IN THE COURT OF THE DISTRICT & SESSIONS JUDGE CUM SPECIAL JUDGE-2 (FTC) (POCSO) :: :: TINSUKIA

District: Tinsukia Present: Md. A. Hakim, District & Sessions Judge cum Special Judge-2(FTC), (POCSO)Tinsukia. POCSO Case No. 1(T)/18 U/s 6 OF POCSO Act The State of Assam Complainant. -Versus -Sri Dilip Moran, S/o- Lt. Bhokmon Moran, R/o- Of New Gandhi Nagar, P.S- Makum, District- Tinsukia, Assam. Accused. Appearance: Sri B.L Agarwal Spl. Public ProsecutorFor the Complainant Sri S. Sarma

Advocate...... For the accused.

Date of Argument: 30-07-19, 14-08-19.

Date of Judgment: 26.08.2019

J U D G M E N T

- 1. The prosecution case is depicted in the FIR by the informant is as follows that during the time of Durga Puja the accused Sri Dilip Moran who is the neighbour of the informant had established physical relationship upon the victim girl (niece of the informant) by enticing to show her Durga Puja somewhere in the Rajgarh T.E. Because of the enticement and threat given by the accused, his niece concealed the said fact and they were unaware about the said fact. But from the sister of the victim the fact came to the light on 31.12.17.
- 2. Receiving the FIR, Makum P.S registered a case no.3/2018 and investigated the matter and on completion of the investigation, charge sheet was submitted against the accused and forwarded to face the trial.
- 3. Upon receiving the record and appearance of the accused in this court and upon hearing both sides and considering the materials on record charge u/s 6 of POCSO ACT has been framed, particulars of which on being read over and explained the accused has pleaded not guilty and claimed to be tried.
- **4.** During trial, prosecution examined Seven (7) witnesses. The accused is examined u/s 313 Cr.P.C. The accused has adduced evidence in his defense.
- **5.** I have heard argument put forth by the ld. Counsel for both the sides as well as gone through the entire materials available

on record.

6. POINT FOR DETERMINATION:

(i) Whether the accused prior to 01.01.17 during the time of Durga Puja at Gandhinagar, Makum in the district of Tinsukia had committed penetrative sexual assault upon the victim(niece of the informant) and thereby committed an offence punishable U/s. 6 of POCSO ACT or not?

DISCUSSION, DECISION AND REASONS THEREOF:

7. P.W.1, the informant has deposed that he knows the accused. He also knows the victim who his niece. The Incident took place in the year 2017 during Durga Puja but he came to know from female members of their family about it only on December, 2017. He came to know that accused, Dilip Moran during Durga Puja festival had taken his niece, victim girl and her younger sister Tripana Neog to show Puja festival and also gave her some toys and also gave something to eat to both of them. While coming back he kept Tripana Neog standing near bike and took the victim girl inside Rajgarh T.E and there he established physical relationship with her. Thereafter he summoned Dilip Moran to their house and on interrogation he refused to have committed the offence but the girls reiterated their version in front of him and as such they lodged the FIR. Ext. 1 is the FIR, Ext. 1(1) is his signature. The victim is aged about 13 years now. He brought her birth certificate. M. Ext. 1 is the birth certificate (proved in original under objection). After lodging the FIR, Police had come. The victim was also sent her medical check. The victim was also produced before magistrate for recording her statement U/s. 164 Cr.P.C.

8. In Cross-examination he has deposed that the accused was called but he did not come. So on 01.01.18 he caught hold the accused near Gandhi Nagar while he was consuming liquor and brought him to his house. They interrogated the accused regarding the incident but denied. His wife informed him regarding the alleged incident on 31.12.17. Ext. 1 was scribed by police at the station. Police recorded his statement. He did not state before police that his wife informed him about the incident. In his family he has his parents, his wife, two younger brothers, sister in laws, two niece, his two daughters. The victim is the daughter of his youngest brother. On the date of incident, he did not ask the victim with whom she went to enjoy Puja. The victim did not state before him what had happened with her or where she had gone for Puja. He cannot say the date and time when the victim went to enjoy Puja. He also cannot say what clothes the victim wore on the date of occurrence. He did not mention in his Ejahar that the accused gave some toys and also gave something to eat to both the girls. But he has forgotten whether he had stated such before the police. He denies the suggestion that he did not state before police that the accused gave some toys and also gave something to eat to both the girls and he willfully refrained to state the same in the court today. He has no personal knowledge regarding the alleged incident. He does not know about the exact place of occurrence. Rajgarh Tea Estate is a vast area. He denies the suggestion that no incident took place as alleged and he has filed the ejahar merely on imagination. Police did not asked for the M. Ext. 1 and as such he also did not give it to the police. He has brought today M. Ext. 1 as he is directed in the summon to bring it. He denies the suggestion that M. Ext. 1 is a fake and illegally manufactured document.

