IN THE COURT OF SPECIAL JUDGE ::::::: BILASIPARA

Present: Shri J. Borah, A.J.S

Special Judge, Bilasipara.

Special (POCSO) Case No-08 of 2018

u/s 376(f)/376(l) of Indian Penal Code & u/s 6 of Protection of Children from Sexual Offences Act.

State of Assam

-Vs-

Joynal Abedin Paramanik

..... accused person

Date of framing charge :- 27-11-2018

Date of recording evidence :- 07-01-2019

21-01-2019

02-03-2019

16-03-2019

30-03-2019

09-12-2019

Date of Argument :- 07-01-2020

Date of Judgment :- 24-01-2020

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam

For the defence :- Mr. Hekmat Ali Seikh,

Ld. Advocate for the defence.

JUDGMENT

1. This case is under section 376(f)/376(l) Indian Penal Code and under

section 6 of Protection of Children from Sexual Offences Act. So, the name of the prosecutrix is not mentioned and she is, hereinafter, referred to 'x'.

2. The prosecution case, in brief, is that 'x', the informant lodged an ezahar with the Bilasipara police station on 16-09-2017 informing that the accused Joynal Abedin Paramanik is her father. The accused Joynal Abedin sent his wife, the mother of 'x', to various places on various grounds and in absence of her mother, the accused Joynal Abedin Paramanik committed sexual intercourse on her. The accused Joynal Abedin Paramanik threatened her if she divulged the occurrence to her mother.

So, the informant prayed for necessary action against the accused Joynal Abedin Paramanik.

- 3. The Bilasipara police station received the ezahar and registered as Bilasipara police station case no. 973/2017 under section 6 of Protection of Children from Sexual Offences Act. The case was investigated and having found prima facie under section 376(2)(f)(I) Indian Penal Code and section 6 of Protection of Children from Sexual Offences Act against the accused Joynal Abedin Paramanik, laid the chargesheet before the court for trial.
- 4. The accused Joynal Abedin Paramanik, hereinafter called the accused, appeared in the case and he was furnished copy. Charge was framed u/s 376(f)/376(l) Indian Penal Code and section 6 of Protection of Children from Sexual Offences Act, POCSO in short, against the accused by my learned predecessor in the office. The charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 10 (ten) witnesses, namely-

1.	`x'/the victim	P.W-1
2.	Basatun Nessa	P.W-2
3.	Saijuddin	P.W-3
4.	Jelekha Khatun	P.W-4
5.	Asatun Bibi	P.W-5
6.	Ajibar Rahman	P.W-6
7.	Jahan Uddin	P.W-7
8.	Ashish Kr. Sengupta	P.W-8
9.	Dr. Laskar Ali	P.W-9

10. Dr. Rinku Ahmed

P.W-10

- 6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence adduced by the prosecution witnesses and also declined to adduce evidence in defence.
- 7. Heard argument for both sides.

8. **POINTS FOR DETERMINATION**

- i. Whether accused, since 2 months prior to lodging of ezahar on 16-09-2017, on several occasions at village Gutipara Pt. II under Bilasipara police station, being father of 'x', committed rape on his daughter 'x' and thereby committed offence u/s 376(f) I.P.C?
- ii. Whether accused, since 2 months prior to lodging of ezahar on 16-09-2017, on several occasions at village Gutipara Pt. II under Bilasipara police station, committed rape on his daughter 'x', who is under the age of 16 years and thereby committed offence u/s 376(I) I.P.C?
- iii. Whether accused, since 2 months prior to lodging of ezahar on 16-09-2017, on several occasions at village Gutipara Pt. II under Bilasipara police station, committed penetrative sexual assault on his daughter 'x', aged about 12 years old repeatedly and thereby committed offence u/s 6 of POCSO Act?

DECISION AND REASONS THERE OF

9. Since P.W-1 'x' is the informant as well as victim, so, she is the prime witness in this prosecution case. So, let's see the evidence of this witness at first.

P.W-1 'x' has stated in her evidence that she is the informant as well as victim in this case. She lodged this case against the accused. The accused is her own father. The occurrence took place 1 (one) year ago (from the date of adducing evidence on 07-01-2019). At the time of occurrence she was only 14 (fourteen) years old. Her father used to send her mother outside. When her mother refused to go, she was rebuked. She (P.W-1) wanted to go with her mother, but her father did not allow. When her

mother went outside, her father i.e the accused had sexual intercourse on her. The accused has committed sexual intercourse with her forcefully. The accused had committed sexual intercourse on her for 4/5 days. The accused also threatened her not to divulge about such sexual intercourse on her to her mother. But when the accused repeatedly committed sexual intercourse on her, she narrated whole the occurrence to her mother. Her mother called upon a village meeting, but the accused did not attend the meeting. So, she lodged ezahar against her father, the accused. Ext-1 is the ezahar. She gave statement before the magistrate. Ext-2 is the said statement.

In her cross P.W-1 has stated that her father stayed at house. Her father lived at Bongaigaon for two years. He came to his house prior to 3 (three) months from the time of occurrence. P.W-1 has denied that the accused did not commit sexual intercourse on her. She cannot say the dates specifically on which she was committed sexual intercourse on her by the accused. The occurrence took place 2 months prior to lodging the ezahar. She denied to lodge this false case against her father. She denied that she brought a false allegation against her father.

10. Thus, minute scrutiny of evidence of P.W-1 'x' shows that the accused is her own father. According to P.W-1 she was only 14 (fourteen) years old at the time of occurrence. P.W-1 brought an allegation against the accused, the allegation is sexual assault on his own daughter by the accused. How the accused committed such sexual act on 'x'. P.W-1 has stated in her evidence that the accused sent his wife. i.e the mother of 'x', outside and taking such advantage, the accused committed sexual intercourse on 'x'. This evidence of P.W-1 is not detracted by the defence. Rather P.W-1 has vehemently denied that the accused did not commit sexual intercourse on her. P.W-1 has also reiterated in her evidence that the accused committed sexual intercourse on her repeatedly for 4/5 days. The evidence of P.W-1 is clear and straight, free from all discrepancies. The defence has failed to detract this evidence of P.W-1. There left not a single room to doubt the evidence of P.W-1.

Learned defence advocate has submitted that P.W-1 has failed to mention the date specifically on which the accused committed sexual intercourse on her. So, this creates doubt in the prosecution case.

P.W-1 'x' is minor girl, aged about 14 years. She is a daughter of the accused. She can never expect such behaviour from her father. In such a situation, P.W-1 'x' will recollect the date of occurrence cannot be expected.

There found no gulf between the content of the statement of P.W-1 recorded u/s 164 Cr.P.C and the evidence adduced by P.W-1 before the court. So, there found no contradiction in the evidence of P.W-1 'x'.

11. P.W-1 'x' has stated in her evidence that she narrated the occurrence to her mother. P.W-2 Basatun Nessa is the mother of P.W-1 'x'.

Now, let's see the evidence of P.W-2 Basatun Nessa.

P.W-2 Basatun Nessa has stated in her evidence that 'x' is her daughter and the accused is her husband. P.W-2 has also stated that the accused had committed sexual intercourse on her daughter 'x'. The accused sent her (P.W-2) to outside and taking advantage of her absence, he committed sexual intercourse on 'x'. 'x' told her about the occurrence.

In her cross P.W-2 has stated that the accused is a fisherman. She did not see the occurrence herself. Her daughter lodged the ezahar after 15 (fifteen) days from the date of occurrence. She has denied that she has adduced false evidence.

12. Thus, careful scrutiny of evidence of P.W-2 Basatun Nessa shows that she is the wife of the accused. She got to know about the occurrence i.e to commit sexual intercourse on 'x', from her daughter. This shows that the evidence of P.W-1 is corroborated with the evidence of P.W-2. Moreover, the evidence of P.W-1 that the accused sent her mother outside the house and taking the advantage of absence of her mother, the accused committed sexual intercourse on her (P.W-1) is also supported by P.W-2. Thus, the evidence of P.W-1 and P.W-2 is corroborated to each other.

Learned defence advocate has submitted that P.W-2 Basatun Nessa is not an eye witness. So, her evidence cannot be believed in toto.

P.W-2 Basatun Nessa herself has stated that she did not see the occurrence. But P.W-2 got to know all about the occurrence from her daughter 'x'. Her daughter 'x' told her. So, the evidence of P.W-2 is direct evidence. It is not hearsay evidence. Such evidence cannot be discarded.

13. Now let's see the evidence of other witnesses.

P.W-3 Saijuddin is the maternal uncle of 'x'. According to P.W-3 Saijuddin, he got to know about the occurrence from his sister Basatun

Nessa. He got to know that the accused committed sexual intercourse on 'x'. He informed their relatives and other heads of the villagers and when they went to the house of the accused, he had gone away.

In his cross P.W-3 has stated he accompanied 'x' to the police station while lodging the ezahar. P.W-3 has denied that the accused was not at his house when the alleged occurrence took place. P.W-3 has also denied that 'x' and her mother told him a false story of rape.

14. P.W-4 Jelekha Khatun has stated in her evidence that 'x' told her that the accused committed rape on her. She did not witness the occurrence.

In her cross P.W-4 has stated that she is not relative to Basatun Nessa. P.W-4 denied that she did not hear from 'x' that the accused committed rape on 'x'.

15. P.W-5 Asatun Bibi has stated in her evidence that on the day of occurrence the accused sent his wife outside of his house. P.W-5 has also stated that she heard cry of 'x' at her house and when she went there she found 'x' in a state of nude. She also saw the accused in the same position. The accused had gone away and 'x' told her that the accused committed rape on her. 'x' also told her that the accused committed rape on her on earlier occasions.

In her cross P.W-5 has stated that she cannot say the date on which the occurrence took place. The accused is not her relative. P.W-5 has denied that the accused did not commit sexual intercourse on 'x'.

16. P.W-6 Ajibar Rahman has stated in his evidence that he heard from his wife that the accused committed rape on 'x'.

In his cross P.W-6 has denied that he did not hear about the occurrence from his wife.

17. P.W-7 Jahan Uddin has stated in his evidence that he heard that the accused committed rape on 'x'.

In his cross P.W-7 has stated that he heard about the occurrence from the mother of \dot{x} .

18. Thus, minute scrutiny of evidence of P.W-3 to P.W-7, it appears that P.W-3, P.W-4 heard about the occurrence from 'x' and Basatun Nessa. Both of them are not eye witness, but they heard directly from 'x'. So, their evidence is direct evidence. Even P.W-3 Saijuddin accompanied 'x' to the police station to lodge the ezahar. So, their evidence cannot be discarded.

The defence too failed to foil their evidence except some suggestions. But the said suggestions were sternly denied by the said witnesses. P.W-5 Asatun Bibi is an independent witness. She is not relative to Basatun Nessa or to the accused. She is extreme neighbour to the accused. She has claimed to see both 'x' and the accused in the state of nude. 'x' also told her that the accused had committed sexual intercourse on her. The defence has failed to detract the evidence of P.W-5 except giving some suggestions. But the said suggestions are sternly denied by P.W-5. There left no room of doubt in the evidence of P.W-5. The other witnesses namely P.W-6 Ajibar Rahman and P.W-7 Jahan Uddin heard about the occurrence from the persons other than 'x'. So, their evidence is hearsay. The hearsay evidence is not considerable as per Evidence Act.

Thus, the evidence of P.W-3, P.W-4 and P.W-5 is convincing. The evidences of the said witnesses have meliorated the prosecution case. The said evidences have got gravity and it cannot be discarded or disbelieved without reason. The defence has failed to foil the evidence of P.W-3 to P.W-5 at any rate.

19. Learned advocate has submitted in his argument that the prosecution has not examined not a single independent witness to establish the case. So, it is the lapse on the part of prosecution.

The earlier discussion shows that P.W-5 Asatun Bibi is an independent witness. She is an eye witness. Her evidence is clear and straight and free from ambiguity. In such a situation, the submission of learned advocate, with due respect, is not accepted.

20. Now let's see whether the plea of prosecution that the accused had committed sexual intercourse on 'x' is supported by P.W-10 Dr. Rinku Ahmed.

P.W-10 Dr. Rinku Ahmed has stated in her evidence that she examined 'x' on 18-09-2017 and found as follows:

General examination normal; no mark of injury; X-ray of iliac crest, elbow joint, wrist joint is given; no spermatozoa seen in vaginal swab supplied. No evidence of recent sexual intercourse /assault is found. Ext-6 is medical report. Ext-6 (1) is her signature.

The evidence of P.W-10, the Medical & Health Officer does not support the evidence of P.W-1. According to P.W-10, she found no recent

sexual intercourse/assault on 'x'.

In Ram Swaroop -vs- State of Rajasthan, 2008, Cri. L.J 2259 SC, the Hon'ble Supreme Court observed as follows:

"8. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference."

"9. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eye witness version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."

It is axiomatic that the evidence of Medical & Health officer is mere opinionative. It is trite law that the oral evidence has to get primacy and medical evidence is basically opinionative.

In this instant case, P.W-1 has been uttering that she was sexually molested by the accused who is her own father. The accused molested her repeatedly.

The vital thing is that the prosecutrix was examined by the Medical & Health Officer after a few days i.e 'x' was produced for her medical examination not in time. This is the lapse on the part of the prosecution, not on the victim.

Being above situation, the evidence of P.W-10, Medical & Health Officer cannot be accepted.

21. Now let's see the age of the victim 'x'.

According to P.W-1 'x', she was 14 (fourteen) years at the time of occurrence. The other witnesses have stated nothing regarding the age of the victim 'x'.

To authenticate the evidence of P.W-1, let's see the evidence of P.W-9 Dr. Laskar Ali.

