IN THE COURT OF SESSIONS JUDGE; DHEMAJI.

<u>Present</u>: Smti R. Bora Saikia, Sessions Judge, Dhemaji.

Special CASE NO.05/ 2014

G. R. Case No.580/2014 (DMJ) u/s 354 of IPC read with section 8 of the Protection of Children from Sexual Offences Act, 2012.

Committing Magistrate: Shri P. Bora,

Chief Chief Judicial Magistrate, Dhemaji.

The State of Assam

 $-V_{S}$ -

Shri Bitram Borgohain Accused.

Appearance:

Shri P.C. Boruah. Public Prosecutor for the Prosecution

Shri K.C. Sonowal, Advocate &

Shri Birendra Gogoi, Advocate for the accused.

Dates of evidence : 22-1-2015, 30-3-2015, 27-5-2015, 10-8-2015,

10-8-2015, 6-1-2016.

Date of argument: 8-8-2016

Date of Judgment : 20-8-2016.

JUDGEMENT:

(1) The prosecution case in brief is that on 29-8-2014 Smt. Beby Borah of Tanganapara Village lodged an ejahar at Police Station, Dhemaji stating therein that the accused-Shri Bitram

Borgohain, Asstt. Teacher of Tanganapara L.P. School at the time of teaching, harassed her minor daughter Smti 'X' (name withheld), a student of Class-V, by pinching her cheek, breast and private parts. On the basis of the said ejahar, police registered a case. Investigation carried out as in the usual manner and on completion of investigation police submitted charge-sheet against the accused to stand trial u/s 354 of IPC read with Section 9 of the Protection of Children from Sexual from Sexual Offenses Act, 2012 (in short POCSO Act).

- (2) The accused put in appearance before the Court of learned Chief Judicial Magistrate, Dhemaji. After furnishing copies of papers and documents complying with the provision of section 207 of Cr.P.C., finding the case to be exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Dhemaji, committed the case to this Court as per provision u/s 209 of Cr.P.C.
- On appearance of the accused before this Court of Sessions, having heard the learned Counsels of both sides and perusing the materials on record, my predecessor-in-chair framed charges u/s 354 of IPC read with Section 9 (f) of the POCSO Act. Later on, charge was altered to Section 10 of POCSO Act. On being read-over and explained the charge, the accused pleaded not guilty and claimed to be tried.
- (4) During trial, in order to prove its case, the prosecution examined 8 witnesses in all. After closure of the prosecution evidence, statement of the accused u/s 313 of Cr.P.C. was recorded. In his statement aforementioned, the accused denied that he had committed the offence alleged to have committed by by him and pleaded false implication due to enmity. However, the accused declined to adduce evidence in his defence.

(5) **Points for desision :**

The following point is sorted out for just decision of the case -

(1) Whether before the date of 29-8-2014 at Gyanudoi L.P. School under Dhemaji Police Station, the accused being a teacher of the aforesaid school, committed aggravated sexual assault on Smti 'X', a student of Class-V, aged about 12 years, by touching her breast, private parts, vagina etc. and thereby he committed an offence punishable u/s 10 of the Protection of Children from Sexual from Sexual Offenses Act, 2012.

(6) <u>Decision and reasons thereof:</u>

I have heard argument advanced by the learned Counsels of both sides, and carefully scrutinized the evidence on record.

- (7) Prosecution has examined the informant-Smti Baby Borah as PW1, victim Smt. 'X' as PW2, Smt. Dipika Borah as PW3, Smt. Sangeeta Nandi as PW4, Smt. Dipali Chaliha as PW5, Smti Pinki Borah as PW6, Smt. Himsikha Bharali as PW7 and the Investigating Officer Faruque Ahmed as PW8.
- (8) PW-1 Smt. Beby Borah in her evidence stated that in the month of August/2014, the accused touched on the breast and vagina of her daughter Smt. 'X', inside the class-room. At the relevant time, her daughter Smt. 'X' was reading in Class-V at Gyanudoi L.P. School. Afraiding on the act of the accused, her daughter stopped to go to school. On being enquired, her daughter disclosed before her about the occurrence. Then, she lodged the ejahar marked as Ext-1 at police station wherein Ext-1(1) is her signature. Further, she stated that at the relevant time Smti 'X' was 12 years old.

In cross-examination PW1 denied the suggestion that she had enmity with the accused and due to that enmity, she concocted this

case against the accused just to harass him. She also denied the suggestion that her daughter did not disclose before her about the occurrence. She clarified that her marriage was solemnized in the year 2001 and after one year of her marriage in the year 2002 her daughter Smt. 'X' was born.

(9) PW2 Smti 'X' is the alleged victim. She stated that the accused is her teacher. While she along with other students were doing physical exercise inside the class room, the accused touched her cheek, breasts and private parts (vagina) for which she felt shame. She disclosed about the occurrence before her mother. Then, her mother lodged an ejahar at police station. Police recorded her statement. Her statement was recorded by learned Judicial Magistrate also. Ext-2 is the said statement wherein Ext-2(1), 2(2) are her signatures.

In cross-examination PW2 stated that on 2/3 days the accused touched her cheek, breast, and private parts. Afraiding this, she did not go to her school for 4 days. On being inquired by her mother, she disclosed about the occurrence before her mother. She denied the suggestion that the accused did not touch her cheek, breast and private parts. She also denied the suggestion that as she did not go to school, her mother scolded her and then she falsely stated that the accused touched her cheek, breast and private parts.

(10) PW3 Smti Dipika Borah stated that few months ago from the date of her evidence, one day, she saw Smti 'X' was weeping. As Smt. 'X' did not go to the school, she (PW3) asked her what had happened to her, and then Smt. 'X' disclosed before her that the accused pinched oh her thigh and afraiding this, she (Smt. 'X') did not go to the school.

In cross-examination PW3 denied the suggestion that

Smt. 'X' did not tell her that the accused pinched on her thigh.

(11) PW4 Smti Sangeeta Nandi stated that as the victim Smti 'X' did not like to go to school, she and paternal *aunti* of Smt. 'X' named Dipika asked her *as to why she did not like to go to school*. Then Smti 'X' told that at the time of physical exercise, the accused touched her breast and thigh.

In cross-examination PW4 denied the suggestion that Smti 'X' had not told before her that the accused touched her breast and thigh.

(12) PW5 Smti Dipali Chaliha stated that she came to know from Beby Borah (PW1) that the accused with evil intention touched at different parts of the body of Smti 'X'. Further, she stated that Smti 'X' also disclosed before her about the incident.

In cross-examination PW5 denied the suggestion that she gave false evidence for the interest of Beby Borah (PW1).

- (13) PW6 Smti Pinki Borah is a class-mate of Smti 'X'. She stated that on the date of occurrence she did not go to the school. Later on, she heard from other boys and girls that the accused did some foul with Smti 'X'.
- (14) PW7 Smti Himshikha Bharali is another class-mat of Smti 'X'. She had no knowledge about the occurrence.
- Officer. He narrated the different steps taken by him in course of investigation. On completion of evidence, he submitted charge-sheet, Ext-5 wherein Ext-5(1) is his signature.

In cross-examination PW8 confirmed the contradictory statement of witness- Smti Dipika Borah (PW3) by stating that the said witness at the time of recording her statement u/s 161 of Cr.P.C. had not stated that she noticed black spot on the thigh of Smti 'X'.

- (16)From the aforesaid evidence on record, it reveals that the prosecution case rests on the sole testimony of the victim Smti 'X'. In the present case, since the provision of POCSO Act has been involved, the prosecution requires to prove that the victim was a child witness, below the age of 18 years on the date of incident. Although no document has been placed on record by the prosecution to prove that the victim was below 18 years at the time of incident, the mother of the victim girl (PW1) in cross-examination clearly stated that her marriage was solemnized in the year 2001 and after one year of her marriage in the year 2002 the victim was born. This part of evidence of PW1 has not been challenged by the defence. So, the fact remains that the victim girl was born in the year 2002. The alleged occurrence took place in the month of August/2014. That being so, it can safely be held that the victim girl was below 18 years of age on the date of occurrence
- (17) At the stage of argument, learned Public Prosecutor submitted that evidence of Smti 'X' who is a child witness is clear, cogent and trustworthy. As such, on the basis of sole testimony of the victim Smti 'X', the accused can be convicted.
- (18) Per contra, learned defence Counsel submitted that the prosecution case is based on false statement of child witness. The informant (PW1) filed this case due to previous enmity. As such, the accused may be acquitted on benefit of doubt.
- (19) I have considered the submissions of learned Counsel of both sides.
- (20) Evidence of child witness cannot be rejected **per se,** but the court, as a rule of prudence, is required to consider such evidence with close scrutiny, and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the

statement of child witness.

- (21) In the case of Dattu Ramrao Sakhare Vs. State of Maharastra (1997) 5 SCC341, it has been held that a child witness if found competent to depose and the fact is reliable one, such evidence can be the basis of conviction. The evidence of a child witness and credibility thereof would depend upon the circumstances of its 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 reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored.
- (22) In the case of Panchi Vs. State of U.P., AIR 1998 SC 2726, it has further held that-" It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child witness susceptible to be swayed by what others tell them and the child witness is easy prey to tutoring."
- From the aforesaid cases, it becomes clear that while appreciating the evidence of the child witness, courts are required to rule out of possibility of child being tutored. In absence of allegation regarding tutoring or using the child witness for ulterior purpose of the prosecution, courts have no option but to rely upon the confidence inspiring testimony of such witness for the purpose of holding the accused guilty or not.
- In the instant case, the accused is a teacher of Gyanudoi L.P. School and the child witness Smti 'X' was a student of the said school. Smti 'X' specifically stated that at the time of physical exercise on 2/3 days the accused touched her breast, private parts, vagina etc. Afraiding this act of the accused, she stopped to go to her

school for few days. On being enquired, she disclosed before her mother (PW1) about the incident. Then her mother filed an ejahar at police station. By cross-examining this witness, defence carried nothing to discard her testimony. Defence could not put any sort of contradiction and omission to this child witness on material fact. Her evidence does not suffer from any vice so as to raise doubt upon authenticity of her testimony. That being so, evidence of the child witness (PW2) can be relied upon.

- (25) Now, the question arises whether the act of the accused touching breast, vagina, falls within the definition of aggravated sexual assault.
- Under Section 7 of the POCSO Act, 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.
- Under Section 9 (f) of POCSO Act, whoever being on the management or staff of a educational institution or religious institution, commits sexual assault on a child in that institution is said to commit aggravated sexual assault.
- Under Section 30 (1) of the Act under any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, then Special Court shall presume the 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. The said presumption is rebuttal one and it for the accused to prove that he had no sexual intent at the time of committing the alleged offence.

- (29) Under Explanation of section 30, it has been mentioned that 'culpable mental state' includes intention, motive, knowledge of a fact and the belief in, or reason to believe a fact.
- (30) The accused is required to prove that no such mental state had existed at the relevant time beyond reasonable doubt.
- Here in the case in hand, from the evidence of child witness Smri 'X' and the evidence of her mother (PW1), this court can presume that it was the accused who had committed aggravated sexual assault by touching the breast, vagina of Smti 'X'. It was for the accused to rebut that neither he committed any sexual incident nor he had committed the offence by proving to the contrary. But, there is no rebuttal evidence. Although it was argued on behalf of the accused that he has been falsely implicated in this case, the accused has failed to discharge onus of proving that he has been falsely implicated in this case due to enmity or any other reason by adducing evidence.
- (32) Considering the evidence on record, facts and circumstances, I come to a conclusion that the prosecution has been able to prove the charge u/s 10 of the Protection of Children from Sexual Offences Act, 2012 against the accused beyond all reasonable doubt. Accordingly, he is convicted under the said section of law.

SENTENCE:

- (33) Before passing the sentence, I have heard the accused in the point of sentence and his statement is recorded to that effect as per provision u/s 235(2) of Cr.P.C. The accused has stated that he has to maintain his family. If he is sent to jail, he will loss his job and the family will face great hardship.
- (34) Under Section 10 of the POCSO Act, it is laid down that whoever commits aggravated sexual assault, shall be punished with imprisonment of either description for a term which shall not be less

than 5 years, but which may extend to 7 years, and shall also be liable to pay fine.

- (35) Considering all the aspects, the accused is sentenced to suffer R.I., for **5** (five) years and to pay fine of **Rs. 1,000**/- i/d , R.I, for another **1** (one) month u/s 10 of the Protection of Children from Sexual Offences Act, 2012. Previous hajoti period during investigation and trial, if any, will be set off from the term of imprisonment imposed on him.
- (36) Given under my hand seal of this Court on this the **20**th day of August, 2016.

(R. Bora Saikia) Sessions Judge, Dhemaji.

Dictated & corrected by me:-

(R. Bora Saikia) Sessions Judge, <u>Dhemaji</u>.

Transcribed & typed by me:-

(B.K. Buragohain) Steno. Grade-I.

APPENDIX:

(1) Witnesses for the Prosecutin:

PW1: Smt. Baby Borah, PW2: Victim- Smt. 'X' PW3: Smti Dipika Borah, PW4: Smti Sangeeta Nandi, PW5: Smti Dipali Chaliha, PW6: Smti Pinki Borah, PW7: Smti Himsikha Bharali

PW7: Smti Himsikha Bharali, PW8: Md. Faruque Ahmed, I/O

(2) Exhibits for the Prosecution:

Ext-1: Ejahar,

Ext-2: Statement of victim 'X' recorded u/s 164 Cr.P.C.

Ext-3: Sketch Map.

Ext-4: Medical Examination Report,

Ext-5: Charge-sheet.

(3) Witnesses for the defence - Nil.

(4) Exhibits for the defence – Nil.

(R. Bora Saikia) Sessions Judge, <u>Dhemaji</u>.