CAUSE TITLE POCSO Case No. 66/15

Informant: 'Z'.

Accused: Sri Apple Kalandi,

S/o- Late Raju Kalandi, R/o- Khowang Tea Estate,

PS- Khowang, District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor. Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor.

For the Defence: B. Dubey, learned Advocate.

:: IN THE COURT OF THE SESSIONS JUDGE, AT DIBRUGARH ::

Present : Mrs. S.P. Khaund, Sessions Judge, Dibrugarh.

POCSO Case No. 66/15

U/Section 376(2)(f) IPC r/w Section 6 of the POCSO Act

State

-Versus-

Sri Apel Kalandi......Accused.

Date of evidence recorded : 12.7.16, 19.1.18, 19.6.18, 2.1.19.

Date of argument heard : 14.2.19.

Date of judgment : 12.3.19.

JUDGMENT

- 1. The factual matrix of this case in compendium is that, on 11.6.15, at about 5.00 p.m, the five (5) year old victim say-"X", tearfully informed the complainant "Z", that she was experiencing pain in her vagina. When the victim did not stop crying "Z"(hereinafter the informant) asked her as to why she was crying ceaselessly. Then the victim informed him that the Apel Kalandi (hereinafter the accused) committed misdeed in her vagina, thereby causing hurt. The victim informed her father "Z" that, during the day time, the accused took her to his house and committed misdeeds with her.
- 2. An ejahar regarding this incident was lodged by "Z" which was registered as Khowang P.S Case No. 23/15, under Section 376(2) (f) of the Indian Penal Code (IPC for short) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short) and S.I Uttam Adhikari was endorsed with the investigation.

- 3. The Investigating Officer (I.O in short) embarked upon the investigation. He recorded the statements of the witnesses and he prepared the sketch map of the place of occurrence (P.O in short). He seized a pair of woollen trousers, one frock and one red coloured half pant. He forwarded the victim for medical examination and also for recording her statement under Section 164 Code of Criminal Procedure (Cr.P.C for short).
- 4. On finding prima facie materials, the I.O submitted charge-sheet against the accused, under Section 376 (2) (f) IPC read with Section 4 of the POCSO Act. On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 6 r/w Section 5(m) of the POCSO Act and under Section 366 of the IPC was framed, read over and explained to the accused person. The accused abjured his guilt and claimed innocence.
- 5. To substantiate the stance, the prosecution adduced the evidence of eight (8) witnesses including the Medical Officer (M.O for short) and the I.O, while the defence cross-examined some of the witnesses to refute the charges.

Submissions:

6. The Learned P.P Smt. Runumi Devi and the Learned Additional P.P Smt. Shahnaz Akhtar laid stress in their arguments that this case is fortified and bolstered by presumption and the victim's evidence can be presumed to be the truth. On the contrary the learned defence counsel Sri B. Dubey emphasised through his argument that the statement of the victim under Section 164 Cr.P.C is signed as "Y" while testifying in the court, she signed as "X". It is submitted that the statement of the victim under Section 164 Cr.P.C is not similar to the FIR. According to the FIR, the P.W.2 was absent, while in his testimony, he deposed that, he was in the house. It is further contended that proper procedure was not followed because no women

constable were present during investigation. Moreover, the neighbours shown on the sketch map were not examined as witnesses. The accused has been implicated falsely by the informant who was eager to avenge old animosity.

Points for Determination:

- 7. On the backdrop of the rival contentions proponed at the bar, the following points are apposite for proper adjudication of this case:
 - i. Whether on 11.6.15, the accused committed aggravated penetrative sexual assault on the 5 year old victim?
 - ii. Whether at the same time and place, the accused abducted the victim by deceitful means, in order to force or seduce her to illicit intercourse?

Decision thereon and the Reasons for the Decision:

- 8. To decide this case in its proper perspective, it is necessary to delve into the evidence. To avoid prolixity, the case will be decided along with the analysis of the evidence.
- 9. The victim "X" was queried and she could give rational answers to the questions and oath was not administered as she was 5 years of age. The victim stated that, the accused is her neighbour. On the day of the incident, she was in the house and her father was sleeping, while her mother went to Bikas Dada's house. At that time, the accused came and removed her panty.
- 10. It is pertinent to mention at this juncture that, the victim is only 5 years of age. The victim could not recall the entire episode in detail because she was a young lass of 5 years and she failed to understand the nature of the act.
- 11. The victim's evidence is corroborated and supported by the evidence of "Z" who testified as P.W.2, that the accused person is known to him. His daughter was 5 years of age and the incident occurred about a year ago. On that day, he was

sleeping inside the house in the evening and his daughter "X" was in the house. When he awoke, his daughter "X" informed him that she was suffering from pain in her vagina. Then, he took her to the hospital at Khowang Tea Estate. After examination, the doctor advised him to take his daughter to the Khowang Hat Dispensary as this is a Police case. Then, he went to the Khowang P.S and informed the Police about the incident. The Police recorded his daughter X's statement. On the same day, he lodged the FIR. On the next day, the Police took his daughter "X" to the AMCH. He also accompanied his daughter. When he asked his daughter why she experienced pain in her private part, she informed him that the accused committed misdeed with her. She told him that the accused inserted her penis into her vagina. The Police also forwarded his daughter to the Magistrate who recorded her statement. He also accompanied his daughter. His wife Sangita Mirdha deserted him about 6 months before the incident.

- 12. It is pertinent to mention at this juncture that the learned defence counsel laid stress in his argument that the FIR was lodged by P.W.2 is contradictory to his statement.
- 13. I have carefully scrutinized the FIR. It is held that there is a minor contradiction between the FIR and the testimony of P.W.2. It is clear from the FIR that the accused took victim to his house. It has also mentioned in the FIR as well as in the testimony of the P.W.2 that the victim complained of pain in the evening. The incident occurred in the accused person's house while "Z" was in his house and he was sleeping when his daughter informed him in the evening about the pain in her vagina. It is apparent from the FIR that the victim was taken to the accused person's house where the offence was committed. The offence was committed without the knowledge of "Z". "X" is a minor who could not even properly explain when the accused assaulted her. This minor contradiction regarding the status of "Z" at the time of the incident is not important.

- 14. In the cross-examination, he (P.W.2) stated that at the time of the incident, the accused was not at the P.O, but he was on duty. He could not say whether his daughter had spoken truth. His daughter may have also sustained injuries while playing. He lodged the FIR as the villagers pressurized him to lodge the case.
- 15. After scrutinizing the evidence of P.W.1 and P.W.2, it is held that the defence failed to elicit any contradiction. The evidence of P.W.1 and P.W.2, that the accused committed sexual assault on the victim remains uncontradicted. It is clear from their evidence and from the evidence of the I.O that the testimonies of P.W.1 and P.W.2 remains uncontradicted. If the victim had lied, why the defence failed to cull out any contradiction of her statement under Section 161/164 Cr.P.C. The fact that the Apel removed her panty on the day of the incident and on earlier occasions remains uncontradicted. The testimony of P.W.2 in his cross-examination, regarding his lack of knowledge about the incident does not exonerate the accused. His answers depict shrewd cross-examination by the defence, but his answers does not depict any contradiction.
- 16. The learned defence counsel emphasised in his argument, that the evidence of P.W.1 and her cross-examination is contradictory because, in her cross-examination she testified that the accused did not do anything to her. It has already been mentioned in my foregoing discussions, that the overt act described by the victim in her testimony remains uncontradicted and uncontroverted. Her statement under Section 161 and 164 Cr.P.C remains uncontradicted.
- 17. **The Learned Magistrate, Smt. Priyanka Hazarika Nair testified as P.W.3 that,** on 12.6.15, she recorded the statement of the victim "X". Exhibit 1 is the statement of the victim and Exhibit 1(1) is her signature. The victim's thumb impression was taken by the Bench Assistant in her presence.

