# IN THE COURT OF SPECIAL JUDGE : LAKHIMPUR : AT NORTH LAKHIMPUR.

#### SPECIAL CASE NO.26/2016.

( POCSO Act )

### **PARTIES**

State of Assam. ... Complainant.

-versus-

Sri Ridang Doley. ... Accused.

## **PRESENT**

Md. Imtiaz Ali, Special Judge, Lakhimpur, North Lakhimpur.

#### **APPEARANCE**

Mr. Jogeswar Gogoi, the learned Public Prosecutor, for the State.

Mr. Ananda Dutta, the learned State Defence Counsel/ Legal Aid Counsel for the accused.

Date of charge : 13.12.2016.

Dates of

Prosecution evidence : 27.03.2017 and 25.04.2017.

Date of statement : 16.05.2017.

Date of argument : 28.06.2017.

Date of Judgment : 11.07.2017.

#### <u>JUDGMENT</u>

1. Accused person, namely Sri Ridang Doley stands charge under Section-448 / 376 (i) IPC RW Sec.8 of the POCSO Act for alleged commission of house trespass and commission of rape and sexual assault on the victim girl.

## **Facts of the Case**

2. Prosecution allegation as disclosed from the F.I.R. (Ext.1) lodged on 09.10.2016 by the informant before the In-charge of Khelmati Police Out Post, in brief, is that on 09.10.2016 at about 6 am, when he and his wife was

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away from the house, the accused entered into his house and attempted to commit rape on his victim daughter, aged about nine years by gagging her mouth, and at that time, he arrived at his home, saw the incident and apprehended the accused and thereafter handed him over to police with the help of local people.

#### **Investigation**

- 3. On receipt of the F.I.R. the In-Charge of Khelmati OP made GD entry No.155 dtd.09.10.2016 and forwarded the F.I.R to the Officer-in-Charge of North Lakhimpur PS, and on receipt of the F.I.R, the Officer-in-charge of North Lakhimpur PS registered a case bearing North Lakhimpur PS Case No.1036/2016 u/s 448/ 376 (i)/ 511 IPC RW Sec.8 of the POCSO Act, 2012. During the course of investigation, the I.O. visited the place of occurrence, arrested the accused person, recorded the statement of the witnesses, and got the victim girl medically examined, and after completing the investigation, finally submitted charge sheet against accused, Sri Ridang Doley u/s 448/ 376(i) IPC RW Sec.8 of the POCSO Act, 2012.
- 4. Subsequently, the case was forwarded to the court of Special Judge by the learned Chief Judicial Magistrate, Lakhimpur, North Lakhimpur as the offence u/s 8 of the POCSO Act is exclusively triable by the court of Special Judge, and accordingly on production of the accused person, a charge u/s 8 of the POCSO Act had been framed against him. The charge was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.
- 5. The accused person in his statement recorded u/s 313 CrPC denied to have committed any crime.
- 6. I have heard Mr. J. Gogoi, the learned Public Prosecutor appearing for the State, and Mr. Ananda Dutta, the learned State Defence Counsel/ Legal Aid counsel appearing for the accused.
- 7. Now, the point for determination in this case is Whether the accused person, Sri Ridang Doley, on 09.10.2016 at about 6 am, had committed house trespass by entering into (or unlawfully remaining in) the

house belongs to the informant in order to commit rape on his daughter, aged about 9 years, and whether the accused had committed rape on the said victim girl, and whether the accused had committed sexual assault on the said victim girl, as alleged?

#### **DISCUSSION, DECISION & REASONS THEREOF**

- 8. To bring home the charge levelled against the accused person, prosecution has examined as many as 4 (Four) witnesses, namely PW.1, Smti Sonali Doley (informant), PW.2, the victim girl, PW.3, Sri Manoj Doley,the informant of the case, PW.2, the mother of the victim girl, PW.3, the victim girl, and PW.4, Sri Muhidhar Taye, the Investigating Officer of the case.
- 9. Now, let me consider the evidence of PW.1, the informant, who deposed that on the day of occurrence, his wife was in the hospital, and he was in his house with his children, and on that day, one of his neighbours asked him to take morning tea in their house. He also deposed that he has a habit of smoking 'Bidi' and as he left his 'Bidi' in his house, he went back to his house to take his 'Bidi', and then he saw the accused pressing his daughter's mouth and was applying force upon her, but he did not know for what purpose, the accused caught his daughter's mouth. He also deposed that he caught the accused and called the shopkeeper, namely Duarah and they gave slaps to the accused and thereafter, handed him over to police. He further deposed that at that time, the accused laid his daughter on bed, and the long pant of the accused was opened. The accused was applying force on his daughter and he also pulled up the frock of his victim daughter. He also deposed that the accused was just above the victim on the bed.
- 10. During cross examination, PW.1 denied that he had not stated before the police that on that morning, he went to take tea in his neighbour's house and when he came back home to take his 'Bidi', he saw the occurrence. He also denied that he did not state before the police that he saw the accused person's pant in open condition and his daughter's frock was pulled up by the accused.

- 11. PW.2, the mother of the victim, deposed that at the time of occurrence, she was in Mid Town Hospital, and on that day, one of their neighbours called her husband and children to take tea in their house, and accordingly, her husband and her brother went there, and when her husband came back to the house to take his 'Bidi', he saw the accused, who was holding his daughter on the bed and the pant of the accused was open and the frock of the victim was in pulled up condition, and then her husband apprehended the accused and called the nearby shopkeeper and they gave slaps to the accused and handed him over to police. She also deposed that her victim daughter also told her about the occurrence.
- During cross examination, PW.2 denied that she did not state before the police that as she was not in her house, one of their neighbours called her husband and her children to their house to take tea and thereafter, the accused entered into their house and opened his pant and also the accused removed his daughter's panty.
- 13. PW.3, the victim girl, deposed that on the day of occurrence, her mother was not in the house, and her nearby aunt called them to take tea in their house, but she did not go there as she was busy in arranging bed, however, her father and others went there to have tea, and at that time, the accused entered into their house, gagged her mouth, opened his pant and after removing her panty tried to do bad acts with her. She also deposed that she did not know what the accused was trying to do with her, and the accused was just above her body on the bed. She also deposed that when her father came home to take his 'Bidi', he saw the occurrence, and thereafter, her father caught the accused and slapped him. She also deposed that her father handed over the accused to police. She further deposed that her statement was recorded in court.
- During cross examination, PW.3, the victim denied that she did not state before the police that on the day of occurrence, her aunt called them to take tea in her house, and the accused entered into their house and caught her.

- 15. PW.4, Sri Muhidhar Taye, the Investigating Officer of the case, deposed that on 09.10.2016, he was serving as the In-charge of Khelmati OP and on that day, one Abdul Hamid lodged an ejahar, and accordingly, he made GDE and forwarded the said ejahar to the O.C of North Lakhimpur PS for registration of a case, and he was entrusted to investigate the case. He also deposed that the informant saw the incident with his own eyes and caught the accused red handed and thereafter, the accused was handed over to police of Khelmati OP. He also deposed that during investigation, he visited the place of occurrence, recorded the statement of the witnesses, arrested the accused and prepared sketch map of the place of occurrence and got the statement of the victim recorded u/s 164 CrPC by Magistrate, and on completion of investigation, he had submitted the charge sheet against the accused u/s 448/ 376(i) IPC RW Sec.8 of the POCSO Act. The I.O also deposed that the medical examination of the victim was not done as the allegation was only attempt to commit rape and to him, age of the victim was 9 years at the time of occurrence.
- 16. During cross examination, PW.4, the I.O stated that he did not examine the ejahar writer and any nearby persons of the place of occurrence. He did not seize anything from the place of occurrence.
- The above is the evidence as a whole adduced by the prosecution witnesses. However, the accused did not adduce defence evidence. PW.3 is the victim herself. In her deposition, she reiterated the prosecution story. The victim had exhibited her statement made before the learned Magistrate u/s 164 CrPC as Ext.2. PW.1 is the informant as well as father of the victim girl, who had lodged the ejahar, Ext.1 after having seen the incident. PW.2 is the mother of the victim girl, who upon coming to know about the incident had enquired her daughter about the occurrence and accordingly, the victim girl reported her about the incident. PW.4 was the Investigating Officer of the case. In his deposition, he had reiterated that the proceeding was carried out by him besides proving of various documents prepared by him during investigation and on usual completion of investigation, he had submitted the charge sheet against the accused vide charge sheet, Ext.4. Thereafter, on conclusion of the evidence of

the prosecution witnesses, the accused was examined u/s 313 CrPC. During his statement, the accused claimed himself to be innocent.

- 18. I have carefully gone through the case record including the evidence adduced by the prosecution side. So far the factum of age of the victim is concerned, same stands cogently proved from the deposition of the victim's father as PW.1. According to him, at the time of occurrence, his daughter was aged about 9 years and in the ejahar, Ext.1, he had stated that the victim was about 9 years old. The victim (PW.3) in her evidence before this court stated her age to be 9 years. Even the I.O had stated that at the time of occurrence, age of the victim was 9 years. In fact, no question was put to the prosecution witnesses in their cross examinations disputing the age of the victim. Therefore, it is clear from the aforesaid evidence that the factum of victim's age to be 9(nine) years at the time of occurrence as the same does not stand disputed. Thus, it is clear that the victim, at the time of occurrence, was less than 18 years of age.
- 19. Coming to the occurrence in question, it appears from the deposition of the victim i.e., PW.3 that the accused after entering into her house initially gagged her mouth and thereafter, opened his pant and then, he after removing her underwear tried to do bad acts with her by mounting on her body on a bed. When her father (PW.1) came and saw the incident, immediately the accused was caught red handed and on receipt of information, the I.O. arrived and thereafter, the accused was handed over to police. Thus, from the evidence of the victim, it stands proved beyond reasonable doubt that the accused was indeed present at the time of occurrence in the house of the informant. Of course, there was no medical evidence since the I.O did not forward the victim girl for her medical examination, but it is pertinent to mention that from the nature of allegation, no medical evidence could have brought up in the instant case as it is not a case of penetration which is very much evident from the evidence of the witnesses. Even in a case of penetration also, existence of injury on the private parts of the victim may not be there. Therefore, non-examination of the victim by a doctor is certainly of no consequence. Coming to the offence u/s 8 of the POCSO Act, it seems that bare perusal of the provisions of Sec.7 of the POCSO Act shows that while certain specific have been specified by the

legislature, the phrase "does any other act with sexual intent which involved physical contact without penetration" clearly shows that it includes all other similar acts of physical contact without penetration, which have been done with sexual intent. Thus, it seems from the language of the Sec.7 of the POCSO Act that first portion is of touching the vagina, anus, breasts etc. and then there is second portion of subsequent phrase, which says does any other act with sexual intent which involved physical contact without penetration and the same said to commit sexual assault. So far the factum of sexual intent is concerned, Sec.30 clearly shows that in any prosecution for any offence under the POCSO Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged against him by the prosecution. Thus, presumption is mandatory on the part of the accused in view of Sec.30 of the POCSO Act and the onus shall be upon the accused to prove to the contrary that the accused had no such mental state. Now, having regard to the facts and circumstances of the present case, it appears that the accused had failed in discharging the said burden and there is neither any defence evidence nor the accused put suggestion that he had no such mental state. Moreover, the evidence of the victim girl clearly suggests such mental state on the part of the accused to sexually assault the victim, who is a child and it was an act of physical contact without penetration done by the accused with sexual intent and this evidence stands covered u/s 7 of the POCSO Act being punishable u/s 8 of the POCSO Act. The victim herself clearly deposed that the accused after opening his pant and removing her underwear, laid her down on the bed and got himself up on her body and tried to do bad acts with her. Even in her statement u/s 164 CrPC, she has similarly stated about the incident. Thus, the record shows that the victim was consistent in giving her statement. There is nothing on record to show that the victim in any manner made attempt to concoct any new story regarding the alleged occurrence or that she stated any act out of her imagination and there is nothing to show that she was being tutored by someone. It is undoubtedly, clear that the victim has stated that the accused himself opened his pant and thereafter, he removed her underwear and then he was trying to sexually assault her by laying himself on her body on a bed. Moreover, on careful perusal of the evidence of the parents

of the victim i.e., PW.1 and PW.2, it appears that there is nothing contradiction in the evidence of the parents of the victim and the victim, as has been sought to be made out. Thus, it seems that there was corroborative evidence of PW.1 and PW.2, which supported the evidence of the victim, PW.3. Thus, the victim, who was made to lie down on the bed by the accused after opening his pant and removing her underwear, and then he mounted on her body to do some bad acts and at that time, her father (PW.1) came to that place and saw the incident, and it is apparently clear that there is no contradiction of any such nature which could either discredit the evidence of the victim or that of other witnesses. There is nothing to show that the deposition could raise any iota of doubt on the prosecution case. As it is evident from the evidence on record that the prosecution case is not for an offence of penetration and is only act of sexual assault. The deposition of the victim supported with other witnesses to the effect that the accused after entering into her house, opened his pant, removed the underwear of the victim girl, laid her down on the bed and mounted on her body to do so bad acts, stands established. Of course, the victim is a child witness, but it seems that she is sufficiently intelligent as same could be evident from her statement u/s 164 CrPC as well as while giving evidence before this court. Such evidence of the victim with close scrutiny shows the quality of her evidence and same is very much convincing. Thus, the evidence of the victim is cogent, convincing and reliable and it also finds corroboration from the evidence of the PW.1 and PW.2. Therefore, the instant case stands on a strong footing. On the other hand, the accused has miserably failed to show on what account, he had entered into the house of the victim. The accused clearly failed to discharge his onus of proving to the contrary which is provided u/s 29 of the POCSO Act. It would be worthwhile to mention the two ways presumption against the accused of his having committed or abetted or attempted to commit any offence punishable u/s 7 of the POCSO Act. Sec.29 of the POCSO Act reads as follows: "Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s 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 contrary is proved". Presumption has been defined in Sec.4 of the Indian Evidence Act. It shows legal presumption or compulsory presumption. Hence, as per Sec.29 of the POCSO Act, if the accused is

prosecuted for committing any offence u/s 7 of the POCSO Act, this Special Court shall presume that such person has committed the said offence unless contrary is proved. In view of the above circumstances, it is, thus, made clear from the defence side that not only the accused has failed to discharge his burden to the contrary, but on the other hand, prosecution side has clearly established its case in proving the guilt of the accused beyond reasonable doubt to the effect that the accused had sexually assaulted the victim with sexual intent and thus, committed the offence of sexual assault as evident in the evidence, which is punishable u/s 8 of the POCSO Act, and that before making such sexual assault, he had trespassed into the house of the victim, and after opening his pant and removing the underwear of the victim, he had mounted over her body and tried to do bad acts with her, but could not succeed due to intervention of the father of the victim, who at that time, arrived at the place of occurrence and caught the accused red handed. In this situation, the accused is certainly guilty of commission of the offence u/s 448/ 376/ 511 IPC RW Sec.8 of the POCSO Act.

20. Thus, in view of what has been discussed above, this court is of the considered view that the prosecution has proved the charge levelled against the accused, Sri Ridang Doley u/s 448/ 376/ 511 IPC RW Sec.8 of the POCSO Act, and accordingly, I find him guilty under the aforesaid sections of Law, and thus, I convict him under the said Sections of Law.

#### SENTENCE

21. Heard the accused as well as the learned Public Prosecutor for the State on the point of sentence. The accused has nothing specific to say except praying to deal him leniently. The learned P.P. has submitted that considering the facts and circumstances of the case, a lenient punishment may be given to the accused. This court is of the opinion that the penal provisions of the POCSO Act is stringent in nature, which shall have to be imposed in case a person is found guilty. Section-8 of the POCSO Act prescribes minimum punishment for three years and maximum to five years of either description. Sec.448 IPC prescribes punishment with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both, and for the offence Under Sec.376/ 511 IPC, the

convict can be awarded minimum punishment of imprisonment for seven years. Under such circumstance, this court does not have jurisdiction or discretion to lesser the sentence from the prescribed minimum sentence.

- 22. Having regard to the entire aspect of this case, for the offence punishable u/s 448 IPC, accused, Sri Ridang Doley is sentenced to pay a fine of Rs.1,000/- (Rupees One Thousand) only i.d., to undergo 3 (Three) months rigorous imprisonment, and for the offence punishable u/s 376/ 511 IPC, the accused is sentenced to undergo rigorous imprisonment for 7 (Seven) years with fine of Rs.5,000/- (Rupees Five Thousand) only i.d., to undergo rigorous imprisonment for 3 (Three) months more, and for the offence punishable u/s 8 of the POCSO Act, the accused is sentenced to undergo rigorous imprisonment for 3 (Three) years with fine of Rs.4,000/- (Rupees Four Thousand) only i.d., to undergo rigorous imprisonment for 2 (Two) months more. The substantive sentence of imprisonment for the offence u/s 376/511 IPC and 8 of the POCSO Act shall run concurrently.
- 23. The period of detention already undergone by the accused shall be set off from the sentence awarded.
- 24. Let a free copy of the Judgment of conviction and sentence be furnished to the accused person forthwith.
- 25. Having regard to the incident of the instant case, this court finds it to be a fit case for awarding compensation to the victim girl u/s 357(A) of CrPC. Accordingly, it is recommended for compensation u/s 357(A) CrPC. The Secretary of Dist. Legal Services Authority, Lakhimpur, North Lakhimpur, shall make an enquiry as regards quantum of compensation and necessary steps shall be taken for grant of compensation.
- 26. Furnish a copy of the findings and sentence of this judgment to the learned District Magistrate, Lakhimpur, North Lakhimpur, under the provision of Section 365 CrPC.

Judgment is pronounced and delivered in open court under seal of this Court with my signature on this 11<sup>th</sup> day of July, 2017.

( I. Ali ) Special Judge, Lakhimpur, North Lakhimpur.

Dictated & corrected by me -

(I. Ali) Special Judge, Lakhimpur, North Lakhimpur.

Transcribed & typed by-Sri Satyabrata Kshattry, Stenographer.

## <u>APPENDIX</u>

# PROSECUTION WITNESSES:

PW.1 - Informant.

PW.2 – Mother of the victim girl.

PW.3 – Victim girl.

PW.4 - SI Muhidhar Taye, the Investigating Officer of the case.

# List of Exhibits:

Ext.1 - F.I.R.

Ext.2 - Statement of the victim girl.

Ext.3 - Sketch map.

Ext.4 - Charge sheet.

( I. Ali ) Special Judge, <u>Lakhimpur, North Lakhimpur.</u>