# CAUSE TITLE PCSO Case No. 16/15

Informant: XXXX

Accused: Sri Sanjay Dey,

S/o- Late Binod Dey, R/o- Hukuta Chariali,

PS- Duliajan, District- Dibrugarh.

# ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

For the Defence: Mr. A Saikia, learned Advocate.

#### IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Shri S.K. Sharma, AJS,

Sessions Judge, Dibrugarh.

> PCSO Case No. 16/15 G.R. Case No. 442/15

> > State of Assam

-Vs-

Sri Sanjay Dey

Charge u/S 4 PCSO Act.

Date of evidence on : 01-06-15, 20-06-15, 04-07-15, 06-08-15 & 14-10-15.

Date of argument : 21-12-15 & 01-02-16.

Date of Judgment : 15-02-16.

### **JUDGMENT**

- 1) Prosecution case is that the accused person was the tenant of a house wherein the informant family were also co-tenants. On 20-02-15, the accused person was watching TV inside the room of the informant's house when the prosecutrix aged about 6 (six) years came inside and the accused person took the opportunity to sexually harass the prosecutrix. The mother of the prosecutrix lodged the First Information Report on 20-02-15 whereafter investigation commenced. During the course of investigation, the Investigating Officer visited the place of occurrence, drew up Sketch-Map, recorded the statement of witnesses, seized certain documents, got the statement of the prosecutrix recorded by the Magistrate and also got medical examination conducted upon her and on completion of investigation, submitted the Charge-Sheet.
- 2) Upon committal, my learned predecessor framed charge under Section 4 of Protection of Children From Sexual Offences Act (hereinafter PCSO Act) against the accused person and the charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 3) In course of trial, prosecution examined seven witnesses and on conclusion thereof, the accused person was examined under Section 313 CrPC wherein the accused person took the plea of denial.
- 4) Heard Smti. R Devi, learned PP for the State and Mr. Saikia, learned counsel for the defence.

#### **POINTS FOR DETERMINATION**

- Whether the prosecutrix was a child within the meaning of Section 2(d) of the Protection of Children From Sexual Offences Act, 2012 (hereinafter 'the Act')?
- 2. Whether the accused committed penetrative sexual assault upon the prosecutrix?

# **DECISION AND REASONS THEREOF**

#### Point No. 1:

5) As per medical evidence adduced by PW-6 Dr. Nibedita Shyam on the basis of physical, radiological and laboratory investigation, the age of the prosecutrix was above 6 (six) years and below 8 (eight) years, which is not disputed and hence, it is established that the prosecutrix was a child at the time of occurrence.

## Point No. 2:

- 6) The prosecutrix in this case is merely 6/7 years old and therefore, certain questions were put to her to test her intelligence and understanding and on being satisfied that she can give rational answers to the questions put to her, her examination was proceeded with.
- 7) PW-1, the prosecutrix deposed that she knew the accused person whom she used to address as Khura (uncle). The accused used to reside near their house. She further stated that at the time of occurrence, when her mother was weaving at the backside of their house, she went inside of their house for drinking water and at that time, the accused was watching TV inside the room of their house. The accused caught hold of her and pulled down her panty and also pulled down his under pant and rubbed his penis against her Susu (vagina). She pushed him away and went out of the room and reported the matter to her mother. During cross-examination, PW-1 stated that at the time of occurrence, she cried but she did not raise halla. She denied the defence suggestion that no incident took place and the accused did not commit anything with her. Therefore, the version of the prosecutrix could not be shaken in any manner during cross-examination, except by way of suggestions. However, being a child witness whose statement was recorded after quite some time by the Investigating Officer, judicial prudence would demand some corroboration.
- 8) PW-2 the mother of the prosecutrix deposed that they reside in an adjoining

room of a rented house. The house of the accused is separated by a wall from her house. On the day of occurrence, at about 12:00 noon, while she was weaving at the backside of their rented house, her daughter was playing with her friend and then, she went inside the house to drink water, but came out crying in less than five minutes and told her that the accused person took off her panty and rubbed his penis against her 'Susu' (vagina). At that time, she was wearing chemise and panty. PW-2 further stated that she did not know whether the accused was in the room or not, as the TV was playing in low volume. When her daughter reported the matter to her, she went inside her house, but did not find the accused there and the TV was playing in a very low volume. PW-2 further stated that the accused used to visit their house earlier also and used to watch TV. Immediately, she informed the matter to the owner of their rented house Smti. Dulumoni Gogoi and she asked PW-2 not to spread the matter. She further stated that as her husband was away as a daily labourer, she did not take any action at that time. However, in the evening, her daughter narrated the incident to her husband and he rebuked PW-2, asking PW-2 where she was at that time. She further stated that she did not report the matter immediately to police as she had to go to Rajgarh to attend a Nam Kirtan (religious ceremony). On Monday, she returned and confronted the accused and slapped him. On the next day, in the evening, the accused after getting drunk came in the night and hurled abuses at them in filthy language, whereafter the accused attempted to overrun them with his four wheeler in front of the house. On the next day morning, PW-2 lodged an ejahar at the police station. She got the ejahar written by a person, who used to come to Duliajan Police Station. PW-2 further stated that said the person wrote the ejahar as per her version whereafter she signed the ejahar. During cross-examination, it was put to her that she did not state before the Investigating Officer that- "On the next day, in the evening, the accused after getting drunk in the night and hurl abuses at us in filthy language. The accused attempted to overrun us with his four wheelers in front of the house." PW-2 denied the aforesaid omission, but the defence failed to get the said omission confirmed by the Investigating Officer. The usual defence suggestions in denial of the occurrence were put to her which she denied. Therefore, the evidence of PW-2 also could not be shaken in any effective manner by way of any material omission or contradiction with

regard to her previous statement before the Investigating Officer.

9) In *Gentela Vijaya Vardhan Rao vs. State of AP* [1996 (6) SCC 241], the Hon'ble Apex Court observed:

"The principle or law embodied in Section 6 of the Evidence Act is usually knows as the rule of res gestae recognized in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue 'as to form part of the same transaction' becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneously and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

- 10) Considering the fact that the prosecutrix narrated the incident to PW-2 immediately after the occurrence, the account given by PW-2 would be an admissible and relevant piece of evidence under Section 6 of the Evidence Act. The other part of PW-2's evidence regarding the accused person having attacked the informant side at night and attempting to run them over with his four wheelers is an eye-witness account which stood firm during cross-examination. Since the aforesaid incident is a corollary to and an effect of a fact in issue, it is a relevant fact which corroborates the fact in issue, i.e., the incident of sexual assault. Therefore, it is admissible under Section 7 of the Evidence Act.
- 11) PW-3, the father of the prosecutrix deposed that the prosecutrix is his daughter and on the day of occurrence, when he came back to his house at about 5:00 pm, his daughter reported to him that when she went inside the house for drinking water, the accused was watching TV and he inserted his penis into her vagina after taking off her panty and immediately, she ran out from the room and reported the matter to her mother, who was weaving at the backside of their house. PW-3 further stated that his wife also told him in the same manner about the occurrence as told by his daughter. His wife also

told him that at the time of occurrence, she was weaving at the backside of their house. PW-3 did not report the matter immediately to any other person on Monday as he had to go to Rajgarh to attend a religious ceremony. On Tuesday, after his return from the said religious ceremony, his wife confronted the accused and she also slapped him. Upto this point, the deposition of PW-3 is in the realm of hearsay.

- 12) PW-3 further stated that on the said night, at about 10:00 pm, the accused came in a drunken condition and he attempted to overrun them with his four wheeler vehicle in front of their house. The accused also destroyed the weaving articles of PW-3's wife and thereafter, he fled from the place of occurrence. PW-3 further stated that on the next day, his wife lodged an ejahar at the police station regarding the incident. During cross-examination, certain suggestions in denial of the occurrence were put to PW-3 which he denied. Otherwise, his evidence also stood unshaken. No doubt PW-3 is a reported witness who was told about the occurrence after quite some time had elapsed. But the 2<sup>nd</sup> part of his evidence is an eye-witness account of a fact relevant under Section 7 of the Evidence Act, for reasons already discussed hereinbefore.
- 13) It has been naturally urged on behalf of the accused that PWs so far discussed are interested witnesses, their evidence is to be considered with utmost caution. That is no doubt true. But at the same time, they are also the most natural witnesses of the case. It is by now well settled that evidence of interested witnesses cannot be disregarded for that reason alone, more so, when they are natural witnesses, unless there exists other reasons to discard their testimony. In *Jayabalan vs. UT of Pondichery*, [2010 (1) SCC 199], the Hon'ble Apex Court held:

"...We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

- As it apparent from the discussion of the evidence of the preceding PWs, their testimonies have been quite consistent on material particulars, and is therefore worthy of credence.
- 14) This brings us to the evidence of an independent witness, namely, PW-5 Smti. Dulumoni Gogoi, who is the landlady of the tenanted premises wherein both the informant side as well as the accused used to reside as tenants. She deposed that on the day of occurrence, at about 2:30 pm, when she came to her house from her daily work, the complainant informed her that the accused person took off the panty of her daughter and attempted to do foul deed with her. Then, PW-5 asked the informant not to disclose the said incident to anybody as the victim was a minor. After three days of the alleged incident, the informant confronted the accused regarding the incident near the tube well near her house. On the next day, in the evening, the accused after getting drunk, abused the complainant in filthy language and also attempted to overrun them with his four wheeler vehicle in front of her house. At that time, PW-5 along with the informant chased the accused person and then the accused ran out from his house. During crossexamination, she denied having omitted to state before the police about the subsequent occurrence regarding the accused having attacked the informant side in a drunken condition with his four wheelers. But the said alleged omissions were not confirmed by the Investigating Officer.
- 15) The evidence of PW-5 also consists of two parts. One part of her evidence is regarding the conduct of the accused on the next day after the main incident, to which she is an eye-witness. This part of her evidence can be safely admitted under Section 7 of the Evidence Act. The other part of it is regarding the incident of sexual assault, to which she is not a eye-witness. She deposed that she was reported about the occurrence at around 2:30 pm as soon as she returned from work. The alleged occurrence took place at around 12:00 noon on the same day, i.e., about 2 ½ hours earlier. Therefore, the reporting of the incident to the PW-5 by PW-2 cannot be admitted in evidence under Section 6 of the Evidence Act. Due to lapse of such time, one cannot be reasonably certain that the speaker was still under the stress of excitement in respect of the transaction in question, so as to permit consideration of the reporting thereof to the listener (PW-5) as part of the Chandrasekhara Rao same transaction. [Ref: **Vasa** VS. Poona

# **Satyanarayana & anr:** [(2000) 6 SCC 286 (para 7)]

- 16) However, the evidence of the independent witness, i.e., PW-5 at least partly corroborates the evidence of the victim as well as that of PWs 2 & 3. Therefore, the discord raised by learned counsel for the accused in placing reliance on the version of so-called interested witnesses can be given a decent burial in view of the partially corroborative evidence adduced by the prosecution through an independent witness, i.e., PW-5.
- 17) The statement of the victim was also recorded under Section 164 CrPC wherein she stated that when she went inside the house to drink water, the accused caught her hand and pulled her and sat her down on a chair near the wall and let her stand near him and after taking off his as well as her undergarments, put his penis to her vagina and undertook to and fro movement. Therefore, the statement of the victim before the Magistrate also subsequently corroborates her evidence before the Court.
- 18) Learned defence counsel strenuously urged that the alleged occurrence took place on 15-02-15 and the First Information Report was lodged only on 20-02-15 and there is no explanation in the First Information Report as to the cause of delay. Therefore, the delay must be regarded as fatal to the prosecution case.
- 19) In *Silak Ram vs. State of Haryana* [(2007)10 SCC 464], the Hon'ble Supreme Court held as follows:

"Coming to the stand that there was delay in lodging the FIR and in dispatch of the report to the Illaqua Magistrate, this also has been elaborately dealt with by the High Court. Delay in lodging FIR by itself would not be sufficient to discard the prosecution version unless it is unexplained and such delay coupled with the likelihood of concoction of evidence. There is no hard and fast rule that delay in filing FIR in each and every case is fatal and on account of such delay in prosecution version should be discarded. The factum of delay requires the court to scrutinize the evidence adduced with greater degree of care and caution. In this case the eye witnesses have given a vivid description of the events. The evidence of PW 11 as noted above, is cogent and consistent and the version given by this witness fits with medical evidence."

20) Coming to the facts of the present case, admittedly the First Information Report was lodged 4/5 days after the occurrence and there is no explanation

for the delay on the body of the ejahar itself. But it is not necessary that the explanation for the delay should find place on the body of the First Information Report itself, as the same can be gathered from the other material on record. The PW-2 in her examination-in-chief stated that she did not report the matter immediately to police as she had gone to Rajgarh to attend a Nam Kirtan and returned on Monday and confronted the accused and slapped him. On the next day, in the evening, the incident of the accused getting drunk and abusing and trying to overrun the informant took place. PW-3 also deposed similarly. PW-5, the land lady deposed that she had asked the informant not to disclose the incident to anybody as the victim was a minor, but after three days of the incident, the informant confronted the accused regarding the incident and thereafter in the evening, the accused got drunk and abused the informant in filthy language and also attempted to overrun her with his four wheeler and on the next day, they lodged the ejahar. The Investigating Officer during cross-examination, stated that the informant had stated that they did not want to lodge the ejahar against the accused, but as he had threatened them on the night of 19-02-15, they lodged the ejahar against him. Although there appears to be some variation with regard to the precise dates on which the informant confronted the accused, whether it was on the next day or two days after the occurrence, the same appears to be natural, having regard to the fact that more than six months had elapsed between the occurrence and recording of evidence of the concerned witnesses. But considered as a whole, there appears to be sufficient explanation for the delay. Moreover, in a case involving rape, sexual assault or the like against women, particularly small girls, some delay is guite natural and is expected and the Hon'ble Apex Court has granted ample latitude in this regard [Ref: *Md. Ali vs. State of Uttar Pradesh:* (2015) 7 SCC 272]. In the facts and circumstance of the present case, I do not consider the delay to be fatal to the prosecution.

21) The defence has made endeavour to establish the present as a case of false implication. According to the accused himself, the motive for such false implication is that the maternal grandmother of the victim had died about one month prior to lodging of the First Information Report and the father of the alleged victim had borrowed Rs. 3,000/- from the accused for the purpose of meeting expenses on the death ceremony, on the condition that he would

- return it within one month. He failed to do so. When the accused demanded money, the PW-2 got into an altercation with him and just to avoid paying money, they lodged the present case.
- 22) Apart from the fact that the defence did not lead any evidence to establish such motive, no such plea was taken during cross-examination of the prosecution witnesses. Rather, what was suggested to PW-2 was that as the wife of the accused belonged to the Tea Tribe community, they wanted to drive them out of the said house, and to achieve the said purpose, they have lodged this false case against the accused. To the PW-3, an even divergent suggestion was made, which is that, as the mother of the victim slapped the accused without any cause and fearing that the accused would lodge a case against her, PW-2 had immediately lodged a false ejahar against him. The wife of the accused was examined as PW-4 and she had also deposed that a quarrel had taken place between her husband and the mother of the victim where the latter slapped the former and during cross-examination, she stated that the mother of the victim did not want the accused side to stay near their house as they belonged to the Bengali community and therefore, she lodged a false case against her husband. There is no allusion to any financial transaction between the accused and the informant side being the cause of lodging of the present case, as alleged by the accused. As can be readily discerned, different causes were attributed at different times as the motivation behind a false case against the accused. In view of such mutually destructive stands, the defence plea regarding false implication cannot be accepted.
- 23) From the discussion made above, I have no hesitation in holding that the guilt of the accused stands established, but the extent of its guilt requires further consideration. The accused has been charged under Section 4 of the PCSO Act which relates to commission of penetrative sexual assault which is defined under Section 3 of the PCSO Act as follows:
  - 3. Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if-
    - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
    - (b) XXXX

- 24) What the victim deposed in her evidence before the Court is that the accused person rubbed his penis against her vagina. The medical evidence as adduced by PW-6 did not detect any evidence of injury on the victim's body or private part. The doctor did not even detect any tenderness in her private parts, which would be expected in case of forceful penetration of a 6/7 years old. Under these circumstances, it cannot be said that the ingredients as required under Section 3 of the Act stands established. However, there cannot be an iota of doubt that act of the accused satisfies the ingredients of Section 7 of the PCSO Act relating to sexual assault punishable under Section 8 of the PCSO Act. The point is answered accordingly.
- 25) In the result, I hold that the accused person is guilty under Section 8 of the PCSO Act and he is convicted accordingly with the aid of Section 222 CrPC.
- 26) Since the accused has been found guilty of sexually assaulting a very young child, he does not deserve to be extended the benefit of Section 361 CrPC or the provision of the Probation of Offenders Act, 1958.
- 27) Heard the convict and the learned Public Prosecutor on the quantum of sentence. The accused has stated that he is a poor person having to look after his family consisting of his wife and daughter and accordingly, prays for leniency.
- 28) Considering all material aspects, I am of the view that the ends of justice would be met by imposing a sentence of 3 (three) years RI and to pay a fine of Rs. 5,000/- (Rupees Five Thousand Only), in default, one month (30 days) SI. He is accordingly sentenced.
- 29) Furnish a free copy of this judgment to the convict immediately and send a copy to the District Magistrate, Dibrugarh.

Given under my hand and seal of this Court on this the 15<sup>th</sup> day of February, 2016.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

# **APPENDIX**

## List of witnesses:

- 1. PW-1 The prosecutrix;
- 2. PW-2 The mother of the prosecutrix;
- 3. PW-3 The father of the prosecutrix;
- 4. PW-4 Smti. Rupali Dey;
- 5. PW-5 Smti. Dulumoni Gogoi;
- 6. PW-6 Dr. Nibedita Shyam; and
- 7. PW-7 SI Tilak Bora.

## List of Exhibits:

- 1. Ext. 1 Statement of the victim recorded under Section 164 CrPC;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Medico-legal Report;
- 4. Ext. 4 Sketch-Map;
- 5. Ext. 5 Seizure-List; and
- 6. Ext. 6 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.