IN THE COURT OF SPECIAL JUDGE :: :: :: CACHAR. SPL. POCSO CASE NO . 39 of 2016

(U/S.4 OF POCSO Act)

Present:-Shri K. Choudhury, LL.M., Special Judge, Cachar, Silchar.

State of Assam		Complainant.
	-Versus-	
Sri Dilowar Hussain Barb S/O Abdul Haque Barbhi Ranighat, P.S-Borkhola,	•	Accused person.
Charge framed on:		21/3/17
P.Ws. examined on:	5/5/17,	22/5/17, 29/5/17,
	9/8/17,	20/9/17, 9/10/17
Statement of accused re	corded U/S 313 Cr.P.C :	20/9/17, 9/10/17
Argument heard on:		30.10.17.
Judgment pronounced a	nd delivered on:	7.11.17
Counsel Appeared:		
For the State For the Accused	: Mr. R.M. Das, Ld. PP : Mr. S. A. Barbhuiya. Ac	Ivocate

JUDGMENT

1. Prosecution case in brief is that on 26/6/13 at about 7-30a.m.the accused being co tenant as usual took the daughter of

the complainant aged about 5 years herein below referred as the victim, on call to his house and the accused thereafter removing her clothes committed penetrative sexual assault on her. The complainant in the mean time coming from shop found the victim as crying and on query it could be learnt that the accused committed rape on the victim. Bleeding was seen in the private part of the victim and on raising alarm neighbouring people came and apprehended the accused who was then handed over to police. Accordingly FIR was lodged to Malugram TOP where the same was entered vide GDE NO. 536 dtd.26/6/13 and the same was forwarded to O/c Silchar PS for registration. In the mean time Investigation was taken by SI Sanjay Bargohain. The FIR was registered as Silchar PS case No. 1331/13 U/s 4 of the Protection Of Children From Sexual Offences Act (POCSO).

2. During investigation accused was arrested and one lungi of the accused having one small blood stain like mark and few sperm like spot was seized. Victim was medically examined. Her statement was got recorded u/s 164 CrPC. The victim in her statement before the Magistrate stated that she called the accused as Mama who at the material time took her in his room telling her to give a chocolate and thereafter he pressing her mouth removed her panty and thereafter he penetrated something on her private part and she raised alarm and accused left away. She had burning pain on her private part. The IO on completion of investigation submitted charge sheet u/s 4 / 18 of Protection Of Children From Sexual Offences Act.Learned C.J.M,

Cachar, after procuring attendance of the accused person forward the case record to this court vide order dtd.13/12/16, Accused appeared before this court on 21/12/16 and copies of relevant police papers to him . This Court after hearing both sides and perusing materials on the record framed formal charge against the accused person U/S. 4 / 18 of Protection Of Children From Sexual Offences Act. The charge was read over and explained to which the accused person pleaded not guilty and claimed to be tried. Hence, trial began.

- 3. To prove the case prosecution examined as many as eightwitnesses including MO and I/O. Four of them were declared hostile by the prosecution and they were cross examined by the prosecution side. Their previous statements were brought into the recorded and confirmed by the IO. Defence plea is that seizure list of panty was prepared collusively and no such incident took place as alleged in the Ext.1, FIR. Further defence plea is that the injury sustained by the victim caused by fall and no blood stain was found in the under garment panty of the victim.
- 4. During examination U/S 313 Cr.P.C. accused took the plea that the victim fell down from the staircase and he rescued her and at that time father of the victim angry expressing that victim was assaulted by the accused. He further stated that while he was taking rice police came to his house and seized one lungi and there was no blood stain and prior to the arrival of the police one person slapped him. He pleaded as innocence.

- 5. Now, point for determination is whether, under the facts circumstances of the case, the accused attempted to commit any penetrative sexual assault on the minor victim daughter of the informant?
- 6. To decide the above points I have heard learned counsel of both sides and perused the evidence on record.
- 7. During hearing Ld. PP has submitted that although the material witnesses turned hostile but prosecution has been able to establish their case against the accused on the basis of circumstantial evidence and court can rely the circumstantial evidence as it does not speak lie. On the contrary ld. Defence counsel submitted that as the material witnesses including the victim have not supported the prosecution case the accused is entitled to get acquittal.
- 8. It is an admitted fact at the material time both the accused and the complainant were residing as co tenant in the same homestead and there is no dispute about the time and place of the alleged incident. According to the defence the victim sustained injury by fall from staircase and he rescued the victim.

Let the evidence be discussed as follows:

9. PW .5 – Miss Orina Raha, the M.O. deposed that on

26/6/13 while she was working as GDMO Department of FSM Department of SMCH examined the victim, a 5 years old female, in connection with GDE NO.526 and as per the aunt of the alleged victim the victim was called by the accused at around 5 a.m. and accused committed intercourse removing panty of the victim and the victim did not give any history on repeated asking. According to the MO the panty was handed over to the escorting police and vulva found reddened and oedematous and Hyman found intact. The MO on the basis of physical including dental examination, laboratory and radiological examination opined the age of the victim as above five years and below seven years. It is also opined that reddening of vulva as described in the report is suggestive of attempted forceful sexual penetration. The MO in the cross examination stated that in very rare case such type of injury might be caused by fall from stair case. The report (Ext.3) was prepared by her with consultation with Dr. Gunojit Das. She denied the suggestion that no stain was found in the undergarment panty of the victim.

10. PW.1 – Eunis Ali Laskar, father of the victim deposed that about four years back at one morning at about 6/6-30 a.m. she heard alarm of the victim and then he and his wife came out and saw the accused and the victim and after that he lodged the FIR against the accused with allegation of torture against the victim by the accused and after that police arrested the accused and victim was got medically examined and victim also gave statement before

the Magistrate. Ext.1 is the FIR. Police seized the wearing panty of the victim vide Ext.2. IO also seized one lungi of the accused vide Ext.3. Ext.2(1) and 3(1) are her signature. At the material time accused resided in the same compound as co tenant and the victim was found crying. On query the victim could not say anything. At this stage the witness was declared hostile by the prosecution. His previous implicating statement has been brought by the prosecution during cross examination by the prosecution.

- 11. PW. 2 – the mother of the victim deposed that at the material time hearing cry of the victim she came out and on her query the victim could not say anything and the police being informed came and police interrogated them and before that her husband arrived and they lodged FIR against the accused with allegation of some bad things done by the accused to the victim. Police apprehended the accused from his house. The neighbouring people also came there. The victim sustained injury on her leg. The victim was examined by doctor and also the victim gave statement before the Magistrate. The witness was declared by the prosecution. She denied her previous statement brought by the prosecution in the cross examination. In the cross examination by the defence she stated that police recorded her statement. In the cross by defence she stated that he victim while playing fell down and sustained injury and started crying.
- 12. PW.3, the victim, who was examined in camera,

deposed that seeing the photograph of the accused she could identify him. At the time of her examination she disclosed her age as 10 years and a student of class IV. According to her while she was reading to Class-I the alleged incident took place. She did not disclose anything against the accused. According to her when she fell down on the ground the accused rescued her. She cried and the accused took her to her house. She called the accused as *Mama*. She was got medically examined. She could not remember whatever stated before the Magistrate. She however proved her signature in her statement. She further deposed that she sustained injury on her head.

- 13. PW.-4, the neighbor of both the accused and the complainant deposed that on the date of occurrence at about 10/11 a.m. hearing hue and cry went near to the tea stall of the complainant and found gathering of around 100/150 people. There he heard that the victim fell down from staircase. He saw the victim and noticed some blood on her panty. He also saw the accused. At that time PW-4 was a president of their Ghaniwala Masjid. Police came and took his signature in a paper. He could not say the contents of the paper where he put signature. At this stage he was declared hostile by the prosecution. He denied his implicating statement as recorded by the IO.
- 14. P.W. 6 deposed that at the material time he ran an NGO at Ghaniwala and he knew the place of occurrence which was

a building in which both accused and the complainant used to reside as a tenant in different room. The complainant had a tea stall near the NGO and also near the PO. On the date of alleged occurrence at about 11 a.m. while he was sitting in the NGO suddenly heard hue and cry coming from the tea stall of the complainant. He then along with others went to the PO. The complainant showed him a lungi and a panty. In the lungi he found spot of sperm and panty was found wet. He also found the accused surrounded by local people. The accused was in a nervous condition. The father of the victim told him (PW-6) that the accused committed sexual assault with the victim. The victim was then sent for medical examination. The victim was found crying with nervousness. By this time police of Malugram TOP arrived there and seized one panty vide Ext.2. At that time victim was around six years. Ext.2(2) is his signature.

