That, they used to lock the door of their room. That, in the Ejahar he mentioned that the incident occurred 5 months ago.

- 11. I have considered the evidence of the P.W2/ father of the alleged victim of this case and found that the P.W2 has corroborated the 'Ejahar' he lodged. The P.W2 being one of the material witnesses supported the evidence of the P.W1/victim of this case. The crux of the evidence of the P.W2 is that his daughter became pregnant and when ladies of their locality asked his daughter about the matter, it was told by his daughter that, she became pregnant due to the action of the accused. This P.W2 has been reported about the incident. Although the P.W2 has been reported about the alleged incident but his evidence corroborated the evidence of the alleged victim/P.W1. Further the evidence of the P.W2 that alleged victim gave birth to a child has also supported the case of the prosecution. The cross examination of this P.W failed to bring out anything to negate the examination in chief of the P.W2 at its first look
- 12. PW 3 *i.e.* the mother of the alleged victim in her evidence deposed that the incident occurred one year ago. That, the accused used to come to their house in order to help them in cultivation. That, he stayed in their house for some days. That, after five months the local ladies group asked "A" as to whether she is pregnant and then "A" told that accused caused her pregnant and she is five months pregnant. That, accused also admitted that fact and stated that he will marry "A". That, accused remained untraced thereafter. That, members of local ladies group went to the house of the accused in order to handover "A" but did not find the accused. That, they informed police as "A" was not accepted.

In the cross-examination this PW deposed that accused came to their house in the midst of the month of 'Aghun'. That, she keeps herself informed about the menstrual period of "A".

13. I have considered the evidence of this PW who is also one of the material witnesses of this case being the mother of the alleged victim. She also like her

husband/PW 2 corroborated the evidence of the alleged victim although; she has also been reported about the incident.

14. PW 4 in her evidence deposed that in the year 2014 when she noticed about the pregnancy of "A" then she and other member of their 'Mohila Samity' asked her and then it was replied that she became pregnant due to the accused.

In cross-examination this PW deposed that it is not a fact that "A" did not tell them that she became pregnant for the accused rather name of some other person was told.

15. PW 5 in her evidence deposed that in the year 2014 ladies of their village were reported by Bibi Phukan about the pregnancy of "A" and when they asked her mother she told that she became pregnant due to Jay Chandra Gogoi. They called the accused and interrogated him and as no decision was reached the matter was informed to police station.

In the cross-examination this PW deposed that she did not tell police that Bibi Phukan informed them about the incident and "A" did not tell that she became pregnant from the side of the accused.

- 16. PW 7 in his evidence deposed that he does not know "A". That on 16-04-2014 one Phuleswar Konwar caused him to write an FIR.
- 17. I have considered the evidence of material witnesses of this case. Here PW 2, PW 3 are parents of the alleged victim of this case *i.e.* PW 1. The evidence of the PW 2 *i.e.* father of the alleged victim clarifies that the alleged victim gave birth to a child after four months. Here the PW 3 is the mother of the alleged victim. The PW 2 & PW 3 was reported about the incident and they both supported the evidence of PW 1/alleged victim. The PW 3, PW 4 & PW 5 are independent witnesses and they have supported the evidence of PW 1/alleged victim and the case of the prosecution to the extent that they were reported by the alleged victim, when asked, that accused caused her pregnant. The evidence of these independent witnesses also supported the case of the prosecution. Another vital evidence yielded from PW 3, PW 4 & PW 5 is that at the time when they asked the alleged victim about the incident they noticed physical transformation of the victim. Here these three independent witnesses have firsthand knowledge about the pregnancy of the alleged victim. I have

considered the cross-examination portion of these witnesses and found nothing which may make the case of the prosecution, discardable.

Medical Evidence:

18. In this case the PW 9 is the doctor who examined the alleged victim. In his evidence the PW 9 deposed that on 17-04-2014 he was working at Sonari Sub-Divisional Civil Hospital as Medical and Health Officer -1. On that day at about 1:30 pm on police requisition he examined Miss "A", daughter of Tuleswar Phukan of Rahan Deodhaichuk in connection with Sapekhati P.S. case no. 19/14. That, the victim was accompanied by WPC Mrs. Rina Phukan. This PW also deposed that on examination he found that the hymen was ruptured and the uterus was six months size. That, ultrasonography reveals that there is a single life 26 weeks 4 days in vertex presentation. This PW in his opinion mentioned that there is no evidence of recent sexual intercourse. That, radiological examination refused by the party. This PW also deposed that according to her statement and body configuration she is approximately 16 years old.

In the cross-examination this PW deposed that pregnancy can be detected only after one month of cohabitation. That, pregnancy period is calculated on the basis of stoppage of first day of stoppage of mensuration cycle.

- 19. The medical evidence clearly supported the case of the prosecution. The examination of PW 9 yielded that at the time of the examination the alleged victim she was 16 years old, carrying 26 weeks 4 days pregnancy.
- 20. The cross-examination of the PW 9 failed to bring out anything specific against the medical evidence, rather it was clarified that he calculated the pregnancy period on the basis of stoppage of mensuration cycle.
- 21. I have carefully scrutinized the evidences of both the I.O.s *i.e.* PW 5 and PW 8.
- 22. If we carefully scrutinize evidences on record then we will find the following points
 - a) The evidence of the alleged victim is clear and specific that accused used to come to their house and one night in the year 2013 raped here. The

- evidence of the PW 1 also clarifies that at a later stage again accused established sexual relation with her.
- b) The most material witnesses of this case *i.e.* parents of the victim as PW 2 & 3 supported the evidence of the PW 1 *i.e.* alleged victim.
- c) The evidence of the father of the alleged victim/PW 2 reveals that the alleged victim gave birth to a child after 4 months from the date of detection of the incident.
- d) Independent material witnesses noticed physical transformation of the alleged victim concerning her pregnancy.
- e) When independent witnesses asked the victim girl about her pregnancy, she told them, that accused caused her pregnancy.
- f) The medical evidence also supported the case of the prosecution.
- g) Medical evidence established that alleged victim is 16 years old, and is a minor one.
- h) Medical evidence also reveals that at the time of her examination she was 26.4 weeks pregnant.
- i) Cross-examination portion failed to bring out anything which may create doubt over the prosecution case.
- 23. If we consider above mentioned points then we will find that the prosecution has proved the case against the accused in regards to the points for determination. As mentioned in the beginning sec. 29 of the Protection of Children from Sexual Offences Act, 2012 makes it mandatory to concerning trial courts to presume that any person prosecuted committing/abetting/attempting to commit any offence concerning sec. 3,5,7 & 9 Protection of Children from Sexual Offences committed/abated/attempted to commit such offence, unless the contrary is proved.
- 24. At this stage behind the background of already discussed prosecution witnesses and sec. 29 of the Protection of Children from Sexual Offences Act, let us now discuss the position as to whether the accused could disprove the

prosecution case. Here the accused did not adduce any evidence. It is their case that if accused has committed rape upon the alleged victim in the month of 'Aghun', 2013 then how the alleged victim can carry pregnancy of 26 weeks 4 days which was detected at the time of her medical examination on 17-04-2014.

- 25. I have considered cross-examination portions of PWs keeping in mind whether cross-examination of PWs has disproved the case of the prosecution. The scrutiny of the cross-examination of PWs will show that nothing significant has been yielded through cross-examination of PWs which may either raise doubt over the prosecution case or negates it completely.
- 26. Considering the point placed during argument that how the alleged victim can carry 26 weeks 4 days pregnancy on 17-04-2014 if the accused raped her in the month of 'Aghun', 2013, I have scrutinized materials on record. The evidence of PW 1 reveals that the first incident took place in the month of 'Aghun', 2013. According to the medical evidence on 17-04-2014 alleged victim was detected with 26 weeks 4 days pregnancy. Here the evidence of the alleged victim is specific concerning the position that accused had raped her. This part of evidence cannot be doubted on the basis of the expert opinion that on 17-04-2014 alleged victim was 26 weeks 4 days pregnancy, when the medical evidence itself clarified that pregnancy was calculated on the basis of stoppage of mensuration cycle. Now if physical relation was started in the year 2013 between the accused and the alleged victim and for that the victim became pregnant then mathematical calculation on the basis of stoppage time of mensuration, concerning the period of pregnancy cannot bring any doubt regarding the factual establishment that physical relation occurred between them and then alleged victim became pregnant. It is not the case that we should discard evidence of the alleged victim and other supporting evidence on the basis of the expert opinion and on the basis of mathematical calculation of the period from sexual intercourse to pregnancy. Here the first hand evidence of the alleged victim is more concrete then medical opinion. In State of Haryana vs. Bhagirath AIR 1997 SC 715 the Hon'ble Supreme Court observed that the opinion given by a medical witness need not be the last word on the subject. Such opinion should be tested by the court. If the opinion is bereft of logic or objectivity, court is not obliged to go by that opinion.

In this case the medical opinion about the duration of pregnancy of the alleged victim cannot be the last word of this case to play the role of a catalyst to negate the entire specific direct evidence.

- 27. Except this point nothing specific has been raised before court. Considering cross-examination of PWs and the point discussed above, this court is with the opinion that the accused failed to disprove the prosecution case.
- 28. The position of evidence yielded from the cross-examination of PW 1 that she used to sleep with her sister keeping the door closed of her room, cannot negate/disprove the specific evidence of the PW 1/alleged victim that accused raped her, on the particular day as this portion of evidence is a general statement and it failed to establish that on the night of occurrence the sister of the alleged victim was present at the place of occurrence and due to closure of the door, accused failed to enter the concerned room to commit the crime.

Another vital aspect I have considered that, materials on record which includes the oral evidence of PW 1, 2 & 3 and medical evidence proves that the alleged victim was 16 years old at the time of the incident. Here the accused failed to disprove that alleged victim was a minor at the time of the incident.

29. I have considered the specific and straight evidence of the victim which has been supported by other witnesses including the medical evidence. At the same time I have considered cross-examination of PWs. Considering the position of the evidence of the alleged victim and the particular evidence that the victim gave birth to a child, this court did not find anything to disbelieve the case of the prosecution, particularly on the point as to why the alleged victim after giving birth to a child will falsely implicate the accused.

FINDINGS

30. By now the position of this case is clear that, accused has committed offence under section 6 of the Protection of Children from Sexual Offences Act, 2012 as, in opinion of this court, prosecution has proved this case against the accused U/S 6 of the POCSO Act, 2012. Accordingly, the accused Sri Jay Chandra Gogoi is here by convicted under section 6 of the Protection of Children from Sexual Offences Act, 2012. I have considered the point as to whether the convict can be released under section 360 Cr.P.C or any other relevant law. In this

regard record shows that convict is 38 years old and is running the family consisting his wife. I have considered those factors along with the position that accused caused rape on the alleged victim and gave birth to a child and abandoned him prior to his birth and also let the mother to suffer. Raping of a minor/abandoning of the mother and the child, under the facts of this case, cannot be compared with any beneficial factor which may favor for release of an accused, unpunished. Here, I have considered the age of the accused and found that, he is bound to be a mature person and is not a youth, having ignorant of the consequence of his action. The facts and circumstances of this case failed to bring anything which may require this court to release the accused, unpunished.

- 31. Heard the accused on the point of sentence. During sentence hearing the accused mentioned that, he has nothing to say. I have considered all aspects of this case, the facts and circumstances of the crime, the possible outcome of the crime and is with the opinion that, accused is liable for adequate punishment and is not entitled for any lighter punishment.
- 32. In Alister Anthony Pareira V/S State of Maharastra: 2012 (2) SCC 272: the Hon'ble Supreme Court held that, Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of (an) appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objectives of sentencing policy is deterrent and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for crime, nature of the offence and all other attendant circumstances.
- 33. Here in this case, considering the facts and circumstances, this court is of the opinion that, convict may not be inflicted with the maximum prescribed punishment for offence under section 6 of the Protection of Children from Sexual Offences Act, 2012, but a little bit lesser punishment will do Justice.

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34. Accordingly, the convict Sri Jay Chandra Gogoi is sentenced to undergo

Rigorous imprisonment for a period of 10 (ten) years and to pay a fine of Rupees

5,000/- (five thousand only) in default S.I. for one month under section 6 of the

Protection of Children from Sexual Offences Act, 2012.

35. The period of detention already undergone by the accused/convict, during

investigation and trial may be set off u/s 428 Cr.P.C.

36. Seized article, if any, will be destroyed in due course of time.

37. Furnish a copy of judgment to the convict at free of cost u/s 363 Cr.P.C.

38. Send a copy of this judgment and order to the learned District Magistrate,

Charaideo as per provision of sec. 365 Cr.P.C.

39. Issue jail warrant.

40. Convict is remanded to custody to serve out the sentence.

41. It is made clear to the convict that judgment and order is appealable and

he may prefer appeal before the Hon'ble Gauhati High Court, if he so desires.

42. Considering evidences on record, as the children and the mother (alleged

victim) surely requires rehabilitation, this court, here by recommend the case of

the alleged victim to the District Legal Services Authority, Sivasagar, for providing

Compensation to them, under Victim Compensation scheme U/S 357(A) Cr.P.C.

Given under my hand and seal of this court on this the 26th day of April, 2019.

(S. I. Rahman)

Additional Sessions Judge : Sonari

Charaideo

Appendix

Prosecution Witnesses.

- Sl. 1---- Prosecution Witness 1 --- Pompy Phukan
- Sl. 2---- Prosecution Witness 2 --- Tuleswar Phukan
- Sl. 3---- Prosecution Witness 3 --- Smti. Bhabani Phukan
- SI. 4---- Prosecution Witness 4 --- Smti. Bibi Phukan
- Sl. 5---- Prosecution Witness 5 --- Smti. Monomoti Phukan
- SI. 6---- Prosecution Witness 6 --- Dilip Kr. Chutia
- Sl. 7---- Prosecution Witness 7 --- Girish Kakoty
- SI. 8---- Prosecution Witness 8 --- Dwipen Pator
- SI. 9---- Prosecution Witness 9 --- Hemanta Kr. Shyam

Prosecution Exhibits. Exhibit 1. Statement recorded u/s 164 Cr.P.C. Exhibit 1(1) & 1(2) signatures of the PW 1.

Exhibit 2 FIR.

Exhibit 2(1) signature of the PW 2. Exhibit 2(3) signature of the PW 7.

Exhibit 3 Sketch map.

Exhibit 3(1) signature of PW 6.

Exhibit 4 Charge-sheet.

Exhibit 4(1) signature of PW 8.

Exhibit 5 Medical report.

Exhibit 5(1) signature of PW 9.

Defence witness.

Nil

Defence Exhibit.

Nil

(S. I. Rahman) Additional Sessions Judge : Sonari Charaideo