#### IN THE COURT OF SPECIAL JUDGE (FTC), SONITPUR AT TEZPUR

**SPL(POCSO) CASE NO.** :- <u>51 of 2018</u>

(Under Section 8 of Protection of Children From Sexual Offence (POCSO) Act, Arising out of GR Case No 1901 of 2018)

Present :- R. Baruah

Special Judge, Sonitpur, Tezpur.

Prosecutor :- State of Assam

-Vs-

Accused :- Sri Siba Mahanta,

S/o Late Gopal Mahanta, Resident of Joysidhi, Joipur,

PS – Sootea, Dist- BNC, Assam

Date of framing charge :- 18-07-2018.

Date of Recording Evidence :- 27-12-2018,07-03-2019.

Date of examination of accused

u/s 313 of Cr. P.C :- 11-03-2019.

Date of Argument :- 03-04-2019, 22-04-2019.

Date of Judgment :- **20-05-2019**.

Counsel of the Prosecution :- Mr A Baruah & Mrs J Baruah,

Learned Addl. Public Prosecutors,

Tezpur.

Counsel for Accused :- A K Mahanta, JM Borah,

Learned Advocates.

#### **JUDGMENT**

1. In this case accused Sri Siba Mahanta is put for trial for the allegation of charge under Section 8 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act').

- 2. The prosecution case in brief is that on 21-05-2018 informant Tutu Bhuyan lodged an FIR before the Itakhola Police Out Post stating inter alia that on 20-05-2018 at around 11.00 AM her daughter went to the cycle repairing shop of accused to repair the puncture of tyre. After repairing the tyre, the accused called her daughter into his house situated behind the shop stating that there is bird chick inside his house and while her daughter entered into the house, the accused gagged her mouth and attempt to rape her. At that moment, brother of victim went inside the house of accused to fill air in his bicycle and noticing him, the accused pushed the daughter of victim and fled away from the backdoor.
- 3. On receipt of the ejahar, I/C, Itakhola Out post made GD Entry No 289 dated 21-05-2018, started investigation and forwarded the same to OC, Sootea PS for registration. Accordingly, O/C, Sootea Police Station registered the case vide Tezpur PS 70/18 under Section 8 of Protection of Children from Sexual Offences Act,2012 (hereinafter referred to as 'POCSO Act'). Police, after completion of investigation, submitted charge sheet against the accused Siba Mahanta for trial.
- 4. On appearance of the accused and after hearing the learned Advocate for both the sides, charge under Section 8 of POCSO Act framed against the accused. The above charge is read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. To substantiate the case, prosecution has examined only 5(five) nos. of witnesses including the victim namely 1. Miss "X"(victim) (PW1), 2. Sri Ranjit Bhuyan (PW2), 3. Smti Tutu Bhuyan (PW3), 4.Sri Pitambar Nath(PW4) 5.SI Lakhi Kalita(PW5), IO.
- 6. Accused is examined under section 313 Cr.P.C. The defence plea is of total denial and declined to adduce defence evidence.

- 7. I have carefully gone through the record of the case and heard the learned Counsel for both the sides.
- 8. The point for decision in this case is that
  - (1) "Whether the accused, on 20-05-2018 at Joysidhi, Shantipur under Sootea PS, committed sexual assault to Smti "X" aged about 11 years minor girl?

#### Reasons, Decisions and reason for decision:

- 9. The charge under section 7 of the Protection of Children From Sexual Offences Act , 2012 provide the definition of 'sexual assault' as follows;
- "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."
- 10. Before appreciating the evidences adduced by the parties, I deem it fit to reflect the summaries of evidence of the witnesses.
- 11. **PW1,** the victim stated that she knows the accused who is her neighbor. On the day of occurrence at around 11 AM, she went to the cycle repairing shop of accused which is situated after one house of her house to repair the puncture of tyre. She called the accused as "Bordeota" (addressed to elder brother of father, in Assamese language). Accused repaired the puncture. When she was about to leave the shop, accused called her to his house situated behind the shop stating that there is a bird chick inside his house and asked her to see the same. After she enter the house, accused took her to the dining room of his house gagged her mouth and open her half pants and underwear and at that moment her brother (PW2) came into the house in search of accused and

called "Bordeota, Bordeota", but, accused did not went out. Her brother came inside the house and on seeing her brother, the accused pushed her away and fled away from the back door. Her brother went out to call her mother and she followed him with bicycle and went to her house. Her mother returned from work in the evening and she narrated the incident to her mother and brother. Her mother after hearing the incident, she went to the house of accused, but, could not find him. On the next day her mother lodged the FIR before the police. On the next day police brought her to the Court for recording her statement. Ext.1 is her statement. Police also took her to the doctor for examining her, but, as there was no lady doctor, the examination was not done.

During her cross-examination, she stated that the accused is their neighbor and she called him as Bordeota. Accused has given in marriage his three daughters and his son resides with him. She often visits the house of accused. The accused earlier never touched her body. When she reached the shop of accused, he was not in the shop and she called him. Accused told her that he is cooking food now and he cannot repair the bicycle. She told him that she will go to her sister's house and hence, cycle should be repaired. Accused told her that he is cooking 'Dal' and it will take some time to repair the cycle.

She denied the fact that accused never told her to see bird chick, but, she herself went into the house.

Accused told her that he had already cooked the 'dal' and thereafter, he came to the shop. Accused opened both of her pants i.e. half pants and underwear.

She denied the fact that while accused repairing her cycle she went inside the house of accused and took biscuit and was eating biscuits inside his kitchen, that when she was in the kitchen accused noticed her and rebuked her, that accused never called her to witness bird chicks in the house, that when the son of accused was inside the house, that she came out of the house of accused, that she has deposed falsely that accused called her inside his house gagged her mouth and open her pants and then her brother saw her, that the accused called her brother to witness what she is doing inside the house of accused, that she

has deposed falsely that the accused called her and took her to the dining room and gagged her mouth and open her pants.

She went out of the house without paying the repairing charges as accused fled away from the place. Police has not seized her pants.

She also denied the fact that accused never called her inside his house with an ill-intention, but, she herself went into his house, that when accused called her brother, he quarreled with the accused charging that why he is using such language about his sister, that when accused told her brother that she went away without paying the charges they planned and lodged this false case against the accused.

In the evening she told her mother about the incident and prior to that, she did not tell the fact to anybody else, as they were not any talking terms with her 'Borma' (addressed to the wife of elder brother of father, in Assamese language), but, her uncle i.e. Khura (addressed to paternal uncle) was in the school. Her bother and accused are not in such good terms. She was not examined by doctor later on by police. She accompanied her mother at the time of filing the FIR. She was present when the FIR was written and it was written by police in the police station. They went to the police station at around 10 AM and thereafter, the FIR was written. On that day police brought her to the hospital and on the next day police brought her to the Court for recording her statement. On the next day they came to the police station and thereafter one lady police and one gents brought them to the Court. She was not taught by the police. She gave her statement before the Magistrate as she gave her statement in the court. Prior to making statements police personnel asked her to narrate the fact before the Magistrate.

She denied that her mother taught her to give statement against the accused as she was not in good terms with the accused.

12. **PW2** said that he knows the accused, who is his neighbor. The incident took place about seven month ago. On the day of occurrence, at around 10/11 AM, he went to the shop accused to fill air in his bicycle tyre with the

pump of the accused. He called the accused several times, but, as accused did not came out he went inside the house and noticed that accused is holding his sister and gagging her mouth and her pants are not there. Noticing him, the accused left the place from the backside. He came back to his house to inform his mother and his sister followed him, but, his mother was not in the house. In the evening, he narrated the incident to his mother. His mother informed the co-villagers, but, no villagers came for taking a decision and then his mother lodged the FIR. He used to sell banana after his classes. On the day of occurrence, he arranged for collecting some banana from villagers and as there was less air in the tyre of his bicycle, he went to the shop of accused for pump as on the next day, i.e. on Monday there was a weekly Bazar/Hat at Toubhanga.

In his cross, PW2 stated that police recorded his statement during investigation. He did not notice his sister going inside the house of accused, but, he noticed her bicycle as he came from other direction.

He denied the fact that he has not sated before police that he went to the shop of accused and thereafter went inside the house in search of pump, that he never stated before police that he went to the shop of accused with his bicycle for filling air, that he never stated before police that he noticed his sister without her pant, that he never noticed his sister without pant and hence he did not state the fact before police, that accused called him to see what his sister had done inside the kitchen and then he went to the spot, that on the day of occurrence he did not visit the shop of accused in order to fill air in the tyre of bicycle and he has deposed falsely that he reached the shop of accused and not finding him he went inside the house of accused, that he has stated falsely that after entering into the house of accused he noticed his sister without her pants.

Initially his sister did not brought back the bicycle, but, when the accused fled away, she brought back the bicycle. He came out from the house of accused and his sister followed him.

He also denied the fact that he is narrating a new story on being taught by his mother, that he stated before police that he did not heard what his sister told his mother later on, that he is stating the facts as taught by his mother, that as the villagers disbelieved the facts allegedly committed by the accused, hence nobody turned up.

13. PW3- the informant of this case stated that victim "X" is her daughter. The incident occurred about seven months ago. At that time the age of her daughter was 11 years and she is studying in Class-V. She knows the accused. On the day of occurrence (Sunday), she went to receive the payments. Her son went to that place i.e to the house of Luhiram Nath and informed her about the incident. Her son told her that when her daughter went to the house of the accused for filling air in the tyres, the accused took her inside the house and gagged her mouth and opened her pants. He told that he also went to the shop of the accused for the purpose of filling air in his bicycle. Her son also told that after noticing him the accused went away from the back side. Then she immediately returned to her home. After returning, her daughter told her that when she went to repair the bicycle, after repairing the accused called her into the house to see chicks of bird. Then she was taken into the dining room thereafter the accused gagged her mouth and opened her pants. When the son of informant went into the house, the accused pushed her and left the place from the backside. She approached some neighbour and boys. Finding no help, she on the next day lodged the FIR. Exhibit- 2 is the FIR. One Rana Bhuyan wrote the FIR as per her version. Police brought her daughter to the court for recording the statement. She also accompanied her daughter to the court on the day of recording the statement. Exhibit- 1 is the statements of her daughter..

During cross PW3 said that on the day of occurrences she went out of the house at around 8.00AM. Her daughter was in the house alone. Her son went out in search of banana. She has got four sons. The elder two used to stay in the house of their grandfather. When she was about to leave, her daughter told her that she needs to repair the bicycle. Her son Ranjit met her at around 11.30AM and told her about the fact. She reached home at around 12.00 Noon. Before reaching home she was aware about the incident committed by the accused to her daughter. Thereafter, her daughter told her about the facts.

She denied the fact that she returned to her home in the evening on the day of occurrence, that accused asked her son to see what is done by her daughter inside his house, and that she went away without paying the charges and because of this a quarrel took place between them and thereafter she planned a false case against the accused, that on the day of occurrence she did not came back to the home after her son informed her about the incident, that her son Ranjit never told her about the incident at the place of occurrence, that Ranjit never brought her back hence he told to the police that he do not know what her daughter told her about the incident, that she never stated to the police that her son immediately came to her and narrated the facts and she returned to the home in his bicycle, that she invented the facts of opening pants of her daughter and thereafter filed a false case against the accused, that as a false case in made there occurred difference between her statement and the statement of her son, that as no villagers believed her versions and hence did not came forward to take steps against the accused, that accused called her son Ranjit to see what her daughter did inside the house, that her son went to the house of the accused on calling by the accused, that she taught her daughter to state that accused gagged her mouth and opened her pants.

Accused has got three married daughter and one son. Accused used to stay with his son. There is incident of the accused misbehaving with the womenfolk of the village earlier.

PW3 further denied the fact that she filed a false case, that she was not in talking terms with the accused from earlier, that she taught her daughter to state the facts before the police and court as she was present, that she taught her daughter to state the false facts and then she signed in the statement, that whole incident created by her but never happened in fact, that the allegations in the FIR are her creature and never stated by her son Ranjit or her daughter.

14. PW4 said that he knows the accused and the informant. Incident occurred about 7(seven) month ago. On the day of occurrence his sister called him over phone at around 12.00 noon and informed about the facts. The

informant told him that her daughter went to the house of the accused for repairing bicycle. Thereafter the girl was called inside the house of the accused, then accused gagged the mouth of the girl and opened her pants. Then the son of the informant went inside the house of the accused and noticed them and then accused fled away from the backside. He informed some boys of the village, but the accused fled away. The boys advised that the police may be informed as the accused fled.

In his cross-examination, PW4 stated that on the day of occurrence he heard about the incident. He denied the fact that he sent two boys after hearing the incident, that whole incident is a creation of her sister and hence he has narrated in support of his sister, that accused asked his nephew to see what is done by his niece inside his house, and that she went away without paying the charges, because of this a quarrel took place between them and thereafter his sister planned a false case against the accused, that the daughter of the informant went inside the house of the accused and ate some biscuits and on saying these things to the son of the informant a quarrel took place and hence my sister planned whole false facts.

15. PW5 the investigating officer of this case, stated that on 21-05-2018 he was posted as I/C, Itakhola OP. On that day one Tutu Bhuyan filed FIR against accused Siba Mahanta alleging that on 20-05-2018 at 11 AM accused attempted to rape on her minor daughter after luring her to come inside his house. In the meantime, the brother of the girl went to the house of accused and noticed the occurrence and then accused fled away from his house. On receipt of FIR he made GD Entry in the post and sent the FIR to Sootea PS for registration and he started investigation. He recorded the statement of informant and the victim in the post. He sent the victim to the Dhalaibil hospital for medical examination. Thereafter, he left for the place of occurrence. He drew the sketch map of the place of occurrence, recorded the statement of witnesses. He search for the accused, but, could not find him and he instructed the neighbours to send the accused to the post whenever he comes. On the next day he produced the

victim in the Court for recording her statement under Section 164 of CrPC. On 24-05-2018 accused surrendered in the police post and after interrogation, he took him into custody and forwarded him to the court after medical examination. After completion of investigation, he submitted charge sheet against the accused under Section 8 of POCSO Act. Ext. 3 is the sketch map. Ext.4 is the charge sheet.

During cross PW5 stated that no report received by him in the post regarding the incident prior to receiving Ext.2. The informant has not mentioned the ground for delay in informing the police nor any statement given in the FIR regarding the delay. On 21-05-2018 at 3.00 PM he received the FIR. Ext.2(A) is the GD Entry No 289 dated 21-05-2018 and his signature. He left for the place of occurrence at 3.50 PM. The place of occurrence is in the house of accused. During investigation he could come to know that accused live in the house with his son. He recorded the statement of the brother of victim near the place of occurrence. Before proceeding to place of occurrence he recorded the statement of victim in the Out Post itself. The accused came to the police post himself. The victim has not demonstrated at the place of occurrence how attempt was made to sexually assault her by the accused. He has not visited around the place of occurrence in presence of victim, eye witness and other witnesses. During investigation, he could find that the age of accused will be about 60 years. Near the house of accused no relatives of accused resides as per the sketch map. During his visit to the place of occurrence and by the nearby residences to gather their names, no one mentioned about any incident occurred the previous day. He has not shown the nearby people of accused as witnesses as they have not made allegation against the accused. The Dhalaibil Hospital after examination referred the victim to Tezpur Civil Hospital, but, victim and her mother refused to come to Tezpur Civil Hospital for further examination stating that no offence of rape committed. After lodging FIR, the victim remained in her house for the night and on the next day her mother brought her to the out post and he accompanied from the post together with woman police to the Court for recording her statement by Magistrate. After recording her statement, learned Magistrate gave

zimma of the girl to her mother. During recording of statement of victim by him, he could find that she had good understanding and can reply the queries properly. Based upon the statement of witnesses, he submitted the charge sheet. All the witnesses are relatives of the victim.

The IO denied the fact that the victim with her relatives has concocte a false case against the accused and based upon that he, without proper investigation submitted charge sheet against the accused.

Witness Ranjit Bhuyan (PW2) did not state before him that "he went to the house of accused seeking pump." He has not seized the bicycles of the victim and her brother Ranjit Bhuyan. During investigation, he has not asked for the location of the bicycle. PW2 did not state before him that "he went to the house of accused in order to fill air in his bicycle with pump". PW2 did not state before him that he noticed his sister without her panty. Witness Tutu Bhuyan (PW3) did not state before him that "her son after the incident, immediately informed her and she came back to her home in the bicycle of her son".

He also denied the fact that he submitted the charge sheet under POCSO Act, only because the victim is allegedly about 11 years old, that accused is not liable for punishment on the basis of his investigation.

In this case, the material witnesses are the PW1(victim) and her brother(PW2). It is not disputed that on the day of occurrence, the victim had been to the kitchen of the accused. It is only to be considered whether the PW1 went inside the house of accused on her own or she was lured to come inside the house. The PW1 said that she was called by the accused to witness some chicks of birds inside the house. The PW1 is a girl of tender age and can be lured to go to places. The accused is a neighbor and PW1 address him as "Bordeuta" (father's elder brother), hence there would be no hesitation on the part of the PW1 to go and see some new interesting things. The defence could not demolish the evidence of the PW1 during cross-examination. The PW1 also exhibited the statement she gave before the Magistrate under Section 164 of CrPC. She is clear that accused grabbled her mouth and opened her pants and at that time her brother (PW2) came into the house. The PW2 has corroborated to the fact by saying that he noticed the accused

grabbing the mouth of PW1 and the pants of PW1 not there. The PW2 has not attempted to embellish the facts. He notices the PW1 and went back to the house.

The argument of the defence that both PW1 & PW2 are tutored by their mother cannot be accepted. Why a brother would make a statement falsely by saying that he noticed his sister without pant in another's residence. PW2 also said that he noticed the bicycle and his sister outside the house of accused.

17. The defence has argued that the accused has been implicated falsely by the PW3. To bring home the contention, learned Advocate for the accused submits that the PW3 got information about the alleged incident at around 11.00 AM the previous day, but, she lodged the FIR on the next day. That, the PW3 admitted that at the work place she was informed by her son and she immediately came to the house whereas the PW2 said that in the evening he narrated the incident to his mother. It is submitted that the informant has not satisfactorily explained the delay in lodging the FIR.

# In State of Andhra Pradesh Vs M Madhusudhan Rao reported in (2009)3 SCC (Cri) 1123, the Hon'ble Supreme Court observed that –

"Time and again, the object and importance of prompt lodging of the first information report has been highlighted. Delay in lodging the first information report, more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained."

Here the above arguments of the defense are of less relevance because PW3 is not an eye witness. The PW2 never said that directly from the house of accused he went to his mother. The PW3 said that she met some neighbors and boys in the village. It should be kept in mind that the PW3 is a daily wage earner. The PW2 said that apart from studying he sells banana in the market. Hence, it needs to be understood how much preparation such person requires for approaching the authority. The PW3 mentioned that she approached the neighbors and boys but,

finding no help she came to the police. Further, the village of the informant is 10 km away from the police station. Moreover, the defence suggested to the PW4 that two boys were sent by him, which he denied.

18. It is argued further that the scene of occurrence is not recreated and the bicycles allegedly brought by the PW1 and PW2 are not seized which are material for deciding the facts.

The prosecution during the trial has proved the location of the shop and house of the accused. The bicycles are not required for drawing the conclusion. The PW2 has mentioned that he noticed the bicycle of his sister outside the house of accused.

19. The defence during cross examination of the witnesses came out wih some pleas, that the PW1 went inside the house and consumed some biscuits and then then accused and his son rebuked her. That when the PW1 came for repairing the bicycle the accused was cooking Dal.

The said son of accused was not examined by the defence. Nor it is brought from the PW2 that when he went inside the house of accused, son of the accused was also present inside the house.

- 20. Though during trial a submissions was made by the prosecution that the charge needs to be altered considering the age of the victim at the time of occurrence, in view of the documents available in the record the same is not considered.
- In view of the above discussions and reasons it is proved that the accused lured the PW1 into his house, gagged her mouth and undress her pants. Gagging mouth and opening the pants of a child in every aspect can be termed as committing sexual assault under the POCSO Act. The activities of the accused, proves that accused with sexual intent made the physical contact with the PW1 without penetration.
- 22. Hence, the accused is convicted under section 8 of the POCSO Act.
- 23. Offence is committed against child. Therefore the accused is not considered under the Probation of Offenders Act.

24. The accused is heard on sentence under the provision of Section 235(2) of CrPC. He submits that he is innocent.

25. The accused is sentenced to undergo rigorous imprisonment for a period of 3 (three) years and pay fine of Rs. 5000/- (rupees five thousand). In default of payment of fine, accused shall undergo further rigorous imprisonment for a period of 2 (two) months.

26. The bail bonds shall remain in force for six months from today.

27. It is seen that no recommendation is made in the record for giving compensation to the victim. Hence, it is hereby recommended to give appropriate compensation to the victim by the District Legal Service Authority, Sonitpur, Tezpur.

28. Free copy of judgment be furnished to the convict.

29. Another copy of judgment be sent to the learned District Magistrate, Sonitpur, Tezpur as per provision of Section 365 of CrPC and to the Learned Secretary, District Legal Service Authority, Sonitpur, Tezpur.

Given under my Hand and Seal of this Court on this the 20<sup>th</sup> day of **May, 2019**.

(R Baruah) Special Judge Sonitpur,Tezpur.

Dictated and corrected by me.

(R Baruah) Special Judge, Sonitpur, Tezpur

Dictation taken and transcribed by me:

Smt. Pori Das, Steno.

#### ANNEXURE

### Witnesses examined by the prosecution:

- 1.PW1 Miss "X"(victim),
- 2.PW2 Sri Ranjit Bhuyan,
- 3.PW3 Smti Tutu Bhuyan,
- 4.PW4 Sri Pitambar Nath &
- 3.PW3 SI Lakhi Kalita(IO).

## Witnesses examined by the Defence:

1.Nil.

## Documents exhibited by the prosecution:

- 1. Ext. 1: Statement of victim under Section 164 of CrPC,
- 2. Ext. 2: Ejahar,
- 3. Ext. 3: Sketch map,
- 4. Ext. 4 : Charge sheet.

(R Baruah) Special Judge, Sonitpur,Tezpur.