DISTRICT: SIVASAGAR.

IN THE COURT OF THE SESSIONS JUDGE, SIVASAGAR:

Ref. :- Spl. (P) Case No.26 of 2015

(Arising out of G.R. Case No.551/2015)

U/S 8 of POCSO Act.

Present :- Sri S. Khound. Special Judge, Sivasagar.

The State of Assam : Prosecution

-Vs-

Sri Thomas Mahali : Accused

Appearance :

For the prosecution/ : Sri A.K. Bora, P.P.,

State of Assam Sivasagar.

For the accused : Sri D. K. Gohain, Advocate,

(State defence counsel), Sivasagar.

Dates of depositions : 29.01.2016, 02.03.2016, 02.05.2016,

27.06.2016, 20.08.2016, 05.11.2016.

Date of argument : 05.12.2016

Date of Judgment : 22.12.2016

JUDGMENT

- The accused Sri Thomas Mahali, son of Late Naron Mahali, resident of Domardolong Tea Estate under Moranhat P.S. in the District of Sivasagar, here in this case has been put to face the trial to answer the charge under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (in short the 'POCSO Act').
- 2. The fact as disclosed in the First Information Report (in short FIR) was that on 02.08.2015, informant Sri Badal Mirdha, S/O Late Mostaram Mirdha of Moran Bijuli Nagar under Moranhat P.S. lodged an FIR before the O/C, Moranhat Police Station alleging, inter alia, that on 01.08.2015, at about 12 noon, accused Thomas Mahali, who is his neighbour entered into the house of the informant by taking the advantage of absence of other family members and took

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away his minor daughter Miss Rastani Mirdha, aged about five years to a nearby Tea Garden and thereafter attempted to commit rape on her. It was further mentioned in the FIR that occurrence was reported to them by one Gejuah Munda of their village who had witnessed the incident. Hence the informant prayed for taking necessary action against accused Thomas Mahali.

- 3. On receipt of the Ejahar, police registered Moranhat P. S. Case No.115/2015 U/S 8 of POCSO Act, and investigated into the case. Accordingly Investigating Officer visited the place of occurrence, prepared the Sketch map, and recorded the statements of the witnesses. During investigation I.O. arrested the accused person, sent the victim 'X' to the Civil Hospital for her medical examination, and on completion of investigation, submitted Charge-Sheet against the accused Thomas Mahali under Section 8 of POCSO Act, 2012.
- 4. The accused Thomas Mahali produced before this court for trial after furnishing copy to the accused person as the case is exclusively triable by the court of Special Judge.
- 5. On appearance of the accused person before this court, and after hearing both the sides formally framed the charge against the accused under Section 8 of POCSO Act, 2012. The particulars of the charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 6. To bring home the charge, prosecution side has examined as many as nine witnesses including the Medical Officer Dr. Nirmalya Choudhury as P.W.1 and victim Rastani Mirdha as P.W.2. Defence cross-examined the said P.Ws but adduced no evidence. Defence plea is of total denial. The statement of the accused recorded U/S-313 of the Cr. P.C. Defence plea is of total denial.
- 7. I have heard Mr. D. K. Gohain, learned State defence counsel and Mr. A. K. Bora, learned Public Prosecutor for the State.

THE POINT FOR DETERMINATION IS -

8. Whether on 01.08.2015, at about 12 noon, accused committed sexual assault on the victim Rastani Mirdha who is below 12 years, and thereby committed an offence punishable U/S 8 of the Protection of Children from Sexual Offences Act, 2012?

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DECISION AND REASONS THEREOF:

- 9. To arrive at a judicial decision, let the evidence on record be appreciated.
- 10. P.W.1 is the Medical Officer Doctor Dr. Nirmalya Choudhury who deposed that on 03.08.2015 he was working at Sivasagar Civil Hospital, Joysagar as Senior Medical & Health Officer. On that day, at about 11 a.m., on police requisition, he examined the victim girl Miss Rastani Mirdha in connection with Moranhat P. S. Case No.115/2015 U/S 8 of POCSO Act. The victim was accompanied by woman police constable 727 Jyotisikha Raidehingia and she was examined in presence of female attendant Rinju Das, ANM and on examination he found the followings:

Identification mark – One black spot over her abdomen.

General physical examination:

General behaviour – good. Mental state – normal. Cloths – changed.

Built and nutrition – average. Weight 16 Kg.

Height -39 Inch. Teeth 10/10.

Development of hair:

Axillary and pubic hair – not developed as she is a minor girl.

Breast not developed and no any injury mark is seen on her body.

Examination of genitalia -

Genitalia – normal. Forchette – normal. Clitoris – normal.

Labia, majora and minora – normal. Hymen – normal. Vagina – normal.

Injury - Nil. Discharge & stain – Nil.

<u>Laboratory examination:</u>

Vaginal smear was done on 03.08.15 - no spermatozoa seen.

Radiological examination:

- (i) Skiagram of left elbow joint reveals incomplete fusion of epiphysis.
- (ii) Skiagram of left wrisy joint reveals incomplete fusion of epiphysis.
- (iii) Pisiform bone epiphysis not seen.

Opinion: On examination of Miss Rastani Mirdha P.W.1 opined that - (I) her age is below 12 years, (ii) no sign of any injury and, (iii) no sign of recent sexual intercourse was detected on her body or private parts during the time of examination. Ext.1 is the medical report and Ext.1(1) is the signature of P.W.1. In cross examination P.W.1 deposed that radiological and pathological reports are not furnished along with the medical report Ext.1.

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- 11. P.W.2 is the victim Smti Rastani Mirdha who deposed that accused is known to her. On the day of occurrence when she was alone in her house at that time accused came there and kissed her by holding her hands, and he did nothing more than that. In cross examination P.W.2 deposed that she calls the accused as 'NANA'. P.W.2 further deposed that accused loves her, and out of love and affection accused gave her a kiss on the day of occurrence.
- 12. P.W.3 is the informant Sri Badal Mirdha who is the father of the victim deposed that accused is known to him and victim Rastani Mirdha is his daughter. Occurrence took place in the year 2015, and on the day of occurrence one Gejuah Munda came to his house and reported them that accused had taken away the victim to the nearby garden and kissed her. Thereafter P.W.3 lodged Ejahar which is Ext.2 where Ext.2(1) is his signatures. P.W.3 further deposed that victim was medically examined and her statement was also recorded in the court. In cross-examination P.W.3 deposed that he is a permanent resident of Khatkhati Khelbari Line and at present he is residing in the premises of the accused Thomas Mahali. He further deposed that accused has no son but he has one daughter and now she is a major girl. He denied defence suggestion that prior to the occurrence quarrel took place between the accused and the P.W.3 regarding boundary of the land. He further denied defence suggestion that false Ejahar was lodged against the accused as because accused wanted to oust the P.W.3 from the premises of the accused. P.W.3 further deposed that they had visiting terms with the accused prior to the occurrence. He denied defence suggestion that accused did not kiss the victim Rastani Mirdha. He further deposed that he only heard the incident but did not see the occurrence.
- 13. P.W.4 is Smti Himani Borgohain who deposed that she knows the accused as well as the victim Rastani Mirdha. About one year back (from the date of deposition), one day, i. e. on the day of occurrence the parents of the victim Rastani Mirdha came to the house of P.W.4 and reported her that when victim Rastani was alone in her house at that time accused came there and wanted to take her somewhere with a view to commit bad act with the victim. P.W.4 further deposed that on the following day of the occurrence she went to the house of the victim Rastani Mirdha. In cross-examination P.W.4 deposed that accused is her neighbour. P.W.4 further deposed that she did not see the occurrence but only heard the incident from Badal Mirdha.
- 14. P.W.5 is Sri Gejuah Munda who deposed that he knows the accused as well as the victim Rastani Mirdha. About ten months back (from the date of deposition) occurrence took place

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and on the day of occurrence when he went to bring his son who was swimming in a ditch of the Doomardolong Tea Estate, at that time he saw the accused lying on the body of the victim in the midst of the garden. Then he reported the occurrence to one Sohadeb Mahanti who was present near the place of occurrence at that time and thereafter he went away to do his duty. Later on he came to know that victim's father lodged Ejahar in the Police Station. Police came and interrogated him. In cross examination P.W.5 deposed that he did not state before police that when he went to bring his son from the garden who was swimming in a ditch, at that time he saw the accused lying on the body of the victim in the midst of the garden. He denied defence suggestion that he stated before police that on 01.08.2015, at about 12 noon he went to the house of Badal Mirdha from his house. P.W.5 further deposed that he did not inform Badal Mirdha and his wife regarding the occurrence. He deposed that accused is known to him prior to the occurrence. P.W.5 further denied defence suggestion that once he had assaulted the accused on being refused to return Rs.500/- which was borrowed from P.W.5 and for this reason he gave false evidence against the accused.

- P.W.6 is Sri Paban Mirdha who deposed that accused is known to him. He also knows the victim Rastani Mirdha who is his niece. Occurrence took place about one year back (from the date of deposition) and at the time of occurrence victim Rastani was six years old. P.W.6 further deposed that on the day of occurrence he was away from his house and on the following day of the occurrence he came to know that accused committed bad act with the victim Rastani Mirdha. In cross examination P.W.6 deposed that he is not aware of the occurrence and victim Rastani also did not disclose the occurrence before him.
- P.W.7 is Smti Kalpana Mirdha who is the mother of the victim deposed that accused is known to her and victim Rastani Mirdha is her daughter. Occurrence took place in the year 2015 and at the time of occurrence victim was six years old. P.W.7 deposed that on the day of occurrence her victim daughter Rastani was alone in her house. On that day, at about 1.00 p.m. when she returned home from the working place then her victim daughter Rastani Mirdha reported her by crying that accused kissed the victim and also touched her breast and when Gejuah Munda witnessed the occurrence then accused left the scene of occurrence. Thereafter occurrence was informed to the villagers.

In cross examination P.W.7 deposed that she did not see the occurrence. P.W.7 further deposed whether any quarrel took place between accused Thomas Mahali and Gejuah

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Munda or not that she does not know. She further deposed that usually her victim daughter Rastani calls the accused as 'Peha' who had also visited their house prior to the occurrence. It is further deposed by P.W.7 that sometimes accused brought sweets to the victim Rastani and also took the victim on his lap out of affection. P.W.7 denied defence suggestion that on the day of occurrence accused Thomas Mahali came to the house of P.W.7 after buying chocolate from the shop with a view to give the same to the victim Rastani and seeing the accused there in the house of the P.W.7 witness Gejuah Munda suspected that accused might have committed bad act upon the victim, and on suspicion accused was falsely implicated with the alleged occurrence. P.W.7 further denied defence suggestion that false Ejahar was lodged against the accused and she gave false evidence in this case.

- P.W.8 is Sri Monoranjan Rajkhowa who deposed that on 03.08.2015 he was working as Bench Asstt. in the court of the Judicial Magistrate First Class, Charaideo, Sonari Miss Arunima Sonowal, and on that day statement of the victim Rastani Mirdha was recorded U/S 164 Cr.P.C. in the court in connection with Moranhat P.S. Case No.115/15. P.W.8 further deposed that in her statement victim put her thumb impression in presence of him. Ext.3 is the statement where Ext.3(1) & Ext.3(2) are the R.T.I. of victim Rastani Mirdha taken by P.W.8. Ext.3(3) and Ext.3(4) are the signatures of P.W.8. Ext.3(5) is the signature of Miss Arunima Sonowal, JMFC, Charaideo, Sonaril which is known to P.W.8. In cross examination P.W.8 deposed that what was stated by victim Rastani Mirdha in her statement that he does not know. The statement of the victim was recorded in the chamber of Miss Arunima Sonowal, JMFC, Charaideo, Sonari. P.W.8 further deposed that he does not know whether the victim is a capable of speak or not.
- 19. P.W.9 is the Investigating Officer Sri Suchen Ch. Bora who deposed that on 02.08.2016 when he was on duty in Moranhat P.S. as S.I. of police, on that day he received an Ejahar from one Badal Mirdha and registered Moranhat P.S. Case No.115/2015 U/S 8 of POCSO Act, and P.W.9 himself took the charge of investigation. Ext.2 is the said Ejahar where Ext.2(2) is the signature of P.W.9 with note. During investigation, P.W.9 visited the place of occurrence, recorded the statement of the witnesses and also prepared the Sketch map. Ext.4 is the Sketch map where Ext.4 (1) is his signature. The victim was medically examined and her statement was recorded in the court. On completion of investigation P.W.9 submitted Charge-Sheet against the accused U/S 8 of POCSO Act. Ext.5 is the Charge-Sheet where Ext.5(1) is the signature of P.W.9.

In cross examination P.W.9 deposed that victim was interrogated in the Police Station. During investigation he visited the place of occurrence along with the staff on uniform.

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P.W.9 further deposed that in his certificate he has not furnished two enclosures which are mentioned in the medical certificate. P.W.9 further deposed that witness Gejuah Munda (P.W.5) did not state before him that when he went to bring his son from the garden who was swimming in a ditch at that time he saw the accused lying on the body of the victim Rastani Mirdha. It is further deposed by P.W.9 that witness Gejuah Munda did not state before him that after reporting the occurrence to Sohadeb Mahanti who was present near the place of occurrence at that time P.W.5 went away to do his duty. P.W.9 further deposed that he did not ask Sohadeb Mahanti regarding the occurrence. P.W.9 further denied defence suggestion that without having any material he submitted Charge-Sheet against the accused.

- 20. Above are the evidence led by prosecution in support of its case.
- 21. To prove the charge U/S 8 of POCSO Act against the accused, the prosecution is to prove that on the day of occurrence the accused committed sexual assault on the victim Smti Rinamoni Mech who is below 12 years of age. Sexual assault is defined in Section 7 of POCSO Act as follows -

"Whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

In the instant case it is seen from the evidence on record that victim Rastani Mirdha who herself deposed as P.W.2 nowhere stated regarding alleged sexual assault on her by the accused Thomas Mahali. P.W.2 victim Rastani Mirdha who is the king pin of this case in her deposed that on the day of occurrence accused came to the house of the P.W.2 and kissed her by holding her hands and apart from this no occurrence took place on that day. In cross examination P.W.2 clearly deposed that usually she calls the accused as 'NANA' who loves her and out of love and affection accused kissed her on the day of occurrence and except the same accused did nothing to her. The contents of the Ejahar is not at all supported by the victim (P.W.2) herself because on the day of occurrence accused did not touch her vagina, anus, chest or made her to touch anus, breast, penis of the accused or anybody else. Accused also did not do

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anything with sexual intent since the accused kissed the victim only out of love and affection to her and that act gives no impression that the accused had any sexual intent in his mind at the time of alleged occurrence. So from the evidence of victim Rastani Mirdha (P.W.2) it is crystal clear that on the day of occurrence accused did not attempt to make physical contact with the victim with sexual intent. Though P.W.5 Gejuah Munda witnessed the occurrence but evidence of P.W.5 is not supported by the evidence of P.W.2 victim Rastani Mirdha.

- Section 30 (I) of POCSO Act defines that the prosecution is to prove the presumption of culpable mental state of the accused while committing the alleged offence. Section 30 (2) of the said Act is very much clear that the fact is to be proved by the prosecution beyond reasonable doubt, and such fact of culpable mental state of the accused can not be established by mere preponderance of probability. 'Culpable mental state' includes motive, intention, knowledge of a fact. In the case in hand though P.W.5 Gejuah Munda alleged that he saw the accused lying on the body of the victim at the time of occurrence, but defence took the plea that said P.W.5 had personal enmity with the accused prior to the occurrence regarding monetary transaction. Apart from that victim herself deposed that at the time of occurrence accused out of affection gave her a kiss and he did nothing more than that. In view of that I am of the view that evidence of P.W.5 Gejuah Munda fails to inspire confidence and not worthy of evidence. Remaining P.Ws did not see the alleged occurrence. Medical Officer (P.W.1) found no injury on any part of the body of the victim.
- On careful scrutiny of entire evidence on record and keeping in mind the facts and circumstances of the case, I am of the view that prosecution has failed to prove its case U/S 8 of POCSO Act, 2012 against the accused beyond all reasonable doubts. Accordingly I hold the accused not guilty and he is acquitted of the charge of offence U/S 8 of POCSO Act, 2012 and set at liberty forthwith.
- 25. Judgment prepared, pronounced and delivered in the open court under my hand & Seal of this court on this the, 22nd day of December, 2016 at Sivasagar.

Dictated & corrected by me.

(S. Khound), Sessions Judge, <u>Sivasagar</u>:

(S. Khound), Sessions Judge, Sivasagar: