IN THE COURT OF SESSIONS JUDGE :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS,

Special Judge, Sivasagar.

Spl. (P) Case No. 38 of 2016 U/S 6 of POCSO Act. (Arising out of Bokota Nemuguri P.S. Case No. 32/2016)

State of Assam

-Vs-

Sri Subhash Goala Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P For the accused : Md. Riajuddin Ahmed, Advocate

Date of framing Charge : 02.02.2017

Dates of Evidence : 01.03.2017, 08.05.2017, 05.02.2018.

 Date of S/D
 : 07.03.2018

 Date of Argument
 : 25.09.2018

 Date of Judgment
 : 09.10.2018

J U D G M E N T

- 1. Prosecution case in brief is that on 11.09.2016, informant Sri Budul Karmakar lodged an FIR with O/C, Bokota-Nemuguri P.S. alleging, inter alia, that on 09.09.2016, at about 12 noon, while his minor daughter victim 'S' (name withheld), aged about 11 years went to the shop of accused Subhash Goala, the shop-keeper Subhash Goala, by criminally intimidating took the victim inside his shop and committed rape on her. Due to non-returning home after lapse of some time, the eldest daughter of the informant went to the shop of the accused and brought back the victim to her house with deplorable health.
- 2. On receipt of the FIR, Bokota Nemuguri P.S. Case No. 32/2016, U/S 4 of POCSO Act, 2012 was registered and investigated. During investigation, I.O. visited the place of occurrence, prepared sketch map and recorded the statement of the witnesses. During investigation, accused Subhash Goala was

arrested and produced him before the court for judicial custody. The victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet U/S 4 of POCSO Act, 2012 against the accused person.

- 3. On receipt of the charge sheet and after furnishing copy to the accused person, vide order dated 02.02.2017, charge U/S 6 of POCSO Act, 2012 has been framed against the above named accused person to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined seven witnesses including M.O. and I.O. Defence cross-examined the said P.Ws.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. After hearing both the sides u/s 232 Cr.P.C, and observing that it was not a case of no-evidence, accused was called upon to enter into defence to which he answered in affirmative and prayed for time to bring witness in defence. Accordingly accused adduced defence evidence by examining one Sri Sunu Karmakar as DW 1.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Md. Riajuddin Ahmed, learned defence counsel and gone through the evidence on record.

POINTS FOR DETERMINATION ARE -

- 6. (I) What was the age of the victim 'S' on the date of incident?
 - (II) Whether on 09.09.2016, at about 12 noon, victim 'S' was subjected to penetrative sexual assault (rape) or any minor offence, i. e. sexual assault or sexual harassment by the accused?

DECISION AND REASONS THEREOF:

7. PW-1 Sri Budul Karmakar, the father of the victim in his evidence deposed that victim S is presently age is 11 years and she is reading in class VI. On last durga puja time, while he and his wife went out of home for work by leaving behind their two daughters at his residence, on return home from work, Spl. (P) Case No. 38/2016 Page 2 of 14

he saw that the victim S was weeping. On inquiry, she told him that at about 12 noon, while she went to the shop of Subhash Goala for bringing surf packet, accused Subhash pulled her inside the shop and after closing the shop, committed misdeed with her by opening her cloths. On her non return in time, his eldest daughter Babita aged about 14 years went to the shop of Subhash to take care of her younger sister and saw the accused in committing misdeed on victim S. On knowing this, on the next morning, he informed the matter to Gaonbura Biren Gogoi and other villagers. On their arrival, they searched for the accused but the accused and his family members were found absconding from their house. On this incident, Budul lodged the FIR at Bokota Nemuguri PS. Police interrogated him. Police also took his daughter for medical examination and brought her to court for statement. In his cross examination, PW-1 deposed that the residence of accused is situated after 4 other houses. Accused sometime used to visit their residence. His daughter used to visit the shop of accused regularly. The shop is constructed with bamboo fencing and door. Residence of other peoples were there at some distance from the shop. Accused has committed rape on his daughter. She was medically examined. In his cross examination, PW-1 denied that accused did not commit rape or misdeed on his daughter. PW-1 also denied that his daughter used to commit theft in the shop. PW-1 denied that on the date of incident, his daughter in her attempt to commit theft, kept herself concealed under the bed in the shop and she was caught red-handed. PW-1 denied that, on this, they falsely implicated the accused to save their daughter from the allegation of theft. PW-1 further denied that few days prior to this incident, on being caught red handed in committing theft by victim S, a village meeting was held and found her guilty.

8. PW-2 victim S in her evidence deposed that accused has a stationary shop in his residence. On the date of incident, at about 12 noon, she went to the shop of the accused Subhash for bringing surf. Her parents went for work and her elder sister Babita was in the house. On going there, after taking surf packet, when she offered money, accused hold her hand, pulled her inside the shop and opened her pant by lying her on earth. He also open his

pant and committed misdeed with her. She got pain on her urinary track for the misdeed. After some time, her sister Babita arrived there and saw them in lying condition. Her sister Babita took her to their house. She informed the matter to parents. Police interrogated her. Police also took her for medical examination and to court for recording statement. She gave her statement in court. Exbt. 1 is her statement in court. Exbt. 1(i) is her signature. At the time of incident, she was reading in class V. In her cross examination, PW-2 PW-2 denied that accused did not commit any misdeed with her. PW-2 also denied that while giving statement to police and in court, she has not stated that "she got pain on her urinary track for the misdeed". She also denied that her sister saw her inside the shop in sitting condition. On seeing her there, her sister made hue and cry and several peoples gathered there. PW-2 denied that she used to commit theft in the shop of Subhash. PW-2 further denied that on the date of incident, she attempted to commit theft, by keeping herself concealed under the bed in the shop and was caught red-handed. She frequently used to visit the shop of the accused. PW-2 denied that on being tutored by her father falsely implicated the accused to save her from the allegation of theft.

9. PW-3 Miss Babita Karmakar, the elder sister of the victim in her evidence deposed that on last durga puja time, while her parents went out of home for work by leaving behind her and victim S at their residence for washing cloth, at about 12 noon, while victim S went to the shop of Subhash Goala for bringing surf packet. Due to her non return, she went to the shop of Subhash to take care of victim S and saw that accused was lying naked on victim S. Victim S was also naked and lying on ground. On this, she brought back victim S to home. On returning parents, she informed the matter to them. On knowing this, accused and his family members flee away from their house. Her father informed the matter to other villagers. Exbt. 2 is her statement in court. Exbt. 2(i) is her signature. She read upto class VI and left school about 2 years back. In her cross examination, PW-3 deposed that accused sometime used to visit their residence. Her sister used to visit his shop regularly. Residence of other peoples were there at some distance from the shop. When

she went to the shop, the door of the shop was closed from inside. She opened it by using force. Residence of accused is in the shop premises of the accused. Accused Subhash also works as priest in their village. In her cross examination, PW-3 denied the suggestion that accused did not commit rape or misdeed on her sister. PW-3 denied that she has not seen any incident of misdeed by accused with her sister. Victim S told her that accused has committed misdeed with her. On seeing her sister in such condition, she made hue and cry and several peoples gathered there. PW-3 denied that while giving statement to police and in court, she has not stated that "she went to the shop of Subhash" to take care of Babita and saw that accused was lying naked on victim S. Victim S was also naked and lying on ground. On this she brought back victim S to home." PW-3 denied that her sister used to commit theft in the shop of Subhash. PW-3 also denied that on the date of incident, her sister in her attempt to commit theft, kept herself concealed under the bed in the shop and she was caught red-handed. PW-3 further denied that, on this, they have falsely implicated the accused to save her sister from the allegation of theft.

- 10. PW-4 Dr. Duplay Patir, the MO of this Case in his evidence deposed that on 12.09.2016, he was working at Sivasagar Civil Hospital as Senior Medical & Health Officer. On that day, on police requisition, he examined victim S and on examination he opined that the victim S was above the age of 12 years and below the age of 18 years. There was no evidence of sign of recent sexual intercourse at the time of examination. There is no any sign of injury detected on her body or private part at the time of examination. Ext. 3 is the medical examination report. In his cross examination, PW-4 deposed that at the time of examination of victim she has not complaint regarding pain in her private part.
- 11. PW 5 Sri Biren Gogoi in his evidence deposed that on 09.09.2016, at about 05.00 PM, Budul Karmakar, father of victim called him to his residence. On this, he along with VDP secretary Muhi Chngmai went to his house and Babita told him that on that day, at about 12 noon, while victim S went to the shop of Subhash Goala for bringing surf packet, due to her non return, she Spl. (P) Case No. 38/2016 Page 5 of 14

went to the shop of Subhash to take care of victim S and saw that accused was lying naked on victim S. Victim S was also lying naked on ground. On this, he asked the victim S about the incident. She also told him that while she went to the shop of accused Subhash, accused took her inside his shop, kissed her and touched her breast. On knowing this, he went to the residence of Subhash and on meeting his wife, she told that Subhash has gone out of her residence. On this, he requested her to remain present with her husband on next day for attempt of village settlement but on the next day when he went to the house of accused, they were found absent. On failure to settle the matter locally, this case was filed. Police interrogated him. In his cross examination, PW-5 denied the suggestion made by defence that while giving statement to police and in court, he has not stated as stated in court so far hearing the incident from Babita and Victim S. PW-5 denied that before police he has stated that Budul came to his residence and informed about the incident. PW-5 also denied that victim or Babita did not inform him anything about any such incident.

- 12. PW-6 Sri Ramchandra Goala in his evidence deposed that he has no knowledge of any incident of 09.09.2016, regarding daughter of Budul Karmakar. He accompanied Budul Karmakar and his daughters to police station. Budul had informed him that Subhash has committed rape with his younger daughter. He has not inquired the said victim about incident. In his cross examination, PW-6 deposed that Police did not interrogate him. PW-6 denied that he deposed falsely.
- 13. PW-7 Inspector Dipak Sutradhar, the I/O of this Case in his evidence deposed that on 11.09.2016, while he was posted as O/C at Bokota Nemuguri PS, on that day at about 2.30 pm, he received one written FIR from Sri Bubul Karmakar and registered Bokota Nemuguri PS case No. 32/16 u/s 4 of POCSO Act and took charge to investigate the case. Exbt. 4 is the FIR of the Case. During he went to the place of occurrence i.e. residence of accused Sri Subhash Goala at Khamon Mazdoor Gaon and drawn a sketch map of the PO. Exbt. 5 is the said sketch map. Exbt. 5 (i) is his signature. On the next day, victim was sent for medical examination and also sent to Court for recording Spl. (P) Case No. 38/2016

her statement u/s 164 Cr.P.C. During investigation, he has collected the medical report and statement given by victim in court. He seized school certificate of the victim on being produced by the complaint. Exbt. 6 is the seizure list. As mentioned in the seizure list, the date of birth of the victim is 09.03.2006. Original certificate was handed over on zimma to complainant. During investigation, he apprehended the FIR named accused Sri Subhash Goala. On completion of investigation, he submitted charge sheet against the accused u/s 4 of POCSO Act. Exbt. 7 is the charge sheet. In his cross examination, PW-7 deposed that the place of occurrence is the shop of accused. Residence of accused is also attached to his shop. He did not find the wife of accused and hence did not record her statement. Several persons have their residences near the P.O. He has not examined the mother of the victim as witness. Victim in her statement before him did not state that she got pain in her private parts. Witness Babita Karmakar in her statement has not stated that "She went to the shop of Subhash to take care of victim S and saw that accused was lying naked on victim S. Victim S was also naked and lying on ground. On this she brought back victim S to home." Witness Biren Gogoi in his statement did not stated that victim has reported to him that accused kissed her and touched her breast. PW-7 denied that he has not investigated the case properly and laid the charge sheet without proper material.

DW-1 Sri Sunu Karmakar in his evidence deposed that on 09.09.2016, while he went to take bath in the hand pump near the shop of accused Subhash Goala, he saw that victim S, daughter of Budul was weeping in the shop of Subhash. On this, he went there and saw that accused Subhash has recovered Rs. 60/- (sixty) from the palm of victim S. By that time Ponakan Gogoi also arrived there in search of him. Several others also gathered there. On settlement of the matter, victim S was released. After 3 - 4 days, he heard about filling of case by Budul against Subhash Goala. O/C Bokota Nemuguri came to their village and recorded his statement and asked him to produce Subhash before police. On that day except committing theft, no other incident took place with the victim S. His residence is in between the house of Budul and

accused Subhash. Several other persons have their residence in that area. In his cross examination by the prosecution, DW-1 deposed that the incident of detection of theft was of about 12 noon. At that time, normally villagers used to remain in their houses or at work place. He cannot say why victim S was weeping at that time. He has seen the recovered money in the hands of Subhash. He has not seen the money in the hands of victim S. Subhash has informed him that he found the money in the hands of victim S. DW-1 denied that Ponakan did not come there in search of him. He has visiting relation with Subhash and they maintain good relation. DW-1 denied that police did not record his statement. DW-1 also denied that due to relation with Subhash, to save him, he deposed falsely. Basing on the above evidence on record, let me decide the points formulated.

Point No. I: 15. So far age of the victim is concerned, in the FIR and in his evidence as PW 1 the informant claimed that at the relevant time victim was aged about 11 years. The victim while adducing evidence in court has also claimed her age as 11 years. PW 4 the M.O., who has examined the victim on 12.09.2016 in his evidence opined that the victim was above 12 years but below 18 years of age. In the X-ray report the wrist joint and elbow joints were however found incomplete fusion of the epiphysis. It may be noted here that during investigation, the I.O. (PW 7) has collected one school certificate of the victim vide Exbt. 6 the seizure list and as per the said document the date of birth of the victim is 09.03.2006. As per the FIR the alleged incident occurred on 09.09.2016. As such, as per the school certificate the victim was aged about 10½ years at the relevant time of the alleged occurrence. During cross examination of the above witnesses defence did not challenge on age of the victim as stated by PW 1, the father of the victim or PW 2, the victim herself. While examining the accused U/S 313 Cr.P.C., accused also did not challenge the above referred evidence on age of the victim when put to him. He simply stated about his ignorance on age of the victim. This part of evidence on age of the victim remains unrebutted by the defence. It may be mentioned here that as per medical jurisprudence opinion of a Medical Officer

on age may vary two years on either side. Under these circumstances, the school document which is found more reliable is accepted on age of the victim. So from the above materials on record it can safely be held that on the alleged date of incident victim was aged about 10½ years.

16. <u>Point No. II:</u> In the course of argument hearing, learned Special P.P. by referring to the evidence of the victim and her elder sister who appears to be an eye witness of the incident has argued that from the evidence of PW 1, PW 2 and PW 3 it is proved that on 09.09.2016, at about 12 noon, while victim went to the shop of the accused for bringing surf, she was pulled inside the shop by the accused and was subjected to sexual assault by the accused and this part of incident was seen by the PW 3, elder sister of the victim. Hence their evidence is found reliable and trustworthy and as such court should take presumption u/s 29 of POCSO Act 2012 towards reliability of their evidence so far minor offence is concerned. On the other hand, learned Advocate for the accused by refuting the submission of learned Special P.P. has argued that in this case the defence has brought out a specific defence story that on the alleged date of incident the victim was caught red handed while committing theft from the cash box of the shop of the accused and on this victim was scolded and after calling the villagers she was let off. It is further argued that on this incident, by concocting a false story, the FIR was lodged after two days of the alleged incident of rape without any explanation of delay in filing the FIR. It is further argued that Section 29 of Pocso Act 2012, is a rebuttable presumption and the accused side by bringing sufficient materials during cross examination and also by examining one Sri Sunu Karmakar as DW 1 has been sufficiently proved that there every possibility of false implication. As such Section 29 of POCSO Act 2012 cannot be applied in this case. In absence of any such presumption, there are inherent defect in the evidence of the prosecution witnesses and as such accused is entitled for acquittal from the charges brought against him. I have considered the submission of both the sides.

17. So far allegation of penetrative sexual assault on the victim is Spl. (P) Case No. 38/2016 Page 9 of 14

concerned, from Exbt. 4 FIR, it appears that a clear allegation has been brought against the accused for committing rape on the victim. PW 2 the victim in her evidence as narrated herein before has clearly stated that after opening her pant accused laid her on the ground, opened his pant and committed misdeed with her and she got pain on her urinary track for the misdeed. PW 3, the elder sister of the victim in her evidence stated that due to non-return of the victim after lapse of some time, she went to the shop of the accused to take care of victim and saw that accused was lying naked over the victim by laying her on the ground. On this she brought back the victim to her house. However PW 4 the M.O., who has examined the victim on 12.09.2016 in his evidence categorically stated that there was no mark of violence found on her body. Hymen was found intact and other organs of genitalia found normal. No abnormality was detected and no injury was found on the private parts of the victim. In his cross examination the M.O. has stated that during examination victim never complained regarding pain in her private parts. The victim in her evidence as PW 2 stated that during investigation police brought her to court and she gave her statement u/s 164 Cr.P.C. vide Exbt.1. On looking at the said 164 Cr.P.C. statement as proved by the prosecution, it appears that on 12.09.2016 the statement of the victim was recorded by Judicial Magistrate 1st Class, Sivasagar and in that statement, victim stated that she was taken inside the shop by the accused by holding her hand and forcibly opened her pant, touched her private parts and attempted to make physical relation with her. On her hue and cry, her elder sister arrived there and on this accused left her and she returned home. From 164 Cr.P.C. statement of the victim, it appears that on that day, she never complained regarding penetrative sexual assault by the accused on her. On that day the victim simply stated that accused touched her private parts and attempted to make physical relation. She was totally silent regarding any sort of penetrative sexual assault by the accused on her. From the evidence of PW 5, it appears that on asking, victim only told him that accused by taking her inside his shop kissed her and touched her breast. PW 5 is totally silent regarding laying the victim on the ground, disrobing her or any attempt made by the accused in committing penetrative sexual assault/rape on her or even touching her vagina. However PW 7, the I.O. in his evidence has confirmed that said PW 5 did not state before him that the victim has reported him regarding kissing and touching her breast by the accused. So this part of evidence of PW 5, appears to be exaggerated. If we look at the statement of the victim given u/s 164 Cr.P.C. coupled with the finding of the PW 4 the M.O., it appears that had there been any penetrative sexual assault on the victim or attempt thereof, the victim being a 10 to 11 years old girl, there must have some injury marks on her private parts. Missing of any such injury marks indicates that no penetrative sexual assault or attempt there of took place with the victim as alleged. This part of findings makes the evidence of the victim suspicious and shaky so far the allegation of committing penetrative sexual assault on the victim by the accused is concerned.

18. Having finding no reliable material on penetrative sexual assault, let me consider as to whether any other minor offence was proved against the accused. Before proceeding further, I am going to discuss the other evidence. From the evidence of PW 1 who is a hearsay witness, it appears that on returning home he could learnt about the incident and on the next day morning he informed the matter to Gaonburah Sri Biren Gogoi (PW 5) and other villagers. In his evidence PW 1 did not explain the reason for delay in lodging the FIR. Admittedly the FIR was lodged after two days of this incident. From his cross examination, it appears that the shop of the accused is constructed with bamboo fencing and door. He denied the defence suggestion that his daughter used to commit theft in the shop of the accused and on the date of incident she was caught red-handed while committing theft and to save her from the allegation of theft he filed this false case. The victim in her evidence as stated earlier has deposed regarding commission of rape by the accused which is found self contradicting. From the cross examination of PW 2 the victim, it appears that residence of accused is with his shop and family members of the accused also reside with him. The victim denied that she used

to commit theft in the shop of accused and on the date of incident in her attempt to commit theft she was caught red-handed. From the evidence of PW 3 it appears that she has admitted that on seeing the victim in naked condition she made hue and cry and several people gathered there. But prosecution failed to produce any witness to support the evidence of PW 3. From the evidence of PW 5 it appears that he is a Gaonburah and on the date of incident the informant came to him and informed the matter. But from the evidence of PW 1 the informant, it appears that on the next day morning he informed the matter to Gaonburah Biren Gogoi. In the contrast, the defence adduced evidence in support of the defence plea of catching the victim in committing theft. At this stage let me look at the evidence of DW 1, who in his evidence stated that on 09.09.2016, while he went to take bath in the handpump near the shop of accused Subhash Goala, he saw the victim in the shop of the accused and she was weeping. Accused has recovered Rs. 60/- (Rupees sixty) from the palm of the victim. On this, several persons gathered there and after settlement of the matter victim was released. He categorically stated that except committing theft no other incident took place with the victim. In his cross examination he admitted that he has seen the recovered money in the hands of the accused. He denied that he deposed falsely.

- 19. So from the evidence of DW 1, it appears that prosecution has failed to discredit his presence at the relevant time and his evidence and thus the defence has been successful in bringing out some materials on allegation of theft, which appears to be probable against the victim and same can be treated as sufficient for rebuttal of presumption available u/s 29 of POCSO Act, 2012. Under the above circumstances, I found no substance in the argument of the learned Special P.P. so far applicability of Section 29 of POCSO Act 2012 in the case in hand is concerned.
- 20. From the inherent discrepancies found in the evidence of PW 2 the victim, so far exaggeration of the facts by the victim, her changing version during 164 Cr.P.C. statement and her evidence in court, apparent improbability of the evidence of PW 3 the alleged eye witness, I am of the opinion that the Spl. (P) Case No. 38/2016

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evidence of the victim (PW 2) and her elder sister (PW 3) cannot relied upon in this case as trustworthy and reliable without further corroboration by independent witnesses. Moreover, delay in lodging the FIR without any explanation makes the prosecution case more doubtful. Law is well settled that when there is any doubt remains in the case, the benefit must go to the accused. In view of above, I am of the opinion that in this case accused is entitled for benefit of doubt.

- 21. From the totality of the fact, I am of the opinion that it will be unsafe to rely the evidence of PW 2, the victim and her elder sister PW 3, the alleged eye witness so far allegation of penetrative sexual assault/rape is concerned. As such doubt remains in the prosecution story.
- 22. Considering all above, I am of the opinion that prosecution has failed to prove the charge U/S 6 of POCSO Act, 2012 or any other minor offences against the accused Subhash Goala. As such, accused Subhash Goala is acquitted from the charge U/S 6 of POCSO Act, 2012 on benefit of doubt and set at liberty forthwith.
- 23. Bail bond executed by the accused and his surety are extended for another six months from today U/S 437-A Cr.P.C.
- Considering the nature of the case, I am of the opinion that it is not a fit case for referring the matter to DLSA for granting compensation U/S 357-A Cr.P.C.
- 25. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 26. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 9th day of October, 2018 Sivasagar.

Special Judge,
Sivasagar:
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APPENDIX

1. Prosecution witnesses -

- PW 1 Sri Budul Karmakar (Informant)
- PW 2 Victim 'S'
- PW 3 Miss Babita Karmakar
- PW 4 Dr. Duplay Patir (M.O.)
- PW 5 Sri Biren Gogoi (Gaonburah)
- PW 6 Sri Ramchandra Goala
- PW 7 Inspector Dipak Sutradhar (I.O.)

2. <u>Defence witnesses</u> -

DW 1 Sri Sunu Karmakar

3. <u>Court witnesses</u> - None

4. Exhibits by prosecution -

- Exbt.1 164 Cr.P.C. statement of the victim.
- Exbt.2 164 Cr.P.C. statement of the witness Babita Karmakar
- Exbt.3 Medical examination report
- Exbt.4 FIR
- Exbt.5 Sketch map
- Exbt.6 Seizure list
- Exbt.7 Charge-Sheet

Special Judge <u>Sivasagar</u>