IN THE COURT OF SPECIAL JUDGE :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, <u>Sivasagar</u>.

Spl. (P) Case No. 14 of 2016, U/S 8 of POCSO Act 2012 (Arising out of Gelakey P.S. Case No. 58/2016)

State of Assam

-Vs-

Sri Siva Nayak Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. D. K. Gohain, Advocate

(State Defence Counsel)

Date of framing Charge : 16.07.2016

Dates of Evidence : 25.01.2017, 21.03.2017,

05.06.2017, 07.02.2018

 Date of S/D
 :
 11.04.2018

 Date of Argument
 :
 15.09.2018

 Date of Judgment
 :
 28.09.2018

JUDGMENT

- 1. Prosecution case in brief is that on 18.04.2016, informant Sri Bikram Nayak lodged an FIR with O/C, Gelakey P.S. alleging, inter alia, that on 17.04.2016, at about 4 PM, while his minor daughter victim 'A' (name withheld), aged about 8 years was playing at the nearby field, the accused Siva Nayak on the allurement of giving Rs. 10/- to her took her to his house and touched her private parts.
- 2. On receipt of the FIR, Gelakey P.S. Case No. 58/2016, U/S 4 of POCSO Act, 2012 was registered and started investigation. During investigation, victim was medically examined and recorded her statement in the court U/S

- 164 Cr.P.C. Accused Siva Nayak was arrested and produced him before this court. On completion of investigation, I.O. has submitted Charge-Sheet against the above named accused person U/S 4 of POCSO Act, 2012.
- 3. Upon receipt of charge sheet, copy was furnished to the accused and after hearing both the sides, vide order dated 16.07.2016, my learned predecessor in office has framed the charge U/S 8 of POCSO Act, 2012 against the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined seven witnesses including M.O. and I.O.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D. K. Gohain, learned State defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 6. (I) What was the age of the victim 'A' on the date of incident?
 - (II) Whether on 17.04.2016, at about 4 PM, victim 'A' was subjected to sexual harassment by the accused with sexual intent?

DECISION AND REASONS THEREOF

- 7. PW-1 Dr. Mukunda Rabha in his evidence deposed that on 19.04.2016 at about 01.00 P.M., he examined the victim A in connection with Gelakey PS Case No. 58/16 and upon examination, he found that the age of the victim is below 18 years. No sign of any recent injuries on her person and no sign of recent sexual intercourse were found. PW-1 proved his report as Ext. 1.
- 8. PW-2 Sri Bikram Nayak, the father of the victim in his evidence deposed that on 17.04.2016, while he was on work, on hearing hue and cry in

the residence of the accused, he went there and came to know that some incident occurred with his daughter. From his daughter (victim A), he learnt that while she was playing in the nearby field, accused Siva Nayak by giving ten rupees, asked her to open her cloths. On denial by her, accused pulled her clothes i.e. pant. His daughter also told him that wife of the accused came at the place and asked the accused about his misdeed and to inform the matter to victim's house, accused has assaulted his wife. On knowing all these, when Bikram Nayak tried to question accused Siva Nayak about the incident, he flew away to nearby field. On this incident, he lodged the FIR. Exbt. 2 is the FIR and Exbt. 2(i) is his signature. At the time of incident, the age of his daughter was about 7-8 years. In his cross examination PW-1 deposed that he has not seen the incident on his own. The FIR was lodged on the next day of the incident. In the FIR, no reason was shown for delay in filling the FIR. House of the accused is near to his residence. Several other children were used to play near his house. He cannot say how his daughter went to the residence of the accused Siva.

9. PW 3 the victim of this case in her evidence deposed that on the date of incident, while she was playing in the nearby field, accused Siva Nayak took her to his house in the name of giving ten rupees and by taking her inside room, he pulled down her pant. She objected but accused hold her mouth. Suddenly, wife of the accused Siva arrived there and he concealed her on the back of the door. When his wife tried to inform the matter to mother of victim, there was hue and cry. On this, the accused has assaulted his wife. Then she left the house of the accused. After some time, her father arrived there. On inquiry, she told the incident to her parents. Police also took her for medical examination and to court for recording statement. She gave statement in court. At the time of incident, she was reading in class III. In her cross examination PW-3 deposed that she used to play with other children near the house of the accused. Siva used to talk to her daily. On that day, Siva did not give her any

money. Siva did not open her other cloths except pant. Siva was about to misbehave her but failed. She denied that Siva did nothing.

