IN THE COURT OF THE SPECIAL JUDGE::::UDALGURI

Present : Sri. P. Saikia, Special Judge, Udalguri.

SPL (POCSO) 20/2018

State of Assam -Vs-

Krishna Adhikari.....Accused.

For the Prosecution : Mr. M. Khaklari, Addl. Public Prosecutor.

For the Accused : Mr. Madhab Ch. Narzary, Learned Advocate.

Evidence recorded on : 08-11-18: 03-12-18: 21-01-19.

Argument heard on : 23-05-19. Judgment delivered on : 29-05-19.

<u>J U D G M E N T</u>

1. The factual matrix of the prosecution case, in a nutshell, is that on 16-04-18, the informant Dhan Kumari lodged a written report with the Officer-in-Charge Udalguri, P.S. alleging inter-alia, that on 11-04-18, while her daughter aged around 11 years old (real name is withheld and henceforth referred to as the victim) was playing, at that time the accused Krishna Adhikari called her daughter and her daughter went to him. Then she was dragged into his house and thereafter the accused at first kissed her cheek and later touch her body and thereafter touch in different parts of her body. At that time when the grandmother of the victim called her and on hearing her call her daughter came running out from the house of the accused. The accused called her

daughter inside his house to outrage her modesty. The accused also gave her some money after outraging her modesty. She has further stated that her daughter stays with her grandmother. On coming to know about the incident she immediately informed the police regarding the incident.

- 2. On the strength of the written report, the Officer in Charge Udalguri P.S. registered a case vide Udalguri P.S. case no. 87/18 under Section 8 of POCSO Act to investigate into the matter. On conclusion of the investigation the police led a report under Section 173 Cr.P.C. for the offence under Section 8 of the POCSO Act appeared to have been committed by the accused to face trial.
- 3. On receipt of the Charge sheet cognizance of the offence was taken. Whereupon process was issued to the accused for his appearance. On appearance the accused was supplied with the copies of documents furnished under Section 173 Cr.P.C. In consideration of framing of charge the entire relevant materials on the case record was perused and having found a prima facie offence appears to have been committed by the accused under Section 8 of the POCSO Act, the formal charge thereunder was framed and the same on being read over and explained to the accused, to which he abjured his guilt and claimed trial.
- 4. To romp home the charge, the prosecution examined as many as eight (8) witnesses including the informant, victim, M.O. and I.O of the case. The prosecution has also exhibited some documents appended with the case record in support of its case.
- 5. The defence of the accused is of total denial. His case as it could be ascertained from the cross-examination of the prosecution witnesses and his examination under Section 313 Cr.P.C. is that he has been falsely implicated. Further, the accused declined to lead evidence for defence.

- 6. In the light of the facts and circumstances of the case, the point for determination is set forth hereunder:-
 - (I). Whether accused on 11-04-18, at Udalguri Ward No. 2 under Udalguri P.S. committed sexual assault upon the victim, aged about 11 years, and thereby committed an offence punishable under Section 08 of POCSO Act.?
- 7. I have heard arguments advanced by the learned counsel for both the sides and also carefully gone through the case record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 8. PW1, Dr. Arup Kalita, is the Medical and Health Officer, who examined the victim on 17-04-18 in connection with this case. But as per his evidence the victim refused to undergo medical examination and as a result, the victim could not be examined in reference to the case. He has proved his report as Ext.1 and Ext.1(1) is his signature. His cross was declined by the defence.
- 9. PW2, Dhan Kumari Chetry, is the first informant of the case and mother of the victim. As per her evidence the occurrence took place in the month of April. Her daughter resides with her uncle at Udalguri and she is studying in class VIII. Since, she resides at Bhalukpung far away from Udalguri she only heard about the incident. On the day of occurrence her daughter was playing in the vacant land belonging to the accused. At that time the accused came out from his house and embraced my daughter from behind and also kissed her. The accused also told her that she was beautiful to look at. At that time her mother called her daughter. Then her daughter immediately ran towards her mother, but before leaving, the accused forcefully thrust one Rs.20/currency note inside her frock above the chest. On the next morning, she came to her mother's house and her daughter narrated her about the incident. In this regard, she lodged an FIR before the police. At the time of occurrence

her daughter was around 11 years old. She has proved and marked the FIR as Ext.2 wherein Ext.2(1) is her signature.

