IN THE COURT OF SPECIAL JUDGE :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 29 of 2014 U/S 8 of POCSO Act (Arising out of Nazira P.S. Case No.219/2014)

State of Assam

-Vs-

Sri Ghana Khanikar Accused

APPEARANCE:

For the prosecution : Sri A. K. Bora, PP, Sivasagar. For the accused : Sri D.K. Gohain, Advocate

(State defence counsel)

Date of framing charge : 15.05.2015

Dates of evidence : 22.06.2016, 16.08.2016, 05.11.2016,

05.04.2017.

Date of S/D : 19.04.2017
Date of argument : 19.04.2017
Date of Judgment : 20.04.2017

<u>JUDGMENT</u>

1. Prosecution case, in brief, is that on 24.10.2014, one Sri Paban Khanikar lodged an FIR with O/C, Nazira P.S. alleging, inter alia, that on 18.10.2014, accused Sri Ghana Khanikar alias Naga has taken away the minor daughter of the informant, i.e. victim 'M' (name withheld), aged about seven years being the grand-father in relation and by taking her in a Mandir near Nazira Station, accused committed misdeed with her. Accused also gave bite injuries on her cheeks and face and caused scratch marks, but victim did not inform the matter immediately to them. After two days of this occurrence, one elderly lady finding this scratch marks on her face asked her about the incident and on this victim has disclosed the matter. As such, there was delay in filing

the FIR.

- 2. On receipt of the FIR, Nazira P.S. Case No. 219/2014, U/S 4 of POCSO Act, 2012 was registered and investigated into the case. During investigation, I.O. visited the place of occurrence, prepared sketch map of the place of occurrence and recorded the statement of the witnesses. During investigation, victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet U/S 4 of POCSO Act, 2012 against accused Ghana Khanikar.
- 3. After furnishing copy to the accused person, vide order dated 15.05.2015, my learned predecessor in office has framed the charge U/S 8 of POCSO Act, 2012 against accused Ghana Khanikar to which he pleaded not guilty. During trial, prosecution side has examined seven witnesses including the M.O. and I.O. Defence cross-examined the said P.Ws.
- 4. Upon completion of the prosecution evidence, accused is examined u/s 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he is called upon to enter into defence.
- 5. I have heard argument of learned P.P. Mr. A.K. Bora and Mr. D.K. Gohain, learned State defence counsel and gone through the evidence and documents. I have considered the submission of both the sides.

POINT FOR DETERMINATION:

6. (i) Whether on 18.10.2014 accused committed sexual assault on the victim?

DECISION AND REASONS THEREOF:

7. PW 1 the victim, in her evidence deposed that she was a student of Class-III and aged about 8 (eight) years. Accused is known to her who took her away to a nearby Namghar and bit on her cheeks and also put his hand on her breast. She requested to let off her but accused kept her for the night in the Namghar and on the next day accused took her back to his house. After

returning home, she informed the matter to nearby Dhandai. Her father also inquired her regarding scratch mark on her cheeks. She also gave her statement in court vide Exbt. 1. In her cross she stated that prior to this occurrence, she used to go with the accused. Police recorded her statement in the Police Station. She gave her statement in court as tutored by her father and police. She denied that before doctor she has not stated regarding biting on her cheeks. She admitted that her father has some strain/hostile relationship with the accused.

- 8. PW 2 Sri Paban Khanikar, the informant in his evidence deposed that accused is his family member and the victim 'M' is his step-daughter. On the day of incident, non-finding the victim in the house, on query, his wife told him that the victim 'M' was taken by the accused and on the next day accused brought her back to their house. The victim disclosed before the nearby people that accused bites on her cheeks. On his inquiry, the victim told him that accused has committed misdeed with her. On this, he lodged the FIR vide Exbt. 2. In his cross PW 2 deposed that the FIR was written on the dictation of some other persons. He cannot say about the contents of the FIR. He denied the defence suggestion that as the victim used to go with the accused, he has filed this false case.
- 9. PW 3 Dr. Sanjib Mahanta in his evidence deposed that on 25.10.2014, on police requisition he examined the victim 'M' in connection with Nazira P.S. Case No. 219/2014 and found that breast not developed, there is no mark of violence on her body, hymen present and on examination of the victim he is of the opinion that the age of the victim was below 16 years and there was no evidence of injury or sign of recent sexual intercourse. He proved his report as Exbt.3.
- 10. PW 4 Sri Dilip Gogoi in his evidence deposed that accused is the grand-father of the victim 'M' and at the time of incident victim was aged about 8 (eight) years. On the night of incident, the accused kept the victim with him in the Namghar. Accused was a Namghoria and on the next day

father of the victim told him that accused has committed misdeed with the victim 'M' at Namghar and the victim is ill. On going there, he saw scratch marks on the cheeks of the victim. Accordingly, on his advice, victim was taken to Ligiripukhuri Hospital, Nazira and on asking, victim told him that accused has committed misdeed with her twice. In his cross examination, PW 4 denied defence suggestion that the evidence given in examination-in-chief were not stated before police. He denied that to remove the accused from the post of Namghoria, they have concocted this false case.

- 11. PW 5 Sri Dipen Gogoi in his evidence deposed that he heard regarding committing misdeed on the victim by the accused. In his cross he admitted that he has seen some quarrel between the mother of the PW 4 Dilip Gogoi and the accused and on seeing this, he informed the matter to police and police took the accused to the Police Station. He did not inquire the matter from the victim.
- 12. PW 6 Sri Horen Gogoi in his evidence deposed that on the date of incident father of the victim informed him that the accused by taking the victim to Namghar, has committed misdeed with her. He has seen the scratch marks on her face. In his cross, he admitted that blood comes out from the injuries of the victim 'M'. The victim was examined by Doctor. He has also heard regarding quarrel between the mother of PW 4 Dilip Gogoi and the accused and on arrival of police, they have handed over the accused to police. He denied that to remove the accused from the post of Namghoria they have concocted this case.
- 13. PW 7 Sri Biren Dutta, the I.O. of this case in his evidence deposed that during investigation of Nazira PS case No. 219/14 he went to the place of occurrence i.e. Hari Mandir near Nazira and drawn a sketch map of the PO. Exbt. 4 is the said sketch map. Victim was sent for medical examination and also in Court for recording her statement u/s 164 Cr.P.C. He has also collected the medical examination report and statement of the victim given in Court. Accused was arrested and forwarded to court. On completion of investigation

he has submitted charge sheet against the accused u/s 8 of Pocso Act. Exbt. 5 is the charge sheet. In his cross by defence, PW 7 stated that incident occurred on 18.10.2014 and FIR was received on 24.10.2014. As the victim did not disclose the matter of harassment on the same day, there was delay in FIR. Victim was sent for medical examination only on 27.10.2014. He has not mentioned the cause of delay in sending the victim for medical examination. During investigation, he found that victim was the grand-daughter of the accused through his daughter. Witness Dilip Gogoi in his statement did not state before him that victim has told him that accused has committed misdeed twice and that he has seen injury marks on the neck and cheek of the victim. He denied that he has not investigated the case properly.

14. During argument hearing, learned Advocate for the accused Mr. D. K. Gohain by pointing out several discrepancies in the evidence and the cross examination part of the witnesses, has submitted that this is a false case and just to frame the accused, colour of sexual assault upon the victim was given. It was submitted that the FIR shows that after two days of the occurrence the victim 'X' has disclosed the incident to one neighbouring lady who was not examined by police or by prosecution during trial and after five days of the incident, the father of the victim lodged the FIR. The delay as explained is not at all satisfactory. It is also argued that from the evidence of P.W. 5 it appears that on the next day of the incident the informant has informed the matter to him and this part of evidence was corroborated by P.W. 4, as such the statement in the FIR which was given is nothing but an eyewash to cover the delay. Learned State defence counsel further argued that from the cross examination of P.W. 5 and P.W. 6 and as stated by accused in his 313 Cr.P.C. statement, the real fact is that on the date of occurrence there was a quarrel between the mother of P.W. 4 Dilip Gogoi and the accused and P.W. 5 has informed this matter to police and accordingly police came there and took the accused with them. Learned defence counsel has further pointed out that in her cross examination, the victim has admitted that she deposed her evidence on being tutored by her father. As such, the cumulative effect of the admission of the victim 'and the evidence of P.W. 5 and P.W. 6 and the statement of the accused given U/S 313 Cr.P.C. clearly indicates that it is nothing but a false and concocted case. Learned PP in his argument, however submitted that statement of the victim is found reliable and court should hold the accused guilty for the offence punishable under the provisions of POCSO Act. I have considered the submission of both the sides.

- 15. On going through the FIR, it appears that immediately after the occurrence, the accused has brought back the victim to the house of the informant and she disclosed the matter after two days. FIR also discloses that on seeing the scratch marks on her cheeks, one elderly lady has pointed out the same to the victim and only on this, the victim has reported the commission of misdeed by the accused with her. But admittedly said lady was not examined as witness. The victim in her evidence in court has deposed that soon after returning to her house, she has informed the matter to the neighbouring Dhandai and her father has asked her about the scratch marks. There was nothing in the evidence that the neighbouring lady has pointed out the scratch marks. Though in her evidence, the victim and the other witnesses has said to have seen the scratch marks, but on going through the medical report of the victim it appears that the Doctor (PW 3) has not found any injury mark on the body of the victim. Thus, it creates a doubt on the existence of the scratch marks on the cheeks of the victim.
- 16. PW 2 in his evidence deposed that victim has reported about commission of misdeed by the accused, but the victim in her evidence has not stated that she informed the matter to her father. Evidence of PW 4 shows that on the very next day of the incident the informant has informed him about the incident by the accused and on this, he went to the house of the informant, seen the victim with ailment and advised for taking her to hospital and accordingly she was taken to hospital. But case record shows that the victim was taken to hospital only after filing of the FIR i.e. after five days of this incident. The father of the victim and the victim herself are silent on the point

of her ailment, taking treatment and the advice of PW 4 Sri Dilip Gogoi. PW 5 and PW 6 are hearsay witnesses. From the cross examination of the victim (PW 1), it appears that she gave her statement in court on being dictated by her father and police and that her father has strain relationship with the accused. PW 2 has admitted that the contents of the Exbt. 2 is written on being dictated by others. Cross of PW - 4 shows that he has exaggerated the vital part of his evidence, i.e. seeing injury mark on the body of the victim and that coming to know about commission of misdeed from the victim. All these aspects show that evidence of PW 1, PW 2 and PW 4 are not reliable and trustworthy.

- 17. If we look at the cross examination of PW 5 and PW 6, it appears a different story. According to them there was a quarrel between the mother of PW 4 Sri Dilip Gogoi and the accused and on this police came there and took the accused. The accused in his 313 Cr.P.C. statement also stated that he has restrained the mother of Sri Dilip Gogoi (PW 4) to utilize the victim as labour and to resist her to go to school and compelled her to keep the infant child in their house and on this, he was handed over to police. This part of the statement of the accused given u/s 313 Cr.P.C. gets corroboration from the cross examination of PW 5 and PW 6. It may be mentioned here that the victim is the granddaughter of the accused through his daughter and the informant is the step father.
- 18. From the combine reading of the materials on record, I am of the considered opinion that prosecution has totally failed to prove the ingredients of offence u/s 8 of POCSO Act, 2012 or any other minor offence against the accused beyond reasonable doubt. The prosecution story as projected does not inspire any confidence and the presumption u/s 29 of Pocso Act stands rebutted.
- 19. Considering all above, I am of the opinion that prosecution has totally failed to prove the ingredients of offence u/s 8 of POCSO Act against the accused beyond reasonable doubt. As such, accused Ghana Khanikar is acquitted from the charge u/s 8 of POCSO Act, 2012 on benefit of doubt and

set at liberty forthwith.

- 20. Issue release order to the Jail Supdt. of District Jail, Sivasagar accordingly.
- 21. As the accused was in Jail custody, no order is passed u/s 437 A Cr.P.C.
- 22. Learned State defence counsel is entitled for his professional fees as per rules.
- 23. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 24. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 20th day of April, 2017 at Sivasagar.

Special Judge <u>Sivasagar</u>

<u>APPENDIX</u>

- 1. Prosecution witnesses:
 - P.W.1 (Victim 'M')
 - P.W.2 Sri Paban Khanikar (informant) P.W.3 Dr. Sanjib Mahanta (M.O.) P.W.4 Sri Dilip Gogoi

 - P.W.5 Sri Dipen Gogoi P.W.6 Sri Horen Gogoi
 - P.W.7 Sri Biren Dutta (I.O.)
- 2. <u>Defence witnesses</u> -Nil.
- 3. <u>Court witnesses</u> -Nil.
- 4. Exhibits by prosecution -
 - Exbt.1 Statement of the victim given u/s 164 Cr.P.C.
 - Exbt.1 FIR
 - Exbt.3 Medical examination report.
 - Exbt.4 Sketch map.
 - Exbt.5 Charge-Sheet

Special Judge Sivasagar