IN THE COURT OF SPECIAL JUDGE :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 45 of 2017, U/S 8 of POCSO Act 2012 and Section 352 IPC (Arising out of Simaluguri P.S. Case No. 110/2017)

State of Assam

-Vs-

Sri Bipin Mech Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. Aditya Kr. Bora, Advocate

(Legal Aid Counsel)

Date of framing Charge : 21.04.2018

Dates of Evidence : 19.05.2018, 15.06.2018, 26.07.2018,

08.08.2018

 Date of S/D
 :
 21.08.2018

 Date of Argument
 :
 04.09.2018

 Date of Judgment
 :
 18.09.2018

<u>JUDGMENT</u>

- 1. Prosecution case, in brief, is that on 26.09.2017, Sri Bikash Dutta lodged an FIR with O/C, Simaluguri P.S. alleging, inter alia, that on that day, at about 5.30 PM, while his sister victim 'P' (name withheld) was returning home from her tuition through village road, finding her alone in the road, accused Bipin Mech misbehaved her by touching various parts of her body with sexual intent. On returning home, the victim informed the matter to him.
- 2. On receipt of the FIR, Simaluguri P.S. Case No. 110/2017, U/S 8 of POCSO Act, 2012 was registered and started investigation. During investigation, victim was medically examined and recorded her statement in the

court U/S 164 Cr.P.C. On 10.02.2018 accused was arrested and produced before this court for judicial custody.

- On completion of investigation, the I/O has submitted charge-sheet against Bipin Mech for trial U/S 8 of POCSO Act, 2012. On receipt of the charge sheet, cognizance of offence was taken, copy was furnished to him. Services of Legal aid Counsel was provided to accused. Upon hearing both the sides, vide order dated 21.04.2018, charges U/S 8 of POCSO Act 2012 and Section 352 IPC has been framed against accused Bipin Mech to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined six witnesses.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence. It may be mentioned here that accused face the trial as UTP.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. Aditya Kr. Bora, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 6. (I) What was the age of the victim 'P' on 26.09.2017?
 - (II) Whether on 26.09.2017, at about 5.30 PM, victim 'P' was subjected to sexual assault by the accused?
 - (III) Whether on 26.09.2017, at about 5.30 PM, accused used criminal force upon the victim?
- PW 1 Sri Bikash Dutta the informant and brother of the victim in his evidence deposed that accused Sri Bipin Mech is known to him being neighbour. Present age of victim is about 15-16 years. She has appeared in HSLC Exams in 2018. Her date of Birth is 17.03.2002. Exbt. 1 is the birth certificate of victim P (proved-in-original). On 26.09.2017 at about 5 5.30 PM his sister on her return from tuition, informed him that while she was returning

home though the field near to their house, accused finding her alone in the lonely filed, hold her hand, touched her breast. On making hue and cry accused tried to flee away and in this attempt, nail marks of accused embossed on the arm of the victim. However accused managed to flee away. On knowing this, on the same day he along with his sister went to Simaluguri PS where he lodged the FIR. Exbt. 2 is the FIR. Police took Xerox copy of the birth certificate of his sister and returned back the original to him. In his cross-examination by defence, PW 1 admitted that he has not seen the incident on his own. He deposed as reported to him by the victim. He denied the defence suggestion that in the FIR and statement before police, he did not mention that "On making hue and cry by victim, accused tried to flee away and in this attempt nail marks of accused embossed on the arm of the victim. However accused managed to flee away." The place of occurrence is at a distance of about ½ KM from his house. He did not hear any hue and cry of his sister. He denied the defence suggestion that his sister got injury on her arm by falling on road due to fear. The said raod used by villagers for coming to village. The incident took place at evening hours. He denied that accused did not hold her or touch her breast. He affirmed that on her cry, neighbouring persons did not gather at the place of occurrence.

