IN THE COURT OF SPECIAL JUDGE, SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, Sivasagar.

Spl. (P) Case No. 21 of 2016, U/S 10 of POCSO Act 2012 (Arising out of Bihubor P.S. Case No. 19/2016)

State of Assam

-Vs-

Sri Rabin Majhi @ Bulu Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

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

Date of framing Charge : 18.02.2018

Dates of Evidence : 11.07.2017, 30.10.2017, 06.03.2018

02.06.2018, 28.06.2018

 Date of S/D
 : 14.06.2018

 Date of Argument
 : 01.10.2018

 Date of Judgment
 : 12.10.2018

J U D G M E N T

- 1. Prosecution case in brief is that on 02.06.2016, one Smt. Rita Munda Das lodged an FIR with O/C, Bihubor P.S. alleging, inter alia, that on 29.05.2016, at evening hours, while her daughter victim 'B' (name withheld), aged about 7 years was alone in her house, accused Sri Rabin Majhi @ Bulu came to her house and by gagging her mouth, forcibly took the victim to nearby jungle and there he opened her pant and committed misdeed with her. However victim rescued herself from the hands of the accused and made hue and cry. On this accused, flee away there from.
- 2. On receipt of the FIR, Bihubor P.S. Case No. 19/2016, u/s 8 of POCSO Act, 2012 was registered and started investigation. During Spl. (P) Case No. 21/2016 Page 1 of 10

investigation, I.O. visited the place of occurrence, prepared sketch map and recorded the statement of the witnesses. The victim was medically examined and recorded her statement in the court u/s 164 Cr.P.C. During investigation, accused was arrested and produced him before this court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet u/s 8 of POCSO Act, 2012 against the accused person.

- 3. On receipt of charge sheet, cognizance of offence u/s 8 of POCSO Act, 2012 was taken and after furnishing copy to the accused and after hearing both the sides, vide order dated 18.02.2017, charge u/s 10 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined five witnesses including M.O. and I.O. Defence cross-examined the said P.Ws.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. After hearing both the sides u/s 232 Cr.P.C, and observing that it was not a case of no-evidence, accused was called upon to enter into defence. Accused examined his mother Smt. Malati Majhi as DW 1.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D. K. Gohain, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

6. <u>POINTS FOR DETERMINATION ARE</u> -

- (i) What was the age of the victim 'B' on the date of incident?
- (ii) Whether on 29.05.2016, accused committed aggravated sexual assault on the victim 'B'?

DECISION AND REASONS THEREOF

7. PW-1 Smt. Rita Munda, the mother of the victim, in her evidence deposed that on 29.05.2016, her daughter was aged about 8 years and a student of Class IV. On the next day of incident, while she return from work, her daughter B told her that on the previous night at about 08.00 PM accused

came to their residence, gagged her mouth and forcibly took her to nearby jungle and opened her and grabbed her. Suddenly the accused fell down and her daughter flee away and made hue and cry. On this, accused fled therefrom. The mother of accused offered to give her new cloth as cloths of her daughter remained at the place. On this incident, on the next day of her return, she lodged the FIR at Bihubar PS. During investigation, police took her daughter to doctor and to Court and her daughter gave statement in court. Police on being led by victim, seized one pink colour panty of her daughter and one check shirt belongs to accused from the place of occurrence. In her cross examination, PW-1 deposed that she has six children. Victim is her 5th child. At the time of incident, her other sons were not present in the house. In between the house of accused and her house, 5 other persons have their houses. The other neighbours did not hear the incident as they went to bed early. FIR was filed on 02.06.2016 though alleged incident took place on 29.05.2016. PW-1 denied that no such incident took place as alleged by her. She also denied that the seized shirt do not belongs to accused. Before filling the FIR, she consulted advocate and it was written by said Advocate. PW-1 further denied that for having enmity with the family of accused, she filed this false case.

8. PW-2 the victim of this Case, in her evidence deposed that on the date of incident, at evening hours, while she was alone in her house and cooking food for her brothers, accused came to her house, gagged her mouth and took her to Jungle. There he opened her pant and grabbed her but he fell down on drain. She flee away therefrom. Accused chased her and near to her bathroom, accused again hold her. On her hue and cry, accused flee away. Her panty left at the place. She informed the matter to the mother of the accused who told her not to disclose the matter and assured her to give new cloth. She informed the matter to her brothers Ram Munda, Sunil Munda, Chandan Munda. On the next day, on return of her mother, she informed her mother about the incident. Her mother informed the matter to police. Police took her to hospital and also in Court. She gave statement in court. Exbt. 1 is her statement. Exbt. 1(i) and 1(ii) are her signatures. She gave similar statement as deposed today. Spl. (P) Case No. 21/2016 Page 3 of 10

Police on being shown by her, seized one pink colour panty of her and one check shirt belongs to accused from the place of occurrence. In her cross examination, PW-2 denied that she deposed falsely that accused gagged her mouth and took her to jungle, opened her pant, grabbed her. PW-2 also denied that she deposed on being tutored by her mother. She denied that they have given the seized articles from their house. She denied that at the time of alleged incident, her brothers were present in their house. She also denied that no such incident took place as alleged by her. In her further cross examination, PW-2 deposed that after 3-4 days of the incident, she was brought to Court for giving her statement in Court and on that day she gave statement in Court. PW-2 denied that in Exbt. 1 (statement u/s 164 Cr.P.C) she has not stated that "On the date of incident at evening hours, she was cooking food for her brothers; accused gagged her mouth; that accused fell down on drain, that accused chased her and near to her bathroom accused again hold her, that on her hue and cry, accused flee away; that her panty left at the place." PW-2 denied that she did not inform the matter to the mother of accused or to her brothers. PW-2 also denied that as she did not inform the matter to her brothers, Police did not interrogate her brothers.

- 9. PW-3 Dr. Nirmalya Choudhury, the medical officer, in his evidence deposed that on 06.06.2016, at about 5.00 p.m., on police requisition he examined the victim B in connection with Bihubor P.S. Case No. 19/2016 U/S 8 of POCSO Act. On examination, he found that her age is below 16 years and above 12 years according to radiological evidences, no sign of recent intercourse seen and no sign of any recent injury seen over the private parts or body of the victim. Ext. 2 is the medical examination report and Ext.2 (1) is his signature.
- 10. PW-4 Makibur Rahman in his evidence deposed that accused Robin Majhi @ Bunu is known to him being a neighbour. Victim and her mother are known to him. On 02.06.2016 at about 12 Noon, while he came out from his garden, on seeing O/C of Bihubar PS at the house of the victim, he went

there. Police, in his presence seize on panty from the victim and took his signature in one paper. Exbt. 3 is the seizure list and Exbt. 3(i) is his signature. From police, he came to know that one boy has committed rape with the victim. He has no personal knowledge about the incident of rape. He did not ask the victim about the incident.

11. PW-5 Inspector Utpal Bora, the I/O of this Case in his evidence deposed that on 02.06.2016, while he was posted as O/C at Bihubar PS, on that day he received one written FIR from Smt. Rita Munda and registered Bihubar PS case No. 19/16 u/s 8 of POCSO Act and took charge to investigate the case. Exbt. 4 is the FIR. On taking charge of investigation, he examined the informant and victim Bohagi Munda at PS campus. Thereafter, he went to the place of occurrence i.e. residence of informant at Santak T.E. and drawn a sketch map of the PO. Exbt. 5 is the said sketch map. He also examined witness found at the PO. During investigation, he seized panty of the victim B, one check shirt of accused. Both the articles were found on the back side of the house in a drain. Exbt. 3 is the seizure list. Exbt. 3(ii) is his signature. During investigation, he sent the victim for medical examination and also to Court for recoding statement of the victim u/s 164 Cr.P.C. On his transfer, he handed over the CD to his successor. From the CD, it appears that, his successor has submitted charge sheet against the accused u/s 8 of POCSO Act. Exbt. 6 is the charge sheet. In his cross examination, PW-5 deposed that in the FIR there was no mention of date and time of occurrence. FIR was received on 02.06.2016 and he started investigation on the same day. On the same day, he recorded statement of the victim at PS campus. Seizure of panty and one shirt were made on 02.06.2016. He has sent the victim to Court for her statement u/s 164 Cr.P.C on 03.06.2016. Medical examination report shows that victim was examined at Sivasagar Civil Hospital on 06.06.2016. CD shows that on 03.06.2016 victim was sent to Santak SHC with requisition and she was returned back with remarks that referred to Sivasagar Civil Hospital. Requisition to Sivasagar Civil Hospital was issued on 06.06.2016. He has not given any note showing explanation for sending the victim for medical examination with such Spl. (P) Case No. 21/2016 Page 5 of 10

delay. Witness Rita Munda while giving statement to him stated that 2 days prior to the incident, victim went to her relatives house and stayed there for few days. PW-5 denied that without causing investigation as per procedure.

- 12. DW-1 Smt. Malati Majhi in her evidence deposed that accused Robin Majhi @ Bunu is her son. Victim Bohagi Munda and her mother Rita Munda are known to her being resident in same campus and they share court yard. Her son Robin Majhi used to stay at the residence of Rita Munda. She never heard about any incident with vitim B by her son till filling of the case. She came to know about the incident only after filing of this case. Victim B and Rita never complained her regarding any misbehaviour on victim by accused. She never assured them for giving any new cloth. Present age of her son is about 18 years. She cannot say why Rita has filed this false case against her son. In her cross examination, by the prosecution, DW-1 deposed that prior to this they have maintained good relation with Rita Munda. Her son worked with Rita Majhi. After this case, the relation with Rita turned hostile. DW-1 denied the suggestion made by prosecution that soon after the incident, victim B informed her about the misdeed done by accused on victim and that her clothes were torn by the accused. DW-1 also denied that on knowing this, she assured the victim B for giving her new cloth in place of her torn cloths. DW-1 further denied that to save her son from this case, she deposed falsely.
- 13. CW-1 Sri Chandan Munda, the brother of the victim, in his evidence deposed that on the next date of incident, while he return from work, his mother Rita Munda told him that on the previous night at about 8 pm accused Rabin took victim to back side jungle of their house. He did not ask victim B about the incident. She also did not tell him anything about the incident of previous night. Rita Munda is his step mother and victim B is step sister. He has two other brothers. During investigation, police did not interrogate him. In his cross examination by the prosecution, CW-1 deposed that Sunil Munda works as Mason. He could not appear today as he was suffering from ailments. In his cross examination by the defence, CW-1

deposed that Sunil Munda and Ram Munda are his two other brothers. On the night of alleged incident, he was not at his residence and he was at Bihubar. At that time Ram Munda was at Kerala. He cannot say about Sunil Munda.

- 14. CW-2 Sri Sunil Munda, the brother of the victim in his evidence deposed that on the date of incident, while he return from work, at about 5.30 PM, his mother Rita Munda told him that on that day at about 3 pm accused Rabin Majhi took the victim B to back side jungle of their house and opened her pant. Though he asked the victim Babout the incident, bit out of shy, she did not tell him anything about the incident. He was not present in the house, when police came for investigation. In his cross examination by defence, CW-2 deposed that at the time of incident, he was not present in the house. CW-2 denied that his mother did not inform him about any incident with victim as no incident happened with her. CW-2 also denied that accused did not commit the alleged incident with victim B and they have falsely implicated the accused in this case.
- 15. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 16. Point No. I: So far age of the victim is concerned, PW 1, the mother of the victim has claimed that on the date of alleged incident the victim was aged about eight years and was a student of Class-IV. PW 2, the victim while adducing evidence on 11.07.2017 claimed her age as 12 years. PW 3, the M.O. Dr. N. Choudhury in his report Exbt. 2 has stated that on the date of examination the age of the victim was found above 12 years, but below 16 years. Admittedly, no age proof document was produced by the victim or her mother while adducing evidence in court. The I.O. in his evidence admitted that he has not collected any document regarding age of the victim. Under these circumstances, I have no option but to go with the medical opinion which appears to be more reliable. As such, basing on the above materials on record, I am of the opinion that on the date of alleged incident victim was above 12 years but below 16 years of age.

17. Point No. II: So far role of the accused is concerned, PW 2 the victim in her evidence deposed that on the date of incident, while she was cooking food for her brothers, accused came to her house, gagged her mouth and took her to jungle. There he opened her pant and while grabbing her accused fell down on drain. Therefrom she flee away. Accused chased her and near to her bathroom accused again hold her. She further deposed that after filing of the FIR she gave her statement in court vide Exbt. 1. In her further cross examination she denied to have make the above referred statement u/s 164 Cr.P.C. On looking at the 164 Cr.P.C. statement of the victim as proved by the prosecution as Exbt.1, it appears that on 03.06.2016 i.e. after 3-4 days of the incident, she was brought to court and deposed that after coming to her house, accused took her to the backside of their orchard and put her in a drain and committed misdeed with her. On asking by accused to sleep over him she refused and run away. Thus from both the statements, it appears that there is a vast difference except the part of taking her to the backside of their orchard. Apart from above, the victim in her evidence stated that immediately after the incident she informed the matter to the mother of the accused as well as to her brothers namely Ram Munda, Sunil Munda and Chandan Munda. On the next day she informed the matter to her mother who in turn filed the FIR. Out of said three brothers two of them namely Chandan Munda and Sunil Munda were examined as court witnesses vide CW 1 and CW 2 respectively. CW 1 Chandan Munda deposed that on the next day of the incident his mother informed him about the incident, but he did not ask the victim and victim also did not tell anything to him. CW 2 Sunil Munda also stated that his mother told him about the incident happened with the victim on that day. Though he asked the victim about the incident she did not disclose anything. Thus it appears that the statement of the victim did not get any support from her step brothers regarding their knowledge about the incident from the victim. There is another discrepancy as pointed out by the learned Advocate for the accused. Though the victim stated about presence of three bothers in her house, but CW 1 stated that he was at Bihubar and another brother was at Kerala. As per the evidence of the victim and PW 1, the incident took place on 29.05.2016, at about 8 PM; whereas CW 2 deposed that on the date of incident, while he return from work, at about 5.30 PM, his mother informed him that accused has committed misdeed with the victim by taking her backside jungle of their house at about 3 PM. The time gap as deposed by CW 2 and PW 1 makes a huge difference. Admittedly the incident happened on 29.05.2016 and the FIR was lodged on 02.06.2016 i.e. on 5th day of the incident. No explanation was given for the delay in filing the FIR. The cumulative effect of the above discussions makes the evidence of the victim unbelievable and untrustworthy. Admittedly, during examination the Medical Officer (PW 3) did not find any injury on the private parts or body of the victim. The I/O did not take any step to identify the seized shirt which was claimed to be of the accused. Finding of panty at the alleged place of occurrence cannot be taken as sole ground to proof of incident by accused.

- 18. Under the above circumstances, the argument of learned Special P.P. that Section 29 of POCSO Act 2012 should be applied cannot be accepted. As the prosecution has failed to prove the fundamental fact with some convincing evidence, I am of the opinion that it is not a fit case for applying the presumption u/s 29 of POCSO Act, 2012. Moreover, if the evidence of the victim as mentioned herein before, the court is taken at per then also at the best it may makes a case u/s 12 of POCSO Act 2012 and for the said offence Section 29 of POCSO Act 2012 is not applicable.
- 19. From the above discussions, it appears that there was no material whatsoever regarding aggravated sexual assault by the accused.
- 20. Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of offence u/s 10 of POCSO Act, 2012 or any other minor offence against the accused Sri Rabin Majhi @ Bulu. As such, accused Sri Rabin Majhi @ Bulu is acquitted from the charge u/s 10 of POCSO Act, 2012 and set at liberty forthwith.
- 21. As the accused is in Jail, no order is passed U/S 437-A Cr.P.C. Spl. (P) Case No. 21/2016 Page 9 of 10

- 22. Seized articles be destroyed in due course of time.
- 23. Considering the nature of the case, the matter is not referred to DLSA for granting compensation U/S 357 A Cr.P.C.
- 24. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 25. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 12th day of October, 2018 Sivasagar.

Special Judge, Sivasagar

APPENDIX

- 1. <u>Prosecution witnesses:</u>
 - PW 1 Smt. Rita Munda (Informant)
 - PW 2 Victim 'B'
 - PW 3 Dr. Nirmalya Choudhury (M.O.)
 - PW 4 Makibur Rahman
 - PW 5 Inspector Utpal Bora (I.O.)
- 2. <u>Defence witnesses:</u> DW-1 Smt. Malati Majhi
- 3. <u>Court witnesses</u>: None
- 4. Exhibits by prosecution -
 - Exbt.1 Statement of the victim given u/s 164 Cr.P.C.
 - Exbt.2 Medical report
 - Exbt.3 Seizure list
 - Exbt.4 FIR
 - Exbt.5 Sketch map
 - Exbt.6 Charge-Sheet

Special Judge, Sivasagar: