IN THE COURT OF THE SPECIAL JUDGE, UDALGURI, ASSAM

SPI. (POCSO) Case No.25/2015 (U/S :7 of POCSO Act)

State
Versus
Kartik Barman
S/O Sri Manik Barman
Vill- Pachim Nalbari,
PS-Tangla, Dist-Udalguri.

PRESENT: Sri P.Saikia,A.J.S., Special Judge, Udalguri.

APPERANCE:

For the Prosecution: Sri M.Khaklary, Addl. P.P., Udalguri

AND

For the accused: Sri D. Saharia, Advocate.

Evidence recorded on: 22.12.15, 6.2.16, 29.3.16, 7.6.16,

29.11.16, 15.9.18.

Argument heard on: 17.11.2018. Judgment delivered on: 1.12.2018.

JUDGMENT

- 1. The prosecution case, in a narrow compass, is that on 12.10.15 the informant Smti. Malati Sarkar lodged an FIR with the Officer-In-Charge, Tangla PS stating amongst others that she has a minor daughter (real name is withheld, henceforth referred as the victim). Her neighbour named Kartik Barman being a married person and hailing from the same village molested her daughter on 10.10.15 which she came to know on 12.10.15.
- 2. On the basis of the written report and treating the same as the FIR the Officer In-charge, Tangla Police Station registered a case vide Tangla P.S. case

No.127/15 U/S 10 of the POCSO Act and entrusted the investigation of the case to SI Dipu Bora. During the course of investigation the I.O. visited the place of occurrence, arrested the accused, recorded the statement of available witnesses U/S 161 Cr.P.C. and sight plane of the place of occurrence. The victim was sent for medical examination and also got her statement recorded U/S 164 Cr.P.C. through Magistrate. On completion of investigation the I.O. laid the charge-sheet against the accused Kartik Barmman U/S 10 of POCSO Act to face trial.

- 3. On receipt of the charge sheet the cognizance of the offence was taken and issued court process to ensure the presence of the accused. On appearance, copies of the police documents supplied U/S 173 Cr.P.C. furnished to the accused.
- 4. Whereupon, on assessing the relevant papers including the case diary and having heard learned counsel of both sides my learned predecessor in office found a prima-facie case and sufficient ground for presuming that the accused had committed the offence U/S 7 of POCSO Act and, therefore, a formal charge thereunder was framed against the accused and the same on being read over and explained to him to which the accused pleaded not guilty and claimed trial.
- 5. To bring home the charge the prosecution has examined in all seven witnesses including the informant, victim, M.O and I.O. of the case and also relied on certain documents mark as exhibits.
- 6. On closure of the prosecution evidence the accused was examined U/S 313 Cr.P.C. He pleaded complete denial and claimed innocence. However, no evidence was led in support of the defence.
- 7. In the light of the above perspective, the point for determination in the present case is set up and framed as:-

Whether the accused on 10.10.15 at Pachim Nalbari under Tangla PS with sexual intent touches the vagina of 6 years minor by the sex organ of the accused as alleged U/S 7 of POCSO Act?

8. I have heard argument advanced by the learned counsel of both the sides and also carefully gone through the evidence on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 9. PW1 is Mrs. Purnima Rabha. She has deposed to the effect that the informant is known to her and the accused is her tenant. She also knows the victim. The occurrence took place about two months ago. When she went to her tenanted premises police asked her name and address.
- 10. In cross-examination she has stated that the house of the informant is intervened by another house to her house. She does not know the husband of the informant as she has never seen him.
- 11. PW is the victim, aged about 7 years. She is a child witness. In her deposition she has stated that on the day of occurrence in the noon accused Kartik Barman on the pretext of calling her to have her meal in his house committed rape on her. Accused Kartik Barman placed his penis on her vagina as a result she received acute pain. The accused did not allow her to shout. She did not narrate about the incident to her mother out of fear. On the next day when her mother asked her she narrated about the incident. Her statement was recorded before the Magistrate. Ext.2 is her statement. Ext.2(1), 2(2) and 2(3) are her signatures.
- 12. In cross-examination she has revealed that she did not state before the police that accused called her to have her meal in his house and the accused threatened her not to make shout. After the incident she came out from the house of the accused through the open door. On the day of occurrence she went to tuition in the morning. After taking her meal she came to catch fish.

After catching fish she came with the accused to her house. But Kartik Barman took her in his own house and after closing door committed rape on her. She stated before the Magistrate in her statement U/S 164 Cr.P.C. that on the day of occurrence in the morning at around 10.30 AM accused Kartik Barman came to their house and after catching hold of her lifted her to his house and thereafter committed rape on her. After the occurrence she was bathed by her mother. Though she received pain as a result of rape she did not tell before the doctor. There are many houses adjacent to the house of Kartik Barman. She has denied the suggestion that accused had not committed rape her on the day of occurrence.

13. PW3, Smti. Malati Sarkar is the informant as well as the mother of the victim who set the criminal law in motion by lodging the FIR vide Ext.1 where in Ext.1(1) is her signature. As per her version the victim girl was six years old at the time of occurrence which took place on 10.10.15 at around 1 PM. The day was Saturday. Her victim daughter and witness Joya Biswas narrated her about the incident. On the day of occurrence in the morning at around 8 AM she alongwith wife of accused Rakhi Barman, sister of the accused Kamini Biswas and Mira Barman went to catch fish. At around 1 PM accused kartik Barman returned his home in order to fetch a spade taking her victim daughter but the accused instead of taking her victim daughter to her house brought to his own house and provided meal to her. In the evening she returned home after catching fish. On that night her victim daughter was complaining of stomach pain. On the next day in the evening Joya Biswas called her to her house from the road to say something before her and asked her to inquire about the incident from her victim daughter. On being asked, her victim daughter told that on the day of occurrence accused called her from her house to his house and committed rape on her. Then she immediately examined the private part of her victim daughter and saw a reddish mark. The victim also complained that she was suffering pain. The victim also told before committing rape on her to give her Rs.5/- but on the next day the accused did not pay her. When she asked about the incident she told before her that the accused after serving meal to her victim daughter chased her away and at that time victim

5

was returning her home with her wearing frock in her hands. Thereafter, she lodged the FIR. She came to know about the incident on the next day as the matter was placed before the village meeting as such delay was caused in lodging the FIR. The accused also confessed before her about the incident and at that time Rakhi Barman, Joya Biswas etc. were present.

14. In cross-examination PW 3 has stated that she asked about the incident to her victim daughter on 11.10.15 and the FIR was lodged on 12.10.15. She has denied that she had not stated before the police that her victim daughter was restless and complaining of having pain on her stomach in the entire night and on the next date in the evening Joya Biswas asked her to get information of the incident from her victim daughter and on 12.10.15 she came to know about the incident and found of mark of reddish colour near her private part and her minor daughter told her that she was feeling pain and on being asked Joya told her that the accused after serving meal to her minor daughter chased her away and Joya also told her that she saw her victim daughter returning home by carrying her frock on her hands and that on being asked the accused confessed his guilt in presence of Rakhi Barman and Joya Biswas and delay in lodging the FIR was caused due to placing the matter before the village people. PW3 has further stated that her husband has been confined in jail for the last several years. The house of the accused and her house are intervened by another house. There are many houses adjacent to her house. She has also denied that she had not stated before the police that on the day of occurrence at about 8 AM she alongwith the wife of the accused Rakhi Barman, the sisters of the accused Kamini Biswas and Mira barman etc. went to catch fish and at about 12 PM the accused came to his house to fetch a spade and the accused without taking her victim daughter to her house rather brought her to his house. It is her further evidence that as per Bengali language anal is known as "Phutki" and the part through which urine passes is called "Suno". She has denied the defence suggestion that as her husband has been confined in jail and as such she took money on credit from the accused and when the accused asked to return the money she instead lodged this false case against the accused.

- 15. PW4 is Dr. Dupur Ch. Bhuyan. He has stated in his evidence that on 13.10.15 he was posted as Munsiff Cum JMFC, Udalguri. On that day he recorded the statement of the victim U/S 164 Cr.P.C. Before recording statement of the victim, who was a minor, and so he ascertained her maturity of understanding to give reasonable answers in order to record the statement. The victim made statement voluntarily before him and the same was read over to her and on acceptance the victim put hersignature. Ext.2 is the statement of the victim and Ext.2(1) is his signature.
- 16. PW5 is Smti. Joya Biswas. According to her evidence, the informant is her related aunt and the victim is the daughter of the informant. Her house is situated near to the house of the informant intervened by two other houses. On the day of occurrence in the noon she was cooking meal. At that time victim came to her house and narrated about the incident. Victim was around 5 to 6 years at the time of occurrence. The house of the accused is situated adjacent to her house. The victim told her that the accused served meal to her. The accused on the promise of giving Rs.5/- laid the victim on his bed and put off her pant. Then the accused put off his own pant and laid on her. Accused also told the victim not to divulge about the incident to any one. She then narrated about the incident to her sister Purnima and in turn Purnima asked the victim about the incident. The victim told before Purnima that incident was real. Before this incident one Monday at around 8.30 PM accused came to her house while she was alone with her younger sister as per parents went to Bengal. Accused asked her that he would give her Rs.10/- is she would allow him to have sexual intercourse. Then she drove him out of her house and before leaving the accused told her not to say about that to any one.
- 17. In cross-examination she has stated that the police recoded her statement. She had not stated before the police that accused had put off the pant of the victim and the accused after putting off his own pant laid on her. After visit of the police at her house in connection with the incident she narrated about the incident to sister Purnima. She has stated that she did not lodge any FIR when the accused proposed for sexual intercourse. She has

denied the suggestion that she has deposed falsely before the court for the sake of the informant.

18. PW6, Dr. Phaltanga Kungur Brahma examined the victim on 13.10.15. The doctor has stated that on 13.10.15, he was serving as Sr. M & H.O. at Udalguri Civil Hospital. On that day he examined the victim aged about 6 years, female, D/o- Raju Sarkar in connection with Tangla P.S. case No.127/15 u/S 10 of POCSO Act, on being escorted by C/128 Thaneswar Rava. On examination he found:-

Height- 99 cm, weight- 15 Kg, teeth- 20 numbers, axillary hair- nil, pubic hair- not present, breast- not developed, hymen- intact, marks of violence- nil, clothing- normal, marks of violence-nil. Urine for pregnancy does not arise.

As per his opinion on examination he found no physical or sexual violence on the victim. Ext.3 is the medical report and Ext.3(1) is his signature.

19. PW7, Dipu Bora is the Investigating Officer of the case. His testimony reveals that on 12.10.15 he was posted as attached officer at Tangla PS. On that day Inspector O/C, Tangla PS received a written FIR from the informant Malati Sarkar. On receipt of the same the then O/C, Tangla PS registered a case being Tangla PS case No.127/15 u/s 10 of POCSO Act and entrusted him to investigate into it. He has proved and marked the FIR as Ext.1 and Ext.1(2) is the signature of the then Inspector O/C, Dhirendra Kalita with his registration note. During the course of investigation he recorded the statement of the complainant and victim, visited the place of occurrence and recorded the statement of other witnesses. The sight plane of the place of occurrence was prepared vide Ext.4. Ext.4(1) is his signature. Victim was sent for medical examination and procured her medical examination report. He also got the statement of the victim recorded u/s 164 CrPC before the Magistrate. After completion of formal investigation of the case he laid the charge-sheet against the accused Kartik Barman u/s 10 of the POCSO Act. Ext.5 is the charge-sheet and Ext.5(1) is his signature.

20. In cross-examination he has stated that as per FIR the occurrence took place on 10.10.15.

He has confirmed that PW3, Malati Sarkar had not stated before him that victim was restless on account of her stomach pain. PW3 stated before him that on being asked Joya she told her that she had seen the accused giving rice to the victim in a dish and thereafter she was driven out. PW7 has confirmed that PW3 had not stated before him that the accused confessed his guilt and at the time of confession Rakhi Barman and Joya Biswas was also present.

He has further confirmed that PW5, Joya Biswas had not stated before him that the accused removed his pant and slept upon her.

On re-cross-examination PW7 has confirmed that PW3 had not stated before him that on being examined the vagina of the victim was found slightly reddish and that the lodging of the FIR was delayed because of her discussion with her husband and other villagers.

- 21. Before embarking on to analyse the evidence on record in its proper perspective it is evident that the victim who is admittedly a minor aged about 6 years was subjected to forceful rape. Taking into consideration of the accusation of the offence of rape against the minor PW2 if we appraise the evidence of the Medical Officer (PW6) it would manifest from his evidene that he examined the victim on 13.10.15 after two days of the incident and found no sign of physical or sexual violence on the victim. In the back drop of the medical evidence of PW6, the evidence of the victim (PW2) is of paramount importance as the whole case reels round her evidence as there was no eye witness to the occurrence.
- 22. In such a situation though the testimony of the victim or rape entitled to primary consideration, but at the same time, the broad principle is that prosecution has to prove its case beyond all reasonable doubt applied equally the case of rape and there can be no presumption that the victim or the prosecutrix would always state the entire story truthfully.

23. In the decision reported in **State of Himachal Pradesh Vs. Asharam, AIR 2006 SC 381**, the Hon'ble Apex Court highlighted the importance to be given to the testimony of the prosecutrix as under in para 5:-

"It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused whre her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be ground for throwing out an otherwise reliable prosecution case."

24. We should also not be unmindful of the observation made by the Apex Court in **Sadashiv Ramarao Hadeb Vs State of Maharastra (2006)10 SCC 92**, wherein it has been observed that –

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

25. It is also worthwhile to mention that victim is a minor of six years old at the time of occurrence. She is now seven years old as per her testimony. So she is obviously is a child witness and the victim of the case.

26. So far as the question of value of the evidence of the child witness, the only precaution which the court should be in mind while assessing the evidence of a child witness must be a reliable one and his or her demeanour must be like any other competent witness and there is no likelihood of being tutored.

27. In **Nivrutti Pandurang Kokote Vs State of maharastra (2008) 12 SCC 565 (567)**, the Supreme Court has observed that –

" It is an established principle that child witness are dangerous witness as they are pliable and liable to be influenced easily shaped and mounded though it is also an acceptance norms that if after careful scrutiny of their evidence the court comes to the conclusion that there is an implies of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

- 28. When we apply the above principles to the case on hand, we find prevaricating statement of the victim (PW2) herself in the implicating of the accused to the alleged offence of rape.
- 29. Though the victim (PW2) has stated in her examination in chief that the accused committed rape on her and received pain but she did not narrate about the incident to her mother out of fear. However, her evidence on this vital aspect has suffered from serious contradiction and discrepancy inasmuch as in cross-examination she has stated that she did not disclose about the incident to her mother till the next date until her mother asked her about the incident. Her statement as regards suffering from pain after commission of rape by the accused at his house cannot be attached with credibility inasmuch as had she sustained pain and injury on her private part after commission of rape by the accused who is a full grown man she would have definitely suffered rupture in her private part and could not have withstood recurring pain that would have ensued after rape on her. It defies logic as to why the victim (PW2) who was a child of six years went at the time of commission of rape would have concealed about the commission of rape by the accused and

her resultant pain thereafter till her mother asked her about the incident on the next day of the incident in the evening.

- 30. It has already been seen from the testimony of M.O. (PW6) that though the victim (PW2) was examined after two days of the incident he did not find marks of violence on the genital part of the victim.
- 31. No doubt, in a case of rape the injury of the victim in her genital part is not sine quanon whether rape has been committed as it is settled position of law that if the evidence of the prosecutrix in a case of rape is found to be wholly reliable, trustworthy and beyond reproach her evidence can be the sole basis of conviction.
- 32. Thus, as regards the medical evidence, it remained settled that in a case related with a crime of rape, the medical evidence being that of opinion plays only a supporting role; and it is not the requirement of law that the case of prosecution would be accepted only when supported by the medical evidence. It is also settled that the medical evidence by itself is not decisive as regards the question of rape because such a question should be decided by the court on the factual matrix of each case.
- 33. Nonetheless, in the facts and circumstances of the case, the mother of the victim (PW3) who is the first informant is of definite importance as her evidence may add corroboration to the prosecution case. Rather she is found to be interested witness. PW3 has stated that on the night her victim daughter was complaining of stomach pain after the previous day of the incident and on the next day in the evening PW5 Joya Biswas called her to her house from the road to say something before her and asked her to enquire about the incident from her victim daughter (PW2) and on being asked her victim daughter (PW2) told that on the day of occurrence accused called her from her house to his house and committed rape on her and immediately thereafter on being examined her private part she observed reddish mark are nothing but concocted statement only to improve the prosecution case inasmuch as her

12

statement on this point has been thoroughly contradicted by confirming through the I.O. (PW7) that she did not make such statement before him. Moreover, if PW3 had noticed reddish mark in the private part of her victim daughter (PW2) this would have also been noticed by the doctor (PW6) who examined the victim (PW2) on the very next day after lodgment of the FIR.

- 34. On scrutiny of the testimony of PW5 as regards the alleged offence her evidence is also not inspiring. She is also found to be not truthful witness and therefore her evidence does not lend credence to the prosecution case though PW5 has stated that on the day of occurrence in t he noon she was coking meal at that time victim (PW2) came to her house and told before her that the accused on the promise of giving Rs.5/- laid her on his bed and after disrobing her and putting off the own pant of the accused committed rape on her is highly improbable when the victim was admittedly 5 to 6 years old tender girl at the time of the commission of the offence. How was it possible for the victim (PW2) who underwent forceful sexual intercourse with the accused? immediately after the incident could in a normal manner narrate about the incident of commission of rape on her without any injury on her private part. Moreover, it is also beyond comprehension as to why PW5 refrained from disclosing about the incident after hearing from the victim (PW2) on the very day of the incident to the mother (PW3). Hence, overzealous testimony of PW5 is found to be full of embellishments and exaggerations only to give momentum to the prosecution case without any authenticity to implicate the accused.
- 35. The another glaring contradiction in the testimony of the victim (PW3) has naturally affected her evidence to accept her as truthful witness is that in her testimony she has divulged that the accused committed rape on her in his house while she was returning home after catching fish in stead of taking her to her own house. On the other hand, she has stated in her statement U/S 164 Cr.P.C. that on the day of occurrence when she was alone the accused came to their house and dragged her to his house and committed rape on her. This vital contradiction in the testimony of the victim (PW3) herself has rendered

her testimony shaky and brittle and therefore, her version cannot be annexed with undue importance without corroboration from t he independent evidence in the attending facts and circumstances of the case.

- 36. The another vital aspect which has cast a shadow on the prosecution case as regards delay in lodging of the FIR without reasonable explanation. In order to substantiate the delay in lodging the FIR the informant PW3 has stated that after coming to know about the incident from her daughter (PW2) she placed the matter before the village meeting is not at all plausible inasmuch as when her victim daughter who was a child of tender age at the time of occurrence what prompted her to place the matter before the village meeting in stead of lodging an FIR before police promptly. In this regard no iota of evidence has come out from the mouth of other witnesses as to the placing of the matter before the village meeting before lodging the FIR. It also appears from the evidence of the informant (PW3) that she had previous enmity between the accused and the informant. Enmity is a double edged weapon it may provide incentive to the occurrence and it may also provide reason for falsely implicating the accused.
- 37. In view of the inherent, improbable and inconsistence evidence adduced by the victim (PW2), informant (PW3) and other witnesses so far as regards involvement of the accused in commission of the rape of victim (PW2) not being supported by medical evidence besides having enmity with the accused the very genesis of the prosecution case has become extremely doubtful and therefore, the prosecution case has created a cloud of suspicion in the mind of this court as to its credibility.
- 38. Situated thus, on final analysis after cumulative consideration of the evidence on record in its totality, particularly the evidence of the victim (PW2) and her mother (PW3) whose evidences are apparently found artificial and unreliable and inconsistent with other evidence on record including the medical evidence which as per settled position of law, cannot be accepted and as a

result, the entire case has become impossible and unlikely to be happened. Hence, the accused is entitled to benefit of doubt.

- 39. In the result, I am constrained to hold that the accused Kartik Barman is not guilty U/S 7 of the POCSO Act. Therefore, he is acquitted thereunder on benefit of doubt and set him at liberty forthwith.
- Bail bond executed by the accused and the surety shall remain in force for another six months under the purview of Section 437(A) Cr.P.C.

Given under my hand and seal of this Court this 1^{st} day of December,2018.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Special Judge, Udalguri.

Sessions Judge, Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Purnima Rabhaii)PW2 Trishna Sarkariii)PW3 Malati Sarkar

iv)PW4 Dr. Napur Ch. Bhuyan v)PW5 Smti. Jaya Biswas

vi)PW6 Dr. Phaltanga Kungur Brahma

vii) PW7 Dipu Bora

B)Defence witness: Nil.

C)Exhibits:

i)Ext.1 FIR.

ii)Ext.2 Statement of the victim U/S 164 Cr.P.C.

iii)Ext.3 Medical report. iv) Ext.4 Sketch Map v)Ext.5 Charge sheet.

Dictated and corrected by me.

Special Judge, Udalguri