#### IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 11 of 2018
(Arising out of Baghbor P.S Case No.118/2017)
U/S 6 of POCSO Act, 2012

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

**Charge framed on:- 28.05.2018** 

State of Assam

- Vs -

Osman Ali.....Accused.

Date of Recording Evidence on - 20.06.2018, 07.08.2018, 27.11.2018,

04.05.2019, 24.05.2019

Date of Hearing Argument on - 03.06.2019

Date of Delivering the Judgment on - 13.06.2019

## **Appearance:**

Advocate for the State-----Mrs. P. Das, Ld. Addl. P.P. Advocate for the Accused------Mr. Rafiz Uddin Dewan, Ld Advocates.

### JUDGMENT

- 1. The brief fact, of the prosecution case, as enumerated in the FIR dated 22.05.2017 lodged by one Ainal Hoque is that accused No.1 named in the FIR whose residence is adjacent to the house of informant by persuading his daughter took her to his room and subjected her sexual torture which continues for months causing her pregnant. It is further alleged that accused threatened his daughter to kill in the event she dares to disclose it to other. However, on 14.05.2017 having noticed the physical growth of his daughter, they came to know that she became pregnant and on quarry she disclosed the fact. Thereafter, accused NO.2,3,4 and 5 named in the FIR were informed to settle the matter but they refused to admit the fact. It is submitted that victim is very innocent and simple girl and she do not know the consequence of pregnancy and taking advantage of her innocence accused did the mischief. Hence the case.
- 2. Following the information as above, Mondia out post entered the same in the general diary vide GDE No.407 dated 22.05.2017 and forwarded the same to Baghbor police station for registering a case. Accordingly Baghbor P.S. registered a case being Baghbor PS Case No.118/17 u/s 120(B)/376/313 IPC R/W section 6 of POCSO Act.

- 3. During the course of investigation, police recorded the statement of the witnesses including the victim girl u/s 161 Cr.P.C., drew sketch map, sent the victim girl for medical examination. Thereafter, she was also forwarded to court for recording her statement before Magistrate u/s 164 Cr.P.C. On conclusion of investigation, I/O collected the medical report and finally laid the charge sheet against accused persons u/s 376/313 IPC and section 6 of POCSO Act with a view to stand trial.
- 4. During the course of time, when accused entered his appearance in court the then learned Special Judge, Barpeta having complied with the section 207 Cr.P.C. vide order dated 28.05.2018, framed charge u/s 4 of POCSO Act. The particulars of the offence on being read over and explained accused pleaded not guilty and claimed trial.
- 5. During the course of trial, the prosecution examined as many as 8 witnesses including the informant, the victim girl, medical officer as well as investigating officer.
- 6. Concluding prosecution evidence, accused was examined u/s 313 Cr.P.C. in which accused denied the prosecution evidence as false but on being asked, declined to adduce defence evidence. His plea is total denial of the prosecution case. Accordingly, case was posted for argument.
- 7. During the course of preparation of judgment it has come to notice that the charge was not properly framed by the then Special Judge. Therefore, having heard the learned lawyers appearing for both sides, this court vide order dated 03.06.2019 altered the charge from Section 4 of POCSO Act to Section 6 of POCSO Act.
- 8. However, the learned defence counsel on being asked declined to adduce fresh evidence. So, hearing the learned lawyers, further prosecution evidence on the altered charge stands closed and fix the case for judgment.

# 9. **Now point for determination** ;-

 Whether on 22.05.2017 and prior thereof from 22.05.2017 accused committed aggravated penetrative sexual assault on the victim (X) aged about 12 years causing her pregnant as a consequence of sexual assault on her as alleged?

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

I have heard the learned lawyers appearing for both sides and also carefully scanned the documents and evidence available on record.

11. Before discussing the evidence on record, it is useful to refer first the definition of offence of "aggravated penetrative sexual assault" as defined in Section 2(a) and (b) of the POCSO Act, 2012.

**Section 2(a)** "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

**Section 2(b)** "aggravated sexual assault" has the same meaning as assigned to it in section 9:

- 12. Now, let this court examine the evidence of the witnesses and documents on record for arriving at a just decision in the case.
- 13. PW-1 Ainal Hoque, who is the informant deposed that he knows the accused as his residence is adjacent to his house. The incident occurred about one year back. At that time, the age of his daughter was 12 years. Accused called her to his residence and committed rape on her and they came to know only after she became pregnant for three months. When his wife asked his daughter, she narrated the story to her. Then a village meeting was held wherein accused and his family were invited but they did not respond. Then he filed the case. Since he do not know how to write, he put his thumb impression in the FIR. He stated that his daughter was sent to medical examination and also produced her before Magistrate for recording her statement. But the child in the womb of his daughter died in the hospital.
- 14. In his cross examination he stated that he filed the FIR only after coming to know about the incident. But after the birth of the child no attempt was made to identify who is the father of the child. He had not seen when accused committed the crime.
- 15. PW-2 is the victim girl (X) who in her deposition stated that accused is her neighbor. One day after her return from school, the wife of accused called her to her house. When she had gone there, she was put in a room, where accused was sitting who removed her clothes by shutting her mouth and committed rape on her. Subsequently, accused committed the sexual intercourse with her for twice when she want to disclose it, accused threatened her of dire consequences. Earlier the brother of accused killed the daughter of her paternal aunt. So out of fear she did not disclose it to others. But her mother came to know when she was carrying pregnancy for three months. Then she told the fact to her father who called the meeting of the society and visited the house of accused but accused denied having his involvement. Then her father filed the case. During investigation police recorded her statement and also sent her for medical examination and she was also forwarded to court for recording her statement before Magistrate. In the hospital, she gave birth a child but the child died.
- 16. In her cross examination she stated that she do not know her date of birth. She read in school but later on, dropped. She understands bad and good things and know that accused committed sexual intercourse with her for three days. But she did not disclose it to others. She was not tutored by any one to depose evidence before Magistrate. She further deposed that she did not shout at the time of commission of the offence by accused because accused shut her mouth closed, threatened her with dagger. She however, stated in her cross examination that in the meeting her father demanded Rs.1,00,000/- from accused but on his refusal he filed the case.
- 17. PW-3 Hasmat Ali also deposed that he knows accused and the victim very well and also aware about the meeting of the society regarding the matter. At that time,

victim was carrying five months pregnancy. The meeting was held against the accused but accused did not obey the command of the meeting. Later on, the victim gave birth a child in the hospital but the child expired.

- 18. In his cross examination he stated that informant is his neighbor but he do not know whether informant demanded Rs.1,00,000/- from accused and was not aware from whose side the victim become pregnant.
- 19. PW-4 Toimuddin also deposed in the same vain by stating that he knows informant and the accused very well and the incident occurred one year back. He saw police visited the house of accused and having seen this, he rushed there and came to know that victim was made pregnant by accused Osman Ali.
- 20. In his cross examination he stated that how the victim become pregnant he do not know.
- 21. PW-5 Sanidul Islam also deposed that he knows informant and the accused well and came to know that victim become pregnant and in this regard police visited the house of accused. But in his cross examination he stated that he do not know how the victim become pregnant.
- 22. PW-6 Kalachan Mia also deposed that he is a co-villager with the informant and accused and also came to know from the victim that she was carrying pregnancy and her father lodged the case and at that time she was 12 years old.
- 23. PW-7 is doctor Anima Boro who deposed that on 23.05.2017 while she was working at FAAMCH, Barpeta as a lady medical officer, she examined the victim girl (X) aged about 12 years in connection with Baghbor P.S. case No.118/17 u/s 120(B)/376/313 IPC and section 4 of POCSO Act. On being produced by one woman police constable and on examination no injury mark was found on her private part. But as per X-ray examination her age was found above 12 years and below 14 years. The doctor further deposed that victim was pregnant for 17 week 3 days at that time.
- 24. In her cross examination she deposed that she examined only pregnancy of the girl not the injury on her private part. Who caused the pregnancy can be ascertained only by DNA test.
- 25. PW-8 Mablik Brahma the investigating officer whose evidence is stereotype in nature. According to her, she on being entrusted to investigate the case, forwarded the victim girl for medical examination as well as produced her before Magistrate for recording her statement and drew sketch map and later on, collected the medical examination report, arrested the accused and finally submitted the charge sheet against accused u/s 376/313 IPC and section 6 of POCSO Act. Ext.2 is the FIR and Ext.2(1) is his signature. Ext.3 is the sketch map and Ext.3(1) is his signature. Ext.4 is the seizure list and Ext.4(1) is his signature. Ext.5 is the charge sheet and Ext.5(1) is his signature.
- 26. In her cross examination she stated that since victim was carrying her pregnancy at the time of investigation so he do not apply for DNA test to ascertain the paternity of the child. She denied that the false charge sheet was filed against accused.

- 27. Based on the evidence available on record, the learned Addl. P.P. submitted that this is a case wherein prosecution has been able to establish the case against the accused beyond all reasonable doubt for sustaining conviction of accused u/s 6 of POCSO Act. She submitted that the version of the victim girl (PW-2) is consistent and credible supported by other prosecution evidence. The evidence of the victim girl that she was made pregnant by accused by having sexual intercourse with her on several dates has been proved by oral evidence of her father as well as medical evidence of doctor who on examination of the victim girl on 23.05.2017 found her carrying pregnancy of 17 months 3 weeks. Therefore, the learned Addl. P.P. submitted that it is a fit case for awarding appropriate punishment to accused person in accordance with law.
- 28. On the other hand, the learned counsel Md. Rafiz Uddin Dewan appearing for the accused person vehemently contended that there is contradictions and inconsistencies in the evidence of the prosecution witnesses for sustaining conviction of accused person u/s 6 of POCSO Act because the evidence of the victim girl has not been supported by medical evidence. He contended that when the medical officer examined the victim girl on 23.05.2017 she found no any injury mark on her private part. Moreover, in her cross examination she stated that no DNA test was done to ascertain the paternity of the child in the womb of the victim girl. Therefore, there is serious doubt as to who caused the pregnancy. Under such a situation, awarding conviction of the accused is highly unsafe. The learned counsel further contended that the evidence of PW-4, PW-5 and PW-6 are all hearsay so no reliance can be placed on their evidence. The other witnesses namely-PW-1 and PW-2 are father and daughter so their evidence is interested. As such, no reliance can be placed on the evidence of such interested witnesses. Therefore, the learned defence counsel submitted that it is a fit case to record judgment of acquittal on the ground of benefit of doubt.
- Having heard the rival contention of the learned lawyers appearing for both 29. sides, this court after careful examination of the evidence available on record found it difficult to accept the submission of the learned defence counsel. On perusal of the statement of the victim girl recorded by police u/s 161 Cr.P.C. and her evidence deposed in court on oath it appears that she very categorically and consistently spelt out the name of accused Osman Ali who committed aggravated penetrative sexual assault on her and none else. According to her, accused Osman Ali had sexual intercourse with her by calling her into his house not only once, but thrice under threat of killing her. The evidence of the victim girl inspires confidence as she is consistent throughout her evidence and cross examination. The contention of the learned defence counsel that the victim did not disclose the fact at the first point of time renders the prosecution case doubtful as to who caused her pregnant. But in the considered estimation of this court, the contention of the learned defence counsel is not backed by any good reason because of the fact that when an adult committed aggravated penetrating sexual assault on a minor girl under threat of killing her in the event she

disclose to others it is very natural that a minor girl could not gather courage to disclose it to any one because of inherent fear in her tender mind. In such a situation, a minor girl do not dare to disclose it, even to her parents because of fear of corporal punishment. So, the minor girl is to bear the pain and agony within herself. Moreover, accused Osman Ali is her next door neighbor so she always nurture fear in her mind which hunt her all throughout. If she disclosed it to others accused will take action event to the extent of killing her. Therefore, under such a breathless circumstances it is natural that a minor girl did not are to disclose it to others. However, when the physical appearance of the girl speaks otherwise it has come to the notice of her parents and then on query by mother of the girl, as deposed by PW-1, who is her father the girl disclosed her ordeal how accused Osman Ali subjected her aggravated penetrative sexual assault on number of occasions under threat and make her pregnant. Under such situation, the informant (PW-1) lodged the case against accused. During the course of investigation as deposed by PW-8 the investigating officer, the girl was sent for medical examination and also sent her for recording her statement before Magistrate and during the course of her examination by medical officer on 23.05.2017 in connection with Baghbor P.S. case No.118/17 u/s 120(B)/376/313 IPC and section 4 of POCSO Act. The medical officer found the age of the victim girl above 12 years and below 14 years and the victim girl was also found carrying pregnancy for 17 weeks 3 days. Therefore, the evidence available on record leads to irresistible conclusion that it was none other then accused who had aggravated penetrative sexual assault on the victim girl on number of times causing her pregnant which is a crime punishable u/s 6 of POCSO Act.

- 30. It is evident from record that the girl gave birth a child in the hospital but died. In this context, this court do not find force in the contention of the learned defence counsel that having not done DNA test to ascertain the paternity of the child in the womb of the victim raises a serious doubt. As this argument pales into the face of cogent and categorical evidence of the victim girl that it was accused who committed the aggravated sexual assault on her and none others. During the course of evidence also defence failed to establish that any other person has excess on the girl other than the accused in causing such pregnancy. Therefore, DNA test in the estimation of this court is not at all necessary to hold the accused guilty.
- 31. In view of the foregoing discussion it is crystal clear that court can also very well draw the presumption prescribed u/s 29 and 30 of the POCSO Act that accused Osman Ali has the criminal intention to commit the offence punishable u/s 5 (J)(ii) of POCSO Act punishable u/s 6 of the said act.
- 32. The most revealing fact as deposed by PW-1 and the victim girl PW-2 is that accused has having his wife living at the time of commission of the offence. Apart from this, accused is a next door neighbor of the victim girl. Therefore, accused knows every weakness and opportune situation and accordingly sexually exploited the victim to his convenience contrary to his role of taking care of minor child of his locality as a

responsible citizen at the time of distress. Accused played the role of aggressor instead of being a protector. So, the act of the accused is impregnated with full knowledge and intention that he is committing a crime against a minor girl of tender age in his neighborhood which is an act reprehensible by any sensible human being. Accused not only put a serious strain in the age old relationship of neighbors in a civilized society but he has broken the faith and trust of neighbors. Accused nakedly invaded into the privacy and the sexuality of the victim girl which violates her dignity as a person.

- 33. In view of the foregoing discussion and reason, this court come to unerring conclusion that accused Osman Ali is guilty of committing offence prescribed u/s 5 (j) (ii) punishable u/s 6 of POCSO Act, 2012. As such, this court holds him guilty accordingly.
- 34. 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 and the nature of the offence committed, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of accused.

#### SENTENCE HEARING

- 35. 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 labour. He is very young and married. So, in the event he is put behind bar his innocent family members would suffer a lot. Hence, accused pleaded clemency.
- 36. Heaving considered all the extenuating and mitigating circumstances of the case, and the punishment prescribed in section 6 of POCSO Act, 2012 accused is convicted and sentenced to undergo Rigorous imprisonment for a term of 10 years (ten) and fine of Rs.1000/- (one thousand) I/d S/I for 3 (three) months. Though the offence prescribed u/s 6 of POCSO Act, 2012 extent to imprisonment for life but considering the age of the accused this court is of the view that awarding punishment of minimum 10 years R/I will be appropriate for the accused person to repent and realize his mistake, accordingly he is convicted in the aforesaid terms.
- 37. 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.
- 38. Let a copy of the judgment be furnished to accused person free of cost as provided in section 363 Cr.P.C.
- 39. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.
- 40. Let the case record be consigned to record room after completing the

## formalities.

41. Given under my hand and seal of this Court on this 13th day of June, 2019.

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 8 nos. of witnesses :-
- PW-1 = is Ainal Hoque, the informant.
- PW-2 = is victim(X).
- PW-3 = is Hasmat Ali.
- PW-4 = is Toimuddin.
- PW-5 = is Sanidul Islam.
- PW-6 = is Kalachan Mia.
- PW-7 = is doctor Anima Boro, the M/O.
- PW-8 = is Mablic Brahama, the I/O.
- 2. The prosecution has exhibited following document :-
- Ext.1 = is the medical report.
- Ext. = 1(1) = is the signatures of doctor Anima Boro.
- Ext.2 = is the FIR.
- Ext.2(1) = is the signature of informant.
- Ext.3 = is the sketch map.
- Ext.3(1) = is the signatures of I/O..
- Ext.4 = is the seizure list.
- Ext.4(1) = is the signature of I/O.
- Ext.5 = is the charge sheet.
- Ext.5(1) = is the signature of I/O.

Sd/-

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