IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 71 of 2017

Under section 10 of POCSO Act. (Arising out of G. R Case No. 3345/17)

State of Assam

-Vs-

Sri Hem Chandra Keot ... Accused Person

Present: Smti I. Barman, AJS,

Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Smti Dulumoni Sinha, Advocate

Date of Argument : 20-06-2019 and 04-07-2019

Date of Judgment : 10-07-2019.

JUDGMENT

- 1. The genesis of the present case is anal sexual assault on a nine years male child (herein after called as "the victim"). It is alleged that on 28-08-2017 at around 3 p.m., when the informant's nine years old son was playing, taking advantage of absence of other family members, accused Hem Chandra Keot by luring called the informant's nine years old son, made him fell down under bamboo trees and making him nude, sexually assaulted him.
- **2.** On receipt of the FIR **(Ext.1)** on 29-08-2017 from the informant that is the victim's mother (PW 1), the In-charge of the Borsola Police Out Post made the G.D. Entry No. 450 dated 29-08-2017 and forwarded the FIR to the Officer-in-Charge of Dhekiajuli

Police Station for registering a case and launched investigation of the case. Receiving the FIR, the O/C, Dhekiajuli PS registered the case being Dhekiajuli P.S. Case No. 779/17 u/s 377 of the IPC and entrusted SI Sura Chandra Doley (PW 8) to investigate the case who had already initiated the investigation. In course of investigation, the Investigating Officer (PW 8) visited the place of occurrence, recorded the statement of the witnesses, arrested the accused, sent the victim for medical examination, got his statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid charge sheet against the accused Hem Ch. Keot u/s 377 of the IPC.

- **3.** On appearance of the accused person before this Court, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, my learned predecessor, framed charge against the accused Hem Ch. Keot under section 10 of POCSO Act and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- **4.** To substantiate the case, prosecution examined as many as 9 (nine) numbers of witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denied all the incriminating evidence that emerged against him.
- **5.** I have heard the argument of the learned counsel of both sides and also have gone through the materials on record.
- **6.** The point for decision in this case is that -
 - (1) Whether the accused Hem Chandra Keot on 28-08-2017 at around 3 p.m. at village Na-pam Pothar under Dhekiajuli Police station committed aggravated sexual assault on the victim male child aged about 9 years and thereby committed an offence punishable under section 10 of POCSO Act?

Reasons, Decisions and reason for decision.

- **7.** Mr. M. Baruah, the learned Special Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of sexual assault on a boy of 9 years old. He further submitted that the evidence of the child victim of sexual assault and the evidence of other witnesses is enough to convict the accused person.
- **8.** Controverting the said argument, Smti Dulumoni Sinha, learned counsel appearing for the accused, submitted that that no explicit reliance can be placed upon the evidence of the minor victim who is a tutored one. Moreover with the discrepancies in the evidence of the prosecution witnesses during investigation and during trial and the medical evidence which is not suggestive of any injury, made the prosecution case doubtful and as such the accused is entitled to benefit of doubt.
- **9.** In this case, the victim and his parents categorically stated that the victim was 9 years old at the time of incident and the medical report also reflects that the victim was below ten years. Age of the victim is not disputed in this case. As such, I unhesitatingly hold that the victim is a child below the age of 12 years at the time of the incident.
- **10.** Now, the question is whether the accused Hem Chandra Keot committed any offence on the victim child. In this respect, it would be apposite to evaluate the evidence of the prosecution witnesses.
- **11.** Let us first see what the victim, the star witness stated.

PW 4 is the victim. He deposed that on the day of incident at around 3 p.m., while he was playing under a Bakul tree, accused came there and luring him to give fishing rod took him inside the jungle and asked him to touch his sexual organ. The accused also threatened him that if he did not touch his sexual organ he will cut him with a dao. He further deposed that the accused opened his

(victim) pant, laid his (accused) wearing gamosa on the ground and inserted his penis into the anus of the victim and thereafter the accused asked the victim to put on the pant. He noticed some jelly type substance emitted from the penis of the accused. Thereafter, the accused gave him one fishing rod. In the incident blood was oozing out from his anus. He returned home and changed his clothes and informed the matter to his father. Knowing about the incident his father went to the house of the accused but did not find him and on the next day, lodged the FIR. He proved his statement before the Magistrate u/s 164 Cr.P.C. as Ext. 2. He admitted that at the time of giving statement before Magistrate as he was unable to write his name, so his mother put her signature in his statement.

During cross he stated that at the time of incident he was a student of class IV. He admitted that from "Ka" standard they were taught to write own name. He also admitted that after recording statement, the learned Magistrate asked him to put signature but he told her that he cannot write his name, so he did not sign on it. According to him, on the day at 12.00 noon the school hour was over. He stated that at the time of the incident the accused was holding a dao in the right hand and by left hand, holds him (PW 4) and he (PW 4) was lying upside down. His mother also noticed blood stain on his white pant. The accused did the misdeed with him for about 10 minutes and during that time the accused was holding the dao in his hand. He admitted that he sustained some scratch injury without bleeding. This witness again stated about bleeding of his anus in the act of the accused and doctor also had seen the injury.

