IN THE COURT OF SPECIAL JUDGE, SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, Sivasagar.

Spl. (P) Case No. 43 of 2016 U/S 6 of POCSO Act. (Arising out of Sonari P.S. Case No. 171/2016)

State of Assam

-Vs-

Sri Chutu Munda Accused

APPEARANCE:

For the prosecution : Sri A. K. Bora, Special P.P. Sri D.K. Gohain, Advocate (State defence counsel)

Date of framing charge : 04.01.2017

Dates of evidence : 27.02.2017, 03.04.2017, 02.05.2017,

30.05.2017.

Date of S/D : 23.06.2017.

Date of argument : 01.08.2017 & 28.08.2017

Date of Judgment : 05.09.2017

JUDGMENT

1. Prosecution case, in brief, is that on 21.09.2016, one Smt. Lakhi Munda lodged an FIR with O/C, Sonari Police Station alleging that on that day at about 1 PM, the victim 'B' informed her that while the victim 'B' (name withheld) and her minor sister used to reside with their father, the accused Chutu Munda since after the death of their mother, after consuming liquor, used to come to their bed and commits misdeed with her. It is also alleged that her father intimidated her not to divulge the matter to others else he will kill them and as such the matter was not disclosed earlier.

- 2. On receipt of the FIR, Sonari P.S. Case No. 171/2016, U/S 376 IPC, read with Section 6 of POCSO Act was registered and investigated into the case. During investigation, accused was arrested and produced him before the court of learned SDJM, Charaideo at Sonari. 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 against the above named accused U/S 376 IPC, read with Section 6 of POCSO Act, 2012.
- 3. Accused Chutu Munda was produced before this court for trial as the case is exclusively triable by the court of Special Judge. Copy of relevant papers were furnished to the accused. Due to his inability to engage advocate on his own. Services of state defence counsel was also provided. Vide order dated 04.01.2017, my learned predecessor in office has framed the charge U/S 6 of POCSO Act, 2012 against the accused Chutu Munda to which he pleaded not guilty and claim to stand trial.
- 4. During trial, prosecution side has examined six witnesses including M.O. and I.O. Miss Sunmoni Munda, the youngest daughter of the accused, with whom the victim used to share the bed at her residence was examined as Court Witness (C.W. 1).
- 5. 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.
- In his 313 Cr.P.C. examinations, the accused has taken the plea that prior to 3- 4 days of filling FIR of this case, he lodged one FIR at Sonari P.S. due to elopement of the victim and she was recovered by Sonari PS from Namrup area. After her recovery, he scolded and assaulted the victim 'B'. Accused further took a plea that on the next day of this incident, the FIR of this case was filed. On this plea, as the accused was provided with services of state defence counsel and is in Jail since the date of FIR, at the request of the

learned defence counsel, I have called for a report from the concern PS and getting information about the FIR filed by accused, records of said case vide Sonari P.S. Case No. 160/16 were called and perused.

7. I have heard argument of learned Special P.P. Mr. A.K. Bora and Mr. D. K. Gohain, learned State defence counsel, and gone through the evidence and documents. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- 8. (I) What was the age of the victim on the date of incident?
 - (II) Whether accused Chutu Munda has committed penetrative sexual assault on his daughter victim 'B' as alleged for several days?

DECISION AND REASONS THEREOF

- 9. Before going to decide the points, let me narrate the evidence on record briefly for better understanding of the facts.
- 10. PW-1 Smt. Lakhimoni Munda, informant of this case in her evidence deposed that that she is the neighbour of the accused. Victim B is the daughter of the accused Chutu Munda. Mother of the victim died about 9 years back. Prior to this case, the victim used to reside with her father and another young sister namely Sonmani Munda. Presently they are residing with her. The present age of the victim is about 13-14 years. After the death of mother of the victim, her father again married who also died. Subsequently, the third wife fled away. On the last year before durga Puja the victim B told Nikita Munda that her father is committing rape with her since last several days. On knowing this, Nikita informed the matter to her. Thereafter the victim also told her about her molestation and rape by her father. She informed the matter to the VDP and thereafter as requested by the victim, she has lodged the FIR. Exbt. 1 is the FIR. In her cross-examination by defence, she admitted that FIR was written at police station and she cannot say about the contents of the FIR. She has not seen the incident of molestation or rape by accused on her own. She knew one Raju Ali of their village. Once said Raju Ali was assaulted by local public for Special (P) Case No. 43 of 2016 Page 3 of 15

offering love to the victim which the victim refused. This incident took place about 15 days prior to the incident. On that incident, accused has assaulted the victim on that day. She denied that the victim tells them about physical assault by her father but they have concocted the matter in to rape case. She accompanied the victim to police station. Accused has his own house. The youngest daughter is going to school. Presently the victim is staying with Nikita Munda. She denied the defence suggestion that she along with Nikita with an intention to grab the property of the accused, concocted the false story of rape.

11. PW-2 victim B in her evidence deposed that accused is her father. Prior to this case she used to reside with her father and younger sister Sonmani Munda. Her mother died several years back. Her father took another wife which fled away. The third wife died. The fourth wife fled away. While she along with her younger sister used to stay with their father, after coming from work, they used to take dinner together. Thereafter, she along with her sister went to sleep in one bed and her father used to sleep in separate bed. On regular basis, her father used to come to their bed and after opening her pant and touching body, commit misdeed. He came to her bed for 5 – 6 times. He used to ride on her body and open his pant. He attempted to commit rape on her but on her objection, he failed to do so. On the next day, she informed the incident to Nikita Bou and Lakhimoni Munda Bou. They took her to police station, where on her request, they filed a case. Police took her to doctor and court. She gave her statement in court. Exbt. 2 is her statement in court. Exbt. 2(2) and 2(3) are her signatures. In her cross-examination by defence, PW 2 admitted that she read upto class VIII. She left school about a year back. Police did not collect any school certificate from her. Raju Ali is known to her. Though he offered her to make love affairs, but she refused. PW 2 denied that she used to roam around with Raju Ali. On offering her to have love affairs, local public assaulted Raju Ali. On this incident, her father physically assaulted her. She denied that on the grudge of physical assault by her father, she falsely implicated him with allegation of attempt of rape and sexual abuse. She also denied that while Special (P) Case No. 43 of 2016 Page 4 of 15

giving statement to police, she has not stated that on regular basis, her father used to come to their bed and after opening her pant and touching body, commit misdeed and that he came to her bed for 5 – 6 times.

- 12. P.W. 3 Dr. Milan Kumar in his evidence deposed that on 21.09.2016 at about 7.30 PM he examined the victim i/c Sonari PS Case No. 171/2016 who came to her with history of sexual assault and upon examination he found her Hyman intact. No sign of sexual intercourse or mark of violence was found on her body at the time of examination. He is of the opinion that her age is above 15 years but below 18 years. He proved his report as Exbt. 3. Cross of this witness was declined.
- 13. PW-4 Smt. Nikita Munda in her evidence deposed that accused Chutu Munda is her uncle-in-law. Victim B is the daughter of the accused. Mother of the victim died several years back. Presently victim is a student of class VII and her present age is about 13-14 years. About 6 months back, while she returned from work, victim B came to her house and informed her that, her father by opening her pant co-habited with her for last several times by compelling her to sleep with him. Prior to this, the victim had to came out of her house on the night hours and her father has to take back her in the morning. On knowing this, she informed the matter to Lakhi Munda. She informed the matter to the VDP. The matter was also informed to villager and the victim told them about the incident to them. On this incident, Lakhi Munda lodged the FIR. In her cross-examination by defence, she denied that before police she has not stated that on knowing this, she informed the matter to Lakhi Munda. She informed the matter to the VDP. The matter was also informed to villager and the victim told them about the incident to them. She denied that she deposed falsely on this aspect. She knew one Raju Ali of their village. She cannot say if said Raju Ali used to visit the residence of victim. Victim once told her that Raju Ali once uttered that he would like to love the victim to which she refused. She denied that the victim used to visit the house

of Raju Ali. However victim has talking terms with Raju Ali. For keeping talking term with Raju Ali, the accused and even we also assaulted the victim. She denied that for assaulting by father, the victim has falsely implicated her father with the false allegation of molestation. She has not seen any injury or the victim never reported of getting any injury to her. Victim is presently staying with her. Accused has his own residence and land. They are looking after the said house. She denied that she and Lakhi with an intention to grab the property of the accused, concocted the false story of rape.

- 14. PW-5 Sri Mahabir Munda, the elder brother of the accused in his evidence deposed presently victim B is aged about 13-14 years. After his return from work, victim told Lakhi Munda that her father has committed rape on her. Lakhi Munda told him about this and also informed the matter to VDP. The matter was also informed to villager. Thereafter, Lakhi Munda lodged the FIR. In his cross-examination he admitted that he has no personal knowledge of this incident. He did not ask the victim about the incident. He came to know from Lakhi Munda. He knew one Raju Ali of their village. Victim once told that Raju Ali has uttered that he would like to love the victim to which she refused. He denied that on this he along with others assaulted Raju Ali. On this matter, accused Chutu assaulted the victim. PW 5 admitted that they are three brothers and live separately in different houses by dividing properties. Informant Lakhi Munda is his wife. He has kept the household articles of the accused in safe custody. Accused has sold some land of their share to some other person. He have objected to the said sale. He denied that, for said sale of land, he did not have good relation with the accused. He also denied that he along with Lakhi with an intention to grab the property of the accused, concocted the false story of rape.
- 15. PW-6 SI Sri Amarjyoti Bailung, the I/O of this case, in his evidence deposed that on 21.09.2015, one written FIR was received from Smt. Lakhi Munda and Soanri PS case No. 171/2016 was registered and he was entrusted

to investigate the case. PW 6 deposed about routine steps taken by him during investigation i.e. visiting the place of occurrence, preparing sketch map (Exbt. 4), getting the victim medically examined, sending her to court for recording her statement u/s 164 Cr.P.C, collection of medical examination report and statement of the victim given in court, arrest of the accused etc. PW 6 also deposed that on completion of investigation, he has submitted charge sheet against the accused u/s 376 IPC r/w section 6 of POCSO Act. Exbt. 5 is the charge sheet. In his cross-examination by defence, PW 6 admitted that the witnesses examined by him are related to the informant and accused. He has not examined the VDP secretary of the village. Nothing found in investigation regarding any village meeting on the incident of this case. He has not collected any school certificate regarding age of the victim. As shown in the sketch Map, residence of Jalil Ali is on the north. Residence of Lakheswar Gohain is in the south. He has not examined them or any of their family members. Victim B in her statement given u/s 161 Cr.P.C did not state before him that on regular basis, her father used to come to her bed and after opening her pant and touch her body but she said of committing misdeed by her father. Victim was examined at the police station. Women police was present while interrogating her. He denied that he did not investigated the case properly and submitted charge sheet with sufficient materials.

16. CW 1 Miss Sonmani Munda, the younger daughter of the accused in her evidence as court witness, deposed that accused Chutu Munda is her father. Victim B is her elder sister. Her mother died several years back. Presently She is residing with Lakhimoni Munda. While she and her sister stay with their father, she used to sleep with her sister. Sometime, her father by keeping her aside, used to sleep with his sister victim B and commits misdeed with her. Her father used to open his pant and her sister's pant and commits misdeed. Her father used to threat us for not to divulge this to others else he will cut us. In her cross-examination by defence, she admitted that her mother expired long back. After death of her mother, they lived with father but he did Special (P) Case No. 43 of 2016

not love them. Her sister (victim) flew away without informing her father. Her father has to bring her back from Namrup with the help of police. After this, victim did not care for father. For this, her father scolded and slapped the victim. She cannot say if victim have talk with Raju Ali. She denied that she deposed on being tutored by Lakhimoni Munda. She denied that she deposed falsely.

- 17. Basing on the above evidence on record, let me decide the points formulated. In respect of Point (i), so far age of the victim 'B' is concerned, in the FIR the age of the victim was mentioned as 13 years. However while giving evidence the P.W. 1 claimed her age as 13 to 14 years. The victim 'B' while giving evidence claimed her age as 14 years and this part was corroborated by P.W. 4, the another relative of the victim. P.W. 3, the medical officer in his evidence stated that on the basis of radiological examination, the age of the victim was above 15 years and below 18 years on the date of examination. The evidence of witnesses on age remains unchallenged. While putting the above evidence on age of the victim to the accused on his 313 Cr.P.C. examination, he admitted that the present age of the victim 'B' is 13 years. It may be mentioned here that the accused is the father of the victim and he is the best person to depose regarding age of the victim 'B'. Considering above, it can safely beheld that on the date of incident, the victim was 13 years.
- Now coming to the allegation of sexual assault by the accused on his daughter victim B, in the course of argument hearing, learned P.P. has submitted that from the evidence it is proved beyond doubt that accused used to go to the bed of his two daughters and attempted to molest the elder daughter i.e. victim 'B' and the said fact was duly supported by the victim and C.W. 1, the younger daughter of the accused who used to sleep with the victim 'B'. On the other hand, learned State defence counsel Mr. D.K. Gohain has submitted that there is an element of great doubt on genuineness of the case and there is every possibility of false implication due to the paternal control

administered by the accused against his daughter who used to mingle up with a Muslim boy of the locality and that just before filling of the FIR, she flew away with the said boy and ultimately the victim has to be recovered with the help of police.

- 19. It may be mentioned here that on the plea raised by the accused regarding filing of an FIR on the matter of elopement of the victim 'B', a report was called for from O/C, Sonari P.S. and Namrup P.S. and on being confirmed that the accused has filed an FIR, case record of Sonari P.S. Case No.160/16 U/S 366 (A) IPC was called for with the Case Diary and same was looked into.
- 20. Now coming to the allegation of the prosecution, on looking at the evidence of P.W. 2, the victim, it appears that she has categorically stated that after taking dinner, when she along with her younger sister (CW 1) went to sleep in one bed and her father (accused) used to sleep in a separate bed, on regular basis, her father used to come to their bed and after opening her pant, touched her body and committed misdeed. She also stated that her father came to her bed for about 5-6 times, used to ride on her body and after opened her pant, attempted to commit rape on her, but on her objection, he failed to do so. Lastly, she informed this matter to Nikita Munda and Lakhimoni Munda. P.W. 1 Lakhimoni Munda and P.W. 4 Nikita Munda fully supported the evidence of P.W. 2 so far the informing the matter to them regarding coming of accused to the bed of the victim at night hours. Though police did not examine Sunmoni Munda, the younger sister of the victim 'B' but she was called as court witness and in her evidence as CW 1, she has clearly stated that she used to sleep with her sister and on several occasions, her father came to their bed and by keeping her aside, used to sleep with the victim. She also stated that her father used to open his pant and her sister's pant and commits misdeed. She further stated that her father used to threat them not to divulge the matter to others, else he will cut them. During cross examination defence failed to shake her evidence on the material point.

- On looking at the defence plea of false implication or its probability, it appears that witnesses have admitted that for offering love by Raju Ali, the victim refused the same and even then she was scolded and assaulted by the accused and her relatives. Except this there is nothing on record to show that the victim has maintained any relation with said Raju Ali despite prohibition by the accused. The above evidence do not show any possibility of false implication of the accused by the victim.
- 22. The other defence plea is regarding elopment of the victim just before the FIR of this case. At the request of the learned defence counsel, I have called for a report on the matter of filling of FIR by the accused on elopement of his daughter, and on receipt of the case record, I have gone through the FIR of Sonari P.S. Case No. 160/16. From the said FIR, it appears that said FIR was lodged on 10.09.2016 by the accused Chutu Munda informing missing of his daughter, i.e. victim 'B'. In that case, after investigation, police submitted Final Report. From the Final Report, it appears that on the date of incident i.e. on 10.09.2016 while her father intimidated her to cut, out of fear she went to Bhajo Railway Station, met with a girl named Parishmita Urang and boarded a train and came to Simaluguri. Thereafter on the same day, with an intention to return Bhajo Station, she boarded a train at Simaluguri Railway Station but she forget to get down from train at Bhajo Station and reached Namrup Station where she got down from train and went with a man to his residence. Said man has handed over her to Namrup P.S. wherefrom her father brought her back. This incident took place on 10.09.2016, but the FIR of this case was lodged on 21.09.2016. So the plea of the accused that on the preceding day of the FIR by Lakhimoni Munda, the victim was recovered is factually incorrect. The defence plea though partially appears to be true so far flee away of the victim and her recovery through police is concerned, but the other part that the victim 'B' flew away with one Raju Ali was apparently incorrect and false.

- it may further be noted here that during cross-examination of PW 1, 4 and 5, defence has put forwarded a suggestion that to grab the landed property of the accused, they have concocted the story of molestation but the accused in his 313 Cr.P.C did not raise said plea. From the evidence it appears that PW 5 has admitted that he has kept the property of accused in safe custody. It is also in evidence after the arrest of accused, the victim and his minor sister are with PW 1 and PW 4. The victim (PW2) and his younger sister (CW 1) did not complaint of misbehaviour by their aunt with whom they are staying.
- 24. Under the above circumstances, while the defence pleas are found not convincing at all, let me scrutinize the evidence of the victim and her younger sister again. As narrated above, the incident of molestation took place at night hours when the victim 'B' used to sleep with her younger sister C.W.1 Sunmoni Munda and the fact that the accused also used to sleep in the same house being father. As such, there cannot be any other eye witness of the occurrence except the younger daughter. The allegation of the victim that her father used to come to their bed was duly supported by C.W.1, the younger daughter of the accused. It may be noted here that against CW 1, accused has no grievances. The conduct of the victim that after bearing the torture for 5-6 times, she informed the matter to her aunts i.e. P.W. 1 Smt. Lakhimoni Munda and P.W. 4 Smt. Nikita Munda, both sister-in-law of the accused appears to be quite natural. Both of them are consistence as to what was reported to them by the victim. There was no discrepancy on their evidence. On close scrutiny of their evidence, the defence allegation that there was possibility of false implication cannot be accepted. On the contrary, prosecution has been able to prove the fact that accused used to come to the bed of the victim at night hours and sleep with her and tried to molest her.
- 25. Under the above facts, let me decide whether the allegation of penetrative sexual assault is proved or something else. In the FIR and during

framing charge, though charge of penetrative sexual assault was framed, but in her evidence P.W. 2, the victim has categorically stated that her father attempted to commit rape on her but failed due to her objection. She stated that her father i.e. accused used to come to their bed, open his pant and her pant, touched her body, ride on her body clearly shows that accused Chutu Munda used to commit sexual assault only and not the penetrative sexual assault. The victim in her evidence has no where alleged of rape on her. The act as alleged by the victim fall under the definition of aggravated sexual assault as defined under section 7 r/w section 9 of the POCSO Act. From the testimony of P.W.2, the victim a clear case of sexual assault is made out only against the accused instead of penetrative sexual assault. Medical report fortifies the above view. M.O. has clearly opined that the Hymen was intact and he did not find any sign of recent sexual intercourse.

- 26. Section 7 and 9 of POCSO Act are quoted here for ready reference:
 - 7. Sexual assault: Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
 - 9. Aggravated sexual assault :
 - (I) whoever commits sexual assault on the child more than once or repeatedly; or
 - (n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child;

is said to commit aggravated sexual assault."

- 27. Apart from above discussions, what factually has been proved, Section 29 of the POCSO Act also provides for a presumption to be taken by the court in favour of the victim. Section 29 of POCSO Act read as follows
 - 29. Presumption as to certain offence:- Where a person is Special (P) Case No. 43 of 2016 Page 12 of 15

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.

- 28. In this case the defence though tried to take a different story regarding false implication, as discussed here-in before, but defence failed to substantiate them even on the scale of preponderance of possibility. The attempt of the defence to rebut the presumption appears to be unsuccessful.
- 29. From the totality of the fact I hold that prosecution has been able to prove the fact that accused Chutu Munda used to commit aggravated sexual assault on his daughter, i.e. victim 'B'. As the offence committed by the accused with his own daughter, in view of the definition of Section 9 (I) and (n) of POCSO Act, sexual assault becomes aggravated sexual assault as made punishable under Section 10 of the POCSO Act. However prosecution has failed to prove the fact of aggravated penetrative sexual assault as defined u/s 3 and 5 of Pocso Act.
- 30. It may be noted here that charge of this case was framed under Section 6 of the POCSO Act, but the offence proved is minor to the offence charged and as such, without altering the charge and by using the power under Section 222 Cr.P.C, I am of the opinion that accused can be held guilty and convicted, which I do accordingly.
- 31. In all view of above, I hold that accused has committed the offence of aggravated sexual assault as defined under Section 7, read with Section 9(I) and (n) of POCSO Act as made punishable U/S 10 of POCSO Act, and accordingly accused Chutu Munda is convicted for the offence punishable U/S 10 of the POCSO Act, 2012.
- 32. I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. In this case, father is the assailant and the minor

victim in absence of her mother is found unprotected in the hands of the father. Considering the nature of the offence proved by the prosecution, I am of the opinion that it is a not a fit case for granting the benefit of this benevolent law in favour of the accused. As such, I decline to extend the benefit of Section 3 and 4 of Probation of Offenders Act to the convict.

- 33. Heard the convict on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. Learned State defence counsel has prayed for leniency in sentence by narrating the facts and circumstances of the case.
- Considering the nature of the offence proved by the prosecution, I am of the opinion that the minimum sentence of 5 (five) years Rigorous Imprisonment with fine will meet the ends of justice for committing the offence punishable U/S 10 of POCSO Act, 2012.
- 35. Accordingly convict Chutu Munda is sentenced to undergo R.I. for 5 (five) years and to pay a fine of Rs. 1000/- (one thousand) i/d further SI of one month for the offence U/S 10 of POCSO Act, 2012.
- 36. Convict Chutu Munda is remanded to the Jail custody to serve out the remaining part of sentence.
- 37. Convict Chutu Munda is entitled to the benefit of Section 428 Cr.P.C. for the period already undergone during trial.
- 38. 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. In view of imposition of meager amount of fine, no order is passed on payment of compensation to victim u/s 357 from fine amount.
- 39. Let a free of cost copy of the judgment be given to the convict immediately as per the provisions of Section 363(1) Cr.P.C.
- 40. Convict is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or Special (P) Case No. 43 of 2016 Page 14 of 15

though legal aid panel advocate or by way of Jail Appeal.

- 41. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 35. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 5th day of September 2017 at Sivasagar.

Special Judge, Sivasagar:

APPENDIX

- 1. <u>Prosecution witnesses</u>:
 - P.W.1 Smt. Lakhimoni Munda
 - P.W.2 Victim B
 - P.W.3 Dr. Milan Kumar (M.O.)
 - P.W.4 Smt. Nikita Munda
 - P.W.5 Sri Mahabir Munda
 - P.W.6 SI Amarjyoti Bailung (I.O.)
- 2. <u>Defence witnesses</u> Nil.
- 3. Court witnesses -
 - C.W.1 Miss Sonmoni Munda
- 4. Exhibits by prosecution -
 - Exbt.1 FIR
 - Exbt.2 164 Cr.P.C. statement of the victim.
 - Exbt.3 Medical examination report.
 - Exbt.4 Sketch map.
 - Exbt.5 Charge-Sheet.

Special Judge, Sivasagar: