### **IN THE COURT OF THE SPECIAL JUDGE: : TINSUKIA**

District: Tinsukia

Present: Sri C. Das,

Special Judge, <u>Tinsukia</u>

### Judgment in POCSO Case No. 54 (M) of 2017

u/s.4 of POCSO Act

The State of Assam......Complainant

- Versus -

Sri Sabil Shah,

S/o Late Moti Shah,

R/o Jharna Basti, Ledo, P.S. Margherita,

District: Tinsukia (Assam)......Accused

### Appearance:

Sri B.L. Agarwal,

Spl. Public Prosecutor......For the State

Smti S. Sharma,

Defence Counsel.....For the Accused

Date of evidence : 24.4.18, 20.7.18, 20.9.18, 15.11.18

6.6.19 & 13.11.19

Date of Argument : 19.02.2020 Date of Judgment : 04.03.2020

### <u>J U D G M E N T</u>

The prosecution case, in brief, is that on 20.8.17, the informant Nizamuddin Shah lodged an ejahar before the In-charge of Ledo Police Out Post, stating interalias that in absence of his mother in the house for forty days, his relative/ elder brother i.e. the accused Sabil Shah, by threatening his minor sister/victim girl,

used to commit penetrative sexual assault upon her forcefully several times. As a result, the victim girl became pregnant. It was detected when the victim girl was taken before the doctor for medical checkup for other reason.

- 2. On receipt of the said ejahar, the police registered Ledo OP GD Entry No.464 dated 20.8.17 and forwarded the same to the Officer-in-charge of Margherita police station for further purpose. Thus, Margherita PS Case No.171/17 was registered and the investigation was started. During the investigation of the case, the I/O visited the place of occurrence, examined the witnesses and got the victim girl examined medically, followed by collection of her medical report. Further the I/O arrested the accused. After completion of investigation, I/O having found a prima-facie case well established, submitted charge-sheet against the accused u/s.4 of POCSO Act.
- 3. Accordingly, the accused when produced before the court, he was furnished with copy of the case immediately. After hearing of the parties, charge was framed u/s.4 of POCSO Act against the accused. The charge was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.
- 4. In this case, prosecution examined eight witnesses and the defence examined none. The plea of the defence as recorded in the statement of the accused u/s. 313 CrPC, was of total denial. The argument of the parties was heard at length and the evidence on record was carefully perused.

### 5. **POINT FOR DETERMINATION**

Whether the accused person between 01.01.2017 to 20.8.2017 at Ledo, Jharna Basti under Margherita Police Station, committed penetrative sexual assault towards the victim girl?

### 6. **DISCUSSION, DECISION AND REASONS FOR DECISION**

During the trial in this case, the prosecution examined Dr. Chinmoyee Phukan as PW1. The doctor in her evidence deposed that on 20.8.2017, she was working as M & HO at Ledo Mini PHC. On that day at about 11.35 A.M., she

examined the victim girl. The victim girl reported to her that her brother continued to have sexual relation with her from the month of May on several times at the time when her mother was not at home and as a result, she became pregnant. She had a history of sexual relationship with the accused four days back. On examination, PW1 found the following:-

"General configuration and development - Normal. Mental state - Normal. Height - 143 cm. Weight - 38 kg. Dentition - 28. Abdomen - no tenderness, no scar, no palpable in lump, only uterus palpable, soft PS positive. Breasts, areola, nipples - not injured. Pubic hair and scalp hair — Normal. Axillary hair — Genitals – No injury seen. Hymen – absent. Vagina – Two fingers Normal. can be inserted easily. Uterus – Palpable, about 14 inches in size. Vaginal discharge/bleeding - not found. Fourchette - Normal. Injuries on body other was done and as per report, than genitals – Nil. Radiological examination fusion not completed, iliac crest - fusion not elbow fusion was complete, wrist completed. Sonography was also done. Normal intra uterine pregnancy – fetus is of 14 weeks 4 days."

- 7. PW1 after examining the victim girl opined that after doing clinical and physical examination and also with the sonography report, it was found that the girl was 14 weeks 4 days pregnant at the time of examination. There is no sign of injuries over any part of her body. Radiological examination shows that the age of the girl is between 16- 17 years. Ext.1 is the report of PW1 with her signature.
- 8. In her cross-examination, PW1 replied that only on the basis of radiological report, she has stated the age of the victim girl was between 16 17 years.
- 9. PW2 is the informant Nizamuddin Shah. He deposed in his evidence that the accused is his stepbrother. The victim is his own sister. The occurrence took place in the month of June, 2017 and at that time, he was in New Delhi and his sister was at Ledo. He returned to Ledo in the month of July, 2017. In the month of August 2017, his sister had stomach pain. He took his victim sister to a doctor and then, he came to know that his sister was pregnant. He asked his sister as to who caused her pregnancy and the victim told him that in his absence, the accused

had committed rape upon her. After that, he lodged an ejahar before police. Ext.2 is the said ejahar with his signature. He stated that the ejahar was written by Sri Amulya Bora and the ejahar was written as per his version. Police sent his sister for medical examination and she was also produced before the court for recording her statement. His mother took his sister/victim to Bihar, where pregnancy of his sister was terminated medically.

- 10. In his cross-examination, PW2 stated that prior to filing of the ejahar, his sister never informed him about the occurrence. He has not filed any document to prove the age of his sister. PW2 denied the fact that his sister had love affairs with some unknown person, who caused her pregnancy and in order to save herself from public embarrassment, she had named the accused as the perpetrator of the occurrence. He further denied that his sister was major at the time of occurrence.
- 11. PW3 is Smti Rejia Khatun, who deposed that immediately after the occurrence, she came to know about it from the mother of the victim girl as well as, from the victim girl that the accused had committed rape upon the victim girl. In fact, they themselves informed her about the occurrence and then, she advised them to go to the police station.
- 12. In her cross-examination, PW3 stated that she has no personal knowledge about the occurrence. Even prior to the occurrence or after the occurrence, she never accompanied the victim girl and her mother to any place.
- 13. PW4 Ajay Pradhan deposed in his evidence that nearly one year ago, Nizamuddin (PW2) informed him that his sister was raped by the accused, who is the elder brother of Nizamuddin and the victim girl. At that time, the victim was four months pregnant. Nizamuddin requested him to write an ejahar for him. However, he did not write the ejahar but he accompanied Nizamuddin to the police station. The ejahar was written by someone in the police station. He did not ask anything to the victim girl.

- 14. PW5 Sanju Lama deposed in his evidence that Nizamuddin (PW2), the brother of the accused, nearly one year ago, informed him that his brother Sabil had committed rape upon the victim and she was pregnant for four months. Nizamuddin requested him to come with him to the police station. He did not meet the victim girl nor did he ask her anything.
- 15. PW6 Smti Renuka Pradhan deposed that about one year ago, the occurrence took place. She saw that the victim and her mother had gone to the police station.
- 16. PW7 is the victim girl (her name is withheld). She deposed that the accused is her own brother. At that time, the accused and she used to reside in the same house. At that point of time, her mother had gone to Bihar. Therefore, on the day of occurrence, she was alone with the accused in the house. Prior to the day of occurrence, for the last six months, she stayed with the accused in the house. During that period, the accused used to beat her. Some days later, her mother returned home and then, she told her that the accused had beaten her and also, sexually molested her. For the said act of the accused, she became pregnant. Her another brother Nizamuddin (PW2) had come home with her mother and he lodged an ejahar before police. Thereafter, the police came and recorded her statement. She was sent to a doctor for her medical examination. She was also, sent to the court for recording her statement u/s.164 Cr.P.C. She had put her thumb impression in her statement, recorded u/s.164 Cr.P.C. Her pregnancy was medically terminated later on at Ledo.
- 17. In her cross-examination, PW7 replied that her pregnancy was caused by an unknown person, not by her brother/ accused Sabil Shah. She concealed that fact from her mother and told her mother that her pregnancy was caused by the accused. When she was taken to Margherita court for recording her statement u/s.164 Cr.P.C., she was escorted by police. She denied that while she gave her statement u/s.164 Cr.P.C., she was tutored by police.

