# THE COURT OF THE SPECIAL JUDGE, SONITPUR AT TEZPUR

**SPL(POCSO) CASE NO.** :- 43 of 2018

(Under Section 8 of POCSO Act, arising out of G.R. Case No 1674 of 2018)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur, Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Ruhit Rowtia,

Son of Late Kamala Rowtia, Resident of No. 1 Ulubari Police Station – Thelamara Dist: Sonitpur, Assam.

Date of framing Charge :- 01/09/2018

Date of evidence :- 14/09/2018, 28/09/2018

& 02/11/2018.

Date of examination of

accused u/s 313 Cr.P.C

2/11/2018

Date of Argument :- 02/11/2018

Date of Judgment :- 02/11/2018

Counsel for the Prosecution: - Mr. Munin Chandra Baruah

Special Public prosecutor.

Counsel for Accused :- Mr. A.K. Saikia, State defence counsel.

### <u>JUDGMENT</u>

- **1.** In this case accused Sri Ruhit Rowtia is put for trial for allegation of charge under Section 8 of POCSO Act.
- 2. The various facts leading to this case according to FIR in brief is that on 30-04-2018 at about 1 p.m. in absence of any of the family members of the complainant, accused trespassed into the house of the informant, gagged informant's 16 years old minor daughter on her mouth and attempted to commit rape while informant's daughter raised alarm accused fled away. Hence, this prosecution case. The ejahar was filed by informant Susanta Dutta before the O/C of Thelamara PS on 30-04-2018.
- On receipt the ejahar, the O/C of Thelamara P.S. registered the case, vide Thelamara PS Case No. 67/18, under Section 448 of IPC read with section 8 of POCSO Act. After completion of usual investigation, the O/C Thelamara Police station sent up the case for trial against the accused Sri Ruhit Rowtia under Section 10 of POCSO Act.
- 4. On being appeared the accused person before this Court after hearing both parties, framed charge under section 8 of POCSO Act against the accused Ruhit Rowtia. Particulars of the charge are read over and explained to which he pleads not guilty and claimed to be tried.
- 5. To substantiate the case prosecution examined as many as 8 (eight) numbers of witnesses. Accused pleads total denial while his statement was recorded u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him where he denied the evidence and declined to give defence evidence.
- **6.** I have also heard arguments put forwarded by the learned counsel for both parties.

# 7. The point for decision in this case is that :

**(i)** Whether on 30-04-2018 at about 1 p.m. at No. 1 Ulubari under Thelamara Police station, accused committed sexual assault on victim, aged about 16 years of age and thereby committed an offence punishable under section 8 of POCSO Act?

# Reasons, Decisions and reason for decision

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW- 1** Susanta Dutta, complainant of this case, has stated before the court that the incident took place in the month of May, 2018. At that time he was not present at his house. His wife informed over telephone that accused Rohit Rowtia by entering into his house dragged his daughter. At the relevant time the age of his daughter was 16 + years. On arrival at his house, at about 2 P.M., he came to know from his daughter that when she was alone at home, accused came to his house and dragged her inside the house. Thereafter on being afraid she went to a nearby house. Thereafter, he has lodged the ejahar against the accused before Thelamara Police station. Ext. 1 is the ejahar and Ext. 1(1) is his signature. His daughter was sent to the learned Court for recording her statement u/s 164 Cr.P.C.

Though PW 1 has been exposed to long cross-examination but the evidence as to his wife informed him over telephone that the accused by entering into their house dragged his 16 years old daughter and on arrival at his house at about 2 p.m. he came to know from his daughter that while she was alone at home, accused came to their house and dragged her inside the house and thereafter on being afraid she went to a nearby house has remained unchallenged.

**10. PW-2** Smti Shyamali Dutta, who is the mother of the victim stated that she knows the accused. Her victim daughter is aged about 16 years. The incident took place about 3/ 4 months ago, at about 11 a.m. At that time she and her husband were not present at home. At that time her victim daughter was alone at home. At the relevant time she reads in class IX. Her victim daughter informed her over phone that accused dragged her with attempt to commit misdeed (bad act) (Badmasi). Then she informed the matter to her husband. Then her husband filed ejahar. At the relevant time, she went to Ulubari Centre to collect the medical card.

Though she has been exposed to long cross-examination but the evidence as to when her victim daughter was alone at home, accused dragged

her with attempt to commit misdeed (bad act) (Badmasi) which was informed to her by victim has remained unchallenged.

- **11. PW-3** Phulesa Khatoon who turned hostile stated that she knows the accused Rohit Rowtia and the victim girl. She also knows the complainant. The incident took place about 3/4 months ago. At about 12 noon to 1 p.m. victim girl came to their house and requested her to use her mobile hand set as she wants to ring her mother.
- **12. PW- 4** Smti Jonaki Kurmi stated that accused, complainant and victims are her neighbours. The incident took place about 3 months ago. At the relevant time she went out to collect medical card. When she returned home victim was found crying. While she enquired the victim, she did not state anything. She came to know that local public assaulted accused Rohit Rowtia.

In cross-examination she admitted that she does not know if there were any quarrel in between the father of the victim and the accused.

- **13. PW 5** Sri Bhaskar Debnath, stated before the court that accused, complainant and victim are his neighbours. The incident took place about 3 months ago. The incident took place at day time. At that time he was at my home. The mother of the victim girl, reported him in his house that accused Rohit dragged the victim girl and took inside the room.
- **14. PW 6,** Miss Juhi Gogoi, Judicial Magistrate, 1<sup>st</sup> class, Tezpur stated that on 03-05-2018 she was posted as Judicial Magistrate, 1<sup>st</sup> class, Sonitpur, Tezpur and on that day in reference to Special POCSO Case No. 43/18 u/s 8 of POCSO Act, she has recorded the statement of one Miss X, D/O Sri Susanta Dutta, 16 years of age, resident of Ulubari, Thelamara, who is a student of Ulubari High School u/s 164 Cr.P.C. She has recorded the statement of the said witness at the court chamber. The witness was escorted and identified by HG Hemi Patangia. The said witness made statement voluntarily. After recording her statement, the statement was read over to her and on acceptance she put signature in her statement. Ext. 2 is the said statement u/s 164 Cr.P.C. of victim girl and 2(1) is her signature. Ext. 3 is her order dated 03-05-2018 and Ext. 3(1) is her signature.
- **15. PW 7,** Miss X, who is the victim in this case, stated that the incident took place on 30-04-2018 at about 11 a.m. At the relevant time she was alone in her house. She was mopping the floor. Accused came and asked her where is her

mother. She told him that her mother is not in the house. He asked her where her mother went to, she replied him that her mother went to Ulubari. Then he went out and secretly came from back side. She was again mopping the floor. He hugged her from back side, forcefully dragged her inside the room but she somehow come out and go out to outside. After about 10 minutes, he again came along with his daughter Divia Routia, aged about one and half years old. He asked her hot water. She told him that in their house there is no hot water. Then his nephew Pittam Routia told her to prepare the hot water through gas but she refused. Then they left her house. Then she informed the matter to her mother over phone. On arrival of her mother, she narrated the incident to her mother. Her mother filed the case against the accused. After instituting the case, police came, recorded her statement and also sent her to the learned Magistrate to record her statement u/s 164 Cr.P.C. Ext. 2 is her statement and Ext. 2(2), 2(3) and 2(4) are her signatures.

Though she has been subjected to vigorous cross-examined by the defence but the evidence as to at the relevant time when she was mopping the floor accused came to their house, asked whereabouts of her mother, thereafter he went out and again secretly came back, hugged her from back side, forcefully dragged her inside the room but she somehow came out and go out to outside and after 10 minutes accused again came with his one and half years old baby daughter and he wants some hot water while she refused accused's nephew told her to prepare hot water but that was also she refused has remained unchallenged.

**16. PW 8,** the Investigating Officer, SI Gokul Sonowal, stated before this court that on 30-04-2018 he was posted as 2<sup>nd</sup> Officer at Thelamara Police station. On that day, one Susanta Dutta filed an ejahar, and on receipt the ejahar, the then O/C registered a case being Thelamara PS Case No. 67/2018 u/s 448 of the IPC r/w section 8 of POCSO Act and entrusted him for investigation by the then O/C Susil Kr. Bhuyan. Ext. 1(2) is the signature of the then O/C of Thelamara PS O/C Susil Kr. Bhuyan which he knew on official communication. On the said day, he has visited the place of occurrence and prepared the sketch map. Ext. 4 is the sketch map and Ext. 4(1) is his signature. He has also recorded the statement of victim, complainant Susanta Dutta and other witnesses at the place of occurrence i.e. No. 1 Ulubari village. Next day, he

has sent the victim girl for medical examination but victim refused to examine her. On 03-05-2018 he has sent the victim girl to the learned court for recording her statement u/s 164 Cr.P.C. Then he has taken the custody of the accused from the hands of public as the local public kept him and assaulted and thereafter, he arrested the accused. Thereafter, on 03-05-2018 forwarded the accused to the court. On completion of usual investigation, he has filed the chargesheet against the accused finding sufficient materials u/s 448 of IPC read with section 10 of POCSO Act vide chargesheet No. 55 of 18 dated 30-06-2018. Ext. 5 is the chargesheet and Ext. 5(1) is his signature.

Witness Phulesa Khatoon stated before him that "on 30-04-2018 at noon while I was busy in my domestic work, Sujala Dutta came to our house and reported me when she was mopping floor Rohit Rowtia came to their house and holding her hands and attempted to commit mis deed. Then I asked her whether she reported the matter to her mother or not, then she reported the matter to her mother through my hand set. Rohit Rowtia is a character loose person. In earlier occasion he also indulged in seeing the girl with bad intention."

Ext. 6 is the case diary of Thelamara PS Case No. 67/18 and Ext. 6(1) is the relevant portion of statement of witness Phulesa Khatoon and Ext. 6(2) is his signature.

- **17.** These much is the evidence of prosecution.
- **18.** Defence plea is total denial while his statement was recorded u/s 313 Cr.P.C.
- 19. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. **Firstly,** the sole evidence of the victim cannot be relied on as her statement made before the court is not tallied with the statement recorded u/s 164 Cr.P.C. **Secondly,** the statement of the victim is not supported by other witnesses. **Thirdly,** there are many contradictions among the statements of the witnesses.
- **20.** On the other hand, learned Special Public Prosecutor has submitted that the prosecution has ably proved the case against the accused beyond any reasonable doubt, hence, accused is required to be convicted under the charged section. Learned Special PP also submitted that in fact there is no enmity in between the accused and the complainant. Even if there is any strange relation

between the accused and complainant, it would not be expected from the complainant to involve his own minor daughter in such a hatred cases.

Learned Special PP again submitted that PWs 1 and 2 are the father and mother of the victim, therefore, question may arise to their interestedness to succeed the case. To rely the interested witnesses in convicting the accused, learned Special PP submitted the case of **Gali Venkataiah Vs. State of Andhra Pradesh** reported in **2008 Crl.L.J. 690.** In regard to minor discrepancies, learned Special PP also submitted the case law of **State of UP V. Krishna Master & ors** reported in **2010 Crl.L.J.3889.** 

- **21.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **22.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is no eye witness to the incident, but after the incident, the victim informed about the incident to her mother and lateron to her father which are corroborated.

According to PW 1, informant and father of the victim, stated that at the time of the incident, he was not present at his house. His wife informed over telephone that accused Rohit Rowtia by entering into his house dragged his daughter. At the relevant time the age of his daughter was 16 + years. On arrival at his house, at about 2 P.M., he came to know from his daughter that when she was alone at home, accused came to his house and dragged her inside the house. Thereafter on being afraid she went to a nearby house. Thereafter, he has lodged the ejahar against the accused before Thelamara Police station. Ext. 1 is the ejahar and Ext. 1(1) is his signature. His daughter was sent to the learned Court for recording her statement u/s 164 Cr.P.C.

Similarly, PW 2, mother of the victim also stated that at the relevant time she herself and her husband were not present at home. At that time her daughter was alone at home. Her daughter informed her over telephone that accused dragged her with attempt to commit misdeed (bad act), then she informed the matter to her husband and then her husband filed the ejahar against the accused. PW 7, victim, also stated that at the relevant time she was mopping the floor of the house then accused entered into their house, asked whereabouts of her mother, when she told him that her mother was not at home as her mother went to Ulubari then accused go out, again secretly entered while

she was mopping the floor, accused hugged from backside, forcefully dragged her inside the room but she somehow came out and go out to outside. After about 10 minutes he again came along with his daughter Divia Routia, aged about one and half years old. He asked her hot water but she refused. Then accused's nephew Pittam Routia told her to prepare the hot water through gas but she refused. Then they left her house. Then she informed the matter to her mother over phone. On arrival of her mother, she narrated the incident to her mother. Her mother filed the case against the accused. After instituting the case, police came, recorded her statement and also recorded the statement through the learned Magistrate u/s 164 Cr.P.C. Though she has been exposed to long cross-examination but her evidence as to accused came to her house while she was mopping the floor, asked whereabouts of her mother, thereafter he went out and again secretly came back, hugged her from back side, forcefully dragged her inside the room but she somehow came out and go out to outside has remained unchallenged.

- **23.** Learned counsel for the accused submitted that the prosecution has failed to prove the age of the victim as they have not been seized any school certificate or Birth certificate of victim to ascertain the age. Therefore, the case cannot be stated to be fallen under POCSO Act.
- **24.** It is true that in the present case there is no documents like Birth certificate or age certificate or any certificate issued by the School authority where the victim last studied or any certificate issued by local Panchayat etc. to prove the victim that she was 16 + years at the time of incident. At the time of deposition, the victim was 16 years as stated by her. Similarly, in her statement recorded u/s 164 Cr.P.C. she also stated that she was 16 years old. Therefore, from her statement it appears that at the relevant time she was 16 years of age, that has not been challenged by defence at any point of time, therefore, it can safely be held that the victim was a minor.
- 25. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD) No.98 of 2015**, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the

settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

- **26.** In this case, the victim and her parents categorically stated the age of the victim was about 16 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. In FIR also informant also stated that at the relevant time the victim was about 16 years. Thus, the evidence of PWs 1, 2 and 7 in respect of age of the victim remains unchallenged.
- In the case in hand, the victim has been consistent on the material 27. particulars with regard to the incident that on the day of incident, while she was alone in her house mopping the floor, accused entered into their house, asked her whereabouts of her mother, when victim replied that her mother went to Ulubari, accused went out and again secretly entered and hugged her from back side, forcefully dragged her inside the room but she somehow came out and the victim also made such statement before the I.O. u/s 161 Cr.P.C and also to the learned Magistrate u/s 164 Cr.P.C. which was confirmed by the learned Magistrate. Though the victim as vigorously cross-examined but the evidence at the relevant to accused came to her house while she was mopping the floor, asked whereabouts of her mother, thereafter he went out and again secretly came back, hugged her from back side, forcefully dragged her inside the room with intent to commit misdeed to her has remained unchallenged. There is nothing in the evidence of the PWs that the accused had any enmity or quarrel with the complainant to file the case falsely against the accused. Therefore, defence of false allegation is not made out.

# 28. The Hon'ble Supreme Court in **State of Rajasthan Vs. Babu Muna** (2013) 4 SCC 206, has observed as under :-

**"9.** We do not have any slightest hesitation in accepting the broad submission of Mr. Jain that the conviction be based on the sole testimony of the prosecutrix, it found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be clarified into three categories, namely, (i) wholly reliable, (ii) whole unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable

testimony of single witness, the conviction can be found without corroboration. This principle applies with greater in terms in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of single witness but the court has no option to acquit the accused."

- **29.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **30.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.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.
- **31.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- **32.** Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? Such issue was dealt by the Hon'ble Apex Court in **Virendra Vs State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that who may testify – all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

- **33.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- **34. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341**, it was held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. Here in the present case, victim was examined on oath as she was 16 years of age.
- 35. On appreciation of the evidence given by the victim and her parents, it comes to the conclusion that it is the accused who attempt to commit sexual assault to the victim. Therefore, I think that the prosecution has failed to prove the ingredients of section 8 of the POCSO Act.
- **36.** In regard to the age of the victim, it appears that as stated above, the victim as well as parents of the victim all were stated that the victim was 12 years of age at the time of occurrence. Under such circumstances, it cannot be sated to be attempted to commit the offence of aggravated sexual assault.

- **37.** Considering the aforesaid aspect, the offence of the accused cannot be stated to be attempted to commit aggravated sexual assault but attempt to commit sexual assault. Therefore, accused Sri Rohit Rowtia is acquitted from the alleged charge u/s 8 of the POCSO Act but he is convicted u/s 18 of the POCSO Act.
- **38.** The accused is heard on the point of sentence where he praying for leniency stating that he has been in jail hajot for more than 6 months and he is the only bread earner of his family, hence, praying for leniency.
- **39.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.
- Turning to the question of sentence, it is the settled law that while 40. deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 35 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.18 of POCSO Act a punishment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

### ORDER

**41.** I convict the accused Sri Ruhit Rowtia u/s. 18 of POCSO Act and sentence him to Simple Imprisonment for 6 (six) months and also to pay a fine of Rs. 5000/- (Rupees five thousand only), in default, another period of Simple Imprisonment for 3 (three) months.

The period, in which he detained in custody, shall be set off from the period of imprisonment, imposed on him.

**42.** As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the

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victim is entitled to get the compensation. To mitigating the mental agony and

trauma suffered by the victim, an amount of Rs. 20,000/- (Rupees twenty

thousand) only is awarded as compensation. The Secretary, District Legal

Services Authority, Sonitpur, Tezpur be asked to give the compensation to the

father of the victim after proper enquiry.

**43.** A copy of this Judgment be furnished to the accused free of cost and a

copy thereof be sent to the District Magistrate, Sonitpur, Tezpur, as per

provisions of law.

Given under my Hand and Seal of this Court on this the 2<sup>nd</sup> day of

November, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

# **APPENDIX**

### **Prosecution Witness**

Prosecution Witness No.1 1. :-Sri Susanta Dutta, complainant, Smti Shyamali Dutta, 2. Prosecution Witness No.2 :-3. Prosecution Witness No.3 Phulesa Khatoon, :-4. **Prosecution Witness No.4** Smti Jonaki Kurmi, :-5. **Prosecution Witness No.5** Sri Bhaskar Debnath, Prosecution Witness No.6 Miss Juhi Gogoi, 6. 7. Prosecution Witness No.7 Victim Miss X, SI Gokul Sonowal, I.O. Prosecution Witness No.8 8.

### EXHIBITS.

Exhibit 1 :- Ejahar,

Exhibit 2 :- statement of victim u/s 164 Cr.P.C.

Exhibit 2(1) & 3(1) :- Signature of Judl. Magistrate Exhibit 3 :- order dated 03-05-2018

Exhibit 4 :- sketch map Exhibit 5 :- Chargesheet.

Exhibit 4(1),5(1) &6(1):- Signature of the I.O.

Exhibit 6 :- Case diary of Thelamara PS Case No.67/18.

(Ashok Kumar Borah) SPECIAL JUDGE SONITPUR: TEZPUR