P.W-9 Dr. Laskar Ali has stated in his evidence that on 18-09-2017 he was posted at Dhubri Civil Hospital as Radiologist. He examined 'x' in reference Bilasipara P.S case no. 973/2017 under section 6 of POCSO Act and found as follows:

"I did X-ray (X-ray film no. L-4001+02+03 of left wrist joint, left elbow joint and left iliac crest to determine the radiological age of the patient 'x'. As per x-ray report I find-

- 1. Left wrist joint- lower end epiphysis of radius is not fused, so approximate age is less than 16 years.
- 2. Left elbow joint- Radial head epiphysis is fused. So approximate age is greater than 14 years.
- 3. Left iliac crest- Iliac crest epiphysis not fused. So approximate age is less than 17 years.

Opinion: In my opinion approximate radiological age is 15 years. Ext-5 is the radiological report. Ext-5(1) is my signature. "

Cross examination of P.W-9 was declined by the defence.

Thus, the evidence of P.W-9 shows that the age of 'x' was 15 years on 18-09-2017. The occurrence took place in the year 2017. The evidence of P.W-1 that she was 14 years is supported by P.W-9. The defence has not rebutted to it. Accordingly, it is accepted that 'x' was 14-15 years old at the time of occurrence.

22. Learned advocate Mr. Hekmat Ali Seikh, for the defence has submitted that there are many contradictions and discrepancies in the prosecution evidence. The said contradictions are vital and this may shroud the prosecution case with doubt.

Gone through the evidence of P.W-8 S.I Ashis Kr. Sengupta who investigated the case. It appears the defence failed to point out not a single contradiction in the evidence adduced by prosecution witnesses. In such a position, the plea of learned advocate cannot be accepted.

23. Learned advocate Mr. Hekmat Ali Seikh, for the defence has also submitted that the prosecution has not examined no independent witnesses to support the prosecution case.

The case record shows that P.W-5 Asatun Bibi is the independent witness. This witness is a vital witness who saw both the victim as well as the accused in nude position. P.W-5 has clearly stated in her evidence in cross that she is the adjacent neighbour to the accused.

So, the plea of the learned advocate, with due honour, cannot be accepted.

24. Now let's see section 5 of POCSO Act.

Section 5 of the Act read as follows:

- "5. Aggravated penetrative sexual assault.-
-(I) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
- (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or............"
- 25. The above decision and reasons behind it shows that the accused had committed aggravated penetrative sexual assault on 'x'. He committed such assault on 'x' repeatedly for many days. So, the ingredient as required u/s 5(I)(n) of POCSO Act are found in this prosecution case. The prosecution has brought home all the ingredients required under section 5 of POCSO Act against the accused.

There found no merit in the defence case.

- 26. The prosecution has proved it's case u/s 6 of POCSO Act against the accused beyond all reasonable doubt.
- 27. Held, the accused is guilty u/s 6 of POCSO Act.

Since, this case is under Special Act, so, section 376(f)/376(I) of I.P.C is not taken into consideration.

28. Now, let's see whether the accused is entitled to benefit of 360 Cr.P.C or section 3/4 of Probation of Offenders Act.

Considered gravity of offence. The way the accused perpetrated the offence. It appears that the society will shock if the accused is given such benefit. At the same time, the administration of justice will severely be affected.

Taking such view, the accused is not given the said benefit.

29. Heard the accused on the point of sentence under section 235(2) of Cr.P.C.

The accused has submitted that he is a poor man. He prays for exoneration.

Considered the prayer of the accused.

30. The accused is convicted and sentenced rigorous imprisonment for 10 (ten) years and to pay fine Rs. 3000/- in default of fine another period R.I for 1 (one) month u/s 6 of POCSO Act.

Set off the previous hazotee period, if any.

- 31. District Legal Services Authority, Dhubri is informed to pay compensation to the victim as per norms.
- 32. Let a free copy of Judgment & order be given to the accused.

The case is disposed of.

Given under my hand and seal by this court on this 24th day of January, 2020 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by,

S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

P.W-1 'x'/the victim

P.W-2 Basatun Nessa

P.W-3 Saijuddin

P.W-4 Jelekha Khatun

P.W-5 Asatun Bibi

P.W-6 Ajibar Rahman

P.W-7 Jahan Uddin

P.W-8 Ashish Kr. Sengupta

P.W-9 Dr. Laskar Ali

P.W-10 Dr. Rinku Ahmed

PROSECUTION EXHIBITS:-

Ext-1 Ezahar,

Ext-2 Statement of 'x' recorded u/s 164 Cr.P.C,

Ext-3 Sketch Map,

Ext-4 Charge sheet,

Ext-5 Radiological report,

Ext-6 Medical report.

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- NIL

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara