IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.14/2018

U/S-8 of POCSO Act, 2012

State of Assam

-Versus-

Sri Raju Boro

s/o-Sri Dhiren Boro

Resident of vill -Amingaon Lothiabagisa

P.S.-North Guwahati

Dist- Kamrup (R)

-----Accused

Appearance:

Mr. A.K. Baruah. Ld. Addl. Public Prosecutor ------for the State

Smti. Mitumoni Boro, Ld. Advocate ------for the

accused

Date of evidence:10.08.2018, 06.09.2018, 17.11.2018, 02.02.2019

Date of Argument: 26.04.2019, 10.05.2019

Date of Judgment: 14.05.2019

JUDGEMENT

- 1. The Prosecution case in brief is that—on 22.01.2018, the informant—Sri phuleswari Rabha lodged an ejahar alleging that on that day at about 5 p.m accused—Raju Boro attempted to rape his minor daughter. And hence, this case.
- 2. On the basis of the said ejahar, North Guwahati P.S Case No. 12/2018 U/S-8 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person—Raju Boro U/S- 8 of the POCSO Act, 2012.
- 3. The case was duly committed and this Court after hearing both the parties, framed charge U/S- 8 of the POCSO Act, 2012 against accused— Sri Raju Boro. The aforesaid charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined as many as six (6) numbers of witnesses including the informant and victim. Defence side adduced evidence of two (2) D.Ws.

5. **POINT FOR DETERMINATION**

(I) Whether the accused person on 22.01.2018 at about 5.00 p.m at village Amingaon Lathia Bagisha under North Guwahati P.S. committed sexual assault on the prosecutrix within the meaning of section 7 of the POCSO Act, 2012 and, thereby, committed an offence punishable U/S-8 of the POCSO Act, 2012 ?

6. **DISCUSSION, DECISION AND REASONS THEREOF**

- 7. Here, in this instant case, the accused is charged u/s 8 of POCSO Act. Now, it has to be seen from the evidences on record as to whether the accused committed sexual assault upon the prosecutrix, minor daughter of the informant.
- 8. Now, question comes, whether the offence committed by the accused falls u/s 8 of POCSO Act. **Sexual Assault** is defined **U/S 7 of POCSO Act** as "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." **Section 8 of POCSO Act** prescribes the punishment for the offence u/s 7of the Act
- 9. Let us go through the evidences available on record to find out if the prosecution has proved the case against the accused.
- 10. Pw-1 is the prosecutrix. Informant is her mother. Pw-1 stated that the incident took place on 22.1.18 at 5.30 pm near her house at Lathia Bagicha . Her mother was not in the house. At the relevant time, she had gone to pick her clothes kept outside over a heap of stones for drying in the sun. But, she did not find her clothes there . She found the clothes of the accused lying there and she picked up to give him. The accused was standing on the road. He asked her to keep the clothes in the bed inside his house. Pw-1 entered his house to keep the clothes in his bed . Thereafter, the accused came and he closed the door of his house. There was nobody in the house apart from them. Pw-1 alleged that the accused opened her frock and panty and he pressed her breast. He pushed her on the bed. Before the accused could do anything with pw-1, she pushed him and ran away from the spot. She told the incident to her Aunt-Malati Boro (PW-3), who was in the shop and wept . Her mother (pw-2) arrived in the evening and she told her the incident. Then, her mother gave the case. Pw-1 was medically examined and she gave her statement u/s 164 Crpc. Ext-1 is her statement and Ext-1 (1 &2) are her signatures.

In her cross-examination, pw-1 stated that when her mother goes somewhere for work, she keeps her in the house of the accused person along with her brother specially in the night hours and when they stay there, they watch movies in the mobile phone of the accused person. When her mother does not arrive home, she give a call from his mobile phone. The accused never stopped her from using his mobile phone. P.W.1 admitted that she did not tell in her statement (Ext.1) that accused was standing on the road when she went to see the clothes. She denied the suggestion that her younger brother was with her when she picked up the clothes. She stated that the shop of one Malati Boro is located about 200 metre away from their house and one Sangita Das is her next door neighbour. But she was not there in the house at the time of occurrence. She admitted that she did not tell the police that she went outside on the road to pick up the clothes and that she found the accused and his clothes there and that she went to the shop of Malati Boro to tell the incident.

11. Pw-2 Smti Phuleswari Rabha is the informant and the mother of the victim. She stated that the incident took place on 22. 1.18 at 5 pm. At the relevant time, she was in D.C office, Kamrup, Amingaon. She reached home at 5.30pm. She found her children (prosecutrix and son) in the shop of pw 3 and brought them home. Pw-2 stated that pw-1 disclosed her that accused-Raju asked her to keep his sun dried clothes inside his house. As she entered the house, the accused closed the door of his house and opened her frock and panty. He pressed her breast. Then, he put her in the bed and tried to do some bad act with her. But Pw-1 pushed him and he fled away. Pw-2 stated that on hearing the incident, she went and told the wife of the accused. Thereafter, she lodged the ejahar. Ext-2 is the ejahar and Ext-2(1) is her signature..

In her cross-examination, pw-2 stated that when she goes somewhere for work, she keeps the prosecutrix in the house of the accused person along with her brother and prosecutrix calls her from the mobile phone of the accused. P.W.2 stated that before the incident, the accused never did anything bad with the prosecutrix. She stated that the ejahar was written by some other person but it was read over to her. P.W.2 did not tell the police that she found the prosecutrix and her son in the shop of Malati Boro.

12. Pw-3 Smti Maloti Boro testified that the incident took place on the day of Saraswati Puja in the year, 2019 at about 5.30 pm. At the relevant time, pw-3 was sitting in her shop, then the victim's brother – Buddha Rabha came running to her shop

and called him to his house. He told her that his elder sister (prosecutrix) was crying at home. Before PW-3 reached their house, victim came running towards her and she was weeping. On enquiry, prosecutrix told her that the accused—Raju attempted to do some bad act with her. Pw-3 kept the prosecutrix and her brother in her shop. After some-time, the informant (pw-2) arrived and the prosecutrix told the incident to her. Then, pw-2 lodged the ejahar. Police obtained her signature in the seizure-list. Ext-3 is the seizure-list and Ext-3 (1) is her signature.

In her cross-examination, pw-3 stated that in the absence of their mother, the prosecutrix and her younger brother often stays in the house of the accused person, whom they call 'Uncle'. She admitted that she did not tell the police that Pw-3 kept the victim and her brother in her shop and that when she was sitting in her shop, the prosecutrix's younger brother — Buddha Rabha came running towards her shop and called her to their house and told her that his elder sister (prosecutrix) was crying at home. And as pw-3 was going there, then on the way, she met the prosecutrix, who came running towards her and started crying and weeping. On being asked prosecutrix told her that accused attempted to do some bad act with her.

13. Pw-4 Smti Sangeeta Das is the neighbour of both the parties. She deposed that the incident took place at about 5.30 p.m in the house of the accused. At the relevant time, pw-4 was standing in the road with pw-3 near her shop. At a little distance away, they saw the accused and the victim talking. Pw-4 stated that the victim's younger brother – Buddha Rabha came running towards them and called them to their house. He told them that his elder sister (prosecutrix) was crying at home. As pw-3 and pw-4 were going there, then on the way, they met the victim, who came running towards them. Pw-4 stated that she caught pw-3 tightly and started crying. After sometime when the victim stopped crying, pw-4 enquire the matter from her. Then, the victim told her that the accused asked her to keep the dried up clothes in the bed inside his house. As she went inside his house, then the accused caught her from the backside and he threw her on the bed. Victim told pw-4 that the accused tried to do some bad act with her and he touched her entire body. She told pw-4 that the accused opened her panty but before he could have any sexual intercourse with her, she fled away from his house. Then, victim's mother (pw-2) arrived and the victim told her the incident. Pw-2 lodged the ejahar. Pw-4 put her signature in the seizure-list. Ext- 3 is the seizure -List and Ext- 3 (1) is the seizure -list.

In her cross-examination, pw-4 stated that the prosecutrix and her younger brother usually stay in the house of the accused when their mother goes out for work. She confirmed that on the date of occurrence, the accused was alone in his house and the victim alongwith her brother were also alone in their house. She admitted that she has good relation with the accused and he behaved properly with them. P.W.4 admitted that she did not tell the police that when she was standing in the road with pw-3 near her shop then the victim's younger brother – Buddha Rabha came running towards them and called them to their house and told them that his elder sister (prosecutrix) was crying at home. As pw-4 along with pw-3 were going there, then on the way, they met the victim, who came running towards them and she caught pw-3 tightly and started crying. After sometime when the victim stopped crying, pw-4 enquired the matter from her. Then, the victim told her that the accused asked her to keep the dried up clothes in the bed inside his house. As she went inside his house, then the accused caught her from the backside and he threw her on the bed. Victim told pw-4 that the accused tried to do some bad act with her and he touched her entire body. She told pw-4 that the accused opened her panty but before he could have any sexual intercourse with her, she fled away from his house.

14. Pw-5 S/I Rana Bhuyan is the I.O who investigated the case. He deposed that on 22. 1.18 upon receiving an ejahar lodged by one, Smti Phuleswari Rabha , he forwarded the ejahar to the O/C North Guwahati P.S , who registered a case bearing North Guwahati P.S No 12 /2018 u/s 18 of POCSO Act, 2012 and directed him to investigate the case. Pw-5 visited the place of occurrence, recorded the statement of the witnesses including the victim girl, prepared the sketch —map Ext-4 is the sketchmap and Ext-4 (1) is his signature. Pw-5 also seized the Original Birth Certificate of the victim vide seizure-list marked as Ext-3 and gave in the zimma of the informant. Ext-3 (3) is his signature. He also sent the victim for medical examination and produced her before the Magistrate for recording her statement u/s 164 Crpc. Ext-5 is the medical report collected by him from the Medical Officer. Thereafter, on completion of the investigation, pw-5 submitted the charge-sheet against the accused person — Raju Boro u/s 8 of POCSO Act.Ext-6 is the charge-sheet and Ext-6 (1) is his signature.

In his cross —examination, pw-5 stated that pw-1 did not tell him that she had gone outside on the road to pick up her clothes and that he found the accused and his

clothes there. Pw-1 also did not tell him that the accused pushed her on the bed and tried to do some bad act. Pw-2 did not tell pw-5 that the accused pushed pw-1 on the bed . Pw-4 did not tell him that the victim told him that the accused caught her from the backside and touched her body and that the victim was alone in her house on the date of occurrence.

- 15. PW-6 Dr Gargee Borthakur is the MO. She deposed that on 22.1.2018 at 7.50pm , she examined the victim girl aged 11 years. Victim complained of alleged history of molestation (touching of private parts) at 5.30 pm on the same day. On examining her, pw-6 did not find any injury on her person.Ext-5 is the medical report . Ext-5 (1) is her signature.
- 16. At the close of the prosecution evidence, statement of the accused person U/S 313 Crpc has been recorded. He has denied committing the offence and desired to adduce evidence.
- 17. D.W.1, Sri Pankaj Das has deposed in his evidence that he know the accused as well as the informant. He is the neighbour of both the parties. Witness—Sangeeta Das is his wife. On the date of occurrence, he was sleeping in the house of the accused—Raju Boro and watching movie in his mobile phone. Accused was also with him. The incident took place about a year ago at about 4.30/5.00 p.m. The minor son of the accused was with him in the house. Then, the victim came with her brother and asked the accused as to where she will keep his sundried clothes. The victim addresses me as 'Bhindow'. The victim wanted to see the movie with us. We told her that she can watch the movie afterwards. Thereafter, the victim snatched the mobile of the accused. The accused got angry and he gave her a slap. She ran away. After watching the movie D.W.1 left the house of the accused at around 7.30 p.m. Afterwards he got to hear that the informant lodged the ejahar against the accused person alleging that the accused did bad act with the victim. No incident alleged in the ejahar had taken place on the date of the incident.

In his cross-examination, D.W.1 has deposed that he did not know the exact date of occurrence.

18. D.W.2, Sri Raju Boro, who is the accused of this instant case. He deposed in his evidence that he know the informant and the victim. He is their neighbour. He has a

wife and two sons. He has good relationship with the informant and her family. Informant has her husband, one daughter and one son. Victim stays in their house during the absence of her mother. She addresses him as 'Peha' (Uncle). On the date of occurrence, he was watching movie in his mobile phone along with one Pankaj Das and his minor son. Then, the victim came along with her brother and with his sundried clothes. The victim wanted to see the movie with them and she snatched his mobile. Thereafter, he got angry and slapped her. She left his house with her brother. After watching the movie, he went to the market at around 6.30 p.m. Pankaj Das also left his house. Afterwards, he got to hear that the informant lodged the false ejahar against him alleging that he did bad act with the victim. No incident alleged in the ejahar had taken place on the date of the incident.

