CAUSE TITLE PCSO Case No. 70/15

Informant: XXXXX

Accused: Sri Sunit Dutta,

S/o- Sri Biren Dutta, R/o- OIL Colony, Qtr. No. AT-3,

PS- Duliajan, District- Dibrugarh.

ADVOCATES:-

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

For the Defence: Mr. S Seal, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Shri S.K. Sharma, AJS,

Sessions Judge, Dibrugarh.

> PCSO Case No. 70/15 G.R. Case No. 2194/15

> > State of Assam

-Vs-

Sri Sunit Dutta

Charge: under Section 8 PCSO Act.

Date of evidence on : 05-03-16 & 07-04-16. Date of argument : 12-08-16 & 09-09-16.

Date of Judgment : 14-09-16.

JUDGMENT

- 1) Prosecution case is that the accused person who is a teacher by occupation used to take tuition of the prosecutrix at her home and on 08-08-15, when he had gone there to take tuition, taking the advantage of absence of her co-student, the accused person caught hold of the hand of the prosecutrix and committed sexual assault upon her. The father of the prosecutrix lodged an ejahar on the next day whereupon a police case was registered and investigation commenced. In course of such investigation, the Investigating Officer recorded the statement of witnesses, drew up Sketch-Map of the place of occurrence, arrested the accused person, got the statement of the prosecutrix recorded under Section 164 CrPC and on completion of investigation, submitted the Charge-Sheet.
- 2) Upon committal, this Court framed charge under Section 8 of Protection of Children From Sexual Offences Act (hereinafter PCSO Act) against the accused person and the charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 3) In course of trial, prosecution examined four witnesses and on conclusion thereof, the accused person was examined under Section 313 CrPC wherein the accused person took the plea of denial.
- 4) Heard Smti. R Devi, learned PP for the State and Mr. S Seal, learned counsel for the defence.

POINTS FOR DETERMINATION

- Whether the prosecutrix was a child within the meaning of Section 2(d) of the Protection of Children From Sexual Offences Act, 2012 (hereinafter 'the Act')?
- 2. Whether the accused committed sexual assault or any other act of similar nature upon the prosecutrix?

DECISION AND REASONS THEREOF

Point No. 1:

5) The father of the prosecutrix, who was examined as PW-1 stated that his daughter was aged 14 years whereas PW-2, the mother of the prosecutrix stated her daughter's age about 13 years. On the other hand, the prosecutrix herself who was examined as PW-3 recorded her age as 16 years at the time of recording her deposition before the Court. She also described herself as a student of Class-IX. But while recording her statement under Section 164 CrPC on 18-08-15, i.e., about 6 months prior to her deposition before the trial Court, she recorded her age as 13 years. Therefore, from the deposition of the PWs themselves, there appears to be a variation of four years as far as the age of the prosecutrix is concerned. The Investigating Officer did not get the prosecutrix medically examined, even in order to determine her age and therefore, there is no medical evidence regarding her age at the time of occurrence. Despite being of school going student, the Investigating Officer did not obtain any age proof in the form of School Certificate or any like document. Therefore, the best evidence with regard to the age of the prosecutrix has not been adduced by the prosecutrix, without any plausible explanation. Merely because the defence failed to challenge the deposition of the PWs-1 & 2 regarding the age of the prosecutrix cannot absolve the prosecution of its burden to establish every ingredient of the offence that the accused has been charged with. In view of the same, coupled with the wide divergence in the oral deposition of the witnesses, I am of the view that the prosecution has failed to establish that the prosecutrix was a child below 18 years of age at the time of occurrence.