- 10. In cross-examination she has revealed that her parents house and house of the accused are adjacently situated. Though accused was their close door neighbour but they have no cordial relation with him. On the day of occurrence there were many other children playing with her daughter in the land belonging to the accused. Accused did not like the children playing at his filed since before the incident. She has denied the defence suggestion that they have boundary dispute with the accused. Since after her marriage she has been staying at Bhalukpoong. After the birth of her victim daughter she has been looking after by her parents at Udalguri. Sometimes she used to stay at Udalguri to look after her parents. She lodged the FIR on 14.4.18 and the incident occurred on 11.4.18. She could not lodge the FIR immediately as she tried to resolve the matter at first with the accused. But when the accused refused to settle the matter by scolding her she has to lodged the FIR. The incident was witnessed by her cousin brother Ishan Rai. One Kaushik Pathak etc. were playing with her cousin Ishan Rai alongwith other children including the victim. She has denied the suggestion that they have land dispute with the accused which resulted in lodging a false case by her against the accused to score her grudge. She has not mentioned in the FIR that before lodging the same they wanted to settle the matter outside the court.
- 11. PW3 is the victim of the case. She has testified to the effect that the occurrence took place on 11.4.18 at around 3.30 PM. When she was playing in the land belonging to the accused alongwith her brothers, sisters and other children. In the meanwhile, the accused came there and called her inside his house. Accordingly she went alongwith the accused inside his house where the accused embraced her and also kissed her. The accused also told her that she was being loved by him and thereafter he touched in her cheek. At that moment, grandmother called her and on hearing her called she came out from the house of the accused but before her leaving the accused forcefully thrust

one Rs. 20/- currency note inside her frock but she threw away the currency note of Rs. 20 and left for her home. Then she narrated the incident to her brother Ishan Rai who was also playing with her. Thereafter she told about the incident to her grandmother and her grandmother in turn informed her mother who was at that time staying at Bhalukpoong. Her mother came to her grandmother's house and after narration of the incident by her, her mother lodged an FIR before the police. Police got her statement recorded U/S 164 Cr.P.C. and she was also sent for medical examination but she refused to undergo medical examination. Her age was 12 years old at the time of occurrence. She has proved and marked her statement under Section 164 Cr.P.C. as Ext.3. Ext. 3(1), 3(2), 3(3) and 3(4) are her signatures.

12. In cross-examination she has stated that on the day of occurrence she was playing on the play ground belonging to the accused with other friends including her uncle Kaushik, Ishan etc. They used to play in the vacant land of the accused where there is a small house belonging to the accused. Before this incident the accused now and then prevented them from playing in that land as he felt disturb. In spite of that they played in that ground. Her grandfather's house and the house of the accused are situated contiguous to each other divided by one boundary without boundary wall. When she was playing football her uncle Kaushik was standing about 15 feet away from her. Her uncle saw her going into the house of the accused when he called her. Her grandfather has no good relation with the accused. Neither her grandfather nor the accused even visited to each other house till the date of incident. She does not know as to when her uncle Ishan narrated about the incident to her grandmother after telling about the incident to my uncle Ishan. She does not remember the date when she told her uncle Ishan about the incident who subsequently told her grandmother about the incident. She told about the incident to her uncle Ishan in the field where they were playing. She has denied the defence suggestion that she gave her statement U/S 164 Cr.P.C. as tutored by her mother. She has further denied the defence suggestion that immediately after the incident she went to her aunt's house and narrated them about the incident and before that she narrated the incident to her uncle who informed her grandmother. She has further denied the defence suggestion that she has falsely before this court though no such incident had occurred at all with the accused.

