IN THE COURT OF THE SPECIAL JUDGE :: :: :: TINSUKIA

District: Tinsukia

Present: Sri P.J. Saikia,

Special Judge,

<u>Tinsukia</u>

POCSO Case No. 05 (T) of 2019 U/s 6 of the POCSO Act

The State of Assam Complainan
-Versus -
Sri Suraj Tanti,
S/o- Lt. Sundra Tanti
R/o- Khobang Norshing Mandir Line
P.S- Doomdooma
District- Tinsukia, Assam Accused.
Appearance:
Sri B.L Agarwal,
Spl. Public ProsecutorFor the State
Munna Kr. Singh,
Advocate For the accused
Date of Argument: 25/09/2019
Date of Judgment: 01/10/2019

J U D G M E N T

PROSECUTION CASE

- 1. The prosecution case revolves around rape upon a 12 year old minor orphan. Because of the demise of her parents, she used to reside at Misimikota in the house of her aunt, who is the wife of the elder brother of her deceased father.
- 2. The accused Suraj Tanti (herein after referred to as the accused only) is the younger brother of the deceased father of the victim girl. He resides at Khobang Tea Estate area. A few days prior to Magh Bihu, this year the accused brought the victim to his house for helping his ailing wife.
- 3. It is alleged that one day, the accused had removed the wearing apparels of the victim girl, then pressed her breasts and thereby removed her pants and inserted his penis into her vagina. It is further alleged that the accused had sexually assaulted the victim girl like that on four days.
- 4. The victim did not tell Geeta Tanti, the wife of the accused about the aforesaid incident. She, however, informed one ASHA worker named Anima Tanti about the aforesaid fact and she transmitted the message to the Child Welfare Office. They came and sent the victim to the Orphanage. One woman from the Orphanage brought the victim girl to the Police Station and had one ejahar written lodged by her. In the ejahar, the victim had put her thumb impression.
- 5. During the period of investigation, the victim girl was subjected to medical examination. Doctor found that the hymen of the victim was torn, but apart from that, there were no marks of any injury on her private parts or other parts of the body. The Doctor opined that as per the radiological

examination, the age of the victim girl would be about 9 to 11 years.

POINT FOR DETERMINATION

6. The only point for determination in this trial, is as to whether the accused in between 18/01/2019 to 01/02/2019 had committed aggravated penetrative sexual assault upon the victim?

DECISION AND REASONS THEREOF

- 7. In order to prove the case against the accused person, the prosecution side has examined as many as seven witnesses, including the Doctor who examined the victim girl during the period of investigation and the Police Investigating Officer. The defence plea is total denial.
- 8. I have carefully gone through the prosecution evidences.
- 9. Considering the nature of the case, I shall first take up the evidence of the victim girl. She has supported the prosecution story in her examination-in-chief.
- 10. During cross examination, she has stated that she did not know the name of the lady, who had taken her to the Police Station. She has stated that the aforesaid woman had written the ejahar for her. The victim has also stated that the aforesaid woman after writing the ejahar did not read over the contents thereof to her. She denied the fact that on being tutored by the aforesaid lady, she gave her statement u/s 164 Cr.PC. The victim also denied the fact that before giving statement to police, she was tutored by the aforesaid lady. The victim disclosed before the defence counsel that she actually

informed the wife of the accused about his acts, but she did not believe her.

- 11. Now, I shall take up the evidence of Lachina Kalandi. She is a teacher by profession. She is also a member of Child Protection Committee. Lachina Kalandi has stated in her evidence that one day she was making survey of school dropping students and at that time, she met the victim girl. She has stated that the victim girl told her that the accused had committed penetrative sexual assault upon her on some occasions. Lachina Kalandi has stated that she informed the Child Protection Committee and thereafter the victim was taken away from the house of the accused.
- 12. In her cross examination, Lachina Kalandi has stated that she did not make any statement before police, as she had done in the court. She denied that she was telling an imaginary story.
- 13. The witness Jinti Gogoi is the Superintendent of Keshab Gogoi Surjudaya Children Home, where the victim girl resided after she was rescued by the Child Line. Jinti Gogoi has stated that the victim told her that just prior to Magh Bihu, she was raped by the accused. Jinti Gogoi has quoted the victim girl as telling her that she was raped by the accused on four occasions.
- 14. The accused declined to cross examine this witness.
- 15. The witness Purnima Kalandi is a member of Child Protection Committee and she has stated in her evidence that in a meeting of the Committee, she came to know about the victim girl and about the fact that she was raped by the accused.

- 16. During cross examination, the witness Purnima Kalandi stated that she did not state before police that she came to know about the occurrence in the meeting of the Child Protection Committee. Purnima Kalandi has stated before the defence counsel that she never talked to the victim girl and therefore, she could not vouch for the authenticity of the occurrence.
- 17. Now, I shall take up the evidence of Geeta Tanti. She is the wife of the accused. She has stated in her evidence that the victim is the daughter of the deceased elder brother of her husband. Geeta Tanti has claimed that the victim has been residing in her house since her childhood. Geeta Tanti has stated that the victim never told her that her husband had ever committed bad sexual act upon her.
- 18. During cross examination, Geeta Tanti has stated that being a housewife, she always remains in the house and she has never seen any such occurrence, as alleged by the victim. She has stated that she was not maintaining a good relationship with ASHA worker Anima Tanti, as because Anima Tanti used to tell false stories to different persons.
- 19. The last prosecution witness is Someswar Bora, the Police Investigating Officer. He spoke about the investigation of the case.
- 20. At the time of his examination u/s 313 Cr.PC, the accused has claimed that the victim girl has been staying in his house since her childhood. He denied all other allegations.
- 21. Here in this case, a question arises as to why the victim girl would bring a false allegation against her own uncle. Geeta Tanti, the wife of the accused has claimed that her

family did not have good relationship with ASHA worker Anima Tanti, about whom the victim girl referred to in her examination. The ASHA worker Anima Tanti was not examined to prove that fact. No evidence has been adduced to that effect to prove that the family of the accused was really maintaining a strained relationship with Anima Tanti.

- 22. There is nothing in the cross examination of the victim girl to disbelieve her. Similarly, the cross examination portion of the evidence of Lachina Kalandi also does not have anything to disbelieve her.
- 23. The Apex Court in **Rai Sandeep v. State (NCT of Delhi)**, (2012) 8 SCC 21 the Supreme Court examined as to when the prosecutrix can be called to be a "sterling witness" as under:
- "22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance

should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

24. So far as appreciation of a child witness is concerned, the Hon'ble Supreme Court has laid down the principle --- In **Panchhi & Ors vs. State of U.P**: (1998) 7 SCC 177, the Supreme Court has held --

The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony.

- 25. In the case of **Orsu Venkat Rao v. State of Andhra Pradesh** (AIR 2004 SC 4961)where the two child witnesses, aged 10 and 6 years had incriminated their father for having strangulated their mother, their belated disclosure on the next day, and the absence of explanation of other injuries which were indicative of a fight between the parents, and the injuries on the deceased not being consistent with the case of strangulation as set up by the child witnesses led to the Apex Court discarding their evidence as being tutored and unreliable.
- 26. Long back in **Jagjit Singh v. State of Punjab** (AIR 1978 SC 988) where the solitary child witness who according to the Court had no opportunity to know the appellant from before had nominated him, the nomination was considered the result of tutoring and the appellant was acquitted.
- 27. In **State of U.P. v. Ashok Dixit** [2000 (3) SCC 70]. it has been observed in paragraph 9:

"Law is well settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on (see Panchhi v. State of U.P.). However it is a question of fact in each case, and there is no universal rule that the evidence of a child witness, even if it cannot be dislodged on the test of facts and probabilities of a particular case can never be sufficient for convicting an accused without corroboration.

28. Now I shall come to section 29 of the POCSO Act. It reads as under ---

Section 29. Presumption as to certain offences.-

Where a person is prosecuted for committing or abetting or attenuating 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

29. While examining as to in what manner presumption under a statute would operate against the accused, the Hon'ble Supreme Court in the case of **Babu .vs. State of Kerala,** (2010) 9 Supreme Court Cases 189, has held as follows:-

"(IV) Burden of Proof and Doctrine of Innocence

27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only 19 apeal406-17.odt when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., AIR 2004 SC 3249; Rajesh Ranjan Yadav v. CBI, AIR 2007 SC 451; Noor Aga v. State of Punjab & Anr., (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325)."

30. In **Sahid Hossain Biswas .vs. State of West Benga**l , the Calcutta High Court has held as follows:-

"23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would shows that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand vs. Yalamarti Satyam, MANU/SC/0022/1971: (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

24. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on

the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence of his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, however, patently absurd or inherently improbable it may be."

- 31. The provision of Section 29 of the POCSO Act, 2012 has been inserted into the Act to fulfill the object of the Act which is to protect children from offences of sexual assault and to secure that children of tender age are not abused.
- 32. Coming back to the case in hand, I am of the considered opinion that the prosecution has been able to establish the

foundation for the presumption under Section 29 of the POCSO Act to operate.

33. I failed to find the answer to the question as to why the victim would speak false evidence against the accused who is her own paternal uncle. The defence side tried to prove that the victim being a child was tutored by someone to speak against the accused. But the victim has denied being tutored by police or any other persons while she gave her statement u/s 161 Cr.P.C as well as u/s 164 Cr.P.C. I find that the child witness is able to understand the questions and is able to give rational answers. The evidence of the child witness is reliable and her demeanour is like any other competent witness and there was no likelihood of being tutored. In this case the hymen of the victim was found torn. A hymen gets torn for various other reasons like cycling, etc. But here in this case before me the torn hymen is a fact that supports the prosecution case against the accused as because there is no cross examination to that effect. I have already stated herein before that the defence side has failed to justify filing of the false case against the accused. Similarly, I do not find any reason as to why Lachina Kalandi and Jinti Gogoi would speak false evidence. Under the aforesaid circumstances. I have reasons to hold that the evidence of the victim inspired confidence. Therefore, I hereby hold that the offence u/s 6 of the POCSO Act is proved beyond all reasonable doubts against the accused.

ORDER

34. That being the position, the accused Suraj Tanti is found guilty of committing rape upon the victim girl.

Therefore, the accused Suraj Tanti is convicted u/s 6 of the POCSO Act.

SENTENCE

- 35. The convict Suraj Tanti has misused the privilege of being the guardian of the victim girl. He used her for satisfying his lust in a very unjustified manner. The victim is a defenseless girl and the convict has taken that opportunity. I do not find any mitigating circumstances in his favour. Therefore, he must be punished adequately.
- 36. I have heard the convict in the matter of sentence. Apart from pleading not guilty, the convict did not plead any other thing. From the evidence, it is clear that the convict has his wife and children.
- 37. The Ld. Special Public Prosecutor has submitted that no separate sentence hearing is necessary in the instant case. The Ld. Special Public Prosecutor has also submitted that he would not have anything to say about what the convict has pleaded. He has submitted that sentence upon the convict may be awarded today.
- 38. I have taken into consideration all the circumstances, pertaining to the case. I hereby sentence the convict Suraj Tanti to undergo Rigorous Imprisonment of 10 (Ten) Years. He is also sentence to pay a fine of Rs. 25,000/- (Rupees Twenty Five Thousand Only) and in default of payment of the fine, he shall undergo another period of Imprisonment of 1 (one) month.

COMPENSATION

- 39. Law has mandated that victim of a crime must be compensated in monetary terms. Here in this case, the victim girl is an orphan and she is presently staying in an Orphanage and the witness Jinti Gogoi is the Superintendent of the aforesaid orphanage named Keshab Gogoi Surjudaya Children Home. The District Legal Service Authority, Tinsukia is directed to pay a compensation of Rs. 50,000/- (Rupees Fifty Thousand Only) to the victim girl and the money shall be fixed deposited in the name of the victim girl in a Public Sector Bank, till she attains majority.
- 40. I hope, the sentence imposed and the compensation awarded would be sufficient to reach the ends of justice.
- 41. A free copy of the judgment be given to the convict immediately. Another copy of the judgment shall be forwarded to the Ld. Deputy Commissioner, Tinsukia, under the the provision of section 365 of the Cr.PC. A copy of the judgment shall also be forwarded to the District Legal Service Authority, Tinsukia.

Given under my hand and seal of this Court on this 1st day of October, 2019.

(P.J. Saikia)

Special Judge

<u>Tinsukia</u>

Dictated & corrected by me.

Special Judge

Tinsukia

A P P E N D I X

PROSECUTION WITNESSES

1. PW1 - Dr. Ashma Zekia Hussain Ghaznavi

2. PW2 - Smti Jinti Gogoi

3. PW3 - Smti Bobita Tanti

4. PW4 - Smti Geeta Tanti

5. PW5 - Smti Lachina Kalandi

6. PW6 - Smti Purnima Kalandi

7. PW7 - Sri Someswar Bora, S.I.

PROSECUTION EXHIBITS

1. Ext.1- Medical report

2. Ext. 2- Ejahar

3. Ext. 3- Sketch map

4. Ext. 4 - Charge sheet

5. M. Ext.1- Copy of statement of the victim

DEFENCE WITNESS

None.

Special Judge

<u>Tinsukia</u>