- 18. The evidence of P.W1 and P.W.2 is fortified by the evidence of Sri Achit Mirdha who testified as P.W.4, that the victim "X" is his granddaughter and the informant "Z" is his son, and the incident occurred about 2 /3 years ago. The victim was taken to the hospital. He denied of having any knowledge about the incident.
- 19. In view of my discussions, regarding the evidence of P.W.1 and P.W.2, it is held that the evidence of P.W.4 also supports the fact, that the incident occurred about 2/3 years ago. The lack of knowledge about the incident does not negate the evidence at all. The evidence of P.W.5 also depicts that an incident occurred about 1 ½ year ago, and the victim "X" took ill at the time of the incident. The victim "X" is his elder brother's daughter.
- 20. The evidence of P.W.1, P.W.2, P.W.4 and P.W.5 is also fortified by the evidence of P.W.6 Smt. Sandhiya Mirdha who testified that the incident occurred about a year ago. She heard that, the accused committed misdeeds the victim "X", and "Z" lodged this case against the accused. It is also apt to mention that P.W.6 is P.W.5's wife.
- 21. **The Medical Officer, Dr. Mohsina Ahmed testified as P.W.7 that,** on 12.6.15, while working as GDMO in the Department of Forensic Medicine at AMCH, she examined the victim "X", on Police requisition, in connection with this case and found the following:

On genital examination: Genital organs were healthy. Vulva is healthy.

Hymen is intact. Uterus not palpable clinically. Vaginal smears were taken from in and around vulva and vagina, result of which does not show any spermatozoa.

Radiological finding:

- i. X-ray of elbow joint (AP view)-Epiphyseal union are completed;
- ii. X-ray of wrist joint (AP view)-Epiphyseal union are completed;
- iii. X-ray of shoulder joint (AP view)-Epiphyseal union are not completed;

However, in his opinion:

- i. X-ray of the wrist joint shows four numbers of carpal bones;
- ii. Medical epicondyle of humerus has not yet appeared in the X-ray of elbow joint; (S/D- Department of Radiology, AMCH, Dibrugarh).

Opinion:

On the basis of Physical examination, Radiological examination & Laboratory

Investigation done on Smt. Sivani Mirdha, he is of the opinion that:

- i. There is no evidence of recent sexual intercourse on her person;
- ii. There is no evidence of recent injury on her person, both body and private parts;
- iii. Her age is above four years and below five years.

Exhibit 2 is the Medico Legal Report wherein Exhibit 2(1) to Exhibit 2(3) are his signatures.

- 22. After scrutinizing the evidence of the M.O and after evaluating the evidence of the other witnesses, it is held that, although no injuries were detected on the examination of the victim, yet the case history of the victim recorded by the M.O depicts that the accused took her to his house, while she was sleeping and also while her father was sleeping and then placed her on the floor of his own house and forcefully committed sexual intercourse. It is clear from the evidence of P.W.7 that the P.W.2 was sleeping when his daughter was sexually assaulted.
- 23. It is apt to mention at this juncture that P.W.2 also testified that, he was sleeping, and when he awoke, he found his daughter complaining of pain in her private parts. The evidence of P.W.2 and the evidence of P.W.7 similarly depicts that, P.W.2 was sleeping when the victim was taken away by the accused for his unholy self gratification.

- 24. The I.O's evidence is important because no contradiction could be culled out on cross-examination of the I.O. **The I.O is S.I Uttam Adhikari who testified as P.W.8 that,** on 11.6.15, he was posted at Khowang P.S as Attached Officer, and on that day "Z" lodged an FIR which was registered as Khowang P.S Case No. 23/15, under Section 376 (2) (f) IPC read with Section 4 of the PCSO Act, and he was endorsed with the investigation. Exhibit 3 is the FIR and Exhibit 3(1) is the signature of S.I Raju Gogoi, with which he is acquainted. He met the informant at the Police Station and recorded his statement and the statement of the victim. He seized the garments adorned by the victim, in presence of witnesses. Material Exhibit 1 is the yellow coloured woollen trouser and Material Exhibit 2 is one black and white chequered frock, which was seized in presence of witnesses. Exhibit 4 is the seizure list and Exhibit 4(1) is his signature.
- 25. The accused surrendered in the Police Station and he seized his garments. Material Exhibit 3 is one pair of red coloured shorts. Exhibit 5 is the seizure list and Exhibit 5(1) is his signature. He went to the P.O and recorded the statements of the witnesses and prepared the sketch map. Exhibit 6 is the sketch map and Exhibit 6 (1) is his signature. He arrested the accused and forwarded him to the judicial custody. He sent the victim for medical examination and also forwarded her to the Magistrate who recorded her statement under Section 164 Cr.P.C. He forwarded the seized articles for forensic examination. Meanwhile, he was transferred to Naoholia Outpost and he handed over the case diary to the In-charge of the Khowang P.S and subsequent thereto, the C/D was handed over to S.I Bikas Dutta who obtained the Forensic Report, 164 Cr.P.C statement and the Medical Legal Report, and on finding prima facie materials, charge sheet was laid against the accused. Exhibit 7 is the charge-sheet and Exhibit 7(1) is the signature of S.I Bikas Dutta, with which he is acquainted.

- 26. It has already been held in my foregoing discussions that, there is clinching evidence that the accused molested the victim. There is a minor contradiction in the FIR which can be safely brushed aside. The victim's father was not aware when the accused committed sexual harassment to the victim. According to the evidence of "X" and "Z", "Z" was sleeping when the accused came and took her to his own house. The P.O is indeed the accused person's house. Exhibit 6 is the sketch map and A is marked as the P.O on Exhibit 6. It is a tea garden line with residences of the tea garden labourers. The map does not denote with clarity whether 'A' is the accused person's house or "Z's" house. The other houses are marked by the I.O with the names of the occupants. The minor contradiction in the FIR is that, it was noted that at the time of the incident "Z" went out for work. The testimonies of "X" and "Z" clearly depicts that, "Z" was sleeping inside the house when the accused came and took "X" to his house and committed the offence.
- 27. It is held by the Hon'ble the Supreme Court of India, in State of Rajasthan Vs. Kalki and another, AIR 1981 SC 1390 that, "normal discrepancy in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time due to mental disposition such as shock and horror at the time of occurrence and these are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."
- 28. Reverting back to this case, it is held that the minor discrepancy in the FIR is a normal discrepancy which does not corrode the evidence. It is also to be borne in mind that the informant affixed his thumb impression and he was not aware exactly

- what was noted down by the scribe on the FIR. Another argument by the learned defence counsel is that, the victim has given her name as "X" while testifying in the Court and while giving her statement under Section 164 Cr.P.C, she has given her name as "Y". It is submitted that, "X" and "Y" are not the same person.
- 29. In this regard I would like to rely on **Kalki's case (Supra)** that, this is also a normal discrepancy. The victim has two names and error in noting down her name cannot be ruled out. The victim has given her thumb impression and she was not aware what was noted down as her name by the Magistrate or by the Sessions Judge. She has been clearly identified by her father "Z" as the victim of this case.
- 30. It is also held that, there is direct evidence by the victim, under Section 60 of the Indian Evidence Act, 1872(the Evidence Act for short) and her evidence is found to be reliable. The testimony and the statement of the victim is embalmed by presumption envisaged under Section 29 and 30 of the POCSO Act.
 - 29. Presumption as to certain offences:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5,7 and Section 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 the contrary is proved.
 - 30. Presumption of culpable mental state: (1) In any prosecution for any offence under this 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 as an offence in that prosecution.

(2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

- 31. Reverting back to this case, it is held that the accused had no business to take the victim to his house and remove her panty. The victim hesitated to describe the entire offence and this gives the benefit of doubt to the accused person. The accused failed to prove that he had no culpable mental state and it is thereby presumed that the accused committed offence of sexual harassment. The date and time given by the witnesses clearly depicts that the incident occurred on the evening of 11.6.15. The victim was too young to specifically mention the date and time of the incident. The doctor's evidence clearly depicts that the victim was around 5 years of age at the time of the incident. The doctor examined the victim on the following day of the incident i.e. on 12.6.15. The informant testified on 12.7.16, that the incident occurred about a year ago. The Magistrate testified that she recorded the statement of the victim on 12.6.15. Thus, it is amply clear that the incident occurred on 11.6.15.
- 32. Although, not charged under Section 12 of the POCSO Act, the accused is held guilty of offence under Section 12 of the POCSO Act, by virtue of Section 222(2) of the Cr.P.C. The accused is charged for having committed aggravated penetrative sexual assault on the victim, but as the accused gets the benefit of doubt regarding complicity of offence of act, under Section 6 of the POCSO Act, the liability of the accused is scaled down to Section 12 of the POCSO Act. The accused had

- committed an offence **under Section 11(i) of the POCSO Act**. He is held guilty of sexual harassment upon the 5 year old victim by his gesture of removing her panty.
- 33. In view of my foregoing discussions, it is also held that there is no evidence that the accused abducted the victim by deceitful means, in order to force or seduce her to illicit intercourse. The accused gets benefit of doubt in this regard.
- 34. I have heard the accused on the point of sentence. He has prayed for leniency. I have considered the act and I have interacted with the accused and there appears to be room for reformation. The accused was a matured man and he intentionally committed sexual harassment to the victim. A deterrent type punishment will deter the accused from behaving in this case any further and it will also send a message to the society at large.

Sentence:

- 35. The accused Apel Kalandi is convicted under Section 12 of the POCSO Act and is sentenced to undergo rigorous imprisonment (R.I in short) for 3 (three) years and pay a fine of Rs.1000/- (One Thousand) and in default of payment of fine to undergo rigorous imprisonment for 1 month. The period of detention during investigation and trial is set off with the custodial sentence.
- 36. Judgment is signed, sealed and delivered in the open Court on the 12th day of March, 2019.
- 37. The fine realised will be paid to the cost fund of the District Legal Services Authority, Dibrugarh.
- 38. The victim also deserves compensation, so this case is recommended for compensation under the under the Assam Victim Compensation Scheme, 2012.
- 39. Send a copy of this judgment and order to the Secretary D.L.S.A for assessment of compensation to the victim 'X'.

40. Furnish free copies of the judgment to the accused Sri Apel Kalandi.

Sessions Judge, Dibrugarh

ANNEXURE

PROSECUTION WITNESSES:

P.W.1: Victim "X".

P.W.2: Informant "Z".

P.W.3: Smti Priyanka Hazarika Nair.

P.W.4: Sri Achit Mirdha.

P.W.5: Sri Sanjib Mirdha.

P.W.6: Smt. Sandhia Mirdha.

P.W.7: Dr. Mohsina Ahmed.

P.W.8: SI Uttam Adhikari.

DEFENCE WITNESSES:

None

EXHIBITS (BY PROSECUTION SIDE):

Exhibit 1: Statement of the victim under Section 164 Cr.P.C.

Exhibit 1(1) is the signature of the victim.

Exhibit 2: Medico Legal Report.

Exhibit 3: Ejahar.

Exhibit 4 & 5 : Seizure list.

Exhibit 6 : Sketch map.

Exhibit 7: Charge-sheet.

EXHIBITS (BY DEFENCE SIDE):

NIL

Sessions Judge, Dibrugarh