IN THE COURT OF SESSIONS JUDGE cum SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

<u>Spl. (P) Case No. 42 of 2016, U/S 451 IPC and Sec. 10 of POCSO Act, 2012.</u> (Arising out of Namtola P.S. Case No. 27/2016)

State of Assam

-Vs-

Sri Binod Thakur Accused

<u>APPEARANCE:</u>

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. D. M. Neog, Advocate

(Legal Aid Counsel)

Date of framing Charge : 03.05.2017

Dates of Evidence : 21.09.2017, 30.11.2017, 05.01.2018,

01.02.2018, 04.05.2018

Date of S/D : 18.05.2018

Date of Argument : 14.06.2018 & 12.07.2018

Date of Judgment : 09.08.2018

JUDGMENT

- 1. Prosecution case, in brief, is that on 06.06.2016, one Sri Sambhu Tassa lodged an FIR with O/C Namtola P.S. alleging, inter alia, that on that day, at about 10.30 AM, while his physically challenged eldest daughter victim 'S' (name withheld), aged about 14 years was alone in the house, his neighbour Sri Binod Thakur (accused herein) came to his house and attempted to commit rape on the victim and also attempted to kill her by strangulating her neck. However, victim somehow rescued herself.
- 2. On receipt of the FIR, Namtola P.S. Case No. 27/2016, U/S 447/354(A)/323 IPC, read with Section 18 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 was found absconding. 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 18 of POCSO Act, 2012 against the accused Binod Thakur showing him absconder.

- 3. On receipt of charge sheet, cognizance of offence was taken and after furnishing copy to the accused and after hearing both the sides, vide order dated 03.05.2017, charge U/S 451 IPC and Section 10 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial.
- 4. During trial, prosecution side has examined nine witnesses including two medical officers and I.O. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- It may be noted here that the victim being physically challenged due to her mental retardation, her 164 Cr.P.C. statement was recorded with the help of interpreter and similarly her evidence in court was also recorded with the help of Smt. Papori Bora, a Graduate Science Teacher of Hearing Impaired School, Jorhat. It may further be noted here that accused was shown absconder and his attendance could procure only on 18.04.2017 after submission of Charge-Sheet and thereafter accused face the trial as UTP till date.
- 6. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D.M. Neog, learned Legal Aid Counsel and gone through the evidence on record. I have considered the submission of both the sides.

7. POINTS FOR DETERMINATION ARE -

- (I) What was the age of the victim 'S' on the date of incident?
- (II) Whether on 06.06.2016, at about 10.30 AM, accused committed

house trespass by entering into the house of the informant with an intention to commit an offence?

(III) Whether on the same date, time and place, accused committed aggravated sexual assault on victim 'S'?

DECISION AND REASONS THEREOF

- 8. Before going further I would like to mention the evidence on record for better understanding of case of the both the sides.
- 9. PW-1 the victim S, in her evidence with the help of interpreter deposed that on the date of incident, while she was alone in her house, accused came to her house and touched her body and breast. He opened the buttons of her shirt. On making cry, accused hold her neck. She got pain on her chest, face and neck. Accused also opened her panty. By that time her mother arrived and accused fled away. PW 1 further deposed that her statement was recorded in Court through the same interpreter. Exbt. 1 is the said Statement. Exbt 1(i) is the signature as expert interpreter. In her cross-examination, the victim through interpreter deposed that she has two younger brothers and on that day, they were also not present in the house. She denied the defence suggestions that accused neither misbehaved her nor touched her breast and body. She denied to have deposed on being tutored by her father.
- 10. PW 2 Sri Judhisthir Tanti, in his evidence deposed that on 06.06.2016, while he was at his residence, mother of the victim came to his house and informed that on her return form work place, she saw her daughter weeping and from her daughter she came to know that accused Binod Thakur after strangulating the neck of Victim, committed misdeed with Victim. On knowing this, he advised her to inform the matter to police and sent her with one VDP member to Namtola PS. She filed FIR. On coming of police, I went to the house of victim. In his cross-examination, PW 2 deposed that police came to the house of informant on next day and then only he accompany police to the house of victim. He did not inquire the fact from the victim as she cannot speak properly.

11. PW 3 Smt. Radha Mani Tassa, mother of the victim in her evidence deposed that accused Binod Thakur is her next door neighbour. Victim is unable to speak properly since last 6-7 years due to suffering from Japanese Encephalitis. She is able to hear but could not speak clearly. However, she (PW 3) can understand her signs and unclear voice due to her long association with her daughter. On 06.06.2016, her daughter was aged about 14 years. On that day, at about 12 noon, while she return home from place of work, she saw her daughter Victim was weeping alone in the house. Her two sons aged about 12 years and 8 years were at their school. Her husband was at his work place. On her arrival, she (the victim) made her understand that accused came to our residence, and opening her cloths, he touched her breast. She also shown her that accused holds her neck by his hand, tried to pull her panty which she also noticed that it has come down from waist. On her arrival home, she saw the accused just outside of his gate. Her daughter has specifically shown the accused that he has committed the misdeeds with her. On knowing this, immediately she went to the residence of VDP Secretary Judhisthir Tanti and informed him about the incident: who sent them to Namtola PS. Her husband Sambhu Tassa lodged an FIR at Namtola PS. On the next day morning, police came to their house. Police took her daughter to hospital. Subsequently her daughter was also taken to court for her statement. After the incident, she also informed the matter to neighbouring peoples and her husband. In her crossexamination, PW 3 deposed that residence of accused was on the other side of the road. Both of them use same road for entering respective houses. Victim could not describe the incident in her voice but shown by signs, which, she understood. She denied that prior to this incident; they have sour relation with the accused. She also denied that accused did not misbehave the victim. She also denied that due to wrong understanding of signs of the victim, she deposed falsely against the accused. She also denied that while giving statement to police, she has not stated regarding opening of her cloths by the accused and that victim also shown her that accused tried to pull her panty which she also noticed that it has come down from waist.

- 12. PW 4 Sri Sambhu Tassa, father of the victim, in his evidence deposed that his daughter born in the year 2000. On 06.06.2016, while he was at Tea Estate on duty, one Bagan employee informed him that someone by entering into his house, has abused his daughter. On this he return home, and saw nail scratch mark on the cheek and chest of the victim. On his arrival, victim made him understand that accused came to his residence, and touched her breast. She also shown that that accused holds her neck and pulled her panty. On knowing this, he went to the house of accused and pulled to his house and shown the incident. Accused was in drunken state. Immediately, he and his wife went to the residence of VDP Secretary Judhisthir Tanti and informed him about the incident. On return from VDP's house, accused fled away. VDP sent them to Namtola PS. On this incident, he lodged the FIR at Namtola PS. Exbt. 2 is the FIR. In his cross-examination, he deposed that one Suman of their line has informed him about the incident. He denied the defence suggestion that while giving statement to police, he has not stated regarding "finding of nail scratch mark on the cheek and chest of his daughter, that accused pulled her panty, that on knowing this, he went to the house of accused and pulled him to his house and shown the incident, that accused was in drunken state. He also denied that prior to this incident; they have sour relation with the accused and that accused did not misbehave the victim.
- 13. PW 5 Sri Bharat Nayak in his evidence deposed that on 06.06.2016, Radhamani Tassa, mother of the victim came to him and informed that in their absence, accused Binod Thakur came to her house hold victims body and strangulated her neck. On knowing this, he went to the house of informant and saw that victim was weeping and she shown some signals to him. He informed the matter to VDP Secretary Judhisthir Tanti. In his cross-examination, PW 5 deposed that from the signs shown by victim, he could understand that she was hold by accused. She was unable to speak properly. He could not understand her words.

- 14. PW 6 Sri Ratnakar Nayak in his evidence deposed that on 06.06.2016, at about 6 PM Sambhu Tassa, father of the victim came to him and informed that in their absence, accused Binod Thakur came to his house hold victims body and strangulated her neck. On knowing this, he advised them to take the matter to police. In his cross-examination, PW 6 stated that father of the victim specifically told him that accused hold the hand, legs and neck of his daughter
- 15. PW 7 Smt. Munna Thakur, a relative of the accused, in his evidence deposed that about a year back, police came to his house and searched the accused Binod Thakur. On his denial about his presence at his residence police left his house. Later on, he heard from local people that Binod Thakur was arrested by police on the allegation of rape of victim.
- 16. PW 8, Dr. Rehan Sheikh, the medical officer in his evidence deposed that on 07.06.2016 at about 01.30 p.m. on police requisition, he examined the victim S in connection with Namtola P. S. Case No. 27/2016 and on examination he is of the opinion that she is a mentally retarded girl. No sign of sexual intercourse. There are some abrasions over face, chin and upper part of neck. Ext. 3 is the medical report. In his cross –examination, the medical officer has deposed that though he advised for radiological examination for determining the age, but the same was not done by the victim side.
- 17. PW 9 Inspector Dipul Kr. Boro in his evidence deposed that on 07.06.2016, he received one written FIR from Sri Sambhu Tassa and investigated the case. On the same day, victim was sent for medical examination. As she is physically disabled having slurred voice, he could not record her statement u/s 161 Cr.P.C. Victim was sent to Court for recording her statement u/s 164 Cr.P.C. As directed by Court, one specialist interpreter from Jorhat Hearing Impaired School was brought and with the help, JMFC Sonari has recorded the statement of victim u/s 164 Cr.P.C. During investigation, he went to the place of occurrence i.e. residence of informant at Towkak T.E. line No. 2 and drawn a sketch map of the PO. Exbt. 4 is the said sketch map.

During investigation, he could not apprehend the FIR named accused Sri Binod Thakur as he absconded. I have attempted on three occasions to arrest him i.e. 07.06.2016, 14.06.2016 and 30.07.2016 but failed as he was found absconding from his house. During investigation, he has obtained one age proof certificate of the victim issued by Medical Officer, Towkak Central Hospital. Exbt. 5 is the said certificate. As per Exbt. 5, the date of birth of the victim Tassa is 11.11.2001. On completion of investigation, he has submitted charge sheet against the accused Binod Thakur by showing him as absconder u/s 18 of POCSO Act. Exbt. 6 is the charge sheet. In his cross by defence, the I/O deposed that Exbt 5 was issued on 22.08.2016. Incident took place 06.06.2016. In the sketch Map, he has shown the residence of Ganesh Pradhan, Ganesh Nayak and Juga Karmakar. He did not examine them or any of their family members as witness in this case. Witness Radha Mani Tassa in her statement before him did not state regarding opening of victims cloths by the accused and that she also shown her that accused tried to pull her panty which she also noticed that it has come down from waist. Witness Sambhu Tassa in his statement did not state regarding finding of nail scratch mark on the cheek and chest of his daughter, that accused pulled her panty, that on knowing this, he went to the house of accused and pulled him to his house and shown the incident, that accused was in drunken state. He did not examine the brothers of the victim as witness in this case. He denied that he had not investigated the case properly.

- 18. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 19. <u>Point No. I:</u> So far age of the victim is concerned, P.W. 3 mother of the victim in her evidence stated that on the date of incident, victim 'S' was aged about 14 years. P.W. 4, father of the victim stated that his daughter victim 'S' was born in the year 2000. This part of evidence on age of the victim remained unchallenged by the defence. In cross examination by defence, P.W. 8 Dr. Rehan Sheikh, the medical officer stated that he has not determined the

age of the victim as radiological examination was not done though advised. P.W. 9 the I.O. in his evidence deposed that during investigation, he has obtained one age proof certificate of the victim issued by the Medical Officer of Towkak Central Hospital and proved the same as Exbt. 5. As per Exbt. 5, the date of birth of the victim is 11.11.2001. This part of evidence on age was put to accused who stated that the age of the victim will be more than what she claimed but he did not throw any light on her age. From the materials on record, it appears that no authentic document was seized by police on age, such as birth certificate or school certificate. Age was also not determined through radiological examination process. Under these circumstances, I have to rely on Exbt. 5 issued by M.O. of Towkak Central Hospital wherein it has been clearly mentioned that the victim was born on 11.11.2001 as per Towkak Medical Record Book. Thus from the above, it appears that on the date of incident i.e. on 06.06.2016, the victim 'S' was aged about 14½ years and same got due support from the mother (P.W. 3) of the victim. As such, it can safely be held that on the date of incident the victim 'S' was aged about 14½ years.

20. Point No. II & III: So far Point No. II and III are concerned, both the points are taken up together for discussion as they are inter related. From the evidence of victim (P.W. 1) which has been recorded with the help of interpreter Smt. Papori Bora, a Graduate Science Teacher attached to Hearing Impaired School Jorhat, it appears that while victim was alone in her house, accused whom she recognized in court being next door neighbour, came to her house, touched her body and breast, opened the buttons of her shirt. She got pain on her neck, chest and face while holding and opening her panty by the accused. So far the injury is concerned, from the evidence of P.W. 8 the medical officer, it appears that on the next day of the incident, he examined the victim who came to him with alleged history of attempt to rape on her. During examination, he found her mentally retarded due to cerebral palsy and found abrasion over lower part of the face, chin, upper part of neck. No injury was detected on her private parts and he proved his report as Exbt. 3. P.W. 3 and

P.W. 4, the parents of the victim, in their evidence has clearly stated that on returning home, the victim made them understand by her signs and signals that accused Binod Thakur came to their house and finding the victim alone, opened her cloths, touched her breast, hold her neck by his hands. The victim also made them understand that accused attempted to open her panty which was found coming down from her waist. In their cross examination except denial, defence failed to dislodge their evidence so far coming of the accused to their house and attempt made by the accused to molest the victim. Finding of injury marks on the face and neck of the victim supports the evidence of the victim so far allegation of strangulating her neck by the accused. The other witnesses, i.e. P.W. 2, P.W. 5, P.W. 6 and P.W. 7 are hearsay witnesses being reported by the parents of the victim which appears to be in a natural course of reaction from the parents knowing on the attempt of molestation made on the victim. They all have categorically stated that soon after the incident, the matter was reported to them with a specific allegation against the accused Binod Thakur and on knowing this, P.W. 5 came to the house of the victim and saw her weeping. The evidence of P.W. 5 in his cross examination affirmed that from the signs shown by the victim, he could understand that she was hold by the accused. Thus though these witnesses could not directly ask the victim about the victim, but under the facts and circumstances, their evidence appears to be relevant to this case towards supporting the prosecution case.

The other aspect, which gives strength to the prosecution case is that while PW 3 returned to her house, she saw the accused in going out of her house. P.W. 3 and P.W. 4 denied having sour relation with the accused and that they have falsely implicated the accused. The evidence on record clearly shows that evidence of the victim (P.W.1) and her mother (P.W.3) is found reliable, trustworthy. The injury found by the M.O. (P.W.8) during examination and the fact that just after the incident, the matter was informed to neighbours including VDP Secretary and Gaonburah gave strength to the prosection. As such, there was no scope of doubt towards any concoction of facts as

suggested by defence. The defence failed to cast any doubt on the evidence of the victim recorded through interpreter that on the date of incident, accused Binod Thakur, who is a neighbour of the victim came to her house while she was alone, touched her breast and on her objection, accused hold her neck and in that process, some abrasion injury was sustained by the victim. Moreover, the absconding character of the accused also make the prosecution case more strengthened.

- 22. Apart from above, Section 29 of POCSO Act 2012 is also applicable in this case which is quoted for ready reference:
 - "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."
- 23. In the present case in hand, if we read the evidence of the victim, which is otherwise found believable and if taken with Section 29 of POCSO Act it leaves no scope to doubt as accused failed to rebut the evidence of the victim by giving either proper explanation or by adducing defence evidence or through cross examination of the prosecution witnesses.
- 24. Considering all above, I hold that on 06.06.2016, at about 10.30 AM, while the victim 'S' was alone in her house, accused trespassed into the house of the informant with an intention to commit an offence punishable with imprisonment and thereby committed the offence of house trespass as made punishable u/s 451 IPC. Moreover, by touching breast of the victim and also touching her body and attempting to open her pant, accused has committed the offence of sexual assault as defined u/s 7 of POCSO Act, 2012. However, as the victim is physically challenged as well as during sexual assault, the accused caused simple injury on the victim under definition of Section 9(i), 9(j) and 9(k) of POCSO Act, the sexual assault becomes aggravated sexual assault.
- 25. To sum up the discussion, I am of the considered opinion that prosecution has been able to prove the ingredients of offence punishable U/S Spl. (P) Case No. 42/2016 Page 10 of 13

10 of POCSO Act 2012 and Section 451 IPC against accused Sri Binod Thakur beyond all reasonable doubt.

- Accordingly, I hold the accused Binod Thakur guilty for the offence punishable U/S 10 of POCSO Act, 2012 and Section 451 IPC and accordingly accused Binod Thakur is convicted under the said Sections of Law.
- I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. In view of the nature of the offence proved by the prosecution, particularly the act of sexual assault on a physically challenged victim by a neighbour, I am not inclined to extend the benefit of Section 3 and 4 of Probation of Offenders Act to the accused.
- Heard the accused on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. Learned Special PP has prayed for awarding maximum punishment for the accused. Learned defence counsel has prayed for leniency in sentence and submitted that as the accused is in Jail custody since 18.04.2017 the period already undergone should be treated as sufficient punishment. I have considered the submission of both the sides.
- 29. Considering all aspects of the case in hand, convict Binod Thakur is sentenced to undergo rigorous imprisonment (RI) for 5 (five) years for committing the offence punishable U/S 10 of POCSO Act, 2012 and also to pay a fine of Rs. 5000/- (Rupees five thousand), i/d further SI of another 3 months Convict Binod Thakur is further sentenced to undergo rigorous imprisonment (RI) for 1 (one) year for committing the offence punishable U/S 451 IPC and also to pay a fine of Rs. 1000/- (Rupees one thousand), i/d further SI for one month. Both the sentences of imprisonment shall run concurrently.
- 30. Convict Binod Thakur is remanded to District Jail, Sivasagar to serve out the remaining part of the sentence.
- 31. Convict Binod Thakur is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.

- 32. It is further provided that in the event of realization of fine amount, the entire amount will go to the mother of the victim which will be used for betterment and treatment of the victim U/S 357 Cr.P.C.
- 33. Considering the fact and circumstances of the case, the matter is referred to DLSA Sivasagar for exploring the possibility of compensation U/S 357A Cr.P.C. Send a copy of the judgment to Secretary DLSA Sivasagar for needful action.
- 34. Let a free of cost copy of the judgment be given to the convict Binod Thakur immediately as per the provisions of Section 363(1) Cr.P.C.
- 35. Convict Binod Thakur is informed about his right of appeal against the judgment and order of conviction and sentence before Hon'ble Gauhati High Court either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 36. Send a copy of the judgment to learned District Magistrate, Charaideo U/S 365 Cr.P.C.
- 37. Learned legal aid Counsel is entitled for his professional fees from DLSA Sivaasagar.
- 38. Judgment is pronounced in open court. The case is disposed of on contest.

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

Special Judge, Sivasagar

APPENDIX

1. Prosecution witnesses -

- P.W.1 Victim 'S'
- P.W.2 Sri Judisthir Tanti
- P.W.3 Smt. Radha Mani Tassa
- P.W.4 Sri Sambhu Tassa (Informant)
- P.W.5 Sri Bharat Nayak P.W.6 Sri Ratnakar Nayak
- P.W.7 Smt. Munna Thakur
- P.W.8 Dr. Rehan Seikh (M.O.)
- P.W.9 Sri Dipul Kr. Boro (I.O.)
- 2. <u>Defence witnesses</u>: None
- 3. <u>Court witnesses</u> None
- 4. Exhibits by prosecution -
 - Exbt.1 164 Cr.P.C. statement of the victim 'S'
 - Exbt.2 FIR
 - Exbt.3 Medical examination report
 - Exbt.4 Sketch map
 - Exbt.5 Certificate issued by M.O. of Towkak Central Hospital
 - Exbt.6 Charge-Sheet.

Special Judge, Sivasagar: