IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, <u>Sivasagar</u>.

Spl. (P) Case No. 56 of 2016 U/S 313/417 IPC and Section 4 of POCSO Act, 2012. (Arising out of Nazira P.S. Case No. 13/2016)

State of Assam

-Vs-

Sri Budha Das Accused

<u>Committing Magistrate:-</u> Sub-Divisional Judicial Magistrate, Nazira.

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P For the accused : Mr. Pankaj Mahanta, Advocate

Date of Commitment : 25.11.2016 Date of framing Charge : 30.06.2017

Date of Evidence : 10.01.2018, 19.06.2018, 18.07.2018,

24.09.2018

 Date of S/D
 :
 04.12.2018

 Date of argument
 :
 18.02.2019

 Date of Judgment
 :
 08.03.2019

JUDGMENT

1. Prosecution case in brief is that on 24.01.2016, informant/victim 'C' (name withheld) lodged an FIR with O/C, Nazira P.S. alleging, inter alia, that about few months back of filing FIR, due to love affairs, accused Budha Das used to come to her house and by giving promise to marry, forcibly cohabited with her on several occasions and for committing sex with her, she became pregnant. On detecting her pregnancy, she informed the matter to accused on which accused gave her tablets and paid Rs. 2000/- for abortion.

Thereafter, accused did not take care of her. It is further alleged that on 14.01.2016, while she was alone in the house and her 15 years old younger brother was sleeping, taking advantage of absence of other family members in the house, accused came to her house and attempted to make physical relation with her. On this, she made hue and cry. On her cry, her younger brother came out from his room and on seeing him, accused fled away. On making hue and cry, neighbouring people gathered there and as per their advice, the matter was informed to local Mahila Samity and subsequently FIR was lodged.

- 2. On receipt of the FIR, Nazira P.S. Case No. 13/2016 U/S 493/313/448/354(A) IPC was registered and started investigation. During investigation, accused was arrested and forwarded to Court for judicial custody. The victim was medically examined and got her statement recorded in court u/s 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 8 of POCSO Act, 2012.
- 3. Upon submission of Charge-Sheet, learned Sub-Divisional Judicial Magistrate (M) Nazira, vide order dated 25.11.2016, transferred the case to the Court of learned Special Judge, Sivasagar as the case is exclusively triable by the Court of Special Judge.
- 4. On appearance of accused person before this Court and after hearing both the sides, vide order dated 30.06.2017, charges u/s 313/417 IPC and Section 4 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined six witnesses including victim and two I.Os. Defence cross-examined the said P.Ws.
- 5. Upon completion of the prosecution evidence, accused was examined u/s 313 Cr.P.C. Defence case is of total denial and false implication. After hearing both the sides u/s 232 Cr.P.C, and observing that it was not a case of no-evidence, accused was called upon to enter into defence to which he declined to adduce evidence in defence.

6. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. Pankaj Mahanta, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 7. (i) What was the age of the victim on the date of incident?
 - (ii) Whether prior to one year of filing FIR on 24.01.2016, accused voluntarily caused miscarriage to the victim without her consent and not in good faith for the purpose of saving the life of the victim?
 - (iii) Whether accused cheated the victim by inducing her to deliver her chastity with a promise to marry her and subsequently refused to marry her?
 - (iv) Whether prior to one year of filing FIR on 24.01.2016, on several occasions, accused committed penetrative sexual assault on the victim?

DECISION AND REASONS THEREOF:

8. PW-1 Smt. Bhani Das, the mother of the victim in her evidence deposed that present age of the victim is about 16 years. About 2 years back, she came to know that her daughter victim C become pregnant for about 2 months. On asking victim C, she told her that she was pregnant through accused Budha Das. She also told her that accused gave her Rs. 2,000/- for abortion and due to taking medicine, miscarriage happened. After this incident, the accused again came to her house and while victim C was sleeping, touched her body and on this victim C and her son Bikash Das made hue and cry, on which accused fled away. Her son Bikash chased Budha but could not apprehend him. On this incident, her daughter victim C lodged an FIR at Nazira PS. In her cross examination, PW-1 deposed that she cannot recollect the dates when accused committed physical relationship with her daughter. After about a month of miscarriage, her daughter lodged the FIR. She accompanied her daughter to Nazira PS at the time of filing of this case. She has no knowledge that her daughter had love affairs with the accused. She never seen the accused in her house while she was at her house. She has not seen the accused in giving Rs. 2,000/- to her daughter for abortion. She has not seen the accused in her house and committing misdeed after abortion as she used to

remain out of the house for earning. Prior to this case, she has not filed any case against the accused. She has no personal knowledge about the incident. She has no knowledge as to when her daughter purchased medicine and her pregnancy was aborted. She also denied that she has deposed falsely.

9. PW-2 victim C in her evidence deposed that her present age is 18 years. She read upto class VII in Uappa Nazira M V School. She had love affairs with the accused for about 2 years prior to filing of this case. Due to the affairs, accused used to call her to nearby field almost every week and in the promise of marriage, accused used to cohabit with her. Likewise, accused committed sex with her for about 10 times in the nearby jungle. On stopping of menstrual period, she informed the matter to accused and upon checking through pregnancy test kits, she ascertained her pregnancy. On this, she informed the matter to accused about her pregnancy, on which he paid her Rs. 2000/-. From this amount, she purchased medicine from local pharmacy and after taking the tablets, her pregnancy was aborted. After giving money, accused did not take care of her. Lastly on 14.01.2016, while she was alone in her room and her brother Bikash Das was sleeping in the next room, accused came to house and hugged her. On this, she made hue and cry. On her alarm, her brother Bikash Das came out from his room and attempted to apprehend the accused but accused managed to flee away by pushing her brother Bikash. On this incident, she informed to her mother and accordingly after discussing the matter in the family, matter was known to local Mahila Samity and NGO. As per their advice, she lodged the FIR at Nazira PS on 24.01.2016. Exbt. 1 is the FIR. Police took her to hospital for medical checkup and also to Court for recording her statement. Exbt. 2 is her statement in court. Exbt. 2(i) to 2(iv) are her signatures. Presently accused married another girl. By not marrying her, accused cheated her. In her cross examination, PW-2 deposed that in the FIR she did not mention about her affair with accuse since last 2 years. She did not mention the dates of alleged sexual relation by the accused in the FIR or in the statement given in court. Before abortion, she did not inform the matter of physical sexual relation with accused to her family members or to others or to police. Residence of accused is situated at a distance of about 1 KM from her residence. She did not hand over medical prescription or empty medicine box to police. On knowing about pregnancy, she took medicine on her own. She did not inform the matter of her pregnancy to her mother. On this incident, a village meeting was organised. Accused did not attend the meeting. 6-7 ladies gathered for meeting. She denied that accused never paid her Rs. 2000/- for taking medicine. She denied that accused never came to her house or hugged her. She denied that she did not read upto class VII. She has forgotten her date of birth. Their family has no visiting relation with the accused family. She denied that due to previous enmity, she has lodged false case against the accused. She further denied that accused Budha Das never cohabited with her.

- PW-3 Sri Bikash Das, the brother of the victim in his evidence 10. deposed that she is one year elder than him. About 2 years back, on 14.01.2016, while he was sleeping in a separate room, on hearing hue and cry of his sister victim C, he rushed to the room of his sister and saw accused Budha Das in her room. When he tried to apprehend him, he flew away by pushing him. After this incident, he came to know that victim C got pregnant through Budha Das and after taking medicine her pregnancy was aborted. On this incidents, victim C lodged an FIR at Nazira PS. In his cross examination, PW-3 deposed that he cannot say why his sister filed this case. He never seen the accused in their house prior to the incident dated 14.01.2016. He cannot say why the accused came to their house on that day. Prior to this case, he has no knowledge about physical relation or affairs between the accused and his sister. Police did not record his statement in this case. He denied that he has deposed falsely. victim C did not state to him that accused cohabited with her or she was pregnant through the accused. They have no talking terms with the family members of the accused.
- 11. PW-4 Sri Mahendra Das in his evidence deposed that she has no knowledge about incident with victim C. On being declared as hostile, during cross-examination by prosecution, PW 4 denied that that on 24.01.2016 while giving statement to the I/O of this case, he has stated that "on 14.01.2016, Spl (P) Case No. 56 of 2016

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Budha Das entered into the house of victim and attempted to commit rape and asking him, he came to know that accused flee away by breaking the fencing wall. On hearing hue and cry, he went there. Accused also with an promise to take her, committed similar incident and on this, village meeting was held but could not resolve the matter." He also denied that Exbt. 3 is his statement given to police and Exbt. 3(i) is the relevant part of his statement. He denied that to save the accused, he deposed falsely by suppressing the truth. In his cross examination by defence, PW-4 Sri Mahendra Das deposed that Police did not interrogate him in this case. Residence of victim C is near to him. Presently victim C might be aged about 21-22 years.

12. PW-5 Sri Tuniram Neog, the I/O of this case, in his evidence deposed that during investigation of Nazira PS case No. 13/16 he went to the place of occurrence i.e. residence of informant and drawn a sketch map of the PO. Exbt. 4 is the said sketch map. During investigation, he recorded statement of witness Mahendra Das on 24.01.2016. In his statement said witness has stated before him that "on 14.01.2016, Budha Das entered into the house of victim and attempted to commit rape and asking him, he came to know that accused flee away by breaking the fencing wall. On hearing hue and cry, he went there. Accused also with an promise to take her, committed similar incident and on this, village meeting was held but could not resolve the matter." He proved that Exbt. 3 is the statement of Mahendra Das given to him. In his cross examination, PW-5 Sri Tuniram Neog deposed that he has not collected any age proof document of the victim. In the sketch map, though six houses near to the place of occurrence, he has not examined Padma Das, Lila Ram Das as witness in this case. In the FIR, there was mention that few months back, she was subjected to molestation by accused but no FIR was filed on that incident. He has not recorded statement of Gaonburah or Mahila Samity Members. He denied that he has not interrogated Mahendra Das. He also denied that he has not recorded statement of any independent witness. He further denied that he has not investigated the case properly.

- 13. PW-6 SI Dulal Gogoi in his evidence deposed that investigation of the remaining part of this case, victim was sent for medical examination and also to Court for recording her statement u/s 164 Cr.P.C. He also seized school certificate showing age of the victim from Bhani Das, mother of the victim. Exbt. 5 is the seizure list. Exbt. 5(i) is his signature. After seizure, the original was handed over to the mother of the victim and Xerox copy was kept in record. As per said copy, the date of birth of the victim is 01.03.1999. During investigation, he has collected the medical certificate of age of the victim. Exbt. 6 is the Medical certificate. In the medical certificate (Exbt. 6) the medical officer has opined that (i) there was no evidence of rape, (ii) no evidence of abortion (iii) according to radiological report, victim is above 18 years of age. On completion of investigation, he has submitted charge sheet against the accused Budha Das u/s 8 of Pocso Act. Exbt. 7 is the charge sheet. In his cross examination, PW-6 deposed that after seizure of the school document, he went to the school and verified the same. However no note was given in the CD. Victim was sent for medical examination on 25.10.2016. He denied that he has not investigated the case properly and wrongly submitted charge sheet against the accused without having any material.
- 14. From the above evidence on record, let me decide the points formulated above for just decision of this case.
- 15. Point No. I: So far age of the victim is concerned, while adducing evidence on 10.01.2018, the victim claimed her age as 18 years. This case was filed for the incident dated 14.01.2016 and prior to that. According to her version, the victim was aged about 16 years. However PW 1, mother of the victim on the date of her evidence on 10.01.2018 claimed the age of the victim as 16 years which shows that the victim was aged about 14 years at the time of alleged incident. PW 3 Bikash Das, younger brother of the victim in his evidence on 10.01.2018 claimed his age as 19 years and also claimed that victim is one year elder than him and this probablize that the victim was aged about 20 years on the date of her evidence on 10.01.2018. PW 6, the I.O. of this case has proved the medical certificate as Exbt.6 and on going through the same it Page 7 of 11

appears that on the date of examination, i.e. on 26.10.2016 the victim was above 18 years of age. The medical report also shows that the victim attained puberty six years back which probablize that she must be above 18 years of age on the date of medical examination if it is presumed that the victim has attained puberty at the age of 12-13 years. PW 6, I.O. of this case in his evidence stated that during investigation he has collected one school certificate in which the date of birth of the victim is mentioned as 01.03.1999 and returned the original to the victim, but said certificate was not brought on record by the prosecution. Under the above materials on record, having found contradictory evidence, I am of the considered opinion that the view taken by the Medical Officer which is based on radiological examination and also got corroboration through the presumption on attaining puberty before six years back, it can safely be held that that at the time of alleged incident the victim was above 18 years of age.

- 16. Point No. II: So far the allegation of miscarriage is concerned, from the evidence of victim it appears that on detecting her pregnancy due to cohabitation by the accused she informed the matter to accused who gave her Rs. 2000/- and accordingly she purchased medicine from local pharmacy and after taking the tablets her pregnancy was aborted. This particular admission of the victim clearly shows that the abortion was made with her consent. In her cross, the victim admitted that she did not inform the matter to her mother or her other family members about her pregnancy or abortion. There is no medical document to support her oral evidence. The victim also admitted that she has not produced any medical prescription or empty medicine box to police. Thus the ingredients of Section 313 IPC regarding miscarriage without consent are missing. The victim being major in age has the right to give consent and accused cannot be held guilty on that count if at all there is any miscarriage.
- 17. <u>Point No. III & IV:</u> So far point No. III and IV are concerned, as I have already held that the victim was major in age, from the trend of her evidence, it appears that she was in love affairs with the accused and they SpI (P) Case No. 56 of 2016

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used to cohabit in nearby jungle. Though the victim stated that accused promised her to marry and cohabited with her, but in her cross she admitted that even after getting pregnant through the accused and deciding for abortion, she did not inform the matter to her mother until the incident of 14.01.2016. This clearly indicates that she was a consenting party and her evidence so far giving promise to marry her cannot be relied upon without any other supporting materials of relevant time. From her evidence, it becomes clear that after the abortion there was breakup in their relation. As such the evidence of the victim is not found trustworthy and cannot be relied upon without any corroboration.

18. So far the incident dated 14.01.2016 is concerned, it appears that on that day, accused came to the house of the victim and while she was sleeping accused hugged her and on making hue and cry, accused flew away. According to victim, on that day her brother Bikash Das (PW 3) was present in the house. In his evidence PW 3 Bikash Das stated that on hearing hue and cry of his sister he rushed to her room and saw the accused in her room. On his attempt to apprehend, accused flew away. Thus from the evidence of both PW 2 and PW 3, it appears that they are totally silent as to the time when the accused entered in the house or how he has entered in the of the victim. In her 161 Cr.P.C. statement, the victim has stated that the incident took place at night hours and on that day she was alone in her house and accused forcibly caused physical cohabitation with her with a promise to marry. She further stated that due to committing rape by the accused, she made hue and cry and on this accused managed to flee away. On her 164 Cr.P.C. statement the victim is totally silent regarding presence of her younger brother Bikash Das in the house, coming of Bikash Das on her hue and cry and attempt to apprehend the accused by Bikash Das. On a close look at the 164 Cr.P.C. statement (Exbt. 2), it appears she was talking of the incident for the first time of physical cohabitation at Magh Bihu time which is totally contradicting the contents of the FIR and her evidence given in court. As per the evidence given in court accused came to her house with an intention to hug her after the

incident of abortion, but on this aspect she is totally silent in her 164 Cr.P.C. statement. Moreover FIR was lodged after ten days of the alleged incident of 14.01.2016, which also creates a huge suspicion on the genuineness of the claim made by the victim. As such no reliance can be placed on her testimony.

- 19. Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of charges u/s 313/417 IPC and Section 4 of POCSO Act 2012 against the accused Sri Budha Das. As such, accused Sri Budha Das is acquitted from the charges u/s 313/417 IPC and Section 4 of POCSO Act, 2012 and set at liberty forthwith.
- 20. Bail bond executed by the accused and his surety stand extended for another six months from today u/s 437-A Cr.P.C.
- 21. Considering the nature of the case, the matter is not referred to DLSA for granting compensation u/s 357-A Cr.P.C.
- 22. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 23. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 8th day of March, 2019 at Sivasagar.

Special Judge, Sivasagar

APPENDIX

- 1. Prosecution witnesses -
 - PW 1 Smt. Bhani Das
 - PW 2 Victim 'C'
 - PW 3 Sri Bikash Das
 - PW 4 Sri Mahendra Das
 - PW 5 Sri Tuniram Neog (I.O.)
 - PW 6 SI Dulal Gogoi (I.O.)
- 2. <u>Defence witnesses</u>: None
- 3. <u>Court witnesses</u> : None
- 4. Exhibits by prosecution -
 - Exbt.1 FIR
 - Exbt.2 164 Cr.P.C. statement of the victim
 - Exbt.3 161 Cr.P.C statement of the witness Mahendra Das
 - Exbt.4 Sketch map
 - Exbt.5 Seizure list
 - Exbt.6 Medical certificate
 - Exbt.7 Charge-Sheet.

Special Judge, Sivasagar