- 13. PW4, is Ishan Roy. His evidence exhibits that the incident occurred in the month of April in the year 2018. On the day of occurrence he was sitting outside his house while the victim alongwith other children including one Kaushik were playing in the field belonging to the accused. At that time he saw the accused coming out from his house and then he called the victim to his house. Accordingly the victim alongwith the accused went inside his house. On seeing this he suspected something wrong was going to be occurred. So he immediately informed his grandmother. Immediately his grandmother came out and raised hue and cry. On hearing the hue and cry of his grandmother accused came out from his house. On the next day of the incident the victim narrated the incident to him that the accused on the previous day embraced her and also touched her hand and put one Rs.20/- currency note inside the upper portion of her frock. The victim did not narrate the incident on the same day of the occurrence out of fear. When he came to know about the incident he informed his grandmother and his grandmother informed the mother of the victim. He did not see the incident by his own eyes.
- 14. In cross-examination he has disclosed that on the day of occurrence he was not playing football alongwith the victim. He remained in his house. His grandmother did not see the accused taking the victim inside the house though he told her about this. He did not actually witnessed the incident. They used to play football in the land belonging to the accused where there is also a small house. The accused asked them several times before this incident not to play football in his field. He has denied the defence suggestion that on the day of occurrence also the accused asked them not to play football in his field. The land belonging to the accused is surrounded by C.I. sheet boundary with a height of about 10 feet. In order to get inside the compound of the accused

one has to enter through the gate. After the incident the mother of the victim called the accused to settle the matter but to no avail.

- 15. PW5, Ranju Chetry. Her evidence is also a hearsay one. It is her evidence that she knows accused as well as the informant. At the material time of occurrence she was at her home which is situated at a distance of ½ KM from the house of informant. About 4-5 days after the incident she was proceeding to market alongwith her co-villager Fulon Devi. When they reached in front of the house of informant they heard hue and cry in the house of the informant out of curiosity they entered into the house of the informant where they found the victim daughter of informant was crying. On being asked she said that about 4-5 days ago while she was playing in the field in front of the house of the accused she was called by him into his house and after entering into his house the accused forcefully put one Rs. 20/- currency note inside her frock and tried to molest her. But in the meantime when the grandmother of the victim called her she came out from the house of the accused and narrated about the incident. During that moment they heard hulla at the house of the accused where the mother of the victim went to ask the accused regarding his attempt to molest her daughter. On hearing hulla they went to the house of the accused where they saw the accused was catching hold of the informant and begun to assault her with his hand. They prevented the accused to assault the informant and informed police. Police seized the birth certificate of the victim in her presence. Ext. 4 is the seizure list. Ext. 4(1) is her signature.
- 16. In cross-examination she divulged that she came to know about the incident after about 5-6 days of occurrence. Before that no one told her about the incident. There are many dwelling houses near the place of occurrence. She does not know the neighborhood persons of the place of occurrence. She has denied that she has not stated before the police that while she was proceeding towards the market with Poonam Jha they heard hue and cry in the house of the informant and entered into her house and met the victim

daughter of the informant who told before them that about 5-6 days ago while she was playing in front of the house of the field of the accused, who forcefully inserted Rs. 20/- denomination note inside her blouse and tried to molest her but she came back to her house when she was called by her grandmother and while she was explaining about the fact in the meantime they heard hue and cry where the mother of the victim went to ask the accused as to his attempt to molest her daughter and at that time they also proceeded to the house of accused and saw the accused assaulting the informant by catching hold of her by his hands. They prevented the accused from assaulting the informant and informed the police. The victim is related to her. When they went to the house of accused on hearing hulla there were many people who had already gathered there. The informant and the accused are neighbors. She put her signature in the seizure list at the police station. She has denied the defence suggestion that the accused did not assault the informant at his house after 5-6 days of occurrence of the main incident.

- 17. PW6, Anju Das is also a hearsay witness. Her evidence is that she does not about the first incident. So far as the second incident is concerned she only heard that the accused tried to molest the victim when she was playing in the field in front of the house of the accused.
- 18. In her cross-examination she has stated that in between her house and the house of informant there are 14-15 other houses. She has no personal knowledge about the first incident.
- 19. PW7, Puja Rani Das is not an eye witness of the occurrence. Her version reveals that she knows the informant as well as the accused and the daughter of the informant. At the material time when she came to her parental home at Udalguri from Sonapur the informant and the victim told before her that few days back while the victim was playing in front of the house of the accused she was called by the accused into his house and tried to molest her by forcibly giving Rs. 20/- currency note to her.

- 20. In cross-examination she has stated that she came to know about the incident after 4-5 days at her parental home at Udalguri. The victim is her niece and they have good relation with the accused.
- 21. PW8, Nalini Brahma is the Investigating Officer of the case. According to her on 16-04-2018 she was posted as I/C women cell at Udalguri Police Station. On that day at around 5:00 PM the informant Dhan Kumari Chetry lodged a written FIR before the O/C Udalguri PS. On the basis of the FIR, the Officer-in-Charge Udalguri PS registered a case being Udalguri P.S. case NO. 87/2018 U/S 8 of POCSO Act and she was entrusted to investigate the case. During investigation she recorded the statements of available witnesses U/S 161 CrPC visited the place of occurrence and prepared sketch map thereof, sent the victim for medical examination and also got the statement of the victim recorded U/S 164 CrPC before the Magistrate. On completion of the investigation she laid the charge sheet against the accused Krishna Adhikari U/S 8 of POCSO Act. She also seized birth certificate of the victim. Ext 4 is the seizure list of birth certificate of the victim. Ext. 4(2) is her signature. Ext. 5 is the sketch map and Ext. 5(1) is her signature. Ext. 6 is the charge sheet. Ext. 6(1) is her signature.
- 22. In cross-examination she has revealed that the FIR was received on 16-04-2018 and as per the FIR incident had occurred on 11-04-2018. The cause of delay in lodging the FIR has not been explained. She did not record the statement of the neighboring witnesses namely Tarabir Rai and Gopal Adhikari. She also did not record the statement of the grandmother of the victim U/S 161 CrPC. She has denied the suggestion that she had not properly investigated into the case to discover the truth of the matter.
- 23. Before scrutinizing the evidences on record as discussed above as to its intrinsic worth in support of the prosecution case, it is worth mentioning at this stage that the accused stands charged for attempted molestation on the victim (PW3) at the hands of the accused on the day of occurrence as it appears

from the FIR (Ext.-2) lodged by the first informant (PW2) who is the mother of the victim. It is also equally evident that the first informant is not an eye witness to the occurrence.

24. In this context, if we evaluate the evidence of the victim (PW3) at the outset it would transpire from her version that on the day of occurrence she was playing in the land belonging to the accused alongwith her brothers, sisters and other children. At that time, the accused came there and called her inside his house. Responding to the call of the accused she went inside his house. Thereafter, the accused embraced her and also kissed her by saying that she was being loved by him. The accused also touched her cheek. At that moment, when her grandmother called her so she came out from the house of the accused. But before her leaving the accused though forcefully thrust one Rs. 20/- currency note inside her frock but she threw away the same and left for her home. Then she narrated the incident to her brother Ishan Roy (PW4) who was also playing with her. Thereafter she told about the incident to her grandmother and her grandmother in turn informed her mother who was at that time staying at Bhalookpung. After few days her mother came home and after narration of the incident by her an FIR was lodged by her mother. Police also got her statement recorded under Section 164 Cr.P.C. vide Ext.-3. In cross-examination she has stated that when she was playing football her uncle Kaushik was standing fifteen feet away from her and her uncle saw her going into the house of the accused when he called her. But it appears from the record that this vital witness Kaushik, uncle of the victim (PW3) has not been examined by the prosecution nor he was cited as a witness of the occurrence when the accused called the victim (PW3) inside his home. No doubt even if he had been examined as prosecution witness he would not have seen what had happened inside the room of the accused with the victim as it is the evidence of the victim that no one was inside the room when the accused caressed her and also thrust one Rs. 20/- currency note inside her frock immediately when she came out from the room after hearing call of her grandmother.

- 25. In that view of the matter the evidence of the victim is singularly important to find out whether her evidence on the material aspect of caressing her by the accused and also thrusting of Rs. 20/- currency note inside her frock at the time of coming out from the house of the accused on hearing call of her grandmother bears a ring of truth to make her as implicitly reliable witness to bring the guilt of the accused. But her evidence is not intrinsically reliable in the face of material discrepancies not only in her own testimony but also with that of the testimony of another important witness PW4, who was playing with her alongwith other children at the time of the occurrence. PW4, the another uncle of the victim (PW3) depicts a different story which is not in tune with the testimony of the victim (PW3) in respect of the material particular of the case. It appears from the evidence of the victim (PW3) in cross-examination that PW4 had also seen the occurrence as to the going of the victim (PW3) inside the house of the accused. The victim (PW3) has however stated that she also stated about the incident as to what had happened inside the house of the accused to her uncle Ishan (PW4) after coming out from the house of the accused.
- 26. In this aspect on scrutiny of testimony of PW4 it is found that on the day of occurrence while the victim (PW3) alongwith other children were playing in front of the field of the house fo the accused, he was sitting outside his house and he saw the victim (PW3) entering into the house of the accused on being called by him. On seeing this he suspected something wrong is going to be occurred so he immediately informed his grandmother who immediately came and raised hue and cry. On hearing hue and cry his grandmother came out from his house and on the next day of the incident the victim narrated about the incident to him. Thus it is easily discernible that there is a major discrepancies and variations in the testimony of the victim (PW3) with the testimony of PW4 on the material aspect so much so that, as per the victim (PW3) her uncle PW4 was playing in the field while the accused called her inside his room. On the other hand PW4 has stated that at that time he was sitting outside his house and noticed the incident of calling the victim (PW3) by

the accused inside his house. In addition to that PW4 has stated that the victim narrated before him about the incident on the next day which is contrary to the testimony of the victim (PW3) who has revealed that her uncle PW4 was playing with her with other children when she went inside the house of the accused when he called her. Another discrepancy which strikes the credibility of the testimony of the victim (PW3) to treat her as truthful witness is that though she has stated that she narrated about the incident before her uncle (PW4) immediately but her uncle (PW4) as has been disclosed in the chief examination itself that the victim (PW3) told him about the incident on the next day. As a result of such vital discrepancies and inconsistencies in between the testimony of the victim PW3 and her uncle (PW4) raise a serious doubt as regard embracing of the victim by the accused in his attempt to molest her and offering of Rs. 20/- currency note by placing it inside her frock has become extremely doubtful to treat this part of her evidence as gospel truth in absence of corroboration from the testimony of PW4. It also defies logic as to why the victim (PW3) had to go inside the house of the accused on being called by him when she has divulged that their parents have enmity with the accused since long back. Had PW4, the uncle of the accused had been alongwith her in the playing ground he would have also entered alongwith the victim (PW3) out of curiosity when she was called by the accused when he suspected something foul was going to take place. Equally the victim (PW3) after coming out from the house of the accused would have narrated about the incident to her uncle (PW4) immediately but she remained silent as PW4 has stated that the victim stated before him what had happened inside the room only on the next day of the incident.

27. Furthermore, the informant (PW2) the mother of the victim has also categorically revealed in her cross-examination that they have no good relation with the accused though they reside adjacent to each other raises a suspicion as to the genesis of the incident so much so that if there had been such an incident the informant (PW2) who resides at Bhalookpung keeping her daughter at her grandmother's house for her looking after her would not have

tried to settle the matter at first with the accused without lodging FIR immediately, which was filed subsequently when the accused refused to settle the matter and rather scolded the informant for coming to his house.

- 28. That aside, when admittedly there is enemity between the informant (PW2) and the accused since long back the reasons for falsely implicating the accused cannot be ruled out. Enemity between the accused the informant (PW2) is a double edged weapon. It may provide incentive for the crime and it may also provide reasons for falsely implicating the accused. The enemity between the informant (PW2) and the accused is an admitted fact. In the face of such previous enemity coupled with the incoherent and unimplicit evidence of the victim (PW3) which appears to have suffered from various contradictions and inconsistencies with the other reliable evidence PW2, who had happened to be present at the time of occurrence has rendered the testimony of the victim (PW3) as an exaggerated one.
- 29. What is also most strikingly notable is that the first informant (PW2) in spite of having inimical relation with the accused rather went to his house to settle the matter amicably for the reason best known to her. The informant (PW2) has herself stated that after coming to know about the incident she went to the house of the accused to settle the matter but to no avail when the accused rather threatened her and also attempted to assault her as a result of such and concoction on the part of the informant (PW2) in spite of being molest by the accused and belated lodging of the FIR has caused doubt in the authenticity of the incident.
- 30. It is well settled that delay in lodging the FIR by itself cannot be a ground of doubt to the prosecution case and also cannot be used as a ritualistic formula depending the prosecution case and doubting its authenticity. It only puts the Court on guard to charge for and consider if any explanation has been offered for delay. Once it is offered, the Court is to only see whether is satisfactory or not. In a case if the prosecution fails to

satisfactorily explain the delay and there is a possibility embellishment or exaggeration in the prosecution version on account of such delay is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. Furthermore, where delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case only depends upon the variety of factors which will vary from case to case.

- 31. In the decision reported in **Dhanpath Vs. State of U.P. (1989) CriLJ 1335** it has been held that "delay in lodging the FIR quite often results in embellishments which is a creator of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity danger creeps in of the introduction of coloured vision, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the FIR should be, satisfactorily explained. When delay in the FIR has not been explained, it would be unsafe to base conviction of the accused upon the evidence produced by the prosecution".
- 32. In the instant case, delay in lodging the FIR (Ext.2) has sought to be explained by the informant (PW2) on the ground that the matter was first placed before the accused for an amicable settlement but when the accused refused to settle the matter amicably she had to lodge the FIR belatedly before the police. But such an explanation is not at all plausible one and deserves no merit as to under what circumstances the informant (PW2) had to place the matter before the accused for amicable settlement when having inimical relation with each other since long back and when her own daughter (PW3) became the victim of offence at the hands of the accused. Hence, the false explanation as to belated lodging of the FIR given by the informant (PW2) coupled with the major contradictions and infirmities in the evidence of the victim (PW3) has indeed created a doubt as to the commission of allege molestation on the victim by the accused by caressing her.

- 33. That besides, the testimony of victim (PW3) is also full of variations and embellishments on the material particular of the case to lend any assurance to the prosecution case. The evidence of victim (PW3) in the facts and circumstances of the case is not wholly reliable due to major discrepancies and infirmities so as to accept her testimony as of sterling quality in absence of independent corroboration.
- 34. Now coming to the evidence of other witnesses PW5, PW6 and PW7 it appears that they are hearsay witnesses and their evidences disclose no iota of implicit evidence to substantiate the prosecution case. While the victim (PW3) is found to be not a reliable witness to treat her as a wholly reliable witness to bring home the charge leveled against the accused and as such, the accused is entitled to benefit of doubt.
- 35. In the result, I am constrained to hold that the accused Krishna Adhikary is not guilty under Section 8 of the POCSO Act. Set him at liberty forthwith.
- 36. Bail bond executed by the accused person and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.
- 37. Judgment signed, delivered and pronounced in the open court today the 29th day of May, 2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Sessions Judge, Udalguri. (P.Saikia)

Sessions Judge,

Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Dr. Arup Kalita.

ii)PW2 Dhan Kumari Chetry.

iii)PW3 Victim.

iv)PW4 Ishan Roy.

v)PW5 Ranju Chetry.

vi)PW6 Anju Das.

vii)PW7 Puja Rai Das.

viii)PW8 Nalini Brahma.

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 Medical Report.

ii) Ext.2 FIR.

iii) Ext.-3 Statement of the victim u/S 164 Cr.P.C..

iv)Ext.4 Seizure list.

v) Ext.5 Sketch Map.

vi)Ext.6 Charge-Sheet.

Dictated and corrected by me.

Sessions Judge,

Udalguri.