IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 26 of 2016

Under section 8 of POCSO Act.
(Arising out Dhekiajuli PS Case No. 519/16)

State of Assam

–Vs–

Sri Gakul Gowala ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Sri A.K. Saikia, Legal Aid counsel

Date of Argument : 28-03-2019.

Date of Judgment : 10-04-2019.

JUDGMENT

- The genesis of the present case is that on 01-08-2016 at around 6 p.m. accused Gokul Gowala committed rape of the informant's daughter in No. 4 Tulip Tea Estate and he was caught red handed by chowkidar Md. Hasen.
- 2. On receipt of the FIR (Ext.5) on 01-08-2016 from the informant (PW1), the victim's father, Dhekiajuli P.S. Case No. 519/16 u/s 376(2) (i) of IPC read with section 4 of POCSO Act was registered and launched investigation of the case. During investigation, the Investigating Officer (PW 8) recorded the statement of the witnesses, sent the victim for medical

examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid charge sheet against the accused Gokul Gowala u/s 4 of POCSO Act.

- 3. On appearance of the accused person before this Court, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge u/s 8 of POCSO Act against the accused Gokul Gowala and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- 4. To substantiate the case, prosecution examined as many as eight witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him stating that when he proceeded towards Samaguri, victim expressed her willingness to go to Samaguri to her aunt's house and accordingly, he along with the victim went to Samaguri and on returning from Samaguri at 4.30 p.m. when they reached Tulip, keeping the victim at the side, he went inside the bagan in nature's call and then seeing them, the chowkidar caught him and had assaulted him and lodged this case falsely implicating him.
- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.
- **6.** The point for decision in this case is that -
 - (1) "Whether the accused Gokul Gowala on 01-08-2016 at around 6 p.m. at No. 4 Tulip Tea Estate under Dhekiajuli Police Station committed sexual assault on the victim Miss "X", a minor girl aged about 10 years, and thereby committed an offence punishable under section 8 of POCSO Act?

 Reasons, Decisions and reason for decision.
- **7.** Before entering into discussion of the oral evidence, let it be seen whether the victim is a child as defined in section 2(d) of the POCSO Act. Here in this case, as per evidence of the victim and her parents, the victim was 10 years old at the time of alleged offence. According to PW 3 the independent witness, the victim was 13 years old. The radiological report reflects that the

victim was below 16 years. Age of the victim girl is not disputed in this case except the evidence of the Medical Officer that the age of the victim may vary two years on either side. In the above, the evidence of the parents who are the best person to know the age of their child coupled with medical evidence, I unhesitatingly held that in any circumstances the victim was a child as defined in section 2 (d) of POCSO Act.

- **8.** Now, the question is whether the accused Gokul Gowala committed any offence on the victim child. In this respect, let me travel through the evidence adduced by the prosecution side.
- 9. PW 1 is the informant as well as the father of the victim. He deposed that on the day of incident at about 7 p.m., his daughter, who was aged about 10 years, went to nearby shop to bring kerosene oil and on the way to shop, accused Gokul Gowala kidnapped her and taking her to Tulip Tea Estate, committed her rape. Seeing the incident, the night chowkidar of Tulip Tea Estate, apprehended the accused and brought his daughter home. Then the accused attempted to flee away, but they tied him. Therafter VDP secretary informed the matter to police. Accordingly, police came and handed over the accused to them. Regarding the incident, he lodged the FIR.

During cross he stated that VDP secretary Hari Sarkar informed the matter to police and he lodged the FIR at about 7.30 p.m. He further stated that the accused kidnapped his daughter when she went to shop which is about half km away from his house. According to him, near the shop where the victim went to bring kerosene oil, there are many residential houses and at that time it was dark. He heard about the incident from Hasen Ali.

10. PW 2 the mother of the victim testified that on the day of incident at around 7 p.m. she sent her daughter to a nearby shop to bring kerosene oil and on the way to shop, accused Gokul Gowala kidnapped her by gagging her mouth and taking her to Tulip Tea Estate attempted to commit her rape. Seeing the incident, the garden chowkidar apprehended the accused and brought her daughter home along with the accused. Then the villagers assaulted the accused and handed over him to police.

During cross, she stated that on the way to the shop where she went to bring kerosene oil, there are many houses on both sides of the road. According to her one Dibya Rai was on duty as gate chowkidar of Tulip Tea estate. She stated that seeing the accused with the victim, Hasen suspected the accused. The victim told her that accused did not do any misdeed to her, he only took her to the Tea garden.

11. PW 3 Mahesh Kheria deposed that on the day of incident, seeing the victim, coming crying from the side of Tulip Tea Estate, when he enquired her, she told that the accused attempted to commit her rape. Neighbouring people gathered there and informed the matter to police. Accordingly police came and arrested the accused.

During cross, he admitted that the victim went with the accused towards the garden but chowkidar Hasen Ali suspected the accused that the accused took the victim with some ulterior motive.

12. The star witness of the case i.e. the victim (PW 4) deposed that on the day of incident at about 5 p.m. while she went to a nearby shop to bring kerosene oil, on the way, accused took her to Tulip TE by gagging her mouth and at the Tea garden under the tea bush, the accused by opening her panty attempted to rape her. She also stated that as the accused put his vest on her mouth, so she could not raise alarm. Seeing the incident, chowkidar of Tulip Tea estate, apprehended them and brought them to her village where the local people assaulted the accused. Thereafter, her father filed this case against the accused. She proved her statement u/s 164 Cr.P.C. as Ext. 1.

But during cross, she stated that on the day of incident, in the forenoon she went to the house of her maternal uncle at Samdhara with the accused by his bicycle and after having launch at 3 p.m. when she was returning with the accused by his bicycle, after crossing the main gate of Tulip Tea Estate, accused went to attend nature's call and she was standing by holding the bicycle of the accused in the road. During that time Hasen Ali who was on duty as chowkidar saw them and scolded them. He also assaulted the accused. Thereafter, Hasen Ali brought her along with the accused to her

home. The villagers tied the accused in her house and assaulted him. VDP secretary informed the matter to police. She admitted that on her way to shop of Jay Singh, there are many houses in both sides of the road. She further stated the accused gagged her by his ganji (vest).

13. PW 5 Dr. Tutumoni Handique, the Medical Officer deposed that on 02-08-2016 she examined the victim who gave history of sexual assault by a known neighbour and not attained menarche. On examination found – hymen absent and as per X-ray report she is below 16 years old but no any injury mark was found on her body or on private part. The doctor proved the medical report as Ext.2, vaginal smear report as Ext.3 and X-ray report as Ext.4.

During cross-examination, the doctor stated that the victim was examined within 24 hours from the time of assault.

14. PW 6 Md. Idrish Ali, the chowkidar of Tulip TE stated that on the day of incident, at around 5.30/6 p.m. when he was on duty seeing the accused Gokul Gowala inside the TE, when he enquired Gokul Gowala what he was doing, he replied that he took his niece to attend nature's call. Thereafter, the victim girl came by crying and reported that accused committed misdeed to her. Then he slapped the accused twice and brought him along with the victim girl to the house of the victim. He had not reported anything to the father of the victim as the victim narrated the whole incident to her father. He also stated that his nick name is Hasen Ali.

During cross he stated that the girl narrated the incident before him in presence of chowkidar Abdul Kadir and when he asked the accused about the incident, the accused replied that he did not commit any misdeed to the victim.

15. PW 7 Jaher Ali stated that on the day of incident he heard that the accused committed rape on the victim in the garden and the accused was caught red handed by local public.

During cross he admitted that after about one or two days of the incident he heard about the incident from one Shiva Kheria.

- **16. PW** 8 the Investigating Officer, deposed that on 01-08-2016 on receipt of an FIR from the informant, O/C of Dhekiajuli PS registered the case being Dhekiajuli PS Case No. 519/16 u/s 376(2) (i) of IPC read with section 4 of POCSO Act and entrusted him to investigate the case. During investigation, he visited the place of occurrence, recorded the statement of the informant and victim and other witnesses, drew the sketch map of the place of occurrence vide Ext.6 (henceforth mentioned as Ext. 6 as already medical report of the victim is marked as Ext.2), sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C., arrested the accused Gokul Gowala and on completion of investigation, submitted chargesheet against the accused u/s 4 of POCSO Act vide Ext.7 (henceforth mentioned as Ext. 7 as already charge sheet is marked as Ext.3).
- In this case, regarding alleged rape on the victim by accused Gokul **17.** Gowala, PW 1, the father of the victim stated that on the day of incident when the victim went to nearby shop to purchase kerosene oil, the accused Gokul Gowala kidnapped her and taking her to Tulip Tea Estate, committed her rape there which was witnessed by night chowkidar of Tulip Tea Estate. Though the victim's father alleged that the accused committed rape on his daughter but the victim's mother PW 2 testified that when her daughter went to a nearby shop to bring kerosene oil, accused kidnapped her and by gagging her mouth took her to Tulip Tea Estate and attempted to commit her rape. On the other hand, during cross examination, PW 2 being mother who is the most natural witness made another version stating that seeing the accused with the victim, Hasen suspected the accused. According to her, victim told her that accused did nothing to her, only he took her to the tea garden. So PW 1 and PW 2 being the father and mother made different version regarding the incident. Moreover, as per evidence of PW 1, Chowkidar Hasen Ali reported him about the incident but Hasen Ali who was examined as Ext. 6 clearly stated that he report nothing to PW 1. The evidence of PW 1 and PW 2, the victim's parents that the accused kidnapped the victim is not supported by the victim herself.

- 18. The star witness of this case, i.e. the victim (PW 4) though during examination-in-chief stated that on the day of incident in the evening at about 5 p.m. when she went to nearby shop of Jay Sing to bring kerosene oil, the accused took her to Tulip Tea Estate by gagging her mouth with his vest (ganji) and under the tea bush removing her clothes forcefully, attempted to commit her rape, but contradicting her own statement, during cross she stated that on the day in the forenoon she went to Samdhara to her maternal uncle's house with the accused by his bicycle and on their return journey, at around 4 p.m. after crossing the main gate, when accused went to attend nature's call, she was standing on the road by holding the bicycle of the accused but seeing them, Hasen Ali scolded them and assaulted the accused. So, the victim stated a complete different version during cross-examination.
- 19. The evidence of the victim also reveals that when she went to bring kerosene oil from the shop of Jay Sing, accused gagging her mouth took her to Tulip TE and in between the shop of Jay Sing and her house, many people resided in both sides of the road. The alleged incident occurred on 1st of August at around 6 p.m. In the month of August at 6 p.m. it is not so much dark. Had she was taken by gagging mouth, certainly, it would be noticed to someone. But none had seen them. Moreover, Jay Sing, the shop keeper was also not examined by the prosecution. Though defence during cross confirmed that the accused gagged her by his vest and defence put suggestion that she had not gone to bring kerosene oil but taking the evidence of the victim in cross-examination as discussed above, it casts a serious doubt about the veracity of the prosecution version.
- 20. Further, the evidence of the independent witness PW 3 is that the victim told him that accused attempted to commit her rape. This independent witness did not state that the incident occurred when she went to bring kerosene oil. Moreover, during cross, PW 3 stated that seeing the victim going with the accused towards the garden, chowkidar of Tulip Tea Estate namely Hasen Ali suspected that the accused took the victim with some ulterior motive which is corroborated by the victim's mother herself who deposed that seeing the accused with the victim, Hasen Ali suspected the accused. Hasen

Ali @ Iddrish Ali, the chowkidar of the Tulip Tea Estate who allegedly seen the incident was examined as PW 6. According to him, seeing the accused Gokul Gowala inside the Tea Estate, when he enquired, the accused replied that he took his niece to attend nature's call but thereafter the victim coming out by crying, informed that accused committed misdeed to her. He also stated that seeing the accused and the victim, he slapped the accused and brought them to the house of the victim. The evidence of PW 6 indicates that he had not seen the accused committing rape or attempting to commit any sexual assault on the victim as alleged by the parents of the victim. Further as per evidence of the victim's father PW 6 Hasen Ali apprehended the accused and the victim but according to victim's mother, Dibya Rai was on duty as the chowkidar of Tulip TE at that time whereas Hasen Ali during cross stated that on the day he was on duty along with one Abdul Kadir as chowkidar. So they made different version. Dibya Rai or Abdul Kadir was also not examined by the prosecution. Further the evidence of PW 6 that the victim by crying told him that accused committed misdeed to her was not stated by him before the I.O. during investigation which is confirmed by the I.O.(PW 8) himself. The evidence of victim's mother is that the accused by gagging mouth took the victim to Tulip TE and evidence of PW 3 that the victim by crying came from the side of the Tea garden and on being asked she told that the accused took her with intent to commit rape were not stated in their statement u/s 161 Cr.P.C. made immediately after the incident. Non mentioning those material particulars before the I.O. makes the prosecution case doubtful.

On a conjoint reading of the testimony of the prosecution witnesses, it reveals that all the PWs including the victim made contradictory statements and as such they cannot be believed in toto. Taking the evidence of prosecution witnesses in totality particularly the evidence of the victim and her mother and other surrounding circumstances as discussed above, it is clear that the allegation against the accused Gokul Gowala have not been established beyond all reasonable doubt and the accused is entitled to benefit of doubt.

- **22.** Accordingly, accused Gokul Gowala is acquitted on benefit of doubt from the charge u/s 8 of POCSO Act and set him at liberty forthwith.
- 23. Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the 10th day of April, 2019.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

Prosecution witnesses.

PW 1 : Father of the victim.
 PW 2 : mother of the victim.

3. PW 3 : Mahesh Kheria

4. PW 4 : Victim

5. PW 5 : Dr. Tutumoni Handique, M.O.

6. PW 6 : Md. Idrish Ali.7. PW 7 : Jaher Ali

8. PW 8 : I.O.Lakhi Prasad Kachari.

Exhibits.

Ext. 1 : FIR

Ext. 1 : 164 Cr.P.C. statement of the victim

Ext. 2 : Sketch map

Ext. 3 : Charge sheet

(I.Barman)
Special Judge,
SONITPUR: TEZPUR