IN THE COURT OF THE SESSIONS JUDGE, CACHAR AT SILCHAR.

Present :- Sri K. Choudhury, Sessions Judge,

Cachar, Silchar.

Spl. POCSO Case No : 14/2016.

U/S..4 of POCSO Act.

State of Assam......Complainant.

-Vs-

Abhijit Dutta.

S/O Late Monindra Dutta.

Tarapur. Silchar. :::::::: Accused person.

Charge framed on: - 09.08.2016.

Date of recording evidence: - 01-10-16, 06-10-16, 21-10-16, 23-11-

16,09-12-16.

Statement of the accused person recorded on:- 17-12-16.

Argument heard on :- 05-01-17.

Judgment delivered on :- 21-02-2017.

ADVOCATE APPEARED

For the prosecution :- Mr. S. Dutta. P. P.

For the defence :- Mr. A. Roy. Learned advocate.

JUDGMENT

1. Prosecution case as reflected in the FIR in brief is that about one and half prior to lodging of the FIR the accused finding the daughter of the complainant aged about nine years (here in below mentioned as

victim) alone in the house called her to his house and with evil intention and forcibly did bed things with her. The victim however did not disclose the same instantly to the complainant. Subsequently about one month prior to filing of the FIR it was noticed that the victim felt ill thereafter on 06-10-15. The victim was taken to Child Specialist for treatment. The victim then disclosed the evil act of the accused to the doctor from whom the complainant came to know that the victim was raped by the accused. It could further be known that the victim since after the alleged incident had been suffering from stomach ache and many other sicknesses. Subsequently after taking of medicines the victim was again examined by doctor on 27-10-15. As per the doctor the incident had allegedly be committed on 05-10-15. After that having fully known about the alleged incident from the mouth of the victim the complainant informed her husband who then came and asked to file ejahar. Accordingly the ejahar was lodged. The same was received vide Tarapur GDE No. 646 dated 31-10-15 and forwarded to O/C Silchar P.S. where it was registered as Silchar P.S. case No. 2940/15 U/s 6 of Protection of Children from Sexual Offences Act (POCSO) Act 2012.

2. During investigation, the victim was produced before doctor who opined the age of the victim is above nine years and below 11 years. As per the doctor report, there was old tear at 1'0 clock and 5'0 clock position. She also gave statement before the Magistrate U/S 164 of Cr.P.C. She inter alia disclosed before the Magistrate that about one and half months back at about 3.00 p.m. while she was proceeding towards her home from the veranda the accused suddenly came and caught hold her mouth and shut her mouth with clothes and took her to terrace. After that he put of her clothes touched her breast, played with her breast, touched her vagina and spitted in her vagina. She felt pain on her

back. The accused slept over her, something white substance came out from her vagina, the accused shown her a knife and threatened her to the effect that he would kill her and her family members in case she disclosed the same. Accused was arrested. On completion of investigation I.O. submitted charge sheet against the accused U/S 6 of POCSO Act 2012.

- 3.Learned J.M. Ist class, Silchar procured the attendance of the accused on the strength of W/A issued on the prayer of I.O. and forwarded the accused to this Court. On production of the accused copies of necessary police papers were furnished to him. This Court after hearing both sides framed formal charge against the accused U/S Sec.4 of Protection of Children from Sexual Offence Act 2012 (POCSO Act). The charge was read over and explained to the accused to which he pleaded not guilty. Hence, trial began.
- 4. To prove the case, prosecution examined as many as seven witnesses (P.Ws) including the victim, two Doctors and wife of the accused. Son of the accused has been examined as C.W. Defence plea is that the land lady and the accused used to create pressure upon the complainant for vacating the house, but the complainant was reluctant to vacate the same and for that the complainant in connivance with her husband lodged false FIR against the accused and the victim being tutored falsely gave statement before the police, Magistrate and also before the Court. The accused in his statement recorded U/S 313 of Cr.P.C. pleaded as innocent.
- 5. Now, the moot question for determination is whether, under the facts and circumstances of the case, the accused committed or penetrative sexual assault on the victim.

- 6. To decide the above appoint I have heard both sides at length and perused the entire evidence on the record. My findings and decisions with reasons thereof are given below.
- 7. It is evident that since prior to the date of alleged incident the complainant along with her victim daughter had been residing as a tenant in the homestead of the house under the mother-in-law of the accused. It is further evident that wife and two sons of the accused also resided in the same homestead along with the accused and his mother-in-law, and it is evident that that after few days of filing of the *ejahar* the complainant left the said rented house. These points are not all disputed.
- 8. P.W.1 deposed that her husband for the previous one year had been working at Monipur in Assam Rifles. When her victim daughter was aged about six months she started to reside in the in-laws of the accused as tenant. About one year back she noticed some illness on the person of the victim. She then took the victim to doctor Bidyut Nath. After examination, the doctor reported to her that the victim was once raped by someone. After that the victim disclosed everything to the doctor in her (P.W.1) presence. The victim disclosed that about 15-20 days prior to her examination while she was playing in the veranda, the accused took her to the roof of the building and embraced her, and did sexual inter course with her. P.W.1 further deposed that the victim also disclosed that the accused threatened her (victim) asking not to disclose anything and in case of disclosure he would kill her family members and for that she did not disclose anything prior to that. After such disclosure they returned to their rented house to the wife of the accused. On being so reported the wife of the accused highly reacted and started to abuse the victim. Wife of the accused took the victim inside the room of the accused and attempted to assault by holding her (victim) body. P.W.1

further deposed that seeing the embarrassing situation she returned with the victim and reported the matter to her husband who told that he would return after one month and would do the needful. After one month her (P.W.1) husband came and they took the victim to the doctor for checking. After that she lodged the FIR against the accused. Through the police the victim was medically examined at SMCH Silchar and was also produced before the Magistrate for recording statement. After filing of the FIR she left the rented house. She further deposed that the victim was reading in Class-IV in K.V. Silchar. After the alleged incident the victim suffered both mentally and physically and for many days the victim did not attend school. The victim was forcibly made to attempt school. However, the victim remained irregular in attending school for about 9-10 months. The victim was then taken to Guwahati for counselling. After that since one month prior to the recording of evidence the victim had been attending school regularly. At the material time the victim was aged about eight years.

9. P.W.2 is the victim. She being found below 12 years age no oath was administered. Some questions were put to her to testify her capacity as witness. She being found capable to adduce evidence examined in camera. She deposed that the accused used to reside as a *Gharjamai* in his in-laws house, where previously they (complainant & the victim) also used to reside as tenant. The accused had two sons, elder was reading in Class IX and younger one is reading in Class-V. At the material time on many occasions at different times, such as 12.00p.m., 5.00 p.m. the accused used to take her to the roof of the house pressing her mouth and had sexual inter course with her penetrating in her private parts. The accused used to press her body and used to touch her different parts. The accused threatened her with dire

consequences in case of disclosure to her parents stating that the accused would kill her and her parents with a knife and for that she did not disclose the matter to her parents. She further deposed that when she felt ill, her mother took her to the doctor namely, Bidyut Nath and she disclosed the entire matter to the Doctor and her mother. According to her, about after one month of the last incident she was medically examined at SMCH by a lady doctor and she also gave statement to the Magistrate. Ext-2(1) is her signature in the medical report. After the incident she could not attend school for one month and was reluctant to attend the school. Her mood was lost and for that she was taken to Guwahati for counseling and after that she started to attend school.

- 10. This Court observed that this witness was very much shy to disclose everything and during recording of her evidence she used to loiter here and there inside the room like a very small girl and very fickle in mind and very unrest and curasive and cute. Ext-3 is her statement recorded by Magistrate.
- 11. PW. 5 Dr. Orina Raha is the doctor of S.M.C.H. According to her on 30-10-15 while she was working as GDMO in the Deptt. of Forensic science examined the victim girl in connection with the relevant police case. AS per the victim girl in around mid-September 2015 the accused took her to the terrace in day light and sucked her breast and had sexual inter course with her, keeping a knife aside, telling her that she tell the truth to anybody her family would be injured. This incident took place on five days. She revealed the story after going to pediatrician. Her mother also gave same history. One of further finding of the doctor is that there was an old hymnal tear at one O clock and five o clock position. The doctor opined the age of the victim was above nine

years and below 11 years. According to her this report is based on radiological and physical examination.

- 12. P.W.6 is Doctor Bidyut Nath. According to his evidence on 06-10-15 he examined the victim aged about 8 years being accompanied by her mother. The patient complains about white discharge from her vagina. He prescribed medicine and advised her for re-examination. On her second visit on 27-10-15 he found the patient suffering from Anemia and warm infection. He further deposed that on the date of Ist examination he suspected that the victim have sexual transmitted decease and accordingly he prescribed medicine. On the second visit he found the victim had abdominal pain and anemia. His further evidence is that on the ist visit he asked the mother of the victim to know as to whether there had been any sexual assault and also asked the mother to get examined the child by Gynecologist.
- 14. P.W.-7 is the I.O. According to his evidence during investigation he sent the victim to SMCH got recorded the statement of the victim U/S 164 Cr.P.C., visited the P.O. recorded statement of witnesses at the P.O. which is the house building of Lila Rani Das where she used to reside along with her daughter and two grandsons on the first floor and sometimes the accused also resided. On the ground floor two tenants were there. Own house of the accused is situated at Saratpally, Silchar. I.O. further deposed that he visited the house on 02-11-15, 05-11-15, 25-11-15, 20-12-15 for apprehension of the accused but the accused was found absconding. He also visited the P.O. for apprehension of the accused but the accused was found absent. In 27-06-16 he got information that the accused just arrived at his home and take in bath. The I.O. immediately went there and apprehended the

accused from his house at Saratpally.

In the cross-examination he stated that the P.W.1 did not exactly state that the Doctor Bidyut Nath disclosed to them that the victim once sexually assaulted. He further stated that no witness could disclose the exact date of incident and he did not record the statement of the victim U/S 161 of Cr.P.c. He asserted about his search of the accused in the house of P.O.

15. During hearing learned P.P. submitted that there is no material contradiction or omission and evidence of the victim is fully corroborated by the evidence of two doctors and her mother and there is no reason to disbelieve their testimony especially of the victim. Further it is submitted that the subsequent conduct of the accused as come out in the evidence of both the I.O. and also the wife of the accused regarding absence of the accused after the alleged incident for a long period in his ordinary place of residence is most relevant U/S 8 of the Evidence Act and the same can be in the absence of proper explanation adversely inferred being a strong circumstances indicating his involvement with the alleged offence. Learned defence counsel strongly contended that the exact date of the alleged incident is not mentioned in the FIR give rise doubt about the genuineness of the prosecution allegation mainly on the ground that the defence could establish some probability of such false implication being a tenancy dispute between the parties. Further it is submitted that such probability also gets support from the fact that in the cross-examination the P.W.2 the victim clearly stated that her mother promised her to purchase a Mobile phone for her to play games and for listening music.

The learned defence counsel cited following decisions:

1. Criminal Appeal 2238/10 passed by Hon'ble High Court.

- 2. Criminal Appeal No. 2073 of 2014. Appellant: Dinesh Kr. Maurya –Vs- State of U.P.
- 3. Criminal No. 425 of 2015 @ SLP (Crl) No. 9896 of 2011.
- 4. Delhi High Court. State of NCT of Delhi –Vs- Rashid 3rd Feb/15.
- 16. Perused the same. Facts and circumstances of all the above cited cases are different with that of the present case in hand. However, I considered the observation made therein with regard to the appreciation of evidence.

17.It is seen that in the cross-examination that the victim stated that she had got a personal Mobile set having SIM No. 9954006207. On this point there is no further cross-examination. The victim asserted that whatever she narrated before the Magistrate, Doctor and the Court is correct. She denied that she being tutored adduced false and fabricated evidence. She gave the topography of the P.O. On her examination before recording her evidence she was found intelligent enough to depose. Her evidence could not be shaken out in the cross-examination made in detail. P.W.3, the Judicial Magistrate Ist Class deposed that she recorded the statement of the victim. It is evident that the statement recorded by the Magistrate corroborates the evidence of the P.W.2. The P.W.3 further stated that the victim was found capable of giving rational answer and was intelligent.

18.P.W. 5 is the wife of the accused. She deposed that 4-5 days after the allegation of rape the accused left their house i.e. the P.O. where the accused used to reside as Gar-jamai. According to her the allegation of rape was brought 4-5 days after the previous Kali-puja. The accused did not return to her parent's house after the allegation of rape. She further

deposed that she had no contact with the accused for about 7-8 months. The accused even did not come to meet her and their two minor sons and also to see her ailing mother who was having breast cancer. The above piece of evidence totally confirms the evidence of I.O. with regard to conduct of the accused as absconder. She further confirms in the cross-examination about the visit of the I.O. in their house. She further stated that for the previous 4-5 years their relation with the complainant was normal and they had good relation and since about 2-3 months prior to the previous Kali Puja i.e. since September 2015 the victim started creating troubles. Sometimes the victim pelted lock and sometimes grooms towards her mother. She further stated that when she interfered into the matter mother of the victim re-acted. She further stated that she asked the mother of the victim for vacating the house. Father of the victim was reluctant to pay due house rent. It is evident that the land lady never issued any rent receipt to the complainant side and after the alleged inside the complainant side vacated the house and evidence does not disclose continuation of the tenancy dispute if any for plea of non payment of rent. The evidence of the wife of the accused is found to be not cogent enough to believe that there might have been some tenancy dispute and for that the complainant involving chastity of her own minor daughter could have filed a false FIR. Evidence of P.W.4 (lady doctor) clearly shows that hymen of the victim was found torn. This piece of evidence remain unrebutted in the cross-examination. That apart disclosure of the victim before the Doctor i.e. P.W.4 with regard to the sexual act of the accused is also not categorically denied in the cross-examination. Therefor it can also be relied upon that the victim reported to the lady doctor about the sexual activities of the victim as eluded earlier. The behavioural change of the victim in the month of September has come out in the evidence of P.W.5 is also found in the

evidence of P.W.1 and P.W.2. Now question comes as to why a normal child would behave abnormally unless there is something happened. This abnormal behaviour as found in the evidence of wife of the accused also fortifies the veracity of the prosecution witnesses.

- 19. Under such circumstances non recording of statement of the victim by the I.O. under the facts and circumstances of this case cannot be considered as fatal. Furthermore some discrepancies as come out in the cross-examination of P.W.2 with regard to identification of some of her own signatures also can be ignored. No reason is found to disbelieve the testimony of the victim corroborated by other cogent evidence of doctors and other P.Ws.
- 20. In view of the above discussion of evidence, contention and consideration of evidence on its entirety it is held that prosecution has been able to prove its case beyond all reasonable doubt U/s 4 of POCSO Act. Therefore, the accused is held guilty and convicted accordingly.
- Heard the accused on the point of sentence. He has stated that he is having two minor sons, wife and ailing mother-in-law whom he is to maintain and thus prayed for leniency. Having considered the above and the age of the accused and also intention of the legislature and all other aspects I convict and sentenced the accused U/S 4 of POCSO Act 2012 to undergo Rigorous Imprisonment (R.I.) for seven years with fine of Rs. 5000/- and in default shall further undergo R.I. for a period of two month.
- 22. As regard victim compensation, having considered the age of the victim, her abnormal behaviour for months together, her leaving of school for months together, counseling at Guwahati, for the trauma,

mental pain, agony and physical sufferings and all other aspects an amount of Rs. 1,00,000/- is highly recommended to be paid to the victim, the P.W.2 being the victim of the crime as an interim compensation. Therefore, the Secretary DLSA shall take necessary steps for payment of the interim compensation and also take further necessary step for payment of any further compensation on the prayer of the victim or her parents. Copy of the Judgment be forwarded to the Secretary DLSA along with the copy of deposition of P.W.1 and P.W.2.

23. Copy of the Judgment be furnished to the accused free of cost as per provision of Sec. 363 Cr.P.C. and to be forwarded to the District Magistrate as per provision of Sec. 365 Cr.P.C.

Judgment is pronounced and delivered in the open Court under my seal and signature on this 21st day of February, 2017.

Dictated & corrected be my

Special Judge. (Shri K. Choudhury)

Cachar, Silchar. Cachar, Silchar.

IN THE COURT OF SESSIONS JUDGE, CACHAR, SILCHAR.

Spl. POCSO Case No. 14/2016.

APPENDIX

(A) PROSECUTION WITNESSES: -

PW. 1 - Smti Dipali Das

PW. 2 - Smti. Riya Das.

PW. 3 – Smti Sarbani Bhattacharjee.

PW. 4 – Dr. Orina Raha.

PW. 5 - Mrs. Soma Dutta.

PW. 6 – Dr. Bidyut Nath.

PW. 7 – Sri Nirupom Nath (I.O.)

(B) <u>DEFENCE WITNESSES</u>: - NIL.

(C) COURT WITNESSES: -

C.W.-1 Sri Anik Dutta.

(D) PROSECUTION EXHIBITS: -

Ext. 1 - F.I.R.

Ext. 1(1) – Signature of P.W.1.

Ext. 2 — Medical report..

Ext-2(1) Signature of P.W.2.

Ext-2(2) to 2(4)- Signature of P.W.4

Ext-2(5) - Signature of Dr. Gunojit Das.

Ext.-3: Statement of P.W.2.

Ext-3(2) & 3(4) - Signature of the victim.

Ext-3(6) - Signature of P.W.3

Ext. 4 – Police requisition.

Ext. 4(1)— Signature of PW-4.

Ext-4(2) - Signature of P.W.7.

Ext. 5 – Sketch map.

Ext. 5 (1) - Signature of PW-7.

Ext-5(A) - Search slip.

Ext-5(A-1) – Signature of P.W.-7

Ext-6 - Another Search slip.

Ext-6(1) - Signature of P.W.7.

Ext-7 - Serch slip.

Ext-7(1) - Signature of P.W.7

Ext-8 - Search slip.

Ext-5-A to Ext-8 exhibited under objection.

Ext-9 - prayer for recording of statement of the victim.

Ext-9(1) - Signature of P.W.7.

Ext-10 -Charge sheet.

Ext-10(1) - Signature of P.W.7

(E) <u>DEFENCE EXHIBITS</u>: - NIL.

(F) <u>COURT EXHIBITS</u>: - NIL.

(G) EXHIBITS PRODUCED BY WITNESSES: - Nil.

(Shri K. Choudhuy), Special Judge, Cachar, Silchar.