IN THE COURT OF SPECIAL JUDGE (POCSO), SONITPUR AT TEZPUR

SPL. POCSO CASE NO. :- 10 of 2019

(Under Section 9(m) of POCSO Act)

Present :- R. Baruah

Special Judge (POCSO)

Sonitpur, Tezpur.

Prosecutor :- State of Assam

-Vs-

Accused :- Sri Suresh Bhumij

S/o Parsuram Bhumij R/o Vill. Rampur Hatinga PO & PS – Jamuguri Dist.- Biswanath, Assam

Permanent Address: Borgang near Railway Station, Line No. 1 Borgang T.E.

P.S. Behali

Dist- Biswanah, Assam

Date of framing charge :- 11-06-2019

Date of Recording Evidence :- 24-07-19, 21-08-19, 30-09-19, 22-10-19

& 28-11-19

Date of examination of accused u/s :-

313 of Cr.P.C.

09-12-2019

Date of Argument :- 09-12-2019

Date of Judgment :- 21-12-2019

Counsel of the Prosecution :- S. Maitra, Ld. Special P.P. and A. Baruah

& J. Baruah,

Addl. Public Prosecutors,

Tezpur.

Counsel for Accused :- D. Sinha & R. Baruah, Ld. Advocates.

JUDGMENT

- 1. In this case above accused is put for trial for the allegation of charge Under Section 9 (m) of Protection of Children from Sexual Offences Act, 2012 (herein after referred as 'POCSO Act').
- 2. The prosecution case in brief is that on 10.03.2019 informant Mira

Rajput lodged an FIR before the In-Charge of Jamuguri Police Station stating that on 09.03.2019 at around 6:00 PM accused Suresh Bhumij took away her 7 years old daughter "X" towards a field by alluring that he would buy notebook for her. Thereafter the accused threw her into a drain used for water irrigation of the village and assaulted her sexually. When she raised alarm by crying, accused tried to kill her by strangulation. After a long time when she did not return to home, the informant with some villagers went in search of the girl/victim and they found the girl weeping inside a jungle adjacent to the drain of water irrigation. Eventually the accused got caught red handed and with the co-operation of the young locals and villagers the accused was handed over to the police.

- 3. On receipt of the FIR, the OC, Jamuguri PS registered the same as Jamuguri P.S case no. 53/2019 under sections 342/352/307 of IPC, R/W Sec. 4 of POCSO Act and endorsed the same for investigation.
- 4. Police after completion of investigation, submitted charge sheet against the accused under section 342/352 and R/W Sec. 8 of POCSO Act.
- 5. The copies of relevant documents furnished to the accused. After hearing the learned advocate for both the sides, charge Under Section 9 (m) of POCSO Act framed against the accused. The above offense read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 6. To substantiate the case, prosecution has examined as many as 8 (eight) nos. of witnesses. The prosecution witnesses namely 1. "X" (PW1) (victim) (name not disclosed in the judgment), 2. Smti. Mira Rajput (PW2), 3. Mamu Deka @ Janmoni Deka (PW3), 4. Dr. Jerina Nazrin (PW4), 5. Sri Durlav Deka (PW5), 6. Miss Anjana Rajput (PW6), 7. Smti. Aimoni Rajput (PW7) and 8. Sri Lakhi Kalita (PW8) (I.O.). After hearing both the sides the evidences of the witnesses recorded previously is also taken into consideration.
- 7. Accused is examined under section 313 Cr.P.C. The defence plea is of total denial and defence has declined to adduce defence evidence.

8. I have carefully gone through the record of the case and heard the learned Counsel for both the sides.

The Ld. Spl. P.P. submitted that on the day of occurrence the accused went missing with the victim in the evening and he was found with the victim at night. The witnesses has corroborated to the above facts. Both the accused and the father of victim used to take liquor. The victim was found crying. The victim has stated that she was assaulted by the accused and also the accused insert finger inside her vagina. The fact is also mentioned in the statement u/s 164 Cr.P.C. The victim also suffered injuries. The evidence of victim could not be shaken during cross examination. The PW3 is the eye witness. The PW4 mentioned about the injury and the age of victim.

On the other hand the Ld. Legal Aid Counsel for the accused submitted that the magistrate who recorded the statement of the victim is not examined by the prosecution. The facts made under 164 Cr.P.C. by the victim is different from the statement made before the court. The PW3 said that he noticed the accused and victim on the focus of light but the same not seized during investigation. The victim put thumb impression in her evidence in the court but she also said that she studies in class III. Though the PW3 mentioned that villagers gathered, none examined by the prosecution. All the relatives of the victim are examined who are interested witnesses. The doctor (PW4) has found no mark of violence in the private parts of the victim. The doctor also mentioned that the abrasions may be caused due to many reasons. The FIR so lodged by the informant is hit by Sec. 162 of Cr.P.C. The PW3 said that as soon as chaos occurred police arrived and took away the accused. The prosecution has not clarified as to how the police arrived on the spot. The information to police not exhibited by the prosecution. The accused did not get the scope to examine the magistrate who recorded the statement of the victim. The stories seems to be concocted the cloths of victim not recovered/seized by the police during investigation. The victim said that she knows the accused properly but it is not clear why she did not mention the name of accused. Hence it can be held that the accused was apprehended only on suspicion.

9. The points for decision in this case are –

(1) Whether the accused on 09.03.2019 at about 6 PM at Rampur, Hatinga under Jamuguri P.S. committed aggravated sexual assault on "X", a 7 years old minor girl?

Discussion, Decisions and reasons for decision:

- 10. Before appreciating the evidence, I am of the opinion that the evidence so adduced by the prosecution witnesses needs to be reflected.
- 11. In the present case PW1 is the victim. She in her examination in chief state as follows:

"Suresh Bhumij has committed the act. During daytime Suresh Bhumij came to our house and proposed to me to buy a copy. Suresh Bhumij used to work together with my father. Thereafter, Suresh took me to the field in a drain, away from my home. Suresh felled me into the drain after gagging my mouth. He also held hard on my neck. Then Suresh opened my pant and threw it away. Thereafter Suresh inserted his finger inside my vagina and also slapped me. People brought me back to the house. It was dark at that time. Previously I gave statement in the court. Police also took me to the doctor for examination. I suffered some injuries on my hand and leg."

The PW1 stated in her cross examination as follows:

"I have got one younger brother and one younger sister. I called my father as 'Ba'. Suresh regularly visit our house and consume liquor. On the day of occurrence also Suresh consume liquor. He brought the liquor himself. The neighbours were available in their houses. My mother and father knew that I went out with Suresh to purchase copy. I cannot write my name. My teacher asks us to draw flag. Teacher does not teach how to write my name. Our teacher used to write on the black board and we copy from the same in our copy. After lunch Suresh slept in the house. After he awoke, he took me to the drain, which is situated at a distance from the house. On that day, for the first time Suresh did such thing on me. The drain was dry. I received injury on my back due to the debris in the drain. Suresh dragged me to the drain and my cloth torn. I received bleeding injury on my back and other parts. Police and my parents noticed the injuries. I and Suresh were returning to the house, then people found us and brought to home. I was taken to

the police. Police noticed my torn clothe and injuries. On the same day I was taken to the doctor. Suresh visit us regularly and hence I know his name. I mentioned to the police and court that Suresh did me such thing. It is not a fact that I do not know Suresh and do not know his name.

I stated the name of Suresh earlier in the court. It is not a fact that I did not state the name of Suresh earlier. It is not a fact that I did not state before the police and Magistrate that Suresh inserted finger into my vagina (the part of body by which we urinate).

It is not a fact that I stated falsely that I was brought to the house by the people.

It is not a fact that I have stated the facts today as taught by others. It is not a fact that I stated facts to the police and the Magistrate as taught by others."

12. The PW2 is the informant. She stated in her examination in chief as follows:

"I am the informant. I know the accused. His name is Suresh Bhumij. He used to work with my husband. He often visits my house. My children used to address him as 'Khura'. The incident occurred about four months back. At the time of occurrence my victim daughter was studying in class-III and her age was 7 years. She is student of Rampur Hatinga Prathamik Vidyalaya. On the day of occurrence at about 6.00PM my daughter/ victim was studying. I was cooking food. The accused came and question my daughter what she is doing. My daughter told that she is writing. At that time the she finished the pages of the copy. My daughter told that she wants another copy. Then Suresh proposed my husband to buy a copy to my daughter and took her away. I stopped her but she went away with the accused. When my daughter did not return for about one hour, I went to the shop of Tirap and enquired. Tirap told me that my daughter has not come. I was shocked and returned to the home and informed everybody. We all started to search for my daughter. We also informed the VDP. Police also arrived. At around 12.00AM (night) Manu Deka noticed my daughter and the accused, near a drain. He informed the people and recovered my daughter.

My daughter came crying and told me that the accused held her by her neck, opened her pant and threw it, slapped her, inserted finger into her vagina, gagged her mouth when she tried to shout. My daughter told me that the accused took her inside a drain. Police took away the accused after handing over by the people. We also went to the police station. I lodged the FIR. Exhibit- 1 is the FIR and Exhibit-1(1) is my signature. Police took my daughter to the doctor for treatment."

The PW2 in her cross examination stated as follows:

"The accused do not visit my house regularly. He often visit my house. On the day of occurrence, at daytime the accused came to my house with my husband. Both took lunch and consumed liquor.

It is not a fact that I did not state to the police that the accused proposed to buy copy to my daughter when she informed that she finished the pages of her copy. It is not a fact that I did not state to the police that I stooped my daughter from going to the shop. The name of the VDP Secretary is Bipul Das, but I do not know his proper name. At the house of VDP Secretary, police found me and my husband. I do not know who informed the police regarding missing of my daughter. It is not a fact that I did not state to the police that my daughter came crying and she told me that accused slapped her, inserted finger into her vagina and gagged her mouth. Police also found my husband. I did not notice injuries on the person of my daughter. One scribe in the police station wrote the FIR.

It is not a fact that I stated the facts as taught by others. It is not a fact that the accused never took my daughter to purchase her copy, nor gagged her mouth, opened her pant and threw the same. It is not a fact that my daughter never reported me that the accused held her by her neck, opened her pant and threw it, slapped her, inserted finger into her vagina, gagged her mouth when she tried to shout and accused took her inside a drain. The accused is a permanent resident of Borgang. Accused reside in the house of his father —in-law, in my village. It is not a fact the as the accused is not a resident of my village and hence as taught by others I deposed falsely against him."

13. PW3 stated in his examination in chief stated as follows:

"I know the informant, the accused and the victim. The incident occurred about four months back. When we family members were taking dinner, at around 8.30 PM, I heard chaos in the village. I came out and could come to know that the daughter of Madan and accused went missing. The villages searched for the girl and the accused. I went back to my home at around 10.30 PM in order to sleep.

I was hearing the chaos while sleeping. At around 11.30PM to 12.00AM I came out of the house to urinate after switching on the light. On the focus of the light I noticed the accused and the daughter of Madan, on the road. I questioned the accused why he went missing with the girl. At that time people gathered and took the accused to the main road. In the meantime police arrived. The accused was taken into custody by the police."

The PW3 in his cross examination stated as follows:

"I noticed the accused and the girl standing near my house. I went near and identify that they are the accused and the girl. It is not a fact that I did not state to the police I saw two person on the focus of the light. It is not a fact that I never saw the accused and the girl while coming out of the house to urinate. I do not know who informed the police regarding the recovery of the victim and the girl. I do not how the accused and the victim went out of the house."

14. PW4 the MO stated in her examination in-chief as follows –

"On 10.03.2019 I was posted as M. & H.O.-1 at Kanaklata Civil Hospital, Tezpur. I had examined the victim girl on 10.03.2019 at about 2:05 PM in the examination room of the labour room complex of KCH, Tezpur in the presence of GNM Anamika Kalita vide hospital registration no. 6636/19. She was escorted and indentified by WPC/396 Sumitra Dutta. Consent was taken prior to examination from her aunty.

Name and address of the victim: Miss 'X", 7 Years, Female, religion Hindu, D/O Sri Madan Rajput, Vill. Rampur Hatinga, P.S. Jamuguri, Dist. Sonitpur (Biswanath), ID mark- Scar over right side of face.

Menstrual History: She has not attained menarche yet.

On examination- Well Dressed, neat & tidy, gait normal average build, Height-111 cm, Weight- 18 kg, Teeth- 5/5/6/6.

At the time of examination, her secondary sexual characters have not yet developed. Axillary and pubic hair absent. Breast not developed. Vulva and vagina-Normal. No external injury seen in genital region.

On examination- 2 X 1 cm² abrasion over left side of neck. Vaginal smear taken and sent for pathological examination.

Investigations advised and report:

1. Vaginal smear for spermatozoa not seen (KCH lab no.- 11/19 dt- 10.03.19)

2. X- ray for age determination- Age of the person under investigation appears to be below 10 years.

(done in Assam X-ray Clinic & Laboratory, Pt ID: AXC- 1986 dt. 11.03.19, report given by Dr. P.K. Barman, Radiologist)

Opinion-

- 1. There were no signs and symptoms of recent sexual intercourse.
- 2. No mark of violence seen in her private parts
- 3. Her actual age at the time of examination appears to be below 10 years.

Ext. 2 is the Medical report and Ext. 2 (1) and 2 (2) are my signatures."

During cross-examination, the MO said that the abrasion mentioned by her may be caused for various reason.

15. PW5 in examination in chief stated as follows:

"I know the informant and the accused. On 09-03-2019 at night I was sleeping in my house. My son at night came out of the house to attend nature's call, and then he noticed Suresh Bhumij near the house. My son held Suresh Bhumij and a chaos took place. Then the villagers and police arrived and took away Suresh Bhumij. Later on I came to know that since evening the daughter of Madan Rajput was missing and in connection with the same, the accused was apprehended. The daughter of Madan Rajput was also with the accused."

In cross examination the PW5 stated as follows:

"I only know that villagers took away the accused from the spot."

16. PW6 in examination in chief stated as follows:

"I know the informant. She is my aunt. Victim is daughter of informant. I forgot the day of occurrence. On the next day of incident, victim told me that accused took her from the house in order to purchase a copy."

In cross examination PW6 stated as follows:

"My sister/victim only told me that she was taken by the accused for the purpose of purchasing copy, but, she did not mentioned about any misbehave by accused towards her."

17. PW7 in examination in chief stated as follows:

"I know the informant. She is my sister-in-law. Victim is my niece. I

know the accused. On the day of occurrence after coming from work at around 5.00 PM I came to know that "X"/victim is missing. At night Mamu Deka apprehended the accused with the victim and informed the villagers. Police came and took away the victim. When I enquired from victim, she told that her pant thrown away by the accused, her mouth was gagged by the accused and accused inserted finger on her private part. The victim also told me that accused threatened her by hold her by her neck."

PW7 in cross examination stated as follows:

"It is not a fact that I did not state before police that "When I enquired from victim, she told that her pant thrown away by the accused, her mouth was gagged by the accused and accused inserted finger on her private part. The victim also told me that accused threatened her by holding her neck".

My house is away from the house of informant. It is not a fact that victim never narrated the fact to me as I mentioned today in the court nor I questioned the victim regarding the incident. It is not a fact that today for the sake of my niece deposed falsely in the Court."

18. PW8 is the I.O. of the case. He stated in his examination in chief as follows:

"On 10.03.2019 I was posted as I/C of Itakhola Police Out Post. On that day during morning hour the Addl. SP over phone informed me that there is no officer at Jamuguri P.S. and as a case is registered under POCSO Act, he directed me to proceed and conduct the investigation of the case. Accordingly I reached Jamuguri P.S. I found the accused Suresh Bhumij in the police station and the victim "X", both sited separately inside the police station. The age of the victim reported as 7 years. The O/C endorsed the Jamuguri P.S. Case No. 53/2019 to me for investigation. Accordingly I started the investigation of the case. The informant Meera Rajput i.e. the mother of victim was also available in the police station. I recorded her statement. I also recorded the statement of victim in presence of lady police. I also recorded the statement of the accused. As it was Sunday and the police papers are taken up in the court at 2:00 PM, I visited the place of occurrence. I searched for the pant of the victim in presence of witnesses. I recorded the statements of nearby witnesses. As informed by the witness Mamu Deka that he noticed the accused and the victim coming out from a nearby nala located near his house, I drew the sketch

map of the place as place of occurrence. Ext. 3 is the sketch map and Ext. 3 (1) is my signature. Thereafter I returned to the Police Station. I forwarded the accused to the court after arrest and send the victim to the hospital for material examination I also forwarded the victim to the court with a prayer to record her statement u/s 164 of Cr.P.C. As per order of court I handed over the victim to her guardian. During investigation I collected the Medical Report of victim. After completion of investigation I submitted charge sheet against the accused u/s 342/352 of IPC & R/W Sec. 8 of POCSO Act. Ext. 4 is the charge sheet and Ext. 4 (1) is my signature. Ext. 5 is the statement of victim recorded u/s 164 of Cr.P.C. Ext. 1 is the FIR and Ext. 1 (1) is the endorsement with signature of the O/C of Jamuguri P.S."

In cross examination the PW8 stated as follows:

"Itakhola Police Out Post is about 6-7 Km. away from Jamuguri P.S. On 10.03.2019 at 6:30 AM I received the telephonic message form Addl. SP namely Sri Jayanta Sarathi Borah. I reached Jamuguri P.S. at 8:00 PM. I found both the victim and the accused sitting in same room separately. I was in Uniform when I recorded the statement of victim girl. Woman police was in civil dress. Her name is Sumitra. I have not put question to the victim prior to recording statement regarding the place where she would feel comfortable while giving statement. We reached Tezpur Court at around 3.00 PM after examination of victim in the Civil Hopsital. We brought both the victim and accused to Tezpur from Jamuguri in the same vehicle. The victim was a school going girl and she could write her name. I could not recover the panty of the victim during search. I did not seize the wearing apparels of victim as well as the accused.

The victim(PW1) did not state before me that "Suresh inserted finger into my vagina (the part of body by which we urinate)", but, she said that hand put on her vagina.

The PW2 did not state before me that "the accused proposed to buy copy to my daughter when she informed that she finished the pages of her copy, that she stooped her daughter from going to the shop."

The PW3 did not state before me that "I saw two persons on the focus of the light".

PW7 did not state before me that "When I enquired from victim, she told that her pant thrown away by the accused, her mouth was gagged by the accused and accused inserted finger on her private part. The victim also told me that

accused threatened her by holding her neck", but, she said that on questioning by villagers, the victim gave statement.

It is not a fact that I have conducted the investigation of the case as required under the provision of POCSO Act. It is not a fact that without finding any materials against the accused I submitted charge sheet against him under the above Sections. It is not a fact that accused is completely innocent."

19. Section 9 (m) of POCSO Act provide as follows, "whoever commits penetrative sexual assault on a child below 12 years".

Penetrative sexual assault is defined u/s 3 of POCSO Act.

- 20. From the evidence on record it is noticed that in the evening of 09.03.2019 the victim went missing from the house. In the FIR it is mentioned that accused took away the victim in order to purchase her a notebook. The PW1 is the victim and she has corroborated to the fact that accused came to her house and proposed to buy a notebook to her. The PW1 in her cross examination said that the accused used to come to her house regularly and used to consume liquor. PW1 said that her parents were aware that she came out with the accused in the evening to purchase a copy from the shop. Since the accused is a regular visitor of the informant hence the going out of victim with the accused initially was not a factor to be suspected by the parents of the victim. The PW1 has clearly mentioned that when she and the accused were returning home after she was subjected to assault by the accused, people found them and brought them to the house. The PW1 is a child of about 7 years. The doctor has also confirmed that the age of PW1 is below 10 years. It should not be expected from the PW1 to describe as to who amongst the people located them first and thereafter brought to the house.
- 21. The PW3 is not a relative of the victim or the informant. The PW3 is a co-villager of informant. The PW3 prior to going to bed had the information that the victim and the accused went missing. It is at around 11:30 PM to 12 AM night in the focus of light he noticed the accused and the victim on the road. Immediately people gathered and took away the accused to the main road. The PW5 has corroborated to the fact that at night his son noticed the accused and thereafter a chaos took place and villagers and police took away the accused. The PW3 has not tried to develop or

embellish the facts. The PW1 in cross examination said that when she and the accused were returning the people found them. It cannot be deduced from the evidence on record that it was not the PW3 who found the victim and the accused at first. It is a fact that the victim is found with the accused at night. Seizure of the light on whose focus the PW3 notice the victim and accused is irrelevant for the investigation of the matter.

22. The Ld. Advocate for the accused argued that there is vast discrepancies between statements of the victim under section 164 of Cr.P.C and given during trial. It is argued that the victim did not utter the name of the accused during investigation.

The PW1 (victim) is a child of less than 10 years. The PW1 said before the Magistrate that a person took her towards the field. She did not mention that the person is not known to her. The PW1 has identified the accused at the trial. Moreover, there is no necessity on the part of the victim to narrate when she was taken out of the house, because her parents are aware that she went out with the accused in order to purchase a notebook. The PW1 has mentioned the facts, which bears the elements to traumatize her in ordinary sense of the term. It should be noted that on the very next day of occurrence the victim gave statement before the Magistrate. Further, the prosecution has exhibited the statement of the victim made under section 164 of Cr.P.C as Exhibit-5. Considering the above, it cannot be said that the defense case is prejudiced for not examining the Ld. Magistrate, who recorded the statement of victim during trial.

- 23. The PW1 said that accused inserted finger inside her vagina and slapped her and prior to that the accused threw her pant. The PW1 also said that the gagged her mouth and held her by the neck hard. The PW2 said that her daughter confide to her all the facts. Naturally, a small child will confide to her mother regarding any strange and unwanted incident took place with her. It should not be expected that the PW6, who is a 12 years should try to elicit from a younger child what is misbehavior.
- 24. The victim stated that the accused put his hand over her vagina and held her neck hard. During trial the victim said that accused inserted finger into her

vagina. The PW4 (doctor) said as follows: "At the time of examination, her secondary sexual characters have not yet developed. Axillary and Pubic hair absent. Breast not developed. Vulva and vagina normal. No external injury seen in genital region." The accused took away the victim with a plea to buy her a notebook and thereafter without going to the shop took the victim to a isolated place. There he undressed the victim and touched the genital region of the victim. Further no explanation came from the defence that there existed other mental state of the accused while keeping the victim with him for so long. The activity of accused is squarely false under the definition of sexual assault under section 7 of POCSO Act. The victim is less than 12 years of age hence, the accused has committed the offence under section 9 (m) of POCSO Act.

- 25. Section 10 of the POCSO Act provides the punishment for commission of offence of aggravated sexual assault. The accused is convicted under section 10 of POCSO Act.
- 26. The offence is committed against a child. The accused is not considered under section 360 of Cr.P.C. and under Probation of Offender Act.
- 27. Heard the accused on the point of sentence under the provision of Section 235(2) of CrPC.
- 28. The accused is sentence to undergo rigorous imprisonment for a period of 5(five) years and pay a fine of Rs. 3,000/- (Rupees Three Thousand). In default of payment of fine accused shall undergo further rigorous imprisonment for two months.
- 29. The period of detention undergone by the accused, if any, be set off from the period of imprisonment.
- 30. It is seen that no recommendation is made in the record for giving compensation to the victim. Hence, it is hereby recommended to give appropriate compensation to the victim by the District Legal Service Authority, Sonitpur, Tezpur.

- 31. Free copy of judgment be furnished to the convict.
- 32. Another copy of judgment be sent to the learned District Magistrate, Sonitpur, Tezpur as per provision of Section 365 of CrPC and to the Learned Secretary, District Legal Service Authority, Sonitpur, Tezpur.

Given under my Hand and Seal of this Court on this the $\mathbf{21}^{\mathsf{st}}$ day of **December, 2019**.

(R Baruah) Special Judge Sonitpur,Tezpur.

Dictated and corrected by me.

(R Baruah) Special Judge, Sonitpur, Tezpur

ANNEXURE

Witnesses examined by the prosecution:

- 1.PW1 Miss "X"(Victim),
- 2.PW2 Smti. Mira Rajput,
- 3.PW3 Mamu Deka @ Janmoni Deka,
- 4.PW4 Dr. Jerina Nazrin,
- 5.PW5 Sri Bir Singh Orang,
- 6.PW6 Miss Anjana Rajput,
- 7.PW7 Smti. Aimoni Rajput &
- 8.PW8 Sri Lakhi Kalita (IO).

Witnesses examined by the Defence:

1. Nil.

Documents exhibited by the prosecution:

- 1. Ext. 1 : Ejahar,
- 2. Ext. 2: Medical report,
- 3. Ext. 3: Sketch map &
- 4. Ext. 4: Charge sheet.

Documents exhibited by the Defence:

1. Nil.

(R Baruah) Special Judge, Sonitpur,Tezpur.