9. P.W.2 Dr.(Mrs.) Wareesa Reja Bora has deposed that on 02.01.18 she was working as M. & H.O - 1 at Tinsukia Civil Hospital. That day at about 1:15 P.M she examined the victim in connection with Makum P.S. case no. 03/18 under sec. 376 IPC r.w sec. 4 of POCSO Act. She was brought and identified by WPC/196, Smt. Ranjita Chetry. She was examined in presence of her grand mother, Smt. Manu Neog. Her grand mother consented for her examination. However, the victim refused. The grand mother gave the history of sexual assault that nearly 4 months back at 11 AM at Garhbasti near Makum, the accused was named as Dilip Moran. She was sent for radiological examination to ascertain her age and as per the radiological report, her age is 7 to 9 years.

OPINION - In her opinion considering her physical appearance, she find her between 7 to 11 years.

Ext. 2 is her Medical report. Ext. 2(1) is her signature.

Ext. 3 is Radiological Report, Ext. 3(1) is the signature of Dr. Geetanjali Deka Kalita, She is conversant with his signature. Ext. 3(2) is her signature.

- 10. In cross-examination she has deposed that she did not examine the victim physically as she refused. Since, she did not examine the genital parts of the victim, as such, she cannot say about any damage in her private parts nor she can say about any sexual assault on the victim.
- she knows the accused. The victim girl has deposed that she knows the accused. The victim is his daughter. The Incident took place last year during Durga Puja, 2008. After returning from Durga Puja his victim daughter and Tripana Neog, her younger daughter had told her that the accused had taken them to show Durga Puja to Garhbasti and after return in the evening at 4 P.M, the younger daughter told her that the accused had taken them inside the garden and

after laying and set on the ground, removed the pant of the victim and committed bad act with her and he offered Rs. 20/- to Tripana Neog to take some eatable and told her not to disclose the fact to anyone. And out of fear she kept this matter concealed. Thereafter the said fact was confirmed by victim. Thereafter she concealed the facts of the incident due to fear of earning bad name of the family. There had been a quarrel between the victim and Tripana Neog in the month of December'17. Then Tripana Neog disclosed the said facts before all the family members. The victim was also sent her medical check up. The victim was also produced before magistrate for recording her statement U/s. 164 Cr.P.C.

12. cross-examination she has stated that Police recorded her statement. She denies the suggestion that she did not state before police that "the Incident took place last year during Durga Puja, 2008. After returning from Durga Puja her daughter victim and Tripana Neog, her younger daughter had told her that the accused took them to show Durga Puja to Garhbasti and after return in the evening at 4 P.M, the younger daughter told her that the accused had taken them inside the garden and after laying and set on the ground, removed the pant of the victim and committed bad act with her and he offered Rs. 20/- to Tripana Neog to take some eatable and told her not to disclose the fact to anyone. And out of fear she kept this matter concealed. Thereafter the said fact was confirmed by victim. Thereafter she concealed the facts of the incident due to fear of earning bad name of the family. There had been a quarrel between the victim and Tripana Neog in the month of December'17. Then Tripana Neog disclosed the said facts before all the family members. The victim was also sent her medical check up. The victim was also produced before magistrate for recording her statement U/s. 164 Cr.P.C. "

- 13. She did not know when the girls went to enjoy puja but at around 4 P.M they returned. She does not know in which garden the incident had happened. The victim wore pink frock and white pant. The younger girl wore pink frock and white long pant. Police did not seize the clothes of victim girl which was wearing on the day of the incident. She denies the suggestion that she did not state before the police what she has stated today in examination in chief.
- 14. P.W.4, Victim Girl (X) has deposed that she knows accused Dilip Moran. The Incident took place during Durga Puja, 2017. She called the accused by the name 'Dadau'. On the fateful day she was playing with her younger sister in a field near their house. The accused came to them. Took both of them on his bike and took them to show Durga Puja to Garhbasti. In Garhbasti he gave them 'Phusca' to eat and Mobile toy. Then he took them to Garbasti garden. There was drain. He parked the vehicle near the drain and kept standing her sister near the bike and took her inside the nulla. There he laid her on the ground, removed her pant. Then he unzipped his pant and then he inserted his penis in her vagina. She had screamed and tried to escape but he caught hold of her. He also gave her Rs. 20/- with a direction that she should not disclose the same to anybody. They returned home at about 1 P.M. Thereafter her younger sister told about the incident to her mother. However, her mother kept the facts of the concealed. Thereafter on 31st December, there had been a quarrel between her and her younger sister and her younger sister disclosed about the facts of the incident. Thereafter this case was lodged by Sri Prasanta Neog who is her Uncle. After filing the case she was also sent for medical examination. She was also produced before magistrate for recording her statement U/s. 164 Cr.P.C. Ext. 4 is her statement U/s. 164 Cr.P.C. Ext. 4(1)

and 4(2) are her signatures.

