IN THE COURT OF THE SESSIONS JUDGE, MORIGAON

<u>Sessions (Spl.) Case No.20/2014</u> U/S 448/354 (A) IPC, R/W Section 8 of POCSO Act

Present: Mr. Dhrupad Kashyap Das

Sessions Judge, Morigaon.

State of Assam

Vs.

Sri Puran Saharia Accused

Date of Charge :- 12.12.2014.

Date of recording evidence :- 08.06.2015, 06.08.2015, 05.10.2015,

15.03.2016 and 02.04.2016.

Date of Argument :- 22.05.2017.

Date of Judgment :- 30.05.2017.

Appearance for the Parties

Advocate for the State:- Mr. A. Kalam, Ld. P.P.

Advocate for the accused: - Mr. M. C. Sarkar, Ld. Advocate,

Mr. P. Mazumdar, Ld. Advocate.

JUDGMENT

1. Filing of an F.I.R. by one Arup Deka of village Nabahatia under Jagiroad P.S. in the district of Morigaon with the then O/C Jagiroad P.S. on 25.09.2014 has given rise to this prosecution case. In this F.I.R., it is alleged by the informant that on 21.09.2014 at around 11.30 A.M., while his minor daughter Miss – X (the real name is withheld to screen the victim from infamy), aged about 3 (three) years, 6 (six) months was sleeping inside the house; the accused, namely Puran Saharia entered into the house with bad-intention and

he bit on her cheek and on her private organ. The victim started to shout immediately and on hearing her shouting her mother came to the spot and save her daughter from the clutch of the accused.

On receipt of this F.I.R., O/C Jagiroad P.S. registered a case vide Jagiroad P.S. Case No.307/2014, U/s 448/354 (A) IPC, read with Section 8 of POCSO Act against the above-named accused and investigation was set in motion.

2. During the course of investigation, the I.O. visited the place of occurrence and drew the sketch map of the place of occurrence. The I.O. arrested the accused. He seized the original birth certificate of the victim and forwarded her to medical examination. The I.O. examined the material witnesses and produced the victim before the Magistrate to record her statement U/s 164 of Cr.P.C. Upon conclusion of investigation, the I.O. having found sufficient incriminating materials submitted the charge-sheet against the above-named accused for alleged commission of offences U/s 448/354 (A) IPC, read with Section 8 of POCSO Act. At the time of filing charge-sheet, the accused was languishing in jail and subsequently, he was released on court bail. Copies of relevant documents were furnished to him. Thereafter, this Court having heard learned Counsel of both sides and basing upon the materials on record, framed charge U/s 448/354 (A) IPC, read with Section 8 of POCSO Act against the abovenamed accused, which was read over and explained to the accused to which he pleaded innocence and claimed to be tried.

3. Point for determination:

(i) Whether the accused on the eventful day i.e. on 21.09.2014 at around 11.30 A.M. at village Nabahatia under Jagiroad P.S. in the district of Morigaon, committed house-trespass by entering into the dwelling house of the informant Arup Deka with intent to commit an offence?

- (ii) Whether the accused on the same day, time and place embraced the victim, a minor girl, and made physical contact and advances involving unwelcome and explicit sexual overtures?
- (iii) Whether the accused on the same day, time and place committed sexual assault on the victim girl, a minor, aged about 3 years 6 months, by biting on her cheek and vagina with sexual intent?
- 4. The prosecution in this case has examined as many as 8 (eight) PWs including the most vital witness, namely PW-1, the informant and PW-2 the victim. Upon conclusion of recording evidence of the PWs, the accused was subjected to examine U/s 313 Cr. P.C. with respect to the incriminating materials that surfaced in the evidence on record against the accused. The plea of the accused is of total denial. The accused declined to adduce defence evidence.
 - **5**. I have heard argument so advanced by Ld. Counsel of both sides. Considering the evidence on record, I have come to the following decisions.

DISCUSSION, DECISION AND REASONS THEREOF

- **6**. In this case it is alleged by the prosecution that on the eventful day the above-named accused by entering into the dwelling house of the informant, embraced the victim, the minor daughter of the informant with bad-intention and also committed sexual assault by biting on her cheek and vagina with sexual intent. Now let us discuss the evidence of various PWs in order to find out the truth of the case.
- (a) PW-1 (Arup Deka), the informant of this instant case stated in his evidence that he knows the accused person. The occurrence of the incident took place on 21.09. 2014 at around 11.00 A.M. At that time he was working in the house of Aghuna Deka, as he was a day labour. Then, at around 12.00 Noon his wife Nandita Deka came to his working place and informed that the accused bit his minor daughter on her private part and on her cheek. Thereafter, he along

with Aghuna Deka, Monai Chetry, Nitu Barman came to the place of occurrence and called the accused person to his house and on being asked, the accused person admitted his guilt. PW-1 further stated that he had seen mark of bite on the cheek of his daughter and on the following day his daughter got trouble to pass urine. Therefore, he informed the matter to Gaonburah and then a village meeting was convened at Na-Bahatia L.P. School, where the accused admitted his guilt. PW-1 has further stated in his evidence that after the village meeting, the Gaonburha referred the matter to police of Jagiroad P.S. and accordingly, PW-1 filed an ejahar at Jagiroad P.S. He proved Ext.1 the ejahar and Ext.1 (1) is his signature. PW-1 further stated that his victim daughter was medically examined and police also interrogated him.

In his cross-examination, PW-1 stated that the residence of Aghuna Deka is situated about ½ km. away from his house.PW-1 did not state before the police that he was informed by his wife, as police did not ask him. He further stated that the accused used to reside near his house. PW-1 denied the fact that he had previous enmity with the accused. PW-1 further denied the suggestion that the accused did not bite his daughter. He did not state before the police that he informed the matter to Gaonburha, as police did not ask him. He further stated in his evidence that he did not state before the police that a village meeting was held at Na-bahatia L. P. School, as police did not ask him. PW-1 also denied the fact that no such incident happened and he deposed falsely due to enmity with the accused.

(b) PW-2 (Miss-X), the victim girl stated in her testimony that on the eventful day she was sleeping on her bed and then one aged person came there, took her on his lap and bit her cheek. PW-2 further stated that the said person put his finger inside her private part and then she sustained pain and raised alarm.

In her cross-examination, she stated that she was not naked at the time of sleeping and at the time of incident she was wearing a frock and pant. PW-2 denied the facts that she sustained injury on her cheek due to mosquito

bite. She also denied the suggestion that she deposed in this case as tutored by her parents. She also denied the fact that the accused did not put his finger in her private part and she deposed falsely in this case. PW-2 further stated that at the time of incident her mother was cooking food.

(c) PW-3 (Smti. Nandita Deka) stated in her evidence that she knows the accused and the victim Miss-X is her daughter. According to her, the occurrence was took place on 21.09.2014 at around 11.00 A.M. at her house. At that time she was cooking food and then suddenly, she heard shouting of her daughter, who was sleeping in the room. She immediately rushed to the room and found the above-named accused who came out from the room and her daughter (the victim) was crying. On being asked, her daughter (the victim) told her that the accused bit her cheek and put finger inside her private part. PW-3 further stated that her husband was doing work in the house of Aghuna Deka. Immediately after the incident, PW-3 informed the incident to the wife of the accused and then Aghuna Deka, Nitu Deka and Monai Chetry who came to their house. They called the accused to her house and on being asked, the accused told them that he committed the mistake and asked to pardon him. Thereafter, the victim was brought to Bhakatgaon hospital and on the next day a village meeting was convened at Na-Bahatia L. P. School, where the accused admitted his guilt. PW-3 further stated that her husband filed the ejahar. She was interrogated by police and her daughter (the victim) was medically examined.

In her cross-examination, she stated that she has two daughters and her mother was also residing with them. The accused is residing near their house. PW-3 further stated that at the time of occurrence of the incident there was no other person and she did not see fingering by the accused on the private part of her daughter, but she had seen that the accused coming out from the room. She denied the facts that she does not see the accused coming out from her room. She also denied the suggestion that they had enmity with the accused person since long. PW-3 further denied the suggestion that she did not state before the police that accused put finger inside the private part of her

daughter. PW-3 again denied the suggestion that she did not see any bite mark on the cheek of her daughter. She denied the fact that the accused did not admit his guilt. She also denied the fact that she did not state before police that accused admitted his guilt at the village meeting.

