IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPL. (POCSO) CASE NO. 92 of 2018

Under section 6 of POCSO Act

State of Assam

Vs

Sri Purna Murmu

..... Accused person

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

For the State : Mr. M.C. Baruah, Special Public Prosecutor.

For the accused : Mr. F.Haque, Advocate, Tezpur

Date of Argument: 25-10-2019 & 20-11-2019

Date of Judgment : 20 - 11- 2019

<u>JUDGMENT</u>

1. The prosecution case against accused Purna Murmu, as projected may, in brief be described thus :

On 29-09-2018, at around 2 p.m., the informant's 11 years old sister/victim put her mobile in the house of the accused Purna Murmu for charging and lateron, time when she went to take back the cell phone, accused raped her forcefully. In the FIR it is also explained that as they were poor hence, out of shame did not disclose the matter immediately.

2. Upon receipt of the FIR from the informant on 17-11-2018, the O/C Missamari PS, registered the case being Missamari P.S. Case No. 189/18 u/s 4 of POCSO Act and entrusted SI Dandadhar Kumar to initiate the investigation of the case. In course of investigation, he recorded the statements of the witnesses,

sent the child victim for medical examination, got her statement recorded u/s 164 Cr.P.C., arrested the accused and on completion of investigation having found materials submitted charge-sheet against the accused Purna Murmu u/s 12 of POCSO Act.

- 3. On appearance of the accused person before this Court, after furnishing the copies of the documents u/s 207 of Cr.P.C. and after hearing both parties, charge u/s 6 of POCSO Act was framed against the accused Purna Murmu and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and demanded to stand for trial.
- 4. To substantiate the charge, prosecution examined as many as 7 (seven) witnesses. In statement recorded u/s 313 Cr.P.C, the accused person denied all the allegations levelled against him and pleading innocence submitted that on that day he was not at home and after returning home, from his wife heard that the girl came to his house for charging the cell phone and lateron at the time of taking back the cell phone she committed theft of one mobile of his family and when his wife caught her red handed and slapped her, out of grudge the case was filed falsely against him. Defence examined none to substantiate the plea.
- **5.** I have heard the arguments of the learned counsel of both sides and also have gone through the evidence on record.

6. The point to be determined in this case is as follows—

- (i) Whether accused Purna Murmu, on 29-09-2018, at about 2 p.m. at village Nagapathar, under Missamari PS, committed aggravated penetrative sexual assault on the child victim, below the age of 12 years, and thereby committed an offence u/s 5 (m) of POCSO Act punishable u/s 6 of POCSO Act?
- **7.** Mr. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of aggravated penetrative sexual assault on a minor girl of 11 years. He further submitted that

the corroborative evidence of the child victim and other witnesses is enough to convict the accused person.

- **8.** Controverting the said argument, Mr. F. Haque, the learned counsel appearing for the accused, submitted that no explicit reliance can be placed upon the evidence of the minor victim who is a tutored one. Morevover with the discrepancies in the evidence of the prosecution witnesses during investigation and during trial, made the prosecution case doubtful and as such the accused is entitled to benefit of doubt. Besides, inordinate delay in lodging the FIR made the prosecution case doubtful and as such the accused is entitled to benefit of doubt.
- 9. In the case, the informant the victim's brother claimed the age of the victim as 11 years. PW 2 the neighbour stated that he heard that she was 12/13 years old at that time. On the other hand, as per medical evidence she was above 14 years and below 16 years at the time of incident. Though the IInvestigating Officer (PW 7) deposed that the informant produced him a photocopy of the school certificate of the victim but neither he seized any certificate nor enquired about authenticity of the photocopy to ascertain the age of the girl. However it is not challenged that the victim was a minor below the age of 18 years at the time of incident. Taking the evidence of victim's brother coupled with the medical evidence though it cannot be unhesitatingly said that she was below 12 years old but it can be safely held in any circumstances she was below 18 years at the relevant time and was a child as defined under section 2(d) of POCSO Act.
- **10.** Now, the question is whether the accused Purna Murmu committed an offence. In this respect, it is considered proper to outline a sketch of the evidence on record.
- 11. Let us first see what the victim, the star witness stated. PW-1 is the victim. She stated that on the day of incident in the morning time she went to the house of accused Purna Murmu for charging the mobile of her elder sister and in the afternoon at 2 p.m. after returning from school, when she again went to the house of the accused to bring the mobile, the accused giving the cell phone by one hand, pulled her by another hand inside his house towards the

bed, made her lay upon the bed and asking not to raise alarm gagged her mouth. Thereafter he took off her frock and pant, laid upon her body and inserting his penis in her vagina did bad act with her. He had threatened her with her life in the event she discloses the occurrence to others. After half an hour, his wife arrived and enquired her as to whether her husband had done anything to her to which she replied in affirmative. Then his wife asked her not to disclose the occurrence to others. Thereafter, she returned home. Out of fear, she informed none about the incident and on the next day she informed the matter to one Jurita bou. Regarding the incident, a village meeting was held and thereafter her elder brother lodged the FIR. She proved her statement before the Magistrate as Ext.1.

During cross, she stated that on the day when she was produced before the court for recording her statement, her elder brother, one Danda and Jamuna Baideo came to the court and they asked her to say what was occurred with her. Accordingly, she made statement before the Magistrate. She clearly denied the suggestion that on being tutored by her elder brother, Danda and Jamuna, she made statement before magistrate. She further stated that in the incident blood was oozing out from her private part and she informed about the bleeding to 'Jurita bou' but on the day of incident she had not shown the bleeding to her sister and mother. Knowing about the bleeding, 'Jurita bou' had taken her to the hospital and after 2/3 days she was taken to the police station.

12. PW 2, Dandaram Das deposed that in the last part of November, 2018 when he was at home, father of the victim called him to his house informing that some untoward incident occurred and that persons gathered infront of the house of the accused. Then on being asked what happened, he told that his daughter put her cell phone for charging in the house of the accused and lateron when she went to the house of the accused to bring back the cell phone, then the accused closing the door, took her wearing apparels off, made her fell upon the ground and then making her lay upon bed committed sexual intercourse with her. Hearing the incident, he went to the house of the accused where about fifteen persons gathered. In the meeting, on being asked, the victim narrated the incident and the accused also admitted that he committed rape on the victim.

During cross, he stated that at first he heard about the incident from the victim's father and then heard from the victim on the day of the incident.

13. PW 3, the elder brother of the victim, testified that at the time of incident when he was in Mumbai, he was called to come home saying that something occurred with his sister. After he came home, his sister reported him that on the day of occurrence when she went to the house of the accused to take back the cell phone which she put there for charging, accused handing over the mobile by one hand, pulled her by another hand to the bed, gagged her mouth and committed rape on her. Hearing the incident, he informed the matter to "Nari Mancha" and as per advice of "Nari Macha", he lodged the FIR, Ext.2.

He denied the suggestion that on that day at the time of bringing back the cell phone which his sister kept for charging in the house of the accused, she had stolen one cell phone from the house of the accused and when she was caught, out of grudge, lodged the FIR falsely.

PW 4 Ramesh Pasowan, the VDP Secretary deposed that a meeting was convened regarding commission of rape on the victim by the accused Purna Murmu @ Majhi. In the meeting he heard that the victim put her cell phone for charging in the house of the accused Purna Murmu and taking the advantage of absence of other family members, the accused took the victim inside the room of his house and by closing the door committed her rape. After the incident, the victim by crying returned home and reported the matter. In the meeting the victim narrated the incident and the accused also admitted his guilt. Thereafter, as per advice of the villagers, the victim's father lodged the FIR.

During cross he stated that the meeting was held after one week of the incident.

15. PW 5 Dr. Rika Engtipi, the Medical Officer of TMCH, Tezpur deposed that on 19-11-2018, she examined the victim Miss X, 11 years, female of village Naga Pathar, PS Missamari, vide TMCH Registration No. TMC/FM/SC 89/18, in presence of female attendant Semima Khatoon, on being escorted and identified by WPC 633 Jonali Gogoi and on examination she found the following

:

Case history: According to the victim girl on 29-09-2018, at 2 p.m. when she went to take her phone back which she kept for charging in one Purna Murmu's house, he forcefully took her to a room and sexually assaulted her. He threatened her that he will kill her if she discloses the occurrence to others. Later she told her neighbor about the incident.

On physical examination:

H- 42.5 cm, W- 33.5 kg, Chest – 74 cm, Abdomen – 65 cm

Teeth – temporary – nil, permanent 14/14 total – 28.

Hairs:

Scalp – present, black clours 46 cm, Axillary – black colour present approx 3 cm, pubic black colour approximately 3 cm, breast – well developed. No injury mark seen.

Menstrual history, Menarche – 11 years, cycle – regular, last menstrual period – 01-10-2018.

Genital examination:

Genital organs – healthy, vulva – healthy hyperpigmented patches over the inner thigh, hymen – old healed tear at 3 O'clock and 9 O'clock position. vagina – healthy, evidence of venereal disease – not detected, vaginal swabs collected from posterior fornix.

Injury on the body not detected. Wearing garments – evidence of struggle not detected. Evidence of stain not detected.

Mental condition at the time of examination - normal,

Behabiour – co-operative, intelligence and memory are normal Gait – normal.

Report of Radiological investigation:

X-ray of wrist – The epiphysis of the lower ends of the radious and ulna are not fused with the parent bone.

X-ray of shoulder joint – the epiphysis of upper end of the humerous is not fused completely with the parent bone.

Elbow – complete epiphysial fusion noted of the bones around the elbow joint.

X-ray pelvis – the epiphysis of the illiac crest is not fused with the parent bone.

Result of laboratory Investigation:

Examination for vaginal swab – spermatozoa and gonococci not detected.

On examination, the Medical Officer found no sign and symptoms of recent sexual intercourse, old healed hymeneal tear present in 3 O' clock and 9 O' clock position, no spermatozoa and gonococci seen in vaginal swab examination and age of the victim is above 14 years and below 16 years. The medico legal report is proved as Ext.3

During cross, the Medical Officer stated that if a girl of 11/12 years is forcefully intercoursed by an adult man, she may have bleeding and may require medical treatment. Except hymeneal tear, no injury on the body of the girl was detected. The victim did not give history of bleeding. Hymeneal tear may cause due to fingering by self or by falling during cycling or climbing in a tree.

16. PW 6 Smti Jamuna Tanti, the President of "Jana Jagritri Naree Manch" of Missamari, deposed that the elder brother of the victim informed their Samity that his sister went to the house of the accused for charging a cell phone and lateron when she again went there to bring back the cell phone, the accused forcefully raped his sister when no other family member was present. In this respect, a meeting was called by the guardian of the victim, where the victim by crying narrated that the accused Purna Murmu raped her. In the meeting the accused Purna Murmu admitted his guilt and then they advised to inform police.

During cross, she stated that her house is less than half km away from the house of the accused. Brother of the victim informed them about the incident after one week.

17. The evidence of PW 7 SI Dandadhar Kumar, the Investigating Officer, is formal in nature. He visited the place of occurrence, prepared the sketch map of the place of occurrence (Ext. 4), recorded the statement of the witnesses including the victim girl, got recorded the statement of the victim u/s 164 Cr.P.C. and sent her to TMCH for medical examination. During investigation the informant produced a photocopy of the school certificate of the victim girl.

He arrested the accused and at the close of investigation, submitted charge sheet against the accused Purna Murmu @ Majhi u/s 12 of POCSO Act (Ext. 5).

During cross, he stated that the date of occurrence is 29-09-2018 and he received the FIR on 17-11-2018. He further stated that during investigation, no original school certificate was produced before him and he did not enquire regarding authenticity of the photo copy of the school certificate. He also stated that he received no any information about the incident either verbally or in writing prior to filing the FIR.

Bearing in mind the findings as regards the age of the child 18. victim as discussed above, let me, now turn to the question of alleged offence of penetrative sexual assault on the child victim. The victim's evidence reveals that on the day of the incident, in the morning time she went to the house of accused Purna Murmu for charging cell phone of her elder sister and in the afternoon at 2 p.m. after returning from school, when she again went to the house of the accused to bring the cell phone, the accused giving the cell phone by one hand, pulled her by another hand towards bed inside his house, made her lay upon the bed and gagged her mouth asking not to raise alarm. Thereafter he took off her frock and pant and laying upon her body inserted his penis in her vagina. He had also put an element of fear by threatening her with death if she reveals the act to others. According to her at the time of incident none was present there and after half an hour, when his wife reached home, she enquired her as to whether the accused had done anything to her to which she replied in affirmative. Then his wife also asked her not to disclose the occurrence to others. Admittedly, out of fear, on that day, she informed none about the incident and on the next day she informed the matter to one Jurita bou. Victim's brother (PW 3) categorically stated that on being informed, he came home from Bombay and then his sister reported him that on the day of incident when she went to the house of the accused to take back the cell phone which she put there for charging, accused handing over the cell phone by one hand, pulled her by another hand to the bed, gagged her mouth and then by threatening committed rape on her.

19. PW 2, the neighbour, was reported about the incident by the victim's father. He fully corroborated the version of the victim. PW 4, the VDP Secretary and PW 6 the President of "Jana Jagritri Naree Manch" before whom the elder brother of the victim reported the incident, made the same version. After arrival of elder brother, a meeting was held. PW 2, PW 4 and PW 5 categorically stated that in the meeting the victim narrated the incident. The evidence of the PWs clearly shows that on the day of incident the victim in the morning time went to the house of the accused to put the cell phone for charging and in the afternoon after returning from school she again went there for taking back the cell phone and then the fateful incident occurred. Defence took the plea that at the time of taking back the cell phone, the victim had stolen one mobile from the house of the accused and when she was caught the case was filed falsely. So, the story of the prosecution regarding charging the cell phone in the house of the accused by the victim and her arrival there in the afternoon for taking back the cell phone is admitted by the defence side. Thus it appears that presence of the victim at around 2 p.m. in the house of the accused for taking back the cell phone is not in dispute. Though in statement u/s 313 Cr.P.C. the accused denied his presence at home when the victim came to his house to take back the cell phone, but during cross examination of the PWs neither took that plea nor denied that at that time the accused was alone at home. To prove the plea of alibi at the relevant time, defence examined none. He even did not examine his wife to prove that he was not at home at that time. Nothing on the record thrown any light of any kind of animosity between the victim family and the accused. The evidence of the PWs that the victim kept her cell phone in the house of the accused for charging clearly shows that they had visiting terms. It is also not believable that even if, a cell phone was stolen by the victim, a quardian would malign his minor sister's name by exposing her as a victim of sexual assault, unless she was subjected to some sexual assault by someone. The evidence of the victim makes it clear that the accused inserted his penis into her vagina. In absence of evidence of any animosity between the parties, I find nothing to disbelieve the evidence of the victim girl. Defence failed to elicit anything from her cross examination to show that the victim deposed falsely. Her evidence is found spontaneous, firm and trustworthy. A young girl will not stake her reputation by levelling a false charge concerning her chastity.

- 20. That apart, the medical evidence is not suggestive of recent sexual inter-course but there is presence of one old healed hymeneal tear at 3 and 9 O' clock position. Though during cross the defence suggested that the hymeneal tear may cause by falling during cycling or climbing in a tree or by self fingering but did not take the said plea during cross-examination of the PWs. The victim was examined after more than one and half month and as such there is no possibility of finding sign of recent sexual intercourse. In the present case, it is not that no injury was found in the private part of the victim.
- Learned defence counsel also had raised the point that 21. prosecution case would fail for the inordinate delay in lodging the FIR . As regards the delay in lodging the FIR is concerned, it is an admitted position that FIR was lodged after one and half month of the incident. The victim clearly stated that the accused as well as his wife threatened her not to disclose the incident to others and in the FIR, the informant, the brother of the victim explaining the delay mentioned that due to poor economic condition and out of shame they concealed the matter. In the case at hand, the place of occurrence is in a village. It is a normal practice that village folk do not come out wide open about cases of sexual assault. In the instant case the victim is a girl of tender age. The victim's sex, age and the offence itself are factors which made the parent/informant/other witnesses to convene a 'meeting' and not to report about the incident to the police immediately. From the evidence of victim and the informant it is forth coming that at the time of incident the informant, the elder brother of the victim was in Bombay and on being informed about the incident he came home and then he approached before the "Jana Jagritri Naree Manch". Thereafter, a meeting was convened and after hearing the victim and the accused, the guardian of the victim was advised to lodge the FIR. Being poor family it is quite natural that the family waited for their son who worked outside the state to discuss the matter and after his arrival reported the incident to "Jana Jagritri Naree Manch" and called a meeting and after that only lodged the FIR. PW 2, PW 4 and PW 6 who were present in the meeting though stated that in

the meeting accused Purna Murmu admitted his guilt but said statement was not Investigating Officer (PW made before the 7). So there omissions/contradictions in their statement as regards the extra - judicial confession of guilt by the accused Purna Murmu at the 'meeting' but the witnesses testified that a 'meeting" had in fact taken place in the matter of the allegation of accused Purna Murmu committing rape on the victim child. Thus some delay was caused in lodging the FIR. This delay cannot be said to be one made purposefully.

22. In this respect the Apex Court in the case of Md. Ali Vs. State of Uttar Pradesh reported in (2015) 7 SCC 7 SCC 272, had been held as follows:

"It is apt to mention here that in rape cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstances is not of significance. The authorities of this Court have granted adequate protection/allowance in that aspect regard being had to the trauma suffered, the agony and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a conservative social milieu. Sometimes the fear of social stigma and on occasions the availability of medical treatment to gain normally and above all the psychological inner strength to undertake such a legal battle."

23. In the facts of this case as discussed above, I am of the considered view that in offence of this sort which involves reputation of a sister/daughter of very tender age, sometime is often taken by guardians to step forward to lodge the FIR and this cannot be a ground to disbelieve them. In the present case, delay is well explained and such delay cannot defeat the prosecution case of committing the act of rape by accused Purna Murmu and in such situation delay in lodging the FIR, in my considered opinion, is not fatal to the prosecution case.

24. The learned defence counsel also urged that the victim being a minor one, there is every possibility of being tutored. Settled law is that evidence of child witness is required to be considered with care and caution so that possibility of being tutored is ruled out, but cases involving sexual molestation and assault requires a different approach.

In Dattu Ramrao Sakhare Vs. State of Maharashtra (1997 (5)

SCC 341), Hon'ble Supreme Court held that: (i) A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. (ii) 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 answers thereof. (iii) The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. (iv) 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. (v) 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 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. (vi) This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. (vii) Though child witnesses are pliable and liable to be influenced easily, shaped and moulded, but 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.

25. In the case at hand, in cross-examination the victim stated that her brother, Danda (PW 2) and Jamuna (PW 6) asked her to say before Magistrate what was done with her. She clearly denied of being tutored by her elder brother, Danda and Jamuna Baideo. The victim made the same version in court whatever she stated before the Magistrate u/s 164 Cr.P.C. and her evidence has been corroborated by PW 2- Danda, PW 3- her elder brother, PW 4, the

VDP secretary and PW 6 the President of "Jana Jagriti Naree Manch". Evidence of the victim is found spontaneous and trustworthy without inviting any suspicion of being tutored. I find nothing, which would lead to believe that the victim was tutored to embellish the version on material point.

- 26. From the evaluation of the prosecution material as discussed above, it is abundantly clear that the evidence brought on record proves beyond all reasonable doubt on the day when the victim went to the house of the accused for bringing back her cell phone, accused Purna Murmu making her laid upon bed inserted his penis in her vagina. The evidence of the victim in this case is convincing and inspiring without the aid of other witnesses that accused Purna Murmu @ Majhi committed penetrative sexual assault on the victim girl. As it is already held that the victim is not below the age of 12 years, the offence committed by the accused on the victim girl below the age of 18 years attracts the ingredients of penetrative sexual assault defined in section 3(a) of POCSO Act punishable u/s 4 of POCSO Act instead of Section 6 of POCSO Act. Accordingly, the accused Purna Murmu @ Majhi is held guilty for the offence punishable u/s 4 of POCSO Act and convicted him accordingly.
- I have heard the accused Purna Murmu @ Majhi on the point of sentence. His statement is recorded where he stated that he has to look after his wife and he is the only bread earner of his family, hence, prayed for taking a lenient view. On the other hand, the learned Special Public Prosecutor submitted that the crime being heinous, the accused should not be dealt with leniency.
- I gave my anxious consideration on the aspect of quantum of sentence. Section 4 of POCSO Act prescribes punishment for a term which shall not be less than 7 years but which may extend to life and shall also be liable to fine.
- 29. In the instant case, the offence committed is penetrative sexual assault against a female child of 13/14 1years who was supposed to spend time in cheerfulness, with her dignity. The girl with afflux of time, would grow with memories of this painful experience. The accused being a man of

50 years was expected to protect her from abuse but instead he himself abused her childhood. Considering all aspects and the submission of the accused, I am of the considered opinion that the minimum punishment provided by law for the offence u/s 4 of POCSO Act will meet the ends of justice.

- **30.** Accordingly, I sentence the convict Purna Murmu @ Majhi to undergo Rigorous Imprisonment for 7 years and also to pay a fine of Rs. 5,000/- in default to undergo Rigorous Imprisonment for another 2 months for the offence punishable u/s 4 of POCSO Act.
- **31.** The period of detention already undergone by the accused shall be set off against the terms of imprisonment as per provision of section 428 of Cr.P.C.
- **32.** Convict/accused convict Purna Murmu @ Majhi be sent to Central Jail, Sonitpur, Tezpur to serve the sentence.
- **33.** Case is recommended for compensation of the victim as per provision of Section 357 A of Cr.P.C. by District Legal Services Authority, Sonitpur, Tezpur.
- **34.** Let a free copy of the Judgment be furnished to the convict.
- **35.** Also send a copy of the Judgment to the District Magistrate, Sonitpur, Tezpur as per provision of section 365 Cr.P.C. and a copy to the District Legal Services Authority, Sonitpur, Tezpur.
- **36.** Given under my Hand and Seal of this Court on this the 20th day of November, 2019.

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

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur

APPENDIX

Prosecution witnesses.

1. PW 1 : Victim

2. PW 2 : Sri Dandaram Das,

3. PW 3 : elder brother of the victim

4. PW 4 : Sri Ramesh Pasowan, VDP Secretary

5. PW 5 : Dr. Rika Engtipi, M.O.6. PW 6 : Smti Jamuna Tanti

7. PW 7 : SI Dandadhar Kumar, I.O.

Exhibits.

Ext. 1 : Victim's statement u/s 164 Cr.P.C.

Ext. 2 : FIR

Ext. 3 : Medico legal report

Ext. 4 : Sketch map

Ext. 5 : Charge sheet.

(I.Barman)
Special Judge,
SONITPUR: TEZPUR