- **15.** cross-examination she has In stated that police recorded her statement. She denies the suggestion that she did not state before police that "the Incident took place during Durga Puja, 2017. She call the accused by the name 'Dadau'. On the fateful day she was playing with her younger sister in a field near their house. The accused came to them. Took both of them took on his bike and took them to show Durga Puja to Garhbasti. In Garhbasti he gave them 'Phusca' to eat and Mobile toy. Then he took us to Garbasti garden. There was drain. He parked the vehicle near the drain and kept standing her sister near the bike and took her inside the nulla. There he laid her on the ground, removed her pant. Then he unzipped his pant and then he inserted his penis in her vagina. She had screamed he caught hold of her. He also and tried to escaped but gave her Rs. 20/- with a direction that she should not disclose the same to anybody. They returned home at about 1 P.M. Thereafter her younger sister told about the incident to her mother. However, her mother kept the facts of the concealed. Thereafter on 31st December, there had been a quarrel between her and her younger sister and her younger sister disclose about the facts of the incident. Thereafter this case was lodged by Sri Prasanta Neog who is her Uncle".
- private parts. On the day of incident she wore white frock and black pant. She denies the suggestion that she has deposed a cooked up story and that is why she did not allow the doctor to examine her private parts. She denies the suggestion that while she puts her signatures Ext. 4(1) and Ext. 4(2), she did not read the contents of Ext. 4 and that is why she does not know the contents of Ext. 4.

- 17. P.W.5, Smt. Manu Neog has deposed that victim is her grand daughter. She also knows the accused, Dilip Moran. The Incident took place during Durga Puja in the year, 2017 and she came to know about the incident in December'17. One day in the month of December, 17 a quarrel took place between the victim and Tripana and Tripana disclosed that during last Durga Puja the accused has taken the victim and her to show Durga Puja and had given them 'Phusca' to eat and toy mobile and thereafter he took them in the garden and asked her to stay there and laid down the victim in a nulla and removed her pant and after removing her pant he leaned over her body. The incident was also confirmed by the victim. Thereafter they caught hold of the accused and handed over you to police.
- that she did not state before police "the Incident took place during Durga Puja in the year, 2017 and she came to know about the incident in December'17. One day in the month of December, 17 a quarrel took place between the victim and Tripana and Tripana disclosed that during last Durga Puja the accused has taken the victim and her to show Durga Puja and had given them 'Phusca' to eat and toy mobile and thereafter he took them in the garden and asked her to stay there and laid down the victim in a nulla and removed her pant and after removing her pant he leaned over her body. The incident was also confirmed by the victim. Thereafter they caught hold of the accused and handed over him to police".
- 19. She did not see the incident herself and whatever she stated, she heard from the victim only. She denies the suggestion that he did not state before police about the confirmation of the fact from the victim as police did not ask her. She has guestioned the accused about the incident

but he denied his involvement. She denies the suggestion that he deposed a cooked up story.

- 20. P.W.6, Sri Jeet Chetia has deposed that he knows the victim and also know the accused. He came to know about the incident after the arrest of the accused and thereafter he came to know about the incident from Palash Neog who is the uncle of the victim and came to know that during Durga Puja the accused had immoral act with the victim.
- 21. In cross-examination he has stated that Police did not record his statement and whatever he deposed today in his examination in chief, did not depose before the police.
- 22. P.W. 7, Sri S.I. Chandan Das has deposed that on 1.1.2018 he was attached to Makum Police Station that day in the evening one Prasanta Neog came to police station and lodged a written ezahar, stating that his niece victim girl during last durga puja was subjected to sexual assault by the accused Moran. That it was also alleged that the victim was threated by the accused and therefore she did not reveal the earlier. And on 31.12.2017 the incident came to light on being disclosed by the younger sister of the victim. On receipt of the ejahar O/C Makum Police Station registered a case and Makum P.S. Case No. 3/18 U/S 376 I.P.C. R/W section 4 of POCSO Act and directed him to investigate the case. Ext. 1 is said ejahar. Ext. 1(2) is the Signature with the endorsement of Shri Bhaskar Saikia then O/C Makum Police Station, he is conversant with his signature. He immediately recorded the statement of the informant Shri Prasanta Neog at the Police station. Then thereafter he proceeded to the resident of informant/ victim. And there he recorded the statement of the witnesses available there including the victim. The villagers who had assembled there produced the accused before him and he took him in his

custody. Since it was night by time the victim could not take medical examination and next day she was sent for medical examination to the Civil Hospital, Tinsukia. He collected the school certificate from the Gopal Krishan Girls High School. Material Ext. 2 is the said certificate. On 02-01-18 the accused was forwarded to the court. On 03-01-2018 the victim was produced before the Magistrate for recording her statement u/s 164 Cr. P.C. There after the victim was referred to Child Welfare Committee for counseling and other needful action. There after he collected the medical report as well as and after completing the investigation he submitted the charge sheet U/S 376 I.P.C. R/W sec 4 Of POCSO Act. Ext. 5 is the Charge sheet. Ext 5 (1) is his signature.

- 23. In cross-examination the PW.7 has stated that he took up investigation on 01-01-2018 at about 6:10 P.M. The victim could not locate the actual place of occurrence. Ext. A is the Sketch Map. Ext. A (1) is my signature. In Ext 'A' a house is indicated as original P.O. and which is marked as Index 'A'. The Ezahar was filed before the police station after four month of the occurrence, but the victim did not told the date of occurrence. He could not investigate about wearing apparels of victim on the date of occurrence. Neither he seized the wearing apparel of the victim nor he send the wearing apparels to the F.S.L. Victim refused to examine her medical examination. He did not asked the victim why she refused to examine her medical examination. He denies the suggestion that no such incident took place as alleged and he has manipulated the case. He did not record the statement of Smt. Tripana Neog i.e the younger sister of the victim.
- 24. It is a fact that the P.W. 1 Shri Prasanta Neog did not state before him that 'the accused gave some toys and also gave to something to eat to both the girls'. It is a fact that the P.W. 3 Smti. Pranati Neog did not state before him that "the incident

took place last year during durga Puja in 2008. After returning during puja her victim daughter and Tripana neog her younger daughter have told that the accused took them to show durga puja to Garh Basti and after returned in the evening at 4 P.M. the younger daughter told her that the accused had taken them inside the garden and after laying and set on the ground, remove the pant of the victim and committed bad act with her and he offered Rs. 20 to Tripana neog to take some eatable and told her not to disclose the facts to anyone. And out of here she kept this matter concealed. There after the said fact was confirmed by the victim. There after she concealed the facts of the incident due to earning bad name of the family. There had been a quarrel between the victim and Tripan Neog in the month of December 2017. Then Tripana Neog disclose the matter before the family members. The victim was also sent for medical checkup. The victim was also produced before the Magistrate for recording her statement u/s 164 Cr.P.C.

25. It is a fact that P.W. 4 victim did not state before him that "the incident took place during puja 2017. He call the accused by name "Dadau". On the faithful day he was playing with his younger sister in a filed near their house. The accused came to them. Took both of them on his bike and took them to show Durga Puja to Garh Basti. In Garh Basti he gave them "Puckhka" to eat and mobile toy. Then he took them to Garh Basti Garden. There was a drain. He parked the vehicle near the drain and kept standing her sister near the bike and took her inside the naala. There he laid her on the ground, and removed her pant. Then he unzipped his pant and then he inserted his pennis in her vagina. She had screamed and tried to escape but he caught hold of her. He also gave her Rs. 20 with a direction that she should not disclose the same any body. They returned home at 1 P.M. Thereafter her younger sister told her mother about the incident. However her mother kept the facts concealed. There after on 31 December there have quarrel between her and her younger

sister. And her younger sister disclose the facts of the incident.

- 26. It is a fact that P.W. 5 Smt. Manu Neog did not state before him that "the incident took place during puja in the year 2017 and he came to know about the incident in December 2017. On one day in the month of December 2017 a quarrel took place between the victim and Tripana. And Tripana disclose the during last Durga Puja the accused has taken the victim and her to show Durga puja and had given them Puchka to eat and toy mobile and there after He took them in the garden and asked her to stay there and laid down the victim in a Naala and removed her pant and after removing her pant he leaned her body. The incident was also confirmed by the victim. There after they caught hold of the accused and handed over him to Police.
- 27. The I/O has denied the suggestion that he has not investigated the case properly and falsely submitted the charge sheet against the accused.
- 28. Sri Dilip Moran deposed that he is DW.1, has conversant with the facts of the case. On 01.01.18 he alongwith Prasanta Neog, Rahul Gogoi and one Babul were celebration New year party in a hotel of Makum Gandhi Nager, Ward no. 8. There was some altercation took place between him and Prasanta Neog and Prasanta Neog. assaulted him. Prasanta Neog is the uncle of the victim. Then he told Prasanta Neog that he will file a case in the P.S. Thereafter Prasanta Neog again assaulted him and tied him in his house for three hours and later handed him over to the police implicating him in this case.
- 29. In Cross-examination by Prosecution, the DW.1 has stated that the Hotel is situated at a distance of about 100 meter from the house of Prasanta Neog. He denies the suggestion that on 01.01.18 he alongwith Prasanta Neog,

Rahul Gogoi and one Babul were celebrating New year party in a hotel of Makum Gandhi Nager, Ward no. 8.

- altercation took place between him and Prasanta Neog and Prasanta Neog, assaulted him. Prasanta Neog is the uncle of the victim. Then he told Prasanta Neog that he will file a case in the P.S. Thereafter Prasanta Neog again assaulted him and tied him in his house for three hours and later handed him over to the police implicating him in this case. He denies the suggestion that for sexually assaulting the victim during last Durga Puja, he was apprehended and handed over to police. He denies the suggestion that to save his skin from this case, he has deposed falsely.
- 31. the point for determination Ld. With regard to counsel for the defence side has pointed out (i) that the FIR was lodged about four months in delay and there is no proper explanation for the reason of such inordinate delay. The mother of the victim girl has deposed that she came to know about the alleged incident on the day of the there is incident. But no corroboration about such concealment. Although the PW.4 has deposed that she told her mother about the alleged incident on the day of the incident but the statement of the victim girl(PW.4) is proved contradictory. Moreover the reason of to save the family reputation, the alleged incident was not informed by the mother of the victim girl is not at all accepted considering the nature of the offence. It is further pointed out that the reason of delay is also not mentioned in the FIR. Hence it cast a doubt that the reason explained by the PW 3 is afterthought, exaggerated and embellished. (ii) That the statement of the PW.1, PW.4 and PW.5 are proved to be contradictory by the I.O so far the description of the alleged place of occurrence is concerned. Hence, the statement of the PW.1, PW.4 and PW.5 are not

reliable. (iii) That the prosecution has failed to prove the place of occurrence. The PW.7(I.O) has stated in his crossexamination that place of occurrence is a house (Ext. A) but the PW's have deposed that the place of occurrence was in a garden. Hence, it creates a doubt about the reliability of the place of occurrence and thus the prosecution story. (iv) That the prosecution has failed to examine the material eye witness i.e. the younger sister of the victim. Who disclosed first about the alleged offence to her mother (PW 3) and later to her family members. Apart from this the prosecution has failed to explain why the younger sister of the victim girl who is the eye witness to the alleged incident is not examined. Hence, it cast a doubt about the authenticity of the prosecution story. (v) That there is discrepancy in the statement of PW.3 and PW.4 about the dress wearing by the victim girl i.e. PW 4 on the date of the occurrence. Hence, it creates a doubt about the allegation. (vi) That the informant PW.1 has stated in his cross-examination that on 31.12.17 his wife informed him regarding the alleged incident. But his statement is not corroborated by his wife as Prosecution has not examined her. Moreover it appears from the FIR that the complainant has written the FIR on 1.1.2017 but the FIR was lodged on 1.1.2018. Hence, it cast a doubt about the deposition of the PW.1 about the source of knowledge of the alleged incident and filing date of the FIR and thus cast a doubt about the authencity of the prosecution story. (vii) That there is no medical evidence to prove about the sexual assault to the victim girl. Hence the prosecution has failed to prove that the accused has committed penetrative sexual assault upon the victim. It is also further submitted that considering the age of the victim girl it is unbelievable that there would not have any injury on the private part of the victim girl. There is not a whisper about the injury on the private part of the victim girl. Ocular evidence is not corroborated by the medical evidence. So allegation of the rape on the victim girl by the accused cast a doubt. **(viii)** That there is no circumstantial evidence against the accused person to prove that the accused has committed rape on the victim girl. **(ix)** That in the FIR there is no mention that the alleged incident was known by the mother of the victim girl long four months ago and kept concealed the fact due to the fear of earning bad name. The statement is also not stated before the I/O. Which proves that the prosecution story is exaggerated, embellished and made afterthought. Hence it cast a doubt that the statement of the PW 3 and the prosecution story.

- **32.** At the end Ld. Counsel for the accused has prayed to acquit the accused and cited the following case laws in his defence: (i) Gauhati High Court 2019(1) GLT 17, Abhijit Dutta Vs. State of Assam Anr. (ii) Tripura High Court 2019(1) GLT (TRI)24, Raju Mog Sharma vs. State of Tripura.
- 33. Per contra, learned Addl. PP has pointed out (i) that although there is discrepancy about the date in statements of the PW's, yet, it is not serious as people have natural habit to forget the date at the time of new year. From the statement of the victim girl recorded U/s. Cr.P.C it is apparent that the court has recorded the statement of the victim girl on 02.01.18. Hence, there is no doubt about filing of the FIR in the police station on 01.01.18. He also pointed out that the case was registered on 01.01.18. Hence, considering all facts and circumstances, it can be held that mentioning of the date in the FIR as 01.01.17 is simply an numerical error. (ii) It is pointed out that the FIR was not lodged in delay. What the delay was caused was natural. It is quite natural for a mother to conceal the fact to save the family reputation and dignity. Hence, the prosecution story is reliable. (iii) It is also pointed out that as per section 29 of POCSO Act, that the court can presume that the offence was committed by the accused against

the victim girl.

- **34.** Upon hearing both sides I have gone through the material evidence on record. It reveals from the FIR that the informant is the paternal uncle of the victim girl. The informant has alleged in the FIR that the accused who is the neighbour of the informant had committed rape on the victim girl about four months ago at the time of Puja from the date of lodging the FIR. It is alleged that the accused took the victim girl along with her younger sister to show Puja and during that time in the midst of a tea garden the accused had committed rape on the victim girl.
- **35.** Admittedly, there is no disclosure of the actual date of occurrence and the fact remains under the cloud on which date the alleged incident was occurred. The FIR has stated that the alleged incident had happened about four months ago at the time of Puja from the date of the lodging the FIR.
- 36. The defence side has emphatically points out about the vital delay in lodging the FIR about four months from the time of the alleged occurrence even after knowing the fact by the mother of the victim girl. It is pointed out that there is no proper explanation by the informant about the reason of delay in FIR nor he has deposed the before the court. The explanation of the reason of delay of FIR although explained by the PW 3 mother of the victim girl yet it is not reliable as the statement is proved to be contradictory. Which indicates the statement made in afterthought. Hence it cast a doubt about the authenticity of the prosecution story.
- 37. Before I discussed about the point of delay I would like to cite the case of Kailash Gour and Ors. V. State of Assam (Criminal Appeal No. 1068/06) MANU/SC/1505/2011 wherein Hon'ble Supreme Court has observed in the case With regard to the delay in lodging FIR that if the delay is not satisfactorily explained the same is fatal to the prosecution.

