IN THE COURT OF THE SPECIAL JUDGE::::UDALGURI

Present : Sri. P. Saikia, Special Judge, Udalguri.

SPL (POCSO) 02/2016

State of Assam

-Vs-

Basu Pariga.....Accused.

For the Prosecution: Mr. M. Khaklari, Addl. Public Prosecutor.

For the Accused : Mr. Jayanta Kr. Brahma, Learned Advocate.

Evidence recorded on : 01-06-16: 19-08-16: 06-09-16:

22-09-16: 02-11-16: 20-12-17:

02-01-19.

Argument heard on : 06-05-2019. Judgment delivered on : 20-05-2019.

JUDGMENT

The prosecution case in a narrow compass is that on 26-10-15, the informant Nandalal Gour lodged an FIR with the Officer-in-Charge of Harisinga P.S. stating amongst others, that on 18-10-15, the accused Basu Pariga committed penetrative sexual intercourse with his minor daughter aged around 9 years old (real name is withheld and henceforth referred to as the victim). Out of fear his daughter did not disclose about the incident to anyone till 25-10-15, when she revealed about the incident.

- Basing on the FIR Harisinga P.S. case no. 64/15 under Section 6 of POCSO Act was registered and police commenced the investigation of the case.
 On conclusion of the investigation the police submitted the charge-sheet against the accused Basu Pariga under Section 4 of the POCSO Act to face trial.
- 3. On receipt of the Charge sheet, copies of documents under Section 173 Cr.P.C. were furnished to the accused after his due appearance on the strength of the process issued by this Court. Whereupon my learned predecessor-in-office having found a prima facie case and adequate materials to frame charge against the accused under Section 4 of the POCSO Act, was pleased to frame formal charge thereunder and the accused pleaded not guilty to the charge when the same was read over and explained to him and claimed to stand trial.
- 4. The prosecution in order to prove its case examined as many as ten (10) witnesses including the informant, victim, M.O. and I.O of the case. The prosecution also relied on certain documents marked as exhibits in support of its case.
- 5. On completion of the recording of the prosecution witnesses, the accused was examined under Section 313 Cr.P.C. The plea of the accused is of total denial and false accusation on concoction. However, no evidence was adduced on behalf of defence.
- 6. In the context of the above facts and circumstances of the case, the point for determination in the present case is set up and framed as under:-
 - (I). Whether accused on 18-10-15, at village Hatigarh Tea Estate Line No. 3 under Harisinga P.S. committed penetrative sexual assault upon the victim, aged about 09 years, and thereby committed an offence punishable under Section 04 of POCSO Act.?
- 7. I have heard arguments put forward by the learned counsel for both the sides and have also appraised the evidences on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 8. PW1, Dr. Bhagirath Dey examined the victim on 26-10-15 in connection with this case being Harisinga P.S. Case No. 64/15 under Section 06 of POCSO Act and found the following:-
 - (1) Finding does not suggested that rape had occurred.
 - (2) Pregnancy test normal.
 - (3) Approximate age 10-11 (Ten to Eleven) years.
 - Ext.-1 is the medical report and Ext.-1(1) is his signature.
 - In cross-examination he has stated that other than sexual assault rupture may occur for other reasons.
- 9. PW2, Nandalal Gour is the first informant of the case. It emerges from his evidence that victim is his daughter and he knows the accused. When the occurrence took place his daughter was around 9 years old. He was not present at his home when the occurrence had taken place as on that day in the morning at around 8 AM he came out for his duty in the tea garden and came back home at around 5 PM. The occurrence took place in the house of the accused. On that day his daughter went to the house of her maternal aunt i.e. the sister of his wife. House of said maternal aunt is situated nearby the house of accused. He does not know what had actually happened. Some people apprehended the accused and handed him over to the police. He came to know that something wrong ("Dhara-Dhari") was done by the accused to his daughter. He lodged the FIR marked through him as Ext.2 and Ext.2(1) is his signature.
- 10. In cross-examination he has stated that his daughter did not disclose anything to him about the alleged occurrence nor did he ask her about the occurrence. The police did not ask him about the alleged occurrence.
- 11. PW3 is the victim, who is a minor. Her evidence was recorded on oath after testing her competence as a child witness and having found her attained

the maturity of understanding she was administered oath before recording her evidence. As per her evidence she knows the accused. She is 9 years old. On the day of occurrence she went to the house of her maternal aunt, Purnima Pariga i.e. sister of her mother. The house of the accused is situated nearby the house of her maternal aunt. At the time of occurrence she was playing in the courtyard of her maternal aunt. At that time accused asked her to come to the house of the accused to have banana. Accordingly she went to the house of the accused. Accused called her inside the room and caught hold of her hand. Then she pushed the accused and somehow managed to escape and came to her maternal aunt's house. She informed the matter to her maternal aunt. When she returned home I informed the occurrence to her mother, Rina Gour. Magistrate recorded her statement and she put her thumb impression in the statement.

- 12. In cross-examination she has stated that she was playing with her brothers and sisters. She knows how to ride bicycle.
- 13. PW4, Rina Gour is the mother of the victim. Her evidence demonstrates that the occurrence took place on a Sunday at around 12.00-01.00 PM. She worked as a tea garden labourer and Sunday is their payment day. At the time of occurrence she was at the tea garden to receive her weekly payment. On the day of occurrence her daughter went to the house of her maternal aunt, Purnima Pariga i.e. her younger sister. After 5/6 days her daughter came back home and she complained stomach pain. She found some behavioral change in her preferring to remain silent. Her younger sister, Dipali Gour came to their house and informed her that accused sexually assaulted her daughter. She then rushed to the house of her sister, Purnima Pariga and enquired about whether any incident as stated by Dipali occurred. Purnima stated that she had no knowledge about such incident. In the meantime the matter was spread in the locality and before enquiring about the matter with her the local people assaulted the accused and informed the police. Police came and took the accused to the police station. Initially her daughter did not disclose about the matter but subsequently when she insisted she told her that on the day of

occurrence the accused person caught hold of her hand with some ill intention but she could manage to escape from his clutches. She told her that pushing the accused she managed to flee away. Her husband lodged the ejahar and Police produced her before the Magistrate and recorded her statement and she put her thumb impression in her statement.

- 14. In cross-examination she has stated that the accused is the elder brother of the husband of her sister Purnima Pariga. On the day of occurrence the victim was in the house of her maternal aunt, Purnima Pariga. She came to know about the incident after about 9 days.
- 15. PW5, Purnima Pariga as stated to the effect that the informant is her elder sister's husband. Accused is her brother-in-law i.e. her husband's elder brother. Victim is the daughter of her elder sister. At the time of occurrence she was not in her home. She came out for her duty in the tea garden. Garden authority provided them house accommodation consisting of two rooms. In one room she alongwith her family members reside and in another room accused resides. While victim was playing outside accused called her to have banana. Accordingly victim went to the room of the accused. The accused caught hold of the hand of the victim with intention to sexually assault her. But the victim could somehow manage to escape. In the evening, she returned home but the victim did not disclose anything to her. Victim went to her home and told the occurrence to her mother. Thereafter, her elder sister narrated the incident to her. The neighbouring people came to know about the occurrence. While she returned home on the day of occurrence she found the victim keeping mum. She asked her whether anything wrong was done but she did not tell anything out of fear.
- 16. In cross-examination this witness has stated that the victim left her home after 3 days of the occurrence and during these period of 3 days victim did not disclose her about the occurrence. She has three children. They are aged 8

years, 5 years and 3 years respectively. House of Raja Praja and Lakhindhar Baraik are situated nearby her house.

- 17. PW6, Christopher Minj; PW7, Madan Kumar Nayak and PW9, Lakhindar Baraik are all hearsay witnesses. They have stated in a similar fashion that they only heard about the incident. According to them on the day of occurrence the accused caught hold of the hand of the victim and then somebody informed the matter to the police and police apprehended the accused.
- 18. In cross-examination they have stated that they did not have any discussion with the victim about the incident.
- 19. PW8 Miss Dipali Gour, has deposed to the effect that about 3 years ago she heard that while the victim was playing in the courtyard of the accused, the accused called her. The accused caught hold of her hand. Then the victim bit on his hand and came out. She gave her statement before the Magistrate vide Ext.3 wherein Ext.3(1) and 3(2) are her signatures.
- 20. In cross-examination she has revealed that she has not seen the incident. The accused is the grandfather of the victim.
- 21. PW10, Reba Kanta Deka is the Investigating Officer of the case. He has stated to the effect that on 26-10-15, he was posted as Officer-in-Charge Harisinga P.S. On that day one Nandalal Gour lodged an FIR, being the then O/C of the Harisinga P.S. he registered a case being Harisinga P.S. Case No. 64/15 under Section 6 of POCSO Act and he himself investigate into it. After conclusion of investigation he laid the charge-sheet against the accused Basu Pariga under Section 4 of POCSO Act. He proved and marked the charge-sheet as Ext.-4. Ext.-4(1) is his signature.
- 22. In cross-examination he has stated that the incident had occurred on 18-10-15, and the FIR was lodged on 26-10-15.

- 23. On careful appraisement of the evidences on record as discussed above what has emerged at the outset from the testimony of the doctor, PW1 who examined the victim in connection with this case the commission of rape on the victim has been totally ruled out by him as he found no sign of recent sexual intercourse with the victim (PW3) nor did he find any injury on her private parts. As per the medical report of PW1, the approximate age of the victim was 10-11 (ten eleven) years as per radiological examination.
- 24. Though the M.O. (PW1) has ruled out commission of rape on the victim, it is well settled that rape is a crime and not a medical condition. It is not necessary that there should be complete penetration of penis with emission of semen and rapture of hymen. It is therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In this context, the Rajasthan High Court in the case of State Of Rajasthan And Anr. vs Gopal And Anr reported in RLW 2006 (1) Raj 604 has observed that in such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a legal crime and not a diagnosis to be made by the Medical Officer treating the victim. The only statement that can be made by the Medical Officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.
- 25. In the backdrop of the above legal proposition it is also germane to point out that the Courts while trying an accused on the charge of penetrative sexual assault/rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.
- 26. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. Prosecution case has to stand on its own legs. Unless the

offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. [Vide: Tukaram and Anr Vs. The state of Maharashtra, (2979) 2 SCC 143; and Uday Vs. State of Karnataka, (2003) 4 SCC 46].

27. The Court is duty bound to appreciate the evidence in the totality of the background of the entire case. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The apex Court in Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171, has held as under:-

"It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances".

28. In Rajoo & Ors Vs. State of Madhya Pradesh, (2008) 15 SCC 133, this Court held: (SCC p. 141, para 10) (P. 861, Para 9)

"10.....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

The court however, further observed:

"11......It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In Tameezuddin @ Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566: (AIR 2009 SC (Supp) 2519, Para 7), this Court held has under:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

29. Now analyzing the testimony of the victim (PW3) who is the alleged victim of rape and a child witness it appears that her evidence has totally demolish the material particular of the case disclosing no iota of evidence as to commission of penetrative sexual assault by the accused which is contradictory to the First Information Report lodged by her father (PW2), who is also admittedly not an eyewitness to the occurrence. The victim (PW3) has stated that at the time of occurrence she was playing in the courtyard on her maternal aunt. At that time accused asked her to come to the house of the accused to have banana. Accordingly she went to the house of the accused who called her inside the room and caught hold of her hand. Then she pushed the accused and somehow managed to escape and came to her maternal aunt's house and she informed the matter to her maternal aunt. So it is evident that the victim (PW3)

has not made even a whisper as to commission of penetrative sexual intercourse by the accused at his house. As a result of such contradictions in the testimony of the victim (PW3) and the FIR Ext.-2 the very genesis of the prosecution case has become doubtful as to happening of such an incident at the material time. That aside the statement of the victim recorded under Section 161 Cr.P.C. and her statement recorded under Section 164 Cr.P.C. are also not at all compatible with her own testimony before the Court. In her statement under Section 164 Cr.P.C. she has stated that she was subjected to penetrative sexual intercourse by the accused, but in her testimony she has kept mum in regard to this material aspect. As a result of such glaring inconsistencies in between the testimony of the victim (PW3) and her statement recorded under Section 164 Cr.P.C. her evidence has become extremely doubtful to treat her as a truthful witness. Her statement is found to be inherently improbable and contrary to natural course of human conduct inasmuch as the victim (PW3) after commission of the allege penetrative sexual intercourse by the accused did not disclose to anyone till the lapse of five days of the incident. It is beyond comprehension as to why the victim (PW3) had remained silent being a tendered age child victim after commission of penetrative sexual intercourse by the accused. Even if it is assumed that if she had under gone forceful penetrative sexual assault by the accused who was an adult person of 40 years old at the time of occurrence she would have definitely suffered injuries on her private parts being a victim of tender age but the same was not noticed by any of her family members including her parents nor she had stated about the incident for the reason best known to her nor any injury was detected by M.O. (PW1) in her private parts or any external injury on her person.

- 30. Even if the victim (PW3) narrated about the incident after five days of the incident to her father (PW2) and her mother (PW4), it is beyond understanding as to why first information was not lodged immediately.
- 31. It is the testimony of the first informant (PW2) that the FIR was lodged on 26-10-15, and the occurrence had taken place on 18-10-15, but delay of

lodging the FIR inordinately has not been explained satisfactorily and therefore delay in lodging the FIR has cast doubt as to the veracity of the incident, when PW2, first informant has categorically revealed in his examination-in-chief itself that as well as in the cross-examination that he does not know what had actually happened and his daughter did not disclose anything to him about the allege occurrence nor did he asked her about the occurrence.

32. Now turning to the testimony of the mother of the victim, PW4 it transpires point blank that her evidence is also full of exaggeration and not at all consistent with the material particular of the case coupled with the fact that she is also admittedly not an eye witness to the occurrence. Her evidence is that after 5/6 days her daughter came back home from her aunt's house and she complained stomach pain and thereafter one day her younger sister Dipali Gour came to their house and informed her that accused had sexually assaulted her daughter is bereft of truth so much so when the victim (PW3) did not disclose about commission of sexual assault by the accused while she was staying at her aunt's house, how come the sister of PW4, Dipali Gour came to know that accused had sexually assaulted the victim (PW3) and why Dipali Gour (PW8), the sister of the mother of the victim, PW4 did not tell immediately about such a serious incident to her sister PW4, who is the mother of the victim. On analyzing the evidence of Dipali Gour (PW8) it appears that her evidence is contradictory to the testimony of the victim herself. She has stated that on the day of occurrence the accused called the victim (PW3) while she was playing in the courtyard of the accused. Thereafter, the accused caught hold of her hand, but the victim bit on his hand and came out. Such a conflicting evidence of PW8 is not worthy of acceptance inasmuch as though she stated to have disclosed before PW4, the mother of the victim that on the day of occurrence the accused sexually assaulted her daughter (PW3), but she has not stated in her evidence on this material aspect of the case. Furthermore, if she knew about committing sexual assault on the victim (PW3) by the accused on the day of occurrence she ought to have immediately talked about the incident to the mother of the victim. But no such report has been made by her for the reason best known to her. It is

12

seen from her evidence that she did not witness the incident of sexual assault on the victim by the accused on the day of occurrence. This witness has also narrated a different story by completely digressing from the material particular of the case disclosing for the first time in her evidence before the Court that accused tired to molest the victim (PW3) but she managed to escape by biting on the hand of the accused which has not been spoken by the victim herself. So it is obvious that PW8 has spun out a new story which is contrary to the substratum of the prosecution case. Hence, the testimony of PW8 cannot be acted upon in support of the prosecution case.

33. Be that as it may the statement of the PW4 in this regard is not at all believable inasmuch as she has herself stated in her evidence that at the time of occurrence her daughter was staying at the house of another sister Purnima Pariga and when she enquired about the incident from her as stated by her sister Dipali then Purnima Pariga stated that she had no knowledge about such an incident. Purnima Pariga in her evidence as PW5 has also stated in no uncertain terms that the victim left her home after three days of the occurrence and during these periods of three days victim (PW3) did not disclose her about the occurrence. So it is amply evident that PW5 was not aware as to the commission of sexual assault by the accused on the victim (PW3) while she was staying at her home. Therefore, the hearsay evidence of PW2, the father of the victim; PW4, the mother of the victim; PW5 and PW8 the aunts of the victim have suffered from material contradictions, inconsistencies in respect of the broad spectrum of the prosecution case in the face of the testimony of the victim herself (PW3) that on the day of occurrence the accused had not committed penetrative sexual assault on her except catching hold of her hand but she managed to escape. When the victim (PW3) has herself nullified the prosecution case as regards commission of sexual assault on her by the accused, the question pops up as to whether the testimony of the victim (PW3) could be believed so far as attempt on the part of the accused to outrage her modesty. But on close scanning of her evidence it is found that her evidence is full of embellishments, improvements and contradictory to the First Information Report (Ext.-2) itself and as such her evidence is found to be not intrinsically reliable and inherently improbable having found no sterling quality as to the credibility of her evidence to impress the Court as a truthful witness. So her evidence is totally discarded to bring home the charge leveled against the accused.

- 34. Situated thus, the evidence of the victim (PW3) has failed to satisfy the test of unimpeachable evidence to record conviction of the accused. Having found the evidence of the victim and other interested witnesses unreliable and inconsistent on the material particular of the case and for that matter, the accused is entitled to benefit of doubt.
- 35. To sum up in view of the cumulative consideration on the evidence on record, it can be safely held that accused Basu Pariga is found not guilty under Section 4 of POCSO Act and, thus, he is acquitted thereunder. Set him at liberty forthwith.
- 36. Bail bond executed by the accused person and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.
- 37. Judgment signed, delivered and pronounced in the open court today the 20th day of March, 2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia)
Sessions Judge,
Udalguri.

(P.Saikia) Sessions Judge,

Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Dr. Bhagirath Dey.

ii)PW2 Nandalal Gour.

iii)PW3 Victim.

iv)PW4 Rina Gour.

v)PW5 Purnima Pariga.

vi)PW6 Christopher Minj.

vii)PW7 Madan Kumar Nayak.

viii)PW8 Dipali Gour.

ix)PW9 Lakhindar Baraik.

x)PW10 Reba Kanta Deka.

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 Medical report.

ii) Ext.2 FIR.

iii) Ext.-3 Statement of Dipali Gour.

iv)Ext.4 Charge-sheet.

Dictated and corrected by me.

Sessions Judge,

Udalguri.