

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE**

**::::UDALGURI**

**Present :Smti. N. Talukdar,  
Addl. Sessions Judge,  
Udalguri.**

**Special (POCSO) 33/2018**

**U/S 6 of POCSO Act**

**State of Assam**

**-Vs-**

**Til Bahadur Bista Chetry.....Accused person.**

For the Prosecution: Mr. R. Sarmah, Addl. Public Prosecutor.

For the Accused : Mr. Tarun Ch. Boro, Learned Advocate.

Date of Evidence : 17-11-18: 15-12-18: 15-02-19:  
12-04-19: 04-06-19.

Date of Argument : 19-08-2019.

Date of Judgment : 31-08-2019.

**J U D G M E N T**

1. The prosecution case in brief is that on 11-06-18, the victim girl who is aged about five years at that time went to the house of the accused for playing. When her mother went there in search of the victim she found the accused coming out from the kitchen of the house alongwith the victim girl in a suspicious manner. Later on, when the mother of the victim was bathing the victim, she noticed reddish spot on the private part of the victim. Since that day the victim complained pain on her lower abdomen and private part and also complained of burning sensation during urination.

Therefore, the parents of the victim suspected that the accused committed rape upon their daughter and finally on 16-06-18, the father of the victim lodged a written FIR with the Officer-in-Charge of Udalguri P.S.

2. On the basis of the FIR, Udalguri PS Case No. 127/18, under Section 6 of POCSO Act was registered and later on added Section 376(AB) IPC and after completion of investigation Police submitted charge-sheet under Section 376(AB) IPC R/W Section 6 of POCSO Act against the accused Til Bahadur Bista Chetry.
3. In consideration of the submission of the learned counsel for both the parties and materials on record and having found sufficient grounds for presuming that the accused person had committed offence under Section 6 of POCSO Act, learned Special Judge framed charge there under and the ingredients of charge under Section 6 of POCSO Act were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Thereafter, the learned Special Judge vide Order dated 04-06-19, transferred the case to this court for disposal.
4. The prosecution in order to prove its case examined the following 06(six) witnesses:
  - PW1- Dhan Bd. Kharka Chetry.
  - PW2- Parbati Devi.
  - PW3- Dr. Bhagirath Dey.
  - PW4- Dilip Bohora.
  - PW5- Tek Bahadur Chetry.
  - PW6- WSI Nalini Brahma.
5. The statement of the accused person had been recorded U/S 313 Cr.P.C. The defence plea was of total denial. Defence has declined to adduce evidence.

6. Situated thus, the points for determination in the instant case are set up as follows:-
- (I) Whether the accused committed aggravated penetrative sexual assault upon Victim-A, aged about 05 years?

**DISCUSSION, DECISION AND REASON FOR DECISION:**

7. I have heard learned Addl. PP Mr. R. Sarmah for the prosecution and learned defence counsel Mr. Tarun Ch. Boro.
8. Learned Addl. P.P. has argued that all the prosecution witnesses had adduced cogent, reliable and trustworthy evidence to bring home the charges against the accused. Though the prosecution has failed to examine the victim girl but PW2, the mother of the victim girl had seen the incident and deposed before the Court narrating the entire incident in a straight forward manner.
9. Per contra learned defence counsel has argued that prosecution has failed to examine the victim girl of the instant case which is fatal to the prosecution case. Learned defence counsel has further argued that PW2, the mother of the victim girl has exaggerated in her evidence. Her evidence is inconsistent with the contents of the FIR and is not corroborated by other prosecution witnesses including PW1, the informant and father of the victim girl. During her evidence PW2 has made material improvement in her evidence and as such her evidence is not at all reliable. Learned defence counsel also argued that the medical evidence has not revealed any injury on the private part of the victim. The victim was a minor aged about six to seven years. Had there been any incident of rape committed upon her definitely she would have received injuries in her private part. It is highly improbable that a girl of such a tender age who allegedly is a victim of an incident of rape did not receive any injuries in her private part. The learned defence counsel has argued that the other

prosecution witnesses have no direct knowledge about the incident. They were informed about the incident by the father of the victim girl.

10. Before appreciating the arguments put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsel, I would like to discuss the evidence adduced by the prosecution.
11. In this case on two occasions the victim girl has been produced before the Court by her mother but her evidence could not be recorded as she did not say a single word before the Court about the incident.
12. The father of the victim has been examined as PW1. He is also the informant of the case. In his evidence PW1 had deposed that at the time of occurrence his victim daughter was 5 years old. On 11.6.18 the accused Til Bahadur Bista Chetry committed rape on his minor daughter when she had gone to the house of the daughter of accused Til Bahadur Bista Chetry situated near his house. When the incident occurred he suspected commission of rape on his daughter by accused Til Bahadur Bista Chetry as when his wife went to the house of the accused to call his daughter back from their house the accused came out in a suspicious manner alongwith his daughter. When his wife took his victim daughter for bathing at that time she noticed reddish spot in her private part and accordingly informed him. Since that date his victim daughter started to complain that her lower abdomen was paining including her private part. In this regard PW1 lodged the FIR. Ext.1 is the FIR. PW1 put his thumb impression in the FIR. In cross-examination, PW1 had stated that he did not witness the incident of rape on his daughter by his own eyes. He lodged the FIR after 5 days of the incident on 16.6.18 as he could not decide as what action would taken by him. His victim daughter like as usual went to play in the house of the daughter of the accused Til bahadur Bista Chetry with other children. PW1 had denied the suggestion that he had lodge a false FIR with the accused out of enmity.

13. What has been transpired from the evidence of PW1 that he is not eye witness of the incident. He was reported about the incident by his wife.
  
14. PW2 is Parbati Devi, mother of the victim girl. In her evidence PW2 had deposed that her victim daughter was 5 years old when the occurrence took place in the year 2018. At the material time she was at her home. While her daughter was playing in the daughter's house of the accused Til Bahadur Bista alongwith other children at around 4 PM, she went to the house of accused to call her daughter and saw that the accused was committing rape on her minor daughter by lying her down on the ground. Out of shame she came out and on seeing her both the accused and her daughter came out from the kitchen. Then she asked her what she had done with the accused. When she had taken her daughter for bathing then the victim told her that the accused had committed rape on her three times and PW2 also found one grey hair in the private part of her daughter. On the next day of the incident her victim daughter told her that she was feeling pain on her abdomen and private part and they took her to doctor for examination at Mangaldai. Her daughter was examined by doctor in connection with this case. In cross-examination, PW2 had stated that at the time of commission of rape by the accused there were other children playing near the place of occurrence. There are other houses adjacent to the place of occurrence. PW2 had denied the suggestion that she had not stated before the police that when she had gone to call her daughter she saw the accused was committing rape on her in the kitchen of his daughter's house. At the time of incident two granddaughters of the accused were playing with her victim daughter. PW2 had denied the suggestion that at the time of the commission of rape the kitchen door was open and that she had falsely deposed against the accused. The accused is an old man like her father of about 70 years. PW2 had denied the suggestion that accused had not committed rape on her daughter and out of hatred and animosity she had falsely deposed against the accused.

15. On careful scrutiny of evidence of PW2 it is found that the evidence of PW2 is inconsistent with the contents of the FIR as well as with the evidence adduced by her husband. In her evidence she had made material improvement deposing that she had seen the accused committing rape on her minor daughter by lying her down on the ground. Moreover, the conduct of PW2 as deposed by her that when she had seen the incident, out of shame she came out from the kitchen is also not natural. It is not at all believable that a mother having seen her daughter being raped by a person would leave the place out of shame instead of offering help to her daughter and protest to the offender. Thus the evidence of PW2 is improbable and not inspiring confidence and as such no worthy of credence.

16. The prosecution case also does not get any corroboration from medical evidence. The Medical Officer Dr. Bhagirath Dey has been examined as PW3. In his evidence PW3 had deposed on examination of the victim he found the following:-

Physical examination:-

Height- 105 cm, weight- 18 Kg, teeth- 10+10, axillary hair- not grown, pubic hair- not grown, breast- not developed , hymen- none, vaginal injury- no, marks of violence- no, clothing.

Vaginal swab examination for spermatozoa:- no spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray for age determination:- 6-7 years.

- (1) Right wrist joint- not united
- (2) Right elbow joint- not united
- (3) Right iliac crest- not United

PW3 had further deposed that in his opinion:-

- (1) Vaginal swab negative for spermatozoa.

(2) No external sign of injury seen.

(3) Radiological age is between 6-7 years old.

Ext. 1 is the medical report. Ext. 1(1) is the signature of PW3.

In his cross-examination, PW3 had stated that he did not find any violent marks in the private parts of the victim.

It appears that the evidence of PW3 ruled out any incident of sexual violence causing injury to the victim.

17. Both PW4 and PW5, who are the independent witnesses of the case, do not have any personal knowledge about the incident. They had heard about the incident from the father of the victim. The evidence of PW4 Dilip Bohora is to the effect that on the date of occurrence, at around 1 PM, the informant Dhan Bd. Chetry came to his home and told him that the accused who is also close neighbor of informant committed rape on his daughter. Then he went along with informant to his house but he did not ask anything to the victim as regards to the incident. The informant lodged FIR before the police regarding the incident narrating about it. In cross-examination, PW4 had stated that he did not witness the incident nor had he asked the victim about the incident. Only the father of the victim told him that the accused committed rape on his daughter as he noticed reddish spot at her private parts. PW4 had denied the suggestion that accused had not committed rape on victim.

18. Similarly, PW5, Tek Bahadur Chetry had also deposed that on the next day of the incident in the mid day he came to know from the father of the victim about the incident. The father of the victim came to his home and told him that on the previous day at around 1:00-2:30 PM while his daughter was playing with other children in front of the house of Dhan Bahadur Chetry at that time accused Til Bahadur who was staying in Dhan Bahadur's house, who is his son-in-law, came out and induced the daughter of informant by offering her biscuits to come inside the house. When the mother of the victim girl did not find her for a long period she

came to the house of Dhan Bahadur and saw the accused and the victim coming out of the kitchen which was bolted from inside. Immediately mother of the victim charged the accused as what he was doing with the victim girl by bolting the door of the kitchen from inside. Then the accused Til Bahadur seeing the mother of the victim became speechless. Thereafter the mother took the victim daughter to her house and examining her body she found a grey hair. So she suspected that the accused had committed rape on victim. At the time of bathing of victim the mother of the victim also noticed stain of blood in her private parts. The victim also told before her on repeated query that accused committed rape on her three times. The informant also advised him as what course of action he would take as regards the matter. Then PW5 said that at first elderly persons of village including him would discuss the matter in the evening and thereafter they would suggest him the appropriate action. In the evening elderly person including himself being the VDP secretary discussed the matter and seeing the gravity of the incident they advised the informant to lodge an FIR before the police. Thereafter the informant lodged the FIR. In cross-examination, PW5 had stated that he had not witnessed the incident. He had narrated the incident as told to him by the father of the victim. When he found the victim at the house of informant she was in normal state. PW5 had denied the suggestion that he had deposed falsely before the court.

19. PW6 is WSI Nalini Brahma, Investigating Officer of the case. In her evidence PW6 had stated that during the course of investigation, she visited the place of occurrence, recorded the statements of the available witnesses U/S 161 Cr.P.C. including the informant, recorded the statement of the victim and she was sent for medical examination. The statement of the victim was got recorded before the Magistrate U/S 164 Cr.P.C. The accused was taken into custody and forwarded to the court. She prepared the sketch map of the place of occurrence. On completion of the investigation, she laid the charge-sheet against the accused Til Bahadur

Bist U/S 6 of the POCSO Act. Ext.2 is the FIR. Ext.2(1) is the signature of the then O/C, Narayan Patangia with the note of registration of the case. Ext.3 is the sketch map of the place of occurrence. Ext.3(1) is the signature of PW6. Ext.4 is the seizure list of birth certificate of the victim. Ext.5 is the charge-sheet. Ext.5(1) is the signature of PW6. In cross-examination, PW6 had stated that PW2, Smti. Parbati Devi had not stated before her that when she had gone to call her daughter she saw that the accused was committing rape on her daughter in the kitchen of the accused daughter's house.

20. On cumulative assessment of the evidence on record it appears that PW4 and PW5 are the witnesses to whom the informant, the father of the victim had reported about the incident. They do not have any knowledge about the incident except information received from PW1, the father of the victim. The medical evidence also does not reveal any injury on the person of the victim including her private part. Though as per the contents of the FIR and evidence of PW1 his wife noticed reddish spot in the private part of the victim but medical evidence do not support such statement in the FIR and the evidence of PW1. Moreover, PW2 the mother of the victim had also not deposed that she noticed reddish spot in the private part of her daughter. The victim is a minor girl aged about six to seven years old, therefore, I find force to the contention of learned defence counsel that it is highly improbable that a girl of such a tender age would receive no injury in her private part had she been a victim of incident of rape.

21. Moreover, as already discussed the evidence of PW1 has got no corroboration from his wife (PW2) who made material improvement in her version rendering her evidence unworthy of credence. The prosecution has also failed to examine the victim girl, who is the vital and material witness of the case.

22. In view of above discussion it appears that the prosecution has failed to establish the charge under Section 6 of POCSO Act against the accused person beyond all reasonable doubt.

23. Situated thus the point for determination is decided in the negative and against the prosecution.

**ORDER**

24. In the result, the accused Til Bahadur Bista Chetry is found not guilty under Section 6 of POCSO Act and acquitted of charge under Section 6 of POCSO Act and set with liberty forthwith.

25. Judgment is signed, delivered and pronounced in the open court today the 31<sup>st</sup> day of August, 2019.

**Dictated and Corrected**

**(N. Talukdar)**  
**Addl. Sessions Judge**  
**Udalguri**

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**Addl. Sessions Judge**  
**Udalguri**

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**Special (POCSO) 33/18**

**APPENDIX**

(A) Prosecution Exhibits :

Ext.-1: Medical report.

Ext.-2: FIR.

Ext.-3: Sketch map.

Ext.-4: Seizure list of birth certificate.

Ext.-5: Charge-sheet.

(B) Materials Exhibits : Nil.

(C) Defence Exhibits : Nil.

(D) Exhibits produced by witness: Nil.

(E) Court Exhibits : Nil

(F) Prosecution witnesses:

PW1- Dhan Bd. Kharka Chetry.

PW2- Parbati Devi.

PW3- Dr. Bhagirath Dey.

PW4- Dilip Bohora.

PW5- Tek Bahadur Chetry.

PW6- WSI Nalini Brahma.

(G) Defence witnesses : Nil.

(H) Court witnesses : Nil.

(N. Talukdar)  
Addl. Sessions Judge.  
Udalguri.