CAUSE TITLE PCSO Case No. 61/15

Informant: XXXX

Accused: Sri Purna Kanta Mohan,

S/o- Late Muruth Mohan, R/o- Naharani Block,

PS- Moran,

District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

For the Defence: Mr. G Pareek, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Shri S.K. Sharma, AJS,

Sessions Judge, Dibrugarh.

> <u>Sessions Case No. 61/15</u> G.R. Case No. 2792/12

> > State of Assam

-Vs-

Sri Purna Kanta Mohan

Charges: under Sections 448/376(2)(f) IPC.

Date of evidence on : 29-01-14, 31-03-14, 12-05-14, 04-03-15, 08-04-05,

08-04-15 & 27-05-16.

Date of argument : 15-09-16. Date of Judgment : 30-09-16.

JUDGMENT

- 1) Prosecution case is that the accused Sri Purna Kanta Mohan is a neighbour of the victim, aged about 13 years. On the day of occurrence, i.e., 16-11-12, the accused went to her house and stayed there for the night as the parents of the victim were away. In course of such stay, the accused molested the cousin sister of the victim and thereafter, committed forceful sexual intercourse with the victim.
- 2) An ejahar was lodged on 17-11-12 at Moran Police Station and a case being Moran Police Station Case No. 180/12 was registered and investigation commenced. In course of such investigation, the Investigating Officer visited the place of occurrence, prepared Sketch-Map, sent the victim for medical examination and on completion of investigation, submitted the Charge-Sheet.
- 3) Upon committal, my learned predecessor framed charges under Sections 448/376(2)(f) IPC against the accused person and the charges were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Subsequently, this Court altered the charge under Section 376 (2)(f) IPC to one under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the Act) and the charge was read over and explained to the accused person, which also he denied and claimed to be

tried.

- 4) In course of trial, prosecution examined six witnesses and on conclusion thereof, the accused person was examined under Section 313 CrPC wherein the accused person took the plea of denial.
- 5) Heard Smti. R Devi, learned PP for the State and the learned counsel for the defence.

POINTS FOR DETERMINATION

- 1. Whether the prosecutrix was a child within the meaning of Section 2(d) of the Protection of Children From Sexual Offences Act, 2012?
- 2. Whether the accused person trespassed the house of the victim?
- 3. Whether the accused committed penetrative sexual assault or rape upon the prosecutrix?

DECISION AND REASONS THEREOF

Point No. 1:

6) The victim stated her age as 12 years and as per the medical report also, it is below 14 years. It is not disputed by the defence. Therefore, the victim is a child as defined under Section 2(d) of the Act.

Point No. 2 & 3:

7) PW-1 stated that she knew the accused and used to address him as Dodou. One day, she had to stay in her house along with her relative sister, i.e., the other victim aged about seven years, as her mother had gone to Assam Medical College & Hospital, Dibrugarh for the purpose of operation of one of her relatives and her father went out for duty as a driver. PW-1 further stated that on that day, the accused went to her house and asked about her parents. As she told the accused about the absence of her parents and the accused stayed in her house. She cooked rice with egg and all of them including the accused took meal together. At night, while they were watching TV, the accused asked them to switch off the TV for which they slept on the bed. The accused slept on the ground in a separate room. At night, the accused went to their bed and touched her and took off the cloths of the victim. He told the sister (cousin) of PW-1 that her hole was small and her sister's hole was big. The accused took of her panty and jumped upon her. The accused inserted his penis into her vagina and committed sexual intercourse with her for a long time. When her sister tried to separate the accused from PW-1, he pushed her. PW-1 further stated that after committing

- all bad things with her, the accused went to the other room asking her not to tell anything to anybody. On the next day morning, the accused left her house telling that he would again come to their house. In her statement before the Magistrate under Section 164 CrPC, she had deposed similarly.
- 8) The apparent contradictions in the version given by PW-1 in her examinationin-chief and that given in cross-examination are required to be noticed at the outset. PW-1 had stated in her examination-in-chief that her father was also absent as he went on duty as a driver. In cross-examination, she stated that not only was her father present, but he had also enjoyed a session of drinking with the accused in their house in the evening of the day of occurrence. Not only that, her father also cooked egg curry while PW-1 cooked rice. She had stated in her examination-in-chief that she had cooked both rice and egg and thereafter, she, her cousin and the accused had their meal together. There being no statement anywhere in her evidence that her father left the house after drinking and cooking, it cannot be presumed that such must have been the case. It is rather difficult to believe that the father of the PW-1, after getting intoxicated would go out for duty at night as a driver. PW-1 stated that she did not know if her father or the accused had sense after consuming liquor. It may be noted that PW-1 had also deposed that on that day, the accused went to her house and asked about her parents and as she told the accused about the absence of her parents, he stayed in her house. She cooked rice with egg and all of them took meal together, which does not at all tally with her account of events given during crossexamination. The father of PW-1 has not even been cited as a prosecution witness to prove that he was absent at the relevant time. Therefore, the vital plank of the prosecution case that the occurrence took place in the absence of the parents of the victim which provided him the opportunity to commit the act, has become highly doubtful.
- 9) The victim/PW-1 for the first time in cross-examination stated that the could not shout as the accused had tied them with gamusa (a traditional cotton towel). This would mean that the accused was carrying with him two gamusas, which is another improbability. Earlier, during cross-examination, PW-1 had stated that the accused gagged her mouth with a gamusa. But she nowhere stated that the accused had also tied her hands and legs, preventing her from removing the gamusa from her mouth. What further

diminishes her testimony is that she had stated in her examination-in-chief that when the accused was allegedly raping the victim, her sister was trying to separate them and was crying 'sister may die', despite having been tied with a gamusa. It would require quite a feat for the accused, an old man, aged between 70 (seventy) to 80 (eighty) years, as per the informant and the accused respectively to tie up two girls at the same time and commit rape upon one of them, that too for a long time, as alleged by PW-1.

- 10) The victim also stated that she earlier used to stay in the house of the accused, but the accused did not display any bad behaviour.
- 11) In her examination-in-chief, the victim described in detail as to how the accused pulled away her panty and unzipped his pant and jumped upon her. Yet, during cross-examination, she stated that she cannot say what clothes she or the accused were wearing at the time of occurrence, nor could she state the approximate date of occurrence, saying it was of January, 2014, although the ejahar was lodged on 17-11-12.
- 12) In view of the above contradictions and inconsistencies, the PW-1 cannot be regarded as a reliable witness whose evidence can be said to be of sterling quality.
- 13) The cousin of the victim who was stated to be with her at the time of occurrence could not be examined at the trial despite several attempts. One Aruna Baruah, grandmother of the victim, to whom the victim first reported the matter, and who would have made the best res gestae witness, was never examination by the police and made a witness in the case.
- 14) PW-2 stated that she knew the accused being the father of a friend of her husband. On 16-11-12, she went to Astha Hospital to see her ailing sister leaving her daughter along with a cousin sister in her house. She could not return on that day and on the next day, i.e., on 17-11-12, she arrived at her house at about 3:00 pm. Arriving at the house, she found her daughter crying and she was lying on the bed while her cousin was consoling her. Upon asking as to what had happened, the prosecutrix replied that the accused had committed rape upon her. PW-2 further stated that her daughter told her that after she left her house, the accused went to their house and asked her about the returning time of her mother. Her daughter replied to the accused that her mother may or may not return. Then the accused told her daughter that he would go their house again in evening time to which her daughter

also agreed. In the evening time, the accused again went to their house and told her that as her mother did not return, he would stay in their house for the night. PW-2 further stated that having good relation, the accused stayed in their house for the night to which her daughter made no objection. As her daughter and her cousin were aged about 11 & 8 years respectively, they agreed to sleep on the ground. But on the night, the accused went to their room, lit up the light and asked them whether they would allow him to have sex with them. PW-2 further stated that the accused committed sexual intercourse with the cousin and told that her private part was small, so he would have sex with the elder one. Thereafter, the accused committed sexual intercourse with her daughter. The PW-2 did not make any allusion to the presence of her husband at their home, although her deposition implied that he was absent.

- 15) The above version of PW-2 differs in material particulars from the version of PW-1, as to the manner in which the accused allegedly approached the victim.
- 16) During cross-examination, she stated that police did not ask her anything and did not record her statement. There are several other houses near the place of occurrence and if somebody cries from her house, nearby residents would hear, all of which casts further doubts on the prosecution case. She stated that her husband left the house after dinner with the accused, which she could not have witnessed as she was absent at the relevant time. She denied the defence suggestion to the effect that the accused person has been falsely implicated due to quarrel regarding sale of land. In any case, when the victim herself has been found to be highly unreliable in view of the various inconsistencies in her evidence and therefore, lacking in credibility, what she allegedly stated before the other reported witness can hardly corroborate the evidence of the victim. The rest of the PWs who are also reported witnesses, stand on the same footing.
- 17) In this case, the Medical Officer could not be examined. But in view of the fact that the authenticity of the Medico-legal Report is not disputed, the same is marked as Ext. 'X' and read in the evidence under the provision of Section 294 CrPC. As per the said report, there is no evidence of any recent injury and the hymanal orifice admits only the tip of the little finger. Therefore, the medical evidence also does not support the claim of forceful sexual

intercourse.

18) In *Nivrutti Pandurang Kokate and Ors. Vs. State of Maharashtra* [(2008)12 SCC565], the Hon'ble Supreme Court held:

"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 under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers 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.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

19) As already discussed, the child witness (PW-1) has not been found to be a reliable one. Considering the broad probabilities of the case as has emerged from the evidence of the PWs discussed above, it appears not unlikely that the version of the prosecutrix is a tutored one.

20) The accused person in his statement recorded under Section 313 CrPC stated

that he had one bigha of disposable land which grandfather of the prosecutrix

wanted to purchase in installment payment. But he sold it away to another

person. Because of this, they have implicated the accused in false case out of

grudge.

21) In view of what has been discussed above, it is not established that the

accused trespassed into the house of the informant and committed

penetrative sexual assault upon the prosecutrix.

22) In the result, I hold that the prosecution has failed to establish its case

beyond reasonable doubt and consequently, the accused person is acquitted

of the offence under Sections 448 IPC read with Section 4 of PCSO Act and

he be set at liberty forthwith.

23) Previous bail bond shall remain in force for a further period of 6 (six) months

under Section 437-A CrPC.

Given under my hand and seal of this Court on this the 30th day of

September, 2016.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

APPENDIX

List of witnesses: XXXX

List of Exhibits:

- 1. Ext. 1 Statement of the victim recorded under Section 164 CrPC;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Sketch-Map; and
- 4. Ext. 4 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.