

**IN THE COURT OF SPECIAL JUDGE (F.T.C), LAKHIMPUR,
NORTH LAKHIMPUR.**

P R E S E N T

Sri P.C. Kalita, A.J.S.,
Special Judge (F.T.C.),
Lakhimpur, North Lakhimpur.

Special (POCSO) Case No.87/2018.
U/s-376 of IPC, R/w-Sec.6 of POCSO Act.

State of Assam
-Versus-
Sri Mohan Baruah, Accused.

A P P E A R A N C E

For the State : Mr. M.Gogoi, Ld. Special P.P.
For the Accused : Mr. M.C. Hazarika, Ld. Advocate.

Date of evidence : 07.09.2018, 12.09.2018, 25.09.2018,
27.09.2018, 16.11.2018, 14.12.2018 &
08.01.2019.
Argument heard on : 25.02.2019, 02.04.2019, 29.04.2019,
31.05.2019.
Judgment delivered on : **14.06.2019.**

J U D G M E N T

1. The prosecution case, inter-alia, in brief, is that on 05.06.2018, informant Smti Jyoti Baruah lodged an ejahar (Ext.1) alleging that on 03.06.2018 at about 8:00 p.m., the accused person namely Sri Mohan Baruah committed rape on her daughter i.e. the prosecutrix (aged about 8 years), inside his house by inducement, while her said daughter had gone to his (accused) house for study and the accused person asked her victim daughter not to disclose the said fact

to other giving money to her. On being watching the uneasy movement of her victim daughter, when she enquired the matter on suspicion, then her daughter told that the accused person had committed rape on her. on inquiry, she found the genital organ of her daughter swelling at that time having mark of sperm in her pent. Thereafter, on 04.06.2018 at about 6:00 p.m., on being asked, the accused person had confessed his guilt in presence of her husband.

2. On receipt of the ejahar, the O/C of North Lakhimpur P.S. registered a case vide N.L. P.S. Case No.601/2018 dtd. 05.06.2018, u/s- 376(A,B) of IPC, R/w- Sec.4 of POCSO Act and then the police conducted the investigation of the case and after completion of the investigation submitted charge-sheet u/s- 376(A,B) of IPC, R/w- Sec.4 of POCSO Act against the accused person Sri Mohan Baruah.

3. The case is received by this Court on transfer for disposal. On appearance of the accused person before this Court, copy is furnished to him. After hearing Ld. Advocates of both sides and perusing the materials on record, charge under section- 376 of IPC, R/w Sec.6 of POCSO Act are framed against the accused, the same are read over and explained to him to which he has pleaded not guilty.

4. During trial prosecution has examined as many as 9(nine) witnesses. After the closure of the prosecution witnesses, the accused person was examined under section 313 of the Cr. P.C. The pleas of the accused person are of total denial and he has declined to adduce any defence evidence.

5. **POINTS FOR DETERMINATION:**

i) Whether the accused person on or about 03.06.2018 at about 8:00 p.m. at village- Gosaibari, under North Lakhimpur P.S., committed rape on the prosecutrix (aged 6 years), daughter of informant Smti Jyoti Baruah inside his house, and thereby committed an offence punishable under section 376 of the IPC, as alleged?

ii) Whether the accused on or about the same date, time and place, after inducing, had committed aggravated penetrative sexual assault on the person of the prosecutrix inside his house, and thereby committed an offence punishable under section 6 of POCSO Act, as alleged ?

DISCUSSIONS, DECISION AND REASONS THEREOF:

6. I have carefully perused the evidence and the materials available in the case record. Heard arguments advanced by the Ld. Advocates of both sides. Now, let us examine the evidence on record to decide the case at hand.

7. PW.1, Smti Jyoti Baruah (informant- cum mother of the victim girl), stated that her victim daughter is now 9 years old. She knows the accused person, who is her paternal uncle. The occurrence took place about 3 months back. On the day of occurrence, at about 7:00 p.m., her victim daughter had gone to the house of accused person for study and she returned home at about 8:00 p.m. Her victim daughter could not walk normally and she (victim) was found restless at that time and even she could not sit on the chair or sofa. On being asked about such manner, her victim daughter did nothing and while her daughter was sleeping, she watched her (victim) private parts and found it reddish in colour. Next morning, on being asked, her victim daughter told her that the accused person had committed sexual intercourse on her by removing her wearing clothes as well as his (accused) own clothes. As the accused person had gagged her (victim) mouth, so she could not raise hue and cry. The accused person had committed such acts upon the victim girl on many earlier occasions by calling her near to his fishery. Her victim daughter did not divulge about the occurrence to them, because of showing threat by the accused person to her. The accused person used to give money to the victim girl sometimes. On 04.06.2018 she informed the matter to her husband,

who was staying at Itanagar at that time and on return of her husband, she lodged ejahar at the police station. Ext.1 is the ejahar lodged by her and Ext.1(1) is her signature thereon. The police recorded the statement of the victim girl and sent her to the Doctor and also to the Court for recording her statement. Ext.2 is her statement recorded u/s- 164 of Cr.P.C. and Ext.2(1) to 2(3) are her signatures thereon.

8. PW.2, the prosecutrix, stated that she knows the accused person, who is her grandfather. The informant is her mother. The occurrence took place many days back. one day, her mathematics teacher entrusted her with home works and failing to complete her math's she had approached her paternal aunt i.e. the daughter-in-law of the accused person at about 7:00 – 8:00 p.m. Thereafter, her said aunt sent her to the accused person saying that she was ill at that time. When she went to the house of her accused grandfather, instead of teaching mathematics to her, he (accused) committed rape on her. The accused person had removed her pent and also lifting up his Ganjee and Churiya laid himself over her body. When she wanted to raise hue and cry, then the accused person threatened her to throw into the water by putting her in a gunny bag. Her accused grandfather had kissed her on her neck and cheeks and thereafter, he penetrated his penis into her vagina. While she told the accused that she had felt pain, then the accused person told her that she would feel better afterwards. Some white substance had been laid upon her body, which had been removed by her accused grandfather. Next day, after informed her mother about the said incident, the accused person asked her as to why she had disclosed the matter to her mother, for which he had to go to the Jail. Next day, the accused person sought pardon before her mother by touching her mother's legs. Prior to the alleged occurrence, the accused person had also committed rape on her near the fishery situated on the

back side of his house. The police brought her to the Doctor and recorded her statement and also brought her before the Court for recording her statement. Ext.3 is her statement recorded u/s- 164 of Cr.P.C. and Ext.3(1) to 3(4) are her signatures thereon.

9. PW.3, Dr. Maichena Bailung (M/O), stated that on 29.04.2015, she was working as Medical & Health Officer at North Lakhimpur Civil Hospital and on that day, in reference to N.L.P.S. Case No.602, she medically examined the victim girl, daughter of Sri Durgeswar Baruah, resident of Gosanibari, under North Lakhimpur P.S., who was produced and identified by WPC/32- Smti Merimoni Chetia and on examination she found as follows:-

Relevant Medical history:- according to the victim girl, on 31st May, at about 7:00 to 8:00 p.m. she went to the house of Mohan Baruah of her same village. After some times, he raped her.

Findings of Medical examination:

- 1 Identification mark :- mode over left side of head.
- 2 Height & weight :- 3 ft. s1 inches.
- 3 General configuration : average.
- 4 Teeth : 24 Nos. in total.
- 5 Breast : not developed.
- 6 (i) Auxiliary hair : not grown
(ii) Pubic hair : not grown.
- 7 Private Parts:
 - i Vulva : developed, tenderness positive on both sides.
 - ii Vagina : developed, tenderness positive on both sides.
 - iii Hymen :
 - iv Uterus : not palpable.
- 8 Laboratory examination for spermatozoa detection: No spermatozoa seen (No.161 / 06.06.2018).
- 9 Ossification test for age determination: Epiphysis is not yet with the diaphysis in elbow and wrist joints.
- 10 External injury: No external injury seen.

Opinion: sign of rape present. The present age of the girl is below 8

years. Injury over private parts present.

Ext.4 is her medical report and Ext.4 (1) is her signature thereon.

10. PW.4, Smti Lukumoni Kakoti Baruah, stated that she knows the informant as well as the victim girl. Accused Mohan Baruah is her father-in-law. She has forgotten the date of occurrence. She came to know about the incident of rape after arresting her accused father in law by the police, but the police did not ask anything to her.

11. PW5 Sri Babul Baruah, stated that stated that he knows the informant as well as the victim girl. Accused Mohan Baruah is his own younger brother. He does not know anything about the alleged incident. On next morning, he heard that the police had taken the accused person. Mother of the victim girl told him that the accused person had committed something upon the victim girl. The informant, being his niece in law, did not disclose the entire incident before him.

12. PW6, Smti Kabita Baruah, stated that she knows both the parties. The occurrence took place about 3 months back. The informant told her that the accused person had committed rape on her victim daughter. Later on, the police arrested the accused person.

13. PW7, Sri Durgeswar Baruah (husband of informant), stated that the victim girl is his daughter. The accused person is his own paternal uncle. On the date of occurrence, i.e. 3.6.2018, his victim daughter had gone to the house of accused person for study. On that day, the wife of accused person was at his (PW7) house and he was at Itanagar. His wife informed him over telephone that the accused grandfather had committed rape on his victim daughter. As a result of aggravated sexual assault, the genital organ of the victim girl was swelling. On 4.6.2018 at night, he returned home and on that very day, he taking his victim daughter and his wife with him to the Nowboicha

O.P., lodged an ejahar there. Thereafter, the police got his victim daughter medically examined, recorded their statements and also got the statement of his victim daughter recorded through the Court.

14. PW8, Sri Dipankar Jyoti Borah, S/I of police (I/O), stated that on 05.06.2018, he was working as I/C at Nawboicha O.P. under North Lakhimpur P.S. and on that day, one Smti Jyoti Baruah lodged an ejahar at the Nowboicha O.P., which was received by him vide G.D. Entry No.66 dtd.05.06.2018 and forwarded the same to the North Lakhimpur P.S. for registering a case under proper section of law. Accordingly, the then O/C of N.L.P.S. registered a case vide N.L.P.S. Case No.601/18, u/s- 376 (A, B) of IPC, R/w- Sec. 4 of POCSO Act. Thereafter, the O/C of N.L.P.S., Sri Ghana Kt. Bhuyan entrusted Sri Phul Kr. Barmam, ASI of Nowboicha O.P. to conduct the preliminary investigation of the case. After completion of the preliminary investigation, the I/O, ASI- Phul Kumar Barman had handed over the Case Diary to him. On the basis of the materials collected by the I/O, he submitted the Charge-sheet u/s- 376 (A, B) of IPC, R/w Sec. 4 of POCSO Act against the accused person Sri Mohan Baruah. Ext.5 is the charge sheet submitted by him and Ext.5(1) is his signature thereon.

15. PW9, Sri Phul Kumar Barman, ASI of Police (another I/O), stated that on 5.6.2018, he was working as ASI at Nowboicha O.P. under North Lakhimpur P.S. On that day, at about 9:00 p.m. one Smti Jyoti Baruah lodged an ejahar alleging that her daughter i.e. the victim girl had been raped by her grandfather Mohan Baruah by inducement. On receipt of the ejahar, the I/C of Nowboicha O.P. forwarded the same to the North Lakhimpur P.S. for registering a case and accordingly, a case vide N.L.P.S. Case No.601/18, u/s- 376(AB) of IPC, R/w- sec.4 of POCSO Act was registered. Thereafter, the I/C of Nowboicha O.P., Sri Dipankar Jyoti Borah entrusted him to investigate into the case. During

investigation, he proceeded to the place of occurrence. Before going to the place of occurrence, he recorded the statements of the informant and witness Durgeswar Baruah, the victim girl at the police station. He arrested the accused person from the place of occurrence and forwarded him to the Court. He sent the victim girl for medical examination and afterwards collected report thereof. Thereafter, he again proceeded to the place of occurrence, prepared a sketch map of the place of occurrence and recorded statements of other witnesses. Ext.6 is the sketch map and Ext.6(1) is his signature thereon. On completion of his preliminary investigation, he handed over the Case Diary to the then In-charge of the O.P.

Appreciation of evidence:

(Offence u/s- 6 of POCSO Act)

16. Admittedly, the victim girl (PW2) and the accused person are grand-daughter and grand-father in relationship.

17. There is no eye witness to see the occurrence.

Delay in lodging the ejahar:

18. From the ejahar (Ext.1) lodged by Smti. Jyoti Baruah, mother of the victim (PW2), it is seen that the incident occurred on 3.6.2018 at about 8:00 p.m. and the F.I.R. was lodged on 5.6.2018, which was received at the police station on the same day i.e. 5.6.18 at about 9:00 a.m. and thereby 3 (three) days delay occurred in lodging the ejahar.

The informant Smti Jyoti Baruah, who is the mother of the victim, neither in her ejahar nor in her deposition before the Court as PW1 has explained the cause of 3 days delay in lodging the ejahar. So, such unexplained delay of three days in lodging the ejahar by the informant (mother of the victim), in the instant rape case, a serious

offence, upon the minor daughter (PW2) of the informant, who is aged about 8 years, in the facts and circumstances of the case, is fatal for the prosecution and creates doubt on the prosecution case.

19. The victim (PW2) is the prime witness in the present case, who was 8 years old at the time of incident i.e. 3.6.2018 and at the time of giving her evidence, during trial, recorded on 07.09.2018, she was studying in class III in a local school. She gave an account of the occurrence and the circumstances in which the accused committed the crime.

The first and foremost aspect which deserves attention is about the version of the prosecutrix (PW2), who is a child witness, as regards to the commission of the alleged offence.

PW2 (victim), in her deposition stated that on the day of occurrence, at about 7:00 – 8:00 p.m., when she had gone to the house of her paternal aunt (daughter-in-law of accused) to learn mathematics, her accused grandfather by removing her pant, lifting up his Ganjee and Churiya, climbing himself over her body and also kissing on her neck and cheeks, penetrated his penis into her vagina and some white substance had been laid upon her body, which had been removed by the accused person. When she wanted to raise hue and cry, then the accused person threatened her to throw into the water by putting her in a gunny bag. Her further deposition is that prior to the alleged occurrence, the accused person had also committed rape on her near the fishery situated on the back side of his house.

This witness, during cross, stated that after 7 days of this incident she told about the incident to her mother. One day, Jugal Baruah, son of accused, pulled her mother by holding the hair, after being assaulted.

20. In her statement recorded u/s- 164 of Cr.P.C. dtd. 06.06.18,

the victim girl (PW2), inter- alia, stated that her accused grandfather committed bad acts upon her near the pond under tree for 3 times. The accused threatened her not to disclose the matter to her parents with dire consequences, and as such she did not disclose it to them. Accused laid her down and by removing her wearing apparel, and with spitting in his penis, committed bad acts upon her, as a result, some white colour substance like 'milk' 'milk' came out from the sexual organ of the accused person. She sustained severe pain, was unable to sit and told her mother about the incident.

21. On a close scrutiny of the aforesaid statements made by the victim (PW2), it is seen that the allegation of penetrative sexual assault upon her by her accused grandfather, when she went to learn mathematics to her parental aunt i.e daughter-in-law of the accused, also prior to this incident committing of such act upon her by the accused near the fishery on the back side of the house of the accused person, narrating about the incident to her mother, all these material facts had not been stated by the victim (PW2) in her statement recorded u/s- 164 of Cr.P.C. dtd. 6.6.2018 vide Ext.3, immediately after the occurrence, just after three days of the incident i.e. on 3.6.2018. The victim (PW2) has also failed to state specifically the exact date or dates on which and the exact places i.e. in the house of the accused the alleged offence of sexual assault was committed upon her by the accused person.

In this regard, the I/O (PW9) in cross stated that he has mentioned in the sketch map (Ext.6) the places where the accused person had committed bad acts upon the victim. He admitted that he has not mentioned specifically the numbers of the rooms of the house of accused person and particularly in which room the alleged incident had taken place.

22. The sketch map (Ext.6) prepared by the I/O (PW9) shows that the place of occurrence is the house of accused Mohan Baruah, indicating 'C' in the index as the place of occurrence, but there is no description of the numbers of rooms in the house of the accused and in which room the alleged rape was committed.

The specific date and place of occurrence is the basic requirement in a criminal case, which have not been ascertained here in the present case by the prosecution.

23. Thus, it is seen that the victim (PW2) has made different statements at different points of time regarding her allegation of commission of penetrative sexual assault upon her by the accused person. So, her (victim) evidence is not found to be trustworthy and reliable.

24. PW3, Dr. Maichena Bailung, medical officer (M/O), opined that the victim girl (PW2) was below 8 years. Sign of rape and injury over her private parts present. On examination, she (M/O) found vulva - developed, tenderness positive on both sides; Vagina- developed, tenderness positive on both sides; Hymen - uterus- not palpable. She (M/O) also found no spermatozoa and no any external injury at the time of her medical examination.

In cross, the M/O (PW3) stated that he has not specifically mentioned whether the alleged rape was recent or old, there is no any specific description regarding the injury on the private parts of the victim and he has not mentioned that the said injury is old or recent.

The medical opinion given by the Doctor (PW3), as aforementioned, does not disclose any physical facts regarding in Column No.7(iii), hymen- there is no any finding. M.O found no spermatozoa and no any injury over her (victim) private parts.

So, the opinion of the Doctor in regard to presence of sign of rape on the victim, cannot be relied upon.

On the other hand, as per the medical history noted down by the M/O, the incident of rape occurred on 31st May, 2018 at about 7:00 – 8:00 p.m., whereas, as per the ejahar (Ext.1), the incident occurred on 3.6.2018.

In such a situation, it is difficult to hold as to on which date the occurrence of penetrative sexual assault, aforesaid, on the victim occurred.

25. According to the victim girl (PW2) and her mother (PW1), the victim girl sustained swelling injury on her private parts, but the medical officer (M.O) did not find any swelling, not even any kind of injury, upon the private parts of the victim. Thus, the ocular evidence of PW1 (mother of the victim) and PW2 (victim) and medical evidence of the Doctor (PW3) are found inconsistent.

26. PW1 (informant- cum mother of the victim), a hearsay witness, stated that on the day of occurrence, on being asked about her (victim) unnatural manner, she said nothing, but at night, after watching her (victim) private parts, she found it reddish in colour. Next morning, on being asked, her victim daughter told her about the alleged occurrence, whereas, the victim (PW2), in her chief, stated that next day of the occurrence, she told her mother about the incident. In cross, she (victim) admitted that she told about the incident to her mother after 7(seven) days of the incident. Thus, it is seen that PW1 (informant) and PW2 (victim) made contradictory statements to each other on this material aspect. So, the evidence of PW1 cannot be relied upon.

27. PW4 (daughter-in-law of the accused), PW5 (elder brother

of the accused) and PW6 (sister-in-law of informant i.e. wife of informant's dear), all are hearsay witnesses and they do not support at all the prosecution case.

28. Sri Durgeswar Baruah (PW7) is the father of the victim girl, who was at Arunachal Pradesh on the day of incident, heard about the occurrence from his wife (PW1). On 04.06.2018 at night he came back home and on the same day he went to Nawboicha O.P along with his wife (PW1) and his victim daughter(PW2), and his wife lodged an ejahar at the O.P., whereas the ejahar (Ext.1) shows that the FIR was lodged on 05.06.2018. During cross, PW7 stated that he does not know personally about the incident. He did not ask his victim daughter about the alleged incident. So, his testimony is not found believable.

29. The I/O (PW9), in cross, has confirmed that PW1, Smti Jyoti Saikia Baruah did not state before him that the accused person gagged the mouth of her victim daughter at the time of committing the occurrence and threatened the victim to throw into the fishery if the victim disclosed the matter to others;

that PW2, the victim, did not state before him that the occurrence took place many days back; one day, her mathematics teacher entrusted her with home works and failing to complete her math's she had approached her paternal aunt i.e. the daughter-in-law of the accused person at about 7:00 – 8:00 p.m. and her said aunt sent her to the accused person saying that she was ill at that time; when she went to the house of her accused grandfather, instead of teaching mathematics to her, he (accused) committed bad acts upon her; her accused grandfather had removed her pent, by lifting up his Ganjee and Churiya, climbing himself over her body and when she wanted to raise hue and cry, then the accused person threatened her to throw into the water by putting her in a gunny bag; her accused grandfather had kissed

on her neck and cheeks and thereafter, he penetrated his penis into her vagina; while she told the accused that she had felt pain, then the accused person told her that she would feel better afterwards; some white substance had been laid upon her body, which had been removed by her accused grandfather; next day, after informing her mother about the said incident, the accused person asked her as to why she had disclosed the matter to her mother, for which he had to go to the Jail; next day, the accused person sought pardon before her mother by touching her mother's legs; prior to the alleged occurrence, the accused person had also committed bad acts on her near the fishery situated on the back side of accused's house;

and that PW7, Durgeswar Baruah also did not state before him that on 3.6.2018, his wife told him that in the evening time, her daughter had gone to the daughter-in-law of the accused person for study; that his wife told him that the accused person touching her private parts, committed forceful sexual intercourse with her daughter; private parts of her victim daughter had been swollen; he had gone to Nowboicha O.P. taking his victim daughter with him and his victim daughter was medically examined.

30. The omission to state these material facts by three PWs before the I/O (PW9), who recorded their statements u/s- 161 of Cr.P.C. immediately after the occurrence, amounts to contradiction, which makes the prosecution case doubtful.

31. Besides, the evidence on record shows that there was previous enmity between the parties regarding purchasing of land by the accused person from one Jiten (elder brother of informant's husband), measuring 3 kathas, 4 lochas of land.

So, out of grudge, the filing of this case by the informant (PW1) against the accused cannot be ruled out.

(Offence u/s- 376 of IPC).

32. It has already been stated that the victim (PW2) is a minor, aged about 8 years. Her deposition is that the accused person committed rape on her.

As discussed hereinabove, the allegation of the victim (PW2) regarding the commission of rape on her by the accused person has not been established.

33. In view of the above discussions and considering all aspects, I hold that the prosecution has failed to prove the case u/s-376 of IPC, R/w- Sec. 6 of POCSO Act against the accused person beyond all reasonable doubts. Hence, I acquit the accused person from the said offences.

34. The accused person is set at liberty forthwith and his bail bond shall remain in force for another 6(six) months from today.

35. The case is disposed of accordingly.

Given under my hand and seal of this Court on this 14th day of June, 2019.

(P.C. Kalita)
Special Judge (FTC),
Lakhimpur, North Lakhimpur.

Dictated & Corrected by me:

(P.C. Kalita)
Special Judge (FTC),

Lakhimpur, North Lakhimpur.

Transcribed & typed by me:
Sri D. Chetia, (Steno)

APPENDIX:

Prosecution witnesses:

PW.1, Smti Jyoti Baruah
PW.2, the prosecutrix
PW.3, Dr. Maichena Bailung
PW.4, Smti Lukumoni Kakoti Baruah
PW5 Sri Babul Baruah
PW6, Smti Kabita Baruah
PW7, Sri Durgeswar Baruah
PW8, Sri Dipankar Jyoti Borah,
PW9, Sri Phul Kumar Barman

Prosecution exhibits:

Ext.1 - ejahar
Ext.2 - statement recorded u/s- 164 of Cr.P.C.
Ext.3 - statement recorded u/s- 164 of Cr.P.C.
Ext.4 - medical report
Ext.5 - charge sheet
Ext.6 - sketch map

Defence witnesses:

Nil.

Defence exhibits:

Nil

(P.C. Kalita)
Special Judge (F.T.C),
Lakhimpur, North Lakhimpur.