#### IN THE COURT OF THE SPECIAL JUDGE ::::::: KOKRAJHAR

## Special Case No.33/2018

State of Assam
Versus
Sri Lutyash Hembrom ..... Accused

Present: Smti Mitali Thakuria,M.Sc,LLB, Special Judge, Kokrajhar

Ld. advocate for the State : Mr M.K.Ghose, Special P.P.

Ld. advocate for the accused: Mr S.Basumatary

Evidence recorded on :18.12.18, 20.3.19, 16.5.19, 19.6.19,

03.7.19, 22.10.19, 06.11.19, 18.12.19

Argument heard on : 02.01.2020

Judgment delivered on: 21.01.2020

## J U D G M E N T

1. The prosecution initiated the case on receipt of the first information report lodged by the informant Sri Mangal Murmu with the allegation that on 24.7.2018 at about 2 A.M. (night) his four years old minor daughter Amita Murmu has been kidnapped by the accused Lutyash Hembrom and after half hour they found their minor daughter inside the jungle and on enquiry she reported that the accused opened her panty and frock etc. and put his fingers inside her mouth and tried to misbehave with her and hence, the first information report.

- 2. On receipt of the first information report in Gurufela Police Out Post the same has been sent to Kochugaon P.S. for registration of the case making Gurufela O.P. GDE No.406 dated 25.7.2018. Accordingly the case has been registered as Kochugaon P.S. case No.24/2018 under sections 448/363 of IPC, read with section 8 of the Protection of Children from Sexual Offences Act and the case was endorsed to S.I. Manturam Barman for investigation. During investigation the I.O. visited to the place of occurrence and recorded the statement of the witnesses, arrested the accused, medically examined the victim and after ascertaining the minor age of the victim, the charge sheet has been filed by the I.O. under sections 448/363 of IPC, read with section 8 of POCSO Act against the accused Lutyash Hembrom. Relevant copies also furnished to the accused person and framed the charge under sections 448/363 of IPC, read with section 4 of POCSO Act against the accused person finding a prima-facie case. The charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 3. The prosecution side examined as many as 10 (ten) number of witnesses including the informant, victim, M.O. and I.O. as follows:-

#### The prosecution witnesses are:

PW 1 Miss Amita Murmu (Victim),

PW 2 Miss Noha Murmu,

PW 3 Sri Mangal Murmu (Informant),

PW4 Sri Surka Murmu,

PW5 Smti Tolomoy Hembrom,

PW6 Sri Robin Hembram,

PW7 Sri Arjun Murmu,

PW8 Dr Sushma Brahma,

PW9 S.I. Mantu Ram Barman.

PW10 Smti B.Gogoi (Magistrate),

The Defence witnesses are:

- 1. DW1 Sri Rangha Soren and
- 2. DW2 Sri Bimal Mardi.

4. The accused person took the plea of total denial while recording his statement under section 313 of Cr.P.C. and adduced two DWs in support of his case.

## 5. **Points for determination:**

- (1) Whether the accused committed the offence of house trespass of the land of the informant ?
- (2) Whether the accused kidnapped the minor victim from lawful guardian to an unknown place ?
- (3) Whether the accused committed the offence of penetrative sexual assault to the minor victim?

# **Discussion, Decision and Reasons thereof:**

- 6. After thorough perusal of the case record including the evidence, first information report etc. and hearing argument from both the parties, I have decided the case as follows with my reason thereof:-
- 7. The first information report of the instant case was lodged by one Sri Mangal Murmu alleging that on 24.7.2018 at about 2 A.M. his four years old minor daughter Amita Murmu has been kidnapped by accused Lutyash Hembrom and after half hour they found their minor daughter inside the jungle and on enquiry she reported that the accused opened her panty and frock etc. and put his fingers inside her mouth and tried to misbehave with her. Prior to the filing of the first information report the I.O. started investigation on receiving the information from the village headman Sri Robin Murmu when the villagers had confined the accused on the allegation that he tried to commit rape on the minor girl and accordingly the I.O. made GDE and visited the place of occurrence.
- 8. The informant adduced his evidence as PW3 and deposed that he along with his wife were sleeping in one room and his four years minor daughter

