In the court of Special Judge, Karbi Anglong, Diphu, Assam

Present : Md. A.U.Ahmed, AJS

Special Judge, Special Court, Karbi Anglong,

Diphu

Special (POCSO) Case No. 19 of 2017 corresponding to GR Case No. 249/17 &

Khatkhati P.S case No. 36 of 2017 Under Section 8 of the POCSO Act

State of Assam Versus Ali Hussain

Name of informant/complainant:

Smt. Deepa Sunar W/o Shri Prem Sunar Village: Wafang Taro

Borlengri II P.S: Khatkhati Dist: Karbi Anglong

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Name of the accused person facing trial:

Md. Ali Hussain S/o Late Mohab Ali

Village: Borlengri Block-II

P.S: Kamalpur

District: Ambasha, Tripura

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Advocates appeared:

For the prosecution: Mr. D. Deka, Public Prosecutor

For the defence : Mr. Jitu Paul, State Legal Aid Counsel

Date(s) fixed for Argument: 04-08-2018 Date(s) fixed for Judgment: 07-08-2018

JUDGMENT

- 1. It is a case of sexual assault towards a female child who was only 13 (Thirteen) years by a person who was made brother of the complainant.
- 2. The prosecution case in brief is that on 14-04-2017, the complainant named above lodged a written ejahar with Khatkhati Police Station stating inter alia that on 10-04-2017 at about 5.30 pm the accused forcefully touched the private parts of the complainant's victim daughter. On receipt of the written ejahar, Khatkhati Police Station registered a criminal case vide Khatkhati Police Station Case No.36-2017 under section 8 of the POCSO Act. On completion of investigation charge sheet was submitted under section 8 of the POCSO Act against the accused person. Hence the prosecution case has come up.
- The accused person is facing trial from the jail hojot. Copy was supplied to him. Having very carefully gone through submissions of both sides as well as case diary I found ground for presuming that the accused person committed the offence under section 8 of the POCSO Act. Accordingly the charge was framed. The particular of the offence charged was duly read over and explained to him to which he pleaded not guilty and claimed to be tried.
- **4.** During trial the prosecution has examined as many as 8 (Eight) prosecution witnesses. The accused person has been examined under section 313 of the CrPC. The defence has examined none. Plea of defence is of total denial.

5. Points for determination:-

Whether on 10-04-2017 at 5.30 Pm the accused person committed sexual assault in the house of the complainant under Khatkhati Police Station, Karbi-Anglong, Assam?

6. <u>Decisions and reasons there of:</u>

I have very carefully gone through verbal marathon arguments advanced by the learned counsel of both sides as well as evidence on record. In the very outset, the learned counsel appearing on behalf of the accused person has contended that the prosecution has miserably failed to prove its case against the accused person beyond all

reasonable doubts. On the other hand, the learned Public Prosecutor, Mr.D.K.Deka refuting the aforesaid submission has submitted that the prosecution has succeeded in establishing its case against the accused person beyond all reasonable doubts. Prior to rebutting the rival submissions, it would be appropriate to give a glance at evidence record.

Appreciation of evidence on record

- 7. PW-1 is Smt. Dipa Sonar who has stated in her statement that she is the complainant of this case. She knows the accused person, victim girl is her daughter. The occurrence took place in the year 2017. On the day of occurrence at evening about 7 pm she and her two sisters were sitting in the "Varandah" and talking. Her brother-inlaw was sleeping in room due to load sheding. At that time in her sitting room her brother in law noticed the accused kissing her daughter forcefully and instantly her brother-inlaw gave slap the victim girl and brought the accused in front of them. On being asked the victim girl told that the accused often used to molest her by touching her breast and kiss her. On being asked, the accused he told that he had entered into the sleeping room by backdoor of the house. At the time of occurrence her victim daughter was about 12 years. Thereafter the accused fled away from their house. Thereafter they informed the "Gaonbura" about the occurrence. Gaonbura convened a meeting. In the meeting the accused was brought by his owner, but in the meeting there was no decision taken in the meeting so she lodged a written ejahar with Khatkhati Police Station. Ext-1 is the ejahar and Ext-1(1) is her signature. Thereafter police got the victim girl medically examined and her statement was recorded in the Court. Court handed over the custody of victim girl to her.
- 8. PW-2 is Shri Prem Sunar who stated in his evidence that he knows the complainant who is his wife. He also knows the accused person. Victim girl is his daughter. At the time of occurrence he was outside of house. After the occurrence he entered into the house and saw my complainant wife, her two sisters, and brother-in-law named Saltan with the accused. As soon as he had entered the house, Sultan informed him that the accused entered into the bed room through the back door and kissed the victim forcibly there. Sultan seeing the occurrence from the drawing room went to the bed room and apprehended the

accused and handed over the victim to the informant after dragging out her by holding of her hairs. The informant also informed him that the accused was making sexual harassment the victim by kissing her on her breasts and that the accused would kill them if matter was informed to anybody. Earlier the accused informed him that he was possessing a pistol. The accused person managed to flee away. There after the matter was informed to local Gaonbura. After one week from the date of occurrence, the accused was brought before Gaonbura after apprehension. As Gaonbura failed to take any decision, his wife lodged a case with Khatkhati police station.

- 9. PW-3 is John Lotha who stated in his evidence that he knows the complainant, accused and the victim girl. The complainant's house is in front of his house. The accused Ali Hussain's house also is nearby his house. On the day of occurrence at evening on hearing "hulla" in the house of the complainant he went there and saw neighbours assembling in the house of the complainant. On being asked the people gathered there told him that accused tried to rape the daughter of the complainant. After occurrence the accused managed to flee away from the place of occurrence. But afterwards the villagers managed to apprehend the accused person and by that time police reached there. Police seized one birth certificate from the victim daughter and I signed there as a witness. Ext-2 is the seizure list and Ext-2(1) is my signature.
- evidence that she knows the complainant, victim and the accused person. The occurrence took place in the year 2017. On the day of occurrence at bout 6.00-7.00 pm they saw many people in front of the house of the complainant. Some people told him that the accused tried to rape the victim but the local public caught the accused person.
- PW-5 is Shri Dorjee Lama who stated in his evidence that he knows the complainant, victim and the accused person. The occurrence took place in the year 2017. On the day of occurrence at about 6.00 pm he saw many public in front of the house of complainant. Some public told him that the accused tried to rape the victim but local people caught the accused person. At the time of occurrence the age of the victim was 12 years. At PO Police

seized one original Birth Certificate of the victim and prepared a seizure list and he put his signature thereon as a witness. Ext-2 is the seizure list and Ext-2(2) is his signature. Later police gave Zimma of the birth certificate to the informant. Ext-3 is the Zimmanama and Ext-3(1) is his signature.

- PW-6 is Shri Janak Rai who stated in his evidence that he the complainant, victim and the accused person. The occurrence took place in the year 2017. On the day of occurrence h heard some "Halla" and saw a gathering in front of the house of complainant. Some villagers told him that the accused tried to rape the victim. At the time of the occurrence the age of the victim was about 12-13 years old.
- PW-7 is Dr Mercy Rongpharpi who stated in her evidence that On 17-04-17 she was posted at Diphu Civil Hospital as Medical & Health Officer. On that day she examined Smt. Sushmita Sunar brought by WBC 550 Prasila Rongpipi in reference with Khatkhati P.S case No. 36/17 and found the followings:

History

One of her neighbour bearing the name of Ali Hussain has been trying to molest her but of and on since February 2017 in the absence of her guardian. According to her there is no history of sexual intercourse.

Medical Examination

On examination hymen was found intact. There was no injury seen on her private parts. The age of the victim by radiological examination is below 14 years in between 12-13 years. Ext-4 is the medical examination report. Ext-4(1) is his signature.

evidence that the occurrence took place in evening about 6 pm. At the time of occurrence she was inside the house and other members of her family were sitting in the courtyard. At that time the accused entered into her house and by holding of her hips he brought her closer to his body and kissed on her lips and touched her breast. The room in which the occurrence took place her Uncle was sleeping and after waking up he dragged the victim out from the room by holding of her hairs to court yard where other family members were sitting. Thereafter her parents

caught the accused and slapped him. At that time the wife of the accused came and to their house and took back the accused with her to their own house. Police got her medically examined and got her statement recorded in Diphu Court. Ext-5 is the statement and Ext-5(1) is his signature. At present her age is 13 years. At the time of occurrence she was reading in class 5.

- In the instant case a female child who was only **15.** 14 years old was involved. The learned defence counsel has submitted that 7 days delay is very much fatal to the prosecution case mainly delay in filing of FIR is avoided as it gives chance for exaggeration and for distorting evidence. Ext-1 is FIR which was lodged by the mother of the victim child. Evidence of PW-2 who is the father of the victim child shows that due to non-availability of local Gaonbura, immediate after occurrence meeting could not be convened. It also appears that there were only four days delay in filing of FIR. From the discussion made above it cannot be said that there has been inordinate or unexplained delay in filing of FIR in the instant case. Taking all aspects I find no substance in the submission made above.
- the evidence of the victim child. Before going to factual matrix let us see whether the victim was a female child or not. The "child" is defined in the section 2(d) of the POCSO Act as "child" means any person below the age of eighteen years. PW-5 is the medial officer who examined the victim child and Ext-4 is the medical report which shows that at the time of occurrence the victim child was below 14 years old female child. PW-2 is the father of the victim child. PW-1 is the mother of the victim child and informant. According to them at the time of occurrence the victim child was 12 years old.
- who are the best person to say the age of the victim child. PW-3 and PW-5 are the basically witness to seizure list by which a birth certificate was seized. Ext-2 is the seizure list which shows that the birth certificate of the victim child was seized on being produced by the informant. It also shows that date of birth of the victim child is 04-12-2003. I

have also perused the Photostat copy of the said birth certificate of the victim child which also shows that her date of birth is 04-12-2003. Evidence of PW-6 shows that at the time of occurrence the victim was about 12-13 years old. The defence has not disputed the evidence on record in respect of age of the victim child at the time of occurrence. From the discussion made above it can be said comfortably that at the time of occurrence the victim was below 14 years.

- that one Sultan saw the occurrence physically. Evidence of victim child marked a PW-8 shows that one there relative saw the occurrence. But said Sultan has not been examined by the prosecution. Evidence of PW-1 and PW-2 shows that they were reported that the accused kissed the victim child and pressed her breast. It is evident that PW-3 to PW-6 came to PO after occurrence hearing shouting and they came to know from the villagers assembled there that the accused made attempt to rape the victim child. The evidence of Medical Officer shows that there is no history of sexual intercourse. Normally in such a case eye witnesses are rarely found.
- of PW-8 who is the victim child. It has been contended by the learned defence counsel that the victim is consented party and as such there is no case against the accused person. It is a case of sexual assault. Sexual assault is defined in the section 7 of the POCSO Act. For appropriate appreciation the said section is re-produced below:-
 - **"7. Sexual assault.-**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."
- 20. Bare reading of section 7 of the POCSO Act shows that the consent of the victim child is totally immaterial. Hence I find no force in the submission made by the learned defence counsel.

- 21. In such a case court can convict the accused on the sole evidence of the victim child if it inspires the confidence of the court. In this regard I would like to refer to the case of **Narender Kumar v. State (NCT of Delhi)** reported in " (2012) 7 SCC 171" and its relevant paragraph is re-produced below:-
 - **"20.** It is a settled legal proposition that once the statement of the 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. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case."
- stated in her testimony that on the night of occurrence the accused entered into their house while other family members were talking by sitting in the courtyard and caught hold of her waist and also dragged her towards his body. The accused kissed her and pressed her breasts. Her statement was got recorded in the court during investigation. Ext-5 is the said statement which shows that the accused person used to come their house and to hold her by her waist and kiss her. It also shows that the accused person was made brother of her mother by putting "Bhai tika" and that the accused threatened her that he would kill her parents if she disclosed the matter to anybody.
- 23. Regarding credibility of the child witness it has been observed by Hon'ble Apex Court in the case law of Raj Kumar V State of MP reported in " (2014) 5 SCC 353" thus:-" Evidence of child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him." Similarly the Hon'ble Apex Court has also observed in case of Alagupandi V State of TN reported in " (2012) 10 SCC 451" thus:-" While assessing evidence of child witness, court must carefully observe his/her demeanour

to eliminate likelihood of tutoring. Conviction can be allowed to stand without any corroboration but as a rule of prudence it is always desirable to seek corroboration of such evidence from other reliable evidence on record.

- 24. Taking all aspects into consideration including afore said observation I find no way to disbelieve the evidence of the victim child.
- 25. Under section 29 of the POCSO Act, 2012 the court can draw presumption that the accused person was involved in the occurrence in question if the defence fails to prove contrary to the fact where upon the prosecution relies. The said section reads thus:-"29. Presumption as to certain offences.-Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 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." In the instant case the defence has only taken plea of denial of "sexual assault" towards the victim child. In the instant case the defence the defence has failed to bring the contrary to the prosecution version.
- **26.** The section 8 of the POCSO Act relates to punishment for penetrative sexual assault which reads thus:-
 - **"8. Punishment for sexual assault .-**Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."
- 27. It is evident that till day of the night of occurrence, excess of the accused to the house of the informant was permissible. There is no creditable evidence showing that the accused entered in to the house of the informant in foul way. From the evidence of victim child marked as PW-8 it has became crystal clear that the accused kissed her and pressed her breasts. In view of the discussion made above I find that the prosecution has

succeeded in establishing its case under section 8 of the POCSO Act only.

<u>Order</u>

- 28. In the result, I find the accused person Ali Hussain guilty under section 8 of the POCSO Act and therefore he is convicted.
- 29. On the Point of Sentence the accused person is heard and to that effect his statement is recorded. It is found that the accused is a driver and a married person and that he is only earning member of his family consisting of a 12 year old child and his wife. It has been submitted by the learned defence counsel that the accused person deserves to be punished leniently as it was his first offence. He has further more submitted that presence of the accused person in his family is highly necessary as he is the only earning member. On the other the learned PP appearing on behalf of State of Assam has submitted that it is not fit case where in leniency in sentencing the accused person can be extended by drawing my attention to circumstances under which this legislation came into existence. He has further submitted that the accused deserves to be exemplarily punished. It is a legislation for the protection of the child from the sexual offences because previously such offences were dealt by various provisions of Indian Penal Code, which were not proving to be effective. Tears and silence are memories of many children who are sexually abused. Child sexual abuse has become an epidemic which is spreading all over the society either higher class or, lower class and attacking the younger ones. Pain and tissue injury can heal with the passage of time, but psychological and consequences still leave scars on individual life.
- **30.** The alleged occurrence took place in the house of the informant. The instant case has proved that even the female child is not safe in their own house. It is evident that the accused person committed the alleged sexual assault upon the victim child in cool brain in a planned manner.
- 31. In Surjit Singh Vs. Nahara Ram and others (2004)6 SCC 513=AIR 2004 SC 4122 it was held "The law regulates social interests, arbitrates conflicting claims

and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal Undoubtedly there is a cross-cultural conflict where living law must find answer to new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, laws as a corner stone of the edifice of 'order' should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public system in the efficacy of law and society could not long."

- Taking all aspects into consideration I find no force in the submission put forwarded by the learned defence counsel to little extent. Accordingly I do hereby order the accused person to suffer RI of 3 (Three) years and to pay fine of Rs. 1000/- i/d SI of 1(One) month. Set off earlier detention period. Let the fine money be paid to the informant if realized. Let certified copy of the Judgment and order be supplied to the accused person at free of cost. Let a copy of the Judgment be sent to the District Magistrate, Karbi Anglong, in terms of section 365 of the CrPC.
- 33. No recommendation for the award of the compensation is passed in favour of the victim.
- **34.** Accordingly this case is disposed of on contest.
- 35. Given under my hand and seal of the Court on this 07th August, 2018 at Diphu, Karbi Anglong.

Dictated and Corrected by me

(Md. A.U.Ahmed, AJS)
Judge, Special Court
Diphu, Karbi Anglong, Assam
Assam

(Md. A.U.Ahmed, AJS) Judge, Special Court Diphu, Karbi Anglong,

The prosecution examined:-

- 1. PW-1 Smt. Dipa Sunar
- 2. PW-2 Shri Prem Sunar
- 3. PW-3 Shri John Lotha
- 4. PW-4 Smt. Sunu Tamang
- 5. PW-5 Shri Dorjee Lama
- 6. PW-6- Shri Janak Rai
- 7. PW-7 -Dr. Mercy Rongpharipi.
- 8. PW-8 Miss Sushmita Sonar

The prosecution exhibited:

Ext-1 is Ejahar

Ext-2 is Seizure list.

Ext-3 is Zimanama

Ext-4 is Medical Examination Report

Ext-5 is Victim Statement.

Defence examined & exhibited: Nil.

Judge, Special Court
Diphu, Karbi Anglong,

Assam