In his Cross-Examination, D.W.2 has deposed that the date of occurrence was 22.01.2018 at about 4.30/5.00 p.m.

- 19. I have heard the arguments of both the Learned Additional Public Prosecutor as well as the Learned Defence Counsel. Defence side submitted written argument also.
- 20. Learned Counsel for the accused submitted that the accused is innocent and the ejahar has been filed only to harass him. He further submitted that the allegation made in the FIR and in the statements of the victim U/S-164 Cr. P.C and section 161 Cr. P.C are contradictory. He also argued that there are contradiction in the evidence of the witnesses and in their statements made before the police U/S-161 Cr. P.C.
- 21. Learned Counsel for the accused relied on the case law reported in **2008** (12) SCC 565 (Nivrutti Panducary and other Vs State of Maharastra) and contended that before recording of statement U/S-164 CR. P.C. by the learned Magistrate the minor victim was not given any opportunity to refresh her mind and no any question was put to testify the understanding of the victim.
- 22. Perused the order dated 24.01.2018 passed by the learned Magistrate, wherein it is clearly stated that "the matter pertains to POCSO Act and as such, in pursuance of the law laid down by Hon'ble Apex Court in the case of State of Karnataka Vs Shivanna, the statement of the victim is recorded immediately on her production". Moreover, the victim has clearly stated her age to be 12 years in her

statement before the Learned Magistrate U/S-164 CR. P.C, so oath was administered to her. Non examination of the Learned Judicial Magistrate is not fatal to the prosecution.

Hence, I find no force in the submission of the Learned Defence Counsel.

- 23. Here in this instant case, the victim who is a child is the vital witness. She has clearly stated that on the date of occurrence at 5.30 p.m, the accused was alone and he closed the door of the house and opened her frock and panty as she entered inside his house to kept the dried clothes. He also pressed her breast and pushed her on the bed. But, before the accused could do anything with her, she pushed him and ran away from the spot. P.W.1 told the incident to P.W.3 and to her mother (P.W.2). P.W.2 fully supported the evidence of P.W.1. The witnesses—P.W.2, P.W.3 and P.W.4 heard about the incident. They are all hearsay witnesses.
- 24. It is well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.
- 25. In the case of Dattu Ramrao Sakhare-versus-State of Maharastra, reported in [1997] 5 SCC 341, the Hon'ble Apex Court has 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 under section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers 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 reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored"
- 26. In another case, i.e, Pancchi –versus— State of Uttar Pradesh, AIR 1998 SC 2726, the Hon'ble Apex Court has held that "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it is found reliable, the law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to

be swayed by what others tell them and this child witness is easy prey to tutoring."

- 27. The ratio as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that if attached to the statement of any other witness if the testimony is consistent. In the present case, the victim has been consistent on the material particulars with regard to the incident. Further, there is full corroboration by her parent, i.e. P.W.2 together with the reported witnesses namely P.W.3, P.W.4. Minor contradictions and omission of testimonies of the witness cannot be a ground to discard their evidence.
- 28. On perusal of the statement of the victim before the court as P.W.1 and her statement before the Magistrate U/S-164 Cr. P.C, I do not find any major contradiction at all. She has also fully supported the allegations made in the ejahar. The evidence of the victim does not suffer from infirmity so to disbelieve her version. There does not appear anything to show that victim is tutored.
- 29. Though it was argued on behalf of the accused that he has been falsely implicated in the instant case by the victim and her mother to harass him, but the accused has failed to discharge the onus of proving that he had been falsely implicated in the case due to enmity or any other reason. In the light of the evidence of the victim (P.W.1) as well as her mother (P.W.2) together with the with the evidence of independent witnesses (P.W.2 and P.W.3), this court can presume under section 29 of the POCSO Act, 2012 that it was the accused, who had committed sexual assault upon the victim and sexual intent required as per Section 7 of the POCSO Act, 2012 can also be presumed in the light of Section 30 of the Act. It was for the accused to rebut that neither he had any sexual intent nor he had committed the offence by proving to the contrary. Evidence was adduced by the accused in his defence ...
- 30. The defence plea is that the informant lodged a false case. Evidence of the defence is that the victim came with her brother to the house of the accused to keep his sun dried clothes. At that time, the accused (D.W.2) and D.W.1 were watching mobile, in the mobile phone of the accused. According to the D.Ws, the victim also wanted to watch the movie with them but they told her to watch the movie afterwards and then, she snatched the mobile. Thereafter, the accused slapped the victim and she ran away. D.W.1 is the husband of the P.W.4. Nowhere in her evidence, P.W.4 stated