- 10. PW-4 Smt. Boby Nayak in her evidence deposed that about 9-10 months back on hearing hue and cry at the residence of accused, she went there and by that time accused was taken to the house of the victim. She heard from victim A that accused Siva Nayak and by giving ten rupees, asked her to open her pant. On denial by her, accused tried to commit misdeed but by that time wife of the accused came there. On these accused left her. In her cross examination PW-4 deposed that she has not seen the incident on her own. She cannot say the date of incident. She denied that being the relative of the victim, she deposed falsely.
- 11. PW-5 Sri Bikash Nayak in his evidence deposed that about 9-10 months back, on returning home from market, the victim told him that while she was playing, accused Siva Nayak by giving ten rupees, asked her to open her pant. In his cross examination PW-5 deposed that he cannot say whether the victim opened her pant or not. At the time of incident, he was at market. He cannot say whether the money was paid or not. He denied that being the relative of the victim, he deposed falsely.
- 12. PW-6 Sri Dipak Nayak in his evidence deposed that on 17.04.2016, while he was sleeping in day time, mother of the victim called him and told his wife about some incident. After some time, he went to the house of the victim and from her mother, he came to know that while victim was playing, accused Siva Nayak by giving some money, asked her to open her pant. On this, he asked the victim who also told him that accused Siva has touched her vagina. Siva was kept apprehended there. On asking Siva, he denied the allegation. In his cross examination PW-6 denied the suggestion that neither victim nor her mother told him about the incident as deposed by him. He also denied that, he deposed falsely.

- 13. PW-7 SI Ajit Mech, the I/O of this case in his evidence deposed that during investigation, 18.04.2016 at about 05.00 PM, he went to the place of occurrence i.e. residence of informant and drawn a sketch map of the PO. Exbt. 3 is the sketch map. He apprehended the FIR named accused Sri Siva Nayak. On the same day, victim was sent for medical examination. On 20.04.2016 victim was sent to Court for recording her statement u/s 164 Cr.P.C. During investigation he has collected the medical report and statement given by victim in court. Exbt. 4 is the statement of the victim given in court u/s 164 CrPC. In her statement the victim has stated that "accused Siva Nayak has called her with an assurance to give Rs. 10/- and asked her to open her clothes, hiding her when his wife came there and assaulted his wife when tried to inform the matter to victim's parents." On completion of investigation, he has submitted charge sheet against the accused u/s 4 of POCSO Act. Exbt. 5 is the charge sheet. In his cross examination PW-7 deposed that as per FIR, incident occurred on 17.04.2016 and FIR was lodged on 18.04.2016. No explanation was given showing cause of delay in filling FIR. He has not collected age proof document of the victim. He has not examined the wife of the accused as witness of the case. PW-7 denied that, he has not investigated the case properly. He also denied that he has submitted charge sheet without proper material.
- 14. Basing on the above evidence on record, let me decide the points formulated for just decision of the case.
- 15. <u>Point No. I:</u> So far age of the victim is concerned, in the FIR the informant has mentioned the age of the victim as 8 (eight) years. PW 1 the M.O. in his report mentioned that X-ray report reveals incomplete fusion of epiphysis of wrist joint and elbow joint and held that victim is below 18 years. The informant while adducing evidence as PW 2 has reiterated that at the time of incident the victim was aged about 7 to 8 years. While recording the evidence of the victim on 25.01.2017, she claimed her age as 9 (nine) years

and a student of Class-III. During cross examination, no challenge was made by the defence on the age of the victim as stated by PW 2, the father of the victim or the fact that the victim was a student of Class-III as stated by PW 3, the victim. In her 164 Cr.P.C. statement Exbt. 4 in which also the victim claimed her age as 8 (eight) years. So from all these unrebutted evidence on age, I hold that on the date of incident victim was aged about 8 to 9 years.

- 16. <u>Point No. II:</u> So far the allegation of sexual harassment upon the victim is concerned, from the evidence as narrated herein before, it appears that the evidence of PW 1 the M.O. that he did not find any injury mark on the body of the victim found to be believable because no allegation has ever been made regarding getting any injury on the private parts of the victim.
- 17. As per the statement of the victim given as PW 3, it appears that while she was playing, accused Siva Nayak took her to his house on the allurement of giving Rs.10/- and by taking her inside the room he pulled down her pant. Though victim objected but accused hold her mouth. Suddenly wife of the accused appeared there and accused concealed the victim on the back of the door. On this matter, there was some hue and cry and accused assaulted his wife. The victim left the house of the accused and informed the matter to her father. The above part of evidence of the victim was duly supported by PW 2, the father of the victim that victim was taken to the house of the accused, accused pulled her pant and at that time the wife of the accused appeared there and then victim flee away. PW 4 and PW 5 also corroborated the evidence of the victim and stated that from the victim they came to know that accused took the victim and asked her to open her pant. PW 4 further corroborated that on denial by the victim, accused tried to commit misdeed. However PW 6 stated that from the victim he came to know that accused touched her vagina, but this part of evidence cannot be relied upon as the victim is silent regarding touching on her private parts. PW 7 is

- the I.O. who did the routine investigation and proved the statement of the victim as Exbt.4 in which also the victim corroborated that accused asked her to open her pant.
- 18. It may be mentioned here that though in the FIR it was mentioned that accused touched the vagina of the victim and on that basis charge was framed for the offence u/s 8 of POCSO Act 2012, which ought to have been framed u/s 10 of POCSO Act, 2012 due to the age of the victim, but from the statement of the victim it appears that accused simply pulled her pant. However, victim is silent regarding touching her private parts. Section 7 of POCSO Act, 2012 defined sexual assault, which is quoted for ready reference.
 - "7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."
- 19. In the course of argument hearing, learned Special P.P. in his argument has tried to convince that the term of "sexual assault" includes "any such other act with sexual intent which involves physical contact" and the act done by the accused covered under this part of definition. However I find force on the defence submissions that definition of section 7 shows physical contact and touching of private parts is necessary and same were missing here.
- 20. At this stage I would like to refer Section 11 of the POCSO Act 2012 which read as under :
 - "11. Sexual harassment.—A person is said to commit sexual harassment upon a child when such person with sexual intent—
 - (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
 - (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefor.
- Explanation.—Any question which involves "sexual intent" shall be a question of fact.
- This definition of sexual harassment appears to be applicable in this case. From the totality of the evidence of the victim, it appears that the evidence that the accused asked the victim to open her pant and on her denial accused pulled her pant amounts to compelling her to exhibit her body. In this case the intention of the accused to touch the private part of the victim is missing which is an essential ingredient of the term of "sexual assault" as defined u/s 7 of the POCSO Act, 2012. From the materials available on record, I am of the considered opinion that the offence proved against the accused only covers the term of "sexual harassment" as defined u/s 11(ii) of POCSO Act, 2012. As such, the argument of learned Special P.P. that accused should be held guilty for causing sexual assault cannot be acceptable.
- The defence argument that accused is innocent also cannot be accepted simply because the wife of the accused was not examined by the prosecution. Non-examination of wife of the accused is quite natural simply because in the social circumstances normally it cannot be expected that a wife will adduce evidence against her husband.
- 23. Considering all above, I hold that though charge was framed u/s 8 of POCSO Act, 2012 for causing sexual assault, but in my considered opinion prosecution has been able to prove the offence of sexual harassment only as defined u/s 11 and made punishable u/s 12 of POCSO Act, 2012.

- As the offence proved is minor in nature to be offence charged, by applying power u/s 22 Cr.P.C. without altering the charge, I am of the opinion that accused can sufficiently be convicted and accordingly accused is held guilty and convicted for the offence punishable u/s 12 of POCSO Act, 2012.
- 25. Heard both the sides on the point of sentence. Statement of the accused is recorded in separate sheets.
- During hearing on the sentence, learned Special P.P. has submitted that no leniency should be shown to the accused. On the other hand, learned Advocate for the accused has submitted that during investigation accused was arrested on 18.04.2016 and was remanded to Jail custody on 19.04.2016 and was in Jail till 4.10.2016, the date on which the bail was granted to the accused. It is also submitted that as per the investigation made by this court on the plea of juvenility taken by the accused in his 313 Cr.P.C. examination, it reveals that on the date of incident accused was aged about 18 (eighteen) years 5½ months. So considering above, the period already undergone should be treated as sufficient sentence of imprisonment of the accused for the offence proved against him. I have considered the submission of both the sides.
- Section 12 of POCSO Act, 2012 provides for punishment up-to 3 (three) years and fine. However, considering the age of the accused, I am of the opinion that the period already undergone, i.e. five and half months in Jail will be sufficient sentence of imprisonment along with imposition of some fine.
- 28. Considering all aspects, I sentence the accused Siva Nayak to undergo simple imprisonment (SI) for 5 (five) months and to pay a fine of Rs. 1,000/- (Rupees one thousand) for the offence u/s 12 of POCSO Act, 2012.
- 29. It is provided that in the event of realization of fine amount, the entire amount shall go to the father of the victim for spending for betterment of the victim as compensation u/s 357 Cr.P.C.

- 30. Convict Siva Nayak is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 31. Considering the fact of order for payment of compensation to victims U/S 357 Cr.P.C is made, no separate is required to be made u/s 357A Cr.P.C. As such, matter is not referred U/S 357A Cr.P.C.
- 32. Let a free of cost copy of the judgment be given to the convict Siva Nayak immediately as per the provisions of Section 363 (1) Cr.P.C.
- 33. Convict is informed about his right of appeal before Hon'ble Gauhati High Court.
- 34. It may be mentioned here that judgment was fixed for delivery on 28.09.2018 but same could not be delivered on that day due to absence of accused and fixed on 01.10.2018.
- 35. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 1st day of October, 2018 at Sivasagar.

Special Judge, Sivasagar:

APPENDIX

- 1. Prosecution witnesses -
 - P.W.1 Dr. Mukunda Rabha (M.O.)
 - P.W.2 Sri Bikram Nayak (informant)

 - P.W.3 Victim 'A' P.W.4 Smt. Boby Nayak

 - P.W.5 Sri Bikash Nayak P.W.6 Sri Dipak Nayak
 - P.W.7 SI Ajit Mech (I.O.)
- 2. <u>Defence witnesses</u>: None
- None 3. <u>Court witnesses</u>
- 4. Exhibits by prosecution -
 - Exbt.1 Medical examination report
 - Exbt.2 FIR
 - Exbt.3 Sketch map
 - Exbt.4 164 Cr.P.C. statement of the victim 'A'
 - Exbt.5 Charge-Sheet

Special Judge, Sivasagar