

Present : Shri C. Das

Judge, Special Court Baksa, Mushalpur

# **JUDGMENT IN SPECIAL POCSO CASE NO.28/2018**

u/s 4 of POCSO Act

State

-versus-

Sri Alfan Soren

..... Accused

Appearance:

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

For the accused : Mr. T. Sarma, Advocate

Date of evidence: 29.11.18, 16.3.19, 29.5.19

Date of argument: 24.6.19 Date of judgment: 8.7.19

#### JUDGMENT

- 1. The case of the prosecution briefly, is that on 12.9.17, the complainant Sri Shankar Konwar lodged a FIR before the In-charge of Darrangamela police out-post, alleging inter-alias that the accused has been committing sexual intercourse with his 14 years old daughter/ victim girl(name is withheld) for last several months. When the victim girl lost the menstrual period, he came to know about her pregnancy.
- 2. Accordingly, the police lodged the Darranga-mela OP. GDE. No.186 dated 12.9.17 on the basis of the said FIR and forwarded it to the Officer-in-charge of Tamulpur police station for formal register of a case. Thus, the Officer-in-charge of Tamulpur police station registered the Tamulpur PS. Case No.262/17 u/s 4 of Protection of Children from Sexual Offences Act (in short; the POCSO Act) and



endorsed the I/O to investigate the case. During the investigation, the I/O visited the place of occurrence, drew up its sketch map and examined the witnesses including the complainant and the victim girl. The I/O also, sent the victim girl for medical examination and recording her statement u/s 164 of Code of Criminal Procedure (herein after referred as CrPC) and at the end of investigation, the I/O having a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

- 3. The accused when appeared in the court, he was furnished with the relevant copy of the case immediately. After hearing both the sides and perusing the material on record, the charge u/s 4 of POCSO Act was framed against the accused. The charge so framed, 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 the I/O and M/O to support its case. Thereafter, statement of the accused was recorded u/s 313 of CrPC where he took the total denial of all incriminating circumstances appeared against him in the evidence. The accused however, declined to adduce any defence evidence. The argument of the parties was heard at length and perused the evidence on record.

#### **POINT FOR DETERMINATION:**

5. Whether on 12.9.17 and before some months, at Horotola village under Tamulpur police station, the accused committed penetrative sexual assault upon the victim girl who is minor daughter of the complainant Sri Shankar Konwar;

## **DECISION AND REASON THEREFORE:**

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6. Learned Public Prosecutor, initiating the argument of the case for the prosecution, submitted that it must be kept in mind that while appreciating evidence on record, that the victim girl is a minor one and she has to be treated a victim of the occurrence. If her evidence is compared with her statement recorded u/s 164 of CrPC., it would show total consistency between it and as such, it can easily be held that her evidence is totally reliable since no ordinary minor girl like the victim would make a false story to implicate the accused in such serious crime



committed against her. Apart from that the evidence of the father informant as well as, PW4 and 5 corroborated the version of the victim girl vis-a-vis, the evidence of doctor confirmed her pregnancy. He submitted that considering the nature of offence, the delay is not important. According to him, all the prosecution witnesses could able to bring home the charge against the accused as such, the accused may be convicted under proper provisions of law, he urged.

- 7. In support of his contentions, learned Public Prosecutor placed reliance on the decision of Hon'ble Supreme Court passed in Mukesh vs. State of Chhatisgarh in Cri. Appeal No.1114 of 2011 decided on 25th September 2014, wherein it was observed that the sole testimony of the witness is sufficient to establish the commission of rape even in the absence of corroborative evidence. Reliance has been placed on the decision of this court in the case of Mohd. Ighal vs. State of Jharkhand which states as under:- There is no prohibition of law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses. Further, in Narender Kumar vs. State of (NCT of Delhi) this court has observed that even if a woman is of easy virtues or used to sexual intercourse, it cannot be a licence for any person to commit rape and conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrixs case becomes liable to be rejected.
- 8. Per contra, learned counsel for the accused submitted that there is delay of about 164 days in lodging the case but there is no explanation made by the prosecution. He submitted that local meeting for settlement of difference with the accused as transpires from the evidence but thereafter, the case was filed after long delay after failure of local settlement in the village of the complainant. Hence, in absence of proper and satisfactory explanation as to the delay, the case of the prosecution cannot be relied upon and should be rejected. As regards to pregnancy of the victim, it alleged in the evidence of the prosecution witnesses that it was the accused who committed sexual intercourse with the victim but there is no medical evidence including any DNA test to confirm that the pregnancy of the victim was caused by the accused. Therefore, the accused is entitled to get benefit of doubt over the prosecution case, he maintained.

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- 9. So far as the offence **u/s 4 of POCSO Act** is concerned, there must be penetration to commit the offence of sexual assault on a child. The nature of definition to attract such offence is provided **u/s 3 of the said Act**. It reads as 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 ant 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 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 the child to do so to such person or any other person.
- 10. Another important aspect of the prosecution case is that the victim should be a child within the meaning of section **2(d)** of **POCSO** Act. The said section reads that "child" means any person below the age of eighteen years. Thus, te law says that irrespective of a boy and girl, the child should be below 18 years of age to attract the offences under the Act. So before going in to evidence of the case, it is pertinent to find out if the victim girl of this case is a child within the meaning of **section 2(d)** of the Act.
- 11. After going through the record, it appears that the victim testified herself as 1 years of age at the time of her examination in the court. PW2 Sri Shankar Konwar is the complainant of the case and the natural father of the victim girl stated in his testimony that the victim girl is 14 years old at the time of occurrence. No document to prove the age of victim girl is furnished by PW2. Hence, only option is to rely the medical evidence. The prosecution examined the doctor as PW6. She stated that X-ray report of the victim girl shows that the age of the victim is above 14 years but below 16 years. Thus, such evidence of doctor makes it clear that the victim was below 18 years old at the time of occurrence and as such, she is a child within the meaning u/s 2(d) of POCSO Act. Therefore, the provisions under this Act is applicable to the accused.

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12. Coming to other main aspects of the case of the prosecution, it appears the victim was examined as PW1. She deposed in the court that on the



fateful day in the morning she went to collect fire wood near the bagan of the accused. At that time, the accused came from behind and gagged her mouth and thereafter, the accused removed her cloths and committed sexual intercourse with her. The accused after that, droved her to her home. Later on, she reported the incident to her mother. After 6 months, she came to know about her pregnancy. Her mother informed her father who filed the case before the police. The local public came to know about the incident. The police sent her for medical examination and recording her statement by a magistrate.

- 13. In the cross-examination, PW1 stated that she did not disclose the incident immediately to her mother but after she became pregnant, she reported the incident to her mother. Thus, the evidence of PW1 implicates the accused but it appears that she did not disclose the matter for about 6 months.
- 14. PW2 Shankar Konwar is the father of PW1. He filed the FIR before the police. He stated that on the fateful day, PW1 went to collect fire wood. The accused caught PW1 from behind and committed physical relation. The age of the victim was 14 years old at the time of occurrence. Initially, PW1 did not disclose the incident to him. After 6 months, when PW1 became pregnant, local public inquired about it and called for a local meeting. PW1 disclosed in the meeting that it was the accused who caused her pregnant. The local public informed the police. Hence, the accused was arrested. He filed the FIR. The victim was sent for medical examination and recording her statement in the court. At present the girl child of PW1 is aged about 11 months.
- 15. In the cross-examination, PW2 disclosed that he did not state to the police earlier that PW1 disclosed the name of the accused for causing her pregnant in the village meeting. Thus, from the evidence of PW2, it transpires that PW1 discloses the incident to him much later and after 6 months while a village meeting was held to inquire about the pregnancy of PW1 and presently, PW1 gave birth to a child.

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16. PW3 Smti. Jaymati Konwar is the mother of PW1 and wife of PW2. She stated that on the fateful day, PW1 went to collect fire wood. At that time, the accused caught PW1 and committed sexual intercourse with her. After 3/6 months, PW1 reported her about the incident. A local meeting was held in connection with the incident. The locals informed the police who arrested the accused. The police



sent PW1 for her medical examination and recording statement in the court. At present, PW1 has a child of 11 months.

- 17. In the cross-examination, PW3 stated that she has not worked in the garden of the accused. She stated to the police earlier that a village meeting was held in connection with the occurrence. Thus, PW3 lends support to the version of PW1 and 2.
- 18. PW4 Sri Teg Bahadur Pradhan deposed that one year back, a local meeting was held in his house where the local public assaulted the accused physically for causing PW1 pregnant. He was present in the meeting and the police was informed. Thus, the evidence of PW4 supports the fact of holding a local meeting in connection with cause of pregnancy of PW1.
- 19. The evidence of PW5 Budheswar Munda is that a local meeting was held in connection with the occurrence between the accused and PW1. The accused was handed over to police. The local public imposed fine payable by the accused. PW1 had a child from the side of the accused. PW5 lends support for holding a meeting in connection with the incident.
- 20. PW6 Dr. Dhritishree Barman is the Medical Officer who medically examined PW1. The Medical Officer stated that PW1 changed her clothing and washed up her genitalia, mouth, anus and canal and changed her cloths after the incident as well as, finding given that fondle height equals to 28 weeks of gestation. Apparently, the medical evidence corroborates the fact that PW1 was carrying pregnancy for 28 weeks gestation. There is no dispute over finding given by PW6.
- 21. The evidence of PW7, I/O of the case, Sri Nayanmoni Das is that he received the FIR of PW2 vide Ext.3 and started the investigation of the case on the basis of endorsement of the higher authority. He proved the sketch map vide Ext.4. he sent the victim to record her statement u/s 164 CrPC and for her medical examination. He arrested the accused. He collected the medical report of the victim. At the end of the investigation, the I/O submitted the charge-sheet against the accused vide Ext.5.

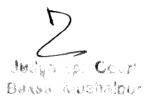
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for DNA test. Thus, from the evidence of I/O, it appears that the pregnancy of the victim is not determined to match with the accused. However, the victim girl was medically examined by doctor. The medical evidence tendered by PW6 confirms that PW1 is pregnant for 28 weeks gestation at the time of examination. The evidence on record, discloses that PW1 presently, gives birth to a child.

- 23. Further, the evidence of the prosecution witnesses shows that PW1 became pregnant for sexual intercourse caused by the accused with her. The incident was come into light of other for about 6 months. PW1 never stated that the accused threatened her not divulge it before anybody neither there is evidence to show that the accused promised to marry PW1 but did not do so. The evidence of PW2 shows that PW1 disclosed the incident before the public in a local meeting. Before that nobody had the knowledge of the incident. It is also, discloses from the evidence that PW1 came to know about her pregnancy after missing of her menstrual period after 6 months of incident. But by latest, a girl/ female can become pregnant immediately after sexual intercourse by a man within one month. A period of 6 months is too long to conceive. Therefore, the period of 6 months as stated by PW1 is found to be not convincing to rely upon.
- As regards to delay in lodging the FIR as pointed out by the defence, the evidence of PW2 shows that he was not aware of the occurrence until disclosed by PW1. Apparently, PW2 disclosed the occurrence after 6 months when she became pregnant and a local meeting was held for the occurrence. After knowing the occurrence, it appears that PW2 filed the ejahar. Non disclosure of incident by PW1 immediately after the occurrence, cannot be attributed to him. It appears that without delay, PW2 filed the ejahar as soon as, he came to know about the incident. Considering the explanation cited by PW2, it appears that explanation for delay is satisfactory and there is no room for doubt over the version of PW2.
- 25. It appears that PW1 is child witness in the case and the sole victim of the alleged occurrence. No doubt, sole testimony of the rape victim can be relied upon if her evidence is wholly reliable. But in case of child victim, there is need of some corroboration since such child may be vulnerable to being tutored by other persons. In **State of Bihar vs. Kapil Singh, AIR 1969 SC 53**, it was held that *when a*

child witness is easily tutored its evidence always dangerous to be accepted without proper corroboration.





- 26. In the present case in hand, it appears that PW1 did not disclose the incident for about 6 months. When a village meeting was called, she disclosed the name of the accused who caused her pregnant. PW1 does not disclose the reason for keeping the incident without divulging to her parents or any of her closed person. There is no evidence that the accused threatened PW1 of any physical hurt if she disclosed the incident before others. The evidence of PW2, 3, 4 and 5 relates to discovery of pregnancy of PW1 allegedly caused by the accused. They have only placed a circumstance which discloses that the accused allegedly made PW1 conceived. But they are not an eye-witnesses of the occurrence. Such circumstance cannot implicate the accused only by PW1 who is a child witness, without corroboration. In between the occurrence and local meeting after discovery of pregnancy of PW1, there is no evidence to corroborate her version. Thus, such for concealing the matter for long time renders the evidence of PW1 unreliable. Moreover, the I/O did not cause the victim for DNA test to verify the paternity of the accused. In view of above, the accused is entitled to get the benefit of doubt. Accordingly, the accused is given the benefit of doubt.
- 27. 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 and he is acquitted and set at liberty. He is required to furnish bail bond u/s 437-A CrPC. The victim is entitled to get adequate compensation under Assam Victim Compensation Scheme from DLSA, Baksa at Mushalpur. Inform the DLSA, Baksa, accordingly.
- 28. Given under the hand and seal of this court on this 8<sup>th</sup> day of July 2019.

Dictated and corrected by:

C. Das

Juliter Seperal County
Baksa Mistaliadour

Judge Special Court Baksa, Mushalpur



### **ANNEXURE:**

### <u>List of prosecution witness:</u>

PW1 ... the victim girl (name withheld)

PW2 ... Sri Shankar Knowar ... informant

PW3 ... Smti. Jaymati Konwar

PW4 ... Teg Bahadur Pradhan

PW5 ... Sri Budhesawr Munda

PW6 ... Dr. Dhritishree Barman ... m/o

PW7 ... Sri Nayanmoni Das ... I/o

### List of defence witness:

Nil

## List of documents exhibited:

Ext.1 ... medical report

Ext.2 ... x-ray report

Ext.3 ... FIR

Ext.4 ... sketch map

Ext.5 ... charge-sheet

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