IN THE COURT OF DISTRICT & SESSIONS JUDGE: CACHAR; SILCHAR

SPL. POCSO CASE NO .25of 2013

(U/S 4 of POCSO Act.)
Present:-Shri K. Choudhury, LL.M.,
Special Judge,
Cachar,Silchar.

State of AssamComplainant.
-Versus-
Deben Ghatowar, S/O- Late NetaiGhatowar Dayapur. P.S. Udharbond
Charge framed on:09.10.2013.
P.Ws. examined on:27.11.13;12.12.13; 07.01.2014. C.Ws examined on;25.02.14; 13.03.14.
Statement of accused recorded under section 313 Cr.P.C:- 10.01.14; &11.03.14.
Argument heard on:18-05-17.
Judgment pronounced and delivered on:23-05-17. Learned Counsel Appeared
For the State:

<u>JUDGMENT</u>

1. Prosecution case as it evolves from the record is thaton23-05-2013 at about 12 noon, the accused being the neighbor of the complainant tempted the minor daughter of the complainant aged about 8 years, here in below referred as victim, by showing her a jackfruit and induced her to go to his homestead. Thereafter he took

her to the adjacent hillock and forcibly rapped her beneath the jackfruit tree, and threatened her with dire consequences in case of disclosure. In the meantime his wife came there and handed over a note of Rs.20/- denomination to the victim asking her not to disclose the matter to her father. Thereafter, the victim came to her house. Her mother noticing oozing out of blood asked her about the incident. The complainant thereafter knowing about the incident lodged FIR on 25-05-13 against the accused. The same was registered as Udharbond P.S. case No. 61/13, U/S 376/506 IPC. During investigation the accused was arrested and the victim was medically examined and she also gave statement U/S 164 Cr.P.C. Doctor could not give opinion regarding the age of the victim for non-receipt of X-ray report. On completion of the investigation the I.O. submitted charge sheet against the accused U/S 6 of POCSO Act.

- 2. Learned C.J.M. Cachar, Silchar after procuring the attendance of the accused furnished copies of all relevant documents and committed the offence fixing 26-08-13 for appearance of the accused before the Sessions Court. The then predecessor in office after hearing both sides, and considering of the materials on record framed formal charges against the accused U/S 4 of Protection of Children from Sexual Offences (POCSO)Act 2012. The charge was read over and explained to the accused to which the accused pleaded not guilty. Hence trial began.
- 3. To prove the case prosecution examined as many as six witnesses including the victim. Two witnesses were also examined as C.W.s.

- 4. Defence plea is that the family members of the complainant used to take jack fruit from the house of the accused without permission and when the accused warned them, a false case was filed against the accused and the victim being tutored adduced false evidence.
- 5. During examination of the accused U/S 313 Cr.P.C. the accused took the similar plea and pleaded as innocent. After that my learned predecessor heard argument of both sides and on the date of Judgment referred the matter to the Hon'ble High Court on the question of validity of Section 29 of the POCSO Act in the light of Article 14,20, 21 of the Constitution of India.

Hon'ble High Court vide Judgment and order dated 25-01-17 passed in Crl. Reference No. 1/15 answered the reference in negative and directed this Court of Special Judge to pronounce the Judgment in accordance with existing provision of the Act of 2012. Hence, this Court proceed to hear the argument.

- 6. Now, point for decision is as to whether, under the facts and circumstances of the case, the accused committed any offence of penetrative sexual assault as charged U/S 4 of POCSO Act.
- 7. To decide the above I have heard learned counsel of both sides at length and perused the entire evidence on the record. Findings, decision and reasons thereof are given below:
- 8. P.W.1 is the victim who being found below 12 years of age was put some question and on being satisfied the learned predecessor

recorded her evidence on oath and in camera. Her approximate age was recorded as 11 years. She deposed that about six months prior to her evidence one day at noon while she was playing *Ranna-bati* alone the accused came there and offered to give her jackfruit to eat from their tree, and saying the same took her to some distance near a tree. After that he pushed her on a ground. She tried to raise cry.He then tied her mouth by a *Gamucha* and pulled down her panty. After that he opened her pant and committed sexual assault and gave two jackfruits and Rs.20/- asking her not to tell the matter to anybody. When she replied that she would tell the same to her parents the accused threatened her to kill and would put her in a gunny bag and would throw it away. At that time her father was absent in the house for work. On that day she did not tell anything to anybody. On the following day seeing her panty, when her mother asked, her she reported the matter. Thereafter her father lodged the FIR

9. P.W. 2 – the father of the victim, deposed that on the following day of the alleged incident his wife saw blood on the panty of the victim and on query the victim reported that the accused taking her in a jungle with promise of giving jackfruit committed rape on her (the victim). It was also reported by the victim that the accused after committing rape gave her Rs.20/- and also threatened her with dire consequences in case of disclosure. It is further deposed that on being so reported by his wife he reported the matter to the member of Panchayat and after that he lodged the FIR. During investigation the victim was medically examined, but for demand of money by the medical authority X-ray investigation could not be done. He lodged FIR two days after the alleged incident as the matter was informed to the group member and panchayat.

- 10. PW. 3 mother of the victim deposed that on the night of the alleged incident the victim felt ill due to fever. On the following day she saw blood in the panty of the victim. The victim then reported that the accused telling her to give a big jackfruit from his *tilla* took her and committed rape. The accused asked the victim not to disclose anything to anybody and in case of disclosure she would be killed. The accused also gave Rs. 20/-her (victim). The matter was reported to the complainant, who lodged the FIR.
- 11. PW. 4 Sanju Mia Laskar, deposed that about seven month back of his deposition, one day while he was engaged in the construction work of a drain of Education department besides the house of the accused saw the victim coming out from the direction of the house of the accused. The victim was found crying. On query the victim told him that the accused promising to give jackfruit took her to his house and committed rape on her. He then called Sahajul Ali, the ward member and informed the matter. Sahajul Ali advised to send the girl to her parents and the victim was sent to her house.
- 12. PW. 5 is the I.O. According to him O/C of the P.S. on 25-05-13 received the FIR and registered the same as Udarbond P.S.case U/S 376/506 IPC and entrusted him to investigate the case. During investigation he made arrangement for sending the victim for medical examination. He visited the P.O. and drew sketch map of the P.O., recorded statement of witnesses and also sent the victim to the Magistrate for recording statement. On completion of investigation he submitted charge sheet.

13. P.W.6 is the M.O. According to her on 25-05-13 while she was working in the deptt. of Forensic medicine SMCH examined the victim, a student of Class-II, and aged about 12 years being disclosed by the victim. The victim gave history of the alleged incident to the affect that on 23-05-13 at around 2.00 p.m. the accused told the victim to go along with him to get a jackfruit. The victim's elder sister allow her to go with the accused. After that the accused taking the victim to a hillock forced the victim to open her undergarments and forcefully tried to commit sexual act. The victim girl shouted and wife of that man i.e. the accused came to the spot and scolded him. He then started beating his wife and gave the victim Rs.20/- and also threatened the victim to kill her in case the incident is disclosed to anyone. The victim girl then went back and did not tell anything to anybody. The elder sister of the victim came to know about the incident from the wife of the accused when the sister went to bring water from the hillock where the wife of the accused told her (sister of the victim) the whole incident.

Main findings of the M/O are that, there were 23 numbers teeth, auxiliary body hairs are found not present, breast found sealed type, puberty not attained, no abnormality detected, intelligence was found average, no stains on wearing garment detected, no bodily injuries detected, hymen found healthy, intact and deep seated. X-ray advised but report was not received. The doctor opined that the definite opinion could not be given for want of X-ray report. The doctor however on the basis of finding of teeth opined the age of the victim as between 6 to 12 years.

- 14. C.W.1 Rashmina Begum, the elder sister of the victim, deposed that on the date of occurrence at about 1 or 2 p.m. while the victim was playing, the accused called the victim to his house. The victim returned home as crying. On the following day when she went to the stream near to the house of the accused to fetch watermet the wife of the accused, who reported that accused committed rape on the victim. She further deposed that returning home when she told the matter to her mother it was reported by her mother that blood was seen on the panty of the victim. Thereafter on query the victim told that the accused committed rape on her, and out of fear of threatening of the accused to the affect that in case of disclosure the accused would kill her, she did not report the incident.
- 15. C.W. 2- Smti Momota Gatowar, the wife of the accused deposed that the house of the victim was situated at far away from their house. She knew Sanju Mia. She did not see the occurrence and did not hear anything regarding the alleged occurrence and cannot say the reason of arrest of his husband.

In the cross-examination she stated that she did not meet the sister of the victim i.e. C.W.1 and told anything to her. She further stated that prior to the alleged occurrence the family members of the victim stolen away jackfruit from their tree and for which her husband threatened them. Neither she nor her husband gave any money to the victim or to any family member of the victim and allegation as brought against her husband i.e the accused was false and baseless.

16. During hearing learned P.P. has strongly submitted that there is no reason for disbelieving the testimony of the victim

corroborated by other material witnesses. On the contrary learned defence counsel strongly contended that there are many discrepancies and contradictions to shake out the credibility of the material witnesses. Further it is submitted that the victim as a tutored witness adduced evidence against the accused.P.W.4 is a chance witness and others are related witness. Further contention is that, delay of two days of lodging FIR, under the facts and circumstances of the case, being not properly explained is fatal for the prosecution. Further contention is that medical evidence does not support the case of the prosecution.

- 17. P.W.5, the I.O., in his cross-examination while giving the description of place of occurrence stated that to the east of the place of occurrence there were houses of Jagannath Gatowar and other people and to the east there is a P.W.D road. Statement of any people of Deshowali community shown in the sketch map was not recorded. The I.O. proved some omissions/contradiction to the effect that —
- 1. P.W.1 did not state about her going to school and playing of rannabati returning from school and that her mother was in the house of her uncle and her sister was in vegetable garden. P.W.1 further did not state to the I.O. that she tried to raise cry but the accused tied her mouth with a gamucha and the accused gave her Rs.20/- and two jackfruit and about any threatening of dire consequences.
- 2. P.W.2 did not state before the I.O. that the victim at the material time did not return from school and about giving of Rs.20/- to the victim by the accused and about threatening in case of disclosure.
- 3. P.W.3 did not state before I.O. that, on that very night the victim suffered from fever and also had been suffering from fever at the time of giving statement, and about disclosure of the incident by the elder sister of the victim and about that accused took away the victim for

giving jackfruit and about that after sometime the victim returned with a jackfruit, and that the accused gave the victim Rs.20/-.

The I.O. however stated that all the three witnesses stated before him that wife of the accused gave Rs.20/- to the victim.

4. P.W.4 did not state before the I.O. that at the material time he was carrying out construction work of Education Deptt. and the victim was found crying and about that he called the member who advised him to send the girl to her parents.

18. P.W.1 both in examination-in-chief and his crossexamination stated that on that day she did not tell to anybody. That being so, the evidence of P.W.4 that, on the date of occurrence she found the victim coming from the direction of the house of the accused as crying, and on guery the victim stated that the accused committed rape on her, has got little evidentiary value. Further it is also difficult to rely upon that any child of 11-12 years of age would easily disclose anything of such nature of alleged incident to any outsider and would not disclose the same to any inmates of her family and will wait for days till query is made. The evidence of P.W.4 does not disclose anything about the manner how the victim was rapped by the accused. It is also not believable that any minor victim without giving any description of the alleged incident would merely say that she was rapped. P.W.2 and 3 as a reported witness stated that the victim reported that she was rapped. But the manner how it was committed is not disclosed. C.W.1, the elder sister of the victim, deposed that the victim was found crying. Now question comes as to why no query was made about her crying on that very day just after the alleged incident. Similarly it appears to be very un-natural that the wife of the accused

first reported to the C.W.1 about the alleged incident. In the history recorded by the doctor being narrated by the victim the accused gave Rs. 20/- to the victim though corroborated by the P.W.1,2 & 3 but it is a contradiction in as much as according to I.O. all of them stated that wife of the accused gave Rs.20/-. P.W.1, the victim in her evidence stated that the accused pushed her on the ground and she tried to cry but her mouth was tied with *gamucha*. But as per the medical evidence the victim narrated to the M.O. that the victim shouted and wife of the accused came to the spot. If it is believed that the victim shouted and the wife of the accused came, question comes as to why the neighbouring people could not hear the shout. Medical evidence does not disclose any injury. Had the victim was pushed down on the ground and the accused forcibly rapped her some sorts of injury naturally would have been found in her body. According to the mother of the victim, she noticed blood stain on panty of the victim. This implies that victim sustained injury. If that be so questions will naturally follow as to why the doctor did not find any mark of injury. Hymen was found to be intact and deep seated. Doctor also opined that no evidence of sexual intercourse was detected. Further, evidence of inmates of the victim merely disclosed about the report of commission of rape by the accused without any description how it was committed. No report of pain of the victim is disclosed in the entire evidence. The medical evidence also does not disclose anything about pain. P.W.1 also did not disclose about any pain suffered by her. Therefore, the evidence that some blood stain was noticed in the panty of the victim is not at all reliable and baseless. If it is believed that the victim reported the matter on the following day of the incident question comes as to why that the parents of the victim waited one more day to lodge FIR. No cogent explanation is found in

the evidence. The evidence of P.W.2, father of the victim, that he could not get X-ray examination done as the medical authority wanted money is also very difficult to be relied upon, in as much as the victim was got medically examined at the instance of Police.

- 19. In view of the above discussions, contentions, deductions it clearly appears that defence plea as taken about the stained relation between the parties relating to taking of jackfruit by the inmates of the family of the victim has got sufficient force and also it clearly appears that out of that stained relation the victim as a tutored witness gave evidence against the accused and the story is a concocted one. Delay of lodging FIR, under the facts and circumstances of the case, is also considered as fatal for the prosecution. Further, evidence of P.W.4 for reasons discussed earlier is also considered as hearsay evidence. Therefore upon consideration of the evidence in its entirety being found full of contradictions and discrepancies and the evidence of rape being not supported by medical evidence it is very difficult to take presumption as emphasized U/S 29 of POCSO Act.
- 20. In the light of the above discussion, it is held that prosecution case is not proved beyond all reasonable doubtU/S 4 of POCSO Act. Accused is thus held to be not guilty of the offences as charged or whatsoever. He is thus acquitted and set at liberty forthwith.

21. Judgment is pronounced and delivered in the open court under my signature and seal of this court on this 25th day of May, 2017.

Dictated & Corrected by me

(Shri K. Choudhury), Special Judge. Cachar, Silchar. (Shri K. Choudhury), Special Judge, Cachar, Silchar.

IN THE COURT OF SESSIONS JUDGE, CACHAR, SILCHAR.

SPL POCSO Case No 25 of 2013. APPENDIX

(A) PROSECUTION WITNESSES: -

P.W. 1-Nashima Begum Laskar

P.W. 2- Sahab Uddin Laskar.

P.W. 3 - Angura Begum.

P.W. 4 -Sanju Mia Laskar.

P.W. 5 -Abu Das

P.W. 6 -Dr. Monalisa Dev

(B) DEFENCE WITNESSES: -

(C) Court Witnesses:-

C.W.-1 –Rashmina Begum.

C.W.-2 -Smti. MoumitaGhatowar

(C) PROSECUTION EXHIBITS: -

Ext.1 – F.I.R.

Ext.1(1) – Signature of the then O.C. of Udharbond P.S

Ext. 2 – Sketch Map.

Ext. 2(1) - Signature of PW-5

Ext.3-Charge-Sheet

Ext. 3(1) – Signatures of P.W.-5

Ext. 4 — Medical Report.

Ext.4(1)-4(3)—Signature of P.W-6

Ext-4(4) – Signature of Dr. Gunojit Das.

(E) <u>DEFENCE EXHIBITS</u>: - NIL

(F) COURT EXHIBITS: - NIL

(G) EXHIBITS PRODUCED BY WITNESSES: - NIL.

Transcribed by me (Shri K. Choudhury),

Pramotesh Dey. Special Judge, Stenographer-1 Cachar, Silchar.