

Present: Shri C. Das,

Judge Special Court Baksa, Mushalpur

# JUDGMENT IN SPECIAL POCSO CASE NO.06/18{OLD NO.19/17}

u/s 4 of Pocso Act

State

-versus-

Sri Gautam Sarkar

..... accused

Appearance:

For the State: Mr. R. Chetry, Public Prosecutor, Baksa

For the accused: Mr. M. Mazumder, Advocate

Date of recording evidence: 18.12.2017, 24.05.2018, 27.06.2018,

26.07.2018,05.10.2018, 07.02.2019, 21.05.2019

Date of argument

: 05.12.2019

Date of judgment

: 19.12.2019



#### JUDGMENT

1. The case of the prosecution briefly, is that on 17.05.2017, the informant Sukumar Mandal lodged an FIR before the In-Charge of Suwagpur Police Out-post alleging inter alias, that since 2016, the accused has been in love affairs with his minor victim daughter by using the means of inducement. In this way, the accused developed illicit physical relation with his victim daughter. Thereafter, the accused tried to cause miscarriage of the victim which was not agreeable to the victim girl. Later on, the accused caused abortion of the victim girl but the accused subsequently, refused to marry the

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victim girl. Hence, he went to the house of the accused with others to discuss about the marriage of the victim girl with him. But the accused denied any relationship with the victim girl. After some days, the victim girl went to the house of the accused. Hence, the accused fled away from his house. The family members of the accused removed the victim the house of the accused by threatening her to life. Later on, the local public handed over the victim girl to him.

- 2. Accordingly, the police lodged Suwagpur OP GDE No.250 dated 17.05.2017 and forwarded the said FIR to the Goreswar Police Station to register the formal case. Accordingly, Goreswar P.S. Case No.45/17 was registered and the investigation of the case was taken up. During investigation, I/O visited the place of occurrence and recorded the statement of the witnesses including the victim girl. Thereafter, I/O arrested the accused and sent the victim girl for medical examination. At the end of the investigation, I/O having found a prima-facie case well established, submitted the charge-sheet against the accused person u/s 4 of Protection of Children from Sexual Offences Act ( in short ; the Pocso Act) to face trial in the court.
- 3. The accused when appeared in the court, he was furnished with the copy of the case immediately. After hearing of the parties and on perusal of material on record, the charge **u/s 4 of Pocso Act** was framed against the accused. The charge was read over and explained to the accused who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, 7(seven) witnesses including I/O and M/O to support the case. Thereafter, in the statement recorded **u/s 313 Cr.PC**, the accused denied all the incriminating circumstances appeared against him in the evidence. The accused however, declined to adduce any evidence in his defence. The argument of the parties was heard at length and the evidence on record was perused.

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### POINT FOR DETERMINATION:

5. Whether during the year 2016, one day at Suklai-Park under Goreswar Police Station, the accused committed penetrative sexual assault upon the victim girl, (name is withheld):



### **DECISION AND REASON THEREFORE:**

- 6. The allegation of the prosecution in this case against the accused is that the accused committed sexual intercourse in the form of penetrative sexual assault upon the victim girl. The requirements of the **offence u/s 4 as defined u/s 3 of Pocso Act,** is that- A person is said to commit "penetrative sexual assault," if
  - a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
  - b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra, or anus of the child or makes the child to do so with him or any other person; or
  - c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or
  - d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- 7. It is the duty of the prosecution to meet the above requirements of the law as above by tendering the evidence to bring home the charge against the accused. At the same time, the requirements **u/s 30 of the Pocso Act** needs to be complied with, in order to prove the case by the prosecution against the accused.
- 8. Learned Public Prosecutor submitted in the argument that the evidence so far recorded in the trial by the prosecution shows that all the requirements of law **u/s 4 of the Pocso Act** have been complied with, The evidence of the prosecution consistently supports the prosecution story. There is not any iota of doubt over the evidence of the prosecution witnesses which is corroborated each other on the material points. Hence, in view of proof of the case against the accused, he urged to convict the accused as per provisions of the law.
- 9. Per contra, learned counsel for the accused submitted that even though there is some material that the accused had relationship with the victim girl and committed sexual intercourse with her, it does not amount to penetrative sexual assault upon the victim girl. He submitted that actually if

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 $\hat{\mathcal{I}}$ here was any physical relationship existed between the accused and the victim, it was a consensus relationship only. It cannot be termed as assault upon the victim sexually and as such, the meaning of the sexual assault does not apply to the act of the accused. He submitted that the allegation brought against the accused is totally false and baseless and there is not proof that the victim girl was made pregnant by the accused. As such, the accused is entitled to get benefit of doubt for the lacuna appeared in the evidence of the prosecution side.

The prosecution examined the Medical Officer, Dr. Urmi Devi as 10. PW-6. Her evidence is important to ascertain if the victim girl was dealt by sexual assault. PW-6 stated that on 18.05.2017, at SMK Civil Hospital, Nalbari, she examined the victim girl as per police requisition and in presence of Narmada Devi and found the following-

The history: According to the girl, is that she had physical relation with a boy connected by mobile phone in her own wish and now, she is pregnant and he denied to marry her.

On examination- Her external genitalia-healthy, vagina and cervixhealthy. Vagina admits two fingers easily. Uterus 28 weeks size. Vaginal swabs was sent for microscopic text. No sperm- seen. X-ray was advised for age estimation. It is found that she is above 16 years and below 18 years. Ultrasound Sono-graphy of lower abdomen was advised. The report was gravy uterus 31 weeks 5 days.

- 11. The opinion of PW-6 is not consistent with recent sexual intercourse/assault but she was pregnant of 31 weeks 5 days. PW-6 submitted the medical report vide Exbt.-3 with her signatures. Exbt.-4 is ultrasound report and Exbt-5 is the X-ray report of the victim girl. PW-6 proved the documents vide Exbt.-3, 4 and 5. The evidence of I/O PW-7, corroborated the claim of PW-6 that the victim girl was examined by PW-6. It appears that there is no dispute over finding of PW-6. Apparently, from the finding and opinion of PW-6, it appears that there was no recent sexual intercourse or assault upon court the victim girl but she was pregnant for 31 weeks and 5 days.
  - 12. If the victim girl was pregnant, she was definitely, subjected to physical/ sexual intercourse with a man. The medical evidence tendered by PW6 shows that the victim was below 18 years but above 16 years. In any view of matter, the victim is not above 18 years. In absence of other documents like birth certificate of the victim, the medical evidence for age determination of victim girl is accepted. Accordingly, it is found that the victim

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was child within the meaning of **Section 2(d) of the Pocso Act**. Hence, the case under the Pocso Act is applicable to the accused.

- 13. The prosecution examined the informant of the case Sri Sukumar Mandal as PW-2. He proved the ejahar vide Exbt.-2. He is also the father of the victim girl. PW-2 stated that the accused used to talk with the victim girl over mobile phone. Both of them went to Suklai Park for a strolling. At that time, the victim was in Class-IX and was 16 years of age. In the said park, the accused committed sexual intercourse with the victim girl. As such, she became pregnant. The victim girl did not disclose her pregnancy. After 8 months of pregnancy, the victim girl reported the same to him. Accordingly, he went to the house of the accused along with the victim girl and co-villagers but the family members of the accused refused to accept the victim girl. After 3-4 days later, the victim girl went to the house of the accused on her own will but the family members of the accused assaulted the victim girl physically and did not allow her to enter into the house of the accused. The local public as such, kept the victim girl in a house. After getting such information over phone, he went and brought back the victim girl. Thereafter, he filed the ejahar. At present, the victim is living with him. The police sent the victim girl for medical examination.
- 14. In the cross-examination, PW-2 stated that he filed the ejahar after 8 months of the occurrence. He cannot say if there is any explanation of delay in filing the ejahar vide Ext.2. He cannot say the victim girl called with whom by her mobile phone. He even did not enquire the victim girl with whom she was talking with over the phone. He did not see the meeting of the victim girl with the accused at Suklai Park.
- 15. PW-1 is the victim girl (name is withheld). She stated that the accused fell in love with her and she was also in love with the accused. One day, the accused called her to Suklai Park in the afternoon where the accused committed sexual intercourse with her under a tree with her consent. Thereafter, she return to her home. After 7 months, she came to know that she became pregnant. As such, she informed the accused but the accused did not respond. The local public asked the accused but he refused to accept her. Hence, she filed the case but now, this case is filed by her father. She gave birth to a child for about 5 months back. Exbt.-1 is her statement with her signature.

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In the cross-examination, PW-1 stated that she did not produce her birth certificate. She went to Suklai Park with Saway Mandal. She cannot say the date of occurrence. After the occurrence at Suklai Park, she did not meet the accused person. Since she fell in love with the accused, she had consent to have physical relation with the accused. The evidence of PW-1 corroborated the version of PW-2.

- PW-3, Smt. Addiya Mandal is the wife of PW-2. She stated that 17. when the victim girl went out of the house, the victim girl came into contact with the accused person. Accordingly, both of them started to mixed-up through phone. Thereafter, the accused called the victim girl to come to a park where the accused committed sexual intercourse with the victim girl. Initially, the victim girl did not disclose the incident to her. After 7 months of pregnancy, the victim girl disclosed the incident to her. Hence, she informed the local public. Accordingly, the local public along with the victim girl went to the house of the accused but the accused refused to accept the victim girl. Subsequently, the victim girl went to the house of the accused on her own. As such, the accused fled away from his house. Thereafter, the mother of the accused drove the victim girl from the house after assaulting her physically. Hence, the victim girl came out and stranded helplessly on the road near the house of the accused. The local public rescued the victim girl and informed her. On next day, she brought back the victim girl to his house. The victim girl gave birth to a child about 1 year back.
- 18. In the cross-examination, PW-3 stated that she cannot say if the victim girl had telephonic contact with the accused from earlier time. After knowing the incident from the victim girl, she did not inform the police immediately.
- 19. The evidence of PW-4 Gopal Mandal is that the informant told her that the accused committed sexual intercourse with the victim girl. Hence, the victim girl became pregnant. Thereafter, he along with the informant and the victim girl and other few villagers went to the house of the accused and reported about the facts of pregnancy of the victim girl. But the accused claimed for DNA test to ascertain his paternity of the child of the victim girl. After getting such reply from the accused, he along with the others returned to his village. Accordingly, the informant filed the case.
- 20. PW-5, Swapan Sarkar stated inter-alias that one day the mother of the victim girl came to his house and reported to his mother that the victim

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was pregnant for 7 months. She reported that the accused caused discussion in the meeting, he along with the local villagers and the victim girl went to the house of the accused and a meeting was held but no valid outcome could arrive at. Later on, he heard that the family members of the victim went to the house of the accused to handover the victim girl but the accused assaulted the victim side and did not allow the victim to enter into the house. According to PW-5, the victim was 16-17 years of age at the time of incident.

- 21. The evidence of I/O is that on 17.05.2017, while he was posted as I/C of Suwagpur Police OP, on that day, he received the ejahar filed by PW-2. He registered the relevant GDE No.250 and forwarded the FIR to O/C Goreswar Police Station to register the case. He took up the investigation and visited the place of occurrence and recorded the statement of the witnesses including the victim girl. He sent the victim for medical examination and to record her statement **u/s 164 Cr.PC**. He could not trace out the accused immediately. On 10.07.2017, the accused surrendered before him and he arrested the accused. He collected the medical report of the victim and drew the sketch map of the place of occurrence vide Exbt.-6. Thereafter, at the end of the investigation, the charge-sheet against the accused was filed vide Exbt.-7.
- 22. From the above evidence of the prosecution witnesses, it appears that there is no dispute that PW1 is pregnant at the time of filing of the case. Both PW1 corroborated by PW2 and 3, alleged that the accused caused PW1 pregnant by having sexual intercourse with her. The evidence of PW1 makes it clear that the occurrence of sexual intercourse, took place with the consent of PW1. But PW1 is found to be child and as such, her consent is not material for the matter. After perusing the evidence of PW1, it appears that the occurrence took place outside the house and at a local public park. Both the accused and PW1 met only once at the said park physically. Thereafter, both of them never met again. Prior to the occurrence, both of them never met face to face except by talking over mobile phone.
  - of the accused. Such evidence of PW1 indicates that she was perhaps, in love with the accused. It appears that PW1 is not totally little girl who does not understand the meaning of sexual intercourse and its consequences at the time of occurrence. If she had no consent to have sexual intercourse with the

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accused, she would have raised hue and cry at the place of occurrence. Moreover, she would report the matter to her parents immediately. But she kept the matter concealed under her tongue for long time which can be extended to 6 months from the date of occurrence. She claimed that she filed a case earlier against the accused which was withdrawn. But there is no evidence nor other witnesses of the prosecution corroborates PW1 on this point. Hence, her evidence on this point is found not reliable to believe. Perhaps, Pw1 stated such version to cover the delay in filing the case. Further, the evidence of PW1 shows that she did not meet the accused after the day of occurrence at a local park. Ultimately, after 6 months, when PW1 disclose the incident to PW2 and 3 with other people, approach was made to contact with the accused. Her evidence discloses that prior to the incident, she used to talk with the accused over phone. But her evidence does not disclose that after the incident continued to maintain contact with the accused by phone. Thus, it appears that PW1 had sexual intercourse with the accused when they met together for first time at a local park. Thereafter, they discontinued their relationship even by phone after the incident. Such evidence of PW1 does not inspire to rely her evidence with confidence. It is highly probable that PW1 concealed some real facts not only before PW2 and 3 but also in her version.

There is no dispute that the case was filed after delay of 6 24. months. PW2 narrated that when PW1 disclosed the incident, he after negotiation of marriage of PW1, with the accused, filed the case. It is probable to take such time for negotiation when PW2 found PW1 already pregnant for several months. It is expected in criminal jurisprudence that there should not delay in reporting the incident to the concerned authority. If there is delay a reasonable explanation needs to record to avoid any doubt. In this case in hand, there is long delay of 6 months in filing the case. PW2 blamed PW1 for causing such delay. A delay of 6 months is a long period where other elements might come into play. There is no contact between the accused and PW1 during that period of 6 months. Thus, causing delay of about 6 months, renders the prosecution story under serious doubt if the accused was involved ge Spr Court in the alleged occurrence. Moreover, most importantly, the medical evidence does not lend corroboration to the version of PW1. Thus, the evidence of Pw1 is not fully reliable to believe. No presumption can be drawn against the accused u/s 30 of Pocso Act. Hence, the accused is given the benefit of above doubt.

25. Under the above facts and circumstances of the case, the prosecution has failed to prove its case against the accused beyond all

reasonable doubt. Accordingly, the accused is held not guilty **u/s 4 of Pocso Act**. The accused is therefore, acquitted and set at liberty. The bail bond of the accused shall stand in force **u/s 437-A CrPC**. Forward a copy of judgment to the District Magistrate, Baksa at Mushalpur **u/s 365 CrPC**. This court recommends for payment of adequate compensation by DLSA, Baksa immediately.

26. Given under the hand and seal of this court on this 19<sup>th</sup> day of December 2019.

Dictated and corrected by:

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Transcribed by:

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B. Brahma, Stenographer



# List of prosecution witness:

PW1 ... the victim (name is withheld)

PW2 ... Sri Sukumar Mandal ... informant

PW3 ... Smt. Addya Mandal

PW4 ... Sri Gopal Mandal

PW5 ... Sri Swapan Sarkar

PW6 ... Dr. Urmi Devi ... M/O

PW7 ... Sri Dipak Sarma ... I/O

# List of defence witness:

Nil

# List of documents exhibited:

Ext.1 .... Statement of victim u/s 164 CrPC

Exbt.2 ... FIR

Exbt. 3 ... medical report

Exbt. 4 ... ultrasound report

Exbt. 5 ... X-ray report

Exbt. 6 ... sketch map

Exbt. 7 ... charge-sheet

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