CAUSE TITLE POCSO Case No. 79/15

Informant: Sri Paban Bhumij,

S/o- Late Kondra Bhumij, R/o- Dikom Sessa Gaon,

PS- Lahoal,

District- Dibrugarh.

Accused: Sri Sanjib Pator,

S/o- Sri Bishnu Pator, R/o- Kuhiarbari Gaon,

PS- Lahoal,

District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor.

For the Defence: Mr. A Rob, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 79/15 G.R. Case No. 2956/15

> > State of Assam

-Vs-

Sri Sanjib Pator

Charges: Under Section 6, read with Section 5(m) POCSO Act.

Date of evidence on : 22-03-16, 22-05-16, 25-05-16, 07-11-16 and 08-12-16.

Date of argument : 19-12-17. Date of Judgment : 17-01-18.

JUDGMENT

- 1) The prosecution case that stems out from the FIR is that on 19-10-15, at about 3:30 pm, Sri Sanjib Pator (hereinafter the accused) who was working as a labour in Sri Paban Bhumij's (hereinafter the informant/complainant) house, committed rape on the nine year old niece of Sri Paban Bhumij. The accused was apprehended and handed over to the police. The informant lodged an ejahar which was registered as GD Entry No. 301 dtd. 19-10-15 and the same was forwarded to Lahoal Police Station. The FIR was registered as Lahoal PS Case No. 747/15 under Section 376 of the Indian Penal Code (IPC in short), r/w Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the POCSO Act) and SI Debojyoti Phukan was entrusted with the investigation.
- 2) The investigating officer (IO in short) embarked upon the investigation and forwarded the victim to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (CrPC in short). The victim was forwarded to the medical officer for examination. The IO also went to the place of occurrence and recorded the statements of the witnesses and prepared the Sketch-Map. On finding prima facie materials, the IO submitted Charge-Sheet against the accused under Sections 376(f) IPC, r/w Section 8 of the POCSO Act.

- 3) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 6 of the POCSO Act was framed, read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced the evidence of eight witnesses including the medical officer (MO in short) and the IO and exhibited several documents. The accused cross-examined the witnesses in extenso to refute the charges. To the circumstances arising against him, the answers of the accused depicts a plea of total denial.

SUBMISSIONS:

5) The learned Public Prosecutor Smti. Runumi Devi and learned Addl. Public Prosecutor Smti. Sehnaz Akhtar submitted that this case has been proved beyond reasonable doubt and stringent punishment ought to be inflicted on the accused to set an example and to deprecate such offences. On the contrary, the learned defence counsel laid stress in his argument that this case is bereft of evidence and is replete with contradictions and the accused deserves acquittal.

POINTS FOR DETERMINATION:

- 6) To decide the case in its right perspective, the following points are apposite to be taken up for decision:
 - i. Whether the accused committed agravated penetrative sexual assault on the nine years old victim X?

DECISION THEREON AND THE REASONS FOR THE DECISION:

- 7) To decide the case in its right perspective, it is necessary to delve into the evidence.
- 8) The victim stated as PW-1 that she used to stay with her maternal uncle and at that time, the accused also used to stay in her uncle Paban Bhumij's house. Her mother passed away and so to pursue her studies, she used to stay in her uncle's house. The incident took place prior to Durga Puja of 2015. On the day of the incident, at about 4:00 pm, she went with her cousin Lobin Bhumij to the field to collect grass. After cutting grass, her brother returned home. She met the accused who suggested her to accompany him so that she could show her kushia fish (eel). At that time, the accused caught her and pushed her to the ground. He removed her panty and inserted his penis in her private part, gagging her in order to prevent her from screaming.

She somehow managed to escape from the accused and she carried her panty in her hand and rushed towards her house. When she reached home, she informed her aunt about the incident. Then her aunt went out, searching for the accused person. In the evening, when her uncle returned, her aunt narrated about the incident to her uncle. She changed her clothes and took bath. Her uncle informed the Gaonburah about the incident. She and her uncle went to the police station and the police recorder her statement. On the next day, she went to Assam Medical College & Hospital, Dibrugarh for medical examination. She also appeared before the Magistrate who recorded her statement. Ext. 1 is her statement before the Magistrate and Ext. 1(1) upto Ext. 1(3) are her signatures.

- 9) It is pertinent to mention at this stage that the witness was not administered oath. Several questions were asked to the witness and considering that her answers were rational, her statement was recorded without administering oath, because she was ten years at the time of the incident.
- 10) Sri Paban Bhumij testified as PW-2 that the accused person used to reside in his house as a labour. The victim X is his niece. After the death of her mother, he used to take care of his niece who is about ten years at present. The incident took place before the Durga Pooja of the previous year (2015). On the day of the incident, at about 4:30 pm, he returned home from work and his wife informed him that when X went to the nearby field, near the dyke, the accused gagged her and committed rape on her. After the incident, the victim returned to her house, holding the panty in her hand and informed his wife about the incident. He asked the victim about the incident and the victim informed him that when she went to the field to bring back the cattle, the accused person arrived there and suggested her to accompany him so that he could show her kushia fish (eel). Then the accused removed her panty and committed rape on her. Then he went out and found the accused and caught him and brought him to his house and he called the Gaonburah Sri Gubordhan Pator. The Gaonburah came to his house and asked the victim about the incident and thereafter, advised him to lodge an ejahar with the police. He asked the VDP Secretary to write the FIR and accordingly, the VDP Secretary wrote the FIR according to his narrative. Ext. 2 is the FIR and Ext. 2(1) is his signature. He also took X to the police station and the police recorded her statement. On the next day, the victim was taken for medical

- examination and to the Magistrate for recording her statement.
- 11) If we scrutinize the evidence, it is apparent that the evidence of PW-1 is perfectly corroborated by the evidence of PW-2. The cross-examination of PWs-1 and 2 could not rebut the evidence of PWs-1 and 2. PW-2 stated in his cross-examination that he affixed his signature on the Ext. 1 in the police station and the scribe of the FIR did not affix his signature on the Ext. 1. It is apparent from the evidence of PWs-1 and 2 that the accused used to work as a domestic help in PW-2's house at the time of the incident. Their evidence remained uncontradicted and uncontroverted.
- 12) The evidence of PWs-1 and 2 is also corroborated by the evidence of PW-3 Smti. Lakhimoni Bhumij. She stated that the accused was a domestic help in their house. The incident took place on the first day of Durga Puja in the year 2015. On that day, the victim went to bring back their cattle from the field. Then the accused took her along with him to show kushia fish (eel) and thereafter, the accused gagged her and removed her panty and committed rape on her. The victim was in tears when she returned home and informed her about the incident. Then her husband Paban Bhumij returned home and X informed Pahan Bhumij about the incident. Her husband slapped the accused and called the Gaonburah. Accordingly, the Gaonburah came to his house and her husband went to the police station along with the victim. The police came to their house on the next day and recorded her statement. She also came to the court along with the victim X at the time of investigation. X is at present eleven years of age. This evidence of PW-3 remained uncontradictes and uncontroverted. This evidence of PW-3 corroborated the evidence of PWs-1 and 2 like hand in glove.
- 13) In sync with the evidence of PWs-1, 2 and 3, Sri Bishnu Pator testified as PW-4 that the accused is his son and the incident took place in the month of October, 2015. At the time of the incident, his son used to stay in Paban Bhumij's house to help Paban Bhumij with his cultivation. On the evening of the incident, he went to Paban Bhumij's house and came to know that his son committed rape on the victim X when she went to the field to fetch cattle. After the incident, Paban lodged an ejahar with the police at Dikom Outpost.
- 14) In his cross-examination, he testified that he did not know about the incident.
- 15) The evidence of the VDP member Sri Ram Pator corroborates and supports

the evidence of PWs-1, 2, 3 and 4. Sri Ram Pator testified as PW-5 that the complainant is his neighbors. The incident took place at the time of Durga Pooja of the previous year. On the day of the incident, Paban Bhumij's son came to his house in the evening and informed him that the accused committed rape on Paban's niece who used to stay in Paban's house after her mother's death. Paban's niece X was ten years of age. Then he immediately went to Paban's house and noticed that the villagers have already assembled in Paban's house. He met the accused and the villagers took him to the Dikom Outpost. He also accompanied them and the police recorded his statement.

- 16) His cross-examination also remained uncontroverted and uncontradicted.
- 17) The Gaonburah Sri Gobardhan Pator testified as PW-6 that the informant Paban Bhumij was known to him. The incident took place about 3/4 months back. On the evening of the incident, he heard a commotion in Paban Bhumij's house and he went there and noticed that the accused was confronted by the villagers in Paban's house. He learnt from Paban Bhumij that the accused committed rape on Paban's minor niece who used to stay in his house. The age of the victim was nine years at that time. The villagers decided to hand over the accused to the police. Accordingly, they handed over the accused to the police at Dikom Outpost. This evidence of PW-6 corroborates the evidence of PW-2.
- 18) On scrutiny of the entire evidence, it is thereby held that there is clinching evidence that the accused committed rape on the victim. It is true that the injuries could not be detected on the medical examination of the victim, but it is a settled principle of law that even without injuries, the accused is liable of the offence of rape if the evidence of the witnesses inspire confidence.
- 19) The medical officer Dr. Mohsina Ahmed examined the victim on 20-10-15 in connection with this case and her opinion was that the victim was above eight years, but below ten years. There was no evidence of recent injury on her body or private part. There was also no evidence of recent sexual intercourse on her person. Ext. 7 is the Medico-Legal Report wherein Ext. 7(1) upto Ext. 7(3) are her signatures.
- 20) Section 29 of the POCSO Act expounds that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 6 of this Act, the Special Court

shall presume that such a person has committed the offence, unless the contrary is proved. In the instant case, the contrary could not be proved. Moreover, the evidence of the victim inspires confidence. The evidence of other witnesses also inspires confidence.

