IN THE COURT OF THE SESSIONS JUDGE, KARBI ANGLONG, DIPHU, ASSAM.

Present : Md. A.U.Ahmed, AJS

Special Judge, Karbi Anglong, Diphu.

Special 17/2015 corresponding to GR Case No.1143/2015 & Diphu Police Station Case No. 275/2015 Under Section 4 of the

POCSO Act.

State of Assam

Versus

Shri Bhaskar Jyoti Kalita

Name of informant/complainant:

Shri Dhanu Malakar

S/o: Late Dhiren Malakar

Address: Police Reserve, District:

Karbi Anglong, Diphu

Name of the accused person facing trial:

Shri Bhaskar Jyoti Kalita

S/O Shri Radha Kanta Kalita

Police Reserve, Diphu

P.S: Diphu

District: Karbi Anglong.

Advocates appeared:

For the prosecution : Mr D. Deka, Public Prosecutor

For the accused : Mr P.N Boro Argument heard on : 11.12.2018.

Judgment pronounced & delivered on: 18.12.2018

JUDGMENT

- **1.** It is a case of sexual assault alleged to have been committed by the accused, Shri Bhaskar Jyoti Kalita.
- 2. The prosecution case in brief is that on 17.12.2015, the informant-Shri Dhanu Malakar lodged an ejahar with Diphu Police Station stating inter alia that on the same day at about 7-30 PM while he and his wife were not available at their house, the accused came to their house and lured their daughter, Smti. Debashree Malakar aged 5 years and 10 months away to his nearby residence. Then the accused rapped her.
- 3. On receipt of the written ejahar, O/C, Diphu Police Station registered a criminal case vide Diphu Police Station case No.275/2015 U/S 376(2)(f) of IPC R/W 6 of the POCSO Act. On completion of the investigation, investigating police officer submitted charge-sheet under section 377 of IPC R/W Section 4 of the POCSO Act.
- 4. On completion of appearance of the accused person, the case was committed to the then Sessions Judge cum-Deputy Commissioner, Karbi Anglong, Diphu for trial. Thereafter, my predecessor transferred this case to this Court for disposal. In due course, copy was furnished to the accused. Having very carefully gone through submissions of learned lawyers of both sides as well as case diary, this Court found sufficient grounds for presuming that the accused person had committed the offence U/S 4 of the POCSO Act and accordingly, the charge was framed. The particular of the charged offence was duly read over and explained

to the accused to which he pleaded not guilty and claimed to be tried.

5. During trial, Prosecution has examined as any as 10(ten) witnesses including the alleged victim. Accused person has been examined U/S 313 of Cr.P.C. Defense examined none. Plea of defence is of total denial.

6. Point for determination is:

Whether the accused person, Shri Bhaskar **Jyoti** Kalita on 17.12.2015 at about 7-30 PM at Police reserve, Diphu under Diphu Police station caused penetrative sexual assault to Miss Debashree Malakar aged about 5(five) years and 10(ten) months and that he thereby committed an offense punishable U/S 4 of the POCSO Act?

7. <u>Decisions and reasons thereof:</u>

I have very carefully gone through the submissions of learned lawyers of both sides as well as evidence on record. In the very beginning, learned lawyer appearing on behalf of the accused has submitted that the prosecution has totally failed to prove its case beyond all reasonable doubts. On the other hand, refuting the aforesaid submission, learned Public Prosecutor, Mr D.K. Deka has submitted that prosecution has duly succeeded in establishing its case.

Prior to forming an opinion on the rival submissions made by the parties, I would like to give a glance at evidence on record.

8. PW-1 is Shri Dhanu Malakar who has deposed in his evidence that he is the informant of this case. He knows the accused, Shri Bhaskar Jyoti Kalita. The occurrence took place in the month of December, 2015. He is staying at his own house situated near Police Deserve, Diphu with his mother, wife and daughter. On the day of occurrence at about 7-30 PM, he and his wife went to Diphu Civil Hospital for meeting his relative keeping their daughter(victim) in the house with his mother. At that time, the victim was 6 years old. On that night at 7-45 O' Clock, the accused over telephone re quested him to come back home immediately as his (informant) mother blamed him for something. He and his wife came home back at 8 PM. Coming back home, he found the victim crying in the lap of his mother. His mother told him that she could not understand as to what the accused did to the victim(his daughter). His mother showed the pant of the victim, worn by her at that time, which contained stains of blood. After making several attempts to know what happened to her, the victim disclosed the facts which happened with the accused. On the day of occurrence, the accused was a tenant of the informant. The victim told him that the accused took her to his bed and penetrated his penis in her vagina. Then the informant went to Diphu Police Station taking the victim with him and lodged the ejahar. Ext.1 is the ejahar and Ext.1 (1) is his signature. Police visited the place of occurrence and seized the blood stained half pant of the victim and one slack vide Ext.2 and Ext. 2(1) is his signature. Police also seized one bed sheet, one pink colour canvass shoe and one mobile handset vide Ext.3. Ext.3 (1) is his signature. Police got the victim examined at Diphu Civil Hospital and her statement recorded in Diphu Court and handed over the victim girl to him.

- 9. PW-2 is Smti. Manju Kheria who has deposed that she is the next door neighbour of the informant. The occurrence took place in the month of December, 2015. At that time, the accused was staying in the house of the informant as a tenant. On the fateful night of the occurrence at 8 O' Clock, she heard crying of the victim girl and hence, she went to the house of the informant. On reaching there, she did not find the accused. She found the victim girl crying who was hugging the informant. On being asked, the wife of the informant told her that the accused rapped the victim. Thereafter, the informant went to the police station with the victim girl. At the time of occurrence, the victim girl was about 6 years old.
- 10. PW-3 is Miss Debashree Malakar who is the alleged victim of this case. She deposed that she knows the accused person. At the time of occurrence, the accused was staying as a tenant in their house. Their house is adjacent to the rented house where the accused was staying. At the time of occurrence, her parents went to the market and her grandmother was there. She addressed the accused as uncle. The accused took her

to his room and got her seated on his bed and his penis touched with her body. Then she started crying. Thereafter, her grandmother came there and took her away from the room of the accused. She told the incident to her grandmother. On arrival of her parents, she told everything to them. Her statement was recorded in the Court. Ext.2 is her statement and Ext.2 (1) and 2(2) are her signatures.

11. PW-4, Smti. Sepali Malakar stated that the informant is her husband. The occurrence took place about three years ago. On the day of occurrence at about 6-45 PM, she along with her husband went to Diphu Civil Hospital. Her daughter, Debashree Malakar and her mother-in-law were staying in the house. At the time of occurrence, the victim was five years old. She and her husband came back from hospital at about 7-45 PM. Reaching home, she found her victim daughter crying. On being asked, the victim told that while they were absent in the house, the accused came and took the victim to his room and forcibly raped her. As she noticed the victim carefully, she found the leggings of the victim torn in two parts and the underwear with stains of sufficient blood. Then her mother-in-law narrated the incident to her. On their return from hospital, they did not find the accused in his room. At that time, a person close to the informant over phone told them that the accused kept himself hidden in the backside of the residence of the Superintendent of Police. On the night itself, they went to the police station and her husband lodged the ejahar. Police took the victim on that very night to Diphu Civil Hospital for her medical examination and seized blood stained Jangia (inner half pant) and torn slack. In the seizure list, she put her signature. Ext.2(2) is her signature. On the next day of the occurrence, the Court recorded the statement of the victim.

12. PW-5 is Smti. Dulu Malakar who has stated in her testimony that the informant is her son. She knows the accused. He was staying in their house as tenant. On the day of occurrence in the evening hours, the parents of the victim went to Diphu Civil Hospital. At that time, she, the victim and an adopted girl were present in their house. By that time, the accused came to their house and wanted to take the victim to him room. She told the accused that the victim was supposed to sleep after taking meal. But the accused ignoring her plea took the victim to his room. After a while, she heard crying of the victim and then proceeded to the room of the accused, but she found both the doors closed. She questioned the accused as to why he kept the doors closed and also asked the reason of crying of the victim. Then the accused came out of his room by the backdoor and she saw the accused taking the victim girl on his shoulder. The accused tried to pacify her crying. Accused told her that the victim would urinate or pass stool and for that reason, she was crying. Thereafter, she took the victim from the lap of the accused and caused her sat on the ground for the purpose of urination. When she tried to remove the leggings and under wear, she found both the pants torn and blood stained. She saw blood

oozing out through the passage of vagina. Then she washed away the place of urination and took her to the kitchen. PW-5 charged the accused as to what he did with the victim, but the accused intimidated her by saying that he did nothing. Then she apprised the matter to the informant and the accused fled away from his room. On reaching of the parents of the victim, she handed over the victim to her father. On being asked, the victim told everything to her father.

- posted at Diphu Police Station. She has stated in testimony that on 17.12.2017 while she was discharging her duty at the Police Station, the parents of the victim along with her came to the police station. She noticed blood on the pant and slack worn by the victim. The Officer-In-Charge instructed her to go to the Civil Hospital for medical examination of the victim. The victim and her parents also went to the hospital. After examination of the victim, she took them back to the police station.
- 14. PW-7 is Shri Padmeswar Saud who has deposed in his evidence that he submitted the charge-sheet of this case. His predecessor-police officer completed the investigation. He only submitted the charge-sheet under section 377 of IPC R/W Sec.4 of the POCSO Act against the accused person. Ext.4 is charge-sheet and Ext.4 (1) is his signature.
- **15.** PW-8 is Dr. Atreyee Goswami, medical officer has deposed in her testimony on that 17.12.2015 while she

was working as Sr. M.& H.O. at Diphu Civil Hospital examined Smti. Debashree Malakar in connection with Diphu PS Case No.275/2015. On examination, she found- no injuries in her body, hymen intact, no spermatozoa on the vaginal swab and enoractal swab. She also found no bleeding on the body of the victim. Age of the victim was about 6-7 years. Ext.5 is the medical report and Ext.5(1) is her signature.

16. PW-9 is Miss Jyotsna Malakar who has deposed in his that the victim is the daughter of the informant. On the day of occurrence at 7 PM/7-30 PM, she and the victim were watching TV. Parents of the victim were not present at that time. At that time, the accused came to their room and took the victim to his room by carrying on his lap. After a while, her mother heard the sound of weeping of victim and she somehow opened the bamboo door and entered into the room of the accused. She saw the accused persuading the victim for not crying. Then her mother took the victim to the kitchen and on being asked, the victim could not say anything. She was only weeping. Thereafter, other persons came to their kitchen. In the meantime, the accused had fled away and the parents of the victim arrived at the house. Mother of the victim saw blood on the pant worn by the victim. Seeing this, they took the victim to the hospital. Regarding this incident, the informant lodged the ejahar. Later, police seized one bed sheet, a chappal of pink colour and a mobile handset. Ext.3 is the seizure list and Ext.3(2) is her signature.

almost completed the investigation. On her transfer, she handed over the case diary to the O/C, Diphu Police Station. During her investigation, she seized semen of the accused from Dr. Nishil Ranjan Nunisa which was collected from the according to used and the under-pant containing semen of the accused. Ext.5 is seizure list and Ext.5(1) is her signature. Ext.6 is sketch map of the place of occurrence and Ext.6(1) is her signature.

APPRECIATION OF EVIDENCE

- **18.** Basically in such a case evidence of victim child plays vital role. Before going for discussing factum of the case let us first see whether victim of this case falls in the category of child. The section 2 (d) of the POCSO Act says that any person who is below 18 years falls in the category of child. PW-1 and PW-4 are the parents of victim. According to PW-1 at the time of occurrence victim was 6 years old. According to PW-4 the victim was 5 years old. PW-8 is the medical officer whose evidence shows that at the time of occurrence victim was 6/7 years old. Considering all aspects it can be said that at the time of occurrence victim was 6/7 years old. Hence it can be said that victim was a child.
- 19. Occurrence took place in the room of the house belonged to the informant wherein the accused was staying on rent. Ext-6 is the sketch map of the PO which indicates that the occurrence took place in the adjacent room of the dwelling house of the informant wherein the accused was staying on rent. After occurrence on getting information from the accused

parents of the victim came home back. According to PW-1 coming home back at 8 pm found the victim child crying in the lap of mother and his mother showed him the pant victim was wearing stained with blood. On being asked for several times the victim child told him that the accused took her to his bed and pierced on her vagina with his penis. PW-3 is the victim who has stated in her evidence that while her parents were not in the house accused took her to his bed and pierced her with his penis after making her sitting on the bed.

- PW-8 is medical officer who examined the victim. His evidence shows that no injury was seen in the body of the victim. No spermatozoa are also detected. Ext-2 is the statement of the victim girl recorded under section 164 CrPC. The occurrence took place on 17-12-15 as reflected in Ext-1. Ext-2 was recorded on 01-01-16 wherein she stated that the accused put his private parts into the private parts. PW-4 also has stated that sufficient blood on the pant which the victim was wearing. Ext-2 is the seizure list which show that the investigation officer seized one pant(Jangia) having blood stains and one slack torn at middle part on 17-12-15 at 10.30 pm on being produced by the mother of the victim.
- 21. Evidence of the victim girl shows that the victim only pierced her body with his penis. Now it has became crystal clear that the evidence of the victim does not corroborates the statement of victim recorded under section 164 CrPC. Evidence of victim girl was recorded almost after 2 ½ years from the date of occurrence. It is found that the evidence of the informant gets

corroboration from the statement of the victim girl recorded under section 164 CrPC. Memory of the child lasts not for long period. Hence on the aforesaid discrepancy I feel hesitation to dis-believe statement of victim marked as PW-2 and evidence of PW-1 that the accused pierced the vagina of the victim with his penis.

- 22. PW-5 is the grandmother of the victim who first noticed blood in the pant the victim was wearing in the time of occurrence. Since medical evidence does not supports that the victim sustained any injury, hence I found doubt in the evidence of PW-1, PW-4 and PW-5 that they noticed blood in the pant which the victim was wearing at the time of occurrence.
- 23. At the time of occurrence grandmother of the victim marked as PW-5 was in the house. Her evidence clearly shows that while parents of the victim child were not in the house the accused took the victim to his room and after a while she heard crying of victim. Her evidence also shows that on hearing crying the victim while she came out from the room he found the doors of the room where the accused was staying were closed. While accused was asked as to why the victim was crying he replied that for natural job she was crying. From the facts narrated above it can be easily inferred that the accused did something foul with the victim. PW-9 is the sister of the informant who was at the time of occurrence in the house. Her evidence also shows that the accused took the victim to his room.
- **24.** "Sexual assault" is defined under section 7 of the section of the POCSO Act which reads thus:- "**7. Sexual**

assault.-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."

- **25.** Section 8 of the Act relates to punishment for the sexual assault which reads-" **8. Punishment for sexual assault .-**Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."
- **26.** In the of context presumption under **Section 29** of the **POCSO** Act, in the case of Amol Dudhram Barsagade .vs. State of Maharashtra the Hon'ble Apex Court has held as follows:-"5. The learned Additional Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under **Section 29** of the **POCSO** Act is absolute. The date of birth of the victim 12.10.2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of **Section** 2(d) of the **POCSO**Act, the submission. The submission that the statutory under **Section 29** of presumption the **POCSO** Act is absolute, must be rejected, if the suggestion is that even if foundational facts

are not established, the prosecution can invoke the statutory presumption. Such an interpretation of **Section 29** of the **POCSO** Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."

27. In view of discussion made above I have found that the prosecution has succeeded in establishing its case under section 8 of the POCSO Act.

ORDER

- **28.** In the result I find the accused guilty under section 8 of the POCSO Act and accordingly he is convicted.
- 29. On the point of sentence the accused is heard and to that effect his statement is recorded. It has been submitted by the learned lawyer appearing on behalf of the accused person that accused person may be punished leniently because he is only earning member of his big family consisting of his old parents. On the other hand learned Public Prosecutor Mr. D.K Deka has submitted that the accused needs to be punished as per the provisions of law.

30. Regarding object of the POCSO Act, the Hon'ble Apex has observed in case of *Eera v. State (NCT of* **Delhi)** reported in "(2017) 15 SCC 133" thus :-"20. The purpose of referring to the Statement of Objects and Reasons and the Preamble the Pocso Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well-being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is guite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and

interest occupy the seminal place in the text of the Pocso Act.".

31. In Surjit Singh Vs. Nahara Ram and others (2004)6 SCC 513=AIR 2004 SC 4122 it was held "The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly there is a cross-cultural conflict where living law must find answer to new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, laws as a corner stone of the edifice of 'order' should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public system in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc."

32. I have very carefully gone through the submissions duly advanced by the learned lawyers of both sides on the point of sentence as well as the observation made

in the case law cited above. Court cannot award sentence whimsically. Sentencing of the any accused person needs to be based on a reasonable policy. In the instant case accused person is a Police Constable and as such he knows the consequence of commission of any offence. The facts of the case clearly shows that he committed the alleged offence with cool brain and plan. Taking all aspects into consideration especially object of the POCSO Act I feel hesitation to extend any leniency in sentencing the accused person.

- order the accused person to suffer RI of 4 (Four) years and a fine of Rs. 2000/- i/d SI of 3(three) months. Set off earlier detention period. Let the fined money be paid to the informant if realized. Let a certified copy of the Judgment and order be supplied to the accused person at free of cost. Let a copy of this Judgment be sent to the District Magistrate, Karbi Anglong, Diphu in terms of section 365 of the CrPC. Considering the nature of the instant case no order in the terms of section 357 A of the CrPC has been passed. Accordingly this case is disposed of.
- **34.** Given under my hand and seal of the Court on this 18th December, 2018 at Diphu, Karbi Anglong.

Dictated and Corrected by me.

(Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi Anglong, Assam (Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi Anglong, Dictation taken and transcribed by me.

Stenographer Grade-I.

APPENDIX

Prosecution Witnesses

PW-1 is Shri Dhanu Malakar

PW-2 is Smti. Manju Kheria

PW-3 is Miss Debashree Malakar

PW-4 is Smti. Sepali Malakar

PW-5 is Smti. Dulu Malakar

PW-6 is Miss Jamuna Malakar

PW-7 is Shri Padmeswar Saud

PW-8 is Dr. Atreyee Goswami

PW-9 is Miss Jyotsna Malakar

PW-10 is Smt. Dipmonia Dihingia

Prosecution Exhibited

Ext-1 is FIR

Ext-2 is Statement of the Victim/ Seizure list

Ext-3 is Seizure list

Ext-4 is Charge Sheet

Ext-5 is Medical Examination Report

Ext-6 is Sketch Map

<u>Defence Witnesses : Nil</u> <u>Defence Exhibited : Nil</u>

(Md. A.U Ahmed, AJS)

Special Judge, Diphu , Karbi Anglong