IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>68 OF 2017</u>

(Under Section 8 of the POCSO Act, arising out of G.R. Case No.

4795/17)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Bikash Basfor

Son of Jugnu Basfor, Resident of Horijan Colony, Police Station – Tezpur Dist:- Sonitpur, Assam

Date of framing Charge :- 29/03/2018

Date of Recording Evidence :- 11/06/2018 & 22/06/2018,

Date of examination of accused u/s :- 22/06/2018.

313 Cr.P.C

Date of Argument :- 04/07/2018

Date of Judgment :- 05/07/2018

Counsel for the state :- Mr. M.Ch. Baruah,

Public prosecutor

Sonitpur.

Counsel for Accused :- Md. Hussain, Advocate.

JUDGMENT

- **1.** In this case accused Sri Bikash Basfor is put for trial for allegation of charge under Section 8 of the POCSO Act, 2012.
- 2. The factual matrix according to the FIR, in brief, is that on or about 4 p.m. of 26-11-2017 taking advantage of absence of any persons accused trespassed into the house of the informant and disrobed and torn the clothes of informant's grand-daughter. While she raised alarm local people arrived there then accused fled away. Hence, this prosecution case. The ejahar was filed by the informant Smti Madhuri Basfor before the Tezpur Police station on 26-11-2017.
- **3.** On being receipt the ejahar, O/C Tezpur Police Station registered a case being Tezpur P.S. Case No. 2420/17 under section 8 of the POCSO Act. After completion of usual investigation, the O/C Tezpur Police Station sent up the case for trial against the accused Sri Bikash Basfor u/s 8 of the POCSO Act.
- **4.** On being appeared the accused before this Court, after hearing both parties, framed charge under section 8 of POCSO Act, 2012 against the accused Sri Bikash Basfor and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- **5.** To substantiate the case prosecution examined as many as 6 (six) numbers of witnesses which includes the informant, victim, other material witnesses and the Investigating Officer and Judicial Magistrate.
- **6.** After completion of prosecution evidence accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the evidence and allegation and declined to give defence evidence.
- **7.** I have heard the argument put forward by the learned counsels of both sides.

8. The point for decision in this case is that:

1. Whether on 26-11-2017, at about 4 p.m. at Horijon Colony under Tezpur Police station, accused committed sexual assault on Miss X (aged about 15 years) and thereby committed an offence punishable u/s 8 of the POCSO Act?

Reasons, Decisions and reason for decision.

- **9.** To arrive at the judicial decision, let me appreciate the evidence on record.
- 10. PW- 1 Smt. Madhuri Basfor stated that she knows the accused Bikas Basfor. Victim is her granddaughter. The incident took place about three months ago at about 4 p.m. At the relevant time her age was about 15 years. At the relevant time her victim granddaughter was at home alone and she was moping the house. Accused entered into the house and pulled her granddaughter's hair and torn her clothes from the chest with intent to commit rape on her. During that time she was wearing blue coloured sporting. Her granddaughter becomes senseless. Local people poured water on her head and mouth and then she regained her senses. During that time local people came to apprehend the accused but he fled away. After regaining her sense victim reported her vividly about the incident. Thereafter, she lodged ejahar before the police station where she put thumb impression. The ejahar was written by a scribe as per her instruction. Then her granddaughter was taken to Civil hospital for medical examination. Thereafter she was sent to court for recording her statement.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time victim was alone in their house, she was moping the house, accused trespassed into the house, pulled the victim's hair and torn her clothes from the chest with intent to commit rape on her has remained unchallenged.

11. PW-2 Smt. Koili Basfor, mother of the victim stated that accused is the husband of her cousin sister. The incident took place about 3/4

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months ago at about 4 p.m. At the relevant time her daughter's age was about 15 years. At the relevant time she was not at home. Her victim daughter was at home alone. After the incident, she has just arrived from her works. She saw her victim daughter was lying senseless. Then local people poured water upon her and she gained sense. She saw her clothes was found torn. After regaining her sense victim reported her that accused entered into their house while she was mopping, accused assaulted her by tearing her clothes and she was dragged by accused by holding her hair with intent to commit rape. Accused has also touched her breast. During investigation police seized the torn blue coloured sporting which was put by the victim at the relevant point of time. **Ext. 1** is the said torn blue coloured sporting where she put thumb impression. The said seized torn sporting is seen in the court today. Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time her victim daughter was alone in their house, after the incident she had just arrived from her works, saw her victim daughter was lying senseless, local people poured water upon her and she gained sense, saw her clothes was found torn, after regaining her sense victim reported her that accused entered into their house while she was mopping, accused assaulted her by tearing her clothes and she was dragged by accused by holding her hair with intent to commit rape has remained unchallenged.

12. PW-3 Smt. Bijuli Basfor stated that accused is the husband of her own sister. Victim is also the daughter of her other sister. The incident took place about 3/4 months ago at about 4 p.m. On hearing hulla at their harijan Kolony she immediately rushed to the house of victim and saw the victim in senseless condition and her clothes were torn out. Then local people poured water upon her and she regained her sense. After regaining her sense victim reported her that accused Bikash entered into her home while she was alone, accused assaulted her by tearing her clothes, she was dragged by accused by holding her hair

with attempt to commit misdeed. Accused has also touched her breast. Then she becomes senseless.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time on hearing hulla she rushed to the house of the victim, saw the victim in senseless condition, her clothe was torn, local people poured water upon her, thereafter she gained her sense, victim reported her that accused entered into her house while she was alone, assaulted her by tearing her clothes and she was dragged by the accused holding her hair and attempted to commit misdeed has remained unchallenged.

13. PW-4 the victim Miss X, stated before the court that at the relevant time she was prepared meal after grooming their house. In the mean time Bikash trespassed into their house, holding her hair dragged her. He torn her blue coloured sporting then she became senseless. Thereafter local people poured water on her and she regained her sense. She informed the matter to her mother and grandmother. Her grandmother took her to the police station and her grandmother filed the case against the accused. Police recorded her statement and she was medically examined. She has also given statement before the learned Magistrate where she put thumb impression.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time she was prepared meal after grooming their house, in the mean time Bikash trespassed into their house, holding her hair dragged her, torn her blue coloured sporting then she became senseless, thereafter local people poured water on her and she regained her sense, she informed the matter to her mother and grandmother, her grandmother took her to the police station and her grandmother filed the case against the accused has remained unchallenged.

14. PW- 5 Sri Upen Bordoloi, the Investigating Officer of this case, stated that on 26-11-2017 he was posted as Attached Officer at Tezpur Police station. On that day, one Madhuri Basfor filed an ejahar before

the police station. In the said ejahar Madhuri Basfor put thumb impression. Ext. 2 is the ejahar and Ext. 2(1) is the signature of the then O/C Tezpur PS Abdul Momin. On being receipt the said ejahar O/C of Tezpur PS registered a case vide Tezpur PS Case No. 2420/17 u/s 8 of POCSO Act and endorsed him to investigate the Case. Thereafter, he has visited the place of occurrence and prepared sketch map. Ext. 3 is the sketch map and Ext. 3(1) is his signature. He has also recorded the statement of victim, complainant and other witnesses. He has also arrested the accused and forwarded him to the court. Thereafter, he has sent the victim to KCH for medical examination and also sent the victim to the learned Magistrate to record her statement u/s 164 Cr.P.C. He has also seized one old blue colour sporting from the victim. Ext. 1 is the siezurelist and Ext. 1(1) is his signature. During investigation he has also collected one school certificate of Tezpur Asomiya Girls' ME School. In the said certificate, the date of birth of the victim Miss X mentioned as 03-01-2004 according to Admission Register. After collecting the medical report and after completion of investigation, he has filed charge sheet against the accused Bikash Basfor u/s 8 of POCSO Act. Ext. 4 is the chargesheet and Ext. 4(1) is his signature.

15. PW- 6 Miss Juhi Gogoi, stated that on 29-11-2017 she was posted at Tezpur as 1st class Judicial Magistrate and on that day in reference to Special POCSO Case No. 68/17 u/s 8 of POCSO Act, she has examined one witness i.e. the victim, D/O late Amit Basfor, resident of village Horijan Colony, Tezpur in her court chamber. The witness was identified by WHG Madhumita Katoki. The victim made statement voluntarily in presence of her grand mother Madhuri Basfor. After recording her statement she has read over the contents of the statement and on her acceptance she put her thumb impression thereon. Ext. 5 is the statement of the victim recorded u/s 164 Cr.P.C and Ext. 5(1) is her signature. Ext. 6 is her order dated 29-11-2017 and Ext. 6 (1) is her signature.

- **16.** These much is the evidence of the prosecution case. Defence plea is of total denial while his statement is recorded u/s 313 Cr.P.C.
- 17. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, there is only one eye witness i.e. the victim in this case. Secondly, there is vast discrepancy in between the prosecution witnesses such as, according to FIR the incident took place at about 4 p.m. of 26-11-2017. On the other hand, the victim could not be able to say the time of incident. Thirdly, there is also many contradictions among the statement of prosecution witnesses. Fourthly, there is no corroboration among the statement of witnesses. Fifthly, according to the I.O. he recorded the statement of the victim while he was in duty in uniform which is violative of section 24(2) of POCSO Act. Lastly, the statement of the victim made u/s 164 cR.P.C. is not corroborated with the statement made before the court.
- **18.** On the other hand, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond all shadow of doubt, as such required to be convicted under the said section of law. Learned Special Public Prosecutor also submitted that in fact there is no enmity in between the accused and the complainant to file a false case. Even if there is any strange relation between the parties, it would not be expected from the complainant to involve her own minor granddaughter in such a hatred case.
- **19.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **20.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is no other eye witness to the occurrence. But immediately after the incident PW 1, the grandmother of the victim came to know that accused entering into their house, pulled her granddaughter's hair, torn her clothes from chest with intent to commit rape, thereafter, her granddaughter became senseless, local people

came and poured water upon her, when she regained her sense then she reported to her grandmother vividly about the incident. Mother of the victim PW 2 also stated that when she arrived at home from her works she saw victim was lying in senseless condition, saw her clothes was found torn, after regaining her sense, her victim daughter reported her that accused entered into their house while she was mopping, accused assaulted her by tearing her clothes and she was dragged by accused by holding her hair with intent to commit rape. PW 3 has also supported the aforesaid statement of PW 1 and 2. Victim also stated that after grooming their house she was alone in their house cooking meal. Accused entered into their house, holding her hair and dragged her. The accused also torn her blue coloured sporting. During that time she became senseless. Thereafter, she regained her senses and informed about the incident to her grandmother and her mother. During investigation, police seized the said blue coloured sporting vide seizurelist Ext. 1 and Ext. 1(1) is her signature. During investigation I.O. PW 5 has also collected one birth certificate of victim from Tezpur Asomiya Girls' ME school. In the said certificate, the date of birth of victim is mentioned as 03-01-2004 according to Admission Register. Under such circumstances, the statement of victim cannot be discarded outright merely on the ground that there is no other eye witness.

- **21.** Learned counsel for the accused argued that the victim is a minor girl and changed her version in different times, before the police, before the Magistrate and even in the Court as such, her statement cannot be considered to convict the accused.
- 22. Here in the present case, as details discussed herein before, the victim stated that at the relevant time while she was alone in their house after grooming floor she was cooking their meal. During that time accused trespassed into their house, hold her hair, dragged her, he also torn her blue coloured sporting put by her then she became senseless. After pouring water by local people victim regained her sense and immediately she reported the matter to her grandmother and her

mother, thereafter she was taken to police station by her grand-mother and her grandmother filed this case. Besides that, grand-mother PW 1 also stated that at the relevant time victim was at home alone and she was moping the house. Accused entered into the house and pulled her granddaughter's hair and torn her clothes from the chest with intent to commit rape on her. During that time she was wearing blue coloured sporting. Her granddaughter becomes senseless. Local people poured water on her head and mouth and then she regained her senses. During that time local people came to apprehend the accused but he fled away. Therefore, PW 1 also seen the incidence took place immediately after the main incident.

Besides, it appears that the statement of the victim is corroborated with the statement made before the police and also before the learned Magistrate u/s 164 Cr.P.C. Though she has been exposed to long cross-examination but her evidence as to while she was cooking meal after grooming their house, accused trespass into their house, dragged her by holding her hair, torn her blue coloured sporting, then she became fainted, when local people poured water she regained her sense and immediately, she reported the matter to her grandmother and her mother has remained unchallenged.

- 23. Learned counsel for the accused submitted that the victim since not been medically examined to know her age therefore, the certificate as alleged to be seized by I.O. the Ext. 1 cannot be relied on as because Ext. 1 was not proved by the Officer who issued it.
- 24. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD) No.98 of 2015**, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is

disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

- **25.** In this case, the victim, her grandmother and her mother categorically stated that at the relevant time she was about 15 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs 1, 2 and 4 in respect of age of the victim remains unchallenged.
- 26. In the case in hand, the victim has been consistent on the material particulars with regard to the incident that on the day of incident, while she was cooking meal after grooming their house, during that time accused trespassed into their house, dragged her by holding her hair, torn her blue coloured sporting with attempt to commit rape, during that time she became senseless, when local people poured water she regained her sense and thereafter, she informed the matter to her grandmother PW 1 and her mother PW 2. PW 1 and PW 2 also stated the aforesaid incident before the court. Victim also made such statement before the I.O. while her statement was recorded u/s 161 Cr.P.C. and she has also made such statement before the learned Magistrate when her statement was recorded u/s 164 Cr.P.C. Though the victim has been vigorously cross-examined but the aforesaid evidence as stated by the victim are remained unchallenged. There is nothing in the evidence of the aforesaid PWs that accused had any enmity or quarrel with the complainant to file the case falsely against the accused. Therefore, defence of false allegation is not made out.

27. The Hon'ble Supreme Court in **State of Rajasthan Vs. Babu Muna (2013) 4 SCC 206,** has observed as under :-

"9. We do not have any slightest hesitation in accepting the broad submission of Mr. Jain that the conviction be based on the sole testimony of the prosecutrix, it found to be worthy of credence and reliable and for that no corroboration is required. It has often been said

that oral testimony can be clarified into three categories, namely, (i) wholly reliable, (ii) whole unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of single witness, the conviction can be found without corroboration. This principle applies with greater in terms in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of single witness but the court has no option to acquit the accused."

- **28.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **29.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and

Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

- **30.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (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 that 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 purpose 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 probabilities.
- **31.** Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? Such issue was dealt by the Hon'ble Apex Court in **Virendra Vs State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that who may testify – 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."

- **32.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- 33. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341, it was held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case.

The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

- **34.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.
- **35.** In the present case, the victim was examined on oath because on the day of recording her statement she was 15 years of age. Apart from that, other witnesses i.e. PW 1 and PW 2 all were supported the evidence of victim PW 4.

Here in the present case as discussed above, while the victim was cooking meal after grooming their house, accused trespassed into their house, dragged her by holding her hair, torn her blue coloured sporting with intent to commit rape. Just immediately after the incident, PW 1 arrived there. She has also noticed the scenery of just after the incident and it is also in the evidence of the prosecution witnesses that after regaining her sense she reported the matter to her grandmother PW 1 and her mother PW 2. The I.O. has also seized the torn blue coloured sporting put by victim at the relevant time, in presence of witnesses. That has been also produced before the court as Material Exhibit.

36. On appreciation of the evidence given by the victim, her grandmother PW 1, her mother PW 2 and other independent witnesses PW 3, it comes to the conclusion that at the relevant time accused attempted to commit sexual assault to the victim. Therefore, I think that the prosecution has failed to prove the ingredients of section 8 of the

POCSO Act, but prosecution has able to prove that at the relevant time accused attempted to commit sexual assault to the victim. Therefore, accused Sri Bikash Basfor held to be guilty for the offence of attempt to commit sexual assault and therefore convicted him u/s 18 of the POCSO Act.

- **37.** The accused is heard on the point of sentence where he praying for leniency stating that he has his wife, children and he is the only bread earner of his family and he has been in custody since 24-01-2018, hence, praying for leniency.
- **38.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.
- 39. Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 22 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.18 of POCSO Act a punishment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

ORDER

40. I convict the accused Sri Bikash Basfor u/s. 18 of POCSO Act and sentence him to Rigorous Imprisonment for 6 months and to pay a fine

of Rs. 1000/- (Rupees One thousand only) in default Rigorous Imprisonment for 15 (fifteen days).

It appears from the record that the accused has been in custody since 24-01-2018.

The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him.

- **41.** As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs. 20,000/- (Rupees twenty thousand) only is awarded as compensation. The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the mother of the victim after proper enquiry.
- **42.** A copy of this Judgment be furnished to the accused free of cost and a copy thereof be sent to the District Magistrate, Sonitpur, Tezpur, as per provisions of law.

Given under my Hand and Seal of this Court on this the 5^{th} day of July, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR:: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

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APPENDIX

Prosecution Witness

1. Prosecution Witness :- Sri Madhuri Basfor, complainant

No.1

2. Prosecution Witness :- Smt. Koili Basfor.

No.2

3. Prosecution Witness :- Smt. Bijuli Basfor,

No.3

4. Prosecution Witness :- Victim

No.4

5. Prosecution Witness :- Sri Upen Bordoloi, I.O.

No.5

6. Prosecution Witness :- Miss J. Gogoi, Judl Magistrate,

No.6 1st calss, Tezpur.

EXHIBITS.

Exhibit 1 :- Seizurelist

Exhibit 2 :- Ejahar

Exhibit 3 :- sketch map

Exhibit 4 :- Seizurelist

Exhibit 5 :- 164 Cr.P.C. statement of the victim.

Exhibit 6 :- Order dated 29-11-2018.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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