IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. : 30 OF 2016

(Under Section 6 of the POCSO Act, arising

out of G.R. Case No. 2679/16 of 2016)

Present : Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

-vs-

Prosecutor : State of Assam

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Accused : Sri Khemo @ Khem Saikia

 Son of Late Bholock Saikia, Resident of Tamulguri, Police Station – Jamuguri, Dist:- Sonitpur, Assam

Date of framing Charge : 28/02/2017

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Date of Recording Evidence : 16/03/2017, 17/05/2017, 14/08/2017, 05/12/2017,

- 12/03/2018

Date of examination of accused

u/s 313 Cr.P.C

26/06/2018

Date of Argument : 19/07/2018

Date of Judgment : 21/07/2018.

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Counsel for the Prosecution : Mr. Munin Chandra Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused : Smt. D. Sinha, Ld. Advocate.

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JUDGMENT

1. In this case accused Sri Khemo @ Khem Saikia is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.

- 2. The prosecution case according to the FIR in brief is that on 19.08.2016 at about 6:30 PM accused sexually abused the informant's daughter Miss "X" (only 3 years) by touching her private parts and penetrating his penis into her vagina which has terrorised her. Hence, this prosecution case. The FIR was filed by Smt. Sakuntala Mudoi before the O/C of Sootea Police Station on 20.08.2016.
- 3. On receipt of the aforementioned FIR, the Officer-In-Charge of Sootea Police Station registered a case being Sootea P.S. Case No-141/16, under section 4/8 of POCSO Act, 2012 and endorsed S.I. Padmeswar Borkakoti to investigate the case. After completion of usual investigation, the O/C Sootea Police Station sent up the accused for trial by filing charge sheet u/s 4 of the POCSO Act against the accused Sri Khemo @ Khem Saikia.
- **4.** On being appeared the accused before this Court, after hearing both parties, charge framed under section 6 of the POCSO Act, 2012 against the accused and particulars of the charge was read over and explained to the accused to which he pleads not guilty and claims to be tried.
- 5. To substantiate the case prosecution examined as many as **eleven** numbers of witnesses. After completion of prosecution evidence, accused was examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the evidence. To buttress the defence, the accused declined to give defence evidence.
- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- 7. The point for decision in this case is that -
 - (1) "Whether the accused person on Sri Khemo @ Khem Saikia at about 6:30 PM at village Jamuguri, Dhalpur under Bihpuria PS, Dist- Lakhimpur committed penetrative sexual assault on the victim Miss "X" (3 years) and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

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REASONS, DECISIONS AND REASON FOR DECISION.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW 1, Dr. Priyanka Jain,** who is the medical officer of this case has stated before this court that on 07.09.2016 she was working at Tezpur Medical College & Hospital, Tezpur as Demonstrator in the department of Pathology and on that day, in reference to Sootea PS Case No. 141/2016, u/s 4/8 of POCSO Act, she along with Dr. Jatindra Deka and Dr. Akash Pradip Bhuyan examined one Sri Khema Saikia. The said person was brought by SI Padmeswar Borkatoki of Sootea PS. Actually, he is unable to produce his semen for analysis. The patient has refused to produce his sample even proper explanation. Ext 1 is her certificate and Ext 1(1) is her signature.
- **10.** In her cross examined, she admitted that the patient was over aged but he could not produce semen. The producer to be followed was explained to him but he could not produce semen.
- 11. PW 2, Sri Padma Sarmah, grandfather of the victim has stated that the incident took place in the month of August, 2016. At the time of the incident, his granddaughter was 3 years old. His daughter Sakuntala and his victim granddaughter came to his house. On the day of incident, when he came from the market at about 8 PM, his wife reported him that now a days it's difficult to believe any person. At night his victim granddaughter was crying and so in the next morning he called his aunt Joymoti Sarmah and his aunt reported him that there is a ruptured in the private part of his granddaughter. Accordingly, he was advised to take his granddaughter to the hospital. Then his daughter Sakuntala has filed the ejahar and his granddaughter has treated at Biswanath Chariali hospital. During investigation, police seized pant which was worn by his victim granddaughter at the time of incident and also bed sheet where the alleged incident took place. Ext 2 is seizure list and Ext 2(1) is his signature.
- 12. In his cross-examination, he admitted that other than the information reported by his wife he knew nothing. He is surprised why this old man indicates in this allegation.
- **13. PW 3, Smt. Renuka Sarmah,** who is the grandmother of the victim of this case has stated that the incident took place about 6 month ago in the evening time. On

the day of the incident, her daughter Sakuntala was busy in cooking dinner. In the previous day some incident took place but she did not know what was happened. In the next day while her granddaughter found difficulties in urinating she was crying. After some time while they noticed the private parts of her granddaughter she saw rupture with reddish on her private parts. While they asked her granddaughter she told them that "Bagan Koka" touches her private parts through his sexual organ. "Bagan Koka" means the accused who is present in the dock. Thereafter, her granddaughter was taken to Sootea hospital. Though the doctor was found absent but the nurse of the hospital advised them to inform the matter to the police. Thereafter, her daughter Sakuntala has filed this case and police has taken her granddaughter to the Biswanath Chariali Hospital.

- **14.** In her cross-examination, she admitted that they came to know about the incident in the next day of incident. They along with Joyanti Sarmah noticed the private parts of the victim girl and saw rupture with reddish on her private parts.
- 15. PW 4, Smt. Joyanti Sarmah who stated that she knows the accused person of this case. The incident took place in the month of "Bhada" of 2016. She came to know about the incident in the next day of morning. In the morning time Sri Padma Sarmah, the grandfather of the victim called her to his house and reported that accused "Bagan Koka" rape on her granddaughter. Then she advised to take the victim to doctor when she notice the private parts of his granddaughter. She saw the swelling on her private parts.
- **16.** In her cross-examination, she admitted that she made her deposition before the court as stated by Sri Padma Sarmah. She has no personal knowledge about the incident.
- **17. PW 5, Smt. Jonmoni Sarmah,** who stated that the incident took place in the month of August-September of 2016. At the relevant time, she was coming from Hojai to Sootea to her parental home. In the next day, she was reported that accused committed misdeed to the victim Miss "X". She saw the victim. Then she turned hostile.
- **18.** The cross examined by the defence, she stated that Sunil Mudoi is the father of the victim. Her mother is a close relative with the mother of the victim. They have no enmity with them. Accused is also not related to him. She speaks truth before the court.

- **19. PW 6, Sri Sonmoni Sarmah,** who stated that he heard from the public that the accused committed rape on one girl. In his cross examination, he stated that in the next day of the incident he came to know about the same.
- 20. PW 7, Mrs. Meenakshi Sarmah, the Ld. Magistrate who recorded the statement of the victim. On 23.08.2016 she was posted at Tezpur as Judicial Magistrate 1st Class, Tezpur. On that day in reference to Sootea PS Case No. 141/16, she has examined one witness i.e. the victim Miss "X", D/o Sunil Mudoi of village Jamuguri, Mouza Dholpur. The victim was three years old only. To ascertain whether she could understand and understanding things, some questions were asked to her. From the questions put to her, she was able to ascertain that the victim is able to understand things put forwarded to her and therefore, now she is noting down her statement in presence of her mother Smt. Sakuntala Mudoi. The mother of the witness is though presence in her chamber, but, she is made to sit in such a position, that she could not see the victims face while the statement is recorded. After recording her statement, she has interpret the statement to her and one being satisfaction, her mother Sakuntala Mudoi put signature in her present. The said victim was brought and identified by WPC/598 Mrs Rekha Katoky of Sootea PS. She also put signature in her present. Ext 3 is the statement of the victim Miss "X" and Sakuntala Mudoi. Ext 3(1) is the signature of the mother Sakuntala Mudoi. She knew her signature as she put signature in her report. Ext 3(2) is the signature of WPC/598 Mrs Rekha Katoky of Sootea PS and Ext 3(3) is her signature. Ext 4 is the order dated 23.08.2016 by which statement was recorded.
- **21.** In her cross examination, she admitted that the girl was accompanied by her mother Sakuntala Mudoi and in her presence, she gave her statement.
- **22. PW 8**, Dr. Jonali Gogoi, the Medical Officer who examined the victim has stated that on 21.08.2016 she was posted as Sr M&HO at Sub-Divisional Civil Hospital, Biswanath Chariali. On that day, at about 10:30 AM in reference to Sootea PS Case No. 141/16 u/s 4 of POCSO Act, she has examined one patient namely, Miss "X" (3 years old) on being escorted and identified by WPC/598 Mrs Rekha Katoky and on examination, she found the followings:

<u>Identification Mark:</u> One black mole at back of head (right side).

<u>On General Examination:</u> She was conscious, clothes normal, behaviour, panicky look. No injury mark present over her body. No blood stain present at her clothes.

Pelvic Examination: Public hair absent. On examination, redness and swelling present around introitus. Labia minora and labia majora(inside). Tenderness present introitus. Slide taken from vaginal swab for age determination. Advised X-ray of wrist, elbow and iliac creast. According to radiologist, her age is three years. Plate No-4119.

Laboratory examination of vaginal swab: No spermatozoa seen.

Remarks: She is three years old. External body injury is absent. But, vaginal injury is present. Attempt to rape cannot be excluded.

Ext 5 is the medical report and Ext 5(1) is her signature. Ext 5(1-A) is the prescription of the Biswanath Chariali Civil Hospital (OPD) and Ext 5(1-B) is her signature. Ext 6 is the laboratory report of Biswanath Chariali Civil Hospital regarding vaginal smear report and Ext 6(1) is the signature of Laboratory Technician which she knows.

- 23. In her cross examination, she admitted that she was not a gynaecologist. Injury of vagina which she mentioned in the report may be caused by irritation and stretching of finger. No definite opinion can be made as to the rape or penetrative sexual assault. Why the patient was panic, she could not say. She may panic for bringing her to the hospital.
- **PW 9, Smt. Sakuntala Mudoi,** the mother of the victim stated that she knows the accused and the incident took place in the month of Ashar, 2016. Probably, in the month of August. At the relevant time, she was in her parent's house at Hatisal, Sootea along with her daughter Miss "X". At the time of incident the age of her daughter was 3 ½ years. It was Thursday. Accused has a small tea garden which is situated infront side of their parental house. On that day, she along with the guests went to Nagsankar Temple. At about 4 PM they returned to her parental house. At about 6 PM accused sitting in her parental house waiting for vehicle to carry green leaves as usual. At that time, her victim daughter was playing in the court yard. Accused took her victim daughter on his lap. At that time she raised alarm. She came out from inside the house and saw her victim daughter was in the lap of the accused without putting pant. Accused

was also found in opening his pant. Then her daughter was crying and took her inside the house.

Next day morning, while her daughter woke up and went to toilet to discharge urine, then she started crying stating that she was suffering severe pain in her private parts. So she could not discharge urine. Then she called their neighbour Asha Karmi Jayanti Sarmah, They show the private parts of her victim daughter to Jayanti Sarmah. She advised her to took her daughter to the hospital. They took the victim to Sootea PHC. But the PHC authority advised them to inform the matter to police. Thereafter, she informed the matter to police. Police advised them to give a written ejahar. Accordingly, she requested on scribe to write the ejahar. Ext 7 is the ejahar and Ext 7(1) is her signature. Her victim daughter was medically examined by a doctor. Thereafter, she was taken to the court to record her statement. Thereafter, her victim daughter was handed over to her.

- 25. In her cross examination, she admitted that in the evening while her daughter was crying she asked her she told her that she fell down for which she sustained injury. Except crying, she did not tell anything. In the next day also she did not say anything to them. She filed the ejahar at the instruction of other villagers. Some of the villagers wrote the ejahar. She does not know the contents of the ejahar. She did not file any ejahar against the accused. Ejahar was written in English so she could not say what was written there. Police recorded her statement. Accused is their neighbour. They have got visiting terms. He is a good man of that locality. She has got no complaint against the accused.
- **26. PW 10, Miss "X",** the victim, who was examined after making enquiry by putting some questions and answers as to her ability to give rational answers stated that at the relevant time she was at Angonvadi School. The incident took place in the morning time. During that time she went to her grandfather's house at Jamuguri. Accused is her maternal uncle. She was taken to doctor as she was suffering from fever. Today her mother did not instruct what to speck before the court. Infact, she could not recall what was happened. Her cross examination was declined by the defence.
- **27. PW 11, Sri Padmeswar Borkatoki,** who is the Investigating Officer of this case has stated before the court that on 20.08.2016 he was posted as 2nd Officer at

Sootea PS. On that day one Sakuntala Mudoi filed an ejahar before the police station and after receipt of the ejahar the then O/C of Sootea PS registered a ca se vide Sootea PS Case No. 141/16 u/s 4/8 of POCSO Act and entrusted him to investigate the case. Accordingly, he visited the place of occurrence at about 5:45 PM and prepared sketch map of the place of occurrence. Ext 8 is the sketch map and Ext 8(1) is his signature. Thereafter, he examined the witnesses and recorded their statement u/s 161 of CrPC. At the place of occurrence, he has seized one panty which was put by the victim at the time of incident along with one bed sheet. Ext 2 is the seizure list of said panty and bed sheet. Ext 2(1) is his signature. He has also recorded the statement of the seizure. As the accused refused to give consent to give semen for examination, so, he has not sent the said panty and bed sheet to FSL. Then, he searched for the accused to his home and took him to the police station for interrogation and arrested the accused and forwarded him before the court. Then, the victim was sent for medical examination and thereafter, the victim was produced before the court for recording her statement u/s 164 of CrPC. After completion of investigation, finding prima facie materials against the accused, he has filed charge sheet against the accused u/s 4 of POCSO Act. Ext 10 is the charge sheet and Ext 10(1) is his signature.

He admitted that he has recorded the statement of witness Smt. Junmoni Sharma Borah, who has stated before him that "Today in the morning at about 7:30 AM her mother informed her about the incident. Thereafter, she immediately went to the house of the victim and saw the victim was crying. Then she noticed some rupture with reddish on her private parts. On seeing the same she afraid and saying that such type of person is never be survived in this world. Thereafter, the victim without wasting time was taken to the civil hospital through police." Ext 9 is the case diary of Sootea PS Case No. 141/16 and Ext 9(1) is the relevant portion of the statement of witness Smt. Junmoni Sharma Borah. Ext 9(2) is his signature.

- **28.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- **29.** I have heard the arguments put forwarded by Learned Counsel of both the sides.

- **30.** Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. *Firstly,* the most important witness i.e. the victim stated nothing about the incident even she was examined after testing her intelligent and ability to give rational answers. *Secondly,* the complainant herself admitted in her cross examination that in the evening time while her daughter was crying she asked her and told her that she fell down for which she sustained injury. Except crying, she did not tell anything. In the next day also she did not say anything to them. Besides that the complainant who is also the mother of the victim filed the ejahar on the instruction of other villagers. Some of the villagers wrote the ejahar but she does not know the contents of the ejahar. At last she stated that the she did not file any ejahar against the accused. Ejahar was written in English so she could not say what was written there. Therefore, the complainant failed to prove the guilt of the accused in her ejahar. *Thirdly,* other witnesses are reported witnesses. Under such circumstances, accused is required to be acquitted.
- **31.** On the other hand, learned Special Public Prosecutor submitted that the prosecution has ably proved the case beyond any reasonable doubt against the accused, hence, the accused is required to be convicted under the charged section.
- **32.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **33.** To prove the charge under section 4 of the Protection of Child from Sexual Offences (POCSO) Act, prosecution must prove the ingredients mentioned in section 3 of the POCSO Act.

Section 3 of the POCSO Act quoted as follows:

<u>Section 3. Penetrative Sexual assault,</u> - 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

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- (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 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.

"The clause defines the offence of penetrative sexual assault. It provides that if a person 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 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 he manipulates any part of the body or the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or he applies his mouth to the penis, vagina, anus, urethra or the child or makes the child to do so to such person or any other person, he is said to commit the offence of **penetrative sexual assault**".

The most important witness in this type of case is the statement of the victim 34. as stated above. In the present case, the victim Miss "X" was examined as PW 10 after making enquiry to test her intelligence and ability to give rational answer. She is a young girl of only 3/4 years. In her statement she could not be able to say about her age. In her statement there is no any ingredients that the accused to indicate in the punishment of committing penetrative sexual assault. Her statement nowhere stated that the accused 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 accused 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 her statement is silent that accused manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or accused 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. Therefore, from the statement of the victim no any ingredients of the alleged charge as revealed.

Similarly, the complainant who is the mother of the victim also goodbye to the prosecution case by stating that in the evening time while her daughter was crying she asked her she told her that she fell down for which she sustained injury. Except crying, she did not tell anything. In the next day also she did not say anything to them. She filed the ejahar at the instruction of other villagers. Some of the villagers wrote the ejahar. She does not know the contents of the ejahar. She even stated that she did not file any ejahar against the accused. Therefore, the ejahar upon which the case was initiated failed to prove by the complainant itself. Besides that one of the main witness Junmoni Sharma was turned hostile. Her hostile portion of the statement is nowhere corroborated with the statement of any other witnesses. Therefore, her hostile portion of statement cannot be used by the prosecution in their favour.

35. In view of the aforesaid discussion, I am bound to hold that the prosecution has categorically failed to prove the charge levelled against the accused beyond any reasonable doubt. As such, the accused is entitled to get the benefit of doubt. Hence, accused is acquitted and set him at liberty forthwith.

- **36.** The liability of the bailor is hereby discharged.
- **37.** Let the G.R Case No. 2679/16 be sent to Ld. committal Court along with a copy of Judgment.

Given under my Hand and Seal of this Court on this the 21st day of July, 2018.

(Ashok Kumar Borah)

SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

(Sri Janmoni Deka), Steno

A-N-N-E-X-U-R-E

1. PRESECUTION WITNESSES

PW 1 :- Dr. Priyanka Jain, the M.O

PW 2 :- Sri Padma Sarmah

PW 3 :- Smt. Renuka Sarmah

PW 4 :- Smt. Jayanti Sarmah

PW 5 :- Smt. Jonmoni Sarmah

PW 6 :- Smt. Sonmoni Sarmah

PW 7 :- Mrs. Meenakshi Sarmah, J.M.F.C. Kamrup (Rural), Guwahati

PW 8 :- Dr. Jonali Gogoi, the M.O

PW 9 :- Smt. Sakuntala Mudoi, the Complainant

PW 10 :- Miss "X", Victim

PW 11 :- Sri Padmeswar Borkatoki, the I.O

2. WITNESSES FOR DEFENCE: NIL

3. PROSECUTION EXHIBITS:

Exhibit 1 :- Medical Report

Exhibit 1 (1) :- Signature of the informant, PW 1

Exhibit 2 :- Seizure List

Exhibit 3 :- Statement of the victim Miss "X"

Exhibit 3(1) :- Signature of Sakuntala Mudoi

Exhibit 4 :- Relevant Order Dated 23.08.2016

Exhibit 5 :- Medical Report of PW 8

Exhibit 5(1) :- Signature of PW 8

Exhibit 5(1-A) :- Prescription of Biswanath Civil Hospital (OPD)

Exhibit 6 :- Laboratory Report of Biswanath Civil Hospital

Exhibit 7 :- Ejahar

Exhibit 8 :- Sketch Map

Exhibit 9 :- The case diary of Sootea PS Case No. 141/16

Exhibit 10 :- Charge Sheet

4. **DEFENCE EXHIBITS:** NIL

5. **COURT WITNESSES:** NIL

(A.K. Borah)
Special JUDGE,
SONITPUR: TEZPUR

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