IN THE COURT OF SPECIAL JUDGE :: :: :: CACHAR. Spl.(POCSO) Case No.20 of 2015

(U/S 8 of POCSO Act)

Present:- Shri Darak Ullah, AJS,

Special Judge,

Cachar, Silchar.

State of AssamComplainant.

-Versus-

Surendra Das......Accused person.

Charge framed on:-.....23.11.19

P.Ws. examined on:-.15.2.17,6.11.17,9.4.18,16.11.18,29.05.19

Argument heard on:-20.11.19.

Judgment pronounced and delivered on:-..... 10.12.19.

Counsel Appeared:

For the State : Smti. B.Acharjee, Id.Spl. PP

For the Accused : Sri. N. Roy,

Smti T.Das, Ld.advocates.

<u>JUDGMENT</u>

1. The prosecution case, in brief, is that the informant lodged an FIR with the In-charge Tarapur T.O.P. stating the facts that on 08.10.15 at about 10 a.m. while the informant and his wife went out of the house for their place of work keeping their minor daughter(victim) in their house, the accused finding the victim alone in the house, with an ill intention disrobed the victim daughter of the informant and also applied force on her and thereafter seeing the occurrence the neigbouring people came and rescued the victim from the clutch of the accused and then the accused went to

his house.

- 2. On receipt of the FIR, a regular PS case was registered vide Silchar P.S. Case No.2747/15 U/S 354 A of IPC R/W Sec.8/12 of POCSO Act.2012. Police started investigation and during the course of investigation the statement of the victim girl was recorded U/S 164 Cr.P.C. The victim girl was also sent to SMCH, Silchar for medical examination. The investigating officer also visited the place of occurrence , prepared the sketch map and also recorded statement of the witnesses and subsequently after completion of investigation submitted charge sheet against present accused person U/S 354 A IPC R/W Sec.8/12 of POCSO Act.
- 3. The offence u/s Sec.8/12 of POCSO Act being exclusively triable by the Court of Special Judge , the case record was sent to this court along with connected papers and the same is taken up for trial by this court. In due course, upon appearance of the accused and after hearing both sides formal charge U/S 8 of POCSO Act was framed by my ld. Predecessor in office against the accused person. The charges having been read over and explained the accused pleaded not guilty and claimed to be tried.
- 4. Now, in the present case the points to be decided are :-
- (i) Whether the accused person on 8.10.2015 at about 10 a.m. committed sexual assault upon the victim, as alleged?
- 5. During trial, prosecution side examined as many as eight witnesses including M.O. and I.O. Statement of the accused person was recorded u/s 313 of Cr.P.C. where the accused person denied the allegations against him. Defence declined to adduce evidence.

6. I have gone through the entire evidence on record and have also heard argument advanced by the learned counsel for both the parties.

The Ld. counsel for the accused argued that the prosecution side has not able to prove the place of occurrence, rather in the charge sheet the house of accused is shown as place of occurrence. PW.2 has stated that the victim was playing in the courtyard, whereas, PW.1 has stated that accused took the victim to the house of the accused. It is further argued that the independent witnesses PW.5 and PW.6 have not supported the prosecution story and both of them had not seen any occurrence. It is also argued that although the alleged occurrence is shown to have been taken place on 8.10.15 but in the FIR the date below to the informant's signature is written as 7.10.15. In view of the above position, Ld. defence counsel has stated that there are enormous doubt in respect of the prosecution case and the prosecution has failed to prove the charge beyond all reasonable doubt against the accused and hence prayed for acquittal of the accused.

On the other hand, Ld. Special P.P. has argued that the prosecution has able to prove the charge beyond all reasonable doubt and the incriminating evidence, more particularly, the evidence adduced by the victim remains unrebutted and there is no reason to disbelieve the evidence of the minor victim PW.3. In view of the above position, the ld. Special Public Prosecutor has argued that the accused is liable to be convicted and punished accordingly.

DISCUSSIONS, DECISIONS AND REASONS THERE-OF

7. Now, let me discuss the evidence below to see whether the prosecution has succeeded to bring home the charges against the accused

person as mentioned in point for determination.

8. PW.1 Bimal Das, the informant of this case, deposed in his deposition that since about last three years he had been residing in the house of Ajoy and Bijoy Poddar as tenant and accused is also a co tenant. He further deposed that about one and half years back just prior to Durgapuja one day he was on duty and at about 10/10-30 p.m. Ajoy Poddar informed him over telephone that accused confined his (informant's) youngest daughter in his (accused's) house and then PW.1 returned home at 11-30 a.m. and then his victim daughter reported him that the accused taking her inside his room gagged her mouth and pulled her clothes. Thereafter PW.1 lodged the FIR vide Ext.1. PW.1 further deposed in his deposition that at that time victim was reading in class-1 and also deposed that at that time his wife was also outside the house.

In his cross examination PW.1 stated that when his children do not go to school they are remain alone in the house for hours together. He also stated in his cross examination that accused is an aged person and having sons and daughter and grand children. PW.1 denied the suggestion of the defence that he did not state the IO that he received telephonic call from Ajoy Poddar and he returned home at about 11-30 a.m.

9. PW.2 Smti. Rina Das, the mother of the victim deposed in her evidence that they are having two daughters of ages 11 years and 6 years respectively and accused is their co-tenant. She further deposed that on the date of occurrence at about 11-30 a.m. her sister met her and informed that the accused confined the victim in his room and then PW.2 returned home and on her query the victim told her that while she was playing with other girl the accused in the name of giving chocolate took her inside his room and closed the door. PW.2 further deposed in her deposition that victim reported

her while the accused was trying to remove the clothes of victim she started crying. PW.2 further deposed that on her arrival she found that her husband had already arrived there.

In her cross examination PW.2 denied the suggestion of the defence that she did not state to IO that the victim reported the alleged incident to her. PW.2 further stated that accused is like her father and he is having sons and grandsons etc.

10 PW.3 is the victim and after her intelligence test her statement was recorded in camera. She stated that the accused is her co-tenant and she calls the accused as 'Dadu' who is an old person. She further stated that while she was reading in class-1, one day she did not go to her school due to headache and on that day when her parents were outside and her elder sister was in school, in their absence in the day time, she was playing with a girl named Chumki in the courtyard and the accused called her to give a chocolate and when PW.3 entered into his room the accused took her to kitchen and closed the door of the house. She further stated that accused removed her under garment and then she started crying and the accused gave her a slap on her crying , and that one Ashadidi managed to open the door as it was not vaulted and then she came out. She further stated that she disclosed everything to her (Ashadidi) and after that at about 1 p.m. her parents returned home and she reported the matter to them. She further stated that she was medically examined and she also gave statement before Magistrate and at that time she was not in a position to put her signature.

In her cross examination PW.3 stated that accused used to give her chocolate and she used to visit his house and on the date of occurrence she also went there to take chocolate and the door was simply closed. She stated in her cross examination that accused did not commit bad things with her. She also stated that her father returned home in the evening. She denied the suggestion of the defence that she being tutored by her parents implicated the accused.

- 11. PW.4, Dr. Orina Raha deposed in her evidence that she examined the victim on police requisition and the victim during examination gave history that on 8/10/15 at around 10 a.m when no one was present, she was with neighbor, aged gentleman named Surendra Das who locked the door and opened up her pants but did nothing and then hearing sound other people gathered, opened the door and freed her. Mother of the victim also gave same history to PW.4 PW.4 on the basis of physical including dental examination, laboratory and radiological investigation done on the victim opined that the age of the victim age was above 7 years and below 9 years, no evidence of recent sexual intercourse detected and no evidence of injury on body or genital detected. In her cross examination she stated that by the word body, she means to say the entire body.
- 12. PW.5 Samar Das deposed in his deposition that about 3 / 3 & 1/2 years ago while he was a tenant in the house of one Anil Podder of Sashti gally he heard that accused has done some bad acts with the victim and he also heard that the matter was ended at the intervention of neighbouring people. He also deposed that Bimal Das also told him that accused had done bad acts with the victim.

PW.5 admitted in his cross examination that he did not state to the IO that while he was a tenant in the house one Anil Podder of Sashti gally he heard that accused has done some bad acts with the victim and PW.5 did not see the incident.

- 13. PW.6 Sankar Poddar is also a hear-say witness who has deposed that he came to know from the neighbouring people that accused person has done some bad acts with the daughter of Bimal Das. In his cross examination PW.6 stated that police did not record his statement and that he does not believe that the accused can do such type of bad act.
- 14. PW.7 S.I. Nirupuam Nath, who is IO of the case deposed narrating various stages of investigation conducted by him such as recording of statement of witnesses, collecting of medical report of the victim etc.

In his cross examination PW.7 stated that he did not draw the sketch map of the PO and did not make Chumki and Asha as witnesses in the charge sheet and also Priyobala, Shyamal Poddar and Anil Poddar were not cited as witnesses in the charge sheet. PW.7 also did not seize any materials.

PW.7 further stated in his cross examination that PW.2 did not state before him that the victim had reported her in respect of the occurrence, and that PW.1 has not stated before him that he received telephonic call from one Ajoy Poddar.

16. PW.8 SI, P.L. Buongpui is another IO and he also stated different stages of investigation conducted by him ,such as, recording of

statement of the witnesses, sending of the victim to court for recording her statement u/s 164 Cr.P.C., preparing of sketch map etc.

PW.8 stated in his cross examination that the date of occurrence as per the FIR was 8/10/15 and the informant Bimol Das put his signature in the FIR and the date was mentioned as 7.10.15. In his cross examination he also stated that he had not seized anything in connection with this case.

- Appreciating the evidence on record, as discussed above, it appears that PW.1 Bimal Das, the father of the victim has stated in his evidence that at the time of occurrence his daughter victim was reading in class-1. PW.3, the victim has stated in her evidence that she was reading in class-1 at the time of occurrence. Dr. Orina Raha, PW.4 has stated in her evidence that on the basis of physical including dental examination, laboratory and radiological investigation done on the victim she was in the opinion that the age of the victim was above 7 years and below 9 years. The defence has failed to rebut the above evidence of PW.1,PW.3 and PW.4 in respect of age of the victim at the time of occurrence. Therefore, I am of the opinion that the prosecution has able to prove that the victim was aged in between 7 to 9 years at the time of occurrence.
- 18. PW.7 and PW.8 are the Investigating Officers who have narrated various stages of investigation conducted by them. Although PW.5 and PW.6 had not seen the occurrence and their evidence found to be hear-say but PW.1,PW.2 and PW.3 have narrated the prosecution story corroborating each other. Although in the instant case PW.1 and PW.2 are reported witness but the evidence of PW.3, i.e. the victim is specific and against the accused in respect of alleged charge. It is quite natural that a minor victim will certainly divulge such incident to her parents and in the

instant case PW.1 and PW.2 are her parents to whom the victim reported the incident.

19. PW.3 is the victim and in her evidence she has specifically stated that on the date of occurrence she did not go to the school due to headache and her parents were on their duty outside their house and she was alone in the house and she also stated that her elder sister was in the school and she was playing with a girl namely Chumki in the courtyard and the accused called her to give a chocolate and when she entered into his room he took her to his kitchen and closed the door of the house. She further stated that accused removed her under garment and she started crying and then the accused gave her a slap and on her crying one Ashadidi opened the door as the door was not vaulted and then she came out and disclosed everything to Ashadidi and thereafter to her parents.

During cross examination although the victim has stated that the accused did not commit bad things with her but the defence had not put any question in respect of taking the victim by the accused to the kitchen and removing of her under-garment by the accused. Even the accused side has not put any suggestion denying that accused committed such acts. In view of the above position, this incriminating evidence remains unrebutted and I do not find any justification to disbelieve the evidence of the minor victim. Although the victim has stated that the door was not vaulted but she has stated that accused closed the door and it was confirmed in her cross examination that the door was simply closed.

20. Let me now go through provisions for the offence of sexual assault. Punishment for sexual assault is provided in section 8 of the POCSO Act ,whereas, sexual assault is defined in Section 7 of the Act as

follows:-

"Sexual assault — 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."

Punishment for sexual harassment is provided in section 12 of the POCSO Act ,whereas, sexual assault is defined in Section 11 of the Act as follows:-

"Sexual harassment- A person is said to commit sexual harassment upon a child when such person with sexual intent —

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means ; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, flim or digital or any other mode, or any part of the body of the child or the involvement of the child in sexual act; or
- (vi) entices a child for pornographic purposes or gives signification therefor.

Explanation : - Any question which involves "sexual intent" shall be

a question of fact."

- 21. Although the charge was framed under section 8 of the POCSO Act but upon consideration of the facts proved by the prosecution I have come to the conclusion that the acts of the accused upon the victim constitutes sexual harassment as defined in section 11 of the POCSO Act which is punishable under section 12 of the POCSO Act.
- 22. In view of the above discussions of the evidence on record it has been established beyond all reasonable doubt by the prosecution side that at the relevant time the accused has sexually harassed the victim girl and accordingly the accused is found guilty U/S 12 of POCSO Act. Accused Surendra Das is, therefore, convicted U/S 12 of POCSO Act.
- 23. Upon consideration of the nature and gravity of the offence and its impact upon the society, I declined to provide the accused person with the benefit of probation of offender's Act.
- 24. The accused is heard on the point of sentence. He submitted that he is aged about 80 years and at the fag end of his life. It is further submitted that he is an ailing person and cannot move properly and there is none to look after his wife who is also an aged person and he is also having an unmarried daughter in his house and therefore he has prayed to exonerate him.
- 25. Upon consideration of the nature and gravity of the offence and the mitigating circumstances which the convict has submitted

during his sentence hearing, I have found that he is an aged ailing person and as such he deserves some leniency.

26. Upon consideration of all aspects, the convict Surendra Das is sentenced to undergo S.I. for a period of 6 (six) months and to pay a fine of Rs.5,000/- (five thousand) and in default of payment of fine S.I. for another 1 (one) month for the offence under section 12 of POCSO Act.

The period already undergone during investigation and trial be set off from the period of sentence.

Bail bond stands cancelled. The bailor is discharged from his liabilities.

Furnish a copy of judgment to the accused free of cost.

 $\mbox{ Judgment is pronounced and delivered in the open court on } \\ \mbox{this the } 10^{\text{th}} \mbox{ day of December, 2019.}$

Dictated and corrected by

Special Judge,

Transcribed by K. Bhattacharjee,

Stenographer Gr. I

Cachar, Silchar.

(Darak Ullah)
Special Judge,

Cachar, Silchar.

IN THE COURT OF SPECIAL JUDGE, CACHAR, SILCHAR Spl.(POCSO) Case No. 20 of 2015. APPENDIX

(A) PROSECUTION WITNESSES: -

PW-1 – Sri Bimal Das.

PW-2 – Smti. Rina Das.

PW-3 – Victim girl.

PW-4 – Dr. Orina Raha,MO.

PW-5 - Sri Samar Das.

PW-6 - Sri Sankar Poddar

PW-7 - SI Sri Nirupam Nath, I.O. PW-8 - SI P.L. Buongpio, I.O.

- (B) <u>DEFENCE WITNESSES</u>: NIL
- (C) PROSECUTION EXHIBITS: -

Ext. 1 – FIR.

Ext. 2 — Medical report. Ext. 3 — Charge sheet. Ext. 4 — Sketch map.

- (E) <u>DEFENCE EXHIBITS</u>: NIL.
- (F) <u>COURT EXHIBITS</u>: NIL.
- (G) EXHIBITS PRODUCED BY WITNESSES: NIL.

Special Judge, Cachar, Silchar.