HEADING OF JUDGMENT IN SPECIAL CASE

IN THE COURT OF SPECIAL JUDGE BILASIPARA

Present:- Smti S. Bhuyan, AJS

Special Judge, Bilasipara

Special Case No- 01 of 2017

u/s 4 of POCSO Act

STATE

Versus

1. Durjan Mallah,

S/O Lt. Bongsi Mallah,

R/O Vill- Bilasipara, W/N-10

PS- Bilasipara, Dist- Dhubri, Assam

Accused person

(Corresponding to GR case No- 16/17 (Bilasipara PS Case No. 12/17) u/s 4 of POCSO Act)

Advocate appeared:-

For the state :- Mr. T. Kr. Bhattacharya, Special P.P.

For the accused :- Mr. Amiya Kr. Nath, Advocate.

Date of institution of the case :- 03-01-17

Date of Framing charge :- 20-01-18

Date of prosecution evidence :- 09-05-18, 30-06-18, 20-07-18, 01-09-18,

25-09-18, 12-10-18

Statement of accused recorded on :- 11-12-18

Date of Argument :- 07-01-19

Judgment delivered :- 19-01-19

Hearing on Sentence :- 24-01-19

Sentence Pronounced

:- 24-01-19

JUDGMENT

Prosecution Case

1. Prosecution case as reveal from Ext-1 ejahar is that on 03-01-17 informant Rekha Mallah lodged written ejahar before O/C Bilasipara PS inter alia citing that on 03-01-17 at about 02.00 pm accused Durjan Mallah enticed her daughter Miss X (name changed, herein after read as Miss X) to his house telling her that he will give biscuit to her and made her sit on his lap and committed rape on her. When her daughter Miss X cried, local people came to the house of accused and caught accused red handed. Thereafter police was called and accused Durjan Mallah was handed over to the police.

Investigation

2. Officer in charge Bilasipara PS, on receipt of ejahar from informant Rekha Mallah registered a police case vide Bilasipara PS case no. 12/17 u/s 4 of POCSO Act and SI Bijoy Kr. Das was entrusted to conduct the investigation of the case and after completion of investigation I/O submitted charge sheet against the accused Durjan Mallah u/s 4 of POCSO Act and cognizance taken.

Charge

3. After hearing learned counsel for both sides and perusal of material on record charge u/s 4 of POCSO Act was framed against the accused Durjan Mallah and when charges are read over and explained to the accused person, he pleaded not guilty and claimed to be tried.

Trial

4. In order to prove the prosecution charges against the accused person, prosecution adduced evidence of all together 9 number of witnesses including one court witness and exhibited 5 nos. of documents. PW-1 Rekha Mallah, PW-2 Jhantu Mallah, PW-3 Miss X, victim, PW-4 Rajesh Choudhury, PW-5 Ahitan Bibi, PW-6 Inspector Saidul Islam (I.O), PW-7 SI Bijoy Kumar Das (I.O), PW-8 Dr. Rinku Ahmed (M.O) and CW-1 Rupam Medhi (court witness). Ext-1 Ejahar, Ext-3 Sketch Map, Ext-4 Charge sheet, Ext-5 Medical report, Ext-6 Statement of Miss X recorded u/s 164 Cr.P.C. After closure of the prosecution evidence, statement of the accused person recorded u/s 313 Cr.P.C. Accused plea is total denial, however declined to adduced evidence in support of the plea of denial.

5. **POINTS FOR DETERMINATION:**-

i) Whether accused on 03-01-17 at about 02.00 pm at Bilasipara W/N-10 under Bilasipara PS committed penetrative sexual assault on informant's daughter Miss X?

ARGUMENT

- 6. Ld. Addl. P.P submits victim girl who is only 5 ½ years old child stated about touching by accused, taking her to his house and child cry when accused touched means it is not proper touch because a child also know the touch of a person. The mother of the child remain intact in her statement and prosecution established the case against the accused beyond all reasonable doubt.
- 7. It has been argued by Id. defence counsel that accused is an innocent person and living alone at his house and evidence of father of the victim shown presence of land dispute and his evidence does not pointed happening of sexual assault and case of the prosecution not established against the accused.

PROSECUTION EVIDENCE

8. PW-1 Rekha Mallah is the informant of the case. Her evidence is that victim child is her daughter and she knows accused person. She deposed incident was took place in the year 2017 in the month of January at about 02.00 pm and at the time of incident she was not present at home and she went to her work where she work as domestic helper. She deposed leaving her victim daughter she went to work as at that time leg of husband got fractured 2-3 months prior to the incident. She deposed accused coming to her house offered biscuit to her victim daughter and lured her daughter to his house. When accused took away her victim daughter, her husband saw it and another person Karanti also saw it and after taking out her daughter in the house of accused, her daughter cried. Hearing cry of her daughter, her husband and other people went there and found that accused touched vagina, face and other private parts of her victim daughter and her husband informed the said incident to her over mobile phone. Thereafter she came home and asked her victim daughter as to what happened to her. To that her victim daughter told her that accused took her to his house in the name of giving biscuit and accused did not give her biscuit and instead accused touch her daughter's vagina, face and other private parts. She deposed police was informed and local people apprehend the accused at the place of occurrence and handed over accused to the police and thereafter she lodged ejahar. She deposed after lodging of ejahar, police took her daughter to

the Doctor for medical examination and thereafter her daughter was produced before the court and after recording of statement of her daughter she was given in her custody. **In cross** she stated she cannot exactly recollect the exact date of incident and she was not present at home at the time of incident. She stated she did not see the incident but she came from her work getting information about the incident. She stated accused Durjan Mallah is her contiguous neighbour and one boundary dispute was earlier taken place with accused family. "She denied defence suggestion that they wanted to purchase the land where accused Durjan Mallah resides by constructing his house; to send off accused Durjan Mallah from his resident and locality she filed this case against the accused Durjan Mallah; accused did not touch vagina, face and private parts of her daughter; accused did not committed the offence as mentioned in the ejahar and stated by her before the court." She further stated she does not know if Durjan Mallah lodged case against them alleging assault on him by the villager and her husband on the date of incident.

- 9. Evidence of PW-2 Jhantu Mallah is that informant is his wife and victim child is his daughter. He deposed incident was took place in the month of January, 2017 and at that time he was present at his home as his leg was fractured. He deposed hearing hue and cry of public and cry of his daughter he came out from the house with supportive stick and saw his daughter crying and he also saw accused Durjan Mallah manhandled by the public. He deposed he come know that accused Durjan Mallah had beaten his daughter and his wife lodged ejahar. He further deposed his victim daughter told him that accused had slapped her. **In cross** he stated he did not see the assault incident and long back there was land dispute between him and accused Durjan Mallah. He denied due to the earlier long back land dispute his wife lodged the case against accused as per his dictation.
- 10. PW-3 Miss X, is the victim child. Her evidence is that she knows accused Durjan Mallah and he lives near to their house. She deposed at the time of incident her father was present at home and her mother went to her work. Accused slapped her at his house. She deposed while she was playing accused Durjan took her to his house telling her that he will give her biscuit but accused did not give biscuit to her. **In cross** she stated accused Durjan Mallah slapped her. She denied accused Durjan Mallah did not slapped her and he only touched her cheek. She stated she cried and hearing her cry, other came and they beaten accused Durjan Mallah.