8. PW 2 the victim in her evidence deposed that her present age is about 16 years. Her date of Birth is 17.03.2002. On 26.09.2017 at about 5.30 PM while she was returning home though village road on the field near to her house, accused Bipin Mech was coming from opposite direction. From some distance, she saw that he was coming smoothly on the side of his road. However, on arriving near to her, accused started coming on the road in zigzag manner and hold on the handle of her bicycle and forced to stop her. On getting down from the bicycle, accused touched her both the breast. On making hue and cry and when she tried to remove his hands, accused tried to flee away and in this attempt nail marks of accused embossed on her right arm. However accused managed to flee away. At that time none was present near to

the place of occurrence. The place of occurrence is a lonely place and the road is through the field. On returning home, she informed the incident to her brother Bikash Dutta, father Sri Prafulla Dutta, and other relatives. On the same day, she along with her brother Bikash and cousins went to Simaluguri PS where her brother Bikash Dutta lodged the FIR. Police took her to hospital for medical check up. After 3-4 days, police took her to court where she gave her statement. Exbt. 3 is her statement given in court. On that she deposed in similar lines. In her cross-examination, victim affirmed that the incident took place on a village road which might be 5-6 feet wide. Said road was an uneven gravel road. She denied the defence suggestion that in her statement before police, she did not state that "From some distance, she saw that he was coming smoothly on his side of the road; that coming near to her accused started coming on the road in zigzag manner and hold on the handle of her bicycle, that when she tried to remove his hands, accused tried to flee away and in this attempt nail marks of accused embossed on her right arm and that accused managed to flee away, that on returning home, she informed the incident to her father Sri Prafulla Dutta, and other relatives." She denied that in her statement before court, she state that "on her hue and cry public gathered there and accused flee away." In her cross-examination she denied that she got injury marks on her right arm due to falling from the bicycle. She also denied that on her falling on road, accused came near to her to help in get her up from road. She stoutly denied the defence suggestions that accused did not hold her cycle or touch her breasts. Police did not seize the bicycle or school bag.

9. PW 3 Smt. Rumi Dutta in his evidence deposed that victim is her niece and is aged about 15-16 years. On 26.09.2017 at evening hours Pinky Dutta, elder sister of victim called her to their house by informing that while victim was returning home through the field near to her house, accused finding her alone, in the lonely filed pulled her cycle, touched her body. On knowing this, she came to the house of victim and on asking; victim stated that apart from holding her hand and touching her body by the accused, nail marks of

accused embossed on her arm. She saw nail marks on her shoulder. On their request, she along with Mamoni Dutta, Bikash Dutta brought the victim to Nazira Hospital for medical check up. Prior to going to hospital, they reported the matter to Simaluguri PS. In her cross-examination, PW 3 admitted that she had not seen the incident on her own. The road between the field is wide enough to cross a vehicle. She denied that, before police, she did not state that "On their request, she along with Mamoni Dutta, Bikash Dutta brought the victim to Nazira Hospital for medical check up. Prior to going to hospital, they reported the matter to Simaluguri PS." PW 3 denied to have deposed falsely against the accused.

- 10. PW 4 Smt. Mamoni Dutta in her evidence deposed that the present age of victim is about 15-16 years. On 26.09.2017, at about 3 PM, while she was at her residence, Bikash Dutta, came to her house and informed that while his sister victim P was returning home from tuition through the field near to her house, accused restrained her by pulling her cycle, touched her breast. On knowing this, she came to the house of victim and on asking, victim stated that while she was returning from tuition, accused Bipin Mech by pulling her bi-cycle, compelled her to get down, laid her cycle and touching her breast. She along with Rumi Dutta, Bikash Dutta took the victim to Simaluguri PS. In her cross-examination, she also admitted that she had not seen the incident on her own. The road between the field is wide enough to cross a vehicle. She denied that, before police, she did not state that "accused Bipin Mech pulled her bi-cycle, compelled her to get down, laid her cycle and touched her breast; that she went to Simaluguri PS." She also denied to have deposed falsely.
- 11. PW 5 Dr. Laxmi Deori, in her evidence deposed that on 27.09. 2017, at about 11.20 A.M., on police requisition, she examined the victim in connection with Simaluguri P.S. Case No. 110/2017 and found Nail mark (1 in number) in right anterior aspect of arm. Victim came to her with alleged history of sexual assault on 26.09.2017 at 05.30 PM. PW 5 also stated that age of victim is below 18 years and one in number, nail mark in right anterior aspect

of arm seen. She proved her report as Ext. 4. In her cross-examination by defence, PW 5 admitted that she has not mentioned the age and colour of the injury.

