

IN THE COURT OF THE SPECIAL JUDGE, NAGAON. SPECIAL (POCSO)CASE NO. 58(N) OF 2016

PRESENT :

Smti. R. Kar,

Special Judge,

Nagaon

State of Assam

Complainant

-Versus -

Juwakin Tirki

Accused Person

ADVOCATES WHO APPEARED IN THIS CASE

For the Complainant

:Sri M.Neog,

Special Public Prosecutor.

For the accused

: Sri Rafique Ullah,

Legal Aid Counsel.

Date of evidence of PWs : 18-01-2017, 31-07-2017,

20-10-2017, 03-11-2017,

27-03-2018.

Date of Argument

: 24-07-2018

Date of Judgment

: 08-08-2018

JUDGMENT

The prosecution case as unfolded from the FIR is that on 04-05-2016, informant Smti. Ilizina Kispotta W/O Akash Kispotta of Podumoni Basti, Purana Salona, district Nagaon lodged an FIR before the In-Charge of Salonah P.P. under Samaguri P.S. alleging that her related uncle-in-law, Juwakin Tirki took her 8 months son to his house at 8 a.m., and by holding both the arms of her son, accused inserted his male organ in his mouth and was sexually exploited, then on hearing crying of his small baby, she rushed to the house of accused and found the accused in half strip from his waist. On seeing such situation of her son she felt it a serious incident and tear outbrust from her eyes and for about 30 second she stood still at that place and saw ejeculated semen sticking into the face of her son and then gathering courage she lifted her son in her lap from the accused and flinched out from the room. Then she saw the wife of the accused at the well plate and going near to her elaborately narrated about the incident. Thereafter she came to her house and told the incident to all available family members of the house and also to their neighbours and thereafter shifted her son to Simanabasti Hospital for his treatment. Hence, the F.I.R.

Special Judge,

- 2. On basis of the said FIR, the In-Charge, Salonah P.P. made the Salonah P.P. GDE No.52 dated 04-05-2016 and forwarded it to Officer-in-Charge Samaguri for registering a case. Accordingly the Officer-in-Charge of Samaguri P.S. registered Samaguri P.S. Case No.202/16 u/s 4 of POCSO Act/2012 and police started usual investigation thereon. Upon completion of the investigation police laid charge sheet U/s. 4 of POCSO Act against the accused Juwakin Tirki.
- **3**. On being produced the accused person was furnished with all the necessary copies as required U/S 207 of Cr.P.C by that court. Subsequently, after hearing both sides and perusing relevant materials a formal charge u/s 4 of the POCSO Act was framed



against accused Juwakin Tirki and same was read over and explained to him to which he pleaded not guilty and claimed to be tried.

- 4. During trial of the case, prosecution side examined 6 witnesses including the Medical Officer and the Investigating Officer. The accused person was examined u/s 313 Cr.P.C. Defense adopted plea of denial and examined none.
- **5.** I have heard argument advanced by both sides.

6. Point for decision:-

i) Whether on 04-05-2016 at about 8 a.m. the accused has committed penetrative sexual assault on the 8 months old male child of the complainant by pentrating his penis in the mouth of the child and thereby committed an offence punishable u/s 4 of the POCSO Act. ?

Special Judge, Nagaon :: Assam

7. Discussion, decision and reasons thereof:

Before entering into the discussion, the gist of the prosecution evidence is laid down below:-

PW 1, (complainant) has deposed that incident took place on 04-05-2016 at about 8 a.m. On that day, in the morning the son of Juwakin, namely, Isak came to their house and wanted to take her 8 months son. Then she told him that she is feeding milk to her son and as such, now, she cannot give him. Subsequently her husband taking the son went towards the road, then from her husband, the wife of Juwakin took her son to their house. After some time, she heard cyring sound of her son and as such she ran to the house of Juwakin and saw that Juwakin was putting in and out his male organ into the mouth of her son. Looking this she stopped a moment there and then she took her baby in her lap. She found her son's face, chest sticked with semen and was wetted. She told the



accused that she has become offended by his act. Thereafter she came to the wife of Juwakin and told about the incident. Wife of Juwakin came to Juwakin and told something to him. She further deposed that then she came back to her house with her baby and narrated the incident to her mother-in-law. Thereafter she along with her mother-in-law took her son to Hospital and from there she went to Police Station and one man wrote the ejahar where she put her signature. Ext.1 is the ejahar and Ext.1(1) is her signature. Police recorded her statement and produced her before Court and caused her statement recorded. Ext.2 is her statement and Ext.2(1), 2(2), 2(3), 2(4) and 2(5) are her signatures.

Special Judge, Nagaon :: Assam PW 2 Deben Kujur has deposed that he knows the complainant and the accused and they are from their village. Incident took place on 4th of May last year. At the time of incident he was at his residence. During day time at about 11 a.m. he heard from the garden people that Juwakin committed bad act by inserting his male organ into the mouth of complainant's son.

PW 3, Kusha Nayak turned hostile to the prosecution.

PW 4, Dr. Imran Hussain deposed that on 03-05-2016 he was serving as S.M. & H.O. at Simonabasti PHC Nagaon, Assam and on that day at around 10.30 a.m. he examined the victim, aged 8 months, male, S/O PW 5 of village Purana Salonah, P.S. Samaguri in reference to 202/2016 on police requisition and on being escorted and identified by Ibrahim Ali UBC 65.

On examination no external injury was noticed. Location of the body - over oral cavity or face. Ext.3 is his report and Ext.3(1) is his signature.

PW 5, father of victim has deposed that complainant is his wife and accused Juwakin Tirki is his neighbour. Incident took

place 1 year ago in the morning at about 8 a.m. and at that time he went to Amoni for his work. At about 9 a.m. his wife called him over phone to the house. He instantaneously returned home and then his wife told him that Juwakin Tirki inserted his male organ into their 8 months small son. Thereafter finding the health condition of their son unwell, his wife took him to a doctor and subsequently lodged ejahar at the police station.

PW 6, Biju Kingkar Basumatary is the investigating Officer of this case.

8. Mr. M.Neog, the learned Special Public Prosecutor appearing for the State submitted that the evidence adduced by the prosecution witnesses, more particularly PW 1 clearly establishes the case of the prosecution. Learned Special P.P. further argued that this is a bizarre incident and as such law should be stringent against such offence. He submitted that PW 1 is the mother of the victim and was the eye witness of the case. He further submitted that the discrepancy in the evidence are in fact only minor inconsistencies which otherwise cannot be the basis for rejecting the credibility of the prosecution evidence. He thus submits that from a perusal of the evidence led by the prosecution, it can be clearly seen that the prosecution have been able to bring home the guilt of the accused person and considering the heinous crime having committed by him accused must be convicted and appropriate sentence be awarded.

The learned legal aid counsel Sri Rafique Ullah on the other hand, refuting the argument of the learned Special P.P., submitted that the evidence of PW 1 having not been corroborated by other witnesses as such conviction of accused cannot be sustained solely on the testimony of PW 1. He further submits that the evidences led by PW 1, the mother of the victim do not have any evidentiary value for convicting the accused in as much as her statement in the FIR—she submitted and her deposition before the

Special Judge, Special Judge, Nagaon: Assain Special Judge, Nagaon :: Assam

Court are absolutely contradictory. He argued that in the FIR complainant has not mentioned the date of incident while in examination-in-chief she mentioned the date of incident as 04-05-Mr. Rafique Ullah further pointed out that PW 1 in her crossexamination admitted that in the statement before the Police and the statement before the Magistrate she mentioned the date of incident as 03-05-2016 and on the same day after attending a doctor she went to the Police Station and lodged the FIR. The learned legal aid counsel further argued that in the cross-examination, PW 1 stated that who had taken the baby from her husband she did not know and thus no chain of link can be establised that the son of the complainant was taken to the house of accused person and committed the offence. He further argued that many new things has been dislcosed in the evidence of PW 1 which are not in the FIR and thus there is an improvement in the evidence of PW 1. The learned counsel further argued that the investigation done by the I.O., was most perfunctory in as much as the I.O. did not seize the alleged cloth with which the semen were swept from the face of the baby. The medical report also does not reflect anything about the presence of semen in the mouth of the victim thus there is inconsistency, more particularly on the occular evidence and the medical evidence. The defence further argued that thought there is eye witness but the medical evidence recedes in the background. He further argued that when the eye witness is totally inconsistent with the medical evidence, there is no reason to believe that the evidence of occular witness. Therefore, conviction of the accused under such circumstances is not sustainable.

10. Now let us appreciate evidence on record how far the prosecution witnesses is able success in this case.

From the evidence led by the prosecution, it can be seen from the evidence of PW 1 (Complainant) that on the relevant day at about 8 a.m. in the morning, the son of Juwakin, namely, Isak came to their house and wanted to take her 8 months son but PW 1

did not allow him to take as she was feeding milk to her son. After some time PW 5 taking his son in his lap went out to road side, then wife of Juwakin took her son to their house. After sometime, PW 1 heard cry of her said son and rushed to the house of Juwakin and saw that Juwakin was putting in and out of his male organ into the mouth of her son. Seeing such act of the accused, PW 1 was shocked and restless for a second and then took her baby in her lap and notice the face of her son covered with wetty semen. Subsquently, PW 1 told the incident to the wife of Juwakin at the outside well and then to her house-hold members at her house.

Special Judge, Nagaon :: Assam

In the cross-examination PW 1 categorically stated that while her husband was with their son in road, the accused person took her son to their house. PW 1 stated in her cross-examination that she had not seen by whom her child was taken to the house of accused from her husband. It appears that PW 1 is a house-wife and as such she have to perform lot of work at their house and as such cannot keep her son in her lap at all the time. Thus it is an inherent probability that she has not seen by whom her son was taken to the house of accused but she confirmed that her son was taken to the house of accused. PW 1 in her cross-examination stated that they have visiting terms with the house of accused and they used to take her baby to their house on earlier occasion also. Thus it appears that there is no any pre-alarming situation to draw the neighbours or others people at the time of occurrence. The victim being a eight months old baby raised his complaint by crying and on hearing sound of crying, PW 1 ran there and saw the incident. PW 1 further affirmed in her cross-examination that she saw Juwakin sitting in his house by holding her son in his lap and Juwakin was wearing a 'Gamucha' . PW 1 has categorically stated in her cross-examination that she saw semen in the face of her son and swept the semen but same had not been shown to police by her or seized by the police. Now learned Legal Aid Counsel has argued that the complainant (PW 1) in her evidence has stated that she found Juakin inside his house and he was sitting by taking the baby in his lap and as such it cannot

be believed that the accused has performed such act. Now, the complainant has not vividly described in her evidence in what exact position she found the accused. It is in the course of cross-examination she stated that she found the accused in sitting position by taking her baby in his lap. It is not at all impossible that in sitting position accused would not be able to do such act as alleged. Mere non-mentioning of exact position in which she found the accused does not render her testimony untrustworthy. PW 5, the husband of the complainant (PW 1) has confirmed that his son was taken to the house of Juwakin by his(accused) daughter. Thus fact is established that the incident took place in the house of the accused Juakin Tirki.

Special Judge, Nagaon :: Assam

Specia

PW 1 and PW 5 stated that on the day of incident, their son was taken to the doctor finding him unwell. The incident occurred on 03-05-2016 at about 8 a.m. From the report of the doctor (PW 4) it appears that he examined the son of PW 1 and PW 5 on the relevant date and time and noticed no external injury over oral cavity or face. The report of the doctor affirmed that he examined the victim in respect of the oral cavity/ face of the baby as complained by the mother of the victim. There was no any complaint of injury or abrasion of the baby and as such in his cross-examination he found the baby in normal state and appearance. Thus the nature of finding of the doctor on victim is similar to the statements made by the prosecution witnesses, more particularly PW 1. PW 1 stated in her evidence stated that she has swept off the semen stick from the face of her son, as such there is no question of finding semen on the face of the baby. Had the baby been examined for any other health problem, the finding of the doctor would be different.PW 3 (Kusha Nayak) before parting hostile lent support to the extent that guarrel took place betwen the complainant and the accused for the son of the complainant. Defence has failed to shake the credibility of PW 1 although she was cross-examined at length.

The omission of date of offence in the FIR cannot be treated as fatal for prosecution case. PW 1 has mentioned the date

of offence as 04-05-2016 in her deposition and in her statements before the police and Magistrate has mentioned the date of occurrence as 03-05-2016 which is common human error and that level of memory differs from person to person and for such variation evidence of PW 1 could not be throw out in toto.

From the evidence PW 6 (I.O.) it appears that immediately after the incident, father of the victim at about 9.30 a.m. informed over phone that accused Juwakin Tirki inserted his male organ into the 7 months son and accordingly he entered the Salna P.P. GD. Entry No.38 dated 03-05-2016 vide Ext.4. He found the accused Juwakin Tirki confined by the people of the locality and he took him in their custody and drew the sketch map vide Ext.5. Thus from Ext.4 (Extract copy of GD Entry) it is evident that immedaitely after the incident PW 5 informed the matter to the police station over phone. It appears from the evidence of prosecution that there was no inimical relationship between the accused person and complainant and they have visiting terms and as such there is no reason why they should tell lie involving their 8 months old child with such dirty matter. PW 1 is a innocent common house-wife and is not legally conscious to produce the cloth before the police for the interest of investigation as such she left uncare of the said cloth. Thus the testimony of PW 1 is wholly reliable . When the incident of the fact is proved by the PW 1, PW 2 and PW 5, coupled with Ext.4 (GD entry) in such a situation minor inconsistencies cannot be a ground to disbelieve the prosecution case.

Special Judge, Nagaon :: Assam

Now the accused in his statement u/s 313 Cr.P.C has simply denied the fact and stated that before logding the FIR he was beaten by the family members of the complainant but the accused has not given any defence evidence in support of his plea.

11. From the evidence it is established that the accused is a pervert and did not spare a baby of 8 months to fulfill his carnal desire. Considering the evidence and materials on record, I have

arrived at the finding that the prosecution has succeeded to bring home the charge against accused Juwakin Tirki u/s 4 of the POCSO Act beyond all reasonable doubt and accordingly he is convicted under the section.

- **12**. Considering the nature of offence and facts and circumstances of the case, I am not inclining to extend any benefit either under the provision of Probation of Offender Act or u/s 360 Cr.P.C.
- **13. Sentence hearing:** I have heard the accused person on the point of sentence. His statement on sentence hearing is recorded in separate sheet and kept with the case record. Accused person has prayed for showing leniency on sentence.
- **14. Sentence**: Considering all aspects, accused Juwakin Tirki is sentenced to undergo Rigorous Imprisonment for 7 (seven) years and also to pay fine of Rs.10,000/- in default R.I. for another 6 (six) months for Section 4 of the POCSO Act.

Period of detention already undergone be set off as per provision of Section 428 of Cr.P.C.

The accused person be sent to judicial custody to serve the sentence passed against him. Issue imprisonment custody warrant accordingly.

Seized articles, if any be destroyed in due course of law.

Furnished copy of the judgment free of cost to the accused person.

Send a copy of the judgment to learned District Magistrate of Nagaon u/s 365 Cr.P.C.



Given under my hand and seal of this court, I have signed and delivered this Judgment on this 8" day of August, 2018 at Nagaon.

R.Kar)

Special Judge, Special Judge, Nagabagassam

Dictated & corrected by me.

8-8-18

(R.Kar)

Special Judge, Special Judge, Naga**yagasam**

Dictation taken & transcribed by

Nen Restlowe (Nipen Rajkhowa)

Stenographer.



ANNEXURE

Prosecution Witnesses

1. P.W.1	PW 1
2. P.W.2	Deben Kujur
3. P.W.3	Susha Nayak
4. P.W.4	Dr. Imran Hussain
5. P.W.5	PW 5
6. P.W.6	Biju Kingkar Basumatary.

Prosecution Exhibits.

P.C.

Defence Witness.

Nil

Defence Exhibit

Nil

Smti. R.Kar)
Special Judge,
Nagaon: Assam