IN THE COURT OF SPECIAL JUDGE, SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, <u>Sivasagar</u>.

Spl. (P) Case No. 20 of 2016 U/S 6 of POCSO Act. (Arising out of Namti P.S. Case No. 11/2016)

State of Assam

-Vs-

Sri Monuj Dutta Accused

APPEARANCE:

For the prosecution : Sri A. K. Bora, Special P. P.

For the accused : Sri Sanjay Sarma & Sri A. Bharali, Advocates

Date of framing Charge : 28.07.2016

Dates of Evidence : 14.02.2017, 04.04.2017, 03.05.2017,

29.05.2017, 23.06.2017

Date of S/D : 10.07.2017

Date of Argument : 24.07.2017, 30.08.2017

Date of Judgment : 06.09.2017

JUDGMENT

- 1. Prosecution case, in brief, is that on 29.05.2017, one Smt. Dipamoni Dutta lodged an FIR with O/C, Namti Police Station alleging, inter alia, that on 28.05.2016, at about 4.00 p.m., her husband, i.e. accused Monuj Dutta took their minor daughter, the victim 'P' (named withheld), aged about 12 years to nearby jungle and committed misdeed with her. This matter was informed to her by the victim 'P'.
- 2. On receipt of the FIR, Namti P.S. Case No. 11/2016 U/S 4 of POCSO Act,2012 was registered. During investigation, the I.O. visited the place of

occurrence, prepared sketch map of the place of occurrence and recorded the statement of the witnesses. During investigation, 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 4 of POCSO Act, 2012 against accused person.

- 3. The above-named accused was arrested and produced before this court for trial as the case is exclusively triable by the court of Special Judge.
- 4. After furnishing copy to the accused, vide order dated 28.07.2016, my learned predecessor in office has framed the charge U/S 6 of POCSO Act, 2012 against accused Monuj Dutta to which he pleaded not guilty. During trial, prosecution side has examined as many as eight witnesses including the M.O. and I.O.
- 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.
- 6. I have heard argument of learned P.P. Mr. A.K. Bora and Mr. A. Bharali, learned defence counsel and gone through the evidence and documents. I have considered the submission of both the sides.
- In the course of argument hearing, learned defence counsel by referring the evidence of P.W.2, the informant and also referring to a petition No. 1218/17 dated 24.07.17, has submitted that the informant of this case, i.e. the mother of the victim 'P' do not want to prosecute her husband, i.e. the accused Monuj Dutta and has no objection in acquittal of the accused and as such court should acquit the accused from this case. It is also argued that even by adducing evidence, prosecution has failed to prove the case beyond all reasonable doubt and there is possibility of false implication due to unruly behave of the accused with his wife and children under the influence of liquor.

Learned defence counsel by referring the evidence of P.W.3, the Medical Officer who has examined the victim, has argued that though the charge was framed regarding aggravated penetrative sexual assault, but during examination of the victim within 24 hours of the alleged incident, the M.O. did not find any sign of aggravated penetrative sexual assault and as such court should presume that the allegation brought against the accused was false. On the other hand, learned P.P. has vehemently objected to the petition filed by the informant on the ground that offence charge is not compoundable. It is also argued that, in this case prosecution has sufficiently proved the ingredients of aggravated sexual assault only though charge was framed for penetrative sexual assault. As such, this matter cannot be taken lightly at the whims of the informant. I have considered the submission of both the sides.

8. <u>POINTS FOR DETERMINATION ARE</u> -

- (I) What was the age of the victim 'P' on the date of incident?
- (II) Whether on 28.05.2016 at about 4 PM victim 'P' was subjected to penetrative sexual assault by her father-accused Monuj Dutta?

DECISION AND REASONS THEREOF

9. P.W. 1 Dr. Prasanta Pratim Sarma in his evidence deposed that on 30.05.2016, at about 12.30 mid-day, on police requisition, he examined the victim 'P' in connection with Namti P.S. Case No. 11/2016 and upon examination he found that victim is below the age of 11 years. During examination, no any sign of recent sexual intercourse or any mark of violence detected on her private parts or body. Exbt. 1 is the medical examination report. In cross, P.W. 1 deposed that occurrence took place on 28.05.2016, at about 4.00 p.m. and he examined the victim on 30.05.2016, at about 12.30 p.m. In case of any penetrative sexual assault there is every possibility of remaining of violence marks on the private parts of the victim.

- 10. PW-2 Smt. Dipamoni Dutta, mother of the victim and wife of the accused in her evidence deposed that on 28.05.2016, at about 4 PM her husband (the accused) took the victim P to nearby jungle and tortured upon her. Victim P told her that her father by gagging her mouth ride on her body and on knowing this, she lodged the FIR vide Exbt. 2. At that time, victim was aged about 10 years. Police also seized wearing apparels of her daughter. Exbt. 4 is the seizure list. M. Exbt. 1 is white colour panty. M. Exbt. 2 is green colour frock. M.Exbt. 3 is one purple colour top. Police also seized one school certificate of the victim. Exbt. 5 is the seizure list. As per school certificate, age of victim P was shown as 12 years in June, 2016. M.Exbt. 4 is the certificate. In her cross-examination PW 2 admitted that she had not seen the incident on her own and lodged the FIR as reported by her daughter. In the FIR, age of her daughter was mentioned as 12 years. She also admitted that the accused used to create nuisance by consuming liquor with her and their children and neighbours. She denied to have deposed falsely. She further admitted that she has lodged the FIR under anger and has no objection if the accused is acquitted from this case.
- 11. PW-3 is the victim P, daughter of the accused. In her evidence she deposed that presently she is reading in class VI at Udaypur High School. On the date of incident, her father took her to nearby jungle, laid a gamocha on the ground, and put his susu (penis) on my her back side. She got pain and cried. By that time one lady came that side for grazing of cow and on seeing her, accused left her. On returning home, she reported the matter to her mother who in turn informed the matter to others. Police came to their house and got her medically examined and brought her to court. Her statement was recorded in court. Exbt. 3 is the statement given in court. On that day also she deposed in similar line as deposed today. Police also seized her wearing apparels. Exbt. 4 is the seizure list. Exbt. 4(ii) is her signature. M. Exbt. 1 is white colour panty. M. Exbt. 2 is green colour frock. M.Exbt. 3 is one purple

colour top. She wore all these three items, at the time of incident. In her cross-examination, she admitted that her father is a daily wage earner and maintains the family. Presently her mother has to work for maintaining them. She has one younger sister and grandmother. She denied the defence suggestion that her father did not commit any misdeed as alleged by her and that she deposed falsely on being tutored.

- 12. PW-4 Anima Dutta, mother of the accused in her evidence deposed that on 28.05.2016, on knowing arrest of her son by police, Dipamoni Dutta informed her that Monuj has committed misdeed with his daughter by taking her to jungle. Subsequently, victim also told her that she was taken to jungle by her father where he committed misdeed with her. Police also seized wearing apparels of her granddaughter. Exbt. 4 is the seizure list. In her cross-examination she admitted that she came to know about the incident hearing from her daughter in law. Accused and his wife have good conjugal relationship. She denied the defence suggestion that accused did not commit any misdeed as alleged by victim and that she deposed falsely on being tutored.
- 13. PW-5 Smt. Pinky Dutta, sister-in law of the accused in her evidence deposed that on 28.05.2016, while she was at her residence, victim P told her that her father Monuj has committed misdeed with her by taking her to jungle. On asking mother of victim, she also told the same to her. In her cross-examination she admitted that while giving statement to police, she has not stated that victim P told her that her father Monuj has committed misdeed with her by taking her to jungle. She has no personal knowledge about the incident.
- 14. PW-6 Smt. Mousumi Bora in her evidence deposed that on 28.05.2016, police came to their village and apprehended the accused. On this, she came to know from villagers that accused has committed rape with his daughter. Victim P also told her and other villagers that her father Monuj has committed misdeed with her by taking her to jungle. In her cross-examination

she admitted that while giving statement to police, she has not stated that victim P told her and other villagers that her father Monuj has committed misdeed with her by taking her to jungle. She has no personal knowledge about the incident.

- 15. PW-7 Smt. Desmin Dutta, sister-in-law of the accused, in her evidence deposed that she resides in same house with accused but in separate room. On 28.05.2016, while she was at her residence, victim P told her that her father Munoj has committed misdeed with her. In her cross-examination she admitted that while giving statement to police, she has not stated that victim P told me that her father Monuj has committed misdeed with her. She has no personal knowledge about the incident.
- PW 8 Sri Biraj Kumar Das, I/O of this case in his evidence 16. deposed that on 29.05.2016, while he was posted as O/C at Namti PS, he received one written FIR from Smt. Dipamoni Dutta and registered Namti PS case No. 11/16 u/s 4 of POCSO Act and took charge to investigate the case. On taking charge of investigation, he examined the informant and victim P at PS campus, the place of occurrence i.e, residence of informant and drawn a sketch map (Exbt. 6), examined witnesses, apprehended the FIR named accused Sri Monuj Dutta, sent the victim for medical examination and also sent her to Court for recording her statement u/s 164 Cr.P.C. During investigation he has collected the medical report and statement given by victim in court. He has also seized wearing apparels of the victim P. Exbt. 4 is the seizure list. He also seized school certificate of age of the victim as produced by informant. Exbt. 5 is the seizure list. On completion of investigation he has submitted charge sheet against the accused u/s 4 of POCSO Act. Exbt. 7 is the charge sheet. In his cross-examination he admitted that as per FIR, date of occurrence was 28.05.2016 at about 4 PM and FIR was received on 29.05.2016 at about 1 PM. Before the FIR there was no information about the incident. There was no mention of reason for delay in filing the FIR. He has not sent the seized articles

of Exbt. 4 for forensic lab etc. for expert opinion. He has not investigated the allegations of tortures by the accused to his family members and his habit of consuming liquor. He denied that he has not investigated the case properly.

- 17. Basing on the above evidence on record, let me determine the points formulated. So far point No. (i) is concerned, regarding age of the victim 'P', from the FIR it appears that her age was mentioned as 12 years. As per M. Exbt.4, certificate issued by the Headmaster of 176 Kukurachuwa L.P. School, the age of the victim 'P' was shown as 12 + on the date of issuance of the said certificate. The said certificate was issued on 10.06.2016 and the alleged incident occurred on 28.05.2016. P.W.1, the Medical Officer though determined the age of the victim as below 11 years, but it is well settled that there may be variation of two years on either side. Opinion of the M.O. regarding age of the victim 'P' which was based on radiological examination of left wrist and left elbow joints. The victim though claims her age as ten years, but while giving statement in court just after the incident she stated her age as 12 years. Considering above materials on record, I found the M.Exbt. 4, the school certificate as more reliable than medical opinion and hold that on the date of incident the victim 'P' was aged above 12 years.
- 18. So far point No. (ii) is concerned, i.e., allegation of committing misdeed by the accuse on her own daughter, the victim P; from the evidence of the M.O. it appears that he examined the victim 'P' on 30.05.2016, at about 12.30 P.M. and upon examination he did not find any sign of recent sexual intercourse or any mark of violence on her body. In his cross examination M.O. has admitted that in case of any penetrative sexual assault, there is every possibility of remaining violence mark on the private parts of the victim. This evidence ruled out the possibility of penetrative sexual assault.
- 19. Looking at the evidence of the P.W. 3, the victim 'P' it appears that on the date of incident, she was taken to nearby jungle by her father, i.e. the accused Monuj Dutta who laid a towel (Gamucha) on the ground and put

his penis on her buttock and victim got pain and cried. On looking at her statement given u/s 164 Cr.P.C. vide Exbt. 3, it depicts that she deposed that after taking her to Jungle, her father opened his Gamucha, laid the same on ground, opened her panty and put his penis on her thigh from backside. So this part of evidence clearly shows that no penetrative sexual assault through vagina was made by the accused. The evidence of the victim regarding putting penis through her buttock comes under the definition of sexual assault only and remains short of definition of penetrative sexual assault.

- 20. 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:

(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."

Now the question falls for determination is whether the evidence of victim 'P' regarding taking her to nearby Jungle and committing of sexual assault by her father, i.e., accused Monuj Dutta is reliable or not as there is no eye witness of the occurrence. As stated earlier, the victim in her statement given U/S 164 Cr.P.C. on 30.05.2016, i.e. within 48 hours of the alleged incident has stated that on 28.05.2016, at about 4.00 P.M. her father asked her to accompany him for fishing and on her denial, by showing a Dao and intimidating her, took her to nearby Jungle, opened his Gamucha, laid the same

on the ground, laid her on the ground, opened her panty and put his penis on her thigh. By that time one man came that way for grazing, on which the accused left her and returned home. While giving evidence in court as P.W. 3, the victim P except the fact of criminal intimidation while taking her to jungle, she has corroborated each and every line. It is her constant version that on returning home she reported the matter to her mother, i.e., P.W. 2 who in return informed the matter to others. During investigation, police also seized the wearing apparels of the victim put on at the time of incident. In her cross examination defence failed to shake her evidence. She stoutly denied the defence suggestion that her accused-father did not commit any misdeed and she deposed falsely on being tutored.

- Now coming to the evidence of P.W. 2, the mother of the victim 'P' it appears that in her evidence she has categorically stated that the victim reported her that her father took the victim to nearby Jungle and tortured her by riding on her body. She also confirmed the fact of seizure of wearing apparels of the victim. In her cross-examination she admitted that she lodged the FIR as reported by her daughter, the victim. P.W. 4, the mother of the accused in her evidence stated that on knowing about the incident from the mother of the victim, she asked the victim who reported her that her father took her to nearby Jungle and committed misdeed on her. Their evidence on this material point i.e., knowing the incident from the victim remained unshaken during cross-examination. It must be kept in mind that these witnesses are wife and mother of the accused and did not have any sour relation with the accused to falsely implicate him.
- 23. Similarly, P.W. 5 Smt. Pinky Dutta, P.W. 6. Smt. Mousumi Bora and P.W. 7 Smt. Desmin Dutta in their evidence also stated that the victim 'P' told them that her father Monuj took her to nearby Jungle and committed misdeed with her. However, PW 5, 6 and 7 have admitted that before police they have not stated this fact regarding telling of the incident by the victim to

them. As such their evidence cannot be relied on. P.W. 8 is the I.O. who has conducted the routine investigation, took the victim for medical examination and to court for recording her statement and on completion of investigation, submitted Charge-Sheet against the accused person.

24. From the above, it appears that the victim (P.W. 3), her mother (P.W. 2) and her grand-mother (P.W. 4) in their evidence categorically implicated the accused Monuj Dutta and corroborated each other so far the fact of taking the victim to Jungle by the accused and committing sexual assault on her. Though the mother and grand-mother of the victim (PW 2 and PW 4) have not seen the incident on their own, but it is in the evidence of their evidence as well in the evidence of the victim that soon after the incident, victim has reported the matter to her mother who in return informed the matter to others. Admittedly the FIR was lodged on the next day but under the fact and circumstance of this case, it can be understand filling of FIR against husband need sufficient courage. Though the defence has argued that there is possibility of tutoring the victim, but from the cross examination of these three witnesses, defence has failed to bring any material to show the probable cause of false implication. In absence of any strong circumstances, merely the ground that accused after consuming liquor used to create nuisance with his wife and children cannot be treated as a sufficient ground for false implication of the accused. It may noted here that P.W. 4, the mother of the accused, in her cross-examination admitted that the accused and his wife have been maintaining a good conjugal relationship. The victim being a student of Class-VI and aged above 12 years, certainly has attained a good level of understanding and will not bring such type of allegation against her father constantly while giving statement before police u/s 161 Cr.P.C, in court u/s 164 Cr.P.C and during trial. There are various other ways to falsely implicate the accused, if at all, mother of the victim wants to do so against her husband. Bringing an allegation of sexual assault against own father by a grown up daughter cannot be presumed to be out of grudge but it must be under terrific pain. I am not impressed with the argument of defence of false implication simply because, the evidence of the victim remains unshaken on this point. Considering all above, I hold that the evidence of victim is fully reliable and trustworthy and was duly supported by her mother and grand-mother.

- 25. 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 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.
- 26. In this case the defence though tried to take the plea of false implication, but defence failed to substantiate the same even on the scale of preponderance of possibility. The attempt of the defence to rebut the presumption appears to be unsuccessful.
- 27. Considering all above, I hold that prosecution has been able to prove the ingredients of sexual assault as defined in section 7 of POCSO Act which becomes aggravated sexual assault being done by father on his daughter as defined in Section 9(n) of the POCSO Act, 2012 against accused Monuj Dutta beyond all reasonable doubt. Accordingly accused Monuj Dutta is convicted for the offence punishable U/S 10 of the POCSO Act, 2012.
- 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.
- 29. 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.

- 30. Heard the convict Monuj Dutta on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. Learned defence counsel has prayed for leniency in sentence by narrating the facts and circumstances of the case.
- 31. 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.
- 32. Accordingly convict Monuj Dutta 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.
- 33. Convict Monuj Dutta is remanded to the Jail custody to serve out the remaining part of sentence.
- 34. Convict Monuj Dutta is entitled to the benefit of Section 428 Cr.P.C. for the period already undergone during trial.
- 35. 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.
- 36. 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.

- 37. Convict Monuj Dutta is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 38. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 39. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 6th day of September 2017 at Sivasagar.

Special Judge Sivasagar

<u>APPENDIX</u>

1. Prosecution witnesses -

- P.W.1 Dr. Prasanta Pratim Sarma (M.O.)
- P.W.2 Smt. Dipamoni Dutta (informant)
- P.W.3 Victim P
- P.W.4 Sri Anima Dutta
- P.W.5 Smt. Pinky Dutta
- P.W.6 Smt. Mousumi Bora
- P.W.7 Smt. Desmin Dutta
- P.W.8 Sri Biraj Kumar Das (I.O.)
- 2. <u>Defence witnesses</u> Nil.
- 3. <u>Court witnesses</u> Nil.
- 4. Exhibits by prosecution -
 - Exbt.1 Medical examination report
 - Exbt.2 FIR
 - Exbt.3 164 Cr.P.C. statement of the victim 'X'
 - Exbt.4 Seizure list.
 - Exbt.5 Seizure list
 - Exbt.6 Sketch map
 - Exbt.7 Charge-Sheet.
 - M.Exbt.1 White colour panty
 - M.Exbt.2 Green colour frock.
 - M.Exbt.3 One purple colour top

Special Judge Sivasagar