- 11. PW-4 Rajesh Choudhury deposed he is neighbour of informant Rekha Mallah and he knows victim child and accused person. He deposed incident was took place in the year 2017. On the date of incident when he returned home from his shop house to take papad for selling in his shop house, he heard from resident of their locality and from his mother that accused Durjan had committed rape on Miss X and local people apprehend him and assaulted. He deposed when he came to his shop house he learnt that accused was taken by police. He further deposed incident was took place in the evening time. **In cross** he stated he went to house at about 06.00 pm from his shop house and he heard marpit incident with accused was take place in front of his house. He stated he had not seen the marpit incident and he has no personal knowledge about the incident. He denied he did not heard from the resident of the locality and from his mother that accused had committed rape on informant's daughter Miss X.
- 12. Evidence of PW-5 Ahitan Bibi is that in the year 2017 on the day of incident, while she came for shopping in the market, she heard hue and cry and came to know that accused Durjan assaulted Miss X, victim child. **In cross** she stated she cannot recollect the exact date of incident. She had not seen gathering of people of the locality. She had not seen who had assaulted whom.
- 13. PW-6 Inspector Saidul Islam is investigating officer. His evidence is that on 03-01-17 while he was working as O/C at Bilasipara PS he had received ejahar from Rekha Malla. Accordingly he registered a police case vide Bilasipara P.S. Case No. 12/2017 u/s 4 of POCSO Act and endorsed SI Bijoy Kr. Das to investigate the case and SI Bijoy Kr. Das submitted the charge-sheet vide Charge-Sheet No. 178/2017 dated 29-04-2017 against the accused Durjan Malla u/s 4 of POCSO Act. He deposed during investigation SI Bijoy Kr. Das visited place of occurrence, drawn sketch map, recorded statement of the informant and other witnesses and victim, and produced victim before the court to record her statement u/s 164 Cr.P.C and after medical examination of the victim arrested accused and produced before the Court and after collecting medical report submitted charge-sheet vide Ext-4. In cross he stated he did not conduct the investigation of the case. He denied he does not know that his junior Police officer, the investigation officer Bijoy Kr. Das did not conduct proper investigation of the case.
- 14. PW-7 SI Bijoy Kumar Das is another I.O of the case. His evidence is that while he was working as S.I at Bilasipara PS on 03-01-17 Rekha Malla lodged written ejahar before O/C Bilasipara PS and O/C Bilasipara PS after registering a police case vide Bilasipara PS Case No. 12/2017 u/s 4 of POCSO Act endorsed

him to investigate the case. Thereafter he had recorded the statement of informant at the police station as informant was available at the police station and also recorded statement of victim child and thereafter took victim child to the Dhubri Civil Hospital for her medical examination and thereafter he had produce the victim child before the court to record her statement u/s 164 Cr.P.C. On the next day of lodging of the ejahar, he went to the place of occurrence i.e the house of accused Durjan Mallah, recorded statement of other witnesses, drawn the sketch map of the place of occurrence. He deposed on the date of incident village public apprehend accused Durjan Mallah and handed over to the Bilasipara PS and he produced the accused Durjan Mallah before the court after interrogating him. He deposed during investigation period he had collected medical report of the victim child. In cross he stated when accused was handed over to police station by the public injury was found on his body and public beaten the accused. He stated according to the case diary when the victim child cried, public apprehended the accused. He denied he has submitted charge sheet in this case without investigation.

- 15. PW-8 Dr. Rinku Ahmed is M.O. Her evidence is that on 03-01-17 she had medically examined victim child in connection with Bilasipara PS Case No. 12/17 and on examination found- identification mark- a mole on the back side of the neck; patient was oriented in space and time; pulse- 64 bpm; temperature-normal; respiratory rate- normal; clothing- fresh; examination of injuries- no injuries found; PV examination not done as the introitus is very small. She further deposed history of case is- one man tried to sexually assault the child. In her final opinion- patient was not consistent with recent sexual intercourse or assault. She deposed Ext-5 is medical report and Ext- 5(1) is her signature. Defence declined to cross examine PW-8.
- 16. CW-1 Rupam Medhi, Bench Assistant, in the court of Ld. SDJM(M), Bilasipara. He deposed on 05-01-2017 Ms. Panchali Shyam was working and posted as SDJM (M), Bilasipara. On that day then Ld. SDJM (M), Bilasipara Panchali Shyam recorded statement of Miss X, victim child u/s 164 Cr.P.C. He deposed he had identified the signature of then Ld. SDJM (M), Bilasipara Ms. Panchali Shyam as Presiding Officer present on the statement of Miss X recorded u/s 164 Cr.P.C. **In cross** he stated on 05-01-2017 he was not working as Bench Asstt.

DISCUSSION, DECISION & REASON THERE OF:-

17. Ext-1 is the ejahar. Ext-1 is lodged by PW-1 Rekha Mallah, mother of the child victim. It has been alleged by informant (PW-1) in her ejahar that on 03-01-

- 17 at about 02.00 pm accused Durjan Mallah enticed her victim daughter (PW-3) to his house telling her that he will give biscuit to her and made her sit on his lap and committed rape on her. When the little girl cried, local people came to the house of accused and caught accused red handed. Police was called and handed over to police. Now let me find out whether informant substantiates the statement before the court that was made by her in the ejahar on 03-01-17.
- 18. PW-1 informant at the time of adducing evidence stated accused offering biscuit to her daughter lured her daughter, taken her at his house and her daughter cried in the house of accused and hearing cry of victim child at accused's house neighboring people and her husband rushed there and saw accused touching her daughter's vagina, private parts and face and when her daughter came home, her daughter told her that accused touched her face, private parts. Her statement shown she has substantiate her statement made in the ejahar. Before the police she stated similar statement what she had made in her ejahar.
- 19. PW-1 in cross stated she did not witness the incident. Her in chief shown she is a domestic helper and was not present at home when incident was took place. She stated she heard incident from her daughter. At the time of incident child victim was aged about 4 years. When victim was examined she stated she knows accused Durjan Mallah and she was taken by Durjan Mallah while she was playing at her house telling her that he will give her biscuit and slapped her at his house and he did not give her biscuit. She stated at that time her mother was not present at home and her father was present at home. In cross she denied that accused did not slap her. She deposed in cross accused had touched her and she cried and other came to accused's house.
- 20. PW-1 not claimed that she was present at her home when incident was took place. Her statement shown she came home after hearing incident that was took place on her 4 years old child. Victim child corroborates accused enticing her (4 years old child victim) from her house to the house of accused in the name of giving biscuit when child was playing at her home. The taking away the child from her house by accused Durjan Mallah to his house in the name of giving biscuit and then not giving biscuit and made her cry touching her made it abundantly clear of his ill motive. Generally children loves to eat biscuit, while child was playing at her house, without taking consent, permission of the guardian of the child, moving the child establish means rea of the accused and then made her to cry by touching her only includes that his touch is fervor with sexual flavor and with this intention accused moves the child victim in the name

of giving her biscuit. Accused after taking child victim to his house did not give her biscuit. That again shown accused with bad intention taken away the child from her house without consent of parents of victim child. Accused lured the child to his house in the name of giving biscuit to her. Other PWs including father of the child victim who rushed to accused's house also stated child was noticed and found in the house of accused. The manner of taking away the child victim silently from her house shown his ill motive. Had accused intention was to give biscuit to the child, he could have given at her house when she was playing at her house. There is no justified reason comes in favour of accused secretly taking away of the child from her house when her father was present at home and when she was playing in her compound. The ill motive of accused present when he took away the child in the name of giving biscuit to her from her compound when she was playing. Accused did not give biscuit to the child after taking her at his house. He beaten her, touch her, made her cry and slapping a child on her cheek and child crying instantly on touching by accused at his house shown that accused did indecent act and his touch was indecent on the child and taking place of untoward incident establish. Touching of the child by the accused is an admitted fact and in cross victim child stated accused touch her and she cried.

- 21. Victim child has made her statement before the Ld. Judicial Magistrate and before Ld. Magistrate she has stated that accused bite on her cheek and put his hand inside her panty from her front side. Before court she stated accused slapped on her cheek after calling her at his home in the name of giving her biscuits and touch her. Her testimonies before the court together with the testimonies of informant make it abundantly clear that accused touched victim child in appropriate manner that is understood by a child.
- 22. Modesty is the property of woman and she carries the same with her birth. In State of Punjab vs Major Singh AIR 1967 SC 63 Hon'ble Apex Court in a case of seven month baby girl possess modesty or not held "The offence punishable under section 354 IPC is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define "modesty". What then is a woman's modesty? I think that the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under section 354 IPC. The culpable intention of the accused is the crux of the matter. The reaction of the

woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section. A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex."

- 23. Coming to the testimonies of PW-4 and PW-5 it has been appeared that when they came, they heard hue and cry and came to know accused assaulted child victim. PW-5 came for shopping in the market and heard incident at place of occurrence and PW-4 also heard that accused committed sexual assault on child victim who is the daughter of PW-1 and PW-2. Statement of PW-4 and PW-5 further pointed that accused was apprehended by public and handed over to police. PW-6 who was then O/C Bilasipara PS and PW-7 IO of the case corroborated the statement of PW-4 and PW-5 about handing over of accused by public after the incident. Victim child was taken to doctor PW-7 and PW-7 MO of the case stated as per history one man try to sexually assault the child. As victim was about 4 years old at the time of incident PV examination was not done as introitus is very small.
- 24. The victim child was taken to the house of accused by the accused from victim's compound in the name of giving biscuit is establish beyond all reasonable doubt and victim girl who went to the house of accused happily cried in the house of accused when he touch her and she made complaint of sexual assault on her by accused and when hearing cry of victim child, neighboring people rushed to the accused's house, found accused with victim child and police was called upon and agitated public manhandled accused and accused was handed over to the police. The entire evidence pointed the means rea of the accused and bring on record the sexual assault on the victim child by touching her inappropriately that made child cry loudly out of pain and fear. Here physical contact of the child by the accused took place and that contact is inappropriate that made child to cry loudly.
- 25. Section 7 of the POCSO Act (Protection of Children from Sexual Offences Act, 2012) says- 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.

- 26. Here, in the present case accused with sexual intent touched victim child and when accused's unfortunate touch is seen by the child victim she shouted and touching of the victim child by accused with bad intention which is present from the very beginning of his conduct of taking away of the child out of the custody of guardian without their consent, knowledge, permission and then making child to cry loudly by touching her body amounted to sexual assault on the child and accused with sole motive to sexually assault the child taken her to his house luring her in the name of giving biscuit and then after taking her at his house he touched the body of the child victim which is not appropriate and fervor with sexual intent fulfill the ingredients of section 7 of the POCSO Act.
- 27. In the case in hand evidence on record more particularly the statement of PW-1 and child victim and statement of victim recorded u/s 164 Cr.P.C which is proved by CW-1 only bring ingredients of section 7 of the POCSO Act against the accused Durjan Mallah. Situated thus, I find that provision of sec 222 Cr.P.C is applicable in the case in hand to render justice to the victim child of the case and same will not miscarriage the due procedure of law and there will not be any vitiation of proceeding and miscarriage of justice will not be done to accused when material on record constituted commission of offence u/s 7 of POCSO Act of which charge has not been framed by the Court. Hon'ble Apex court in a catena of decision held that-'It is true that section 222 Cr.P.C entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried'. Section 222 Cr.P.C is quoted below:-

28. Section 222 Cr.P.C- When offence proved included in offence charged-

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it;
- (2) When a person is charged with an offence and facts are proved which reduces it to a minor offence, he may be convicted of the minor offence, although he is not charged with it;
- (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged;

- (4) Nothing in this section shall be deemed to authorize a conviction of any minor offence where conclusions requisite for the initiation of proceeding in respect of that minor offence have not been satisfied.
- 29. Upon perusal of the evidence on record I am of the considered opinion that ingredient of section 7 of POCSO Act has been fully satisfied in this case against the accused Durjan Mallah. From the evidence on record I found accused Durjan Mallah is guilty of commission of sexual assault on victim child by taking her to his house luring her in the name of giving biscuit. Therefore I have come to my considerate judicious finding that when prosecution fairly able to bring home the ingredients of section 7 of POCSO Act against the accused Durjan Mallah beyond all reasonable doubt which attracts penal provision of section 8 of the POCSO Act, therefore, to meet the ends of justice and to give justice to the victim of this case, invoking of section 222 Cr.P.C is utmost required and accordingly by invoking provision of section 222 Cr.P.C , I hold accused Durjan Mallah guilty of under section 8 of POCSO Act and accused Durjan Mallah is convicted u/s 8 of the POCSO Act.
- 30. Considering the facts and circumstances of the case and nature of the offence and manner of the commission of the offence by the accused, I do not find any just ground to consider the accused u/s 360 Cr.P.C. and to extend the benefit of Probation of Offender Act in favour of the convicted accused and accordingly he is not considered under the said benevolent provision of the Act.

HEARING ON SENTENCE

- 31. I have heard accused and his counsel and prosecution side on the point of sentence. Accused stated he is poor person and plea of sentence of accused is written in a separate sheet enclosed with the case record. Ld. defence counsel prayed for leniency for convicted accused. Ld. Addl. P.P submits that accused be sentenced in accordance with law.
- 32. Considering the nature of the offence and facts and circumstances under which accused have committed the offence of rape on victim girl, spoiling of her life, loss of chastity and womanhood, mental agony suffered by the victim in view of the rape and her future agony because of the rape committed on her, her status and future life in the society because of the rape, and increasing number of sexual assault on child, I am of the opinion that accused does not deserve any leniency and he is to be dealt with exemplary punishment.

RESULT

33. Accordingly, convicted accused Durjan Mallah is sentenced to undergo rigorous imprisonment of 3 years and 10 months R.I and to pay fine of Rs 10,000/- i/d another 6 months R.I. u/s 8 of the POCSO Act.

ORDER

- 34. Accused Durjan Mallah is found guilty u/s 8 of the POCSO Act and he is convicted u/s 8 of the POCSO Act by invoking provision of section 222 Cr.P.C. Accordingly, convicted accused Durjan Mallah is sentenced to undergo rigorous imprisonment of 3 years and 10 months R.I and to pay fine of Rs 10,000/- i/d another 6 months R.I. u/s 8 of the POCSO Act. Accused Durjan Mallah is acquitted from charge of section 4 of POCSO Act. Bail bond of accused Durjan Mallah stands cancelled. Surety discharged.
- 35. Period under detention is set off u/s 428 Cr.P.C. Let furnish free copy of Judgment to convicted accused Durjan.
- 36. The convicted accused is told that he has right to appeal against the judgment and order of this court before Hon'ble High court through the jail authority or independently of his own. Convicted accused is further informed that he is entitled free legal aid to prefer appeal before the Hon'ble High court.
- 37. Send copy of judgment to learned District Magistrate Dhubri u/s 365 Cr.P.C.
- 38. Given under hand and seal of this Court on this 24th day of January, 2019 at Bilasipara.

(Smti S. Bhuyan)

Special Judge, Bilasipara

Dictated and Corrected by me,

(Smti S. Bhuyan) Special Judge, Bilasipara

Typed by, Swmkhwr Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

PW-1 Rekha Mallah,

PW-2 Jhantu Mallah,

PW-3 Miss X, victim,

PW-4 Rajesh Choudhury,

PW-5 Ahitan Bibi,

PW-6 Inspector Saidul Islam (I.O),

PW-7 SI Bijoy Kumar Das (I.O),

PW-8 Dr. Rinku Ahmed (M.O)

PROSECUTION EXHIBIT:-

Ext-1 Ejahar,

Ext-3 Sketch Map,

Ext-4 Charge sheet,

Ext-5 Medical report.

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT EXHIBITS :- Ext-6 Statement of Miss X recorded u/s 164 Cr.P.C

COURT WITNESS :- CW-1 Rupam Medhi

(Smti S. Bhuyan)

Special Judge, Bilasipara