- 38. In State of H.P. Chand v. Giyan (MANU/SC/0312/2001: (2001) 6 SCC 71 The Hon'ble Supreme Court has observed that if the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However if the delay is explained to the satisfaction of the court the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.
- **39**. In the Dilawar Sing v. State of Delhi (2007 12 SCC, **641**) Hon'ble Supreme Court has observed as follows that: In criminal trial one of the cardinal principles' for the court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed the delay is treated as fatal to the prosecution case".
- **40.** Hon'ble Gauhati High court has also held in the case of **Rakesh Debnath v. State of Tripur**a (**2010 (6) GLJ 394)** that FIR required to be filed at earliest opportunity. Delay in lodging FIR casts a serious doubt on truthfulness of prosecution story.
- 41. Hon'ble Supreme Court has decided in the case Mahtab Sing & Ors. Vs. U.P. (2010 (13) SCC (Cri) 1185) that unnatural conduct of complainant in lodging the FIR is always doubtful.

- 42. Coming back again to the case it is revealed from the bare perusal of the FIR that no reason of delay is cited by the informant in lodging the FIR. The informant PW 1 has also not deposed anything in this regard. But the prosecution has tried to explain the reason of delay in lodging the FIR by the deposition of the PW 3. It is found that at the time of the examination in chief the PW 3; mother of the victim girl has deposed that she knew the alleged fact; on the day of the incident but did not inform the matter in fear of her family reputation might be tainted. But her statement is not corroborated by the informant (PW 1) nor by the FIR. Prosecution has failed to cite plausible explanation for the delay in lodging the report. As the accused has adduced defence evidence and taking the plea that due to the fight between the informant and the accused before the filing the FIR, the instant case is lodged falsely against him it cast a doubt about the authenticity of the prosecution story. In view of the time of delay the informant has got ample opportunity to make deliberation upon the complaint and make embellishment or fabrications to the prosecution story. The allegation in the case is very serious nature and keeping silent for about four months is not believable in the name of reputation of the family name. Hence it cast a doubt about the truthfulness of the prosecution story.
- 43. With regard to the place of occurrence Ld. Counsel for the accused has pointed out that the prosecution has failed to identify the proper place of occurrence. There is no resemblance about the place of occurrence stated by the PW 1, PW3, PW4, PW 5 with the sketch map of PW7 (I/O) hence the prosecution story cast with a shadow of doubt. It is pointed out that the statement of the PW.1 PW. 3, PW 4 and PW.5 are proved to be contradictory by the PW 7 (I.O) so far the description of the alleged place of occurrence is concerned. Hence, the statement of the PW.1, PW.3, PW 4 and PW.5 so far the place of occurrence is concerned are not reliable and believable.

- 44. Upon hearing on this point from both sides I have strolled through the material on record and found that the PW 1, PW3, PW 4 & PW5 have unequivocally states that the alleged offence was committed in the midst of a garden. But PW 7 (I/O) has stated that the victim could not locate the actual place of occurrence. Ext. A is the Sketch Map. Ext. A (1) is my signature. In Ext 'A' a house is indicated as original P.O. and which is marked as Index 'A'.
- **45.** Although it can be presumed that being a little girl, the victim girl might have failed to properly locate the place of occurrence but in course of cross-examination the I/O has stated that the place of occurrence is a house. Which belies the deposition of the P.W's about the place of occurrence. As the prosecution has failed to identify the place of occurrence it cast a doubt about the authenticity of the place of occurrence.
- 46. The evidence of the PW 3 with regard to the dress of the victim girl wearing on the day of the alleged incident is found to be contradicted by the PW.4 i.e. victim girl. PW.3 has stated in course of her cross-examination that the victim girl was wearing pink frock with white pant. But the PW.4, Victim girl stated in her cross-examination that on the day of incident she was wearing white frock and black pant. The evidence of the mother and the victim girl with regard to the dress of the victim girl on the day of the alleged incident suffering from serious infirmities and not consistent with the material aspect and hence, found unreliable. In view of the statement of the PW.3 and PW.4 can be presumed that they have developed the Prosecution story. Hence, cast a doubt about the alleged incident.

- Prosecution has failed to examine the material eye witness, i.e the younger sister of the victim who disclosed first about the alleged offence to her mother and later to her family members. Apart from this the Prosecution has failed to explain why the younger sister of the victim, who is the eye witness to the alleged incident and the wife of the informant who informed the incident first to the informant is not examined. Hence, it cast a doubt about the authenticity of the prosecution story.
- **48.** In this regard, Ld. P.P has submitted that the examination of the younger sister of the victim is not necessary as the victim girl is enough to prove the case.
- 49. Upon hearing both side, I have gone through the material on record and found that in the FIR, the informant has stated that on 31.12.17 the family members of the informant came to know about the alleged incident through the own sister of the victim girl. Apart from this it is appeared in course of recording the statement of the victim girl U/s. 164 Cr.P.C that the incident was at first informed to her mother by her sister and her sister was the eye witness to the incident. The PW.3, mother of the victim girl had also deposed that after returning from Durga Puja her younger daughter told her about the alleged incident. From this evidence it is crystal clear that the younger sister of the victim girl is a vital and material witness in this case. But the Prosecution has failed to examine the vital and material witness, i.e. younger sister of the victim girl. Neither she is cited as a witness in the charge-sheet. The Prosecution has failed to give any plausible explanation why the vital and material witness, the younger sister of the victim girl is not examined. It is also revealed from the deposition of the PW.1(informant) that he came to know

about the alleged incident from the female members of their family. But in course of his cross-examination, he has deposed that his wife had informed him regarding the alleged incident on 31.12.17. But Prosecution has not examined the wife of the informant nor cited any reason of non-examination. From this it cast a doubt about the source of information received by the informant, PW.1 and thus the reliability of the prosecution story.

- FIR was written by the complainant on 01.01.17 as it appears from the body of the FIR. But the FIR was lodged on 01.01.18. Hence, it cast a doubt about the source of knowledge and alleged incident.
- on the FIR is simply a clerical mistake as it is proved from the recording of the statement of the victim girl before the Court and lodging date of the FIR proves that the case was lodged on 01.01.18. Hence, there is nothing to doubt about the contents of the FIR and the lodging of the date of the FIR.
- **52.** Hearing the arguments from both sides, I have gone through the Ejahar and found that the date is mentioned on the top of the Ejahar as 01.01.17 but from the Ejahar and the statement of the victim girl recorded U/s. 164 Cr.P.C and other relevant documents it can be presumed that the date put on the Ejahar as 01.01.17 is an clerical error. Hence, I do not see any doubt about the ejahar and date put on there.
- **53.** Ld. counsel for the accused has pointed out that there is no medical evidence to prove about the penetrative sexual assault upon the victim. The ocular evidence is also not supported by medical evidence. Ld. counsel for the

accused has drawn the attention to the MODI's MEDICAL JURISPRUDENCE AND TOXICOLOGY 17th Edition page 355 and submitted that considering the age of the victim girl and had there been any penetrative sexual assault being committed upon the victim girl then there would have been damage on the private parts of the victim girl. But as the falsehood of the informant and the victim girl would have come out in examining the victim girl by the PW.2(M.O), the victim girl did not allow her to be medically examined. Hence, it cast a doubt about the Prosecution story.

- 54. In reply Ld. P.P has emphatically submitted that as the victim girl herself has refused to be examined by the doctor, hence the allegation of penetrative sexual assault could not be determined by medical evidence. He has emphasized that as the mother and the victim girl have alleged that the accused has committed penetrative sexual assault upon the victim, they should be believed and relied upon.
- 55. Upon hearing on this point, I have gone through the medical evidence adduced by the PW.2. It is revealed from the opinion of the PW.2 that the age of the victim girl was 7-11 years at the time of the examination. In course of her cross-examination she has stated that she did not examine the victim girl physically as she had refused. Hence, she cannot say about any damage in the private parts or any sexual assault was committed on the victim girl.
- **56.** It is to be noted that the alleged incident was occurred about four months ago from the date of the medical examination of the victim girl. So had the PW.2(M.O) examined the victim girl medically then she would have not found any superficial injury on the private parts of the victim

girl. But she could have determined whether any penetrative sexual assault had happened to the victim girl or not?

- **57.** Here I would like to extract the views of Modi's Medical Jurisprudence and Toxicology, 17th Edition, page 355 and which has mentioned that -
 - (a) In girls under 14 years of age, the vaginal orifice is usually so small that it would hardly allow the passage of the little finger,
 - (b) In case of sexual intercourse, the hymen may not remain intact if the vaginal orifice is big enough to admit 2 fingers easily,
 - (c) In the case of girls of less than 14 years, the distensibility of the vaginal orifice has to to taken in view.
 - (d) If penetration take place in the case of girls of such an age, then there can be expected to be widespread damage of:-
 - (i) the fourchette.
 - (ii) hymen,
 - (iii) labia majora,
 - (iv) labia minora,
 - (v) Vulva and
 - (vi) vaginal canal.
- 58. From the observations of the Modi's Medical Jurisprudence and Toxicology, 17th Edition, page 355, it can be well presumed that if any alleged penetrative sexual assault had taken place with the victim girl then there have been wide spread of damage of (i) the fourchette,(ii) hymen,(iii) labia majora,(iv) labia minora.(v) Vulva and (vi) vaginal canal. But as the victim girl refused to be medically examined her by the PW.2, the said damage on the private parts of the victim girl could not be ascertained. And hence belies the allegation of

commission of penetrative sexual assault on the victim girl. In view of the above discussion and the observations made by the Modi's Medical Jurisprudence and Toxicology, 17th Edition, page 355 and considering all facts and circumstances it cast a doubt about the commission of penetrative sexual assault upon the victim girl.

- **59.** Hon'ble Supreme Court of India in the case of **State of Himachal Pradesh vs. Asha Ram, (2005) 13 SCC 766)** has observed that the testimony of the prosecutrix alone can form the basis of conviction if it inspires confidence and is found to be reliable.
- 60. But here in the instant case the testimony of the victim girl does not inspire any confidence. It cannot be relied upon as the material circumstances does not corroborate her statement. The medical evidence has also not corroborating the testimony of the victim girl. Hence it cast a doubt about the evidence of the victim girl.
- 61. In the case of Sikandar Ali vs. state of Assam {2010 (3) GLJ 679} Hon'ble Gauhati High Court has held that mere suspicion or suspicious circumstances cannot ease prosecution of its main duty of proving its case against an accused person beyond reasonable doubt.
- Supreme Court has observed in **State of U.P vs. Ravindra Prakash Mittal (Dr.) AIR 1992 SC 2045** that when a case rests on circumstantial evidence, a complete chain of circumstances, which rule out every other possibility except guilt of the accused, has to be established. The essential ingredients to prove guilt of an accused person by circumstantial evidence are:

- **A.** The circumstances from which the conclusion is drawn should be fully proved.
- **B.** The circumstances should be conclusive is nature.
- **C.** All the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence.
- **D.** The circumstances should to a moral certainly exclude the possibility of guilt of any person other than the accused.
- **63.** In the **Sibu Das** @ **Bapa Vs. State of Tripura (2013(1) GLT 682)** Hon'ble Court has observed in para 15 as follows that "The Supreme Court in the case of Dasari Siva Prasad Reddy Vs. Public Prosecutor, High Court of A.P reported in (2004) 11 SCC 282 has observed in a case of circumstantial evidence that a strong suspicion, no doubt exists against the appellant but such suspicion cannot be the basis of conviction, going by the standard of proof required in a criminal case".
- 64. The Supreme Court has cautioned about the danger that conjecture and suspicion may take the place of legal proof in cases depending largely on circumstantial evidence. Hanumant and Another Vs. M.P, [1952] SCR 1090 Supreme Court has observed as follows :- "In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in Reg v. Hodge ((1838) 2 Lew. 227), where he said :- "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to from parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to

overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

12. It is well to remember that in cases where the evidence in of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and pendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused".

65. In State of Punjab Vs. Jagir Singh Baljit Singh reported in AIR 1973 SC 2407, which is noted, as follows: "23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the produce of interplay of different human emotions. In arriving at the conclusion of a crime, the Court has to judge the evidence by yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Court should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

- establish the fact which is consistent with the hypothesis of the guilt of the accused. The chain of evidence in the instant case is not complete. The circumstances against the accused is not fully established. The circumstances against the accused is not conclusive nature and tendency. The prosecution has put the allegation upon the accused but without any material corroboration. Although the allegation is put up by the witnesses yet there is no evidence of possibilities or probabilities. Hence the prosecution story becomes unreliable and shrouded with suspicion.
- 67. In view of the above discussion and considering the evidence on record, I am of the considered opinion that the Prosecution has failed to prove the case against the accused U/s. 6 of POCSO Act beyond all reasonable doubts. Hence, the accused person namely 1) Sri Dilip Moran is acquitted on benefit of doubt and set at liberty.
- **68.** The Prosecution is directed to dispose of the seized material in accordance with law.
- **69.** The bail bond of the accused is extended U/s. 437(A) Cr.P.C.
- **70.** As the prosecution has failed to prove that the victim girl has suffered from penetrative sexual assault, I am not inclined to allow compensation to the victim girl as per section 357 A Cr.P.C.
- **71.** Send a copy of the Judgment to the Deputy Commissioner of Tinsukia.
- **72.** The case is disposed of herewith.

73. Given under her hand and seal of this court on this the 26^{th} day of August 2019.

Dictated & corrected by me:

(A. Hakim), District & Sessions Judge cum Special Judge-2(FTC), (POCSO)Tinsukia. (A. Hakim), District & Sessions Judge cum Special Judge-2(FTC), (POCSO)Tinsukia.

Transcribed by:

P.D Phukan, (Steno)

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A N N E X U R E

PROSECUTION WITNESSES:

P.W.1, Sri Prasanta Neog,

P.W.2, Dr.(Mrs.) Wareesa Reja Bora,

PW.3, Smt. Pranati Neog,

PW.4, Victim girl(X),

PW.5, Smt. Manu Neog,

P.W.6, Sri Jeet Chetia,

P.W.7, S.I, Sri Chandan Das.

DEFENCE WITNESSES:

DW.1, Sri Dilip Moran.

PROSECUTION DOCUMENTS:

Ext. 1, is the Ejahar,

Ext. 2 is the Medical report,

Ext. 3 is the Radiological report,

Ext. 4 is the statement of the victim girl, U/s. 164 Cr.P.C.

Ext. 5 is the Charge-sheet.

Ext. A is the Sketch map.

Material Ext. 1 is the Birth certificate of the victim girl,

Material Ext. 2 is the School certificate of the victim girl.

(A. Hakim), District & Sessions Judge cum Special Judge-2(FTC), (POCSO)Tinsukia.