

Present : Shri C. Das

Judge, Special Court Baksa, Mushalpur

# JUDGMENT IN SPECIAL POCSO CASE NO.100/18(OLD NO.8/17 & No.27/16)

u/s 4 of POCSO Act

State

-versus-

#### Sri Dhiren Boro

.... Accused

### Appearance:

For the State

: Mr. R. Chetry, Public Prosecutor, Baksa

For the accused: Mr. A. Boro, B. C. Boro, Ms. A. Rabha, R. Goyary, Advocates

Dates of evidence recorded: 5.7.17, 20.9.18, 16.11.18, 17.1.19, 27.2.19,

2.5.19

Date of argument

: 21.8.19

Date of judgment

: 4.9.19

#### **JUDGMENT**

1. The case of the prosecution briefly, is that on 3.9.15, the complainant Sri Narayan Choudhury lodged a FIR before the In-charge of Suwagpur police out-post, alleging inter-alias that on 1.9.15, at about 3 pm., the accused by inducement, called his minor daughter/ victim girl (name withheld) and committed sexual intercourse with her.

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2. The police accordingly, lodged the Suwagpur GDE No.54 dated 3.9.15 and forwarded the FIR to the Goreswar police station to register a formal case. Therefore, the Officer-in-charge of Goreswar police station registered the case No.99/15 and started the investigation. During the investigation, I/O visited the place of occurrence, drew up its sketch map and examined the witnesses



including the complainant and the victim girl. The I/O sent the victim girl for medical examination and seized the cloths of the victim. The I/O arrested the accused. At the end of the investigation, I/O having found a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

- 3. The accused appeared in the court after receipt of summons and as such, copy of the case was furnished to him immediately. After hearing of both the sides and on perusal of material on record, the charge u/s 4 of POCSO Act was framed against the accused. The charge so framed, was read over and explained to the accused, who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, six(6) witnesses including M/O and I/O to support its case. In the statement recorded u/s 313 CrPC., the accused denied all incriminating circumstances appeared against him in the evidence. The argument of the parties was heard at length and perused the evidence on record.

#### **POINT FOR DETERMINATION:**

5. Whether on 1.9.15, at about 3 pm., at village- Bornoddipar under Goreswar police station, the accused committed penetrative sexual assault upon the victim girl (name withheld) the minor daughter of the informant Sri Narayan Choudhury;

### **DICISION AND REASON THEREFORE:**

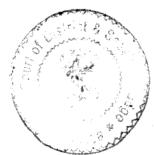
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At the outset, learned Public Prosecutor submitted in the argument that those witnesses who were examined in the case, corroborated each other on material for which the evidence of the victim girl cannot be disbelieve. There is lack of medical evidence to corroborate the version of the victim but that does not mean that the victim tendered false evidence against the accused since the victim cannot be treated as an accomplice. He further submitted that it is a settled rule of law now, the sole testimony of victim can be based of a conviction order against the accused in case of sexual offence. Since the prosecution witnesses have able to bring home the charge, the accused is liable to be punished as per law, he submitted.



- 7. Per contra, learned counsel for the accused submitted that the evidence of the prosecution witnesses are contradictory to each other. From their evidence, it is not clear if the accused committed sexual offence or attempted to commit it inasmuch as, the victim was the consenting party to the occurrence. He submitted further that the accused and the victim were known to each other and had some gossip with each other but without bad intention. However, PW3 made it vulgar act or colour to it. It is his submission that there was nothing ill-act or sexual intercourse took place between the accused and the victim for which medical evidence does not lend support it. Therefore, the evidence of the prosecution could not prove the case beyond all shadow of doubt and as such, the accused is entitled to be acquitted, he maintained.
- After perusing the evidence on record, it appears that the 8. occurrence took place at the side of river bank during day broad light. The prosecution examined the complainant Sri Narayan Choudhury who is the father of the victim girl as PW2. He deposed that on the fateful day at about 3.30 pm., the victim girl with her friend Ms. Bidang Boro went to river side. Earlier, the accused collected mobile phone number of the victim girl which was not known to him. When the victim girl reached the river bank, the accused called the victim over phone to know her whereabout. The victim informed the accused about her location and as such, the accused went to bank of river. The accused kept aside the friend of the victim girl, took her towards jungle forcibly. Hence, the victim raised hue and cry. As such one Sukram Boro(PW3) rushed to the spot and saw the incident and tried to prevent the accused from doing forceful intercourse with the victim. PW3 brought back the victim to his house. So he called a village meeting. But the accused did not allow to hold the meeting. Hence, he went to police station to lodge the FIR. The police sent the victim girl for medical examination. He filed the FIR vide Ext.2 with his signature. The police seized the wearing cloths of the victim vide Ext.3 with his signature. Ext.4 is the medical report of the victim with his signature.

9. In the cross-examination, PW2 stated that PW3 reported him about the incident. The local meeting was held after one day of the offence where several dge Spi Court villagers were present. The victim girl informed him that the accused called Bidang Baksa Mushalpur Boro to river side. There was nobody present at the river bank at the relevant time. He stated that the victim was 14 years of age at the time of occurrence but he did not submit the birth certificate of the victim to the police. Apparently, PW2 is not an eye-witness of the occurrence.



- 10. PW1 is the victim girl. Her name is withheld. She is the daughter of PW2. She stated that she was in class-VIII at the time of occurrence. She deposed further that on the fateful day at about 2 pm., she went to river bank. The accused called her to come there. He called her near to water by holding her hand. Thereafter, the accused laid her down on the ground. The accused committed sexual intercourse with by opening her panties. The accused was wearing a long pant and he opened the chain and committed the intercourse with her. She raised shouting. She also, ran away. The accused raped her but could not complete the intercourse with her. The accused called her to come to watch water by phone. Due to her alarm, PW3 saw her. PW3 escorted her to her home. The accused fled away. She gave her statement vide Ext.1 with her signatures.
- 11. In the cross-examination, PW1 stated that she could not recollect the date of occurrence. The FIR was written as per her dictation. A local meeting was held after the occurrence. She admitted that the accused was wearing long pant and he opened the chain to the police earlier since it was not asked to her. She reported the incident first to her mother. PW3 and Bidang did not see the incident. When the accused pulled her, Bidang left far away from her. Apparently, PW1 narrated the incident to implicate the accused.
- 12. But PW3 does not corroborate the version of PW1. It is the evidence of PW3 Sri Sukram Basumatary is that on the fateful day at about 2/3 pm., he went to river side. He saw two girls in the jungle. He also, saw the accused followed the girls. The accused committed sexual intercourse with the victim girl. He went near the accused and abused him for such act with the victim. The accused denied his allegation. Having seen his presence at the spot, two girls fled away there from. Subsequently, he came across with the victim and inquired her about her address. He came to know that the victim is the daughter of PW2. He handed over the victim to her parents. He reported the incident to PW2. On next day, police visited the place of occurrence.
- 13. In the cross-examination, PW3 stated that the victim went to the spot with the accused. Thus, the evidence of PW3 contradicts the version of PW1.
- 14. PW4 Dr. Dolly Gogoi deposed that on 4.9.15 at SMK civil hospital, Nalbari, she examined the victim(PW1) in connection with the case and found that no external injury found. No injury on genitalia parts. Hymen was torn. No fresh injury. Investigation advised for vaginal smear for sperm and x-ray for age

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determination. Report – skeletal age from radiological evidence, is estimated below 18 years and above 16 years. Vaginal smear- no sperm seen. She submitted the report vide Ext.4 with her signature. Thus, the medical evidence does not corroborate the version of PW1. There is no dispute over finding of PW4 on the victim girl.

- Goreswar police station at the relevant time. On the fateful day, the parents of the victim girl brought her to the police station with the allegation that the accused committed rape on the victim girl. The police seized the wearing cloths of the victim girl vide Ext.3 with her signature. There is no dispute over the evidence of PW5. Apparently, PW5 is an official witness of the occurrence. Hence, it appears that the wearing cloths of the victim girl was seized by I/O but no such FSL report regarding examination of such cloths of the victim, is submitted in the case by the prosecution.
- the FIR from the informant and accordingly, he lodged a GDE at his out-post and forwarded the FIR to Goreswar police station for register of a formal case. Thereafter, he went to the place of occurrence and examined the witnesses. The accused surrendered before the Goreswar police station and accordingly, he arrested the accused. He examined the victim girl and sent her for medical examination and for recording her statement u/s 164 CrPC. The Officer-in-charge of Goreswar police station registered the case no.99/15 and endorsed him for investigation. He prepared the sketch map of the place of occurrence vide Ext.5 with his signature. He seized the wearing cloths of the victim girl vide Ext.3 with his signature. His next I/O collected the medical report of the victim and filed charge-sheet against the accused vide Ext.6 with the signature.
- 17. In the cross-examination, I/O stated that PW2 did not submit any explanation regarding delay in filing the FIR. He had shown a tree in Ext.5 but no person resided near the tree.
- 18. Thus, from the evidence of the prosecution witnesses, it appears that the occurrence was taken place near the river bank. Fro the version of I/O, it appears that the place of occurrence was secluded place. The evidence of PW1 is corroborated by PW2 who is the father of PW1. But PW2 was not present at the

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place of occurrence and his evidence is not direct. His version is come from the report of PW1. On the other hand, PW3 was present at the place of occurrence. If the evidence of PW1 is carefully perused, it appears that she alleged that she was accompanied by her friend Bidong Boro. But the prosecution failed to examine such important witness of the occurrence. Such girl would corroborate the claim of PW1 and actual incident between the accused and PW1. No reason is cited by the prosecution. Hence, due to withheld of such girl namely; Bidong Boro, an adverse presumption is drawn against the prosecution u/s 114 [Illustration-(g)] of Evidence Act, that if such important witness like Bidong Boro was examined, she would have deposed unfavourably to the prosecution case. Therefore, such presumption shakes the veracity of the prosecution case.

- 19. It appears that finding of medical expert is not in dispute between the parties. It shows from the medical evidence that PW1 was below 18 years but above 16 years. Therefore, in any view, the age of PW1 is below 18 years and as such, she is a child within the meaning of Section 2(d) of POCSO Act.
- 20. Besides above, the evidence of PW1 discloses that she was called by the accused to the river bank and took her by holding her hand. But PW3 contradicts such version of PW1 that he saw two girls were moving in the jungle area and the accused followed them. The evidence of PW3 shows that the occurrence was taken place inside of jungle area. Thus, the claim of PW1 that the occurrence took place near river bank is not correct. PW1 stated that she raised shouting when the accused committed sexual intercourse with her when PW3 came nearby. But PW3 never stated that he heard any shouting of PW1 before arriving at the spot. According to the version of PW3, there was no force used by the accused. Further, the version of PW3 shows that having seen him at the spot, the victim and other girl fled away. This means that other girl was present near PW1 at the relevant time. But PW1 stated that other girl was kept aside by the accused. Thus, it contradictory to the version of PW1 with PW3. It seems that PW1 conceals some real facts of the incident. The version of PW3 shows that there was some understanding between the accused with her prior to the occurrence. Apparently, the version of PW1 does not inspire confidence to rely upon her version. Moreover, the claim of PW1 that she was raped by the accused is not corroborated by medical evidence. The witnesses of the prosecution could not tender consistent evidence as to the occurrence to credit their trust worthiness.

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21. The prosecution alleged that the accused committed penetrative

sexual assault on PW1 which is defined u/s 3 of POCSO Act. The offence of penetrative sexual assault is defined that a person is said to commit "penetrative sexual assault" if -

- (a) he penetrates his penis to any extent into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person;
  or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- From the above provisions of law makes it clear that penetration of 22. own penis, or any other object to any extent into the vagina, urethra, anus of a child or his/ her body or manipulation of such parts of the child or applies mouth into the such parts of the child by the accused or any other persons or to do same act by the child to him or any other person, is sufficient to constitute the offence. In the instant case, PW1 and 3 as well as supported by PW2 that the accused committed penetrative sexual assault upon PW1. It is even come from the evidence of PW1 that the such assault was not completed by the accused and during the middle, she ran away. But PW3 stated that due to his presence, PW3 ran away with her friend from the scene. If there was some penetration, then, PW1 would suffer some injury or mark on her private part. But the medical evidence most importantly does not find any injury on the person of PW1. Moreover, the wearing cloths of PW1 was not sent for FSL examination by I/O which is a serious lapse of the investigation. If there was FSL report for the cloths seized by I/O vide Ext.3, it could have drawn an inference of penetration by the accused into the vagina of PW1. But absence of the same, tenders the evidence of PW1 unreliable. Hence, there is doubt over the version of the prosecution witnesses regarding such offence committed by the

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23. That apart, the provisions of Section 30 of POCSO Act allows the court to draw presumption of culpable mental state of the accused which defines that (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



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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 to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
- 24. From the evidence of PW1, it appears that she knew the accused prior to the occurrence since she had conversation with the accused over mobile phone. Her evidence shows that she went with her friend to the place of occurrence at the call of the accused. Had there been no understanding between PW1 and the accused, PW1 would not go to the spot. It appears that prior to the occurrence, both PW1 used to meet the accused at such place but on the fateful day, PW3 caught them red-handed and as such, PW1 ran away due to presence of PW3 at the spot. Having considered the above fact, it does not appear any phenomenon to presume the culpability of mental state of the accused to commit such offence against PW1. Apparently, major contradictions appears in the evidence of the prosecution witnesses and there is also, lapse in the investigation to cover up some vital facts does not come into light. Hence, the evidence of the PW1 is not at all reliable to believe to any presumption of any culpability of mental state against the accused to commit the offence.

It is correct to say that there is delay of 2 days in lodging the FIR vide

Ext.2 by PW2. The occurrence took place on 1.9.15 while FIR was lodged on 3.9.15 after two day. It is expected in law that the FIR of an offense should be filed immediately to avoid any embellishment or colourful exercise of mind as well as, to facilitate quick start of investigation by the police. If there is delay in lodging the FIR, then, an explanation of delay ought to be furnished to ascertain its genuineness. Unless such explanation come from the informant, the genuineness of it looks under doubt. But in the instant case, PW2 explained the delay that he called a village meeting immediately after the incident. But due to obstruction of the accused, he filed the ejahar before the police. This means that PW2 waited for a result or decision from the meeting which was not allowed to hold by the accused. Mushalper It is common in rural area to call for such village meeting before approaching to the police. PW2 is from village back ground. Hence, calling such village meeting for a settlement locally was expected by him which took time as well as, obstruction of the accused. Therefore, it appears that the delay in lodging the FIR is duly explained by PW2. Even then, the evidence of vital witnesses like PW1 and 3 is



found to be not credit worthy to rely upon. Therefore, the accused is entitled to get benefit of doubt. Accordingly, the accused is given the benefit of doubt.

- 26. Under the above facts and circumstances of the case, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s 4 of POCSO Act. The accused is thus, acquitted and set at liberty. The bail bond of the accused shall remain in force u/s 437-A CrPC for another 6 months from today. The seized articles shall be destroyed. Foward a copy of judgment to the District Magistrate, Baksa, Mushalpur u/s 365 CrPC. The victim is entitled to get compensation u/s 357 CrPC. Hence, this court recommends payment of such compensation by DLSA, Baksa district.
- 27. Given under the hand and seal of this court on this  $4^{th}$  day of September 2019.

Dictated and corrected by :

C. Das.

Judge, Special Court, Judge Spi Court Baksa, Mushalnur

Baksa, Whishelett

Typed by:

P. Deka, Com. Typist



### **ANNEXURE:**

# List of prosecution witness:

PW1 ... victim girl (name is withheld)

PW2 ... Sri Narayan Choudhury ... complainant

PW3 ... Sri Sukram Basumatray

PW4 ... Dr. Dolly Gogoi ... m/o

PW5 ... Smti. Rupamoni Kalita

PW6 ... Sri Naren Bora ... I/o

### List of defence witness:

Nil

## List of documents exhibited:

Ext.1 ... statement of victim u/s 164 CrPC

Ext.2 ... FIR

Ext.3 ... seizure list

Ext.4 ... medical report

Ext.5 ... sketch map

Ext.6 ... charge-sheet

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