Point No. 2:

6) In view of the finding of Point No. 1, the accused cannot be held liable for the offence under Section 8 PCSO Act. But still he may be convicted for a lesser or minor offence under Sections 354/354-A IPC if the material on

- record so justifies, with the aid of Section 222 CrPC.
- 7) PW-1 stated that in the month of August, 2015, the accused was engaged as private tutor of his daughter as well as his neighbour Partha Pratim Gayon. On 8th August 2015, the accused went to his house for the purpose of tuition class, but on the said date, Partha Pratim did not go to his house. As the accused had already arrived, so his wife PW-2 went to the house of Partha Pratim to call him. Accordingly, Partha Pratim came to his house and the accused came out from his house after finishing the tuition class. PW-1 further stated that his daughter informed her mother that the accused had done misdeed with her and that he kissed her and touched her private parts. At that time, he was present in the house. At about 2.30 pm, when he came from his college, his wife informed him about the incident. Upon asking, his daughter told him what she had narrated before her mother.
- 8) During cross-examination, PW-1 stated that though he went to the police station to lodge an ejahar, police told him that they were busy and asked him to come on the next day. He denied the defence suggestion that his daughter did not tell him anything about embracing, kissing and touching and that that is why he did not mention the same in the ejahar. He further stated that he did not mention the cause of delay in his ejahar.
- 9) PW-3 the prosecutrix stated that on 08-08-15, at about 9:20 am, the accused went to her house for tuition class. One Partha Pratim Gayon also used to take tuition with her in her house. On the said date, he had not come to her house for tuition and that is why her mother went to call him whereas she was in her room with the accused, being the tution master. PW-3 further stated that there was a table with three attached chairs and she was sitting on one chair whereas the accused was sitting on another chair. Upon calling of the accused, when she got up and went near him, he embraced her and kissed her. The accused caressed her face with his hand and brought his hand down to her breast. PW-3 further stated that at that time, her mother along with Partha Pratim reached the gate and hearing the sound of opening the gate, the accused told her to go and sit whereafter both of them started the tuition class and the accused left the place after completing the tuition class. At the time of occurrence, her father was not present in the house as he had left for the College for his job. At about 2:00 pm, when her father arrived at the house, her mother narrated the incident to him which took

- place with her. Upon asking by her father, she told him what had taken place with her.
- 10) During cross-examination, PW-3 denied the suggestion that she did not narrate the incident to her father and that she deposed before the Magistrate as tutored by police and by her parents and that no such occurrence took place and that is why, there was no description of the occurrence in the First Information Report and that a compromise talk took place with the accused and her parents in the police station. Therefore, other than giving suggestions, the testimony of the prosecutrix has stood firm.
- am, the accused went to her house, but Sri Partha Pratim did not go to her house to attend the tuition class. She went to the house of Partha Pratim to call him and her daughter was in reading the room along with the accused. Within 5 minutes, she arrived at her house along with Partha Pratim and after completing the tutorial class, the accused left her house. PW-2 further stated that she saw her daughter weeping and upon asking as to what had happened, she informed her that the accused embraced her, kissed her and touched her breasts. Her daughter also informed her that on prior occasions also, the accused had committed such misdeed with her. PW-2 further stated that at about 2:30 pm, when her husband came back from the college, she narrated the incident to him as told to her by her daughter.
- 12) During cross-examination, she admitted that she did not state before police what she had deposed before the Court as police did not ask her. However, she stated that the police questioned her and the prosecutrix together and recorded her statement. But no material omission or contradiction could be brought out during cross-examination of PW-2. She denied the defence suggestion to the effect that no such incident had taken place or that her daughter never told her about any previous misdeed having been committed by the accused. Therefore, since the prosecutrix immediately after the occurrence reported the matter to the PW-2, the evidence of PW-2 is admissible under Section 6 of the Evidence Act as that of a res gestae witness which stood unshaken and corroborated the evidence of PW-3 in all material particulars [*Gentella Vijayavardhan Rao vs. State of AP:* 1996 (6) SCC 241].
- 13) PW-4 Sri Jitumoni Bora stated that on the day of occurrence, in the evening,

- when he was in his college, PW-1 called him to his house and accordingly, PW-4 went to his house. Upon his arrival, PW-1 told him that his daughter was attending a tutorial class alone in her house taken by the accused and the accused misbehaved with her by touching her body.
- 14) During cross-examination, while denying the defence suggestion, he stated that the accused used to take several tutorial classes, but he never heard any complaint from any other student against the accused prior to the occurrence. But that is hardly of any relevance.
- 15) Mr. S Seal, learned counsel for the defence submitted that it is clear from the evidence of the PWs that the prosecutrix, who was apparently a major or at least of sufficient understanding and maturity, did not protest in any manner to the alleged advances made by the accused, which would indicate that she was a consenting party. If indeed, as deposed to by the mother of the prosecutrix, the accused had done so on earlier occasions also, the prosecutrix kept mum when she had several opportunities to report the matter to her mother. Even on the alleged date of occurrence, the prosecutrix, after being allegedly molested by the accused, did not go away from the room upon arrival of her mother, but remained there and the accused and the prosecutrix completed her tuition class and only after the accused left, the prosecutrix was allegedly found weeping by the PW-2. Such conduct is most unnatural and therefore not believable, submits Mr. Seal. Moreover, there is no explanation in the ejahar as to why it took so long for the informant to lodge the same before the police which itself would show that it is a concocted story. The prosecution has withheld a most material witness, namely, the boy who used to take tuition along with the prosecutrix and who was allegedly present on that day with the prosecutrix and the accused, the reason obviously being that the said co-student did not notice anything amiss.
- 16) I am unable to accept the above line of reasoning. The prosecutrix is a young school going girl studying in Class-IX, and highly suseptible to the coercive influence of her teacher. PW-3, the mother of the prosecutrix, clearly deposed that she found her daughter weeping soon after the accused left which testimony stood unshaken. If at all it was a consensual act, the prosecutrix would not have been found weeping. The absence of the co-student provided the requisite opportunity to the accused. She would have been either too

embarrassed or lacking in courage to report the act to her mother immediately upon her arrival as the accused, her teacher was still present. Teacher enjoy a particular kind of dominance over their young students, which inspires awe as well as fear in their mind and different individual react differently to similar situations. The evidence of the prosecutrix cannot be disbelieved on that ground alone. The non-examination of the co-student is not at all material as he was not privy to any of the happenings that took place prior to his arrival at the place of occurrence and subsequent thereto. Merely because he may not have noticed anything amices is not sufficient to discredit the prosecution version. The delay in lodging the ejahar has been explained by the informant, stating that police told him to come back on the next day. PW-4, an independent witness, has deposed that the informant reported the matter to him on the same evening. Therefore, the alleged delay in lodging the First Information Report does not cast any doubt on the prosecution case.

- 17) The accused person in his defence statement stated that he never went to the house of the prosecutrix on the day of occurrence. It is in the nature of a plea of alibi. But no evidence was led to prove it. Neither was such a suggestion given to the PWs during cross-examination.
- 18) Accused further stated that tuition fees @ Rs. 3,000/- per month from the prosecutrix was well as the co-student was due since last three months, but he did not insist for payment, although he asked once. That would hardly sufficient impetus to the informant to make such a serious allegation against the accused, at the risk of the reputation and academic performance of his daughter.
- 19) From the evidence discussed above, it is established that the accused used criminal force upon the prosecutrix, knowing it to be likely that he will thereby outrage her modesty, thereby satisfying the ingredients of the offence under Section 354 IPC.
- 20) The question that now requires consideration is whether it would be permissible to convict the accused under Section 354 IPC in the absence of charge thereunder, the charge having being framed under Section 8 of the PCSO Act, by taking recourse to Section 222 CrPC which provides:

222. When offence proved included in offence charged:

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.
- 2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
- 3) XXXX
- 4) XXXX
- 21) Section 2 (n) of the CrPC defines "offence" as follows:
 - (n) **"offence"** means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattletrespass Act, 1871 (1 of 1871);
- 22) Therefore, the offence under any law is covered by Section 222 CrPC.
- 23) In *Dalbir Singh Vs. State of U.P.* [MANU/SC/0320/2004], the Hon'ble Supreme Court held as follows:
 - "14. Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C. Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same Section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely Chapter XXXV which deals with Irregular

Proceedings and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this Section provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent Court unless the appellate or revisional Court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In Lakhjit Singh (supra) though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from 302 to 306 IPC having regard to the principles underlying in the said Section. In Sangaraboina Sreenu (supra) the Court completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.

15. In Willie Slaney v. State of Madhya Pradesh MANU/SC/0038/1955: 1956CriLJ291, a Constitution Bench examined the question of absence of charge in considerable detail. The observations made in paras 6 and 7, which are of general application, are being reproduced below:

"6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along with certain well-established and well-understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions."

After analysing the provisions of Sections 225, 232, 535 and 537 of Code of Criminal Procedure, 1908 which correspond to Sections 215, 464(2), 464 and 465 of 1973 Code, the Court held as under in para 44 of the Report:

"Now, as we have said, Sections 225, 232, 535 and 537(a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that 'whatever' the irregularity it is not to be regarded as fatal unless there is prejudice.

It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.

Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one."

16. This question was again examined by a three Judge Bench in Gurbachan Singh v. State of Punjab MANU/SC/0132/1957: 1957CriLJ1009 in which it was held as under:

"In judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangarabonia Sreenu (supra) was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC."

- 24) In *Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand)* [MANU/SC/4421/2006], the Hon'ble Supreme Court convicted the appellant under Section 354 IPC although charge was framed under Section 376 IPC by the learned trial Court, with the aid of Section 222 CrPC.
- 25) Section 7 of PCSO Act, which defines the offence punishable under Section 8 provides as follows:

"7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

26) Section 354 IPC provides as follows:

"354. Assault or criminal force to woman with intent to outrage her modesty.--Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

- 27) A comparison and contrasting of the two penal provisions would show that the offence of sexual assault defined under Section 7 of the Protection of Children from Sexual Offices Act requires a sexual intent on the part of the offender while making physical contact with the victim, whereas Section 354 IPC requires an intention to outrage the modesty of the victim or knowledge of likelihood thereof, regardless of whether the offender harboured any sexual intent as well, as at the time of assault or use of criminal force upon her. On the other hand, the offence of sexual assault would be complete upon mere touch with the requisite sexual intent, regardless of its effect upon the victim, i.e., whether or not the said act outrages her modesty is irrelevant.
- 28) In the instant case, the accused was charged with having committed sexual assault, i.e., having touched the victim with sexual intent. The victim in her evidence described the manner in which the accused touched her, which included kissing and touching of face and breast of the victim. In any view of

the matter, such acts, which definitely amount to use of criminal force, are certain to outrage the modesty of any unwilling lady. The accused had and availed of full opportunity to meet the said facts alleged against him and took the plea of alibi. Therefore, no prejudice would be caused to the accused nor would it occasion a failure of justice if he is convicted of the offence under Section 354 IPC, though not charged with it, in view of Section 464 CrPC, considered in the light of Dalbir Singh (Supra).

- 29) In the result, I hold that the prosecution has proved its case under Section 354 IPC beyond reasonable doubt and consequently, the accused person is convicted of the offence under Sections 354 IPC.
- 30) Heard the convict and learned Public Prosecutor on the point of sentence. Considering that an offence of a sexual nature has been committed upon a young girl, I am not inclined to extend the benefit of the Probation of Offenders Act to the convict. The convict stated that he has a wife and a small child, earning a livelihood only through tuition. Accordingly, he has prayed for leniency. No previous criminal record has been brought to notice.
- 31) Considering the above, the convict Sunit Dutta is sentenced to undergo RI for 1 (one) year and to pay a fine of Rs. 5,000/-, i.d., SI for 14 (fourteen) days.
- 32) Furnish a free copy of this judgment to the convict immediately and send a copy to the District Magistrate, Dibrugarh.
- 33) The case is referred to the District Legal Services Authority, Dibrugarh for consideration of compensation to the victim under the Assam Victim Compensation Scheme. Communicate the order to the Secretary, District Legal Services Authority, Dibrugarh.

Given under my hand and seal of this Court on this the 14th day of September, 2016.

Sessions Judge, Dibrugarh

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

APPENDIX

List of witnesses:

1. XXXXXX

List of Exhibits:

- 1. Ext. 1 Ejahar; and
- 2. Ext. 2 Statement of the victim recorded under Section 164 CrPC.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

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