IN THE COURT OF SESSIONS JUDGE :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS,

Special Judge, Sivasagar.

Spl. (P) Case No. 25 of 2015 U/S 6 of POCSO Act. (Arising out of Simaluguri P.S. Case No. 66/2016)

State of Assam

-Vs-

Sri Pankaj Mech Accused

APPEARANCE:

For the prosecution : Sri A. K. Bora, P.P.

For the accused : Sri D.K. Gohain, Advocate

(State defence counsel)

Date of framing Charge : 03.02.2017

Dates of Evidence : 02.03.2017, 30.03.2017, 25.04.2017,

22.05.2017, 05.06.2017, 30.06.2017,

08.08.2017

 Date of S/D
 : 27.07.2017

 Date of Argument
 : 06.03.2018

 Date of Judgment
 : 19.03.2018

JUDGMENT

- 1. Prosecution case, in brief, is that on 20.06.2016, informant Smt. Rupa Mech, wife of Sri Biswajit Mech lodged an FIR with O/C, Simaluguri P.S. alleging, inter alia, that on that day, at about 10.00 A.M., accused Sri Pankaj Mech took away 5 (five) years old daughter of the informant victim 'P' by enticing her to his house and committed the offence of penetrative sexual assault on the victim 'P'. The accused also asked the victim not to divulge this fact while keeping the victim at her house. The informant has noticed blood stain on the wearing apparels of the victim.
- 2. On receipt of the FIR, Simaluguri P.S. Case No. 66/2016 U/S 4 of Spl. (P) Case No. 25 of 2016 Page 1 of 14

POCSO Act was registered and investigated into. During investigation, on the same day i.e. on 20.06.2016 the I.O. has seized the wearing apparels, particularly one panty and one frock of the victim and produced the victim for medical examination on 21.06.16 at Sivasagar Civil Hospital. On the next day, i.e. on 22.06.16 the victim was produced before the learned JMFC, Sivasagar and accordingly statement of the victim was recorded U/S 164 Cr.P.C. During investigation, accused was arrested and remanded to judicial custody. The seized panty and frock were sent to FSL for forensic examination and also collected the report. On completion of investigation, I.O. has submitted Charge-Sheet against the above named accused U/S 4 of POCSO Act, 2012.

- 3. Upon furnishing copy to the accused person, vide order dated 03.02.2017, charge U/S 6 of POCSO Act, 2012 has been framed against the above named accused person to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined eight witnesses including the victim and M.O. Defence has examined Miss Ankita Mech as D.W.1. Sri Arun Chetia and Dr. Nirmal Chutia were examined as Court Witness vide C.W.1 and C.W. 2 respectively.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Accused inclined to adduce evidence for his defence when he was called upon to enter into defence. Defence case is of total denial and false implication.
- 5. I have heard argument of learned P.P. Mr. A.K. Bora and Mr. D.K. Gohain, learned State defence counsel and gone through the record.

POINT FOR DETERMINATION IS -

6. (i) Whether on 20.06.2016, at about 10 AM, accused Pankaj Mech committed the offence of penetrative sexual assault on the victim and thereby committed an offence punishable u/s 6 of POCSO Act, 2012?

DECISION AND REASONS THEREOF:

7. PW-1 Smt. Rupa Moni Mech, mother of the victim, in her evidence deposed that at the time of occurrence, victim P was a student of a class-I and was aged about 5 years. On 20.06.2016, while her daughter was kept at the residence of her grandmother, the accused took the victim to show his residence and after some time, accused kept her at her house. At about 9 AM, while she prepared to go to Bank and take the victim for cleaning on her legs, she saw that her panty and frock were wet and smell is coming out. On this, she asked her as to how the pant and frock get wet, she told her that the accused Dihingiya da @ Pankaj entered his penis (susu) to her urinary track (vagina) and she got pain on her urinary track. She also told her that accused has instructed her not to divulge this to others. On opening of her panty, she saw slight blood stain in her panty and her vegina was of radish in colour. On this, immediately she informed the matter to her mother-in-law Kunja Mech and her husband's sister Moon Gogoi @ Bornali. She along with her mother-in-law went to the residence of accused to inform the matter on which they denied. By this time, local peoples also gathered there and came to know about the misdeed of the accused. Thereafter she took her daughter to Nazira Hospital where they asked for police requisition. On this, she went to Simaluguri PS and lodged the FIR. Police brought her daughter to Nazira. On the next day, her daughter was brought Sivasagar Civil Hospital for medical examination. Police seized the frock and panty on the date of incident. Exbt. 1 is her FIR. Exbt. 2 is Seizure list. PW 1 also deposed that after filling of the case, police brought her daughter to Court and get her statement recorded by Magistrate. In her crossexamination PW 1 deposed that she could came to know about the misdeed at about 8-9 AM. FIR was written under her handwriting. In the FIR she has mentioned the time of incident at about 10 AM. At about 10 AM she went to pluck tea leaves and returned without plucking as rain started. She returned within 10-20 minutes. Before police she has stated the time of incident as 10 AM in the morning. She denied that her claim of detecting the incident while going to Bank is false and fabricated. Her mother-in-law Kunja Mech went with her to Police Station. She also denied that while giving statement to police, she has not stated that "on this, immediately, she informed the matter to her mother-in-law Kunja Mech and her husband's sister Moon Gogoi @ Bornali." Her husband normally stayed at Guwahati for lively hood. She used to do labour work. About a year back of this incident, her husband used to sell BOILER at Simaluguri Market and accused worked in that shop as helper on payment basis. It is also denied by her that his wages were due but she asserted that accused has committed misappropriation on that period. She further denied that just before the incident, accused has demanded his due wages and for this, she has concocted this case with false allegation.

- 8. PW-2 the victim in her evidence deposed that she reads in Class-I her mother used to pluck tea leaves. Her father lives at Guwahati. She know Dihingia Da @ Pankaj Da who took her to his house. He keeps Pig at his residence. There he put his susu on her susu for several time. She got pain in her susu. Her panty and frock got wet. Thereafter, he brought her to her house and keep her at her residence. He also assured her to give Chips and told her not to tell the matter to her mother. But she told her mother. Police took her to Hospital. Police also brought her here (court). On that day she also tell the same way. In her cross by defence, she stated that her mother came with her today and also on that day. Dihingiya Da came to assault her mother in the meeting. Her mother told her to say about the incident.
- 9. PW-3 Smt. Junu Mech in her evidence deposed that victim P is aged about 5 years. On 20.06.2016, accused Pankaj Mech went to the house of victim to sow crop and thereafter he took out with the victim for love affect. Thereafter Rupa Mech informed the villagers that accused has committed rape with her daughter. At the time of village meeting, she was at Sivasagar. This fact was told to her by her daughter Ankita Mech. She has not inquired about the incident from the victim or her mother. In her cross PW 3 stated that in the village meeting, the allegation was found false. In the village, accused being parent-less boy, loved by all. Accused used to cut boiler for the husband of the informant for free.

- 10. PW-4 Sri Biren Mech in his evidence deposed that victim was aged about 3-4 years. On 20.06.2016, grandmother of the victim called him and others to Namghar. On arriving there, he saw gathering of some people there. Grandmother of the victim told them that accused Dihingia @ Pankaj Mech has committed rape with her grand-daughter. On inquiry, the victim told that accused has committed misdeed with her. On this, they advised her to inform the matter to police. In his cross examination, PW 4 stated that Biswajeet is the father of the victim and seldom used to reside with his wife. Accused Pankaj has no any close relative. Pankaj used to live at the residence of the victim and also worked with father of the victim in his broiler shop. Pankaj resides in small room at the residence of Junu Mech. Sometime, accused stayed in the residence of Rupa Mech. On the date of incident, Pankaj sowed paddy in the field of Rupa as labour. Pankaj has no land of his own and sells labour. PW 4 also deposed that he has heard about some guarrel between Pankaj and Rupa in respect of Broiler business. There was also some guarrel on the matter of payment of wages for sowing paddy on the date of incident. On this matter, there was a meeting at Namghar. In the said meeting, Rupa brought the allegation of misdeed with her daughter against Pankaj Mech. In the meeting, victim P was roaming around and playing. No injury mark was seen on the person of victim P. In the meeting, it was found that the allegation of rape as false and hence matter was referred to police. In the meeting, 10-15 persons gathered there. While giving statement to police, he has stated that the allegation brought against Pankaj was not true. Pankaj normally used to love children and play with them. He also told police that he did not believe the allegation of rape by Pankaj.
- 11. PW-5 Sri Babu Gogoi in his evidence deposed that on 20.06. 2016, he came to the residence of his in-law Bhanti Mech for help in sowing paddy and heard that accused Dihingia has committed rape on victim P. At that time victim P was aged about 5 years. He has not inquired the matter from the victim. He further deposed that during investigation, police seized jangia and frock of victim in his presence. Exbt. 2 is the seizure list. Exbt. 2(2) is his Spl. (P) Case No. 25 of 2016

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signature. In his cross examination PW 5 deposed that he has not seen the incident of rape. He denied that he has not told about this fact to police. Rupa Mech has accompanied him today to court. It is also denied by PW 5 that he has deposed as tutored by Rupa Mech. He also stated that he has seen that the seized frock and jangia was handed over to police by the mother of the victim. He has not seen the seized articles in Court today. He has seen Purnima in wearing the seized cloths.

- 12. PW 6 Dr. Prasanta Pratim Sarma, the M.O. in his evidence deposed that on 21.06.2016, while he was working at Sivasagar Civil Hospital at about 12 noon, on police requisition, he examined the victim P in connection with Simaluguri P.S. Case No. 66/16 U/S 4 of POCSO Act and upon examination he opined that according to the radiological evidence victim is below the age of 12 years, there was no sign of recent sexual intercourse, no sign of any mark of injury detected on her body or private parts at the time of examination. He proved his report as Exbt. 3. In his cross by defence, the M.O. stated that in case of any attempt of penetration on a girl of 5 to 6 years of age, presence of marks of violence is bound to occur. Normally the marks of injury may remain upto 48 hours. As per Exbt. 3 he has examined the victim within 24 hours but he did not find any mark of injury on any part of her body. He admitted that in his report Exbt. 3, the date of examination was wrongly mentioned as 21.05.2016 instead of 21.06.2016.
- 13. PW-7 ASI Bishnu Sarkar, the I.O. of this case in his evidence deposed that on 20.06.206, at 6.30 PM, while he posted as ASI at Simaluguri PS, he has received oral information from Rupa Mech regarding commission of rape on her 5 year old daughter by Pankaj Mech @ Dihingia by taking her to his house. On getting this information, same was entered in G D Entry book vide G D Entry No. 436 dated 20.06.2016 and after verbally informing the matter to SDPO, he immediately went to the residence of the informant to investigate the matter. On arriving there, he has seized the undergarment of the victim girl in presence of witnesses vide Exbt. 2, the seizure list. M.Exbt. 1 is the seized blue

colour pant and M.Exbt. 2 is the white silk frock, which he can recognize. There from he also went to the residence of accused. He searched for him but could not trace him in his house. He has drawn a sketch map of the PO. Exbt. 4 is the said sketch map. He has also recorded statement of the witnesses found there. On the same day, at about 7.30 PM, the informant Smt. Rupa Mech submitted written FIR and on this being i/c of the PS registered Simaluguri PS case No. 66/2016 u/s 4 of POCSO Act and entrusted SI Biju Das of Lakuwa OP to make further investigation of the case. He has handed over the SCD to the I/O Sri Biju Das. In his cross examination, PW 7 stated that Ramudeodhai Gaon falls within Simaluguri PS and not within Lakuwa OP. At the time of giving oral information, the complainant came alone. He stated that he cannot say whether on this matter there was any village meeting. He has not seen the copy of the GD Entry No. 436 dated 20.06.2016. He denied that he has not made any GD Entry as above and that he did not conducted the investigation as per law. He further stated that at the time of seizure, the M.Exbt 1 and 2 are produced by the informant from her house. In the Exbt. 2 there was no mention that seized articles were handed over by her mother. PW 7 further deposed that as there was no other SI of police available at Simaluguri PS, he being in-charge of the PS, has to entrust the case to I/C Lakuwa OP. PW 7 admitted that he has not given any document showing that he was incharge of the O/C of Simaluguri PS and that no SI was present at the PS.

14. PW-8 SI Manjujjal Gogoi, another I.O. of this case in his evidence deposed that on 15.07.2016, while he posted as I/C Lakuwa OP, on that day Simaluguri PS Case No. 66/2016 u/s 4 POCSO Act was entrusted him to investigate the remaining part of investigation of the case. Earlier investigation was done by his predecessor I/O SI Biju Das. On going through the CD, it appears that the medical report and the forensic report were not collected. During investigation, he has collected the medical report and FSL report. Exbt. 5 is the FSL report. FSL report shows that the exhibit No. Sero 3704/A and Sero 3704/B gave positive test for human semen. On completion of investigation, he has submitted charge sheet against the accused u/s 4 POCSO Act. Exbt. 6 is the

charge sheet. In his cross examination, PW 8 admitted that he has not recorded statement of any witnesses. He was entrusted to investigate the case by O/C Simaluguri PS but this fact was not in charge sheet. However there is a note to this effect in the CD. Ramudeodhai Gaon did not fall within the territorial jurisdiction of Lakuwa OP. He denied that he has not investigated the case properly.

- 15. CW 1 Sri Arun Chetia, who has appeared with GD Entry Book of Simaluguri PS has proved the GD Entry No. 436 dated 20.06.2016. Exbt. X is the GD Entry Book. Exbt. X(i) is the GD Entry No. 436 dated 20.06.2016. Exbt. X(ii) is the true certified copy of GD Entry No. 436 dated 20.06.2016. Exbt. X(i) the GD Entry No. 436 dated 20.06.2016 contains that at about 6.30 PM, one Smt. Rupa Mech w/o Sri Biswajeet Mech of Ramudeodhai Gaon appeared in person at the PS and informed that accused Pankaj Mech @ Dihingia by enticing took her 4 (four) years daughter and committed rape on the said child. This GD Entry also contains that after making the entry ASI B. Sarkar went to the PO with other staff.
- 16. CW 2 Dr. Nirmal Chutia, who has appeared with the medico legal report of victim P has proved the same as Exbt. Y which was prepared by Dr. Satyajeet Dutta, the then M&HO-I posted at Nazira Sub-Divisional Civil Hospital. CW 2als deposed that Exbt. Y report contains that on 20.06.2016, at about 8.30 PM, Purnima Mech was brought to Nazira SHC by her mother with alleged history of sexual assault on Purnima Mech. Upon physical examination, the attending Doctor did not find any external injury on the victim at the time of examination. However in view of history of sexual assault, the victim was referred to Sivasagar Civil Hospital for examination by experts.
- DW 1 Miss Ankita Mech in her evidence deposed that informant Rupa Mech is her Aunt. Accused Pankaj Mech is her uncle. On 20.06.2016, a quarrel took place between Rupa Mech and Pankaj Mech on the matter of some amount due from Rupa Mech. Pankaj has asked for his due amount of labour charge from Rupa Mech. On this matter a village meeting was also held. In the

said village meeting Rupa brought some allegations of committing misdeed by Pankaj with victim P. Victim was present and running here and there in the meeting. Biren Mech, Junu Mech, Kunja Mech (mother-in-law of Rupa), Bornali @ Moon Gogoi and several others were present. In the said meeting no decision was arrived at but it was observed that, allegation of Rupa was false. Subsequently, Police came to their village and interrogated the persons present in meeting. DW 1 further deposed that Pankaj Mech used to reside in his relatives houses. Pankaj also lived for several days at the residence of Rupa Mech. Pankaj also worked with Rupa and her husband in their Boilar business. There was rumour that Pankaj and Rupa have illicit relation. On 20.06.2016, paddy was sown in the field of Rupa and Pankaj worked as labour on that day. The quarrel took place for non payment of labour charge. In cross examination DW 1 deposed that she is working in a beauty parlour at Simaluguri. Her duty time is 10 Am to 4 PM. She denied that on the date of alleged incident she was not present in the meeting and village. The village meeting dated 20.06.2016 was presided by Smt. Runu Mech and Sri Biren Mech (VDP). She has not brought the minutes of the meeting for perusal of court. On the behavioural aspect and character of Rupa Mech, no specific meeting was held in the village. No information was given to police on this matter. Pankaj Mech also used to live at their residence on some occasions. Meeting has mainly discussed the matter of due amount of Pankaj. She also denied that to save the accused from the offence committed by accused with victim, she deposed falsely. She knew that police arrested Pankaj on the allegation of committing misdeed with victim.

So far age of the victim is concerned, from the evidence of P.W.1, the mother of the victim it appears that on the date of occurrence victim was a student of Class-I and she was aged about 5 years. The M.O. (P.W. 6) upon radiological examination has opined that age of the victim is below 12 years. The victim who has been examined as P.W. 2 herself stated that she was a student of Class-I at the relevant time. P.W. 3 Smt. Junu Mech and P.W. 4 Sri Biren Mech also confirmed that the victim was aged about five years at the relevant time of the alleged occurrence. Defence has not challenged so far the

age of the victim. Considering above materials, I hold that at the relevant time of alleged occurrence victim was aged about five years.

19. Now looking at the evidence of P.W. 1, the mother of the victim, it appears that accused took the victim from the house of the grand-mother and after sometime, kept her at her residence. At about 9.00 A.M. while she was cleaning the leg of the victim she noticed that the panty and frock of the victim got wet and on asking the victim divulged the fact of rape committed by the accused on the victim. On opening her panty she saw slight blood stain and immediately the matter was informed to her mother-in-law and Moon Gogoi and even also local peoples gathered there and came to know about the misdeed committed by the accused. Thereafter victim was taken to Nazira Hospital where they asked for police requisition and then she went to Simaluguri P.S., lodged the FIR and thereafter her victim daughter was brought to Nazira. From the evidence as narrated above, it appears that P.W. 1, mother of the victim came to know about the incident at about 9.00 A.M. while she was preparing to go to Bank and took her daughter victim 'P' for cleaning her legs and found foul smell from the panty and frock of the victim. As per the statement of the P.W. 1 at 9 A.M, the victim told her about the penetrative sexual assault by the accused and upon perusal of the private parts of the victim she found blood stain as well as saw the vagina was of radish in colour. Immediately she informed the matter to others and took the victim to Naira Hospital. But in her cross examination, she stated that after knowing this, she went to pluck tea leaves. If we look at the evidence of C.W. 2 Dr. Nirmal Chutia who appeared before this court with the Medico Legal Register of Nazira Sub-Divisional Civil Hospital stated that as per the Hospital Register on 20.06.2016, at about 8.30 P.M. victim 'P' was brought to Nazira SHC by her mother with alleged history of sexual assault on victim 'P', but upon examination the attending Doctor did not find any external injury on the victim. However in view of history of sexual assault, the victim was referred to Sivasagar Civil Hospital. Looking at the evidence of P.W. 6 Dr. Prasanta Pratim Sarma who examined the victim on the next day at about 12 noon in his evidence categorically stated Spl. (P) Case No. 25 of 2016 Page 10 of 14

that hymen was present, vagina was normal, labia, majora and minora are normal, forchette normal and opined that there was no sign of recent sexual intercourse or any mark of violence on her person. In his cross examination P.W. 6 categorically admitted that in case of any attempt of penetration on a girl of 5 to 6 years of age presence of marks of violence is bound to occur. Normally the marks of injury may remain upto 48 hours. So from this two medical reports it appears that though the victim was examined within 12 hours of the alleged incident of penetrative sexual assault, but the Medical Officers did not find any mark of injury or reddishness or anything else showing any symptom of forcible sexual intercourse or any attempt thereof upon the victim.

- 20. Admittedly the victim is aged about five years. Keeping the above in mind and looking at the evidence of victim, it appears that after taking the victim by the accused to his house, the accused put his penis on her vagina for several times for which victim got pain in her vagina. Thereafter victim was brought back to her house by the accused. So there is a direct clash of medical opinion and the evidence of victim. As per the victim (P.W.2) and her mother (P.W.1) accused has penetrated, but no any evidence was found by the M.O. upon the victim at the time of examination. Thus the medical evidence cast a serious doubt on the alleged allegation of penetrative sexual assault on the victim. If we look at the cross examination of the victim, it appears that in her victim admitted that her mother told her to say about the incident. Though this cannot be treated to dislodge the entire evidence, but looking at the other circumstances brought by the defence during cross examination as narrated in evidence, apparently accused worked under the husband of the informant. Though there was denial to the fact that wages were due to the accused, but P.W. 1 has admitted that accused has committed misappropriation on that period shows that there was some animosity between the informant and the accused.
- 21. Now looking at the evidence of other witnesses it reveals that P.W. 3 is a hearsay witness. P.W. 4 in his cross admitted that accused has no any

close relative and he used to live at the residence of the victim and worked with the father of the victim. He has heard about the quarrel between the informant and accused in respect of Broiler business. Accused also used to sow paddy in the field of the informant and there was some quarrel on the matter of payment of wages for sowing paddy. P.W. 4 also deposed that on the matter of allegation of penetrative sexual assault upon the victim there was a village meeting and in the meeting, the victim was playing normally and the allegation of rape was found false. P.W. 5 is a hearsay witness. P.W. 7 and P.W. 8 are the I.Os of this case.

- 22. P.W. 8 though proved the FSL report which gave positive test for human semen on the garment of the victim, but it is in the evidence that those were handed over to police by the informant from her house. I found force in the submission of defence that, finding of semen itself cannot prove the involvement of the accused. DW 1 in her evidence deposed that there are rumors in village that the accused and the informant had illicit relationship.
- 23. In this case, due to admitted fact of animosity, the applicability of Section 29 of POCSO Act, 2012 regarding presumption appears to be rebutted by the defence through the witnesses.
- 24. From the totality of the fact, I am of the opinion that it will be unsafe to rely the testimony of P.W. 1 and P.W. 2 so far allegation of penetrative sexual assault is concerned, as such doubt remains in the prosecution story.
- 25. Considering all above, I am of the opinion that prosecution has failed to prove the charge U/S 6 of POCSO Act, 2012 or any other minor offences against the accused Pankaj Mech. As such, accused Pankaj Mech is acquitted from the charge U/S 6 of POCSO Act, 2012 on benefit of doubt and set at liberty forthwith.
- 26. Issue release order to the Jail Supdt. of District Jail, Sivasagar accordingly.

- 27. As the accused was in Jail custody, no order is passed U/S 437 A Cr.P.C.
- 28. Considering the fact and circumstances of the case, the matter is not referred to DLSA for granting compensation U/S 357 A Cr.P.C.
- 29. Learned State defence counsel is entitled for his professional fees from Govt. of Assam as per rules.
- 30. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 31. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 19th day of March 2018 at Sivasagar.

Special Judge, Sivasagar:

<u>APPENDIX</u>

1. Prosecution witnesses -

- P.W.1 Smt. Rupamoni Mech (Informant)
- P.W.2 -(Victim)
- P.W.3 Smt. Junu Mech
- P.W.4 Sri Biren Mech
- P.W.5 Sri Babu Gogoi P.W.6 Dr. Prasanta Pratim Sarma (M.O.) P.W.7 ASI Bishnu Sarkar
- P.W.8 SI Manjujjal Gogoi (I.O.)

2. Defence witnesses -

D.W.1 - Miss Ankita Mech.

3. Court witnesses -

- C.W.1 Sri Arun Chetia
- C.W.2 Dr. Nirmal Chutia

4. Exhibits by prosecution -

- Exbt.1 -FIR
- Exbt.2 -Seizure list
- Exbt.3 -Medical examination report
- Exbt.4 Sketch map
- Exbt.5 -**FSL Report**
- Exbt.6 -Charge-Sheet
- Exbt.X -**GD Entry Book**
- Exbt.X(i) GD Entry No.436 dtd 20.06.16.
- Exbt.X(ii) Truecertified copy of GD Entry 436 dtd 20.06.16.
- M.Exbt.1 Seized blue colour panty.
- M.Exbt.2 Seized while silk frock

Special Judge Sivasagar