IN THE COURT OF THE SPECIAL JUDGE SONITPUR :: TEZPUR

Special (POCSO) Case No. 19 of 2015.

GR Case No. 1533/15

(Section 6 of the Special POCSO Act, 2012)

State of Assam

- Versus -

Sri Jaydev Mandal

Present: Mr. P.J. Saikia, AJS,

Special Judge, Sonitpur, Tezpur.

Appearance:

For the State : Mr. H.P .Sedai,

Public Prosecutor.

For the accused : Sri P.Singh Sethi, Legal Aid

counsel.

Date of evidence : 13-11-2015,08-12-2015,

03-03-2016.

Date of argument : 28-04-2016.

Date of judgment : 28-04-2016.

J U D G M E N T

1. This is a case under the Protection of Child from Sexual Offices Act, 2012 (POCSO Act in short).

The Prosecution case.

- 2. It has been alleged by Mamoni Kurmi that on multiple occasions her neighbor Jaydev Mandal (the accused) used to sexually assault her 11 years old daughter. It is further alleged that on being threatened of dangerous consequences, the young girl did not disclose anything to her parents till 23-06-2015. On that day the victim girl informed her mother about the aforesaid facts.
- 3. During the period of investigation, the victim girl was examined by a magistrate u/s 164 Cr.P.C. (Ext.6). She has stated that on the day of occurrence at about 3 p.m. her father was sleeping inside the house. She has stated that the accused had summoned her to his house and gave her some fried Bengal grams. At that time, except the accused, there was nobody in his house. The victim has stated that after closing the door of the house, the accused had gagged her mouth with his hands and laid her on a bed. According to the victim, her pant was removed and the accused forcefully raped her. It may be mentioned that while giving the statement under section 164 Cr.P.C, the Magistrate used the word "forcefully raped". The victim girl further stated that the accused asked her not to disclose the matter to anyone and also threatened her that if she did so he will beat her. The accused gave her Rs. 10/- in cash. The victim has also disclosed that on that day her mother beat her as she wanted to know as to why she had gone to the house of the accused on that day. At

that point of time the victim disclosed the aforesaid facts before her mother.

4. The victim girl was also subjected to medical examination. The Doctor has reported that there was sign of injury on her private parts, nor there were any signs or symptoms of recent sexual intercourse.

Point for determination.

5. The only point for determination in this trial was as to whether the accused had committed penetrative sexual intercourse upon the victim girl.

Decision and Reasons thereof

eye witness to the occurrence. Therefore, I shall take up her evidence first, before taking up the evidence of remaining witnesses. In her examination-in-chief she has supported her statement which was recorded u/s 164 Cr.P.C. She has stated that on six occasions the accused had committed rape upon her and on each occasion he used to dish out the threat of dire consequence if she had disclosed the matter to anyone. The victim has stated that on the last such occasion, her younger sister had seen the occurrence as she had peeped through the window of the house of the accused. The victim girl has stated that it was her younger sister who actually informed her mother about the aforesaid facts.

- **7.** During cross-examination, the victim girl was confronted with the fact that she did not state before police that the accused actually called her to his house, closed the door and after removing her pant, inserted his penis into her vagina. She denied the aforesaid fact. The victim has admitted before the defence counsel that she did not state before the police that her younger sister had seen the incident by peeping through the window of the house of the accused.
- **8.** Now, I shall take up the evidence of the younger sister of the victim girl. Her name is withheld and is referred to as X. At the time of giving evidence she was about 8 years old.
- **9.** She has stated before the prosecution counsel that she had seen the accused closing the door after her elder sister had entered into his house. The young witness also stated that she had peeped through a gap in the door of the house of the accused and saw that the accused had removed the pant of her elder sister. She had also seen that the accused gagging the mouth of her elder sister. The witness stated that she was also advised by the accused not to disclose the matter to her mother. The younger witness has divulged that the person called Aman Dey had informed her mother about the aforesaid incident.
- **10.** X has stated before the defence counsel that the aforementioned Amon Dey resides in their house. The young witness was also confronted with the fact that she did not state before the police that she had seen the aforementioned incident through a hole in

the door of the house of the accused and she denied the aforementioned suggestion. She was also confronted with the fact that she did not state before police that after seeing the incident through the hole the door of the house of the accused, she had informed her mother and she denied the aforesaid fact also. She denied this suggestion.

- 11. Now, Ι shall take the evidence of the up informant/mother. She has stated in her evidence that on 23-06-15 she came to know about the incident from her victim daughter. She has quoted her daughter as saying to her that on the day the accused took her to his house and after closing the door he had removed her clothes and inserted his penis into her vagina. The mother has further quoted her daughter as telling to her that the accused had done that act on previous occasions also. The informant/mother has further stated before the prosecution counsel that her younger daughter had also witnessed the incident through a hole in the door of the house of the accused and informed to her about the said fact.
- **12.** During cross-examination, the informant/mother has stated that on 23-06-2015 itself, albeit, on being questioned by her, the accused had admitted the aforesaid fact. But she did not state the said fact before police and when this fact was confronted to her she denied the said suggestion. The informant/mother also did not state before police that her younger daughter X did not see the incident through a hole in the door of the house of the accused. When this fact was confronted to her she again denied the suggestion.

Monomati Kurmi. She is a hearsay witness. She came to know about the fact of this case after she was informed by the mother of the victim. She has also stated that the victim girl also told her that the accused had sexually assaulted her.

During cross-examination, this witness has disclosed that the victim girl did not inform her about the date and time when she was sexually assaulted for 4/5 days. She has stated that she had written the ejahar of this case as per instruction of the victim girl.

- 14. The prosecution side has examined two other witnesses namely, Kashiram Kurmi and Premdhan Biswas. This Kashiram Kurmi is the father of the victim girl. He has stated that his wife had informed her that on the pretext of giving fried Bengal grams and chocolate the accused had called his daughter to his house and thereafter sexually assaulted her. He has also quoted her daughter as saying to him that the accused had sexual intercourse with her.
- During cross-examination, the defence counsel had confronted him with the fact that he did not state before police that his wife had informed him about the occurrence stating that on the pretext of giving Bengal gram and chocolate the accused had sexually assaulted his daughter. The witness denied the aforesaid fact. The witness was also confronted with the fact that he did not state before police that his daughter had also informed him that the accused had sexually assaulted her. The witness denied the aforesaid facts also.

- **16.** Premdhan Biswas is a hearsay witness and there is nothing in his evidence to warrant any discussion.
- 17. The Doctor who performed the medical examination upon the victim was also examined and the doctor spoke about the medical report. Similarly, the Investigating Officer was also examined who spoke about the investigation.
- 18. After careful examination of the prosecution evidence, I have found that the entire case depends on the evidence of the victim girl. She did not state before police that the accused called her to his house, closed the door and after removing her pant inserted his penis into her vagina. She also did not state before police that the accused had dish out his threats of danger if she had disclosed the matter to her mother. She also did not state before police that her younger sister had seen the incident through the hole of the window of the house of the accused.
- 19. Similarly, the informant/mother also did not state before police that on the day of the aforesaid occurrence the accused had admitted his guilt before her. The informant/mother also did not state before police that her younger daughter X had seen the incident through a hole in the door of the house of the accused.
- **20.** The younger sister of the victim girl also did not state before police that she had peeped through the hole in the door of the house of the accused and saw the incident. She also did not state

before police that she had informed her mother after she had witnessed the incident of sexual assault upon her elder sister in the house of the accused.

- **21.** The father of the victim girl also did not state before police that his wife and his daughter had informed him about the said occurrence. All these omissions have been confirmed by the I.O.
- to improve the case of the prosecution by stating new things in this Court. By failing to state material facts before the I.O. and narrating those facts in the court for the first time amounts to serious contradictions. These witnesses stated different things before different forums. By failing to state before police that on the day of occurrence, the accused called her to his house, closed the door and after removing her pant inserted his penis into her vagina, the prosecutrix has made her evidence unreliable, because, the aforesaid fact is the basis of the entire prosecution case. She also did not state before police that the accused threatened her if she disclosed the matter to anyone else.
- 23. Similarly, her younger sister also did not state before police that she had seen the incident through a hole in the door of the house of the accused. She has stated this fact for the first time in this court. She also did not state before police that she had informed her mother about the said fact after witnessing it through the hole in the door of the house of the accused.

- **24.** It may be stated that the mother of the victim girl did not also state before the police that the accused had admitted his guilt before her.
- **25.** The explanation to Section 162 of Code of Criminal Procedure, says that 'An omission to state a fact or circumstance, in the statement may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in, which such omission occurs.'
- **26.** Whether any omission amounts to contradiction in the particular context shall be a question of fact. What is omitted to be stated is omission. A statement cannot include that, which is not stated. Omission amounting to contradiction can be used for the purpose of confrontation under Section 145 of the Evidence Act. Every omission is not contradiction.
- 27. Very often to make a statement sensible or self consistent it becomes necessary to imply words which are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. Sometimes a positive statement made has a negative aspect & negative one a positive aspect. If a witness states that a man is dark, it also means that he is not fair. Further, there are occasions when we come across two statements made by the same person at different times, and both of them cannot stand or co-exist.

- **28.** An omission amounting to contradiction can be proved either by bringing on record the whole of the statement confining its use to the actual absence of the statement in Court or the police officer may be asked to refer to the statement of the witness in the diary for refreshing his memory as asked whether such statement was made.
- **29.** Still today the only authority on this subject is **Tahsildar Singh Vs. State**,(AIR 1959, Supreme Court-1012),In this case it has been laid down that------

'relevant & material omissions amount to vital contradictions which can be established by cross- examination and confronting the witness with his previous statement. Take an example ' in a murder case, the witness tells investigating officer that only one accused had fired his gun while in Court he states that both the accused had fired their guns. This kind of omission is very significant and relevant and shall amount to contradiction because the ballistic report says that the dead man received bullets fired from two different guns. Section 162 of Code of Criminal Procedure, casts a restriction about the use of statement made by any witness to a police officer in the course of an investigation which mandates that, such statement cannot be used for any purpose but any part of his statement, if duly proved may be used to contradict such witness in the manner prescribed by Section 145 of the Indian Evidence Act.

30. Reverting to the case in hand, the omissions as has been highlighted by the defence counsel are serious contradictions and they have made the evidence of these witnesses unreliable because they

have stated different stories before different forums. I find myself foreclosed against all options to hold that that the evidence of the prosecutrix, her younger sister and her mother, who are the most material witnesses of this case, have failed to inspire confidence.

31. Now, I have no doubt that the prosecution has miserably failed to prove the offence against the accused Jaydev Mandal beyond all reasonable doubt.

OR DER

32. That being the position, the accused Jaydev Mandal is found not guilty and he is acquitted from this case.

Given under my hand and seal of this Court on this 28^{th} April, 2016.

(P.J.Saikia) Special Judge, Sonitpur, Tezpur.

Dictated and corrected by me.

(P.J. Saikia) Special Judge, Sonitpur, Tezpur.

Typed by me. (R. Hazarika)

Steno.

APPENDIX

Prosecution witnesses:

P.W.1 -	Dr. Jharna Kakoti, M.O.
P.W.2 -	Smti Monomati Kurmi
P.W. 3 -	Smti Mamoni Kurmi, informant
P.W. 4 -	victim
P.W. 5 -	Miss Karismita Kurmi
P.W. 6 -	Sri Kashiram Kurmi
P.W. 7 -	Sri Premdhan Biswas,
P.W. 8-	Sri Mahendra Deka, I.O.

Defence witnesses

NIL

Prosecution Exhibit

Ext.1	-	Medical report.
Fxt.2	_	advice slip

Ext.2 - advice slip Ext.3 - Vaginal smear report.

Ext.4 - USG report.

Ext.5 - FIR

Ext. 6 - Statement of the victim Ext. 7 - sketch map of the P.O.

Ext. 8 - Chargesheet.

<u>Defence Exhibits</u> -

NIL

(P.J. Saikia) Special Judge Sonitpur, Tezpur.