CAUSE TITLE POCSO Case No. 9/17

Informant: 'Y'.

Accused: Sri Samiran Mithu Das @ Mithu Das,

S/o- Late Gopal Chandra Das,

R/o- Chabua 'A' Ward,

PS- Chabua,

District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor. For the Defence: Mr. UK Saha, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 9/17 G.R. Case No. 240/17

> > State of Assam

-Vs-

Sri Samiran Mithu Das @ Mithu Das

Charges: Under Sections 11(i)(iv) POCSO Act.

Date of evidence on : 12-07-17, 13-07-17, 18-04-18, 08-10-18 and 27-05-19.

Date of argument : 10-06-19. Date of Judgment : 24-06-19.

<u>JUDGMENT</u>

- 1) The prosecution case in a narrow compass is that Sri Samiran Mithu Das @ Mithu Das recently constructed a hut near the informant's house. He has been indulging in anti social activities around the area. He utters obscene words without hesitation and ogles at the informant's daughter and displays obscene gestures. On 16-01-17, 'Y's daughter informed her that when she paces around the terrace of the building, the accused utters obscene words and displays obscene gestures. He also displayed his private parts, to the annoyance of the victim. The victim say 'X' was so terrified that she could not sleep the entire night and was very restless. On 17-01-17, the informant 'Y' lodged an ejahar with the police. 'Y' is 'X's mother. The ejahar was registered as Chabua PS Case No. 17/17 under Section 11(i) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short) and SI Tapan Das was endorsed with the investigation.
- 2) The investigating officer (IO for short) embarked upon the investigation. He

went to the place of occurrence, prepared the Sketch-Map and recorded the statements of the witnesses. He forwarded the victim for medical examination, but the victim refused medical examination. The IO also forwarded the victim to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (CrPC for short). On finding prima facie materials, he submitted Charge-Sheet against the accused under Section 11(i) POCSO Act.

- 3) On appearance of the accused person, copies were furnished and a formal charge under Section 11(i)(iv)/12 POCSO Act was framed, read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced the evidence of six witnesses including the IO, and exhibited several documents. To refute the charges, the defence cross-examined the witnesses in extenso. On the inculpatory circumstances arising against him, the tone and tenor of the accused while answering questions under Section 313(1)(b) CrPC depicts a plea of total denial. The accused answered that the victim is not known to him. He never saw her. His house is surrounded by vegetation and foliage and it is not possible that he will be visible from the terrace of the informant's house.

Submissions:

5) The learned Public Prosecutor Smt. Runumi Devi and the learned Additional Public Prosecutor Mrs. Sahnaz Akhtar laid stress in their arguments that there is clinching evidence against the accused person and he deserves stringent punishment for his act of disturbing the psyche of the victim. On the other hand, the learned defence counsel Mr. UK Saha laid stress in his argument

that this case is replete with contradictions. The date mentioned in the FIR is not similar to the time explained by the victim. The place of occurrence is $1/4^{th}$ kilometer away from the victim's house and there are other houses between the place of occurrence and the victim's house. There are trees, vegetation and foliage obstructing the view's house from the victim to the accused person's house. The boundary wall is also an obstruction of view from the victim's house to the place of occurrence. There is an acrimonious relationship between the accused and the victim's father and this was affirmed by PWs-1, 2 and the IO. The accused was also accompanied by other miscreants who were not incriminated. There is addition and development in the evidence, when the victim stated that the accused also harassed her when she used to proceed for tuition. The age was also not ascertained by the prosecution

Points for determination:

- 6) On the backdrop of the rival contentions, proponed at the bar, the following points are apposite for proper adjudication of this case:
 - i. Whether the accused displayed obscene gestures and exhibited his private parts and other body parts to the victim 'X' with sexual intent?
 - ii. Whether the accused repeatedly or constantly stalked the victim 'X' and followed her and watched her?

Decision thereon and the reasons for the decision:

- 7) To decide this case it its proper perspective, it is necessary to delve into the evidence.
- 8) The victim 'X' testified as PW-1 that the accused is her neighbour, as his land is situated near her house. She informed her mother about the incident on

16-01-17. The incident took place earlier than on 16-01-17. The accused constructed a hut over his plot of land which is near to their house. He used to consume alchohol in the hut along with his friends. The incident occurred during winter and as it was winter, she went to the terrace to study under the sun. She noticed the accused from her terrace and the accused winked at her and unzipped his trouser and displayed his penis. Whenever she used to go for tuitions, he used to wink at her and smile at her. Whenever they used to cross paths, the accused used to wink and smile at her and he used to wave his bottle containing alchohol whenever she used to return home from her tuitions. Whenever she used to go to her school, crossing his house, he used to show obscene signs and wink at her. When the accused displayed his penis by unzipping his pant, she informed her mother about the incident on 16-01-17, because she was terrified by his act. Her mother informed her father about the incident and her mother lodged an ejahar with the police. She went to the police station along with her mother. The police took her to the Assam Medical College & Hospital at Dibrugarh for medical examination and also forwarded hr to the Magistrate who recorded her statement Ext. 1 wherein Ext. 1(1) and Ext. 1(2) are her signatures.

9) In her cross-examination, she testified that her father does not stay with them and she resides with her mother at the 1st floor and some tenants reside on the ground floor. Their house is an RCC building. There is one house between the accused person's house and their house. She went to the terrace on 15-01-17 and she has given evidence about the incident which occurred on 15-01-17. The hut which belongs to the accused person, is covered by a boundary wall and she has not noticed how many people were there, but she was certain that the accused was present. The boundary wall

is more than 5 feet and if she stood by the boundary wall, the wall is taller than her. There are trees and foliage around the accused person's compound, but she did not know what kind of trees of these trees were. When she went to the terrace on the day of incident, she was reading a book and the accused did not call her by her name. She has noticed the boundary wall in the compound. She commutes for her tuition classes through the main road. She goes for her tuition classes at 6:00 am and most of the shops are closed at that time, except a paan shop. Her father is not in talking terms with the accused. She did not know if the accused person is a married man with children.

- 10) It is pertinent to mention at this juncture that despite the cross-examination of the victim, the learned defence counsel failed to elicit any contradiction. Her statement under Section 161 CrPC is held to be consistent to her testimony in the Court. The argument of the learned defence counsel that the date of incident as mentioned by the victim, is not similar to the date of the incident mentioned in the FIR, has no leg to stand. It is clear that the FIR was lodged on 17-01-17 and the victim's father was informed about the incident on 16-01-17. The victim informed her mother about the incident on the following day, because she was terrified on the day when the incident occurred. Thus, it is as clear as crystal from the evidence of the victim that the incident occurred on 15-01-17 when the accused displayed obscene acts by unzipping his trousers and revealing his penis to the annoyance of the victim.
- 11) The victim's mother 'Y' testified as PW-4 that the accused is her neighbour.

 Her daughter is about 16 years, at present. The incident occurred on 16-01-17. When her daughter used to commute to her school, her daughter

used to notice the accused near the paan shop. The accused use to wink at her whenever she used to cross him near the paan shop. While her daughter used to go to the terrace, the accused used to unzip his trouser and exhibit his private part and also displays alchohol bottle to her daughter. Her daughter informed her about the incident and the accused person's activities. She informed her husband about the accused person's activities over phone. The incident occurred on 16-01-17 and her daughter informed the accused person's activities on 16-01-17 and when her husband returned home, she informed him about the accused person's activities of winking at her daughter and exhibiting his private part and alchohol bottle. She lodged an ejahar on 17-01-17 at Chabua Police Station. Ext. 2 is the FIR and Ext. 2(1) is her signature. Her daughter also accompanied her to the police station. The police recorded her statement. Her daughter was forwarded to the Assam Medical College & Hospital at Dibrugarh for medical examination, but as she did not have any physical injury, she did not allow her daughter to be examined.

12) Thus, it is clear that the evidence of PW-4 corroborates the evidence of PW-1. There is a difference of a day regarding the date of the incident which can be safely brushed aside. It is not possible for human mind to specifically recall the exact date and time of the incident which occurred more than a year ago. Rather, perfect corroboration depicts that the witnesses are tutored. Her daughter has already clarified that on the same day, she did not inform her mother about the incident. It is also in the FIR Ext. 2 that PW-1 was restless throughout the night and on the next day, 'Y' was informed by PW-1 about the incident. No contradiction could be elicited through the cross-examination of the witnesses. It is true that 'Y' did not mention in the FIR regarding the

accused person winking at her daughter while her daughter crossed the paan chop. The cross-examination of 'Y' reveals that there are two houses between her house and the accused person's house. They have a terrace and they also have a boundary wall and thee is vegetation near her house. She denied the suggestion that the accused person's premises are not visible from her terrace due to the thick vegetation around her house. Other people also visits the accused person.

- 13) I would like to reiterate the remaining part of the cross-examination which is similar to the cross-examination of her daughter. I would like to emphasize that no contradiction could be elicited through the cross-examination of PWs-1 and 4. It is thereby held that the statements of PWs-1 and 4 under Section 161CrPC are consistent to their testimonies in the Court. It has been proved beyond a reasonable doubt that the accused person uttered obscene words and displayed his penis to the victim by unzipping his pant.
- 14) The learned defence counsel laid stress in his argument that PW-4 did not mention the date of the incident.
- 15) This is not an incident of one day. It is true that the victim testified that the incident occurred on 15-01-17, but the accused has been continuously harassing the victim. The victim has been disturbed by the accused person's overtures.
- 16) The evidence of PWs-1 and 4 is also corroborated and supported by the evidence of PW-5. The victim's father, say 'Z' testified as PW-5 that the accused is his neighbour. The incident occurred on 16-01-17 and his wife called him on the same day over phone, but as there was no network connection, she again called him on 17-01-17. His wife informed him that his daughter went to the terrace to study and then she saw the accused person

in the adjoining land displaying obscene gestures and his private parts. There is a bamboo house at the adjoining land. His daughter informed his wife about the incident and then his wife lodged an ejahar against the accused person. On the same day, he returned to Chabua from Arunachal Pradesh. He was hesitant to ask his daughter and his wife informed him about the entire incident.

- 17) In his cross-examination, he testified that he is an owner of a three storied building where his wife resides. There are other tenants in his house. The accused has business at MES tiniali. He resides in the camp near his house. The accused works and cultivates land and also throws parties in his campus, which is adjacent to his house. There is one enclosure between his house and the accused person's area. There is a protection holf wall on the 2nd floor. His wife informed him that on 16-01-17, there were two other men with the accused having a party. His wife informed him that the incident occurred in the morning, but she did not inform him the exact time.
- 18) I would like to divert the attention towards the cross-examination of PW-5. The learned defence counsel cross-examined PW-5 in extenso, but failed to elicit any contradiction. It is held that the evidence of PW-5 is consistent to his testimony under Section 161 CrPC.
- 19) The learned defence counsel laid stress in his argument that there was prevailing animosity between the accused and the informant, and a false case has been foisted. This argument of the learned defence counsel has no leg to stand. PWs-1, 4 and 5 vehemently denied in their cross-examination regarding any acrimonious relationship between the accused and PW-5 when they were cross-examined by the defence. The cross-examination of the witnesses depicts mere denial of suggestions by the defence counsel. **No**

contradiction as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short) could be elicited through the crossexamination of the witnesses and also through the cross**examination of the IO.** It is thereby held that the accused used to wink at followed 15-01-17 the victim and her on or on 16-01-17, and displayed his penis to the victim. The accused waved alchohol bottle and unzipped his trousers and displayed his penis to the victim, stood firm. No reason is fathomable, why an innocent girl of 15 or 16 years would falsely implicate an elderly married man of 52 years with such despicable act.

- 20) Regarding a minor contradiction of a variation in one date between the testimonies of the witnesses, I would like to rely on the decision of Hon'ble the Supreme Court of India.
- 21) The learned defence counsel laid stress in his argument that according to the victim's testimony, the incident occurred on 05-01-17 and as it is a false case, her parent's evidence depicts that the incident occurred on 16-01-17.
- 22) I disagree with the submission of the learned defence counsel. It has already been held in my foregoing discussions that perfect corroboration indicates that the witnesses are tutored. The witnesses are prone to differ. Each witness cannot perfectly narrate according to other witness until and unless they are tutored.
- 23) It has been held by Hon'ble the Supreme Court in *A. Shankar vs.***Karnataka 2011 AIAR, (Criminal) CRL 516 that:

"However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected

in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."

- 24) Reverting back to this case, it is held that the core of the prosecution case remained the same. It is clear that the accused displayed his penis by unzipping his pant to the annoyance of the victim. The victim was present and no other girl or woman was present at that time. It is also held that the accused winked at the victim and followed her movement and waited for her at the paan shop, when she commuted for her tuitions. The defence failed to contradict or controvert the testimonies of the victim and her family members. Regarding the evidence of other witnesses, I would like to divert the attention to the evidence of other witnesses.
- 25) Sri Abesh Jaiswal testified as PW-2 that the accused person resides at a little distance from his house. The victim is known to him, but he does not know her name. The incident occurred about 4/5 months ago. On the following day of the incident, he heard that the accused was arrested by the police from his

- house. He heard that the accused committed misdeed with 'Z's daughter.
- 26) Similarly, Sri Bijoy Tiwari testified as PW-3 that the accused, the complainant and the victim are known to him. The incident occurred about few months ago. He heard that the accused used to watch the minor victim when she used to go to the terrace. Thus, it can be held that the evidence of PWs-2 and 3 depicts that they heard about the incident. It is but obvious that in a case of sexual harassment, it is difficult to find any eye-witness.
- 27) IO's evidence also proves the prosecution case. SI Tapan Das testified as PW-6 that on 17-01-17, he was on duty at Chabua Police Station. On that day, the OC of Chabua Police Station received an FIR from 'Y' and registered a Chabua PS Case No. 17/17 under Section 11(i) POCSO Act and he was endorsed with the investigation. Ext. 2 is the FIR and Ext. 2(2) is the signature of the OC with endorsement. He arrested the accused and forwarded him to the jail. Prior to this, he recorded the statement of the victim at the police station and thereafter, he arrested the accused person. The victim was forwarded for medical examination and also to the Magistrate for recording her statement. He went to the place of occurrence, prepared the Sketch-Map and recorded the statements of the witnesses. Ext. 3 is the Sketch-Map and Ext. 3(1) is his signature. He obtained the Medico-legal Report Ext. 4. On finding prima facie materials, he submitted Charge-Sheet against the accused person. Ext. 5 is the Charge-Sheet and Ext. 5(1) is his signature.
- 28) No contradiction could be elicited through the cross-examination of the witnesses and through the cross-examination of the IO. The statement of the victim under Section 164 CrPC is also consistent to her testimony in the Court.

- 29) I have perused the Sketch-Map which depicts the place of occurrence vividly.
 'A' is shown as the place of occurrence and 'C' is shown as the accused person's house. There is one house between the place of occurrence and the complainant's house. It is clear that anybody standing from the terrace at 'A' will clearly notice any incident or occurrence at 'C'.
- 30) POCSO Act is also supplemented by presumption under Section 30 of the Act which embodies:
 - **30. Presumption of culpable mental state: (**1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
 - (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

31) In the instant case, the accused failed to prove that he has no such culpable mental state with respect to the act with which he was charged. The accused had no business to follow a minor girl who is even younger than his daughter and wink at her and wave an alchohol bottle towards her, or unzip his trouser revealing his penis to annoy her.

- 32) It has already been held in my foregoing discussions that there is clinching evidence that the accused followed the victim and winked at her when she used to proceed to her tuition classes. No contradiction could be elicited on cross-examination of all the witnesses regarding this allegation and evidence. It is also held that the accused unzipped his trousers while the victim was studying in the terrace of her house and displayed his penis to her shock and dismay. No contradiction could be elicited regarding this act of the accused through assiduous cross-examination of the witnesses by the defence. It is held that the prosecution could prove beyond a reasonable doubt that the accused is guilty of offence under Section 12 POCSO Act. The act committed by the accused is a despicable act. A deterrent type of punishment is the need of the hour. An innocent victim was anguished by such an act of the accused person. Suffice it to mention that a period of imprisonment for 3 (three) years will meet the ends of justice.
- 33) I have heard the accused on the point of sentence. He has prayed for leniency.

SENTENCE:

- 34) The accused Sri Samiran Mithu Das @ Mithu Das is convicted under Section 12 POCSO Act and sentenced to undergo rigorous imprisonment (RI in short) for 3 (three) years and to pay a fine of Rs. 1,000/- (Rupees One Thousand) only and in default of payment of fine, to undergo RI for 1 (one) month. The period of detention of the accused during investigation and trial is set off with his custodial sentence.
- 35) Considering the facts and circumstances and the nature of the offence, this case is not recommended for victim's compensation.
- 36) Furnish free copies of judgment to the accused and to the District Magistrate.

Judgment is signed, sealed and delivered in the open Court on the 24^{th} day of June, 2019.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

> > Contd.

APPENDIX POCSO Case No. 9/17

List of witnesses for prosecution:

- 1. PW-1 The victim 'X';
- 2. PW-2 Sri Abesh Jaiswal;
- 3. PW-3 Sri Bijoy Tiwari;
- 4. PW-4 The informant 'Y';
- 5. PW-5 'Z'- The father of the victim 'X';
- 6. PW-6 SI Tapan Das.

List of exhibits for prosecution:

- 1. Ext. 1 Statement of the victim 'X', recorded under Section 164 CrPC;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Sketch-Map;
- 4. Ext. 4 Medico-legal Report;
- 5. Ext. 5 Charge-Sheet.

List of material exhibits for prosecution: Nil.

List of witnesses for defence: Nil.

List of exhibits for defence: Nil.

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.