- PW8 is the I.O. of this case, Sri Ghana Kanta Gogoi. He deposed in his 18. evidence that on 19.8.2017, he was working as a Second officer at Ledo O.P. under Margherita P.S. On that day, Sri Ajay Pradhan (PW4) had come to the O.P. along with the victim girl and verbally informed that the accused Sabil Shah had made his own sister i.e. victim girl, pregnant. On that issue, he made a G.D. entry being No.445 dated 19.8.17. He immediately sent the victim girl for medical examination. On 20.8.2017 in the morning hours, he had recorded the statements of the victim girl, Ahida Begum, Rejia Khatoon, Ajay Pradhan and Sanju Lama. He also, visited the place of occurrence and recorded the statement of Renuka Pradhan (PW6). He prepared a sketch map of the place of occurrence vide Ext.4. At about 3 P.M. on that day, Nizamuddin Shah, the elder brother of the victim girl, filed a written ejahar in the police outpost. He sent the ejahar to Margherita P.S. for registration of a case. Thereafter, a case was registered as Margherita P.S. Case No.171/17 u/s.4 of POCSO Act and he was entrusted to investigate the case. On 20.8.17, he apprehended the accused and interrogated him. On 21.8.17, he sent the victim girl to the court for recording her statement u/s.164 Cr.P.C. On conclusion of investigation, he filed the charge-sheet vide Ext.5 against the accused. The I.O. proved the documents submitted by him during his examination without any dispute over it.
- 19. In his cross-examination, PW8 replied that before filing of the ejahar, he had recorded statements of the witnesses and prepared a sketch map vide Ext.4. In the sketch map, he did not mention as regards to how many rooms were there in the house and in which room of the house, the occurrence took place. He has not mentioned the distance between the house of Renuka Pradhan (PW6) and the place of occurrence. He did not try to go for DNA profiling of the child of the victim. He never investigated, when the victim delivered the child. He denied that he filed the charge-sheet without conducting the case properly.
- 20. In the course of the arguments being advanced by the learned Special Public Prosecutor, it was submitted that in the case of sexual offence, the testimony of the victim is sufficient to hold the accused guilty and to record the order of conviction. He submitted that in the present case in hand, the evidence of

the victim girl (PW7) disclosed the incident in support of the prosecution which indicated that the accused committed penetrative sexual assault upon her. Further he argued that there is no documentary evidence available to determine the age of the victim girl at the relevant time of occurrence and as such, the medical evidence may be accepted which shows clearly that the victim (PW7) was below 18 years of age at the time of occurrence and as such, the accused is liable to be punished as per law, for the offence committed against the victim girl.

- 21. Per contra, learned counsel for the accused submitted that in the present case, it cannot be held that the prosecution is able to prove its case against the accused beyond all reasonable doubt. It is pointed out to the evidence of PW7, who is sole victim of the prosecution story that the victim did not implicate the accused for the alleged occurrence neither there was medical evidence to corroborate the fact that the accused committed the penetrative sexual assault upon her. It is stated that though there was no dispute that the victim girl was pregnant, but it was not ascertained in the investigation that the pregnancy of the victim girl was caused by the accused. Thus, in the mist of above serious lacuna appeared in the evidence of the prosecution evidence including the victim girl, there is doubt if the accused was involved in the alleged offence of the prosecution. Therefore, the accused may be acquitted by giving the benefit of doubt.
- 22. After hearing the above submissions, it is proper to consider the age of the victim girl (PW7) since it is vital for the prosecution to attract the offence under provisions of POCSO Act. It is not denied that the birth certificate of the PW7 is not produced in the case by the prosecution to ascertain the correct age of the victim girl. Hence, the medical evidence tendered by PW1 needs to consider in this regard. From the evidence of PW1, it appears that the age of PW7 at the time of examination, was in between 16 to 17 years. There is no evidence from PW1 that PW7 may be above 17 years. Apparently, from the evidence of PW1, it makes more clear that PW7 was definitely below 18 years at the time of occurrence. Therefore, it is held that the victim girl (PW7) was the child within the meaning of **Section 2(d) of POCSO Act**.