PW 6 Sri Ujjal Goswami the I/O of this case, in his evidence 12. deposed that on 26.09.2017, at 10 PM, he received one written FIR from Sri Bikash Dutta and registered Simaluguri PS case No. 110/17 u/s 8 of POCSO Act. On the same night, victim was sent for medical examination at Ligiripukhuri Hospital and she was advised to come on next day. On the next day, he sent the victim to Sivasagar Civil Hospital for medical examination and also sent her to Court for recording her statement u/s 164 Cr.P.C. He went to the place of occurrence as shown by informant and drawn a sketch map of the PO. Exbt. 5 is the said sketch map. During investigation, on 10.02.2018, he apprehended the FIR named accused Sri Bipin Mech and forwarded him to Court. He also collected Birth certificate of the victim. On completion of investigation, he submitted charge sheet against the accused u/s 8 of POCSO Act. Exbt. 6 is the charge sheet. In his cross-examination, PW 6 deposed that he visited the place of occurrence on the next day of receipt of FIR at 11.30 AM. He did not take the victim with him to the place of occurrence. The place of occurrence is a village road. he did not mention the width of the road. But vehicles can easily ply on that road. Police vehicle went to the PO by using that road. He has not examined the teacher wherefrom the victim returned after taking tuition. He has not ascertained whether any other student was with her. He examined the bicycle used by the victim. During his investigation no eye witness of the occurrence was found except the victim. PW 6 confirmed that witness Bikash Dutta in his statement before him did not state that "On making hue and cry by victim, accused tried to flee away and in this attempt nail marks of accused embossed on the arm of the victim. However accused managed to flee away." Victim in her statement before him did not state that "From some distance, she saw that he was coming smoothly on his side of the road, that coming near to her accused started coming on the road in zigzag manner and hold on the

handle of her bicycle, that when she tried to remove his hands, accused tried to flee away and in this attempt nail marks of accused embossed on her right arm and that accused managed to flee away, that on returning home, she informed the incident to her father Sri Prafulla Dutta, and other relatives." However she has stated that she informed the incident to her brother. Witness Rumi Dutta in her statement before him did not state that "On their request, she along with Mamoni Dutta, Bikash Dutta brought the victim to Nazira Hospital for medical check up. Prior to going to hospital, they reported the matter to Simaluguri PS." He did not find any injury mark on the arms of the victim. I/O has denied that without going to the p/o he prepared the sketch map and completed his investigation by sitting at PS. He did not seize the Original Birth certificate of the victim.

- 13. Basing on the above evidence on record, let me decide the points formulated for just decision of the case.
- Point No. I: So far age of the victim is concerned, it appears that the 14. informant as PW 1 has proved the birth certificate of the victim as Exbt. 1 in which the date of birth of the victim was mentioned as 17.03.2002. The victim in her evidence as PW 2 has confirmed that her present age is about 16 years (deposing on 19.05.2018) and she has appeared in HSLC Exams in 2018 and her date of birth is 17.03.2002. PW 3 and PW 4 in their evidence also stated that victim was aged about 16 years and she has passed the HSLC Exams in the year 2018. PW 5, the M.O. in her evidence stated that basing upon incomplete fusion of epiphysis of wrist joint, has opined that the victim is below 18 years of age. This part of evidence so far age of the victim is concerned remains unrebutted and unchallenged by the defence which is otherwise also found reliable and trustworthy. Exbt. 1, birth certificate shows the date of birth of the victim as 17.03.2002 and the alleged incident happened on 26.09.2017. As such, on the date of alleged incident the victim was aged about 15 years 6 months and 9 days.
- 15. Point No. II & III: Now coming to the role of the accused in Spl. (P) Case No. 45/2017 Page 7 of 13

causing the alleged incident of sexual assault and use of criminal force on the victim, in the course of argument hearing, learned Special P.P. has submitted that except the victim there was no other eye witness of this case and the evidence of PW 1, PW 3 and PW 4 are relevant though they are hearsay witness simply because soon after the incident, the victim has informed the matter to PW 1 and thereafter PW 3 and PW 4 who came to the house of the informant and from the victim (PW 2) they came to know about the incident. All these witnesses corroborated the entire incident with minor exaggerations from their earlier statement but supported the victim. Learned Special P.P. also argued that the alleged incident happened on 26.09.2017, at about 5.30 PM and on the same night the FIR (Exbt. 2) was lodged at Simaluguri P.S. It is further argued that apart from the trustworthy evidence of the victim and her relatives, the Medical Officer (PW 5) has also confirmed that during medical examination conducted on the next day of the incident, one nail mark was found on the right anterior aspect of arm of the victim which confirmed the evidence of the victim of getting injury. On the other hand, learned Legal Aid Counsel Mr. Aditya Kr. Bora has argued that the case was filed due to misconception and while the victim fell down from her bi-cycle, the accused was crossing the road and tried to pick up the victim with an intention to help her to get her stand up from the road. It is further argued that there was no sexual intent on the part of the accused while he tried to pick up the victim from falling with cycle. Learned counsel also argued that apart from above, as there was some previous enmity between the informant and the accused, by taking advantage of this incident, accused was falsely implicated. As such, accused deserves to be acquitted. I have considered the submission of both the sides.

16. From the evidence narrated herein-before, particularly from the evidence of the victim, it appears that she has vividly described about the incident and categorically stated that on her way to returning home, while crossing the lonely field, she saw that accused was coming from opposite

direction and on seeing her, he started coming on the road in zigzag manner, hold on the handle of her cycle and forcefully stopped her from returning home. On getting down from the bicycle, accused touched her both the breasts. While making hue and cry, she tried to remove his hands, accused tried to flee away and in this attempt, nail marks of accused embossed on her right arm. On returning home she immediately informed the matter to her brother Bikash Dutta and other relatives and on the same night she came to Simaluguri P.S. This part of evidence of the victim remains unshaken. Though some part of her evidence appears to have been exaggerated from her earlier statement u/s 161 Cr.P.C., but the main aspect that the accused forced her to stop on the road and touched her body was not a part of exaggeration. Though getting nail marks injury on her right arm was not stated before police, but the medical officer (PW 5) during examination of the victim, has found one nail marks in right anterior aspect of the arm.

- Apart from all above, the victim has stated that after the incident she was brought to court where she gave her statement vide Exbt. 3. On going through the said statement (Exbt. 3), it appears that victim deposed in similar line and clearly stated that accused touched her body and she raised hue and cry and while removing his hands, nail scratch marks embossed on her right arm. The victim also mentioned that accused was known to her prior to the incident being a co-villager.
- 18. Under this circumstances, at the best she might have omit to state the same before police but she has stated the same in Court u/s 164 Cr.P.C. As getting nail scratch bite is not going to the root of the case that cannot be treated as contradiction. In this case for the charge u/s 8 of Pocso Act, touching of breast is an offence of Sexual Assault, and that part was not a part of exaggeration, the other exaggerations can be treated as mere omission only. From her cross examination, it is proved that at the relevant time the place was lonely and the victim was alone. The victim denied the defence suggestion that on falling road from her bicycle, accused came near to her to

help her in getting up from the road. Though this suggestion was advanced by defence, but while giving 313 Cr.P.C statements, accused did not take any such plea that he tried to help the victim in getting up from the road, rather accused has claimed this part of evidence as false. From the evidence of PW 1, it also appears that on knowing the incident from the victim, he along with his sister and other relatives came to Simaluguri P.S. and lodged the Exbt. 2 FIR. From his cross, it appears that the place of occurrence is at a distance of about half kilometer from his house and that no neighbouring persons gathered at the place of occurrence. From the evidence of PW 3 and PW 4 it also appears that soon after the incident they were called to the house of the informant and from the victim they came to know about the incident as narrated by the victim regarding touching her hands and body by the accused, also embossing of nail marks on her arm which they saw.

