IN THE COURT OF SPECIAL JUDGE...... BIJNI.

Present: N.U. Ahmed,
Special Judge,
Bijni.

Special(P) case No.13(B)/2019

U/S 354 of the IPC, R/W section 8 of the POCSO Act.

THE STATE OF ASSAM

-VS -

Md. Anar Ali.... Accused.

## **APPEARANCE:**

Advocate for the prosecution

Advocate for the defence

Date of charge

Date of evidence

Date of Argument

Date of Judgment

: Mr. P. Dev Ray, learned Addl. P.P. &

: Mr. S. Kr. Das, learned Advocate.

: 29-08-2019.

: 11-09-19, 24-09-19, 06-12-19, & 18-12-19.

: 04-02-2020 & 15-02-2020

: 26-02-2020.

#### **JUDGMENT**

- 1. The prosecution case, in brief, is that on 20-07-2019, informant Asak Ali lodged an FIR with the I/C Ballamguri O. P. alleging inter-alia that on 20-07-2019 at about 1:00 PM his daughter (name withheld herein after known as victim 'X') along with Sabina Khatun, Jesmina Khatun and Kamala Khatun were gone to Khayar garden to collect fire wood. While they were searching fire wood, then suddenly accused Anar Ali came there and with a pretext to uplift victim "X"'s bundle of firewood on her head, tried to disrobe her and tried to commit rape on her. The other girls were searching firewood inside the jungle. Victim "X" raised hue and cry and on hearing hue and cry of the victim "X", her two friends came to the place of occurrence and accused Anar Ali fled away from the place of occurrence. Hence, the present case.
  - 2. On receipt of the FIR, I/C Ballamguri O. P. entered the same in General Dairy vide GDE No.168 dated 20-07-2019 and forwarded the same to O. C. Bijni P. S. On receipt

SEADOL. SESSO

of FIR, O. C. Bijni P. S. registered a case being Bijni P. S. case No. 238/19, U/S 354 of the IPC R/W section 8 of the POCSO Act and started investigation. During investigation I. O. visited the place of occurrence, recorded the statement of witnesses, recorded the statement of victim girl under section 164 of the Cr. P. C. by Judicial Magistrate, sent the victim girl to Hospital for medical examination, seized one school certificate of the victim girl and after completion of investigation I.O. submitted charge sheet against accused Anar Ali u/s 354 of the IPC R/W section 8 of the Protection of Children from Sexual Offences Act, 2012 (in short here in after called as POCSO Act)

3. After receiving the charge sheet cognizance was taken u/s 354 of the IPC, R/W section 8 of the Protection of Children from Sexual Offences Act, 2012, against the accused Anar Ali and started a Special (P) case. Copies of the relevant documents were furnished to the accused person as per provision of section 207 of the Cr. P. C. After hearing both the sides learned Advocate and on perusal of case record charge was framed u/s 354 of the IPC, R/W section 8 of the POCSO, Act, 2012 and the contents of charge was read over and explained to the accused person to which he pleaded not guilty and daimed to be tried.

- 4. During trial prosecution side examined as many as nine witnesses including informant and the victim. Accused was examined u/s 313 of the Cr. P. C. and recorded his statement in separate sheets. The defence case was of complete denial and the defence side has not adduced any defence evidence.
- 5. I have heard argument put forwarded by learned advocate of both sides. I have gone through the case record as well as evidence on record.

#### **POINT FOT DETERMINATION**

- 6. (i) Whether accused on 20-07-19 at about 1 PM at No.3 Dakhin Makra, Khayar garden under Bijni P.S., voluntarily assaulted victim "X" a minor girl with intending to outrage her modesty and thereby committed an offence punishable u/s 354 of the IPC?
- (ii) Whether accused on the same day, time and place, sexually assaulted victim "X" and thereby committed an offence punishable u/s 8 of the POCSO Act, 2012?

Special Judge

COURTON

# :DISCUSSION, DECISION AND REASON THEREOF:

- 7. To bring home the charges the prosecution examined nine witnesses including the informant, M.O and victim. Let me scrutinize the evidence on record to decide the points.
- 8. PW1 Md. Esak Ali is the informant of this case. PW1 in his deposition has deposed that he knows the accused Anar Ali. Victim "X" is his daughter. About two and half months ago, one day at about 11/12 am he came to his house and his wife reported him that while victim "X" went to collect fire wood then Anar Ali caught hold her and tried to disrobe her and she raised hue and cry and on hearing her hue and cry two girls namely, Jesmina Khatun and Sabina came near the place of occurrence and accused fled away from the place of occurrence. Thereafter, his wife and he went to the house of accused Anar Ali and they report the incident to the parents of the accused but accused Anar Ali assaulted him and his wife. Thereafter, they returned to their house. Thereafter, he filed this case. He proved the FIR as Ext.1 and Ext.1(1) is his signature. After filing the case police went to the place of occurrence and asked him about the incident. Police also seized one school certificate of his daughter and he put his signature in the seizure list. He proved the seizer list as Ext.2 and Ext.2(1) is his signature.

During his cross-examination, he stated that the land from where his daughter was collecting fire wood is belong to one Satish Master. Near the place of occurrence Gazi Rahman has a betel-nuts garden. Gazi Rahman is the elder brother of Anar Ali. In a little distance from the place of occurrence there is natural Pond. He heard the incident at about 12/1 P.M. There is a bamboo fencing around the betel-nuts garden of Gazi Rahman. Defence side put suggestion to him that his daughter i.e., victim "X" along with two others girls went to the betel nuts garden of Gazi Rahman to pick up the bamboo fencing stick and the accused persons along with his brother and his son tried to prevent them from picking up the bamboo fencing and at that time other two girls fled away but his daughter fell down on the ground, which he denied. Defence side put suggestion to him that he deposed falsely, which he denied. The incident of assaulting him and his wife by the accused had not seen by any other persons except the family members of the accused person and his family members. Defence side put suggestion to him that accused did not try to remove the cloth of his daughter and accused has not touch the body of his daughter, which he denied. Defence side also put suggestion to him that he filed false case against the accused and depose falsely, which he denied.

Special Judge

CUURTO

9. PW2, Johura Khatun, in her deposition has deposed that informant is her husband.

She knows the accused Anar Ali. Victim "X" is her daughter. About 3 months ago, one day, while she was in her house then her daughter returned back after collecting fire wood and she fell down in the courtyard and reported her that while she was coming back with fire wood in her head then she was tried, she sit down to take rest near the betel nuts garden and at that time accused Anar Ali was going near the place of occurrence to catch fish and accused touch her body and she raised hue and cry and the accused fled away on the East. After getting the information, she along with her husband went to the house of accused and reported the incident to his parents. The parents of the accused person stated that they abandoned their son and they express their inability to help them. Thereafter, Anar Ali came out and pushed and gagged her and assaulted her husband. Thereafter, they returned to their house and her husband filed this case. Police asked her about the incident and recorded her statement.

During her cross-examination, she stated that a talk of compromise was going on between them and they sought Rs.10,000/- as compensation but accused and his family members denied to pay the amount. Near the place of occurrence there is a betel nuts garden of Gazi Rahman. Gazi Rahman is the brother of accused Anar Ali. Defence side put suggestion to her that her daughter along with two others girls went to the betel nuts garden of Gazi Rahman to pick up the bamboo fencing stick and the accused person along with his brother and his son tried to prevent them from picking up the bamboo fencing and at that time other two girls fled away but her daughter fell down in the ground, which she denied. She further stated that the incident was seen by several people. Defence side put suggestion to her that they filed a false case against the accused and she deposed falsely, which she denied. Defence side also put suggestion to her that accused did not touch the body of their daughter, which she denied. Defence side also put suggestion to her that in the interest of her husband she deposed falsely, which she denied.

10. P.W.3, is the victim "X". PW3 in her evidence stated that informant is her father. She knows the accused Anar Ali. About 1 month ago, one day at about 10 a.m. she and her two friends went to collect fire wood from Khayar garden. After collecting firewood at about 12:00 noon while they were returning then they sit down under Shisu tree to take rest. At that time accused Anar Ali was going to catch fish from this side. She lifted firewood bundle on her head but her cloth fell down from her head and she tried to pick up the cloth. Then accused Anar Ali told her that he would lift the cloth. But at the time of lifting the cloth accused touched her chest. Thereafter she raised hue and cry and returned to her house. On hearing her hue and cry her two friend who were proceeded in front of her came to her and she met two persons and she reported the incident to that

Special Judge Bijni

BIJAN

two persons and the persons asked her to report the matter to the parent of accused. She came to her house and reported the incident to her mother. After getting the information, her mother and father went to the house of accused and reported the incident to his parents and Anar assaulted her parents. Thereafter, her father filed this case. She further stated that the name of her two friends are Jesmina and Sabina. After filing the case police took her in the court and Magistrate recorded her statement. She proved her statement as Ext.3 and Ext.3(1), 3(2), 3(3) and 3(4) are her signatures. She also stated that accused persons touching her chest and tried to disrobe her.

During her cross-examination, she stated that while accused Anar Ali lifting her fire wood on her head then her two friends gone ahead and name of another two persons are Gaji and Rafik. Near the place of occurrence there is a betel nuts garden of Gaji Rahman and the betel nuts garden was surrounded by bamboo fencing. The bamboo fencing was in broken conditions. Defence side put suggestions to her that she took the bamboo stick from the bamboo fencing, which she denied. Defence side also put suggestion to her that while she was taking bamboo stick from the bamboo fencing of the garden of Gaji Rahman then accused Anar, his son and his brother Gaji prevented her and thereafter, they run away, which she denied. Gaji Rahman is the brother of accused Anar. Defence side put suggestion to her that accused person did not lifted her fire wood bundle on her head, accused did not touch her chest and also did not try to disrobe her, which she denied. Defence side put suggestion to her that accused person did not assault her father and mother, which she denied. Defence side further put suggestion to her that her father filed this case on false allegation and she deposed falsely, which she denied.

11. PW4, Lalchand Ali, in his deposition has deposed that he knows the informant Asak Ali and the victim "X". He also knows accused Anar Ali. About 2 months ago, he heard that while victim "X" was returning after collecting fire wood then accused Anar Ali caught her on the road. The informant lodged the FIR and Police took one School Certificate of victim "X" and seized the same. He put his signature in the seizure list. He proved the seizer list as Ext.2 and Ext.2(2) is his signature.

During his cross-examination, he stated that he cannot say the date of hearing about the incident. Police went to the house of informant and, thereafter, took them to the place of occurrence and in the place of occurrence police took his signature in a paper. He has not notice whether Ext.2 was written or blank at the time of taking his signature. Police went to the place of occurrence on the next day of the incident.

12. P.W.5 Miss Jesmina Khatoon, in her deposition has deposed that she knows the

Special Judge Special Judge informant, victim "X" and the accused person. She further stated that about 2 months ago, one day noon they went to the garden of Satish Master to collect fire wood. While they were returning to their house along with the fire wood bundles and she was ahead of victim "X" then accused Anar Ali was going on that side. From their back side victim "X" screamed and they run to the place of occurrence and found that victim "X" was crying and she told her that accused touch her chest. Thereafter, they took the victim "X" to her house. Victim "X" reported the incident to her parents and parents of the victim "X" went to the house of accused to inquire about the incident and accused Anar Ali tried to assault them with spade. Thereafter, father of victim "X" filed this case.

During cross-examination, she stated that they three friends went to the victim "X" but they did not found accused Anar Ali there. Defence side put suggestion to her that adjacent to the garden of Satish Master there is land of brother of accused, which she denied. Defence side also put suggestion to her that they broke the fencing of Gaji Ali, which she denied. She further stated that while they were returning towards their house then accused Anar Ali, his brother and his son chased them. Defence side put suggestion to her that as the accused chase them and for this reason father of victim "X" filed this false case and on the tutor of informant she falsely deposed, which she denied.

- 13. PW6, Miss Kamala Khatun, in her deposition has deposed that she knows the informant, victim and accused person. She further stated that about 2 months ago, one day, she, Sabina, Jesmina and the victim "X" went to the khayar garden for collecting fire wood. She alone collected the fire wood and returned to her house. Victim "X" was came later. After she reached home and while she was taking food then victim "X" told her that accused touched her body.
- 14. PW7, Miss Sabina Khatun, in her deposition has deposed that she knows the informant, victim "X" and the accused person. She further stated that about 2 months ago, one day, she, Kamala, Jesmina and victim "X" went to garden for collecting fire wood. The fire wood was fell down from the head of victim "X" and while the accused lifting the fire wood on the head of victim "X" then accused caught her. Victim "X" raised hue and cry and she went there. She saw that accused was caught hold the victim "X" and on seeing that incident she raised hue and cry and ran away from the place of occurrence.

During cross-examination, she stated that at the time of hue and cry of victim "X" along with her there was Kamala and Jesmina. She further stated that she deposed in court on the tutor of informant Asak Ali who is his maternal grandfather. Defence side put suggestion to her that while they were collecting fire wood then accused Anar, his brother

Abial Jude

and his son chased them which she denied and accused did not touch the body of the victim "X", which she denied.

15. PW8, Dr. Amritamsh Mishra, is the M.O of this case. PW8 in his deposition has deposed that on 31.07.2019, he was working at Ballamgri P.H.C as M.O. On that day at about 12.40 PM, he had examined Md. Ashak Ali and Jahanara Khatun in connection with Bijni P.S case No. 238/19. The patient was escorted by Babulal Basumatary. On examination he found simple fresh injury of Md. Ashak Ali and he has not found any visible injury of Miss Johura Khatun. He proved the medical report as Ext.4 and Ext.4(1) is his signature.

During cross-examination, he stated that in Ext.4 he had not described the injury of Ashak Ali. He has not given any opinion regarding injury.



16. PW9, Sri Lohit Medhi, is the I.O of this case. PW9 in his deposition has deposed that on 21-0-19, he was working at Ballamguri outpost. On that day informant Asak Ali lodged an FIR and he entered the same in the general diary vide G.D.E No. 168 dated 21-07-19 and forwarded the FIR to Bijni P.S to register a case and he took the charge of investigation. He further stated that during investigation he visited the place of occurrence, recorded the statement of witnesses, prepared the sketch map of the place of occurrence, sent the victim girl to hospital for medical examination and arrested the accused person. Thereafter, O.C Bijni P.S registered a case being Bijni P.S Case No. 238/19 and entrusted him for investigation. He collected the medical report and School certificate of the victim girl and also sent the victim girl for recording her statement U/s 164 Cr.P.C. Thereafter, after completion of investigation he submitted charge-sheet against the accused Anar Ali u/s 354 of the IPC and Section. 8 of the POCSO Act. He proved the seizure list as Ext.2 and Ext.2(3) is his signature. He also proved the sketch map as Ext.5 and Ext.5(1) is his signature. He also proved the charge-sheet as Ext.6 and Ext.6(1) is his signature.

During cross-examination, he stated that PW7 Sabina Khatun before him has not stated that at the time of incident she was near the victim "X". Defence side put suggestion to him that he has not properly investigated the case, which he denied.

17. Learned Addl. P.P. submitted that when an allegation leveled against an accused under the POCSO Act, then the special Court shall as per provision of Section 29 of the POCSO Act presumed that accused has committed the offence. Here in this case the allegation against the accused is u/s 8 of the POCSO Act and as such court shall presume

that accused has committed the offence. Learned Addl. P.P. also submitted that the victim girl in her evidence categorically stated that the accused person touch on her chest and tried to disrobe her and as such the prosecution able to prove the offence u/s 8 of the POCSO Act against the accused beyond all reasonable doubt and this is a fit case to convict the accused person.

On the contrary, learned advocate for the accused person submitted that though 18. under the POSCO Act a statute presumption goes against the accused person but the presumption is not absolute and it is rebuttable and the prosecution should prove its case to the extent of guilt of the accused and, thereafter, the presumption come to play. Learned advocate further submitted that the victim girl along with PW5, PW6 and PW7 went to the betel nut garden of the brother of accused and they broke the bamboo fencing of the garden and while the accused and his brother Gaji Rahman and his son were going to catch fish then on seeing them they chased the victim and other girls and for this reason the victim girl falsely implicated the accused person. Learned Advocate also submitted that PW5 in her cross-examination clearly stated that while they were coming to their house then accused Anar Ali, brother of Anar Ali and son of Anar Ali chased them. PW6 who was also accompanied of the victim girl, in her evidence stated that after collecting the fire wood she come to the house and then she came to know about the incident. Learned advocate further submitted that PW7 also in her cross-examination stated that on the tutor of informant she deposed in the court. So, there are so many anomalies in the prosecution witnesses and as such it creates doubt on the prosecution case and the accused is entitled to benefit of doubt. Learned advocate also submitted that prosecution failed to prove this case against the accused beyond all reasonable doubt and this is a fit case to acquit the accused person.

19. I have duly considered the submission of both the side learned advocate. In this case there is no dispute regarding age of the victim "X". Victim "X" in her evidence stated her age 12 years. The defence side has not challenged the age of the victim girl. So, there is no doubt that at the time of occurrence the age of the victim girl was below 18 years and she was child as per definition of section 2(d) of the POCSO Act.

20. As per section 29 of the POCSO Act the statute cast duty on the special court to presume that if an allegation leveled against the accused person then the special Court shall presumed that accused person committed the offence. Section 29 of the POCSO Act

COUNTY OF THE PROPERTY OF THE

provide as follows:-

- "29. **Presumption as to certain offences.** Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."
- 21. On plain reading of section 29 of the POCSO Act, it reveals that the statute cast duty on the special court to presume that accused had committed the offence unless the contrary is proved. So, it reveals that the presumption u/s 29 of the POCSO Act it rebuttable. So, to presume the accused to be guilt we should scrutinize the evidence on record.
- PW3 is the victim girl of the case. PW3 in her evidence stated that while the 22. accused lifting fire wood on her head then accused touch on her chest and tried to disrobe her and she raised hue and cry and on hearing hue and cry PW5, and PW7 came to the place of occurrence and on seeing them accused person fled away. In her evidence she also stated that on the way she met two persons and during cross-examination she disclosed the name of those two persons are Gaji and Rafik. Gaji is the elder brother of the accused. PW5 also in her evidence stated that accused Anar Ali, his brother and his son chased them while they were coming towards their house. From the evidence of PW5 it reveals that she has not seen accused Anar Ali in the spot. PW6 in her evidence stated that she come to know about the incident after she returned home. PW7 in her evidence stated that she saw that accused Anar Ali caught hold the victim girl and on seeing the incident she raised hue and cry and ran from the place of occurrence but during her crossexamination she stated that she deposed in the court on the tutor of the informant. But on the other hand from the evidence of PW5, it reveals that she and PW7 on hearing hue and cry of PW3 went to the place of occurrence and PW3 reported them about the incident and she has not seen accused Anar Ali in the place of occurrence. If PW5 and PW7 were went to the place of occurrence at the same time then obviously both of them should see the accused person. But PW7 in her evidence stated that she saw the accused caught hold the victim girl and on seeing the said incident she raised hue and cry and left the place of occurrence. On the other hand PW5 in her evidence stated that she and PW7 brought the victim girl to her house and reported the incident to PW1 and she has not seen accused Anar Ali in the place of occurrence. PW3, PW5, PW6 and PW7 are child

Special June

AUUL

witness and they are most vulnerable witness and there is every possibility of tutor of child witness. PW7 in her evidence clearly stated that on the tutor of informant she deposed in the court.

PW1 and PW2 had not seen the occurrence. PW1 after hearing the incident from 23. PW3 lodged the FIR. Though the FIR is not substantive piece of evidence yet it is soul of the prosecution case. The prosecution case set into motion on the basis of FIR. So, the statement of FIR should also be considered at the time of appreciation of evidence. PW1 in the FIR stated that on the day of occurrence at about 1 P.M. while his daughter was collecting fire wood at Khayar garden then accused suddenly came there and on the pretext of lifting the bundle of fire wood on the head of his daughter tried to disrobe her and attempt to commit rape on her. She raised hue and cry and her accompanied girls came to the place of occurrence and accused Anar Ali fled away. But from the evidence of PW1 and PW2, it reveals that after PW3 reported the incident to them then they went to the house of accused Anar Ali and accused Anar Ali had assaulted PW1 and PW2 and, thereafter, he filed this case. But PW1 remained silent about his assault in the FIR. PW2 in her cross-examination also stated that a talk of compromise was going on and they claimed Rs.10000/-, but the accused person denied to pay the money and for this reason aper husband filed this case. From the evidence of PW5 it reveals that on the day of eccurrence accused, his brother and son chased them while they were returning home. If They were chased then there is no question of lifting of bundle of firewood on the head of victim by accused person. Every fact has to some probability. From the evidence on record it reveals that while PW3, PW5, PW6 and PW7 were returning to their house then accused, his elder brother and son were going on that road to catch fish and they chased them. If along with accused there were his elder brother and son, then it is not probable that in presence of his son and elder bother he would tried to molest a little girl. From the evidence on record it also reveals that there is butel-nut garden of the elder brother of the accused which is surrounded by bamboo fencing and the bamboo fencing was in broken condition. So, the defence plea of collecting bamboo stick of the fencing by the victim and her friends and accused and his brother chasing the victim and her friends cannot be ignored. Rather PW5 in her evidence clearly proved the plea of the defence. Hence, considering entire evidence on record I find that it is not safe to rely on the evidence of PW3 and PW7 and evidence of PW3 and PW7 are not believable at all. Other witnesses had not seen the incident. Therefore, I have nothing to hesitate to hold that prosecution failed to prove the charges against the accused person and the prosecution case is doubtful.

THE COUPLING AND THE CO

- 24. From the discussion made above, I find that prosecution failed to bring home the charges against the accused person beyond all reasonable doubt. Hence, accused Anar Ali is found not guilty u/s 354 of the IPC R/W section 8 of the POCSO Act. So, accused Anar Ali is acquitted from the offence u/s 354 of the IPC R/W section 8 of the POCSO Act and he is set free at his liberty forthwith.
- 25. Bail bond furnished by the accused person shall remain in force till next six months from today as per provision of section 437-A of the Cr. P. C.
- 26. Send a copy of judgment and order to the District Magistrate, Chirang as per provision of section 365 of the Cr. P. C.
- 27. The seized document be returned to the informant in due course of time.

Considering the facts and circumstances of the case, I find that this is not a fit to recommended the DLSA, Chirang for victim compensation u/s 357-A of the Cr.

Given under my hand and seal of this court on this the 26<sup>th</sup> day of February,

Dictated and corrected by me,

Special Sippeçial Judge Biini

Bijni.

2020.

N. U. Ahmed)

Special Judge

Bijni.

### **APPENDIX**

(A) Prosecution witnesses:

PW1- Asak Ali

PW2- Johura Khatun

PW3- Victim "X"

PW4- Lalchan Ali.

PW5- Miss Jesmina Khatoon.

PW6- Miss Kamala Khatun.

PW7- Miss Sabina Khatun.

PW8- Dr. Amritamsh Mishra

PW9- Sri Lohit Medhi.

(B) Prosecution exhibit-

Ext.1- FIR.

Ext.2- Seizure List.

Ext.3- Statement of the victim "X" u/s 164 of the Cr. P. C.

Ext.4- Medical examination report.

Ext.5- Sketch Map.

Ext.6- Charge sheet.

(C) Defence witnesses- Nil.

(D) Defence exhibit- Nil.

Šp**ecial Judge** Judge Bijni. Bijni