

IN THE COURT OF THE SESSIONS JUDGE ::::: BONGAIGAON

Special (P) Case No. 1 (M)/2017.

U/S 6 of POCSO Act.

(Arising out of GR Case No. 52 of 2013)

State of Assam

Vs.

Md Ajijul Ali.....Accused.

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

Appearance :-

*For the State : Smti R. Choudhury, Special Public  
Prosecutor.*

*For the accused : Sri K.Chakraborty, Advocate.*

Date of Argument : 17.11.2018, 1.12.2018.

Date of Judgment : 04.12.2018.

*Smti I. Barman*  
*Special Judge,*  
*Bongaigaon.*

1. Prosecution case in brief is that on 4.2.2013 at around 12.30 P.M while the informant's 9 ½ years daughter 'X' proceeded to take bath at Pakalaga river, accused Ajijul Ali by enticing, committed her rape which was witnessed by one Minara Begum.

2. On receipt of the FIR from the informant (PW 2)

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(2)

on 11.2.2013, the O/C, Manikpur Police Station, registered a case being Manikpur Police Station Case No. 27/2013 U/S 376(f) IPC and entrusted S.I. Sailen Kr Kalita to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, sent the victim for medical examination, got recorded the statement of the victim and the eye witness (PW 4) U/S 164 Cr.P.C, arrested the accused and on completion of investigation laid charge-sheet against the accused Ajijul Ali U/S 376(f) IPC.

3. On appearance of the accused and on perusing police report and hearing both sides, though charge U/S 4 of POCSO Act was framed against the accused but later on charge was altered to section 6 of POCSO Act for committing the offence U/S 5(m) of the Act being the victim below the age of 12 years. The accused pleaded innocence when charge was read over and explained to him and claimed for trial.

4. **Point for determination:-**

*Whether on 04.02.2013 at around 12.30 P.M at village  
Abadi under Manikpur Police station, accused Ajijul  
Ali committed aggravated penetrative sexual assault on  
the victim 'X' below the age of 12 years and thereby  
committed an offence U/S 5(m) of POCSO Act  
punishable U/S 6 of POCSO Act?*

4.12.18  
Special Judge,  
Bongaigaon.

5. In this case, to bring home the charge against the accused, prosecution has examined as many as 13 witnesses. Statement of the accused was recorded U/S 313 Cr.P.C in which, he denied all the allegations leveled against him. Defence examined none.

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6. I have heard argument advanced by the learned counsel of both sides.

**Discussion, decision and reasons thereof:-**

7. Mrs R. Choudhury, the learned Special Public Prosecutor appearing for the State has submitted that it is a case of penetrative sexual assault on minor girl under the age of 12 years and solitary evidence of the victim is sufficient to convict the accused.

8. Refuting the argument advanced by the learned Special Public Prosecutor, Mr Chakraborty appearing for the accused has submitted that with discrepancies on material facts in the testimony of the witnesses, the case U/S 6 of POCSO Act has not been proved against the accused and he is entitled to benefit of doubt.

9. In this case, PW 2 and PW 9, the parents of the victim, stated that they did not remember the date of the birth of their daughter. PW 5 the victim in her deposition recorded in August, 2007, mentioned her age as 13 years. The alleged incident occurred in the year 2013 and on that count, she was 9 / 10 years old at that time. Admittedly, the victim got married in the year 2016 i.e at the stage of 11 / 12 years. Regarding age, the Investigating Officer seized a school certificate of the victim which reflects that her date of birth is 4.4.2002 and as such on the day of incident i.e on 4.2.2013, she was 11 years 10 months old. Prosecution has not examined the issuing authority of the school certificate (M. Ext 1). The Medical Officer also could not ascertain the age of the victim for non-availability of X-ray report. Though defence during cross of PWs took the plea that she was above 18 years at the time

*S. U. R. 18*  
Special Judge,  
Bengalgaon.

Contd.....

(4)

of incident but except giving suggestion, no evidence either oral or documentary is produced in that respect. In the above, though it can not be ascertained as to whether she was below 12 years or not but the evidence of PWs show that she was certainly below the age of 18 years and was a child as defined in section 2(d) of the Act.

10. Now the question is whether the accused Ajijul Ali committed any offence on the victim child. In this respect, let me travel through the evidence adduced by the prosecution side.

11. PW 1 Popi Begam knew nothing about the incident. PW 2, the father of the victim deposed that on the day of incident at around 12.30 P.M while his daughter went to the nearby river, to take bath, then accused Ajijul coming by bicycle from somewhere stopped there and taking the victim to the nearby jungle, took off her pant and raped her. The wife of Aituddin witnessing the same, reported at his house about the incident and later on, while his (PW 2) daughter returned home, his wife enquired her about the incident to which she replied in affirmative. But due to poor financial condition immediately he could not file the FIR. Later on, wife of Aituddin informed the matter at Manikpur Mahila Samittee and then through the said Mahila Samittee, he lodged the FIR. During cross-examination he stated that he did not enquire his daughter about the incident. He stated that there is a road by the side of the river which was hardly used by the villagers as there is another road. According to him, the river is visible from his house but not at audible distance. He admitted that there are 2 / 3 cases in between the accused and wife of Aituddin i.e PW 4.. He also stated that he did not know if

V.N.Z.S  
Special Judge,  
Bengalgaon.

Contd....

(5)

out of grudge, the wife of Aituddin conspired with his wife, filed this case falsely.

12. PW 3 Aituddin Ali deposed that on the day of incident in the evening while he returned home, his wife informed him that while she went to see their vegetable garden, she had seen the accused Ajijul Ali committing rape on the victim by gagging her mouth beside the river and then scolding him by his (PW 3) wife, the accused holding her leg, asked to forgive him. Thereafter, his wife reported the incident at the house of the victim and before the Mahila Samittee. During cross-examination he stated that he did not see the incident. He denied the suggestion that since prior to the incident, a case is pending between his wife and the family members of the accused. He stated that the river is at a lonely place and a few villagers used the same for bathing.

13. PW 4 the wife of PW 4 claiming as eye witness disposed that on 4.2.2013 at about 12.30 P.M while she proceeded to see her vegetable garden near river, she noticed a bicycle with vegetables beside the road. Though she was there for half an hour but had seen none. At that time, hearing cry of someone when she proceeded forward, had seen the accused Ajijul committing rape upon a 9  $\frac{1}{2}$  years old girl. Seeing her, Ajijul released the girl and beg for pardon. Then she scolded the accused and left the place and the girl also returned home. She reported the incident to the mother of the girl and asked not send the girl to river alone. She further deposed that in the incident while she was abusing the accused, Muktar Ali reached there and enquired

J.12.16  
Special Judge,  
Bongaigaon.

Contd.....

(6)

whether the vegetables upon the bicycle belonged to accused. She proved her statement U/S 164 Cr.P.C as Ext 1. During cross examination she stated that they did not use the river for bathing. She stated that seeing the incident, she did not call the villagers and also did not take the girl to her house. She denied about any case between herself and the accused prior to the incident.

14. PW 5 Ranu Choudhury, in her evidence stated that one day PW 4 coming to her house reported that on previous day a girl was raped by accused Ajijul in village Abadi which incident she witnessed while went there to change the place of her cow. At that time she (PW 5) was counselor of Family Counseling centre. She advised PW 4 to ask the parents of the girl to lodge FIR. She stated that they some women also went to Manikpur Police Station and met the victim there and on being asked the victim, she asserted the incident. During cross-examination she stated that the parents of the victim did not report either orally or in writing before the Family Counseling centre.

15. PW 6 Eskar Ali knew nothing about the incident. PW 7 Salam Ali turned hostile. He stated that he heard nothing.

16. PW 8, the victim in her evidence deposed that on the day of incident at 12.00 noon she went to river for taking bath and after bathing when she was standing on the bank of river, the accused came there by riding a bicycle and gagging her mouth took her to the nearby jungle and laying upon her body, tried to insert his penis in her vagina but on being resisted, the accused could not succeed. She deposed that as

Special Judge,  
Bengangaon.  
J. 5.12.16

Contd....

(7)

her body was smeared with mud, she again took bath and threw away her jangia in the river and then returned home. She deposed that after the incident when she tried to stand up, mother of Aitu had seen her and the accused and reported the incident to her mother. She proved her statement U/S 164 Cr.P.C as Ext 2. During cross examination she stated that the river is visible from their house. She stated that her mother and grand mother were at home at the time of incident. She denied the fact that the accused neither gagged her mouth nor tried to do bad act with her. She stated that after the incident, PW 4 asked her mother to file case saying that in case of filing case, they would get Rs. 1,00,000/- from the accused and then they would share the money.

17. So far the evidence PW 9, the mother of the victim on the day of incident her victim daughter went to river for taking bath at 12.00 noon. After returning home, her victim daughter reported her nothing but thereafter the wife of Bhabesh reported her first that accused Ajijul removing the pant of her daughter did misdeed with her, Then on being asked, the victim narrated that when the accused attempted to commit misdeed with her, the mother of Aitu witnessed the incident. The mother of Aitu reported the incident to wife of Bhabesh who reported her first about the incident. Then she informed the matter to her husband who lodged the FIR. During cross examination she stated that the river is situated at a few distance from their house but the river is not visible from her house. She deposed that the villagers used to take bath in the said river. She stated that on being asked, her daughter told her that the accused asked the victim to remove her pant but she did not remove. Corroborating the evidence of the victim (PW 8), this witness also stated that PW 4 asked to lodge the case against the accused saying that they

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Jyoti  
Special Judge,  
Bengalgaon.

(8)

would get money. She denied the fact that the case was filed falsely in conspiracy with PW 4 to get money.

18. PW 10 Moneswar Patgiri knew nothing about the incident.

19. Dr. Chandita Borah, the Medical Officer deposing as PW 11 stated that on 12.2.2013 she examined the victim and on examination found no injury mark over body or private parts. Hymen absent, vagina admits two fingers with difficulty. She stated that sexual intercourse can not be ruled out as hymen is absent. The medical officer proved the report as Ext 3. During cross-examination she admitted that hymen can be absent due to cycling and swimming.

20. PW 12 SI Sailen Kr Kalita, the Investigating Officer deposed that on being entrusted to investigate the case, he recorded the statement of the witnesses alongwith the victim, visited the place of occurrence, prepared the sketch map of the place of occurrence, vide Ext.6, got recorded the statement of the victim and PW 4 U/S 164 Cr.P.C, sent the victim for medical examination, seized a school certificate of the victim vide Ext 4, arrested the accused and submitted charge sheet against the accused (Ext 7). He also proved the FIR as Ext 1. He stated that the school certificate was produced by the father of the victim but he did enquire about the authenticity of the school certificate.

Special Judge,  
Bengalgaon.  
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21. PW 13 Purnanda Das, the then Bench Assistant of the Court of the Judicial Magistrate, Ist Class, Bijni deposed that on

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13.2.2013 the victim was produced in connection with Manikpur Police Station case no. 827/13 U/S 376 IPC and accordingly the learned SDJM(M) Smti T. Hussain recorded her statement. He further stated that on 18.2.2013 PW 4 was produced in the Court for recording her statement U/S 164 Cr.P.C in connection with this case which was accordingly recorded by the then learned SDJM(M), Bijni Smti T. Hussain Madam. He proved the statement of PW 4 and the victim as Ext 1 and Ext 2 respectively.

22. In the case in hand, the evidence of the victim is that on the day after taking bath at nearby river, when she was standing at the bank of the river, accused Ajijul Ali by riding his bicycle reached there and gagging her mouth, took her to the nearby jungle, laid her upon ground, removed her jangia and then laying upon her body tried to insert his penis in her vagina but on being resisted by her, he could not succeed. Thereafter she again took bath as her body was smeared with mud and dropped her jangia in the river. According to her, after the incident when she tried to stand up, mother of Aitu had seen her and the accused, and then informed the matter to her mother. So as per evidence of the victim, PW 4 had not seen the accused committing the alleged offence of rape. PW 4 testified that when she went to see her vegetable garden situated near the river, she noticed a bicycle loaded with vegetables but saw no body for half an hour and thereafter hearing somebody's cry, when by following the sound, she proceeded forward, she had seen the accused committing rape upon the child victim and seeing her, the accused released the girl and asked to forgive him. The evidence of PW 4 who claimed to be the eye witness shows that the accused committed rape on the victim but the

9.12.18  
Special Judge,  
Bongaigaon.

Contd....

(10)

victim herself stated that on being resisted by her, the accused could not succeed to rape her. However, she alleged that the accused making her laid upon ground, took off her jangia and then laying upon body tried to insert his penis in her vagina. But the mother of the victim the most natural witness to whom a child supposed to be reported first about any incident, deposed that the victim told her nothing and when wife of one Bhabesh reported her that the accused Ajijul removing pant of the victim did misdeed to her, she asked the victim and then only the victim told that the accused attempted to commit misdeed to her but again during cross she stated that the victim told her the accused asked her to remove pant which she did not. So the vital witnesses i.e the victim, her mother and PW 4 stated different versions on material particulars.

23. Taking the evidence of PW 4 it is found that she claimed to be the eye witness of the incident, but according to the victim when she tried to stand up, mother of Aitu had seen her and the accused. So the evidence of PW 4 that she had seen the accused committing rape on the victim is not believable one. Moreover, according to PW 4 she heard cry but the victim nowhere stated that she cried. Most interestingly in the case, the victim during cross-examination stated that PW 4 told her mother to lodge FIR saying that in filing FIR they would get Rs. 1,00,000/- from the accused and they would share the money. PW 9 mother of the victim herself corroborated that PW 4 asked her to lodge case saying that they would get money. It is also in the evidence of victim's parents that cases are pending between the accused and PW 4. Victim's father (PW 2) does not deny the possibility of filing case falsely for conspiracy of PW 4 due to her (PW 4) dispute with the accused.

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J. u. 12. 18  
Special Judge,  
Bengalgaon.

(11)

24. Further in the case, according to PW 5, the counselor of Family counseling centre, on next day, the alleged incident was reported to her by PW 4, not the parents of the victim. If such a heinous incident was known to her on the very next day why they did not advise for filing FIR immediately is the question. If according to PW 4, on the very day she informed the mother of the victim about the incident which she allegedly witnessed, why the parents waited for one week to lodge the FIR. Such long delay in such a heinous crime was not explained by the prosecution. According to the victim's mother (PW 9), the wife of Bhabesh reported her first about the incident who (Bhabesh's wife) heard from PW 4. So PW 9 also contradicted the version of PW 4 that she (PW 4) immediately reported the matter to PW 9. Further according to PW 4, seeing the incident when she abused one Muktar came there and enquired as to whether the vegetable upon the bicycle belonged to Ajijul. But neither Muktar nor Bhabesh's wife was examined by the prosecution.

25. That apart PW 4 deposed that she went to see her vegetable garden but in statement U/S 161 Cr.P.C she stated that she went there for bathing which was confirmed by the Investigating Officer (PW 12). In statement U/S 161 Cr.P.C she also stated that after the incident she bathed in the river. On the other hand PW 5 deposed that PW 4 told her that when she went to change the place of cow, she had seen the incident. With the discrepancies in the evidence of PWs as discussed above they cannot be believed in toto beyond all reasonable doubt. Taking the evidence of PW 4, it is also not believable that inspite of witnessing the incident, she did not accompany the minor girl to her house. Further after the incident if the victim again bathed in the river,

8.12.18  
Special Judge,  
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(12)

certainly PW 4 was present there at that time but she did not corroborate that version. In the backdrop of evidence on record, I am of the considered opinion that benefit of the evidence which goes in favour of the accused should be given preference to the evidence which goes in favour of the prosecution.

26. Situated thus, the conclusion which is irresistible is that the prosecution has not gathered the evidence of that standard which is required to establish the guilt of the accused, even for the attempt of sexual intercourse.

27. Under the facts and circumstances, I find that the prosecution has failed to establish the case against the accused Md Ajijul Ali U/S 6 of POCSO Act. The accused Md Ajijul Ali is acquitted of the charge U/S 6 of POCSO Act and set at liberty forthwith.

28. His bail bond shall remain in force till next six months.

29. Given under my hand and seal of this Court on this 4<sup>th</sup> day of December, 2018, at Bongaigaon.

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(I. Barman)  
Special Judge,  
Bongaigaon  
Bongaigaon.

*Dictated and corrected by me,*

*Ju.12.18*  
(I. Barman)  
Special Judge,  
Bongaigaon  
Bongaigaon.

(13)

## A P P E N D I X

### Prosecution witness:

PW 1 – Popi Begum.  
PW 2 – Father of the victim.  
PW 3 – Md Aituddin Ali.  
PW 4 – Minara Begum.  
PW 5 – Ranu Choudhury.  
PW 6 – Eskar Ali.  
PW 7 – Salam Ali.  
PW 8 – Sahera Begum.  
PW 9- Mother of the victim.  
PW 10 -MoneswarPatgiri.  
PW 11- Dr ChanditaBorah.  
PW 12- S.I Sailen Kr Kalita.  
PW 13- Purna Nanda Das.

### Defence Witness:

Nil.

### Documents Exhibited by Prosecution:

Ext-1 Statement of PW 4 U/S 164 Cr.P.C.  
Ext-2 Statement of the victim U/S 164 Cr.P.C.  
Ext-3 Medical examination report.  
Ext-4 seizure list.  
Ext-5 Ejahar.  
Ext-6 Sketch map of the place of occurrence.  
Ext-7 Charge sheet.

### Material Exhibited by prosecution:

M. Ext 1 – School certificate

### Defence Exhibit:

Nil.

*2 u. 12. 18*  
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*Special Judge,*  
*Bongaigaon.*  
*Bongaigaon*