that her husband (D.W.1) was in the house of the accused watching movie at the relevant time. D.W.1 is an interested witness. So, the defence evidence put forward by the accused in this case does not inspire confidence and is not found to be reliable at all.

- 31. Now, it is clear from the evidences on record, that when Pw-1 entered his house to keep the dried clothes in his bed, then, the accused closed the door of his house and then he opened her frock and panty and pressed her breast. Then, he pushed her on the bed but she pushed him and ran away. This attracts the offence of sexual assault U/S-7 of the POCSO Act which is punishable U/S-8 of the POCSO Act, 2012. So, the offence U/S-8 of the POCSO Act is well proved against the accused.
- 32. It has come out from the statement U/S-164 Cr. P.C of the prosecutrix that she was 12 years old at the time of incident. MO also confirmed that she was a minor girl at that time. Therefore, prosecutrix was a child as per section 2 (d) of POSCO, Act.
- 33. In the result, it is held that the prosecution has succeeded in bringing home the charge U/S 8 of the POCSO Act against accused—Raju Boro beyond all reasonable doubt. Hence, he is held guilty of committing the offence punishable under section 8 of the POCSO Act and is convicted under the said section of law.
- 34. Considering the facts and circumstances of the case and the nature of the offence committed by the accused, he is not entitled to get the benefit of Probation of Offender Act or under section 360 Cr.p.c.

35. **SENTENCE**

Heard the accused on the question of sentence. Also heard the Learned Defence Counsel as well as the learned Addl. Public Prosecutor. Accused has stated that he has not committed the offence and he has no earlier criminal antecedent. He submitted that he is a daily wage labour and he has a family to look after. He has pleaded leniency in awarding the punishment.

36. Considering the entire facts and circumstances of the case ,the nature of the offence and the mental injury suffered by the child victim, the accused –Raju Boro is sentenced to undergo rigorous imprisonment for 3 (three) years and to pay a fine of

Rs. 5,000/- (Rupees five thousand) only in default to undergo rigorous imprisonment for 6 (six) months, for the offence under section 8 of POCSO Act, which in my opinion , will meet the ends of justice in this case.

- 37. The period of detention already undergone by the accused will be set off from the period of imprisonment.
- 38. Now, coming to the aspect of compensation to the victim, who is a minor girl. She has suffered mental agony. And she needs to be provided with restorative and compensatory justice. So, the Learned Secretary, District Legal Service Authority, Kamrup, Amingaon is directed to assess and grant adequate compensation to the prosecutrix (P.W.1). The said compensation amount shall be used by the parents of the prosecutrix for her welfare.
- 39. The Judgment is delivered in open Court and written on separate sheets.
- 40. A free copy of the Judgment be furnished to the convict immediately. A copy of this order and Judgment be sent to the District Magistrate, Kamrup, Amingaon as per provision of law.

Given under my hand and seal of this Court on this 14th day of May, 2019.

Special Judge, Kamrup, Amingaon

<u>APPENDIX</u>

Prosecution Witness:

Pw-1 is the prosecutrix

Pw-2 Smti Phuleswari Rabha

Pw-3 Smti Maloti Boro

Pw-4 Smti Sangeeta Das

Pw-5 S/I Rana Bhuyan

PW-6 Dr Gargee Borthakur

Prosecution Exhibit

Ext.1 is the statement of the Prosecutrix made before the Court U/S—164 Cr. P.C.

Ext.2. is the ejahar.

Ext.3 is the seizure list.

Ext.4 is the sketch map.

Ext.5 is the medical report.

Ext.6 is the charge sheet.

Defence Witnesses:

D.W.1, Sri Pankaj Das

D.W.2, Sri Raju Boro

Defence Exhibit

<u>Nil</u>

Special Judge, Kamrup, Amingaon