IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 25 of 2016

Under section 10 of POCSO Act.
(Arising out of G. R Case No. 2244 of 2016)

State of Assam

-Vs-

Sri Kumud Kumar Nirsing @ Satnami ...

Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : I. Ansari, Advocate

Date of Argument : 01-03-2019 &15-03-2019.

Date of Judgment : 18-03-2019.

JUDGMENT

- The genesis of the present case is sexual assault on a five years old girl (herein after called as "the victim"). It is alleged that on 15-07-2016 at around 6:30 p.m., accused Kumud Satnami had taken the informant's 5 years old daughter/victim to his house and attempted to commit her rape. Not finding the victim at home, when the informant searched for the victim, found her in the house of the accused in indecent condition.
- 2. On receipt of the FIR **(Ext.1)** on 15-07-2016 from the informant, the victim's mother, the Officer-in-charge of Missamari PS registered the case being Missamari P.S. Case No. 84/16 u/s 6/8 of POCSO

Act and entrusted SI Pradip Kr. Kakoti to investigate the case. During investigation, the Investigating Officer (PW 9) recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid chargesheet against the accused Sri Kumud Kumar Nirsing @ Satnami u/s 8 of POCSO Act.

- 3. On appearance of the accused person before this Court, after furnishing the copies of the documents u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge u/s 10 of POCSO Act against the accused Sri Kumud Kumar Nirsing @ Satnami and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- 4. To substantiate the case, prosecution examined as many as eleven numbers of witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him and taking the plea of enmity regarding land dispute stated that his father mortgaged 2 bighas of land to the victim's father who threatened him not to return the mortgaged money and taking advantage of a Shradha Ceremony, he was implicated falsely. He also stated that just prior to the incident he came from Bangalore. Defence examined one witness in support of his plea.
- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.
- 6. The point for decision in this case is that -
 - (1) "Whether the accused Sri Kumud Kumar Nirsing @ Satnami on 15-07-2016 at around 6 p.m. at village Bahbera under Missamari Police Station committed aggravated sexual assault on the victim Miss "X", a minor girl below the age of 12 years, and thereby committed an offence punishable under section 10 of POCSO Act?

Reasons, Decisions and reason for decision.

- **7.** Mr. M. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of sexual assault on a girl of 5 years old. He further submitted that the evidence of the child victim of sexual assault is enough to convict the accused person.
- **8.** Controverting the said argument, Mr. I. Ansari, the learned counsel appearing for the accused, submitted that no explicit reliance can be placed upon the evidence of the minor victim who is a tutored one.
- 9. In this case, the victim and her parents categorically stated that the victim was 5 years old at the time of incident and the medical report also reflects that the victim was below 12 years of age. Age of the victim is not disputed in this case. As such, I unhesitatingly hold that the victim is a child below the age of 12 years at the time of incident.
- **10.** Now, the question is whether the accused Kumud Kr. Nirsing @ Satnami committed any offence on the victim child. In this respect, let me travel through the evidence adduced by the prosecution side.
- 11. PW 3 is the victim. She deposed that on the day of incident in the evening after playing on the road with her friends Jayanti and Kirti, when her friends went home and she was also about to return home, accused Kumud who is her neighbour came there and took her to his house on his lap and laid her upon a bed and then 'opening' his pant and her panty, touched her private part through his private part. During that time, when she was called by her mother, the accused gagged her mouth, for which she could not respond. But noticing her chappal on the front side of the house of the accused, her mother entered into the house of the accused and saw the incident. Seeing her (PW 1), the accused fled away and then she reported the incident to her mother and her uncle Shiva. She proved her statement u/s 164 Cr.P.C. as Ext. 2.

During cross, she stated that on the day of incident, many persons attended the Shradha ceremony held at her grand mother's house

situated near her house. She stated that in the house of the accused, his aunt, brother and many other family members were present at the relevant time and when the accused took her to his house on his lap, she was crying but nobody came. She stated that before recording her statement by police and Magistrate, her mother asked her to tell what really happened and her father asked her what is to be stated before the Magistrate. She stated that she was accompanied by her parents and sister to the court for recording statement before Magistrate. She admitted that before the Magistrate and police she stated that she came to her parents crying. She denied the suggestion that as tutored by her parents, she stated that the accused touched her private part by his penis.

Close on the heels of the evidence of the victim, her mother 12. PW 1 deposed that on 15-07-2016 at about 6.30 p.m. after lighting up the lamp at home, when she searched for her 5 years old victim daughter who was playing in front of her house, she did not find her and then she informed the matter to the neighbours. At that time she noticed the chappal of her daughter infront of the house of the accused. So she called her daughter but she did not get any response; hence, she entered into the house of the accused and found the accused and her daughter upon the bed in a naked condition. She had seen the accused putting his penis in the private part of her daughter. She also noticed some jelly type white substance over her daughter's private part and on her panty. Then on raising alarm, accused immediately fled away from his house. Thereafter, many neighbours came there and on being enquired, her daughter told that while she was playing, accused took her to his house on his lap, laid her upon a bed and opening her panty and his pant, touched her private part by his penis and when she cried, the accused gagged her mouth. She further stated that neighbours also noticed some white substance on her panty. On the very night at around 9 p.m. she lodged the FIR, Ext.1. She stated that the FIR was written by one Shyamanta Das as per her dictation and on being read over the contents of the FIR, she had put her signature on it.

During cross, she stated that the accused is the uncle's son of her husband. She denied that Pranab Sarmah and Paresh Satnami are her neighbours. She stated that since her marriage, she never heard any quarrel between the accused and the family members of her husband regarding boundary of land. She denied that there is land dispute between the parties and that they demanded Rs. 2 lacs from the accused if the accused did not vacate the occupied land and also threatened the accused to implicate him in a false case. She stated that on that day, there was a Shradha ceremony in the house of her mother-in-law who resided near her house and many invitees attended the Shradha till 7 P.M. She admitted that the statement of the victim was recorded by Magistrate after 3/ 4 days of the incident.

13. PW 2 the elder sister of the victim's father categorically stated that on the day of incident at about 6.30 p.m. the informant reported to her that the accused took the victim on his lap to his house and committed misdeed on her. Knowing about the incident, she asked her victim niece, who also narrated that the accused took her to his house on his lap, then made her lay down upon a bed, removed her pant, and touched her private part by his penis. At that time the accused gagged her mouth with his hand for which she could not raise alarm and could not respond while her mother was calling her. The informant also told her about noticing some white substance in the private part and panty of the victim girl.

During cross, she stated that the accused belongs to their family. She denied any dispute between the accused and the family members of the informant.

14. PW 4, Sri Jharkhand Satnami, the uncle's son of the accused, testified that on the day of incident, at around 6.30 p.m. the mother of the victim girl informed him that accused had taken the victim girl to his house on his lap, made her lay upon a bed and touched her private part with his sexual organ. The victim's mother also had shown him the panty of the victim where he noticed some semen like white substance. Thereafter he went to the house of the accused but did not find the accused as he fled away.

In cross, he stated that the house of the accused is on the other side of the road just infront of his house. This witness also stated that on that day the shradha ceremony of his mother was held in his house till 8/9 p.m. and the invitees present in the shradha ceremony after knowing about the incident, gathered at the place of occurrence.

- 15. PW 5, the niece of the informant, deposed that on 15-07-2016 immediately after the occurrence, the informant reported to her that at around 6.30 p.m. accused Kumud Satnami took her victim daughter on his lap to his room and thereafter when she (victim's mother) went to the room of the accused, saw the accused, committing bad act with the victim. She found the victim girl crying and then on being asked, the victim told her that when she was playing, accused took her on his lap to his house, made her lay upon the bed and touched her private part with his sexual organ. She further stated that the mother of the victim had shown her the panty of the victim where she saw some white substance. She also noticed white substance on the legs of the victim.
- **16.** PW 6 Dr. Amarjit Kour, the Sub-Divisional Medical Officer of KCH, Tezpur deposed that on 16-07-2016 she examined the victim and found no mark of injury on her body as well as in her private parts. There was no sign and symptoms of recent sexual intercourse and the age of the victim is below 12 years. She has proved the medical report as Ext.2(A), x-ray report with plates as Ext.3, vaginal smear report as Ext.4 and advice slip as Ext. 5.

During cross, she stated that victim did not state about the history of the incident.

17. PW 7, the cousin brother of the victim deposed that hearing hue and cry in the house of his maternal uncle, the victim's father, he rushed there where his aunty told him that accused took her daughter to his house on his lap and by gagging her mouth committed misdeed on her in his room upon a bed. Then on being asked, the victim also narrated that the accused touched her private part. Police seized the light blue colour panty of the victim vide seizure list Ext. 6. He proved the seized panty as Material Ext. 1.

During cross, he stated that immediately after the incident, at around 7 p.m. he along with his aunty and victim went to the police station and police seized the panty on the very day at about 7 p.m. but at that time the seized panty was not put on by the victim. He further stated that police arrived at his aunty's house immediately after filing the ejahar at about 7 p.m., and seized the panty of the victim from the house of informant. He denied the suggestion that police did not seize the panty from the house of the informant, rather they handed over the panty at the police station.

18. PW 8 Smti Renu Borah Handique, the Scientific Officer, Serology Division, Directorate of Forensic Science, Kahilipara, Assam deposed that on 30-07-2016 she had received one parcel through departmental Incharge in connection with Missmari PS case No 84/16 under Section 6/8 of POCSO Act sent by Dy Supdt. Of Police, Headquarter, Sonitpur, Tezpur, containing one light sky blue colour panty(small size) having stains of suspected semen which is Marked as "A", heavy growth of fungus and on examination detected presence of human spermatozoa in the panty.

She has proved the report as Ext. 7, forwarding letter of Director cum Chemical Examiner to the Govt of Assam, Directorate of Forensic Science, Kahilipara, Assam Guwahati-19, addressed to the Dy. Supdt of police (Headquarter) Sonitpur, Tezpur as Ext. 8.

In cross, she stated that in the report, she had not mentioned the details of procedure of examination.

PW 9 Sri Pradip Kr. Kakoti, the Investigating Officer, has deposed that on 15-07-2016 on receipt of an FIR from the informant at about 9 p.m., the O/C, Missamari PS registered the case and on being entrusted with the investigation of the case, he sent the victim first to Missamari PHC and then to KCH, Tezpur for medical examination. He in presence of witnesses vide seizure list, Ext. 6, seized the panty of the victim produced by the informant on the very day, reportedly worn by the victim at the relevant time. He also sent the seized panty to FSL, visited the place of occurrence, prepared the sketch map of the place of occurrence vide Ext. 9, recorded the

statement of witnesses, got recorded the statement of the victim u/s 164 Cr.P.C., arrested the accused and on his transfer, O/C of Missamari PS Nurul Hussain submitted the chargesheet against the accused Kumud Nirsing (Satnami) u/s 8 of POCSO Act vide Ext. 10.

During cross, he stated that informant produced the panty of the victim saying that at the time of incident, the victim wore the said panty but when it was produced, the victim was not wearing the panty. He seized the panty at the police station. He admitted that he had not sent any semen of the accused to FSL for examination. He further stated that the house of Pranab Sharma and Sri Paresh Satnami are near to the place of occurrence but they were not examined as witnesses as he did not find them. He further stated that though he sent the victim on 16-07-16 for recording statement u/s 164 Cr.P.C. but on that day her statement was not recorded. Hence, she was given in the custody of her mother and on 18-07-2016, her statement was recorded.

20. PW 10, J. Sarmah, the then learned Sub-Divisional Judicial Magistrate, Sonitpur, Tezpur, deposed that on 18-07-2016 she recorded the statement of the victim in presence of her mother as the victim was only 5 years old and after recording the statement of the victim, the same was read over to the victim where the victim put her signature . She proved her signature in the statement of the victim u/s 164 Cr.P.C. as Ext. 2(4) and relevant order dated 16-07-2016 and 18-07-2016 as Ext. 11 and 12 respectively.

During cross, she stated that she did not give any certificate that the victim made her statement voluntarily.

- **21.** PW 11, Nurul Hussain, another Investigating Officer, deposed that on transfer of earlier I.O., he collected the FSL report and filed chargesheet against the accused Kumud Kr. Narsing @ Kumud Kr. Satnami u/s 8 of POCSO Act vide Ext.10.
- **22.** Defence taking the plea of enmity regarding land, examined one witness.

DW1 Mohan Ch. Satnami, uncle of the accused, deposed that on 16-07-2016 about 100/200 people attended the Shradha ceremony of his sister-in-law (Bou) and he was also present there till 9 p.m. During that time no incident took place near the Shradha place and on the next day he heard that the accused was apprehended by police. According to him, a plot of land belonging to the father of the accused was mortgaged to the son of his brother (victim's father) and after the death of the accused's father, when the accused wanted to return the mortgage money to the mortgagee, the victim's father instead of taking the money demanded the land and forcefully possessed the land belonging to the accused. Regarding this, a dispute arose between the informant and the accused and thereafter victim's mother concocted this false case with intent to grab the land.

During cross, he stated that he did not know if any incident took place in the house of the informant. He did not ask the informant about the arrest of the accused and they also did not inform him about the incident as the incident was shameful. He further stated that inspite of knowing the fact of this case, he did not go to the house of the informant to know about the actual incident. He further stated that he exactly did not know whose Shradha ceremony, he attended.

the victim reveals that after playing with her, when her friends returned home and she was also about to return home, her neighbour accused Kumud coming there, took her, to his house on his lap, made her lay upon a bed and then the accused 'opening' his pant as well as her panty, touched her private part by his private part. At that time when her mother called her, the accused gagged her mouth for which she could not respond but seeing her chappal in front of the house of the accused, when her mother entered into his house, saw the incident and then the accused fled away. PW1, the victim's mother, the most natural witness also corroborating the victim's evidence, testified that at 6.30 p.m. when she did not find her daughter who was playing in front of her house, she searched for her and at that time noticing the chappal of her daughter in front of the house of the accused, she called

out for her daughter but not finding any response, she entered into his house and found the accused touching the private part of the victim daughter by his genital organ upon a bed but seeing her, the accused fled away and then the victim narrated the incident.

24. PW 2 - the paternal aunt of the victim, PW 5 - the victim's cousin sister and PW 4 - the cousin brother of the accused himself also stated that the informant reported to them that the accused took the victim to his house on his lap, made her lay upon a bed and touched her private part by his genital organ. Another witness PW 7 - the cousin brother of the victim in the same tune deposed that the informant told him that the accused taking the victim on his lap to his house, committed misdeed on her upon a bed. PW 2, PW 5 and PW 7 also categorically stated that hearing about the incident from the victim's mother, when they asked the victim, she also narrated that the accused touched her private part with his sexual organ.

In this case, medical evidence shows that the victim was examined on the very next day and it does not suggestive of any injury on the victim's body or on her private part or about any recent sexual intercourse. The evidence of the victim is that the accused laid her upon bed and opening her panty as well as his pant touched her private part by his penis. She does not allege penetration. Her evidence that the accused touched her private part by his penis clearly shows that the accused committed sexual assault on her.

Officer which was sent to FSL and presence of spermatozoa was detected in the panty. Regarding seizure, learned defence counsel Mr. Ansari pointed to the discrepancy that as per version of the seizure witness PW 7, the uncle of the victim, police seized the panty from the house of the informant whereas the Investigating Officer said that he seized the panty at the police station when the victim was not wearing the same. But the thing which remains unrebutted is that police seized the panty on being produced by the informant containing stains of suspected semen. The evidence of the victim's mother (PW1) is also that she had seen some white substance on the private part of the victim and on her panty. PW 4 and PW 5 also categorically stated that

they noticed some semen like white substance in the victim's panty. In this case, the FIR was lodged immediately after the occurrence at 9 p.m. of 15-07-2016 and the panty of the victim was also seized on the very night at 9.45 p.m. It was sent to FSL and human spermatozoa was detected in the same. Though the learned defence counsel argued that when the Investigating Officer did not sent any semen of the accused to FSL, it cannot be said that the semen sent to FSL belonged to the accused, but only for this reason, the story cannot be thrown away over board which is otherwise established. Finding semen in the seized panty of the victim confirm to the act of commission of sexual assault with the victim.

The learned counsel appearing for 26. the accused also vehemently argued that as per evidence of the PWs, when at the alleged time of incident, admittedly many persons attended the Shradha ceremony, it is not believable that such an incident occurred there but on minute perusal of the evidence on record, it reveals that the Shradha ceremony was going in her mother-in-law's house which is near to her house. Victim's evidence reveals that her grand-mother's house is situated near the place of occurrence. Their evidence indicates that the Shradha ceremony was held in a separate house. Accused is the uncle's son of victim's father. When such a relative took a girl of 5 years on his lap, even if someone noticed, he may not suspect. Another argument advanced by defence side is that as per evidence of the victim, at the relevant time, other family members of the accused were present at home and in such circumstances, it is not possible for the accused to commit such an offence but in the case in hand, the victim is too minor to suspect when he was with her within one room. Being an infant child of 5 years, she also might not have the knowledge what was going on with her. Holding of Shradha ceremony on the day of incident and existence of the accused at home were also admitted by the accused in statement u/s 313 Cr.P.C. The learned defence counsel further pointed towards the discrepancy in the evidence of PW 1 and the Investigating Officer (PW 9) regarding existence of residence of Pranab Sarmah and Paresh Satnami near the place of occurrence but it is well settled that difference in some minor detail, which does not otherwise affect the case of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on account of minor variation and discrepancies. Learned defence counsel also argued that as per evidence of the I.O. at first the victim was sent to Missamari PHC first which is not supported by any other witnesses but there is no evidence including the I.O. that she was examined at Missamari PHC and I found no force in the argument.

- 27. Further, claiming the victim as tutored witness, the learned counsel of defence pointed that as per evidence of the victim herself, she was tutored by her father before giving statement u/s 164 Cr.P.C (Ext.2). The learned defence counsel also argued that the victim was produced before the Magistrate on 16-07-2016 but on that day her statement was not recorded and she was sent with her parents and only on 18-07-2016 her statement was recorded and as such there is every possibility of being tutored. On careful perusal of the cross-examination of the victim, it appears that she stated that before giving statement u/s 161 Cr.P.C. as well as u/s 164 Cr.P.C., her mother told her to speak what really happened and her father told her what is to be stated before Magistrate. Her evidence shows that her mother told her to say what is actually happened and her father asked her what is to be stated. Her evidence does not clearly indicate that she is a tutored one. Moreover, before recording statement of the victim, to testify her when she was told that, she was supposed to be tutored by her mother, she clearly replied as "no" and in deposition she made the same version as made u/s 161 as well as u/s 164 Cr.P.C. Evidence of the victim is found spontaneous and trustworthy without inviting any suspicion of being tutored.
- While arguing that the evidence of child witness is required to be considered with care and caution and possibility of being tutored is required to be ruled out, defence side relied on the case reported in 2003 Crl.L.J. 1262, (2012) 3 SCC 795, 2016(3) GLT 671. In those cases the child were witnesses to the prosecution story, whereas in this case the child witness is none other than but the victim of sexual assault. However, it is not in doubt that a settled principle of law is that while appreciating testimony of a child witness, the court must adopt a careful and cautious approach to

ensure that the child is speaking the truth, voluntarily and is totally uninfluenced of any external factor. It needs to be assumed that the child is not tutored. But cases involving sexual molestation and assault, requires a different approach. The Hon'ble Apex Court in the case of State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745 laid down that "Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be life long. A special safeguard has been provided for children in the Constitution of India in Article 39."

Here, **Section 118 of the Evidence Act** is required to be looked into which reads as under :

"Who may testify. – All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

29. In Dattu Ramrao Sakhare Vs. State of Maharashtra (1997 (5) SCC 341), Hon'ble Supreme Court held that : (i) A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. (ii) Even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. (iii) The evidence of a child witness and credibility thereof would depend upon the

circumstances of each case. (iv) The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. (v) The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. (vi) This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. (vii) Though child witnesses are pliable and liable to be influenced easily, shaped and moulded, but if after careful scrutiny of their evidence, the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

30. In this context, the Apex Court in the case of <u>State of Himachal Pradesh v. Sanjay Kumar alias Sunny</u>, (2017) 2 SCC 51, held as under:

 thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal Pradesh, (2003) 8 SCC 551}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

After going through Section 118 of the Evidence Act and the Judgments quoted above, it can be concluded that testimony of a child witness can be accepted if such evidence is reliable and free from any influence. As discussed above, the child witness in this case is none other than the victim herself, she appears to be a witness of truth. I find nothing which leads the victim to be tutored to embellish the version on material point.

31. Mr. Ansari, the learned counsel of the accused also argued that oral evidence must be direct and as such hearsay evidence of the witness in this case cannot be taken into consideration. In this regard he placed reliance on the ruling reported in 2011 Cr.L.J. 1844 and (1998) 2 GLR 334.

In the case reported in **2011 Cr.L.J. 1844,** the informant nowhere stated that he disclosed about alleged robbery to any of the witnesses and therefore the evidence of other witnesses cannot be taken into consideration being not eye witnesses only the hearsay witnesses which was not confirmed by the person from whom they allegedly heard about the incident. **In the other case i.e. (1998) 2 GLR, a case of murder,** the Medical Officer was not examined who conducted autopsy of the dead body.

32. To understand "hearsay' evidence, it will be apposite to take note of the decision of the Hon'ble Supreme Court in the case of **Sukhar Vs.**State of U.P. and Balram Pd. Agarwal Vs. State of Bihar.

The Apex Court in Sukhar Vs. State of U.P., (1999) 9 SCC 507

held that Section 6 of Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the purview of said Section, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. Also "the statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus:

"Under the present exception (to hearsay) an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a carbrake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now, this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued."

33. In Balram Prasad Agrawal versus State of Bihar and others, (1997) 9 SCC 338, the Apex Court reiterated the principle laid down in the case of <u>1</u>. D. Jain v. Management of State Bank of India, AIR 1982 SC 673: (1982) 1 SCC 143 wherein a Bench of three learned Judges in paragraph 10 of the Report has made the following observations:

"The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. (See Stephen on Law of Evidence).

The Privy Council in the case of <u>Subramaniam v. Public Prosecutor</u>, (1956) 1 WLR 965 observed:

Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental, state and conduct thereafter of the witness or some other persons in whose presence these statements are made."

- In this case also, as per evidence of PW 2, PW 5 and PW 7 immediately after the incident, the victim's mother reported to them about the incident and then on being asked the victim herself narrated them about the incident and immediately after the occurrence at 6.30 p.m. victim's mother informed PW 4 about the incident. PW 2 and PW 5 also had seen some white substance in the panty of the victim. The victim's mother (PW 1) herself saw the incident when seeing the chappal of the victim, entered into the house of the accused. The evidence of the aforesaid witnesses therefore cannot be said to be hearsay.
- Further learned counsel of defence also submitted that the 35. version of PWs before the Investigating Officer and during trial varied on material particulars, hence their evidence cannot be relied upon and placed the ruling reported in (1995) 1 GLR 421 and (2010) 4 GLR 567. On reading of the aforesaid rulings, I find that the case reported in (1995) 1 GLR 421 relates to a situation when PWs made different version before the Investigating Officer and during trial as to who assaulted the deceased and two other injured amongst the three accused persons and held that when the testimony of the eye witnesses made improvement of grave magnitude from their statement u/s 161 Cr.P.C., it is impossible to rely upon such eye witnesses. But in this case, though there are some minor omissions but on a close and dispassionate scrutiny of the evidence of the victim shows that during cross defence could elicit nothing tangible to discredit her version on crucial aspect regarding taking her to the house of the accused on his lap and then opening her panty touching her private part by his genital organ. Probative value of her evidence remains unshaken throughout her cross.
- **36.** Though the learned counsel relying the ruling reported in **(2010) GLR 445,** argued that in the present case, all the witnesses being

interested witnesses, it is unsafe to rely those witnesses, but in my opinion only on ground of related witnesses, they cannot be discarded or rejected which is otherwise believable. Moreover, all the witnesses of this case are related to the informant as well as to the accused person being the accused is none other than uncle's son of the victim's father. It is a case of sexual assault and the victim appears to be a witness of truth and not a witness of imagination who had the capacity to narrate the things clearly.

- Taking the plea of enmity, the defence examined his uncle Mohan Chandra Satnami (DW 1) who deposed that a plot of land of the father of the accused was mortgaged to the father of the victim and when the accused wanted to return the mortgaged money, victim's father instead of taking money, demanded the land and was possessing the land of the accused and thereafter filed this concocted case but it is quite unbelievable that a mother for this reason would set up her minor daughter with a false allegation of sexual assault against an innocent who is their relative. A mother or father can not put reputation, prestige and dignity of her/his daughter at stake for such trivial ground by levelling false charges.
- 38. Further though DW 1 stated that on the day of Shradha ceremony of his sister-in-law (Bou) who is the mother-in-law of the informant was held in the house of informant and about 100/200 people attended the Shradha till night where he was present till 9 p.m. and till then no incident took place near the Shradha but during cross he stated that he did not know whose Shradha ceremony was held which he attended. He again stated that when police visited the house of the informant in connection with this case, he had not gone there inspite of knowing the fact of the case and the informant also did not inform him as the incident was shameful. His evidence clearly shows that some untoward incident had occurred. Moreover as per evidence of DW 1 the incident occurred on 16-07-2016 whereas the alleged incident is of 15-07-2016. The learned defence counsel also relying the ruling reported in **2015 (2) GLT 71** and **(2010) 3 SCC (Cri) 330** submitted that the defence witnesses are entitled to equal treatment with those of prosecution, but in this case the evidence of DW 1 casts a doubt about his presence at the Shradha

ceremony on 15-07-2016 near the place of occurrence and nothing can be derived from his evidence, rather his evidence points towards a shameful incident.

- 39. In the light of the aforesaid discussions on factual and legal aspects and in view of consistency found in the statement of the victim, her mother and other prosecution witnesses I find no scope to reach to any other hypothesis other than the guilt of the accused Kumud Kumar Sirsing @ Satnami. The evidence of the victim who is a little girl of 5 years of age inspires confidence of this court and I found no reason to disbelieve her. It has been proved beyond all reasonable doubt that on the unfortunate day i.e. on 15-07-2016 in the evening time accused taking the victim, aged about 5 years to his house on his lap, made her lay upon bed and opening his pant as well as her panty, touched her private part by his penis resulting emission of semen and human semen was detected in her panty. The prosecution succeeded in establishing that the accused Kumud Kumar Nirsing committed sexual assault on the victim who is below 12 years of age and it comes within the purview of definition of aggravated sexual assault u/s 9(m) of POCSO Act punishable u/s 10 of POCSO Act. Considering all, accused Kumud Kumar Nirsing @ Satnami is held guilty of the charge u/s 10 of the POCSO Act and convicted accordingly.
- 40. I have heard the accused Kumud Kumar Nirsing @ Satnami on the point of sentence. His statement is recorded where he stated that he is a daily wage earner and is to look after his parents out of his meagre income and prayed for leniency. On the other hand, the learned Public Prosecutor submitted that the crime being heinous, the accused should not be dealt with leniency.
- 41. I gave my anxious consideration on the aspect of quantum of sentence. Sentencing for any offence has a social goal, sentence is to be imposed in respect of the offence and the manner in which the offence has been committed. The purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him created a concavity in the social goals.

- **42. In Gopal Singh Vs. State of Uttarakhan 2013 (2) SCALE 533,** while dealing with the philosophy of just punishment which is the collective cry of the society, the Apex Court has stated that "just punishment would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors."
- **43.** From the above observation of the Apex Court, it reveals that while dealing with sentencing, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasized upon in the said cases. In the case in hand, sexual assault was committed on a 5 years old girl, helpless and vulnerable both physically and psychologically.
- 44. Though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reason that children are ignorant of sexual acts and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls.
- In the instant case, the 5 years old girl, was supposed to spend time in cheerfulness with her dignity. No sexual character is developed on the victim. She understands nothing what the accused was doing with her. The young girl, with afflux of time, would grow with memories of this painful experience. The convict abused her childhood and sexually assaulted her. He committed a serious offence against a minor and therefore, in my considered view he does not deserve a lenient consideration.
- **46.** Considering all aspects, I sentence the convict Kumud Kumar Nirsing @ Satnami to undergo Rigorous Imprisonment for 7 (seven) years and

also to pay a fine of Rs. 10,000/- (Rupees ten thousand), in default to undergo Rigorous Imprisonment for another 6 (six) months for the offence punishable u/s 10 of POCSO Act. The period of detention already undergone by the accused shall be set off against the terms of imprisonment as per provision of section 428 of Cr.P.C. His bail bond stands cancelled and surety be discharged.

47. Convict/accused Kumud Kumar Nirsing @ Satnami be sent to District Jail, Sonitpur, Tezpur to serve the sentence.

Case is recommended for compensation of the victim as per provision of Section 357 A of Cr.P.C. by District Legal Services Authority, Sonitpur, Tezpur.

- **48.** Let a free copy of the Judgment be furnished to the convict.
- **49.** Also send a copy of the Judgment to the District Magistrate, Sonitpur, Tezpur as per provision of section 365 Cr.P.C. and a copy to the District Legal Services Authority, Sonitpur, Tezpur
- **50.** Given under my Hand and Seal of this Court on this the **18th day of March, 2019.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno.

Prosecution witnesses.

1. PW 1 : Mother of the victim.

2. PW 2 : Elder sister of the victim's father.

3. PW 3 : Victim

4. PW 4 : Jharkhand Satnami
5. PW 5 : Niece of the informant.
6. PW 6 : Dr. A. Kour, M.O.

7. PW 7 : cousin brother of the victim

8. PW 8 : Smti R. Borah Handique, Scientific Officer.

9. PW 9 : Sri Pradip Kr. Kakoti, I.O.

10. PW 10 : Smti J. Sarmah, SDJM, Sonitpur, Tezpur

11. PW 11 : Nurul Hussain, another I.O.

Defence witnesses.

DW 1 : Uncle of the accused.

Exhibits.

Ext. 1 : FIR

Ext. 2 : 164 Cr.P.C. statement of the victim

Ext. 2(A),3,4 &5 : Medical, X-ray, vaginal smear reports and advice slips

respectively

Ext. 6 : Seizurelist

Ext. 7 : FSL report.

Ext. 8 : forwarding report of FSL

Ext. 9 : sketch map

Ext. 10 : Chargesheet.

Material Exhibit.

Material Ext. 1 : seized panty.

(I.Barman) Special Judge, SONITPUR: TEZPUR