- As stated earlier on the next day of the incident, i.e. on 27.09.2017 the victim was examined at Sivasagar Civil Hospital and during examination one nail marks in right anterior aspect of the arm of the victim was found by the M.O. (PW 5). PW 6 is the I.O. who has done the investigation in routine manner. He has confirmed the matter of getting the FIR (Exbt.2) on 26.09.2017 and that on the same night the victim was sent to Hospital for medical examination, but she was advised to come on next day. He also visited the place of occurrence and prepared sketch map vide Exbt.5. On going through Exbt. 5, it appears that the place of occurrence is a lonely place in between field and no residence is shown in and around the place of occurrence.
- On the point of evidentiary value of an injured/witness, Hon'ble Supreme Court of India in the case of State of U.P. Vs Naresh & Others, (2011) 4 SCC 324 held as follows:
 - "27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate

someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein."

- 21. It may be noted here that apart from the charge of Sexual Assault accused was also charged with use of criminal force upon the victim. From the above discussion it is clear that by stopping her cycle, touching her body also amount to use of criminal force on the victim and the said offence is also proved beyond doubt.
- 22. From the totality of the fact, it appears that, defence failed to bring any material to disbelieve the prosecution evidence, particularly the evidence of the victim. Evidence of victim is found reliable and trustworthy to the extent of sexual assault and use of criminal force on her by the accused Bipin Mech.
- 23. To sum up the discussion, I hold that prosecution has able to prove the ingredients of offence sexual assault as defined u/s 7 of Pocso Act and use of criminal force upon the victim as defined u/s 351 IPC.
- Considering all above, I have no hesitation to hold that accused Bipin Mech has committed the offence punishable u/s 8 of the Pocso Act 2012 & also u/s 352 of the IPC of and he is held guilty for the aforesaid offences.
- 25. I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. In view of the nature of the offence proved by the prosecution, I am not inclined to extend the benefit of Section 3 and 4 of Probation of Offenders Act to the accused.
- 26. Heard the accused on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the

sides. Learned Special PP has prayed for awarding exemplary punishment for the accused as provided by section 8 of Pocso Act. Learned Legal Aid Counsel has prayed for leniency in sentence and submitted that as the accused is in Jail custody since 10.02.2018, the period already undergone should be treated as sufficient punishment. I have considered the submission of both the sides.

- 27. Considering all aspects, convict Bipin Mech is sentenced to undergo rigorous imprisonment (RI) for 3 (three) years for committing the offence punishable U/S 8 of POCSO Act, 2012 and also to pay a fine of Rs. 2000/- (Rupees two thousand) only i/d further SI of 1 (one) month. Convict Bipin Mech is also sentenced to undergo simple imprisonment (SI) for 1 (one) month for committing the offence punishable U/S 352 IPC. Both the sentences of imprisonment shall run concurrently.
- 28. As the convict has faced the trial as UTP, he is remanded to District Jail, Sivasagar to serve out the remaining part of sentence.
- 29. Convict Bipin Mech is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 30. It is provided that in the event of realization of fine amount, the entire amount be paid to the victim as compensation u/s 357 Cr.P.C.
- 31. Considering the fact and circumstances of the case, the matter is not referred to DLSA Sivasagar for compensation U/S 357A Cr.P.C.
- 32. Let a free of cost copy of the judgment be given to the convict Bipin Mech immediately as per the provisions of Section 363(1) Cr.P.C.
- 33. Convict Bipin Mech is informed about his right of appeal against the judgment and order of conviction and sentence before Hon'ble Gauhati High Court within 60 days either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 34. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.

- 35. Learned Legal Aid Counsel is entitled for his professional fees from DLSA Sivasagar as per rules.
- 36. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 18th day of September, 2018 at Sivasagar.

Special Judge, Sivasagar:

<u>APPENDIX</u>

- 1. Prosecution witnesses:
 - P.W.1 Sri Bikash Dutta (Informant)
 - P.W.2 Victim 'P'
 - P.W.3 Smt. Rumi Dutta
 - P.W.4 Smt. Mamoni Dutta
 - P.W.5 Dr. Laxmi Deori (M.O.)
 - P.W.6 SI Ujjal Goswami (I.O.)
- 2. Defence witnesses None
- 3. Court witnesses: None
- 4. Exhibits by prosecution:
 - Exbt.1 Birth certificate
 - Exbt.2 FIR
 - Exbt.3 Statement of the victim given U/S 164 Cr.P.C
 - Exbt.4 Medical report
 - Exbt.5 Sketch map
 - Exbt.6 Charge-Sheet

Special Judge, Sivasagar: