DISTRICT : GOLAGHAT.

HEADING OF JUDGMENT IN SPECIAL CASES :
IN THE COURT OF THE SPECIAL JUDGE, GOLAGHAT.

Ref.:- Special (POCSO) Case No. 22/2017.
Arising out of G.R. Case No.109/2017.
U/S 4 of POCSO Act.

Present :- Shri S. K. Sharma, Special Judge, Golaghat.

The State of Assam. Prosecution.
-Vs Shri Biswajit Phukan. Accused.

APPEARANCE:

For the prosecution : Mr. P. Bora,

Special Public Prosecutor, Golaghat.

For the accused : Miss B. Gogoi,

Advocate, Golaghat.

Dates of evidence : 06.07.2018, 01.12.2018,

07.01.2019, 11.03.2019, 10.04.2019, 16.05.2019,

08.07.2019.

Date of argument : 12.02.2020.

Date of Judgment : 26.02.2020.

JUDGMENT:

1. The accused Shri Biswajit Phukan, son of Shri Punaram Phukan, resident of No.2 Tamuly Gaon, under Borpathar Police Station, District - Golaghat, Assam, here in this case has been put to face the trial to answer the charge under section 4 of POCSO Act.

- 2. The fact as disclosed in the First Information Report (in short FIR) is that on 14.04.2017, at about 9 P.M., at night, the daughter of the informant, aged about 11 years was performing Bihu dance along with her friends in the house of one Brajen Bora of the same village. At that time, the accused took the victim girl from there on his motorcycle by saying that he would take her to her house. After taking her for a distance, on the road of No.2 Tamuly Gaon, near a bamboo grove, the accused stopped his motorcycle and then accused unfastened the panty of the daughter of the informant and thereafter, he inserted his finger into her vagina and as a result of which the daughter of the informant could not urinate.
- 3. On receipt of the written ejahar from the informant Shri Baba Bora @ Mohan, the father of the victim on 15.04.2017, the O/C of Borpathar Police Station registered the case vide Borpathar P.S. Case No.41/2017, u/s 7 of POCSO Act and he himself investigated the case. During investigation, the I.O. visited the place of occurrence, examined witnesses and prepared sketch map of the place of occurrence. He also got the victim examined by Doctor and collected the report and also got her statement recorded in the Court. During investigation, the I.O. seized one half pant of the victim and he also seized one motorcycle by which the victim was taken by the accused at the time of occurrence. During investigation, the I.O. arrested the accused person and forwarded him to the Court. Thereafter, on completion of investigation, the I.O. submitted charge sheet against accused Biswajit Phukan u/s 4 of POCSO Act to stand trial in the Court.
- 4. On appearance of the accused person before this court, and after hearing learned counsels of both the sides and having found prima facie materials against the accused, my learned predecessor has framed charge u/s 4 of POCSO Act against the accused and the contents of the charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. To bring home the charge against the accused, the prosecution side has examined as many as 10 witnesses including the M.O. and I.O. After closing the prosecution evidence, the statement of the accused person has been recorded under the provision of section 313 of Cr.P.C. The accused declined to adduce evidence in his defence. The plea of the accused is total denial.

6. I have heard Miss B. Gogoi, learned counsel for the accused and Mr. P. Bora, learned Special Public Prosecutor for the State.

NOW THE POINT FOR DETERMINATION IS-

7. Whether the accused on 14.04.2017, at about 9 P.M., at night, at No.2 Tamuly Gaon, under Borpathar Police Station, District – Golaghat, committed penetrative sexual assault upon the victim child on the road; and thereby committed an offence punishable under Section 4 of POCSO Act as alleged?

DECISION AND REASONS THEREOF:

- 8. To arrive at a judicial decision, let the evidence on record be appreciated.
- 9. P.W.1 is the informant of this case as well as father of the victim, who deposed in his evidence that he knows the accused person. At present, the victim girl is reading in Class VII and her age is now 12 years. The occurrence took place about 1½ years back, at about 9'30 P.M., at night and at the time of occurrence, his victim daughter was playing *Bihu* dance in the village *Namghar*. P.W.1 also deposed that at the time of occurrence, his motor bike was being used by the accused. On the next day, his wife told him that when the accused took the victim at night in the motorcycle from the place of *Bihu* function, then on the road, the accused tried to unfasten the clothes of the victim and he inserted his finger into the vagina of the victim. His wife came to know about the occurrence from the victim. Thereafter, on the next day, he lodged the ejahar. Ext-1 is the ejahar and Ext-1(1) is his signature. Ext-2 is the seizure list and Ext-2(1) is his signature. P.W.1 also deposed that police interrogated him and the victim was medically examined by Doctor. It is thus clear that the evidence of P.W.1 as regards the actual occurrence is hearsay in nature.

In cross examination, P.W.1 has stated that he was working as helper in the vehicle of the accused since $1\frac{1}{2}$ years back and relationship between him and the accused was good. He told the accused to enhance his daily wages prior to the

occurrence. Sometime, when he unable to go to his work, then accused came to his house to take him. P.W.1 also stated that when the accused did not enhance his daily wages, then he refused to do work with the accused and then accused came to his house and told him to do work in his vehicle for some days. On the next day of the occurrence, the accused came to his house and took him to Merapani for visiting and at that time his wife and his victim daughter were present in the house. On that day, his wife offered tea to the accused on the occasion of *Bihu*. P.W.1 further stated that on the day of occurrence, he told the accused to bring his victim daughter from the place of *Bihu* function. On the day of occurrence, the accused took the victim girl in the motorcycle and handed her over to them. P.W.1 denied defence suggestion that the accused did not insert his finger into the vagina of the victim. He also denied defence suggestion that he lodged the false case against the accused.

10. P.W.2 is the victim girl, who deposed in her evidence that she knows the accused person. She is reading in Class VII. The occurrence took place about 1½ years back. On the day of occurrence she was performing *Bihu* dance in the house of one Bolen of her same village and at that time, the accused came there and told her that she was called by her parents and then accused took her in the motorcycle. Then on the way, near a bamboo grove, the accused inserted his finger into her vagina and accused also told her not to disclose the matter before her parents. Thereafter, the accused dropped her near her house and then accused left the place. On the next day, in the evening, she reported the matter to her mother and at that time, when her father came there, then her mother reported the matter to her father. P.W.2 also deposed that she gave her statement before the Court. Ext-3 is her said statement and Ext-3(1), Ext-3(2), Ext-3(3), Ext-3(4) and Ext-3(5) are her signatures. Police also got her examined by Doctor and police seized her one wearing panty by preparing seizure list. Ext-4 is the seizure list and Ext-4(1) is her signature.

In cross examination, P.W.2 has stated that it took two minutes time to come to her house from the house of Brajen Bora where she was performing *Bihu* dance. The road between her house and the house of Brajen Bora is very bad. As the road was bad, therefore, on the day of occurrence, the accused told her to sit on the motorcycle by crossing her legs on both sides of the seat. P.W.2 also stated that as at that time, she was wearing *mekhela-sadar*, so, she could not lift her legs and therefore,

the accused seated her on the motorcycle by holding her legs and at that time she got injury from the nail of the accused.

11. P.W.3 has deposed in her evidence that the victim is her daughter. She knows the accused person. The occurrence took place on 14.04.2017, at about 8'30 P.M., at night. On the day of occurrence, her victim daughter went to the village to perform *Bihu* dance and at that time the accused took her victim daughter from that place to her house on his bike and on the road, the accused stopped the bike and thereafter, the accused inserted his finger into the vagina of her victim daughter. When the victim reached her house then the victim disclosed the matter before her and thereafter, she (P.W.3) informed the matter to her husband. On the next day of the occurrence, her husband lodged the ejahar at Police Station. At the time of occurrence, the victim was 11 years old and that time, she was reading in Class VI at No.2 Milanjyoti M.E. School. In connection with the occurrence, police seized one panty of the victim girl by preparing seizure list. Ext-4 is the seizure list and Ext-4(2) is her signature. M. Ext-1 (M.R. No.9/2017) is the said seized panty of the victim girl.

In cross examination, P.W.3 has stated that at the time of occurrence, the relationship between the accused and her family members was good. The accused has green tea leaves business and her husband was working in the vehicle of the accused. Her husband asked the accused to enhance his daily wages from Rs.120/-. The road near the place of occurrence was bad. P.W.3 denied defence suggestion that as the victim was wearing mekhela-sadar, therefore, the accused asked the victim to sit on the bike by crossing her legs on both sides of the seat of the bike. The accused has a long nail in one of his finger. On the next day of the occurrence, the accused came to her house and thereafter, the accused and her husband went to Merapani and after returning from Merapani, the accused again came to her house. At the time of occurrence, the accused hold the legs of the victim and then the accused seated the victim on the seat of the bike by crossing her legs. Police told her to bring one panty of the victim and then she gave one panty of the victim to the police. P.W.3 denied defence suggestion that she did not state before police that she informed regarding the occurrence to the village people. She also denied defence suggestion that the accused did not insert his finger into the vagina of the victim, rather the victim sustained injury from the nail of the accused when the accused got her seated on the

bike.

12. P.W.4 Shri Jugen Neog has deposed in his evidence that he knows the accused person. He also knows both the informant and the victim girl. The occurrence took place on 14.04.2017, at about 8/8'30 P.M., at night. On the day of occurrence, when they were performed *Bihu* dance in the house of Brojen Bora, then at that time, the accused came there and took the victim from there. Thereafter, he did not know what was happened. P.W.4 also deposed that one Mantu Gogoi informed him over phone that the accused committed rape on the victim. The bike in which the accused took the victim was belonged to the informant and the accused told them that the informant told the accused to take the victim.

In cross examination, P.W.4 has stated that police did not interrogate him.

13. P.W.5 Shri Dhurba Bora has deposed in his evidence that he knows the accused person. He also knows both the informant and the victim. The occurrence took place in the month of *Bohag* (Assamese calendar year) of the year 2017. On the day of occurrence, he along with the victim and other persons of his village were performing *Bihu* dance in the house of Brajen Bora. At that time, the accused came there on the Motorcycle belonging to the informant and then the accused took the victim from there by the said Motorcycle. On the next day, he came to know from one Mantu Gogoi that the accused committed indecent act with the victim on the road. He did not know what was happened later on.

In cross examination, P.W.5 has stated that in the evening, the accused took the victim from the house of Brajen Bora in the bike. It took about 10 minutes time to come to the house of the informant from the house of Brajen Bora and the road is bad. All the village people used to come and go through the said road.

14. P.W.6 Shri Mantu Gogoi has deposed in his evidence that he knows the accused person. He also knows both the informant and the victim. The occurrence took place in the month of April, 2017. On the day of occurrence, he along with the victim and other persons of his village were performing *Bihu* dance in the house of

Brajen Bora. At that time, the accused took the victim from the house of Brajen Bora in a Motorcycle. Later on, he came to know that the accused committed rape on the victim. P.W.6 also deposed that one Paban Dutta has informed him regarding the occurrence.

In cross examination, P.W.6 has stated that he did not state before police that Paban Dutta has informed him that the accused committed rape on the victim.

15. P.W.7 Shri Fitik Bora has deposed in his evidence that he knows the accused person. He also knows both the informant and the victim. The occurrence took place on 14.04.2017, at about 9 P.M., at night. After the occurrence, he heard from the people that the accused committed rape on the victim. In connection with the occurrence, police seized one Hero Honda Motorcycle. Ext-2 is the seizure list and Ext-2(2) is his signature.

In cross examination, P.W.7 has stated that he did not state before police that he heard from the people that the accused committed rape on the victim. He does not know what was written in the seizure list and on being asked by police, he put his signature in the seizure lsit.

16. P.W.8 is the Medical Officer Dr. Mohan Saikia. His evidence reveals that on 16.04.2017, he was working at Swahid Kushal Konwar Civil Hospital, Golaghat as Specialist Gynecologist. On that day, he examined the victim girl, resident of No.2 Tamuly Gaon, under Borpathar Police Station, District – Golaghat, Assam in reference to Borpathar P.S. Case No.41/2017, vide GOPD Registration No.212 on being escorted and identified by WPC-506 Smti. Janmoni Buragohain after obtaining prior consent to ascertain the following -

Identification mark :- Small black mole over right side of the chest.

Height :- Could not be obtained.

Weight :- Could not be taken.

Teeth :- 12/12.

Breasts :- Not developed.

Axillary & pubic hairs :- Absent.

Per-abdominal examination :- No any abnormality detected.

External genitalia :- Developed. No injury mark present.

Introitus :- Does not accommodate two fingers.

Hymen :- Intact.

Internal genitalia :- No injury mark present.

X-Ray vide No. 61 shows age was below 16 years.

Vaginal smear for presence of spermatozoa was taken vide Laboratory No.89 and spermatozoa not seen.

After examination, the Doctor, P.W.8 has opined that the age of the girl was below 16 years and sign of recent sexual intercourse not seen and injury on her private part also not seen. Accordingly, he issued Ext-5 the medical examination report and Ext-5(1) is his signature. Ext-6 is the report of Pathologist and Ext-6(1) is the signature of Dr. Biraj Mahatoo, Pathologist. Ext-7 is the X-Ray report and Ext-7(1) is the signature of Dr. Ajit Baruah.

17. P.W.9 Shri Ashim Handique has deposed in his evidence that he knows accused, informant and the victim. About two years back, the informant lodged an ejahar against the accused. He heard from the people that one occurrence had happened between the accused and the victim. When police came, then he went to the place of occurrence. In the house of the informant, he put his signature in the seizure list. But he did not see what article was seized by police. Ext-4 is the seizure list and Ext-4(3) is his signature.

18. P.W.10 Shri Prajanan Kr. Brahma is the I.O. of this case. His evidence reveals that on 15.04.2017, he was working at Borpathar Police Station as an Attached Officer. On that day, the informant Shri Baba Bora @ Mohan has lodged an ejahar before the O/C of Borpathar Police Station. On receiving the ejahar, he being the In-charge of Borpathar Police Station on that day, registered the case vide Borpathar P.S. case No.41/2017, u/s 7 of POCSO Act and he himself took up investigation of the case. During investigation, he examined the informant, victim girl and one witness, namely – Champa Bora at the Police Station. On 16.04.2017, he has searched for the accused, but could not find him out. Thereafter, the victim was examined by Doctor. P.W.10 also deposed that during investigation, he visited the

house of the informant and seized one cofee-blue coloured half pant of the victim on being produced by the victim by preparing seizure list. Ext-4 is the seizure list and Ext-4(4) is his signature. During investigation, he has seized one Motorcycle by which the victim was lifted by the accused at the time of occurrence. Ext-2 is the seizure list and Ext-2(3) is his signature. Thereafter, he has given zimma of the said Motorcycle to the informant. Thereafter, he has visited the place of occurrence, recorded the statement of witnesses and prepared sketch map of the place of occurrence. The occurrence took place in three different places and therefore, he has prepared three numbers of sketch maps of the place of occurrence. Ext-8, Ext-9 and Ext-10 are the sketch maps and Ext-8(1), Ext-9(1) and Ext-10-(1) are his signatures. Thereafter, he has arrested the accused person and forwarded him to the Court. During investigation, the statement of the victim was recorded in the Court u/s 164 of Cr.P.C. P.W.10 further deposed that he has collected the medical examination report of the victim. Thereafter, on completion of investigation, he has submitted charge sheet against the accused u/s 4 of POCSO Act to stand trial in the Court. Ext-11 is the charge sheet and Ext-11(1) is his signature.

In cross examination, P.W.10 has stated that he has not mentioned in the sketch maps the direction from which side the accused came and lifted the victim girl and through which road they proceeded at the time of occurrence. In the sketch map, Ext-10 he has shown that the occurrence took place in front of the house of Brojen Bora on the road. He has not shown in Ext-10 the location of the house of the victim from the place of occurrence. P.W.10 has denied defence suggestion that he has not shown the direction where the occurrence took place. P.W.3 did not state before him that she reported the occurrence to the village people. He has also denied defence suggestion that the pant which he has seized was not used by the victim at the time of occurrence. He has further denied defence suggestion that he has not recorded the statement of witness Jogen Neog. He also denied defence suggestion that he has not investigated the case properly.

19. What is established from the above is that on the late evening of 14.04.2017, the accused at the instance of the father of the victim had picked her up from the site of the *Bihu* dance on a motor bike belonging to her father. It transpires from the evidence of the

victim P.W.2 that she reported the matter to her mother only in the evening of the next day of occurrence, whereafter the mother intimated the father (P.W.1) soon thereafter. This is at variance with the version of the P.W.3 (mother) who had deposed that the victim had reported the matter to her upon reaching home, i.e. soon after the incident on the same evening. It is to be noted here that the Ext-1 FIR reveals that the same was lodged on 15.04.2017, i.e. the day after the occurrence, at 9'15 P.M. It further transpires that in between the time of occurrence and the lodging of the FIR, the accused and the informant father had together gone on a trip to Merapani on 15.04.2017 and upon return therefrom, the accused was served tea at her house by the mother of the victim on the occasion of Bihu. It would be some what credulous to believe that the mother of the victim of a sexual assault would offer tea to the accused after the incident or that the father would go on a trip with the accused and after coming back and having tea together would go and lodge the FIR. This could only have happened if the victim had not reported the occurrence to any of them prior to these events taking place on 15.04.2017. But since it is the categorical stand of the P.W.3, mother of the victim that her daughter informed her of the occurrence immediately upon her return from the Bihu dance on 14.04.2017 evening itself, the Court cannot rely solely on the version of the victim, a 12 years old child deposing more than a year after the alleged occurrence, particularly when she had stated before the Magistrate in her statement u/s 164 of Cr.P.C. (Ext-3) recorded three days after the occurrence that she told her mother about the occurrence upon her return home, who in turn told her father. Considering the above circumstances along with the evidence of the principal witnesses regarding dispute between the informant, an employee of the accused and the accused regarding rates of wages, there arises reasonable doubt regarding the veracity of the prosecution case and the possibility of false implication cannot be ruled out.

20. Apart from the above, it is discerned from the cross examination of P.W.2 that the road between her house and the house of Brajen Bora is very bad. As the road was bad, therefore, on the day of occurrence, the accused told her to sit on

the motorcycle by crossing her legs on both sides of the seat. P.W.2 also stated that as

at that time, she was wearing mekhela-sadar, so, she could not lift her legs and

therefore, the accused seated her on the motorcycle by holding her legs and at that

time she got injury from the nail of the accused. Therefore, the version of the victim in

cross examination effectively transforms the nature of alleged act of the accused from

an intentional one to an accidental one. This also gives rise to the alternative possibility

that the FIR was the result of a misapprehension of facts by the informant side.

21. The medical evidence as discussed herein before also does not

bolster the prosecution case in this regard in any way.

22. As far the evidence of the P.W.4, P.W.5, P.W.6, P.W.7 and P.W.9, they

can safely be discarded as hearsay. P.W.10, the Investigating Officer deposed that he

seized one half pant of the victim from her house, but to what end only the I.O. knows

as the same was never subjected to any kind of forensic examination. Neither has it

been established in the evidence that it was the same garment that the victim was

wearing at the time of alleged occurrence.

23. In view of what has been discussed above, I hold that

the prosecution has failed to establish its case beyond reasonable

doubts. Accordingly, I hold accused Biswajit Phukan not guilty and he is

acquitted the charge of offence u/s 4 of POCSO Act and set him at

liberty forthwith. His bail bond stands discharged.

Given under my hand and seal of the Court on this the 26th day of

February, 2020.

(S. K. Sharma) Special Judge,

Golaghat.

Dictated & Corrected by me.

Special Judge, Golaghat.

APPENDIX:

WITNESSES FOR THE PROSECUTION:

- 1. P.W.1 Shri Baba Bora @ Mohan Bora.
- 2. P.W.2 The victim girl.
- 3. P.W.3 Smti. Champa Bora.
- 4. P.W.4 Shri Jogen Neog.
- 5. P.W.5 Shri Dhurba Bora.
- 6. P.W.6 Shri Mantu Gogoi.
- 7. P.W.7 Shri Fitik Bora.
- 8. P.W.8 Dr. Mohan Saikia, M.O.
- 9. P.W.9 Shri Ashim Handique.
- 10. P.W.10 Shri Prajanan Kr. Brahma, I.O.

WITNESSES FOR THE DEFENCE : Nil.

EXHIBITS FOR THE PROSECUTION:

- 1. Ext-1 Ejahar.
- 2. Ext-2 Seizure list.
- 3. Ext-3 Statement of the victim recorded u/s 164 of Cr.P.C.
- 4. Ext-4 Seizure list.
- 5. Ext-5 Medical examination report of the victim.
- 6. Ext-6 Report of Pathologist.
- 7. Ext-7 X-Ray report.
- 8. Ext-8 Sketch map of the place of occurrence.
- 9. Ext-9 Sketch map of the place of occurrence.
- 10. Ext-10 Sketch map of the place of occurrence.
- 11. Ext-11 Charge sheet.

EXHIBITS FOR THE DEFENCE: Nil.