## IN THE COURT OF THE SPECIAL JUDGE, SIVASAGAR.

Present: Sri B. Roy, AJS,

Special Judge, Sivasagar

Special(P) case no. 16/2018

Under

section 10 of POCSO Act

State

Vs

Sri Gopal Tassa.

## Appearance: -

Mr. A.K. Bora ......Advocate of the Accused.

Mr. S. Gogoi ......Special P.P.

Date of evidence: 30.08.2018, 26.09.2018, 06.12.2018, 21.08.2019,

23.09.2019.

Date of Argument: 04.11.2019.

Date of Judgment: 18.11.2019.

## **JUDGMENT**

- 1. The brief facts of the case is that the informant (name withheld) who is the father of the victim girl (name withheld) lodged an FIR in the Demow police station on 13.05.2018 stating that on 12.05.2018 at about 3.00 p.m. his minor daughter aged about 9 years was alone in the house and at that time the accused Sri Gopal Tassa @ Bhaya came to his house and sexually assaulted his minor daughter and also attempted to rape her by offering Rs. 20/- to the minor girl. The victim girl somehow freed herself from the clutches of the accused and took shelter in the house of a neighbour. Later on, the neighbouring people came to know about the incident and apprehended the accused and informed the matter to the police.
- 2. The OC of Demow PS received the said FIR on 13.05.2018 and registered Demow PS case no. 131/2018 u/s 12 of POCSO Act. SI Mukut Ali was endorsed with the investigation of the case. On completion of investigation the I.O. submitted the

charge-sheet against the accused Gopal Tassa u/s 12 of POCSO Act. Cognizance of the offence u/s 10 of POCSO Act was taken after going through the charge-sheet and other materials available on record.

- 3. As the accused was in custody and he was incapable of engaging a lawyer, legal-aid-counsel Sri Aditya Kumar Bora was engaged to defend the accused.
- 4. Copy of relevant documents were furnished to the accused. Charge u/s 10 of POCSO Act was framed, read over and explained to the accused to which he pleaded not guilty.
- 5. In the course of trial the prosecution side examined 8(eight) witnesses. The defence plea is of denial.
- 6. The accused was examined u/s 313 of Cr.P.C.
- 7. Heard argument of ld. counsel of both sides.
- 8. The points for determination are as follows:
- (i) Whether at the relevant point of time the victim girl was aged about 09 years only?
- (ii) Whether the accused came to the house of the informant while the victim was alone in the house?
  - (iii) Whether the accused committed the offence as alleged in the FIR?

## Discussion, decision and reasons:

9. The PW-1 is the informant. He stated that his daughter is aged about 9 years and she is a student of class I. The incident took place at around 2/2.30 p.m. on 12.05.2018. At that time he was not present in the house. At around 5/5.30 p.m. he returned back home and then came to know from his daughter that while she was alone in the house the accused came to the house and touched her breast and also touched her entire body inappropriately. The informant also came to know from his daughter that the accused wanted to commit misdeed with her and offered her Rs.20/-. He stated that when his daughter created hue and cry, the villagers came and the accused fled away from the place of occurrence. In the meantime the accused fled away. Later on the villagers apprehended the accused and he lodged

the FIR. The PW-1 stated that during investigation police seized one certificate of age proof of his daughter which is marked as Ext.1. The PW-1 stated that the date of birth of his daughter is 07.03.2009.

In his cross-examination PW-1 was contradicted on some points but while examining the I.O. (PW-7) those contradictions were not affirmed by the defence. The PW-1 denied the suggestion that he did not want to lodge the FIR but on being pressurized by the members of some organization he lodged the FIR. The PW-1 also denied the suggestion that the accused did not intentionally touch her daughter inappropriately rather he touched her inadvertently while playing with her.

10. The PW-2 is the victim girl. She stated that she was 09 years old. She was a student of class I at Laojan L.P. School. She also identified the accused and said that he is her neighbour. She stated that the accused is also known as 'Bhaya'. The PW-2 stated that the incident took place on a Saturday at about 3.00 p.m. At that time Bhaya came inside the house and pressed her breasts. The accused then offered Rs. 20/- and asked her to allow him to do misdeed with her ("মইতোমাক২০টকাদিমাতুমিমোককৰিবদিবানেকি?"). The PW-2 clearly stated that she could understand that allowing someone to do misdeed (কৰিবদিয়াটো) is said in bad sense and she started crying. Then her aunt and brother-in-law arrived. In the meantime the accused left the place of occurrence. Later on, her father came to know about the incident and lodged the FIR. She was taken to hospital for medical examination. Her statement was recorded in the Court.

In her cross-examination the PW-2 stated that on the day of occurrence she went to school. At the relevant time she was washing the utensils inside the house. At that time the accused arrived and enquired about her father. The PW-2 stated that both the families had good relation and they used to visit each other's house. The PW-2 denied the suggestion that the accused did not press her breasts but he was only tickling((ara))her. She also denied the suggestion that the accused did not want to commit misdeed with her by offering Rs. 20/-. The PW-2 denied the suggestion that while the accused was cuddling her, accidentally his hands came in contact with her breast.

11. The PW-3 Nowel Rai in his evidence stated that he knows that informant

and the accused as they are his neighbours. PW-3 stated that in the early evening he saw a gathering in the house of the complainant and he went there and asked about the incident to the victim. The victim told that the accused grabbed her from back side and thereafter pressed her breasts and when she raised alarm, the accused offered Rs. 20/- and asked her not to create hue and cry.

In cross-examination the PW-3 stated that there were about 200/250 people in the gathering. The PW-3 in cross-examination stated that he came to know about the incident when the victim girl was narrating the same to the police. The PW-3 denied other suggestions put by the ld. defence counsel.

12. The PW-4 Subid Machwa in his evidence stated that he knows the informant and the accused. On the date of occurrence the brother-in-law of the victim girl namely Jamidar Kalandi asked him to accompany him to the house of the victim. Accordingly he went there and came to know from the victim that the accused had touched her inappropriately and also pressed her breasts. The victim girl told him that the accused (Nana) offered her Rs. 20/- and wanted to have sexual intercourse with her.

In cross-examination PW-4 stated that police did not record his statement.

- 13. The PW-5 Jamidar Kalandi stated in his evidence that on 12.05.2018 in the evening hours he went to the house of the victim and came to know from his father-in-law that the accused had hugged the victim girl. He then enquired about the incident with the victim girl and she told him that while she was in her house, the accused Bhaya came to her room and held her arms and shoulder. Later on the matter was informed to the Union of the garden.
- 14. The PW-6 Shyam Bhumij stated in his evidence that on 12.05.2018 in the evening hours hearing hue and cry he went to the house of the victim and came to know from the father of the victim girl that the accused had touched the body of the victim girl.

In cross-examination he stated that police did not record his statement.

15. The PW-7 Inspector Mukut Ali stated in his evidence that on 13.05.2018 he was posted at Demow police station. On that day he was endorsed with the

investigation of Demow P.S. case no. 131/2018 u/s 12 of POCSO Act. He visited the place of occurrence and prepared sketch map of the place of occurrence, recorded statement of the witnesses. The victim was medically examined. Her statement was recorded u/s 164 of Cr.P.C. The accused surrendered in the police station. He stated that on completion of the investigation, charge-sheet was submitted against the accused Gopal Tassa u/s 12 of POCSO Act. The PW-7 exhibited the FIR marked as Ext. 2 wherein Ext. 2(1) is the signature of O.C. Sanjib Kumar Baruah which he recognizes. Ext.3 is the sketch map wherein Ext. 3(1) is his signature. Ext.4 is the medical examination report collected by him. Ext.5 is the charge-sheet wherein Ext. 5 (1) is his signature.

In cross-examination PW-7 stated that he visited the place of occurrence along with woman police namely Junmoni Bora. He went to the place of occurrence in civil dress though the same was not mentioned in the case diary. He also admitted that he has not submitted the extract copy of GD entry showing the surrender of the accused. The PW-7 denied that he did not investigate the case properly.

16. The PW-8 Miss Sivani Dutta in her evidence stated that on 14.05.2018 she was working as Judicial Magistrate 1<sup>st</sup>Class at Sivasagar. On that day in connection with Demow P.S. case no. 131/2018 u/s 12 of POCSO Act, she recorded the statement of the victim girl who was aged about 09 years. Before recording her statement she tested her capacity and competency as a witness. The victim was accompanied with her father and she was produced by WHG Indumoni. The victim girl put her thumb impression in the statement. Ext. 6 is her statement wherein Ext. 6(1) is the signature of PW-8.

In cross-examination the PW-8 affirmed that the thumb impressions were taken in her presence though there is no mention of the name in the official/staff who had taken the thumb impression.

17. During his examination u/s 313 of Cr.P.C. the accused was confronted with all the implicating materials available on record. The accused admitted that at the time of the incident the victim girl was 09 years old. He stated that he was playing with the girl and his hand accidentally came in contact with her breasts. The accused stated that at the time of the incident the victim girl was not alone and one

Jiten Kalandi (since deceased) was also present. The accused stated that it is a false case filed against him. He also stated that he does not want to adduce any defence witness.

- 18. The first point to be decided is whether at the time of the incident the victim girl was aged about 09 years only. From the evidence of the prosecution witnesses it appears that the date of birth of the victim is 07-03-2009. The exhibit-1 is the L.P. School certificate of the victim girl according to which her date of birth is 07-03-2009. In his examination under section 313 Cr.P.C. the accused also admitted that the victim girl was about 09 years old at the relevant time. So there is not dispute with regard to the age of the victim girl. Hence the point no.1 is decided in affirmative and is held that the victim girl was 09 years old at the time of the alleged incident.
- 19. The second point to be decided is whether the accused came to the house of the informant while the victim was alone in the house. The PW-2 who is the victim girl stated that the accused is also known as 'Bhaya'. She further stated that the incident took place on a Saturday at about 3.00 p.m. At that time Bhaya came inside the house and enquired about her father while she was washing utensils. The PW-1 stated that on the date of occurrence at around 5/5.30 p.m. while he returned back home, then came to know from his daughter/victim that while she was alone in the house, the accused came to the house. In his examination under section 313 Cr.P.C. the accused stated that at the relevant point of time, one Jiten Kalandi (since deceased) was present in the house of the victim girl and she was not alone. But in the course of trial the defence failed to bring any material on record to show that Jiten Kalandi was present with the victim. Accordingly the second point is answered in affirmative.
- 20. The third point to be decided is whether the accused committed the offence as alleged in the FIR. From the evidence of the prosecution witnesses is clear that the only eye-witness of this case is the victim/PW-2. All other witnesses came to know about the incident either from the victim or through the father of the victim. So let us first examine the evidence of the PW-2/victim. From the evidence of the PW-2 it appears that she stated in clear and unambiguous language that on the date of the incident on a Saturday at about 3.00 p.m. Bhaya came inside the house

and pressed her breasts. The accused then offered Rs. 20/- and asked her to allow him to do misdeed with her ("মইতোমাক২০টকাদিম।তৃমিমোককৰিবদিবানেকি?").The PW-2 clearly stated that she could understand that allowing someone to do misdeed("কৰিবদিয়াটো")is said in bad sense and she started crying.In her crossexamination the PW-2 stated that on the day of occurrence she went to school. At the relevant time she was washing utensils inside the house. At that time the accused arrived and enquired about her father. The PW-2 stated that both the families had good relation and they used to visit each other's house. The PW-2 denied the suggestion that the accused did not press her breasts but he was only tickling(গুদগুদী)her. She also denied the suggestion that the accused did not want to commit misdeed with her by offering Rs. 20/-. The PW-2 denied the suggestion that while the accused was cuddling her, accidentally his hands came in contact with her breast. The other prosecution witnesses supported the PW-1 and stated that they came to know from the victim/PW-1 and her father that the accused had touched the body of the victim inappropriately while she was alone in the house doing some household work.

21. In his examination under section 313 Cr.P.C. the accused admitted that his hands came in contact with the breasts of the victim girl. The accused took the plea that the entire incident occurred accidentally. As stated already the defence did not adduce any witness. Section 29 of the POCSO Act, 2012 says that where a person is prosecuted for committing or abetting to commit any offence under section 3, 5, 7 and 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. The Hon'ble Gauhati High Court in (2017)3 GLR 50 held that the presumption raised under section 29 of the Act is rebuttable one. So the reverse burden is on the defence to rebut the presumption once the prosecution is successful in shifting the initial burden upon the accused. In the instant case the evidence on record makes it crystal clear that the accused came to the house of the victim girl while she was doing household work and grabbed her and pressed her breasts. The bad intention of the accused can be easily inferred from the evidence of the victim girl who stated that the accused offered Rs. 20/- and asked her to allow him to do misdeed with her ("মইতোমাক২০টকাদিমাতৃমিমোককৰিবদিবানেকি?"). The victim girl understood that allowing someone to do misdeed("कविन्द्राटिंग") is said in bad sense and she started crying. So the victim girl clearly disclosed the intention of the accused in her evidence. It is also pertinent to mention here that though the victim girl was aged about 09 years only, but the length of her cross-examination and the way in which she gave answers during cross-examination (which is evident on record) makes it clear that she was having sufficient maturity of understanding of life. She clearly stated that the accused came and asked her about her father and then he (accused) committed the crime. From the evidence on record it can be understood that the victim girl used to live with her father in the house and at the relevant time her father was not present. The PW-1 made it clear that he was not present in the house at that time. On the other hand the accused took the plea that he was playing with the victim and his hand accidentally came in contact with the breasts of the victim girl but the defence failed to rebut the evidence of the PW-2 regarding the offer made by the accused to the victim girl offering to pay her RS. 20/-.

- 22. From the evidence as discussed above it is clear that the victim girl was about 09 years old at the time of the occurrence [Section 9 (m) POCSO Act, 2012]. The accused was having a good relationship with the father of the victim girl as he used to work with her father. Section 7 of the POCSO Act, 2012 defines sexual assault according to which whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
- 23. From the discussion made above it is established that the accused committed the offence of aggravated sexual assault on the victim and he is held guilty under section 10 of the POCSO Act, 2012 and accordingly convicted.
- 24. Before sentencing the accused I have considered the applicability of the Probation of Offenders Act, 1958 or section 360 of Cr.P.C. to the accused. Taking into consideration the age of the victim and the age of the accused and the nature of the offence and the manner of commission of the offence, I do not find the accused fit to get the benefit under the said provisions of law.

- 25. Heard the accused on the point of sentence. His statement is recorded in a separate sheet. I have also heard the ld. advocates of both sides.
- 26. Accordingly the accused Gopal Tassa is sentenced to undergo rigorous imprisonment (RI) for 05(five) years for committing the offence punishable under section 10 of POCSO Act, 2012 and also to pay a fine of Rs. 1,000/- (one thousand) only, in default, to undergo simple imprisonment for of one month. As the accused contested the case through legal aid counsel due to this poor economic condition, lesser amount of fine is imposed upon him.
- 27. Considering the fact of imposing minimum amount of fine due to poor financial back ground of the convict, no order is passed for payment of compensation to victim U/S 357 Cr.P.C.
- 28. The convict is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial, if any.
- 29. Let a free of cost copy of the judgment be given to the convict immediately as per the provisions of Section 363(1) Cr.P.C.
- 30. Convict is informed about her right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 31. Send a copy of the judgment to learned District Magistrate, Sivasagar under section 365 Cr.P.C.

Given under my hand and seal of this Court on this 18<sup>th</sup> day of November, 2019.