

IN THE COURT OF THE SPECIAL JUDGE, DHEMAJI.

Present: **Shri S. Das, A.J.S.,**
Special Judge,
Dhemaji,

JUDGMENT IN SPECIAL (POCSO) CASE NO. 3(DH) 2016.

U/s 448 of IPC read with Sec.4 of POCSO Act.

(G.R. Case No.237/2016 (DMJ); Dhemaji P.S. Case No.105/2016 Under Sections-
448/376 (2) (f) of IPC read with Sec. 9(a) (iv) of POCSO Act)

The State of Assam

- Versus -

Shri Milon Das,Accused Person
S/O Lt. Purna Kanta Das,
R/O Bhebeli Gaon,
P.S. Gogamukh,
Dist.- Dhemaji.

Appearance:

Shri A. Fogla,
Public ProsecutorFor the State
Shri K.C. Sonowal, AdvocateFor the Accused

Dates of prosecution evidence: 13-12-2016, 28-03-2017, 08-05-2017,

09-06-2017 and 17-08-2017,

Date of defence evidence : 17-08-2017,

Date of arguments : 22-07-2019.

Date of Judgment : 22-07-2019.

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JUDGMENT

1. The prosecution case in brief is that on 28-03-2016 complainant- Smt. Lilima Saikia, W/O Shri Bipin Saikia, R/O Rup Nagar, P.S. Dhemaji, District-Dhemaji, lodged an ejahar with Dhemaji Police Station alleging interalia that on that day i.e. on 28-03-2016 at about 5.30 PM. in the evening the accused-Milon Das came to her house on a motor-cycle along with another person. While she was talking with the other person at her courtyard, then the accused-Milon Das took her minor daughter-Smti 'X' (real name is withheld) aged about 5 years 2 months, into her house and put off her wearing pant laid her down on the bed and inserted his finger into her (victim) vagina and the victim became 'Akara' (dumb).
2. On receipt of the ejaha, Police registered a case vide Dhemaji P.S. Case No. 105/2016 Under Sections- 448/376 (2) (f) of I.P.C. read with sec 9(a) (iv) of the POCSO Act. On completion of investigation police submitted Charge-sheet against the accused-Shri Milan Das u/s 448/376 (2) (f) of I.P.C. read with Sec. 10 of POCSO Act.
3. On receipt of the case record and on appearance of the accused, this Court considered the materials on record and upon hearing both the sides, framed charges u/s 448 of I.P.C. read with Sec. 8 of POCSO Act and read-over and explained to him to which he pleaded not guilty. The prosecution, in order to prove its case, examined 8 witnesses. At the closurer of prosecution evidence, statement of the accused was recorded u/s 313 of Cr.P.C. Accused in his statement u/s 313 Cr.PC stated that Bipin Saikia had borrowed Rs.30,000/- from his wife and promised to return the same after receive of his salary. On 28-03-2016 at about 3 PM Bipin Saikia asked him over phone to come to his house to take back his money. Then he went to the house of one Gyan Ch. Narah. When they reached the house of Bipin Saikia, he was absent at his home. His wife asked them to sit and told them that she would call his husband. Then they sat in the courtyard and they were offered betel nut. Then Bipin Saikia's wife let them know that her husband was not receiving phone. Then they left Bipin Saikia's house and on the way he met Bipin Saikia at station road. When he asked Bipin Saikia to return his money, Bipin Saikia assaulted him with a bamboo lathi and

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also took away Rs.5000/- from his pocket. His wife lodged a complaint against the accused in the court which was registered as CR. No.58/2016. He stated that the accused has filed false case against him to avoid repayment of money and also filed this false case against him. Accused examined himself as DW1 and also adduced evidence of one other witness as D.W.

4. Points for determination :

(1) That, on 28-03-2016 at about 5.30 PM at Rup Nagar under Dhemaji Police Station, you committed house trespass by entering into the dwelling house of the complainant-Smt. Lilima Saikia to commit sexual assault on her minor daughter Smti 'X', and thereby you committed an offence punishable u/s 448 of I.P.C.

(2) That , on 28-03-2016 at about 5.30 PM at Rup Nagar under Dhemaji Police Station, inside the house of complainant-Smti Lilima Saikia, you committed penetrative sexual assault inserting your finger into the vagina of Smti- Drisirani Saikia and thereby you committed an offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012.

5. I have gone through the evidence on record and heard arguments of both sides.

Discussion of Evidence :

6. **PW1 Dr. Gunaram Doley** stated that on **31-03-2016** he was serving as Medical & Health Officer at Dhemaji Civil Hospital. On that day, he examined the victim Smt. 'X' vide Emergency OPD ML No. 364/2016 dated 28-03-2016 on being identified by WHG Hiramai Bordoloi. On examination, he found no any injury or sign of recent sexual intercourse. As per radiological report, the age of the victim girl is above 5 years and below 9 years.

Exhibit-1 is the medical examination report and Ext-1(1) is his signature. Ext-2 is the X-Ray report and Ext-2(1) is the signature of Bhupen Kuli which is known to him.

Defence declined to cross-examine PW1 (Doctor).

7. **PW2, the victim Smti 'X'** stated that the accused Milon Das is known to her. Accused made her sleep on the bed and he touched her vagina ('**SUSU**') with his penis. He also put his finger on my 'SUSU'. Then her mother shouted and

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she came to her mother. She did not tell her mother anything at that time but when he went, she told her mother. She was medically examined by Doctor and she told before another judge also and she had signed there. Exhibit-3 is the statement u/s 164 of CR.P.C. and Ext-3 (1-2) are her signatures therein.

In cross-examination PW1 stated that the school is nearby. She studies on her own and her mother help sometimes. Today (i.e. 13-12-2016) she came with her mother and father. I had come to Court earlier also but do not remember when. Her mother told her what to say. She denied the defence suggestion that accused-Milon Das did not go to their house and did not do anything to her. She admitted that she did not cry nor did she shout.

8. **PW3 Smti Lilima SAikia** stated that she is the mother of the victim Smti 'X'. Accused-Milon Das is an old friend of her husband. During Matric Examination accused-Milon Das had duty there. He is a police constable. Then her husband met him and asked him to come over to their house. Accused came to their house one day at about 3.30 PM with his wife. They had called her husband and told him about their coming. Her husband told her. at that time she was sieving the rice. When they came, she asked them to sit in the house and they stayed in our house that night. Next day at about 9 AM Milomn Das came for his duties and his wife left at about 10 AM. During the entire duty period, he used to bring drinks and also take his friends to their house. She did not like it. After his exams duties got over he did not come for about one month. Then after one month he came with a Missing person on a bike. She asked them to sit in the veranda. Victim was having fever that day and she was taking her in her lap. Then Milon Das asked her to come to him and she went to him. Then she went inside to get the 'tamul'. Then he (accused) took her daughter and she was outside with the other person. They did not come out for a long time and a doubt came to her. Then she shouted and the victim ran out hugged her. Her chest was against her cheek and it was beating very hard. Milon Das then came out and again called her (victim) but she refused to go to him. When she asked why she started shivering. She got suspicions. But Milon was insistant. Then she took her in her lap and sat down. Then Milon wanted water and asked for the victim. But she hugged her tightly and she got more suspicions. Then she went and got water and he had some.

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Milon came out. In order to confirm her suspicion, she asked her to wait as she wanted to wash her feet. Then Milon came from the back and again grabbed her but she shouted and ran to her. Then Milon again gave her 2 ten rupee notes and asked her to go with him to the shop but she refused. Her husband had not come back and they asked about him. But during the evening they left. Then she asked the victim and she told her that Milon had made her sleep on the bed and opened her pant and touched his penis to her vagina and had made her touch his penis and had also asked her to take out her tongue and had even inserted his finger in her anus. She called her husband and when her husband came she told him about the incident. Then she lodged complaint. Victim was examined medically. She also gave her 164 Statement.

Exhibit-4 is the FIR and Ext-4(1) is her signature. Ext-5 is the 164 Statement and Ext-5(1-2) are her signatures.

In cross-examination PW3 stated that she did not tell the police and the Magistrate about how the accused had come to their house during the Matric period and about his wife coming and staying in their house and he bringing friends and having drinks at our house. She denied the defence suggestion that she did not tell the Magistrate and the Police about the victim having fever and she taking her in her lap nor about his friend advising treatment nor about her having a fast heart beat. She denied that she did not tell the Magistrate and the Police that Milon Das wanted to have water and that he had again grabbed her from behind and she shouted. She denied that she did not tell the Magistrate and the Police that the accused had made her/victim touch his penis. She denied that she did not tell the Magistrate and the Police about calling fishing and then informing her husband and saying that they have to file the case. She denied the defence suggestion that her husband had taken Rs,30,000/- from Milon and when he went there to get back the money, they filed the false case and also beat him up and snatched Rs, 5000/- from him. It is denied that she has given false case and that they have tutored the victim to give false evidence. She denied the defence suggestion that nothing bad had happened to her. She did not raise any alarm even though there are other people nearby.

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9. **PW4 Shri Bipin Saikia** stated that she knows the accused Milon Das. Lilima SAikia is his wife. The incident took place about 7 months back. He was not at home at the time of incident. The accused (Milon) had misbehaved with his daughter Smt. 'X'. Accused had asked her daughter to take out her tongue and had also taken out his penis and touched it to her private parts. He got back home and was told about it by his wife. At that time his daughter was about 5 years old. He asked his daughter/victim and she also told him what his wife had told him. His wife had filed the case. When he went to file the case Milon Das was also there and when he said that he was the culprit he fled even though the police had tried to catch him. Her daughter was medically examined by Doctor.

In cross-examination PW4 stated that he was not at home when the incident took place. He denied the defence suggestion that he had not told the police that the accused had tried to flee from the police station. He denied that the accused had filed a case against him for taking his money and had also beaten him up. He had heard that a Missing person had also gone there but he does not know his name. He knew Milon from before. He denied the defence suggestion that his daughter did not tell him anything about the incident and they have filed a false case against him.

10. **PW5 Gyan CH. Narah** stated that he knows the accused Milon Das. He does not know any Lilima Saikia. IT was last year. There was a Congress Meeting at Gogamukh on that day. He had gone there and he was returning and had reached Karisuk and was having tea in the office of the Congress there. Then he went out and reached the market and there Milon Das called him and he wanted to go to someone house. But, said that he cannot go. But he insisted and so he went with him on his bike. They went to someone house. There, the lady was sitting in the courtyard and then he called her. There was a daughter also. The child was crying and when he enquired the lady told that she was suffering from fever. Then he told to wash her hands and feet with warm water. He also asked them to take to the doctor. Then the lady went inside to bring betel nut. Then they had the nut. Then he told Milon that they should go but he said let them wait for some time. Then he left him there and came out and was waiting in the courtyard. After sometime, he returned to their house and then Milon came out of

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the house and they left on the bike. Then they stopped and he got busy with the phone and left him.

Defence declined to cross-examine PW5.

11. **PW6 Dipjyoti Sutradhar** stated that he is a police constable. He knows the accused Milon Das. He also knows Lilima Saikia and the victim Smt. 'X'. The occurrence took place in the year 2016. At that time he was at home. Two guests had come to his house and he had gone to see them off. He overheard from some boys there that Milon Das had done bad thing to the girl. Then he heard that Lilima had come to the Police Station so he came and there also he got to hear about the incident. He did not ask Lilima anything.

In cross-examination PW6 denied the defence suggestion that he had not heard anything.

12. **PW7 Smt. Chenehi Sonowal** stated that she knows the accused-Milan Das. She also knows Lilima Saikia and her daughter-Dristirani Saikia. It was about 1 year ago. Milan Das has gone to Lilima's house as guest and at that time Dristirani was having a fever and he asked her to sit in his lap and also asked her to go with him to the shop. He also took her inside and made her lie on the bed and put her finger in her private parts. Then she told her mother about the incident and she called the neighbours and also called her husband who was not at home at that timer. Later Lilima filed a case in the police station. She had also asked Dristi and she told her about the incident. Police also seized two ten rupees notes that Milan had given Dristi and the same were handed over to the police by Lilima.

Exhibit-6 is the seizure list and Ext-6(1) is her signature. M.Ext-A are two ten rupees note that were seized by the police and shown to him in the Court.

In cross-examination PW7 stated that on the date of incident she was not there, she had gone to her mother's house. She got to know about it the next day. She denied the defence suggestion that she had lied today as they are her neighbours. She had good relationship with them.

13. **PW8 Nirmal Biswas** stated that on 28-03-2004 he was posted as 2nd Officer at Dhemaji Police Station. On that day at about 7 PM O/C, Dhemnaji Police Station SHri Lambit GOgoi received an ejahar from Smt. Lilima Saikia and he

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registered a case vide DHemaji P.S. Case No. 105/16 u/s 448/376 (2) (f) read with Sec- 9(a) (iv) of POCSO Act and entrusted him with the investigation of the case. During investigation he sent the complainant and the victim to Dhemaji Civil Hospital for medical examination. On 29-3-2016 in the morning at 9 AM he went to the P.O. The P.O is the house of the complainant situated at Rup Nagar. He prepared a sketch map. Ext-7 is the sketch map and Ext-7(1) is his signature. He seized two ten rupee notes vide Ext- 6, seizure list. Ext-6(2) is his signature. M Ext. 1 and 2 are seized two ten rupee notes. He questioned the witnesses including the complainant and recorded their statements. He went to the house of the accused but did not find him in his house. He sent the complainant and the victim girl to the court for recording their statements u/s 164 of Cr.P.C. He collected the medical report of the victim, On 2-5-2016 he arrested the accused and sent him to the court after medical examination. After completion of investigation he filed charge sheet against the accused u/s 448/376 (2) (f) IPC R/W Sec. 10 of POCSO Act. Ext-8 is the Charge-sheet and Ext.8(1) is his signature. Ext.9 is the sketch map and Ext.9(1) is his signature. Ext.10 is the charge-sheet and Ext.10(1) is his signature. Ext.4 is ejahar and Ext.4(2) is the signature of O/C Lambit GOgoi with note.

In cross-examination PW8 stated that witness- Lilima SAikia did not state before him that the victim was suffering from fever. Witness Lilima Saikia also did not state before him that accused wanted water, he grabbed the victim and she shouted.

14. **DW1 Smt. Rinku Das** stated that accused-Milan Das is her husband. He is a police constable. They have been living in a rented house at Ram Nagar for about 7 years. They have two sons and a daughter. Satyajit is their eldest son. She knows Bipin SAikia of Rup Nagar. About 2 years ago Bipin SAikia took money from her husband for the business of pig. He assured them to return the money within 6 months. At the time of giving money to the person, her eldest son was present. But Bipin Saikia did not return the money to them within the period of 6 months.

In cross-examination DW1 could not say when they lend money. Bipin Saikia called her husband to receive money on 28-3-2016. She denied that taking

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money by Bipin Saikia as loan is not true. She also denied that Bipin Saikia called her husband to return the money, did not commit 'mar-pit'. She also denied that they made this plan of giving money on loan to Bipin Saikia in connection with this case.

15. **DW2 Shri Khagen Dutta** stated that he knows complainant Bipin Saikia and accused Milan Das. He has a Tea stall at Dhemaji Chariali. Both of them used to come to his Tea stall for having tea, betel nut etc. He heard about discussion of money between them. He heard that Milan Das told Bipin Saikia to return the money.

In cross examination DW2 admitted that he does not know about monitory transaction between accused Milan Das and Bipin Saikia. Accused Milan Das never told him that he has to get money from Bipin Saikia.

Appreciation of Evidence :

16. From the discussion of the evidence on record it appears that PW3 the complainant as well as mother of the victim lodged complaint against the accused alleging that on the relevant date and time accused came to her house. At the time accused come to her house, PW3's daughter was having fever and accused asked her daughter to come to him and then he took her in his arms and came inside the room of a house and as stated by her daughter accused sexually abused her daughter. PW3 in her evidence also stated that when the accused was with her daughter inside the room she suspected that something bad was going on. She shouted and her daughter came out of the room and hugged her. She also stated that her daughter was shivering. She suspected some fault play. She also stated that accused again grabbed her daughter and her daughter shouted. On being asked her daughter told her that Milon made her sleep on her bed and removed her panty and touched her vagina with his penis. And he also made her touched his penis. In cross examination she denied defence suggestion that her husband had taken Rs.30,000/- from the accused and when he went to their house to get back the money, they gave him a beating and snatch Rs.5,000/- from him. She also denied that she has given false case against the accused. PW2 victim in her evidence stated that accused made her sleep in the bed and touched her chucu (vagina) with his penis. She also stated that he also put his finger in

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her vagina. She stated that she did not tell her mother about the incident when the accused left. In the cross examination PW2 stated that her mother told her what to say in the court. PW2 also gave statement u/s 164 Cr.PC and made similar statement. The victim was medically examined, but doctor did not find any sign of sexual assault or intercourse nor any marks of violence on the person of the victim. PW4 father of the victim made similar statement as PW3. PW5 in his evidence stated that on the relevant date he along with accused Milon Das went to the house of the complainant and there they had betel nut and accused Milon Das stayed in their house for some time and he left. And thereafter accused Milon Das came out and both of them left the place. PW6 stated that he heard that accused Milon Das misbehaved with complainant's daughter. PW7 in his evidence stated that he heard about the incident on the next day.

17. Coming to the evidence of the DWs it is seen that Smt. Rinku Das wife of accused Milon Das examined herself as DW1. She stated that about two years back Bipin Saikia (PW4) had borrowed money from her husband for doing business as pig seller. He promised to return the money when PW4 got his salary. She also stated that her son was also present at the time of giving money. In cross examination DW1 stated that PW4-Bipin Saikia called her husband to his house to return the money. DW2 Khagen Dutta testified that he had a shop at Dhemaji Chariali and both accused and Bipin Saikia came to his shop and he heard accused Milon Das asking Bipin Saikia to return his money. However in the cross he stated that accused Milon Das did not tell him about lending money to Bipin Saikia.

18. I have very carefully considered the evidence of PWs as well as DWs. I have also carefully examined the plea taken by the accused in support of his defence. From the materials on record it reveals that the accused along with PW5 went to the house of the victim. PW5 did not support the evidence of PW2 and PW3. It also revealed from the cross examination of PW3 that she did not raise any alarm even though there were other people nearby. Moreover PW2 the victim in her cross examination stated that her mother told her what to say in the court. The medical evidence is silent about any marks of violence or sign of intercourse

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and as such it militates against the evidence of any sexual violence on the person of the victim.

19. In the instant case as discussed above though prosecution relies upon the evidence of the victim, her evidence did not find support from the medical evidence. Over and above PW5 who was present at the time of occurrence did not support the prosecution version regarding involvement of the accused in the alleged commission of sexual assault.

20. I am also conscious about the provision that – 'Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.' It is well settled that even if the evidence of DWs is not believed, the initial burden is on the prosecution to prove its case beyond all reasonable doubt.

21. In view of what has been discussed above I find that prosecution has failed to prove the offence u/s 448 IPC and 4 of POCSO Act beyond all reasonable doubt.

ORDER:

22. In the result I find accused **Milon Das** not guilty u/s 448 IPC and 4 of POCSO Act. Accordingly, he is acquitted of the charges leveled against him. Set him at liberty forthwith.

23. Judgment is pronounced in open Court.

24. Given under my hand and seal of this Court on this the **22nd day of July/2019.**

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 (S. Das)
 Special Judge,
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