IN THE COURT OF THE SPECIAL JUDGE ::::::: NALBARI

Present: Smti S. Bhuyan Special Judge

Nalbari.

Spl (P) CASE NO: 39/17 u/s- 354 IPC and Section 8 of POCSO Act.

STATE

-Vs-

Basudev Deka

S/O-Late Prabhat Deka R/o, Vill-Saplekuchi

PS & Dist-NalbariAccused person

Appearance:-

For the prosecution : Mr. K. Sarma, Special PP
For the defence : Mr. G. Nath, Advocate.

Date of institution of the case : 18/09/17

Date of framing charge : 29/11/17

Date of evidence : 13/02/18, 04/05/18, 19/06/18,

22/11/18

Statement of accused recorded: 17/06/19

Date of Argument : 29/07/19, 13/08/19

Judgment Delivered : 27/08/19
Sentence Hearing : 29/08/19
Sentence Pronounced : 29/08/19

JUDGMENT

1. The case of the prosecution as revealed from the ejahar lodged by Sewali Medhi W/o-Sanjay Medhi of village Saplekuchi, P.S. & District- Nalbari, is that on 17/09/17 at about 3 pm her minor daughter Miss 'X' (name changed as the case is register under POCSO Act) along with her minor son Barnil Medhi went to

the house of Dayaram on the occasion of Biswakarma puja to have puja khana. From the puja feast they were taken to the house of accused by the accused. Accused keeping minor son of informant in the veranda took her victim daughter in the backside of accused's house and pressed and touched her breast. After the incident her daughter came home by crying and disclosed her the incident and when asked about the incident to accused then wife of the accused misbehaved her. Hence, the case.

- 2. O/C Nalbari PS on receipt of the ejahar registered Nalbari PS case vide Nalbari PS case No. 694/17 u/s-354 IPC read with section-8 of the POCSO Act and lynched investigation. During investigation, IO of the case recorded statement of informant at the police station. IO visited the place of occurrence, drawn sketch map of the place of occurrence, recorded statement of the witnesses and victim. On the next day, IO of the case produced victim girl at SMK civil Hospital, Nalbari for medical examination and then produced her before the court to record her statement u/s-164 Cr.P.C. IO of the case arrested accused, produced him before the court, collected medical report and after completion of investigation submitted charge sheet against the accused Basudev Deka u/s-354 IPC and section-8 of the POCSO Act.
- 3. On receipt of the charge sheet my then learned predecessor took cognizance and issued process to the accused and after furnishing copies to the accused, framed charge u/s-354 IPC read with section-8 of the POCSO Act against the accused Basudev Deka and when charges are read over and explained to the accused he pleaded not guilty and stood for trial.
- 4. In order to prove the charge against the accused person, prosecution altogether adduces evidence of 6 no's of witnesses including informant, victims and I/O of the case and exhibited 4 no's of documents. PW-1, Sewali Medhi (informant), PW-2, Miss 'X' (victim), PW-3, Basanta Rajbongshi, PW-4, Arjun Barman, PW-5 Latika Harijon and PW-6, Manalisha M Bhakta (I/O). Ext-1, Ejahar,

Ext-2, statement of victim recorded u/s-164 Cr.P.C, Ext-3 Sketch Map of the place of occurrence, Ext-4, charge sheet. After closures of the evidence of the prosecution, statement of the accused Basudev Deka recorded u/s-313 Cr.P.C and accused plea is total denial however he declined to adduce evidence in support of his plea of denial.

POINTS FOR DETERMINATIONS ARE:-

- (i) Whether victim girl Miss 'X' was under the age of 18 years and she was minor on the date of incident?
- (ii) Whether accused Basudev Deka assaulted or used criminal force upon Miss 'X' and outrage her modesty?
- (ii) Whether accused committed sexual assault upon Miss 'X', as defined under section 8 of the POCSO Act?

Argument

- 5. I have heard argument of learned counsel for both sides. Learned Special Public Prosecutor submitted that victim is a minor girl and prosecution beyond all reasonable doubt fairly able to establish the charge of section-354 IPC read with section-8 of the POCSO Act against the accused.
- 6. Learned defence counsel made submission that except the victim and her relatives other witnesses not supported the case of the prosecution and IO of the case prove the contradiction and prosecution failed to establish the case beyond all reasonable doubt.

DISCUSSION, DECISION AND REASON THEREOF:

7. Ext-1 is the ejahar. In Ext-1 ejahar, PW-1 Sewali Medhi stated that on 17/09/17 on the day of 'Biswakarma puja' at about 3 pm her victim daughter Miss 'X' (name changed) along with her 5 year old son went to the house of Dayaram for Biswakarma puja and after taking puja prasad (khichiri) accused Basu Deka took her children to accused house and keeping her son outside the house he took her daughter Miss 'X' on the backside of accused house

and pressed the breast of her daughter. Her daughter after coming to home narrate the incident to her. Thereafter she asked the accused about the incident but accused wife misbehaved her and rebuked her.

- 8. PW-1 informant, PW-2 victim girl, PW-3 Basanta Rajbongshi, PW-4 Arjun Barman, PW-5 Latika Harijon, stated incident was took place on the day of Biswakarma puja on 17/09/17 and on the point of taking place of incident on the day of Biswakarma puja there is no two views coming from the statement of PWs. Thus taking place of incident with the victim girl is confirmed by all the Pws. Statement of the PWs more specifically from the statement of Pw-1 and statement of the accused recorded u/s 313 Cr.P.C revealed that victim is a minor girl and she is aged about years 11 years old at the time of incident.
- 9. Now, let me discuss the evidence on record to arrive at the just decision of the case whether accused committed the incident as alleged.
- 10. PW-1, is the informant and mother of the victim girl. Her evidence and evidence of PW-2 victim girl, revealed on the date of incident PW-2 with her minor brother went to the house of Dayaram to attend 'Biswakarma puja' to take khichiri. The statement of PW-4, pointed that accused from the house of Dayaram came to his house and it is also coming from the statement of all the PWs that accused was present in the puja house and daughter of PW-1 visit puja house to have khichiri.
- 11. PW-1 statement is that her daughter PW-2, after returning from the 'Biswakarma puja' from the house of Dayaram told her that accused Basu Deka called her daughter Miss 'X' to his house telling her that he will give Indian gooseberry to her and at that time her 5 year old son was also present with Miss 'X'. The statement of PW-1, informant, PW-2, victim and PW-4 pointed that victim was present first in the house of Dayaram where from she was seen in the compound of accused and at that time accused

Basudev was present at his house. This piece of evidence is not cross examined by the defence could not over turn the fact that victim girl went to puja, where from she was seen in the compound of accused and accused was present at that time. This very fact is disclosed by PW-4 and this is unrebutted fact. Presence of accused and victim at the same time in the house of accused is established beyond all reasonable doubt.

- 12. The evidence of PW-1 further pointed that her daughter also told her that accused asked her son to stand on the veranda and he took her daughter in the back side and from veranda he took Miss 'X' inside the room and then unbutton her frock and pressed her breast and she sustained pain and her daughter told accused 'uncle (khura tumi ki korisa) what are you doing', to that accused replied that he is making love with her and when her daughter tell that she will shout, he replied he will bring a pillow and at that time someone called accused and accused gave few Indian gooseberry to her daughter and sent her daughter. Coming to know the incident she disclosed the incident to her in laws and her khuri sahu Golapi Medhi.
- 13. PW-2 victim girl evidence pointed that on the date of incident she went to the house of Dayaram where 'Biswakarma puja' was performed. Her evidence pointed after taking khichiri she went to wash her hands and accused took her to the courtyard of his house telling her that he will give her Indian gooseberry and she with her brother went to the courtyard of accused with accused. Thereafter accused asked her brother to stand on the veranda and took her inside the room telling that he will give gooseberry. Thereafter accused made her sit on the bed, lift her frock, pressed her breast and when she asked what you are doing khura (khura tumi ki korisa), accused tell her that he is making love with her and when she told him she will shout accused brought a pillow to gagged her mouth and at that time someone

called accused and accused asked her to leave the room giving her few gooseberry and she narrated the incident to her mother.

- 14. In cross she denied all the suggestion put by the defence that accused did not take her to his house, did not press her breast, did not took her inside the room asking her brother to stand outside, accused made her sit in the bed, took her to his house in the name of giving gooseberry, did not press her breast, did not insert his hand through her frock, did not brought a pillow to gagged her mouth when she told accused that she will shout. In cross she stated that when accused took her there was no other person present in the house of accused. She also denied defence suggestion that there was land dispute between their families and no visiting terms with the house of accused.
- 15. On scrutiny of the statement of PW-1 and PW-2, I find that there is corroboration in the statement of PW-1 and PW-2 by each other. The fact that accused was present in the house of Dayaram is established from the statement of not only PW-1 and PW-2 but also from the statement of PW-3, PW-4 and statement of accused u/s-313 CrPC. It is not the plea of the prosecution that incident was took place in the house of Dayaram.
- 16. The statement of PW-3, pointed on that date of incident he heard taking place of quarrel between father of victim with accused on the fact of allegation that accused committed rape on Miss 'X', the victim girl.
- 17. PW-4 evidence pointed puja feast continue till 3.20 PM and PW-4, Arjun Barman deposed accused help in preparing khiciri for the puja. He deposed that at about 2.20 pm, accused son and PW-2, was plucking gooseberry in the campus of accused and accused went to his house leaving aside cooking and he slapped Miss 'X'. On the evening he heard that accused was called by victim's father but he does not know the reason and on next day he came

to know that victim father lodged a case against accused alleging that accused committing indecent act with his daughter. At the time of cross examination, there is no cross from the side of defence with regard to the presence of victim girl in the compound of accused. Accused leaving puja house to his house at that time, therefore this part of the evidence of the PW-4 is remain intact and is unassailable piece of evidence and same establish the fact that accused went to his house from puja house and at that time he was seen with victim girl at his house.

- 18. PW-2 the victim girl in her statement before the police, before the magistrate u/s-164 CrPC and before the court stated that on the date of incident she went to the house of Dayaram on the occasion of biswakarma puja and after taking khiciri (khana) when she went to wash her hands accused called her to his house in the name of giving Indian gooseberry (amlakhi) and touched her breast pressed her breast and except this statement there is nothing else elicited from her mouth during rigorous cross examination by the defence and failed to demolish her stand in her in chief on the fact that accused molested her by touching and pressing her breast.
- 19. During her examination she passed the test of giving rational answer and she has proper understanding and given the answer after knowing the same. Her statement pointed that at the time when she was taken to the house of accused no other person were present in the house of accused. She was also seen by PW-4, in the courtyard of accused near the gooseberry tree. Except the point that she is a child, no other fact coming outs from the cross examination to disbelief her piece of statement.
- 20. The statement of PW-2 further pointed that she is matured enough to understand the question put to her and accordingly she given the rational answer. Defence failed to distract her during rigorous cross examination and I find her statement believable

beyond all reasonable doubt and only fact of age cannot be bar to disbelief and reject her testimonies and I find her piece of testimonies safe to accept and accordingly I have accepted the same.

- 21. PW-1 the informant stated that after hearing incident from her daughter she went to the house of accused to make an enquiry about the incident of alleged sexual assault upon her daughter by accused but she did not find the accused as he did not come out and accused wife told her that he was sleeping when she narrated incident to accused wife. So she returned home and when her husband return home she narrated the incident to her husband. Her husband went to accused house to disclose the incident to the mother of the accused but mother of accused told her husband that accused is not present at home and thereafter her husband noticed accused drinking and accused run away after noticing her husband.
- 22. Statement of PW-5 pointed that in the evening accused came to his pan shop to take pan and at that time accused was called by Sanjay Medhi, father of the victim. Thus again establish the contention of PW-1 that her husband was searching for accused to hear him personally on the alleged incident.
- 23. The entire scrutiny of the evidence on record along with the statement of IO of the case it is seen that incident was took place in the house of accused. On the date of incident 'Biswakarma puja' was performed in the house of Dayaram where accused was present, helped in cooking in preparation of the puja feast. The victim with her brother went to the puja to have puja feast. She was noticed in the courtyard of accused by PW-4, though PW-4 stated that victim with accused son plucking gooseberry from the gooseberry plant but it remain unchallenged that accused went to his house at that time from the puja house and victim was also present at accused compound at the same time and this part is unassailable and unrebutable piece of testimonies. Prosecution plea is that accused came to his house from the puja house, where

he sexually assaulted the victim girl and the fact of accused and victim present together at same time at accused house has been established by prosecution beyond all reasonable doubt. It is also not believable that parents put their 11 year old girl who yet not attain puberty for betting with her chastity for the boundary dispute.

- 24. During cross examination of the victim nothing elicited about the presence of any boundary dispute. There is not a single question put to PW-1 with regard to boundary or land dispute between accused family and informant family.
- 25. PW-3 and PW-5 are not cross examined by defence. Statement of PW-3 does not pointed any fact of land dispute. Therefore, the statement of PW-4 which he made in his cross with regard to the presence of land dispute being not corroborated is not acceptable and I did not consider her this part of cross examination and I find the statement of victim of the sexual assault of this case believable, acceptable beyond all reasonable doubt and I have accepted the same which carries weight and is convincing piece of evidence.
- 26. Modesty is the property of woman and she carries the same with her birth. In State of Punjab vs Major Singh AIR 1967 SC 63 Hon'ble Apex Court in a case of seven month baby girl possess modesty or not held "The offence punishable under section 354 IPC is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define "modesty". What then is a woman's modesty? I think that the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under section 354 IPC. The culpable intention of the accused is the crux

of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section. A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby of 10 years old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex."

27. In State of Himachal Pradesh vs Sanjay Kumar @ Sunny (2017) 2 SCC 51, The Hon'ble Supreme Court in held that "By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix- has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it is difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell as woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance".

- 28. The Hon'ble Apex Court in State of HP Vs. Asha Ram (2005) 13 SCC 766 held that "It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."
- 29. The lifting of the frock of the victim girl, touching her body, her private parts, pressing the breast is nothing else but sexual assault on the poor girl who is defenseless person before a matured old man. Woman born with her chastity. A new born is having her chastity and a new born also feel the touch of others and none have any right to touch a girl in inappropriate manner and touching in inappropriate manner even to a new born child amounts to sexual assault be it boy or girl. One cannot dishonor the chastity of others by touching inappropriately removing the dress, lifting, pulling down unbuttoning dress of a little one and doing of all or any of the activity amounted to sexual assault, outraging the modesty of the child and woman.

- 30. Here the accused lift the frock of the victim girl pressed her breast who yet not developed any secondary sexual character and then when the poor victim girl telling the accused what you are doing khura. The accused replied "I am making love". All these conduct of the accused person amounted to outraging the modesty of a woman attacked on the inner spirit of the woman and all this attract the ingredient of section-7 of the POCSO Act which is punishable u/s-8 of the POCSO Act.
- 31. The statement of the victim girl show accused took victim girl inside the room keeping her brother outside to stand and when victim told accused she will shout, accused brought a pillow show accused used criminal force upon the victim girl, when he took poor 11 years old girl inside the room when none was present inside the room, then he made her sit on the bed, lift her frock and pressed her breast and taking pillow to gagged her to kill her all attracted the use of criminal force. Here the age of the victim girl is only 11 years and taking a little girl inside the room in absence of other that too in the pretext of giving something and then lifting her frock and putting his hand on her breast and then pressing her breast for which she sustain pain is amounted to use of criminal force to outrage the modesty of the woman.
- 32. From my aforesaid discussion I come to my considerate finding that prosecution fairly able to bring home the charge of section 354 IPC and charge of section 8 of the POCSO Act against the accused Basudev Deka beyond all reasonable doubt.
- 33. In the result, I hold accused Basudev Deka guilty of committing offence punishable u/s-354 IPC and section-8 of the POCSO Act and accordingly I convict accused Basudev Deka u/s-354 IPC and section-8 of the POCSO Act. His bail stands cancelled.
- 34. Considering the facts and circumstances of the case and nature of the offence committed by the convicted accused

Basudev Deka, he is not entitled the benefit of Probation of Offender Act or section 360 I.P.C. Accordingly, convicted accused Basudev Deka is heard on the point of sentence. Accused plea is of clemency. I have heard Id Special PP for the state and learned defence counsel for the accused on the point of sentence.

HEARING ON SENTENCE

- 35. I have heard accused and his counsel and prosecution side on the point of sentence. Accused pleaded mercy and his sentence is written in a separate sheet enclosed with the case record. Ld. accused counsel prayed for leniency considering the fact that accused is only earning member of the family and he is to look after his ailing mother, wife and his children. Ld. Special P.P submits that accused be sentenced in accordance with law.
- 36. Considering the nature of the offence and facts and circumstances under which accused have committed the offence of sexual assault on a minor girl of 11 years and increasing number of sexual assault on child, I am of the opinion that accused does not deserve any leniency and he is to be dealt with exemplary punishment so as to send message to the society that like-minded will also be dealt in same manner.

RESULT

37. Accordingly, I hereby sentenced the accused Basudev Deka to undergo R.I. for 4 (four) years and to pay fine of Rs. 3,000/- i/d 6 (six) months S.I. u/s-8 of the POCSO Act and further sentenced the accused to undergo R.I. for 3 (three) years and to pay fine of Rs. 2,000/- i/d 4 (four) months S.I. u/s-354 IPC. All the sentences will run concurrently.

ORDER

38. Accordingly, I hereby sentenced the accused Basudev Deka to undergo R.I. for 4 (four) years and to pay fine of Rs. 3,000/- i/d 6 (six) months S.I. u/s-8 of the POCSO Act and further sentenced the

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accused to undergo R.I. for 3 (three) years and to pay fine of Rs. 2,000/- i/d 4 (four) months S.I. u/s-354 IPC. All the sentences will

run concurrently.

39. Period under detention is set off u/s 428 Cr.P.C. Let furnish

free copy of Judgment to convicted accused Basudev Deka.

40. The convicted accused is told that he has right to appeal

against the judgment and order of this court before Hon'ble High

court through the jail authority or independently of his own. Con-

victed accused is further informed that he is entitled free legal aid

to prefer appeal before the Hon'ble High court.

41. Send copy of judgment to learned District Magistrate

Nalbari u/s 365 Cr.P.C.

Given under hand and seal of this Court on this 29th day of

August, 2019 at Nalbari, District- Nalbari.

(Smti S. Bhuyan) Special Judge, Nalbari

Dictated and Corrected by me,

(Smti S. Bhuyan) Special Judge, Nalbari.

Typed by, Biswajit Bhattacharjya Copyist

APPENDIX

A. **Prosecution witnesses**

PW-1, Sewali Medhi (informant),

PW-2, Miss 'X' (victim),

PW-3, Basanta Rajbongshi,

PW-4, Arjun Barman,

PW-5, Latika Harijon

PW-6, Manalisha M Bhakta (I/O).

B. <u>Defence witness</u>

NIL

C. Prosecution Exhibits

Ext-1, Ejahar,

Ext-2, statement of victim recorded u/s-164 Cr.P.C,

Ext-3 Sketch Map of the place of occurrence,

Ext-4, charge sheet.

D. <u>Defence Exhibit</u>

Nil.

Special Judge Nalbari