21) Section 30 of the POCSO Act also expound as follows:

- "30. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. *Explanation.* In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.
- 22) Reverting back to this instant case, it is held that the accused took the victim to a secluded place in the pretext of showing her some eel. The culpable mental status of the accused can be deduced from his conduct. Regarding lack of medical evidence, in the instant case, the victim was examined after some delay which led to the disappearance of the medical evidence. The IOs cross-examination could not impeach the testimony of the witnesses. The IOs cross-examination also could not contradict the evidence of the other witnesses. It is clear that the incident took place during the time of Durga Puja of 2015.
- 23) The evidence of the IO SI Debojyoti Phukan as PW-7 depicts that he duly conducted the investigation. On 19-10-15, he received information over phone at about 9:00 pm and registered a GD Entry No. 300 dtd. 19-10-15 and immediately, proceeded to the area at Kuhiarbari. He met the accused and the victim and brought them to the outpost. Then he took the victim to the Lahoal PHC. On the same night, Paban Bhumij lodged an ejahar and after registering a GD Entry No. 301 dtd. 19-10-15, he forwarded the ejahar which

was registered as Lahoal PS Case No. 147/15. Ext. 2 is the FIR and Ext. 2(2) is the signature of the Officer-in-charge (OC in short) of Lahoal Police Station with his endorsement. After completion of investigation, he submitted Charge-Sheet against the accused. Ext. 5 is the Charge-Sheet and Ext. 5(1) is his signature. Ext. 6 is the extract copy of the GD Entry No. 300 and Ext. 6(1) is his signature. Ext. 4 is the Sketch-Map of the place of occurrence and Ext. 4(1) is his signature.

- 24) It is clear from the Sketch-Map that the place of occurrence is amidst a paddy field which has been clearly depicted by the evidence of PW-1. The statement of PW-1 under Section 164 CrPC is consistent to her testimony in the court. The statement of the victim under Section 164 CrPC and her testimony in the court clearly depicts that the accused committed penetrative sexual assault on her.
- 25) Recapitulating the entire evidenced, it is thereby held that there is clinching evidence that the accused is complicit.
- 26) According to the medical officer's opinion, the age of the victim is above eight years, but below ten years. In this context, I would like to rely on the decision of Hon'be the Supreme Court of India in *Jaya Malla vs. Home Secretary, Govt. of India* [AIR 1982 SC 1297] wherein it was observed that one can take judicial notice that the margin of error in age ascertained by radiological examination, two years on the either side.
- 27) Reverting back to this case, I would like to extend the benefit of two years of the victim on the higher side. As the victim is said to be below ten years, her age is taken to be above twelve years. Considering the variations of the radiological examination, instead of holding the accused guilty of offence under Section 6 of the POCSO Act, he is held guilty of offence under Section 4 of the POCSO Act by virtue of Section 222(2) CrPC.
- 28) Heard the accused on the point of sentence. He has answered that he has to take care of his parents and he will suffer immensely in case of prolonged confinement.
- 29) I have considered the age and antecedent of the accused. There was no brutality to be detected on medical examination of the victim. Considering the age of the victim, it is held that such an offence has to be deprecated and discouraged. Suffice it to mention that imprisonment for seven years will act as a deterrent and also send a message to the society at large.

SENTENCE:

- 30) The accused Sri Sanjib Pator is convicted under Section 4 POCSO Act and is sentenced to undergo rigorous imprisonment for 7 (seven) years and a find of Rs. 1,000/- (Rupees One Thousand) only, in default of payment of fine, to undergo rigorous imprisonment for 1 (one) year. The period of detention already undergone by the accused during investigation and trial is set off with his custodial sentence.
- 31) Furnish free copies of judgment to the accused and to the District Magistrate.
- 32) The victim who has undergone such an ordeal deserves compensation. This case is thereby recommended for compensation to the District Legal Services Authority, Dibrugarh to decide the quantum of compensation to be awarded to the victim under the Victim's Compensation Scheme, 2012.

 Judgment is signed, sealed and delivered in the open Court on the 17th day of

Sessions Judge,

Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

January, 2018.

Sessions Judge, Dibrugarh

APPENDIX

List of witnesses:

- 1. PW-1 The victim X;
- 2. PW-2 Sri Pawan Bhumij;
- 3. PW-3 Smti. Lakhimoni Bhumij;
- 4. PW-4 Sri Bishnu Pator;
- 5. PW-5 Sri Ram Pator;
- 6. PW-6 Sri Gobardhan Pator;
- 7. PW-7 SI Debojyoti Phukan;
- 8. PW-8 Dr. Mohsina Ahmed.

List of Exhibits:

- 1. Ext. 1 Statement of the victim recorded under Section 164 CrPC;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Printed proforma of FIR;
- 4. Ext. 4 Sketch-Map;
- 5. Ext. 5 Charge-Sheet;
- 6. Ext. 6 Extract copy of Dicom Outpost GDE No. 300 dtd. 19-11-15; and
- 7. Ext. 7 Medico-legal Report.

List of witnesses and Exhibits for defence- None.

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.