- 23. On proper scrutiny of the evidence of the prosecution witnesses, it appears that there is no immediate report of the occurrence by the witnesses including PW7. It is not denied that PW7 kept mum for long time after occurrence till she was produced before a doctor for her stomach pain. Apparently, the occurrence took place for several occasions but PW7 never reported it anybody. May be the reason that she had lack of maturity as minor as well as, out of fear of the accused who stated to have beaten her regularly while she was living alone in the house. It is also, not denied that as brother of PW7, the accused lived alone with PW7 for quite a sometime. The evidence of PW7 shows that the accused used to beat her and molested her sexually. Such evidence of PW7 is contradicted by herself in her cross-examination. Her cross-examination disclosed that she was pregnant by some unknown person but she concealed the same from her mother and told that her pregnancy was caused by the accused. The evidence of PW2 is that after knowing the facts of the case, he set the law in motion by lodging the FIR vide Ext.2. He proved the Ext.2. He corroborates the version of the prosecution case but his evidence is not direct enough to rely upon. The evidence of PW3, 4, 5 and 6 are reported in nature. Hence, their evidence does not come to help the prosecution case though they support the case.
- 24. Thus, the above discussions indicate that there is no other reliable witness of the occurrence and as such, reliance ought to place on the sole victim of the occurrence. The medical evidence confirms about four months of pregnancy carried by PW7 without any dispute at the time of discovery of the fact from PW7. But the medical evidence tendered by PW1 does not disclose any material to hold that PW7 was subjected to penetrative sexual assault as defined **u/s 3 of POCSO Act**. No doubt, pregnancy of the victim means that she was subjected to sexual intercourse. But such penetrative sexual act must be an assault as defined u/s. 351 IPC.
- 25. It is settled law that if the conviction is based on the sole testimony of the victim witness, in cases of sexual offence, the evidence of such witness must be wholly reliable. On the base of the above principle of law, if the evidence of PW7 who is the sole victim of the occurrence, is carefully scanned, it appears that initially, she implicated the accused in her examination-in-chief. But in her cross-

examination, she totally gave a contradictory version that an unknown person committed such act but not the accused. Such contradictory version of PW7 makes the entire circumstances of the case under doubt. PW7 is found to be near 18 years of age and she could understand and can identify her perpetrator, very easily. However, she tendered evidence which is shrewd by doubt. Thus, the evidence of PW7 is not at all reliable to believe. The accused as such, is entitled to get the benefit of doubt. Accordingly, the accused is given the benefit of doubt.

- 26. 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 acquitted and set at liberty. The accused is in jail hazot and as such, the jail authority is directed to release the accused forthwith, if he is not wanted in any other case. Furnish a copy of judgment to the District Magistrate, Tinsukia immediately u/s. 365 CrPC. Before parting with the case, this court recommends for payment of compensation as per Assam Victim Compensation Scheme, to the victim of offence by DLSA, Tinsukia immediately. Inform accordingly.
- 27. Given under my hand and seal of this Court on this the 4<sup>th</sup> day of March, 2020.

Dictated & corrected by me.

Special Judge Tinsukia (C. Das) Special Judge Tinsukia

# <u>A P P E N D I X</u>

## **PROSECUTION WITNESSES**

1.	PW1	-	Dr. Chinmoyee PhukanMedical Officer
1.	PW2	-	Sri Nirjamuddin (Nizamuddin) ShahInformant
2.	PW3	-	Smti Rejia Khatun
3.	PW4	-	Sri Ajay Pradhan
4.	PW5	-	Sri Sanju Lama
5.	PW6	-	Smti Renuka Pradhan
6.	PW7	-	Ms. X ( victim girl)
7.	PW8	-	Sri Ghana Kanta GogoiI.O.

## **DEFENCE WITNESSES**

Nil

## **PROSECUTION EXHIBITS**

- 1. Ext.1 Medical Report
- 2. Ext.2 FIR/Ejahar
- 3. Ext.3 Certified copy of GD Entry No.445
- 4. Ext.4 Sketch map
- 5. Ext.5 Charge-sheet

## **MATERIAL EXIHIBITS**

1. M. Ext.1 - Statement of the victim u/s. 164 CrPC.

Special Judge <u>Tinsukia</u>