

GAHC010282092019



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

CRL.A(J)/108/2019

Moni Baruah
S/O. Lt. Mekel Baruah, Vill. Kerekoni Majgaon, P.S. Silapathar,
Dist. Dhemaji

.... **Appellant**

VERSUS

The State of Assam

..... **Respondent**

**BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

Advocate for the Appellant	:	Mr. A. Gogoi
Advocate for the Respondent	:	Mr. P.S. Lahkar
Date of Hearing	:	09.06.2023
Date of Judgment	:	09.06.2023

JUDGMENT & ORDER (ORAL)

1. Heard Mr. A. Gogoi, learned Legal Aid Counsel for the appellant as well as Mr. P.S. Lahkar, learned counsel for the respondent.
2. The appellant, Moni Baruah has preferred this appeal from the Jail against the judgment and order dated 29.06.2019 passed by the Sessions Judge, Dhemaji, convicting the appellant under Section 6 of The Protection of Children from Sexual offences Act (POCSO Act for short) and sentencing him to undergo rigorous imprisonment for 10(ten) years and to pay

a fine of Rs. 1,000/- with default stipulation.

3. It is submitted on behalf of the appellant that the FIR was lodged after a period of 6 (six) months. There is an inexplicable delay in lodgement of the FIR and the appellant ought to get the benefit of doubt. The evidence of PW-5 clearly indicates that the victim was not mentally stable and incarceration of the appellant on the basis of the statement of the victim, who is not mentally stable will be perilous. The capability of such a victim to identify her assailant becomes doubtful. The statement of the victim under Section 164 of the Code of Criminal Procedure (Cr.P.C for short) as well as her evidence in Court is contradictory. These major contradictions casts a shadow of doubt over the veracity of the evidence of the victim.

4. Mr. P.S. Lahkar, learned Addl. P.P. has submitted that the victim was a minor at the time of the incident.

5. The genesis of the case was that about 6 (six) months ago (from 27.12. 2015), Sri Moni Baruah, (herein after referred to the appellant), in the absence of the other family members of the victim's family, committed rape of the 16 year old victim 'X'. He also impregnated the victim by establishing illicit physical relationship with the victim. The appellant threatened the victim not to divulge about the matter. When the victim's mother noticed physical changes on her body, she confronted the victim who revealed that the appellant impregnated her.

6. The victim's mother 'Y' lodged the FIR, which was registered as Silapathar P.S. Case No. 340/2015, under Section 376 of the Indian Penal Code, (IPC for short), read with Section 6 of the POCSO Act. The Investigating Officer (I/O in short) embarked upon the investigation. During investigation, he recorded the statement of the victim and forwarded her for medical

examination and for recording her statement under Section 164 Cr.P.C. On conclusion of investigation, charge-sheet was laid against the appellant under Section 376 IPC read with Section 6 of the POCSO Act.

7. At the commencement of trial, a formal charge under Section 376 (1) IPC read with Section 6 of the POCSO Act was framed and read over and explained to the appellant. The appellant abjured his guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 7(seven) witnesses including I/O, and the Medical Officer (M/O in short). The accused did not tender any evidence in defence. When the statement of the accused was recorded under Section 313 Cr.P.C, he answered the questions to the incriminating circumstances against him in an evasive manner.

8. The trial Court decided the case on the following points:-

“ *Whether:-*

(i) That, before 6 months from the date of 21.12.2015 on several occasions, appellant committed rape on Smti 'X', a minor girl below the age of 18 years and thereby, committed an offence punishable under Section 376(1) of IPC.

(ii) That, before 6 months from the date of 21.12.2015, appellant committed aggravated penetrative sexual assault on Smt. 'X' and thereby appellant committed an offence punishable under Section 6 of POCSO Act.”

9. The trial Court decided this case holding that the evidence of the victim was found to be convincing. The mother of the victim had confronted her when she noticed that her daughter was pregnant. The victim informed her mother that the appellant committed rape on her. As the statement of the victim was found to be reliable, the trial Court convicted the

appellant on the basis of presumption. The trial Court held the appellant guilty on the basis of presumption, as defined under Section 29 of the POCSO Act.

10. The question that falls for consideration in this appeal is that whether the trial Court erred in holding the appellant guilty of offence under Section 6 of the POCSO Act.

11. To decide this case in his proper perspective, it is necessary to reappraise the evidence.

12. The informant is PW-1 and she has deposed that her daughter is an innocent girl. About 8 months ago, the accused had taken away her daughter to stay in his house. At night, the accused committed rape on her daughter. Even after the incident, the accused had committed rape on her daughter 'X' on two occasions, when her daughter was alone at home. The appellant had threatened her daughter not to disclose about the incident. As her daughter 'X' was terrified, she did not disclose about the incident of rape. Later on, her daughter became pregnant. When she confronted her daughter 'X', her daughter revealed that the appellant had committed rape on her. Then, she lodged the ejahar (FIR) with the police. The ejahar was written by a scribe and she affixed her thumb impression on the ejahar. Her daughter was examined by the Medical Officer. Her daughter was only 15 years old at the time of the incident. She has admitted in her cross-examination that victim 'X', used to roam around the village and used to graze cattle. She has not accepted the suggestion of the defence that as the appellant had scolded her daughter for roaming alone, out of grudge they have slammed this false case against the appellant.

13. The victim has stated as PW-2 that the informant is her mother. On the day of the incident, she was sleeping and the appellant's wife came to her house and asked her to sleep

in her house. Then the appellant committed 'bad act' on her. A child was born, but her child has died. Then her mother lodged this case against the appellant. She has denied the suggestion of the defence that she did not make a statement before the Magistrate that the appellant's wife had taken her to the appellant's house.

14. It is pertinent to mention at this juncture that the statement of the victim under Section 164 Cr.P.C has not been proved by the victim. The Magistrate who recorded the statement of the victim was also not examined as a witness. The evidence of the victim is not similar to the evidence of her mother. The victim has stated that the appellant had committed bad act with her but she has not categorically stated that the appellant committed sexual assault on her. The victim has stated that the appellant's wife took her to their house, whereas, the victim's mother 'Y' has stated that the appellant had taken her daughter to stay in his house. The victim has also not stated that the appellant had threatened her not to divulge about the incident. Thus, the reasons of the inexplicable delay in lodging the FIR has not been properly explained. The victim's father was also not examined as a witness.

15. A neighbour Sri Deben Hazarika has testified as PW-5 that both the parties are known to him. The incident had occurred about a year ago. He heard that the appellant had indulged in an illicit relationship with the victim and the victim became pregnant. The victim was 7(seven) months pregnant. The victim 'X' is not mentally stable.

16. It is submitted by the learned counsel for the appellant that the evidence of the PW-5 reveals that the victim is not mentally stable. The victim's mother has also stated as PW-1 that the victim is an innocent girl. The mental condition of the victim has been questioned by the learned counsel for the appellant. It is submitted that it will be perilous to rely on the

statement of a girl whose mental condition is not stable, more so when the victim herself has not clearly described the act committed by the appellant.

17. It is also submitted by the learned counsel for the appellant that the evidence of PW-4 and PW-6 is hearsay evidence. Sri Petal Hazarika has testified as PW-4 that the informant and the victim are known to him. The incident had occurred about a year ago. The O/C had come to the informant's house and the informant told the O/C that the appellant had sexual intercourse with her daughter and had impregnated her daughter, who was seven months pregnant at the time of incident.

18. Sri. Dambaru Chutia has also testified as PW-6 that about 2 years ago, one evening, many people gathered in the informant's house and he went there and he learnt from the public that the appellant had committed rape on the victim ('X').

19. I have scrutinized the evidence. It is held that on the shaky evidence of the informant and that of the victim, presumption cannot operate against the appellant. The learned trial Court has erred by holding the appellant guilty on presumption of culpable mental state. The prosecution was conducted in an apathetic manner and so was the defence. The statement of the victim under Section 164 Cr.P.C was also not exhibited.

20. The I/O Sri Kuladhar Konwar has testified as PW-7 that on 27.12.2015, he was posted as I/C at Sissiborgaon out post under Silapathar P.S. and on that day, he received an FIR from the informant. He registered GD Entry vide No. 1035 dated 27.12.2015 and forwarded the same to the police station, which was registered as Silapathar P.S. Case No. 340/2015, under Section 376 IPC read with Section 6 of the POCSO Act. He embarked upon the investigation and forwarded the victim to the Magistrate, who recorded her statement under Section 164

Cr.P.C. The victim was examined by the doctor. He seized the birth certificate of the victim. Meanwhile, he was transferred, and he handed over to the case diary to the officer in-charge. The charge-sheet was laid by the S.I. Ganesh Barman. He identified the signature of the S.I. Ganesh Barman as Exhibit-7(1) on the charge-sheet, which is marked as Exhibit-7. The I/O has proved the sketch map as Exhibit-3 and Exhibit-3(4) as his signature. The paper Exhibit-1 is the birth certificate of the victim.

21. According to the birth certificate of the victim, paper Exhibit-1, her date of birth was 01.09.2000. The incident allegedly occurred 6(six) months prior to 18.08.2016, which clearly reveals that the victim must have been around 16 years at the time of the incident. It is therefore held that the learned trial Court has erroneously held the appellant guilty of offence under Section 6 of the POCSO Act, because the victim was not below 12 years of age at the time of the incident. No DNA test was also carried out to prove the paternity of the child. It is also held that the learned trial Court has erroneously held the appellant guilty of offence under Section 6 of the POCSO Act, because, the victim has stated that the incident occurred only once, when she was sleeping in the appellant's house, when the appellant committed 'bad act' on her.

22. Recapitalizing the entire evidence, it is held that the prosecution has failed to prove beyond reasonable doubt that the appellant is guilty of offence under Section 376 IPC or Section 6 of the POCSO Act. The victim's mother has testified as PW-1 that the appellant had impregnated her daughter and had committed rape on two occasions in her house and on one occasion in his house, when the victim was taken away to the appellant's house. The victim has not stated that the appellant had committed penetrative sexual assault on her. She has testified as PW-2 that the appellant had committed bad act on her. Her evidence is not

substantiated by the evidence of the other witnesses PW-4, PW-5 and PW-6.

23. As the victim herself has failed to implicate that the appellant committed penetrative sexual assault on her, her mother's evidence cannot be considered as conclusive proof to hold the appellant guilty of offence u/s 6 of the POCSO Act. Moreover the victim, PW-2 has not stated that the appellant's threats had prevented her from divulging about the incident. Thus, the inexplicable delay of 6/8 months in the lodgement of the FIR casts a shadow of doubt over the veracity of the informant's evidence. Under such conditions, DNA test was required in support of the paternity of the victim's child.

24. The appellant cannot be held guilty of offence under Section 6 of the POCSO Act. At best, he could have been held guilty of offence of sexual assault. The appellant has already been in jail since 29.06.2019 for almost four years. The appellant is to be set at liberty forthwith, if he is not wanted in connection with any other case. Surety stands discharged. The judgment and order dated 29.06.2019 passed by the Sessions Judge, Dhemaji in connection with Sessions Case No. 29(DH)/2016 is hereby set aside.

Send back the LCR.

JUDGE

Comparing Assistant