15. PW-7, IO of this case deposed that on 26.6.13 while he was posted at Malugram TOP as SI of police received the FIR. He made GD entry and forwarded the same to Silchar PS where it was registered as Silchar PS case no.1331/13 U/s 4 of POCSO Act and before that at 8/10 a.m. he received telephonic information from one Taj Uddin to the effect that five years old daughter of Euinis Laskar was sexually assaulted by co tenant and thereafter the villagers apprehended him and kept confined. Accordingly he by giving GDE no. 526 dtd 26/6/13 proceeded to the PO along with staff and there he found the accused as kept confined by the local

people. He then recorded the statement of the mother of the victim and also visited the PO which was the bed room of the accused from where he seized one lungi lying on the bed. The lungi was found with stain of blood. He drew sketch map of the PO and also recorded statement of local people and in the mean time father of the victim handed over the under garment (panty) of the victim and the same was seized. He also recorded the statement of the father of the victim and arrested the accused from the PO. The victim was sent to SMCH for medical examination and after that the case was endorsed in his name for investigation. He collected the medical report and also produced the victim before the Magistrate for recording statement. He sent the seized lungi to FSL, Kahilipara Guwahati for examination of blood stain found on the lungi. He received requisition from FSL, Guwahati for sending blood sample of the accused. FSL report disclosed that sample was not of good quality. Thereafter IO submitted charge sheet. He confirmed the statement of PW1, 2 and 4 as brought by the prosecution in the cross examination. According to the IO PW-1 stated before him that at the material time wife of PW-1 was found as crying and on query she stated that the accused inducing the victim girl took to his room and forcibly had sexual relation with the victim and as a result the victim sustained injury on private part wherefrom blood was oozing out and instantly hearing hue and cry villagers gathered and the matter was informed to them and the villagers assaulted the accused and cut his hair. Further according to the IO PW-2 stated before him that the victim went out at about 7 a.m. and after some

time returned home crying and on query the victim reported that she was feeling pain on her abdomen and it was noticed that some liquid was coming out from the undergarments of the victim and on further query the victim told that the accused made her lying released some liquid on her. PW-2 also stated before the IO that she noticed some blood stain and suspected that accused committed sexual intercourse on the victim and on her raising hue and cry neighbouring people came along with her husband and assaulted the accused and handed over him to the police.

- 16. PW-4 stated before the IO that on 26/6/13 at about 7-30 a.m. hearing hue and cry he visited the PO and from the local people came to know that the victim was taken away by the accused and had sexual intercourse and as a result blood came out from her private part and accused was assaulted by the public prior to the arrival of the police and police seized one lungi of the accused and in the lungi there was blood stain and stain of semen.
- 17. In the cross examination the IO denied the suggestion that the seized lungi was not of the accused. One omission is proved to the effect that PW-6 did not exactly state before the IO that the complainant told him that the accused committed sexual assault on the victim and victim was found in a nervous condition.
- 18. Ld. Defence counsel referring the cross of PW-1 and 2 submitted that they admitted about their some strain relation and

miss-understanding with the accused relating to monetary transaction and for that this case was filed.

- 19. PW-2 in her cross examination stated that police recorded her statement and the victim while playing fell down and sustain injury and started crying. In the examination in chief she stated that the victim sustained injury on the leg.
- 20. PW-3 the victim in her evidence stated that she sustained injury on her head. The same are found to be not only contradictory with other witlessness but also with the medical report. Therefore their evidence in this regard under the facts and circumstances of this case is very difficult to be believed. Although the PW-1 and 2 were declared hostile by the prosecution but their entire evidence cannot be disbelieved so far as the same is corroborated by other witnesses including medical evidence. There is no denial about the evidence that at the material time victim was found crying. PW-1 did not say anything in his examination in chief about the cause of crying. No reason also could be brought in his cross examination by the defence as to why police seized the wearing panty of the victim. He also deposed that one lungi of the accused was seized vide Ext.3. No reason could be brought by the defence as to why the lungi of the accused was required to be seized by the police. This indicates that whatever allegation brought in the FIR the Ext.1 has got a base. According to PW-3 the victim she forgot what she stated before the Magistrate. It may be true on

the ground that she adduced evidence about four years after the alleged incident. According to her she fell down on the ground and the accused rescued her. If that be so the question comes as to why a false allegation has been brought against him and as to why many people were gathered and accused was slapped. The accused admitted in his statement defence that he was slapped. The contradictory statement of the PW-1 and 2 as proved by the IO regarding assault by the public is partially admitted by the accused in his 313 Cr.P.C. statement. Therefore, the contradiction as proved by the prosecution cannot be overlooked. PW-6 appears to be an independent witness. According to him he saw a spot of sperm in the lungi and panty of the victim was found wet and the accused was found surrounded by local people. In the cross examination it has come out that more than 100 people gathered at the PO. The same is also corroborated by the evidence of PW-4 who deposed to have found gathering of around 100/150 people at the PO. Had the accused really rescued the victim he would not have been surrounded by the local people of such huge number. He is one of the seizure witnesses. He denied the suggestion that the seizure list was prepared collusively, but no reason could be brought out as to why he would give false evidence. His evidence is corroborated by the PW-7 the IO. According to the IO blood stain was found in the lungi. It appears that the IO took all the necessary steps for DNA test of blood sample for comparison with the blood spot found in the lungi but his attempt failed as blood was not of good quality for the test. The evidence of the IO is also found to be corroborated by

the evidence of the MO, the PW-5 who denied the suggestion that no blood stain was found in the undergarment panty of the victim. PW-4 though declared hostile but he deposed that he saw the victim and noticed some blood on her panty. Therefore it clearly evident that victim sustained injury on her private part. Now question comes how she sustained such injury. The MO opined that reddening of vulva as described is suggestive of attempted forceful sexual penetration. In the cross examination the MO categorically stated that in a very rare case such type of injury might be caused by fall from staircase. It appears that nobody saw the victim to fall down. Even the mother of the victim did not disclose how the victim sustained injury on her leg. She however stated that FIR was lodged against the accused with the allegation of some bad things done by the accused. The evidence of PW-4 about noticing of some blood on the panty of the victim is not categorically denied by the defence in the cross examination. That being so this piece of evidence remained unrebutted and corroborative with the evidence of MO and PW-6. Had it been case of fall from stair case the IO would not have seized the lungi from the bed room of the accused. Although the victim deposed to have forgot about the contents of the statement made before the Magistrate but she proved her signature in her statement the Ext.4 recorded by the then Judicial Magistrate 1st class Pranab Sharma whose signature and relevant order sheet has been proved by his the then Bench Assistant PW-8. The main contents of the Ext.4 is that the accused taking the victim inside his room entered something in the way of her urine and for

that she raised alarm and she experienced burning sensation at the time of urinating. The contents of the Ext.4 though not supported by any material witnesses including the victim but the contents tends to suggest that the MO rightly opined that reddening of vulva is suggestive of attempted forceful sexual penetration. It cannot be expected that where parents of any victim of tendered age turn hostile the victim would dare to disclose about the actual happening coming from their custody and that too, about four years after the alleged incident. It may be contended that where the victim and her parents do not directly implicate the accused in such nature of cases how can court arrive at any decision against any accused of such nature of case. It is true that man may conceal some real facts but circumstances cannot tell lie.

- 21. In the instant case evidence of doctor supported by others complete the chain of circumstances such as :
 - (1) Crying of the victim,
 - (2) Raising hue and cry,
 - (3) Gathering of more than 100 people,
 - (4) Finding of accused,
 - (5) Surrounding of the accused by the local people and slapping the accused,
 - (6) Giving of telephonic information to the police and their instant visit to the PO by giving GD entry about sexual assault and handing over of the accused to the police by public,

- (7) Seeing of blood stain on the panty (under garment) of the victim,
- (8) Seizure of lungi of the accused from his bed room,
- (9) Finding of blood spot and semen like spot in the lungi,
- (10) Lodging of FIR against the accused with the allegation of penetrative sexual assault,
- (11) Instant sending of the victim for medical examination but not for treatment and also no treatment was advises etc. are indicatives of the involvement of the accused with the alleged offence as disclosed in the FIR.

No reason is found to disbelieve the evidence of MOthe PW-5, PW-6 and PW-7-IO being partially corroborated by PW-4 and other witnesses.

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- 22. In view of the above discussion of evidence on the record and consideration of evidence in its entirety, it is held that the prosecution case is proved beyond all reasonable doubt U/S 18 r/w section 4 of POCSO Act. Therefore, accused person is held to be guilty and convicted accordingly.
- 23. Heard the accused on the question of sentence .He has stated that he is only an aged widow mother and there is none except him to look after and maintain his aged mother.
- 24. Having due regard to the above and all other aspects

this court is of the view that sentence of fine will meet the ends of justice and accordingly accused is convicted and sentenced to pay a fine of Rs.5,000/- (rupees five thousand) i/d to undergo R.I. for 2 (two) months.

25. Seized materials be destroyed in due course as per law.

26. Bail bond remain in force till period of appeal. The copy of the judgment be furnished to the accused at free of cost as per provision of Section 363 Cr.P.C. and a copy of this judgment also be forwarded to the D.M. Cachar as per provision of section 365 Cr.P.C.

Judgment is pronounced and delivered in the open court under my signature and seal of this court on this 7th Day of November, 2017.

Dictated and corrected by

Special Judge, Cachar, Silchar. (K. Choudhury) Special Judge, Cachar, Silchar.

Transcribed by K. Bhattacharjee, Stenographer

IN THE COURT OF SESSIONS JUDGE, CACHAR, SILCHAR. Spl. (POCSO) Case No. 39 of 2016.

APPENDIX

(A) PROSECUTION WITNESSES: -

P.W. 1	– Eunis Ali Laskar
P.W. 2	 – Mustt. Forida Begum.
P.W. 3	– Khadedja Begum Laskar
P.W. 4	 – Muzafar Ali Laskar.
P.W. 5	Dr. Miss Orina Raha
P.W. 6	 – Masoom Ahmed Laskar
P.W. 7	– Sanjay Bargahain

P.W. 7 — Sanjay Bar P.W. 8 — Moloy Das

(B) DEFENCE WITNESSES: - NIL

(C) PROSECUTION EXHIBITS: -

Ext. 1	– FIR
Ext. 1(1)	Signature of PW-1
Ext. 1(2)	Signature of PW-7
Ext. 1(3)	 Signature of the then OC Silchar
Ext. 1(4)	 Signature of the then OC Silchar
Ext. 2	– Seizure list
Ext. 2(1)	Signature of PW-1
Ext. 2(2)	Signature of PW-6
Ext. 2(3)	Signature of PW-7
Ext. 3	Seizure List
Ext. 3(1)	Signature of PW-1
Ext. 3(2)	Signature of PW-4
Ext. 3(3)	Signature of PW-7
Ext. 4	 Statement of victim
Ext. 4(1)	Signature of PW-3.
Ext. 4(2)	Signature of PW-3

Ext. 4(3),(4) Ext. 5 - Medical report Ext. 5(1) - Signature of PW-5 Ext. 5(2) - Signature of PW-5 Ext. 5(3) - Signature of Gunogit Ext. 5(4) - Signature of the guard Ext. 5(5) - Story narrated by the Ext. 6 - Police requisition. Ext. 6(1) - Signature of PW-5. Ext. 6(2) - Signature of PW-7 Ext. 7 - Charge sheet. Ext. 7(1) - Signature of PW-7 - Relevant order sheet. Ext. 8(1) - Signatures of Pranab	Das dian of the victim victim's aunt
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- (E) <u>DEFENCE EXHIBITS</u>: NIL (F) <u>COURT EXHIBITS</u>: NIL
- (G) EXHIBITS PRODUCED BY WITNESSES: NIL.

(Shri K. Choudhury), Special Judge, Cachar, Silchar.