was sleeping in another room. In the night he heard hulla from another room and then came to know that his youngest daughter Amita Murmu is missing. There was hue and cry and all the neighbours also came out but, they could not trace her out and after some time she herself came out from the jungle and on enquiry he came to know that the accused Lutyash Hembrom took her inside the jute cultivation and asked her to sit on the ground and covering her mouth he opened her panty and frock and entered his finger into her mouth. Thereafter he entered his finger into the vagina and the village bicher was held and as per the decision of the villagers he lodged the first information report.

- 9. The minor victim of this case also gave her statement as PW1. After putting some preliminary questions and capacity of understanding of the minor is judged and then her statement was recorded with the help of interpreter in presence of her mother. She deposed that on the night of the occurrence the accused Lutyash Hembrom took her when she was sleeping with her elder sister Fulmoni. He took her inside jute cultivation, put off her panty and frock and then he entered his finger into her vagina and then into her mouth. She got hurt and cried and thereafter the accused Lutyash Hembrom fled away from there and then she came out and saw her father and other persons. She also deposed that she was brought before the learned Magistrate and she gave her statement.
- 10. PW2 is the elder sister of the victim who is also minor of 8 years old and hence her statement was also recorded after assessment of her capacity of understanding. She also identified the accused and deposed that on the night of occurrence she was sleeping with her sister Amita Murmu. Accused Lutyash Hembrom entered into their room and opened her panty and frock and she woke up and could identify him. But, out of fear she did not make any hue and cry and thereafter he went out of their house. After some time he again came inside the

room and this time he opened skirt of her elder sister Fulmoni when she woke up accused Lutyash went out of their room. After a while he again came inside of their house and took her youngest sister Amita. She then told to other sisters and reported the matter to their parents.

- 11. PW4 one of the neighbours and as per him all the neighbours came to the house of the informant Mangal Murmu hearing noise in his house and then he informed that his youngest daughter Amita has missing. They all were busy in searching the victim and after her recovery she reported that the accused took her inside the jungle and opened her frock and panty and entered his fingers into her mouth. She got hurt on the neck.
- 12. PW5 is the mother of the victim and corroborating the evidence of her husband she also deposed that they were sleeping in another room and their daughter were sleeping in another room when accused Lutyash Hembrom entered into their house, initially he touched her daughter Noha Murmu and tried to open her cloth and when she woke up he went out of the room and thereafter he again came inside the room and took their youngest daughter Amita Murmu. They came to know about the same from their daughter and thereafter she along with her husband and other villagers started searching their daughter and finally they recovered their daughter inside the jute cultivation. After her recovery she reported that accused took her inside the jute cultivation and entered his finger into her mouth.
- 13. PW6 Robin Hembrom, village headman deposed that on the day of the incident the informant and other villagers brought the accused Lutyash to his residence and on enquiry the informant told him that the accused took his minor daughter inside the jute cultivation and by opening her frock and panty etc. he put his finger into her mouth. The minor victim also reported the matter to him

and thereafter accused also confessed his guilt before the villagers. As per him the victim could not exactly pointed the accused Lutyash but, she stated that a person who took her is very much similar to the accused Lutyash.

- 14. PW7 another neighbour who also engaged himself in the night in searching the victim and after her recovery she narrated the incident to him.
- 15. PW8 is M.O. of this case and as per his opinion the victim is between 4 to 6 years old and she has not exposed any sexual intercourse.
- 16. PW9 is I.O. of this case and he deposed that getting the information from the village headman that the villagers kept confined a person who committed rape on the minor girl, he made GDE No.402 dated 25.7.2019 (Ext.4) and rushed to the place of occurrence. Accused was apprehended and he recorded the statement of the witnesses on the spot, victim was medically examined, accused was forwarded to the court and statement of the victim was also recorded under section 164 Cr.P.C. Apart from her statement the I.O. also recorded the statement of her parents and her elder sister under section 164 Cr.P.C. On completion of investigation he filed the charge-sheet against the accused Lutyash Hembrom under sections 448/366(A) of IPC read with section 4 of POCSO Act.
- 17. The prosecution examined the learned Magistrate, Smti B. Gogoi who was working as Sub-Divisional Judicial Magistrate (S), Kokrajhar during that period who recorded the statement of the victim Amita Murmu, her elder sister Noha Murmu and her parents.
- 18. From her evidence it is seen that the statements were recorded after seven days of the occurrence. She took help of one official employee as interpreter while recording the statement of the witnesses.
- 19. So from the testimonies of the prosecution witnesses discussed above, it is seen that PW1 and PW2, minor daughters of the informant clearly stated in their evidence that on the night of the incident the accused entered into

their house misbehaved all the sisters and finally he took youngest one Amita Murmu inside the jute cultivation and had penetrative sexual assault on her.

- 20. PW3 and PW5 father and mother of the victim respectively also corroborated their statements to the extent that the accused entered into their house and took their youngest daughter Amita Murmu inside the jute cultivation and had penetrative sexual assault on her. He opened the frock and panty, put his fingers into her mouth and also inside her vagina. PWs4, 5, 6 and 7 are the independent witnesses but, they also engaged themselves in searching the victim when they came to know about her missing and after her recovery the victim reported before them that the accused forcibly took her inside the jute cultivation opened her frock and panty and put his fingers into her mouth. So all the prosecution witnesses corroborating to each other has specifically stated that in the night of the occurrence accused Lutyash entered into the house of the informant and took their youngest daughter Amita inside the jute cultivation and had penetrative sexual assault on her.
- 21. So the cross evidence of all the witnesses have to be scrutinized carefully to arrive at a just decision. The learned advocate appeared on behalf of the accused has stressed on the point of identification of the accused person. PWs1 and 2 victim and eye witness of the case deposed that they could identify the accused Lutyash. It is also raised by the learned advocate that as per PW1 there was electric light inside their house and she could identify him when he was lifting her but, as per PW2 the electric light of their varandah was switched on but, the bulb inside room was switched off. So the learned advocate for the accused brought this contradiction and submitted that this is major contradiction between two vital witnesses. It is admitted that as per PW1 the light in varandah

of their house was switched off and as per PW2 the light of varandah of their house was switched on and the light inside of their house was switched off. The fact remained that in the night both PWs1 and 2 could identify the accused Lutyash in the light of electric bulb. Both the witnesses are of minors age and hence there may be some sort of discrepancies in regard to the switch on or off of electric bulb but, for that their entire evidence specially about the identification of the accused cannot be discarded. PW2 also stated that she could identify the accused easily as he belonged to their village and she knows him since earlier. From her evidence it also reveals that there was sufficient electric light in the varandah and the accused could easily be identified.

- 22. The Hon'ble Gauhati High Court in a case reported in 2001 (1) GLR 557 has held that- "over importance should not be attached to omission or contradiction or minor discrepancies which do not go to the root of the matter and shake the basic version of the prosecution."
- 23. Another point raised by the learned advocate for the accused as to why the informant waited to lodge the FIR only after the village bicher if the accused was identified in the night itself?
- 24. But, from the GDE of the I.O. as well as from the evidence of the witnesses it is very much clear that the incident took place in the midnight and the accused was brought from his own house on the next day only and then a village bicher was held which is very common in the village and in the society to which the parties belonged and the first information report was lodged only when the accused confessed his guilt before the villagers. It is very evident from the testimonies of the I.O. that he immediately rushed to the place of occurrence getting the information about the confinement of the accused by the villagers where from he apprehended the accused and also brought the victim and other witnesses and her parents to the police station. So merely for delay of lodging the

first information report for one day and for non-explanation of delay of the first information report could not be the only ground to disbelieve the prosecution case. The incident took place in the midnight of 24.7.18 and the first information report was lodged by the informant on the next day i.e. 25.7.18. It reveals from the evidence of the prosecution witnesses that after recovery of the girl the villagers enquired about the matter and came to know about the involvement of the accused and accordingly on the next day i.e. 25.7.18 he was brought for the village bicher and thereafter the first information report was lodged. So for such delay prosecution case cannot be disbelieved.

- Another point raised by the learned defence counsel is non-examination of another vital witness Fulmoni, elder daughter of the informant. But, the question arises as to whether due to non-examination of the witness Fulmoni creates any doubt in the veracity of the prosecution case. Admittedly Fulmoni was sleeping in the same room when the accused entered into their house and he also touched her body but, it is to be seen as to whether the prosecution failed to establish the case inspite of non-examination of vital witness Fulmoni. More so, Fulmoni is the elder sister of both PWs1 and 2 and hence it cannot be expected that she would have not deposed in favour of the prosecution if she would have been examined by the prosecution.
- During the course of argument the learned advocate for the accused also stressed on the point that the extra-judicial confession of the accused before the villagers. PWs testified that the accused was brought in the village bicher where the matter was enquired and accordingly he confessed before the villagers about the commission of offence. But, the learned advocate stressed on the point that his confession before the villagers was not voluntarily and it was under threat and compulsion and hence it cannot be accepted. But, all the prosecution

witnesses have denied when it was suggested that the accused confessed his guilt only out of fear and compulsion. But, at the same time it is admitted that some of the villagers present in the meeting assaulted the accused out of angerness but his confession before the villagers has established and all the prosecution witnesses corroborating to each other have deposed that the accused confessed his guilt when the matter was enquired. The defence also examined two witnesses who also claimed their presence in the meeting and deposed in favour of the accused stating that the villagers made him bound to confess in the village bicher. But, from the DWs it is very much evident that they have also heard about the incident from the villagers that the accused took youngest daughter of the informant inside the jute cultivation. DW1 claimed his presence at the time of village bicher but, DW2 was not present in the village bicher and he only had impression the accused confessed only when the villagers were assaulted the accused. From these DWs it is seen that they have also heard about the incident and the accused was brought in the house of the village headman only for the bicher for the alleged offence.

27. It is admitted that extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In <u>Madan Gopal Kakkad Vs</u> Naval Dubey and Another (1992) 3 SCC 204, the Apex Court after referring

- **to Piara Singh and Others Vs. State of Punjab (1977)4 SCC 452** held that "the law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstances mentioned in the confession must be separately and independently corroborated".
- 28. Here in the instant case it is seen that the prosecution not only brought the evidence of extra-judicial confession by the accused but also able to produce sufficient corroborative evidence to prove the commission of offence by the accused.
- 29. The circumstances of the prosecution case is that in the midnight the accused entered into the house of the informant where his daughters were sleeping and PW1 and PW2 could identify the accused in the light of electric bulb. Both the witnesses the victim and her elder sister are very specific and their identification of the accused could not be rebutted by cross-examining them. Both the minor girls specifically stated that they could identify the accused in the light of electric bulb.
- 30. In this context the learned advocate for the accused took the plea that both PWs1 and 2 i.e. victim and eye witness of the case are child witnesses and hence their evidence could not be accepted as they can be very easily influenced. Regarding the evidence of acceptance of the child witness a case of Hon'ble Apex Court reported in (2008) 12 SCC 565 Nivrutti Pandurang Kokate Vs State of Maharashtra can be cited which was relied on the case of Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra (2009) 6 SCC 712 (FB), the Hon'ble Supreme Court of India has held that-

"...... Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

As per section 118 of the Evidence Act, 1872, all persons shall be competent persons 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.

- 31. Coming to the medical evidence it is seen that the doctor did not find any injury mark on her body and private part and it is also opined that the victim has not been exposed to sexual intercourse. At the same time it is also opined by the doctor that the victim is between 4 to 6 years but not above 7 years.
- 32. In this context the learned advocate for the defence has submitted that there is no injury mark on the private part of the victim though it is alleged that he put his fingers into her vagina. It is alleged against the accused that he took the victim inside the jute cultivation made her laying on the ground put off her frock and panty and put his fingers into her mouth and vagina for which she got hurt. But, there is no evidence that he forcibly put his fingers into her vagina causing injury on her private part nor it is stated by the witnesses that the minor girls sustained injury on her private part while entering his fingers into her vagina but, it is alleged that she got hurt when the accused put his fingers into her mouth. PW1, minor victim of the case is very specifically stated that after opening her panty and frock the accused put his fingers into her vagina and then put his fingers into her mouth for which she got hurt. The mother of the victim

(PW5) also corroborated the victim and they deposed that the minor girl sustained injury on her mouth as the accused put his fingers into her mouth.

33. Section 3 of the POCSO Act read as follows:-

A person is said to commit "penetrative sexual assault" if-

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object of a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person of any other person.

As per the provision of this Act even manipulation of any part of the body of a child so as to cause penetration would amount to penetrative sexual assault which is available under section 4 of POCSO Act [2017 SCC Gau 576 - Sri Kamakhya Roy Vs State of Assam].

34. But, here in the instant case it is seen that penetrative sexual assault on the minor victim is not only established but it is also seen that the victim is a girl of four years and hence it comes under section 5 (m) of POCSO Act i.e. aggravated form of penetrative sexual assault. But inadvertently the charge was framed under section 4 of POCSO Act and the case was proceeded accordingly. However, it was within the knowledge of the accused that he is charged with the

allegation of penetrative sexual assault on the minor girl of four years old. During the entire proceeding also the accused had knowledge about the age of the victim and defence also cross-examined the minor victim and other witnesses accordingly. So no prejudice will be caused if the accused is convicted under section 6 of POCSO Act instead of under section 4 of POCSO Act as he got ample opportunity to defend his case for the charge levelled against him for a penetrative sexual assault on a minor girl of 04 years. The prosecution could establish that the accused kidnapped the minor victim, took her inside the jute cultivation and he entered his fingers into her mouth and vagina. Thus, it is seen that the case is well established against the accused under section 363/448 of IPC and under section 6 of POCSO Act.

- The Hon'ble Supreme Court in a case reported in (1983) 3 SCC 217 Bharwada Bhoginbhi Hirjubhai V. State of Gujrat has held that"testimony of victim of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should not find difficulty in acting on the testimony of the victim of sexual assault alone to convict an accused when her testimony inspires confidence and found to be reliable. Seeking corroboration of her statement before relying upon the same as rule in such cases amounts to adding insult to the injury".
- 36. In the instant case also it is seen that there is nothing to disbelieve the victim (PW1) irrespective of the fact that she is child witness. The defence also could not bring any evidence or reason to lodge false case against him by the informant. While recording the statement of the accused he only took the plea that the FIR was lodged against him only on suspicion and compelled him to confess about the guilt. But, he could not substantiate the plea that the FIR was

lodged by the informant only on suspicion. The evidence of both the child witnesses i.e. PWs1 and 2 could not be rebutted by cross-examining them or from the evidence of DWs. Rather, it is seen from the evidence of DWs that the accused was brought by the villagers and in the said meeting he confessed his guilt.

- 37. So considering the detail discussion made above, it is held that the prosecution is able to establish the case against the accused Sri Lutyash Hembrom under section 6 of POCSO Act and under section 448/363 of IPC and accordingly the accused is convicted under the said section of law.
- 38. I have considered section 360 Cr.P.C. to release the accused on probation. But, the heinous crime of committing penetrative sexual assault with 04 years old minor girl shakes our judicial conscience. The offence is inhuman. Sexual violence apart from being dehumanizing act is an unlawful intrusion of right of privacy and sanctity of a female and as such the accused does not deserve such leniency.
- 39. Heard the accused on the point of sentence under section 235 (2) Cr.P.C. which is written in separate sheet and tagged the same with case record. He submitted that he is poor person and has family burden and there is none to look after his wife, children and old ailing mother who solely depend on him and accordingly, he prays for his release without any sort of punishment.
- 40. The object of the sentence should be to protect the society and deter the criminal. Gravity of the offence, mitigating factors, manner in which the offence was planned and committed, prescribed punishment and the social abhorrence of the offences etc. are indicators for sentencing. Reference in this regard made to the Judgment of the Hon'ble Supreme Court reported in **2016 (16) SCC 441 (Jasbir Singh Vs Tara Singh).**

- 41. In the present case the accused not only lifted minor girl of 04 years of age but took her inside the jute cultivation and committed penetrative sexual assault on her and he also tried to had sexual assault to other sisters of the minor.
- 42. However considering the entire circumstances of the case, I find that it is not a fit case for sentencing the accused with the maximum punishment of imprisonment for life and hence **Rigorous Imprisonment for 10 (Ten) years** with fine will meet the ends of justice for the convicted section 6 of the POCSO Act and **Rigorous Imprisonment for 01(One) year** with fine for the section 363 of IPC and **Simple Imprisonment for 03(Three) months** for the section 448 of IPC will meet the ends of justice.

#### ORDER

- 43. In the result, the accused Lutyash Hembrom is hereby convicted under section 6 of the Protection of Child from Sexual Offences Act and section 363/448 of IPC and hereby sentenced with **Rigorous Imprisonment for 10 (Ten) years** along with fine of Rs.2,000/- (Rupees Two Thousand) only for the convicted section 6 of the POCSO Act. In default of payment of fine will undergo **Rigorous Imprisonment for two months.** Further he is sentenced with **R.I. for 01 (One) year** along with fine of Rs.500/- (Rupees Five Hundred) only for the section 363 of IPC and in default of payment of fine will undergo S.I. for 01 (One) month and further will undergo **S.I. 03 (Three) months** for the convicted section 448 of IPC. All the sentences for imprisonment will run concurrently. The period of custody of the accused shall be set off from the period of sentence, if any.
- 44. Free copy of the judgment be furnished to the convict Lutyash Hembrom under section 363 of Cr.P.C. and also a copy of the Judgment be furnished to the learned District Magistrate, Kokrajhar complying the provision of under section 365 of Cr.P.C.

17

The judgment is delivered in the open court and given under my hand and seal of the Court on this 21st January/2020 at Kokrajhar Court.

Dictated & corrected by me

Special Judge,

Kokrajhar

Special Judge,

Kokrajhar

## **Appendix**

## The prosecution witnesses are:

PW 1 Miss Amita Murmu (Victim),

PW 2 Miss Noha Murmu,

PW 3 Sri Mangal Murmu (Informant),

PW4 Sri Surka Murmu,

PW5 Smti Tolomov Hembrom,

PW6 Sri Robin Hembram,

PW7 Sri Arjun Murmu,

PW8 Dr Sushma Brahma,

PW9 S.I. Mantu Ram Barman,

PW10 Smti B.Gogoi (Magistrate),

# <u>The Court Witness is</u>: Nil

#### The Defence witness is:

- 1. DW1 Sri Rangha Soren and
- 2. DW2 Sri Bimal Mardi.

#### The exhibited documents are:

- 1. Ext-1 ... Medical report of the victim,
- 2. Ext.2 ... Charge sheet,
- 3. Ext.3 ... FIR,
- 4. Ext.4 ...Extract copy of GDE,
- 5. Ext.5 ... Sketch map,
- 6. Ext.6 .... Statement of victim Amita Murmu,
- 6. Ext.7 ....Statement of witness Noha Murmu,
- 7. Ext.8 ....Statement of witness/informant Mangal Murmu,
- 8. Ext.9 ....Statement of witness Tolomoy Hembrom.

The Defence witness and exhibit: Nil.

Special Judge, Kokrajhar