(d) PW-4 (Subha Deka) stated in his evidence that he knows the informant and the accused. According to him the occurrence took place in the last year. After the incident, a village meeting was held about 1 ½ km. away from his house and he was called to attend the said meeting. Accordingly, he attended the said meeting and on reaching there, he came to know that the above-named accused had done some bad work with the victim Miss- X, aged about four years. PW-4 further stated that at the time, when the meeting was going on, the situation was hot and on seeing the mood of the people, he immediately informed the matter to police. PW-4 also took the accused to Jagiroad P.S. and handed over him to the police to save his life.

In his cross-examination, he has denied the fact that he stated before the police that he heard that accused did some bad work with the victim.

(e) PW-5 (Badan Mahanta) an independent witness, stated in his evidence that he knows the informant and the accused. According to him, on the eventful day, in the afternoon he was at his house. He was called to a village meeting, which was held at Sankarpur L. P. School and on reaching there he had seen strong gathering of people there. He also found that the people were very furious and they attempted to assault the accused and when they found that the situation was getting deteriorated, then to save the life of the accused, he along with some other by hiring a vehicle took the accused to Jagiroad P.S. and handed over him to the police.

In his cross-examination, he stated that he has no personal knowledge regarding the entire incident.

(f) PW-6 (Ganesh Deka @ Aghona) stated in his evidence that he knows the informant, victim and the accused. According to him, the occurrence of the incident took place about one year back. On that day, he was doing repairing

works in his house and he engaged the informant to do the work. Thereafter, at around 11.00 A.M. the wife of the informant came to his house and told them that her daughter was kissed and bitten by the accused. She stated before them that the accused bit her daughter on her cheek. PW-6 further stated that the victim was around three years of age at the time of incident of occurrence. The informant called him and then he went to the house of the accused. On being asked, the accused admitted that he kissed the victim but he refused the fact that he bit the victim, however, the accused asked them to excuse him. PW-6 further stated that on the following day, police personnel came to the place of occurrence and he also went there. Police recorded his statement.

In his cross-examination, PW-6 stated that he resides about 200/300 meters away from the house of the informant. PW-6 denied the facts that the accused did not bite and kiss the victim and the accused did not admit his fault before them.

(g) PW-7 (Dr. Madhushmita Baruah Deka) stated in her evidence that on 26.09.2014, she was working as Medical and Health Officer No.1 at Morigaon Civil Hospital. On that day, she examined Nilakhi Deka, daughter of Arup Deka of Na-Bahatiya in connection with Jagiroad P.S. Case No.307/2014 and found the following:

She had a history of rape by her so called grandfather.

Identification Mark: Scar Mark on her Right index finger.

Height: 3 feet 10 inches; Weight: 15 Kgs.

Teeth: Upper – 10, Lower – 10; Breast: Not developed,

Auxiliary hair : Absent; Public hair : Absent; Vaginal hymen : Present.

External injuries : Abrasion (2cm x $\frac{1}{2}$ cm x $\frac{1}{3}$ cm) on her right inner

thigh.

Vaginal injuries: Nil; Genital canal and Perineum: Normal.

Vaginal smear lab Regd. No.ML/137 dated 26.09.2014, No Spermatozoa seen.

X-Ray No.3724, 3729, 3726, 3727 dated 27.09.2014,

Reported by radiologist Dr. N. Ahmed, According to X-ray report the age of the girl is less than 5 years.

After examination, PW-7 opined that -1. Victim was sexually assaulted, 2. Abrasion on her right inner thigh, 3. Her age is less than 5 years.

PW-7 proved Ext.2 the medical report and Ext.2 (2) is his signature.

In her cross-examination, PW-7 stated that on the basis of injuries on her right inner thigh and the history of the child and her parents, she opined it as sexual assault. PW-7 further stated that it may be a self-inflicted injury, but keeping in view of the age of the child self-inflicted injury was on doubt. PW-7 further stated that if the child falls on a hard substance, such injury may be caused, but other part of the body must also received injury. Injuries cannot be seen by radiology, until and unless it is a bone injury. Superficial injury cannot be ascertained by radiological department. PW-7 denied the fact that she has given wrong opinion that the child was sexually assaulted.

(h) PW-8 (Birendra Bordoloi) stated in his evidence that on 21.09.2014 he was serving as S.I. of police at Jagiroad P.S. On that day, some women of nabahatia village came to the P.S. and filed an ejahar, which was registered by the then O/C of Jagiroad P.S. and entrusted him to investigate the case. PW-8 further stated that he was accompanied by the village people to the village Nabahatia. According to him, prior to their arrival in the said village, a village meeting took place and in that meeting, the village people assaulted the accused. The Gaonburha rescued the accused and handed over the accused to him and accordingly, he (PW-8) brought the accused to the police station and got him medically examined. PW-8 questioned the accused and then the accused informed him that he took the victim on his lap and cared her. The I.O. stated that as per the version of the informant and his wife, the accused bit the victim on her cheek. Thereafter, PW-8 having found materials, arrested the

accused and forwarded him to the Court. PW-8 further stated that the victim was medically examined at Morigaon Civil Hospital and after examination, the victim along with her mother was forwarded to the learned Court for recording statement U/s 164 of Cr. P. C. PW-8 further stated that he examined the

witnesses, drew up the sketch map of the place of occurrence and seized the original birth certificate of the victim. PW-8 proved Ext.3 the sketch map, Ext.3 (1) is his signature thereon and Ext.4 the seizure list, Ext.4 (1) is his signature thereon. PW-8 also collected the medical report of the victim and upon conclusion of investigation and having found sufficient materials; he submitted the charge-sheet against the accused. PW-8 proved Ext.5 the charge-sheet and Ext.5 (1) is his signature thereon.

In his cross-examination, he has stated that PW-3 Nandita Deka did not state before him that the accused put his finger in the private part of the victim and PW-4 Subha Deka did not state before him that the accused had done some bad work with the victim.

7. In this case, the victim (PW-2) is a minor girl of about 3 to 4 years old at the time of occurrence of the incident. She has become a POCSO victim for the alleged occurrence of the incident and the truthfulness of the entire prosecution case ultimately rest upon the testimony of this child witness. Despite the strong support and corroboration of the other witnesses; the evidence of the victim, who is a child witness, bears utmost importance for proving the prosecution case.

Section 118 of the Evidence Act lays down that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Thus, all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease, or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. The decision on the question whether a child witness has sufficient intelligence primarily rests with the trial Judge who notices his/her manners, his/her apparent possession or lack of intelligence, and

said Judge may resort to any examination which will tend to disclose his/her capacity and intelligence as well as his/her understanding of the obligation of an oath. A child of tender age can be allowed to testify if he/she has intellectual capacity to understand the questions and give rational answers thereto.

- **8**. In view of Section 118 of the Evidence Act, a child is competent to testify, if he can understand the question put to him, and gave rational answers thereto. The admissibility of the child witness has to be considered for reliability on scrutiny of his evidence, if the child is found to be reliable then only the child may be taken as a reliable witness. The statement of a child witness is to be examined very carefully in order to see that he/she was not tutored. The Court is prudent to require the evidence of child witness with close scrutiny.
- 9. In the instant case, the victim PW-2 was subjected to answer rational questions before recording of her evidence and her evidence was recorded after finding her as competent witness as she was able to answer rational questions. In her evidence, she specifically stated that at the time of occurrence of the incident, she was sleeping on her bed and at that time one aged person came to her room and took her on his lap and then said aged person bit her cheek. She also stated that the said aged person put his finger inside her private organ for which she sustained pain and subsequently, raised alarm. In her crossexamination, she stated that when she was sleeping she was wearing a frock and a pant. She further denied that mark on her cheek due to mosquito bite. She has also denied that she was tutored by her parents to depose before the Court. The reliability of this child witness can be based on the situation that she raised alarm as soon as she sustained pain because of the fingering by the accused on her vagina. Therefore, this child witness had the idea of raising alarm so that her shouting could be heard by her family members, who will come forward to save her.

A girl child, who is a victim of POCSO as well as other related offence is certainly an injured witness. In the case of testimony of such a child witness who sustained injury at the hands of assailant has to be considered very cautiously. When there was an incident in which the victim/injured witness did not sustain

injury; ordinarily that witness is unlikely to falsely implicated an innocent person. It is unlikely that an injured witness will do so, unless she has strong motivation to do so. Further, convincing evidence is also required to discredit an injured witness.

- **10**. Upon perusal of evidence, it appears that the testimony of the victim is not bereft of any corroboration. The parents of the victim i.e. PW-1 & PW-3 have clearly narrated the occurrence of the incident. The informant i.e. PW-1 who is the father of the victim girl saw mark of bite on the cheek of his daughter. Further, the accused also admitted his guilt before the village meeting, which was called for by the village people. The father of the victim girl found that her daughter could not pass urine after the incident. It is also revealed that no major contradiction could have been extracted during the cross-examination of the parents of the victim girl. PW-3, the mother of the victim girl stated in her crossexamination that as soon as she rushed to the room of her daughter after hearing her shouting she saw the accused person moving out from that room. The evidence of the parents of the victim and mark of injury which they have noticed on the cheek and private part of the daughter has clearly established that their minor daughter was subjected to sexual assault at the hands of the accused person. Further, the mark of injury sustained by the victim was also detected on the examination of the victim made by the M.O. (PW-7) in as much as, the M. O. found that the victim was sexually assaulted and there was abrasion in her right thigh. In cross-examination, the M.O. stated that it was a case of sexual assault and there is hardly any chance of self-infliction injury since the victim was a child of less than 5 (five) years old. The I.O. of the case i.e. PW-8 who conducted investigation had forwarded both the victim and her mother to the Magistrate for recording their statement. The I.O. after finding sufficient materials against the accused submitted charge-sheet against him.
- **11**. Under aforesaid facts and circumstances, this Court does not find any difficulty in acting on the testimony of the child witness when her testimony has fully inspired confidence and found to be worthy of credence. And, if we seek

corroboration of the statement of the victim then her parents as well as other independent witness have clearly supported the occurrence of the incident committed by the accused. This Court has un-doubtedly found the accused guilty and is of the view that the prosecution has clearly established that on the eventful day of the occurrence of the incident, the accused illegally entered into the room of the victim girl while she was sleeping and after taking her in his lap,

he had sexually assaulted her. Thus, the accused found guilty of offence punishable U/s 448/354 (A) IPC, read with 8 of the POCSO Act. Prosecution has established its case beyond any reasonable doubt.

SENTENCE

After arriving at such finding, I have heard the convict U/s 235 (2) Cr.P.C. on the point of sentence prescribed U/s 448/354 (A) IPC, read with Section 8 of POCSO Act. The sentences prescribed are explained to the convict. During hearing, the convict has pleaded innocence and also prayed for leniency and lesser punishment. After hearing the convict on the point of sentence, he is sentenced and punished with :-

S.I. for 1 (one) year and a fine of Rs.1,000/-, in default to pay the same, he is further sentenced to S.I. for 1 (one) month for offence punishable U/s 448 IPC,

and

R. I. for 3 (three) years and a fine of Rs.5,000/-, in default, to pay the same, he is further sentenced to S.I. for 6 (six) months for the offence punishable U/s 354 (A) IPC,

and

R.I. for 3 (three) years and a fine of Rs.10,000/- and in default to pay the same, he is further sentenced to S.I. for one year for the offence punishable U/s 8 of the POCSO Act.

It is directed that all the sentences are run concurrently. The period of imprisonment, which has already undergone by the convict shall be deducted from the total period of sentence.

In case of realization of the fine amount from the convict, the same shall be provided to the victim as compensation for her loss or injury U/s 357 (1)(b) Cr. P. C.

In the instant case, the victim deserves to receive compensation U/s 357-A of Cr.P.C. The DLSA, Morigaon shall decide and determine the compensation amount to be awarded U/s 357 – A Cr. P.C.

Send a copy of this judgment to the Secretary DLSA, Morigaon for necessary action and also to the District Magistrate, Morigaon.

Let a free copy of the Judgment be given to the convict forthwith.

Judgment delivered in the open Court on this 30th day of May, 2017 under my hand and seal.

Dictated & corrected by me

Sessions Judge

Morigaon.

Sessions Judge, Morigaon.

APPENDIX

A. Prosecution witness

1. PW-1: - Sri Arup Deka,

2. PW-2:- Sri Nilakhi Deka,

3. PW-3: - Smti. Nandita Deka,

4. PW-4 :- Sri Subha Deka,

5. PW-5: - Sri Badan Mahanta,

6. PW-6: - Sri Ganesh Deka & Aghona,

7. PW-7: Dr. Madhushmita Baruah Deka,

8. PW-8 :- Sri Birendra Bordoloi,

B. <u>Defence witness: Nil.</u>

C. Prosecution Exhibit:

- 1. Ext.1, the ejahar.
- 2. Ext.2, the medical report,
- 3. Ext.3, the sketch map,
- 4. Ext.4, the seizure list,
- 5. Ext.5, the charge-sheet.
- D. Defence exhibits :- Nil.

Sessions Judge, Morigaon.