BEFORE THE SPECIAL JUDGE ::::: DHUBRI

Special Case No.7/2015

U/s.8 of POCSO Act, 2012

G.R (GPR) 670/2013

State of Assam

- Vs -

Mithun Baishnab

Present : Sri Rajib Goswami, AJS

Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor, Dhubri for the State. Sri Amrit Lal Bairagi, Advocate for the defence.

Date of Evidence : 30-07-2015, 11-08-2015 & 20-01-2016

Argument Heard : 17-02-2016 Date of Judgment : 29-02-2016

<u>JUDGMENT</u>

The prosecution case in the FIR in brief is that on 14-12-2013 at around 8 p.m. the accused Mithun Baishnab had tried to commit sexual assault on the minor daughter of the informant at the house of the informant when the informant, Swapna Ghosh, mother of the victim was busy at the kitchen.

- 2. FIR was lodged at Daobhangi Police Patrol Post and the same was received vide G.D Entry No.161 dated 15-12-2013. The FIR was forwarded to Gauripur Police Station. A case was registered by the O.C, Gauripur Police Station on 15-12-2013 U/s. 8 of Protection of Children from Sexual Offence Act against the accused Mithun Baishnab. Upon the FIR the case was investigated into by the I.O. and after completion of investigation I.O. had filed charge sheet against accused Mithun Baishnab only u/s.8 of POCSO Act.
- 3. Accused person appeared before the Court. Charge u/s.8 of POCSO Act had been framed against the accused Mithun Baishnab. Charge had been read over, explained and interpreted to accused to which accused pleaded not guilty and claimed to be tried.

4. The prosecution had examined as many as 7 (seven) witnesses including the I.O. & M.O. Accused person was examined on the circumstances coming up against him in the evidence of P.Ws. Accused person pleaded total denial and declined to adduce any evidence in his defence.

5. <u>POINT FOR DETERMINATION</u>

Whether the accused Mithun Baishnab on 14-12-2013 at about 8 p.m. at village Khagrabari under Gauripur P.S. committed sexual assault on the victim?

DECISIONS AND REASONS THEREON

6. The evidence of PW-1, Smti Swapna Ghosh reveals that she had filed the FIR ext-1 bearing her signature ext-1 (1). The victim is her daughter. Victim was 7 (Seven) years old at the time of incident. The accused was a frequent visitor to the house of PW-1. The accused used to take tuition of the victim. On the day of the alleged occurrence the accused got the clothes removed from the body of the victim and attempted to penetrate her. The victim had started screaming. On hearing her scream the PW-1 had come to the P.O. PW-1 had noticed the panty of her daughter was wet with spermatozoa.

In her cross-examination PW-1 had stated that the FIR was registered at Rupshi Outpost the following day of the incident at around 5 p.m. The police had come to their house the following day of the day the FIR had been lodged. PW-1 admitted not having assigned any reason for the delay in lodging the FIR. PW-1 also admitted to Jamatosh and Biswanath being her brother-in-laws, who had assisted her in filing the FIR. According to PW-1 she had been cooking meal at the relevant point of time. She denied the suggestion that she had not stated before the I.O. about the accused trying to penetrate her daughter after stripping her and having noticed the undergarment of her daughter stained with spermatozoa. She admitted to the defence suggestion of Sukla Rani Ghosh & Sushil Ghosh being her immediate neighbours and with regard to Usha, Nikhil, Purna Chandra Baishnab being her neighbours.

7. PW-2, the victim had stated that she is a student of Motijan L.P. School and she was reading in Class –IV on the day of the alleged occurrence and the accused was also known to her. According to PW-2 the accused on the day of incident had come to take tuition. He used to often come for the said purpose. It was night hours. Her mother was busy in some work. The accused took her to a bed and stripped her of her clothes. She started screaming. Her undergarments got wet. She failed to perceive how her undergarments got wet. Her mother did not come. Later at the time of dinner her mother got to know about the alleged occurrence. She had been brought to the court to get her statement recorded before the Magistrate. Ext-2 is her statement bearing her signature ext-2 (1). She had been examined by a doctor.

In the cross-examination she reiterated to being a student of Class-III at the time of alleged occurrence. According to PW-2, she had dinner around 1 and $\frac{1}{2}$ hours after the accused had left. It was winter. She was wearing two pants. She was also wearing a top.

8. PW-3 Sri Jonotosh Kr. Ghosh had stated that both accused and the victim are known to him. The incident had taken place in the night. Both parents of the victim had told him that the accused had tried to commit rape on their daughter.

In his cross-examination PW-3 had admitted to informant and the victim being his relatives. His house is separated from the informant's house by another house. There being around three houses ahead of his house from the place of occurrence. Witness Biswanath is his own brother. PW-3 denied the suggestion that the accused's father had dispute with his family and in view of his previous enmity with the accused's father the accused has been framed in this false case.

9. PW-4 Sri Biswanath Ghosh had known both accused and the victim. The incident had taken place in the night. According to PW-4 both parents of the victim had told him that the accused had tried to commit rape on their daughter.

In cross-examination P.W-4 admitted to informant and the victim being his relatives. He reiterated about a house separating his house from the informant's house. He admitted to PW Biswanath being his own brother. According to PW-4 the house of the accused is located at a distance of two houses ahead of his house.

- 10. PW-5 Smti Molina Dey had stated to have known both accused and the victim since they are residents of her village. The day after the alleged occurrence at around 9 a.m, she had been reported about the alleged occurrence by the mother of the victim. On repeated persuasion, the victim's mother had told her that the accused used to take tuition of the victim. The accused attempted to rape her daughter. The victim was brought before her after some time. On being asked the victim had told her that Mithun had come to take tuition when mother was at the kitchen. The victim had told PW-5 that the accused had stripped of her of clothes. She raised alarm and the accused had fled away. When PW-5 had approached Mithun's father, she had been told that Mithun lives in Punjab. PW-5 expressed her doubt with regard to any such incident having taken place at all. According to PW-5 out of previous enmity this case had been filed. The witness was declared hostile.
- 11. PW-6 Dr. (Mrs) Rinku Ahmed had stated that on 19-08-2013 she was posted at, Dhubri Health & Maternity Centre. On that day she had examined Tithi Ghosh, D/o. Khitish Ghosh, Khagrabari, Dist. Dhubri and found the following:
 - 1. General external appearance was normal.
 - 2. PV examination could not be done as introit us is very small.
 - 3. There was no injury, bleeding or bruise was seen.

According to PW-6 her findings are not consistent with recent sexual intercourse and assault. Ext-3 is his Report bearing her signature ext-3 (1).

In her cross-examination she reiterated not having seen any sign of recent sexual intercourse or bleeding on the victim.

12. PW-7 S.I. Siddheswar Ray had stated that on 15-12-2013 he had received the FIR from one Swapna Ghosh, W/O. Khitish Ghosh to the effect that one Mithun Baishnab who had come to her house and tried to commit sexual

assault on her daughter. Following receipt of the FIR, he had made the GD Entry No.161 dated 15-12-2013 and sent the FIR to the Gauripur Police Station for registration of a case and taken up the investigation of the case. He had visited the place of occurrence, got the statement of the victim girl recorded u/s.164 of Cr.PC. He had got the victim medically examined. He had also examined witnesses at the place of occurrence. He had also drawn the sketch map of the place of occurrence. Having found a prima facie case against the accused, he had filed the charge sheet showing the accused absconder. Ext-4 is the charge sheet bearing his signature ext-4 (1).

In his cross-examination PW-7 had denied the suggestion that FIR is a fabricated document and it was not lodged by informant Swapna Ghosh. The occurrence had taken place on 14-012-2013 and FIR had been lodged on 15-12-2013 at 5 p.m. There was a delay of around 26 hours in lodging the FIR. However, no reason had been assigned for the delay in lodging the FIR. Usha, Nikhil, Kamal, Panchanan, Purna, Sadhana, Sukla & Sushil, who are immediate neighbours of the complainant but they had not been listed as witnesses. PW-3 and PW-4 are brother-in-laws of complainant Swapna Ghosh. PW-1, the informant of the case, Swapna Ghosh had not told him with regard to having been told by her daughter about accused trying to have intercourse with her and later finding the panty of the victim wet with sperms.

13. He had not depicted the distance of the house of PW-3 and PW-4 from the place of occurrence in the sketch map. He had not seized the undergarments of the victim that had been used by the victim at the time of the alleged occurrence. He had not listed the name of Magistrate who had examined the victim. He had not furnished the extract copy of the GD Entry with the charge sheet. He had set about for investigation after making the GD entry and before receiving the FIR in respect of the alleged occurrence. The alleged occurrence had been reported by one Mallika Dey before ext-1 had been lodged.

Above is the threadbare discussion of evidence on record.

14. The learned P.P. had elaborately delved into the reliability of the evidence of PW-1, informant considering she being the mother and PW-2, the

victim who was only 7 years old at the relevant point of time to differentiate between a sexual Act and other Act. According to learned P.P. both PW-1 and PW-2 had been specific with regard to the prosecution version and the 164 statement also support the prosecution version. PW-3 and PW-4 had supported the alleged occurrence. According to learned PP all these witnesses inspired confidence and is sufficient to bring home the charge u/s 8 of the POCSO Act.

- 15. On the other hand learned defence counsel had submitted before the Court that evidence of PW-1 to PW-4 is the evidence of relatives and as such has to be looked into the reliability of their evidence in the light of evidence of independent witnesses. The only independent witness, PW-5 President of Assam Mahila Samata Society had been declared hostile and in her evidence she had stated that there had been a dispute between the father of the victim and the father of the accused and that the accused was in Punjab at the relevant point of time. The incident was reported to the police after two to three days after the incident as per the victim and as such the reliability of the prosecution version has to be accepted with the pinch of salt. In support of his submission, the learned defence counsel had put reliance on the decision of our Apex Court as reported in 1972 Cri LJ 1296 wherein it was held in Thuliakali v. the State of Tamin Nadu in the light of Sec. 154 of Cr.PC, delay in giving information to the police that "When an occurrence is not reported for more than 20 hours after the occurrence even though the police station is only two miles from the place of occurrence it is unsafe to base conviction upon the evidence". Yet in another decision of this Court as report in 2011 CRI LJ 2640 in Kuldeep Yadav v. State of Bihar in para 32 (n) held as such " The version given by eye-witnesses who were also interested witnesses on account of their relationship with the deceased and being inimically deposed against the accused persons is highly exaggerated, contrary to each other and not fully corroborated with medical evidence and"
- 16. Now having taken into consideration submission of the learned counsels for both sides, I however am inclined to agree with learned P.P. since the complete evidence of only independent witness PW-5 does not come up for consideration since she has been declared hostile. But then PW-5 in her

examination-in-chief had admitted that the victim had confided in her about the alleged occurrence and this portion of the evidence of PW-5 remained uncontroverted since the victim has reiterated what she had stated before PW-5 with regard to Mithun stripping of her clothes and that she raised alarm in her evidence before the Court as well as in her statement u/s.164 of Cr.PC. Further, the fact of PW-5 having learnt from the father of the victim that at the relevant point of time the accused Mithun was in Punjab and that there had been long standing dispute between the victim's family and accused's family have not been proved by the defence. Beside the plea of alibi relates to Sec. 11 of the Evidence Act when facts otherwise not relevant become relevant when (i) they are consistent with the fact in issue or relevant fact (ii) if by themselves or in connection with other facts they make the existence or non-existence of any fact or issue or relevant fact highly probable or improbable.

- 17. Now so far the plea of alibi is concerned, the accused has not taken the plea that he was in Punjab at the relevant point of time during his examination u/s.313 of Cr.PC. Neither has adduced any evidence to that effect and as such no importance can be attached to the evidence of PW-5 who has otherwise been declared hostile and as such the fact cannot be considered as relevant fact not being consistent with the facts in issue.
- 18. In order to bring home charge u/s.8 of POCSO Act, the victim should be a minor. Considering the appearance of the victim supported by the evidence of M.O. that the PV examination could not be done as introit-us of the victim is very small the fact that she was below 18 years was not required to be substantiated separately. The victim herself had stated about she being a student of class-IV at the relevant point of time. The evidence of the victim inspired confidence. This piece of evidence is remained uncontroverted since in her statement u/s.164 of Cr.PC she had stated her age to be 7 years. The PW-2 being herself the victim is not free of apprehension and may not be able to disclose the entire occurrence and there may be some minor contradiction with regard to her explanation of the alleged occurrence. However, the fact the accused had stripped her of her undergarments and her mother PW-1 finding the undergarment wet with spermatozoa remained uncontroverted. Though the

evidence Medical Officer is silent with regard to any aggravated form of sexual assault but nevertheless a circumstances coming up in evidence are consistent with the offence of sexual assault as enumerated u/s.7 of POCSO Act. Section 7 of the POCSO Act envisages that "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.

- 19. Thus the prosecution has been able to establish in the light of the evidence above the offence u/s. 8 of the POCSO Act beyond all reasonable doubt against the accused Mithun Baishnab. The accused is convicted accordingly u/s.8 of POCSO Act.
- 20. Accused is heard on point of sentence. Accused person pleaded for leniency. Considering the nature of offence proved to have been committed by the accused I do not find it a fit case for rendering the benefit of release on Probation of Good Conduct under Probation of offenders act 1958. Considering minimum punishment provided for the offence u/s.8 of the POCSO Act being R.I. for 3 (three) years and fine, I am inclined to provide minimum punishment to the victim Mithun Baishnab. The accused is sentenced to R.I. for 3 (three) years and a fine of Rs.1,000/- in default to S.I. for 2 (two) months. I am also inclined to refer the victim to the DLSA, Dhubri for payment of compensation u/s.357 (A) of Cr.P.C.
- 21. Accused be given a free copy of the judgment free of cost immediately. Earlier detention if any is to be set off as against the sentence of imprisonment.

A copy of the judgment be furnished to the D.M. Dhubri.

Given under my hand and seal of the Court on this 29^{th} day of February, 2016.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.

APPENDIX

A. <u>Prosecution Witness</u>.

P.W-1 - Smti Swapna Ghosh

P.W-2 - Miss. Tithi Ghosh

P.W-3 - Sri Janotosh Kr. Ghosh

P.W-4 - Sri Biswanath Ghosh

PW-5 - Smti Molina Dey

PW-6 - Dr. (Mrs.) Rinku Ahmed

PW-7 - S.I. Siddheswar Ray.

B. **Court Witness**

Nil

C. **Defence Witness**

Nil

D. **Prosecution Exhibits.**

Ext-1 - FIR

Ext-2 - Statement u/s.164 of Cr.P.C.

Ext-3 - Medical Report

Ext-4 - Charge sheet.

D. **Defence Exhibit**

Nil

Special Judge, Dhubri