IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR

SPECIAL POCSO CASE NO. 66 of 2017

Under section 18 of POCSO Act.
(Missamari PS Case No. **116 of 2018**)

State of Assam

-Vs-

Sri Prakash Kurmi ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Smti Dulumoni Sinha, Legal Aid

counsel.

Date of Argument : **16-07-2019.**

Date of Judgment : **30-07-2019.**

JUDGMENT

- The genesis of the present case is sexual assault on a seven years old girl (herein after called as "the victim"). It is alleged that on 13-07-2018 at around 5.30 p.m., in absence of other family members, the accused Prakash Kurmi, who is the uncle of the victim, forcefully committed rape on the child.
- 2. Investigation was initiated on a telephonic information from one Suresh Tanti that one Prakash Kurmi committed rape on the victim girl, aged about 7 years, on which Belsiri Police Out Post GDE No. 183 dated 13-07-2018 was made. On receipt of the verbal information, I/C Paban Kr. Sut along with

staff visited the place of occurrence, recorded the statement of the victim and other witnesses, drew the sketch map (Ext. 4) of the place of occurrence and arrested the accused. On the next day i.e., on 14.07.18 on receipt of the FIR (Ext.1) from the informant (PW 2), the Officer-in-charge of Missamari PS registered the case being Missamari P.S. Case No. 116/18 u/s 4 of POCSO Act and himself investigated the case. In course of investigation, the Investigating Officer (PW 9) recorded the statement of witnesses and on completion of investigation having found materials, laid chargesheet against the accused Prakash Kurmi u/s 18 of POCSO Act.

- **3.** On appearance of the accused person before this Court, after furnishing necessary copies as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge u/s 18 of POCSO Act against the accused Prakash Kurmi and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- 4. To substantiate the case, prosecution examined as many as ten witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and stated that he used to call the victim's father as dada who keeping their daughter (victim) in his house went to Delhi to do work. During that period as the girl used to go here and there, hence he abused her and on the relevant day finding her in another's house, he brought her home, got her bathed and asked her to sleep with his two sons but then the villagers suspecting that he did something with her, lodged the case falsely against him.
- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.

- **6.** The point for decision in this case is that -
 - (1) Whether the accused Sri Prakash Kurmi on 13-07-2018 at around 5.30 p.m. at Majengjuli under Missamari Police Station attempted to commit any offence punishable under the POCSO Act or to cause such an offence to be committed and in such attempt, does any act towards the commission of the offence, on the victim Miss "X", a minor girl aged about 7 years, and thereby committed an offence punishable under section 18 of POCSO Act?

Reasons, Decisions and reason for decision.

- **7.** Mr. M. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of sexual assault on a minor girl. He further submitted that the evidence of the witnesses of alleged sexual assault is enough to convict the accused person.
- **8.** Controverting the said argument, Smti Dulumoni Sinha, the learned legal Aid counsel appearing for the accused, submitted that the evidence available on record coupled with the evidence of the victim, does not warrant conviction of the accused person.
- **9.** In the case, the victim claimed her age as 8 years at the time of incident. The evidence of the witnesses also disclosed that the victim was less than 10 years old at that time and the medical evidence also shows her age as 7-9 years. Age of the victim is not disputed in the case. In the above it can be safely held that the victim was below the age of 12 years and a child as defined in section 2(d) of POCSO Act.
- **10.** Now the question is whether accused Prakash Kurmi committed any offence on the victim child. In this regard let me travel through the evidence adduced by the prosecution side.

- 11. PW 1 Sri Sumit Kullu, in his evidence, deposed that after the incident, the victim who is less than 10 years, reported them that accused Prakash Kurmi by opening her panty committed her rape. Hearing the incident, they informed police. He stated that they met the accused in his house in inebriated condition. According to him taking advantage of absence of other family members the accused committed the misdeed on the victim girl. During cross he stated that his house is just adjacent to the house of the accused. Near the house of accused Prakash Kurmi, there are many houses. He further stated that before his arrival at the place of occurrence, Manglu, Dan, Suresh Tant and 2/3 others reached there. He denied the suggestion that the fact of reporting the incident by the victim was not stated before police during investigation.
- PW 2, Salmi Topno, in her evidence, stated that on the day of 12. incident, at around 5.30 p.m. in absence of other family members, accused opened the panty of the victim and kissed her. At that time one Felesita came to the house of the accused and seeing the incident raised hulla. Hearing hulla, she at first rushed to the place of occurrence and saw the accused and the victim. Then on enquiry, the victim told that accused opened her panty and kissed her. Then she reported the matter to the VDP secretary over telephone who accordingly came and on being asked the victim, she narrated the incident in her presence. Thereafter, local people gathered and called police. She further stated that due to parents death the victim girl used to reside in the house of the accused. Regrading the incident, as member of the VDP she filed the FIR vide Ext. 1. During cross, she stated that at the time of incident, the inmates of neighbouring houses were present except Anjana. She stated that the accused's family consists of his wife and children and at the time of incident, the accused's wife went out for work but their children were at home. She had not seen the incident. She denied the suggestion that the fact of reporting by the victim that accused opened her panty and kissed her was not stated before the police. She also denied the suggestion that the fact of arriving of Felesita in the house of the accused and witnessing the incident were not stated before the police. According to him, victim still resides in the house of the accused.

- 13. PW 3, the wife of the accused, deposed that their niece the victim used to reside with them since last 2/3 months prior to the incident and on the day when she returned home, police took her husband and the victim to the police station. Then, on being enquired the victim told her that accused attempted to kiss her but on arrival of one Felesita, he could do nothing. During cross, she stated that the parents of the victim used to keep their daughter in her house when they went outside for work and in those period sometimes, the accused changed her clothes and also got bathed her. According to her, accused always treated the victim as his own child and fed her meal personally but the victim never complained her against the accused.
- 14. PW 4 Felesita Egress, a girl of 8 years, deposed that on the day when she went to the house of the accused to bring pumpkin, she saw the victim crying outside the house. The victim told her that the accused kissed her which she did not expect from her uncle (accused). According to this witness, victim also told her that the accused attempted to commit "publa" means rape. Then she along with the victim went to the house of PW 2 and reported the incident. During cross, she stated that she did not know the meaning of "publa" and on that day for the first time she went to the house of the accused.
- **15.** PW 5 is the victim herself. She deposed that on the day when she was in the house of the accused the accused kissed her on her cheek when his wife was not at home. At that time her uncle was in drunken state. Thereafter, Felesita came there and she informed the matter to Felesita and also narrated the matter to PW 2. She made statement before the Magistrate in presence of accused's wife and presently she is residing with the wife of the accused.

During cross she admitted that accused and his wife treated her as their own daughter and they provided her meal and clothes as their children. She also admitted that on earlier occasions also her uncle (accused) kissed her, opened her pant like other days and got bathed her. She further stated that on the day of incident as the accused rebuked her hence she was crying, but she could not say why PW 2 filed the case.

- **16.** PW 6 Miss J. Gogoi, the learned Judicial Magistrate, 1st class, Tezpur recorded the statement of the victim us/ 164 Cr.P.C vide Ext. 2. PW 7 Sri Suresh Tanti only heard that accused Prakash Kurmi committed rape on his adopted daughter when she was 7/8 years old.
- 17. PW 9 Sri Paban Kr. Sut, the Investigating Officer, deposed that on 13-07-2018 on receiving a telephonic information from Suresh Tanti that accused Prakash Kurmi committed rape on a young girl of 7 years at village Mejengjuli, he made the Belsiri OP GDE NO. 183 dated 13-07-2018 and along with staff went to the place of occurrence. There he heard that accused fled away after committing the incident. He drew the sketch map of the place of occurrence vide Ext. 4 and proved the extract copy of GDE No. 183 dated 13-07-2018 as Ext.5 . He recorded the statement of the victim and other witnesses, sent the victim to TMCH for medical examination and arrested the accused. During cross, he stated that he did not seize any wearing apparel of the victim or the accused.
- **18.** PW 9 SI Kanak Hazarika, deposed that on being endrosed him to investigate the case after filing the FIR, he recorded the statement of witnesses, collected the medical report and finding sufficient materials submitted chargesheet against the accused u/s 18 of POCSO Act.
- **19.** PW 10 Dr. Geetumoni Sonowal, the Medical Officer, deposed that on 16-07-2018 she examined the victim in connection with Missamari PS Case No. 116/18 who gave the history of sexual assault on 13-07-2018 and on examination, found hymen intact but found no evidence of recent sexual intercourse or violence mark on her person and victim is above 7 years and below 9 years of age. She proved the medical report as Ext.7.
- **20.** In the case the evidence of the Pws reveal that the accused is the uncle of the victim and the alleged incident occurred when her parents keeping her in the house of the accused went outside for work. Lateron after the death of her parents she used to reside in the house of the accused and still is residing there. Victim's evidence shows that on the day of the incident when PW3 her aunty the wife of the accused was not at home, the accused who was in

drunken state, kissed on her cheek. Then Felesita (PW4) came and she informed the incident to Felesita. During cross examination she clearly stated that the accused and his wife treated her as their own daughter and on earliar occassions also the accused kissed her and got bather her. She further stated that on the day of the incident, the accused opened her pant like other days. PW4 the minor girl aged about 8 years who was reported first by the victim testified that on the day when she went to the house of the accused to bring pumpkin, found the victim crying outside of the house and she reported her that the accused kissed her and attempt to commit her publa. Though this child witness clarified the meaning of publa as rape, but it is difficult ot believe that a child of 8 years would know what is rape and in cross she also admitted that she did not know the meaning of 'publa'. Moreover the material particular that the victim told her that the accused attempted to commit her rape was not stated before the investigating officer. On the other hand, the victim does not disclose any act towards attempt of rape. Rather regarding the reason of cry the victim stated that on the day for scolding by the accused, she cried. The evidence of PW4 and PW5 also shows that after PW4 came to the house of the accused, they went to the house of PW2 Salmi Topno where the victim narrated her about the incident. But PW2's evidence is that hearing hulla she reached to the place of occurrence and seeing the accused and the victim, when she enquired, the victim told that the accused opened her pant and kissed her and at that time PW4 Felesita came and seeing the incident raised hulla. But PW4 herself nowhere claimed that she witnessed the incident. The investigating officer confirmed the fact of reporting PW2 by the victim that the accused opened her pant and kissed her was not stated by PW2 in her statement u/s 161 Cr.PC made immediately after the incident. PW2's evidence also disclosed that at the time of the incident the children of the accused were present at home and since the day, the victim stayed in his house, he treated her like his own daughter. Though PW1 stated that the victim told them that the accused by opening her panty committed her rape but the victim herself did not corroborate his version.

The unimpeachable evidence of the child and PW4 and PW3 who were reported first by the victim shows that on the day in absence of the wife, the

accused kissed the victim and opening her panty got bathed her. The evidence of the victim clearly indicates that the accused and his wife treated the victim who stayed in his house as their own child and the accused on the day of occurrence also he kissed her and opening her panty got bathed her as did other days. Accused's wife PW3 also corroborated that sometimes the accused changed the cloth of the victim who is his elder brother's daughter and helped her in bathing and even sometimes fed the child like his own children. The evidence of the victim shows nothing abnormal in bathing her by her own paternal uncle. The accused who was affectionate towards the victim being his niece, out of love might have kissed and get bathed her who is only 7 years old. The victim herself stated that she did not know why PW2 filed the case. The acts of the accused shows no any bad intention. The evidence of the witnesses recorded by the prosecution particularly the evidence of the victim does not reveal that the accused attempted to cause of any sexual offence under POCSO Act and as such the accused could not be held guilty for the alleged offence u/s 18 of POCSO Act. Hence, accused Prakash Kurmi is acquitted on benefit of doubt. The accused is in hajot. Be set him at liberty forthwith if not warranted in any other case.

21. Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **30**th **day of July, 2019.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Prosecution witnesses.

PW 1 : Sumit Kullu.
 PW 2 : Salmi Topno.
 PW 3 : Aunty of the victim.
 PW 4 : Felesita Egress.
 PW 5 : The victim.

6. PW 6 : Juhi Gogoi, Ld. Magistrate.

7. PW 7 : Suresh Tanti.

8. PW 8 : Paban Kumar Sut, I.O.9. PW 9 : SI Kanak Hazarika, I.O.10.PW 10 : Dr. Geetumoni Sonowal, M.O.

Exhibits.

Ext. 1 : FIR

Ext. 2 : 164 Cr.P.C. statement of the victim.

Ext. 3 : Order passed by Ld. Judicial Magistrate,

1st Class, Tezpur.

Ext. 4 : sketch map

Ext. 5 : Case Diary.

Ext. 6 : Chargesheet.

Ext. 7 : Medical Report.

(I.Barman) Special Judge, SONITPUR: TEZPUR