

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

Present: **C. R. Saikia, AJS**
Additional Sessions Judge
Cum Special Judge, POCSO
Tinsukia

(Date of judgment:- **10.05.2022**)

(Case No. POCSO Case NO. **05(T) 2018 (U/s 6 of POCSO Act)**)

COMPLAINANT :	STATE OF ASSAM
REPRESENTED BY	B.L. Agarwal Learned Special P.P.
ACCUSED	Rajesh Prasad @ Bablu Prasad (A1) S/O Late Bhagawan Prasad R/O Hebeda 8 No Line, Makum P.S. Makum District : Tinsukia(Assam)
REPRESENTED BY	Naresh Prasad Learned Advocate

Date of Offence	31-01-18
Date of FIR	07-02-18
Date of Charge sheet	25-04-18
Date of Framing of Charges	27-08-18
Date of commencement of evidence	25-09-18, 30-10-18, 26-11-18, 28-11-18, 26-02-19, 27-03-19, 27-09-19
Date on which judgment is reserved	10-05-22
Date of Judgment	10-05-22
Date of the Sentencing Order, if any	

Accused Details:

Rank of the Accused	Name of Accused	Date of Arrest	Date of Release On Bail	Offences charged with	Whether Acquitted or convicted	Sentence Imposed	Period of Detention Undergone during Trial for purpose of Sec. 428 Cr.P.C.
A1	Rajesh Prasad @Bablu Prasad	08-02-18	17-05-18	Section 6 of POCSO Act			

JUDGMENT

1. The gist of the prosecution case as disclosed in the ejahar is that on 31-01-18 in the afternoon while the informant Miss X (her name withheld) was doing household work, her father took her to bed and raped her by disrobing her. The said informant lodged an ejahar with the Officer In-charge of Makum P.S. by disclosing the said facts.
2. On the basis of the said ejahar Makum P.S. case No 30/18 u/s 376 IPC R/W section 4 of POCSO Act was registered. On completion of investigation the Officer In charge of Makum P.S. filed charge sheet against accused Rajesh Prasad @ Bablu Prasad u/s 376 IPC R/W section 4 of POCSO Act.
3. On appearance of the accused copies of relevant documents were furnished to him as per requirement of law. After hearing learned counsels of both sides and on perusal of relevant documents on record my learned predecessor in office framed a formal charge against the accused under section 6 of POCSO Act. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
4. Prosecution side adduced the evidence of nine (9) witnesses and exhibited seven documents. The statement of

the accused recorded under section 313 Cr.P.C. is of total denial. The accused has declined to adduce evidence in defence. I have heard the arguments of both sides and perused the evidence on record.

5. The point for determination in this case is as follows:

- (i) Whether the accused in this case committed aggravated penetrative sexual assault on his daughter Miss X and thereby committed an offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012?

DISCUSSION OF EVIDENCE , DECISION AND REASONS
THEREOF

6. PW 1 is the medical officer who conducted medical examination of the victim after the alleged incident. PW 2, PW 3, PW 4, PW 5 and PW 7 are the witnesses of the neighbourhood. PW 6 is the victim and PW 8 and PW 9 are the police officers who conducted investigation of this case. The relevant evidence of these witnesses shall be considered at appropriate place in order to discern the veracity of the prosecution case.

7. The evidence of PW 6/ victim is of utmost importance in this case as there is no eyewitness to the alleged offence. Let me, therefore, first assess the evidence of PW 6.

8. It is in the evidence of PW 6 that on the day of the alleged incident while she was alone in her house, her father/accused came home in a drunken state and asked her to serve him food. After having his food the accused had closed the front door of the house and removed his wearing apparel and the wearing apparel of the victim and he had forcible sexual intercourse with the victim on the bed.

9. What is elicited during the cross examination of PW 6 belies her evidence regarding the accused having forcible sexual intercourse with her. In her cross examination PW 6 stated that at the time of the alleged incident the accused removed his clothes and also removed her clothes and then he laid her on the bed and then she managed to escape. If we juxtapose the evidence of PW 6 in her chief and her evidence in the cross examination, we find that there is a distinct variation in her evidence regarding the alleged act of the accused. The act of having forcible sexual intercourse cannot be used for the act of making attempt to rape and vice versa. Situated so the evidence of PW 6 regarding the alleged offence suffers from serious weakness. Only one piece of her evidence regarding the alleged act may be true at one time. Amid such situation the evidence of PW 6 regarding the alleged offence loses its credence. In view of such significant variance in the evidence of the victim herself regarding the alleged offence, her evidence becomes very weak and infirm. Such weak and infirm evidence does not inspire credibility.

10. The evidence of PW 6 becomes more doubtful in the face of the evidence of PW 3 whom the victim had reportedly informed about the incident. It is in the evidence of PW 3 that in the evening of the day of occurrence the victim had informed her that the accused had attempted to commit rape on her. There is nothing in the evidence of PW 3 to state about the fact of the accused having forcible sexual intercourse with the victim. From this evidence of PW 3 also it comes out that the victim herself is not clear about the nature of the alleged offence. Whether it is an attempt to commit rape or an act of forcible sexual intercourse is not clear from the evidence of PW 6 and PW 3. In her cross examination PW 6 has stated very candidly that she was born in the year 2000. The alleged incident took place in the year 2018. It can easily be inferred that at the time of the alleged incident the victim had attained sufficient stage of maturity to distinguish between the act of attempt to commit rape and the act of having forcible sexual intercourse. Amid such factual situation the significant variation in the evidence of PW 6 regarding the alleged act of the accused throws serious doubt in the prosecution case. The alleged act of the accused remains an open ended fact in view of variation in the evidence of the victim herself. The victim has failed to bring out clearly the alleged act that happened to her. It is not known from the evidence of PW 6 whether the accused committed rape on her or whether the accused attempted to commit rape on her. Hence the evidence of the victim herself fails to establish the foundational fact of the prosecution case.

11. It has been settled in a catena of decisions that the

evidence of prosecutrix can be acted upon if her version is credible. In case of rape corroboration is not a matter of law, but a guide of prudence. It is evident that the cogent and convincing evidence of the prosecutrix can be safely relied upon. But in this instant case the evidence of the victim herself suffers from the vice of variation in version. As such her evidence is not worthy of trust and can not be relied upon.

12. PW 1 testifies in her evidence that in her opinion rape cannot be ascertained from the medical examination of the victim. At this point I would like to reproduce the **opinion of Modi in Medical Jurisprudence and Toxicology , 25th Edition : "Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. Therefore, the issue of whether rape has occurred or not is a legal conclusion, not a medical one....The only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts or bite marks noticed in any part of the body...."**

13. As evident from the observation of Modi the medical officer is not to decide the factum of rape. The duty of the medical officer is confined to find out any injury in the private part or in any part of the body. The evidence of PW 1 is totally silent about any injury in the private part of the victim. Hence the evidence of PW 1 does not throw any light in the prosecution case.

14. PW 2 testifies that one day the victim had come to her home and had told her that her father had committed rape on her. This evidence of PW 2 does not throw any light in the prosecution case as her evidence is merely hearsay evidence and the victim has not deposed that she had told PW 2 about the incident.
15. PW 4 testifies that one evening Arati Pandey came to her and told her that the accused had committed rape on his daughter. That then she met the victim and confirmed from her the incident and then she informed the matter to the police. The evidence of Arati Pandey who is examined as PW 2 falsifies the evidence of PW 4. In her cross examination PW 2 has stated candidly that she never informed anyone about the occurrence. Situated so the evidence of PW 4 also fails to throw any light in the prosecution case.
16. The evidence of PW 5 is also of the same nature like that of PW 4. It is in the evidence of PW 5 that she had come to know from Arati Pandey that the accused had committed rape upon his daughter. But as the evidence of PW 2 is very clear that she never informed anyone about the incident, the evidence of PW 5 does not have any footing. PW 7 is the husband of PW 3. PW 7 testifies that his wife informed him about the alleged offence. The evidence of PW 7 is merely hearsay and hence does not throw any light in the prosecution case.
17. PW 8 and PW 9 are the investigating officers who did all the formalities of investigation such as visiting the place of occurrence, recording the statements of

witnesses, preparing the sketch map, and submission of charge sheet as per law. The evidence of PW 8 and PW 9 are mostly formal in nature.

18. In this case the charge is framed against the accused under section 6 of the POCSO Act. **Sections 29 and 30 of the POCSO Act enable the court to draw rebuttable presumption as to the culpability of the accused prosecuted under the provisions of the Act.** Sections 29 and 30 place reverse onus upon the accused to displace any presumption of guilt. **In the case of Bhupen Kalita v. State of Assam reported in 2020(3) GLT 403 learned single judge of the Hon'ble Gauhati High Court has laid down that in order to invoke the presumption incorporated under section 29 of the POCSO Act, the prosecution has to prove the foundational facts of the offence charged against the accused. If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witness through cross examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability.**

19. Keeping in mind the above stated position of law if we consider the facts of the instant case, we are of the opinion that the prosecution has failed to establish the foundational facts. As discussed above the testimony of the prosecutrix herself is found not trustworthy. Her

evidence is not corroborated by any other witness. In absence of any cogent and convincing evidence on record to establish the foundational facts of the case, the presumption laid down under section 29 of the POCSO Act can not be invoked.

20. In the net result of the foregoing discussion of evidence and reasons it is held that prosecution has failed to bring home the guilt of the accused. Therefore, the point for determination needs to be answered in negative. Accordingly, accused Rajesh Prasad is acquitted of the alleged offence under section 6 of the POCSO Act. He is set at liberty forthwith. His bail bond is extended for a period of six months in view of provision under section 437 A Cr. P.C.

21. Considering the facts of the instant case the matter is not referred to the District Legal Services Authority, Tinsukia for compensation under section 357 A of Cr.P.C. It is also not sent to the District Magistrate U/S 365 Cr.P.C. considering the facts of this case.

Given under my hand and seal of this court on this
10th day of May 2022.

(C.R. Saikia)
Addl. Sessions Judge cum
Special Judge POCSO
Tinsukia

APPENDIX**LIST OF PROSECUTION/DEFENCE/COURT WITNESSES****A. Prosecution**

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
PW1	Dr Sonali Chetia	Medical witness
PW2	Smti. Arati Pandey	Neighbouring witness
PW 3	Smti Nita Tanti	Neighbouring witness
PW 4	Smti Usha Sharma	Neighbouring witness
PW 5	Smti Deepa Kar	Neighbouring witness
PW 6	Miss X (Name withheld)	The victim
PW 7	Sri Sanjay Tanti	Neighbouring witness
PW 8	ASI Jayanta Borgohain	Police witness
PW 9	SI Chandan Das	Police witness

B. Defence Witnesses, if any: NIL

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
-	-	-
-	-	-

C. Court Witnesses, if any : NIL

RANK	NAME	NATURE OF EVIDENCE (EYE WITNESS, POLICE WITNESS, EXPERT WITNESS, MEDICAL WITNESS, PANCH WITNESS, OTHER WITNESS)
-	-	-
-	-	-

LIST OF PROSECUTION/DEFENCE/COURT EXHIBITS**A. Prosecution:**

Sr. No.	Exhibit Number	Description
1	Exhibit P-1	Medical Examination report
2	Exhibit P-2	Laboratory Report
3	Exhibit P-3	Radiological report with X-Ray Plates
4	Exhibit-4	Ejahaar
5	Exhibit-5	Victim Statement
6	Exhibit-6	Sketch Map
7	Exhibit- 7	Charge Sheet

B. Defence : NIL

Sr. No.	Exhibit Number	Description
-	-	-
-	-	-
-	-	-

C. Court Exhibits: NIL

Sr. No.	Exhibit Number	Description
-	-	-
-	-	-

D. Material Objects:

Sr. No.	Exhibit Number	Description
1	MO1	Birth Certificate

(C.R. Saikia)
Addl. Sessions Judge Cum
Special Judge POCSO
Tinsukia