12. Close on the heels of the evidence of the victim, his mother who is the informant of the case stated in her evidence as PW 1 that on the day of incident when her victim son was playing under a Bakul tree in front of their house, accused Hem Keot was doing work near the said tree. At that time accused called her son towards the bamboo groves luring to give fishing hook and thereafter asked her

son to touch penis. The accused also asked her son to open his pant and when her son refused, the accused threatened him by showing a dao and forcefully took off his pant. Thereafter, the accused made him fell upon ground and committed carnal sex on him. After committing the said act, accused gave her son a fishing hook and luring that he would give Rs. 10/-, asked him not to disclose the matter to anybody. After the incident, her son returned home and fell asleep and when they returned home from work, found the victim crying. He did not respond as usual and his health condition is also not found good. Though at first her son hesitated to report the matter but on being asked by his father, he narrated the whole incident in her presence. Then they searched the accused in his house but did not find him as he fled away. Thereafter, she lodged the FIR.

During cross she stated that the bamboo grooves where the accused took her son are owned by her cousin brother and in the back side of the said bamboo groves, there is residence of her brother. At the relevant time neither her brother nor his wife were at home and her mother who is a deaf and dumb was at home. She further stated that near her house, the residence of Gobinda Deka and 3/4 others are situated. She also stated that she noticed blood oozing out from the anus of her child and back side of the clothes were also wetted but they could not produce the clothes to the police.

13. PW 2, the father of one daughter and the victim male child, categorically stated that on the day of incident, the accused called his son to the bamboo groves with luring to give fishing hook. Thereafter the accused laid his wearing gamosa, asked the victim child to lie thereon and then asked to touch the penis of the accused. Thereafter the accused asked the child to open his pant and inserting his penis in anus did carnal sex. After that accused gave one fishing hook to the child and luring to give Rs. 10/-, asked the victim not to disclose

the matter to others. On the day, when he returned from work, he found his son crying upon bed. Then on being asked, the victim told him that the accused calling him under the bamboo groves did carnal sex, as a result he had been suffering from pain in backside. Hearing the incident, he went insearch of the accused but did not find him. Thereafter, his wife lodged the FIR.

During cross, he stated that his daughter did not state about the incident as she might have felt shy. He also stated that in the place of occurrence many broken articles like bamboo root, branch of bamboo etc were lying. He only saw the blood stain but not seen any injury and the pant of the child was also found with blood stain. Villagers also noticed the blood stain in the pant of his son.

- **14.** PW 3 Sri Gobinda Deka, the co-villager deposed that the parents of the victim informed him that the accused committed carnal sex on the victim, aged about 9 years, under the bamboo groves. Then they the villagers proceeded to the house of the accused but did not find him.
- **15.** PW 5 Dr. Nabajit Barman, Demonstrator, Department of Forensic Medicine and Toxicology, TMCH deposed that on 30-08-2017 at around 2 p.m. in reference to Borsola GDE No. 450 dated 29-08-2017 he examined the victim and opined that the age of the victim boy is above 7 years and below 10 years and no sign of recent anal intercourse or evidence of recent injury on private part or any other parts of the body was detected. He proved the Medical report as Ext.3.

During cross, he stated that if a minor boy aged about 7 years was anal inter-coursed with force, there must be some injury over private parts and anal inter-course by any person to a child under bamboo groves, there may be some injury.

16. PW 6 Pulen Rajbongshi deposed that the accused used to work in his house as day labour and on the day of incident when he was at

Dhekiajuli, his wife informed him over phone that accused Hem Chandra Keot committed anal intercourse to the victim in the midst of their bamboo groves.

During cross he admitted that there is a Bakul tree infront of their house. He stated that the accused was apprehended by police on the very night of the incident.

- **17.** PW 7 Atul Barman on the next day morning came to know that the accused forcefully committed anal sex to the victim in the back side of bamboo groves. At this stage the witness was declared hostile.
- **18.** PW 8 SI Sura Chandra Doley, the Investigating Officer, deposed that on 29-08-2017 on receipt of an FIR from the informant he made the Borsola OP GDE No. 550 dated 29-08-2017 and sent the FIR to O/C Dhekiajuli Police station for registering a case. Accordingly, consequent to the registration of the case by O/C, he was entrusted to investigate the case. During investigation he visited the place of occurrence, prepared the sketch map of the place of occurrence vide Ext. 4, recorded the statement of witnesses, sent the victim for medical examination, got recorded his statement u/164 Cr.P.C., arrested the accused and on completion of investigation, submitted chargesheet against the accused u/s 377 of the IPC vide Ext. 5. He confirmed the relevant statement of hostile witness Atul Barman made before him vide Ext. 6(1).

During cross, he stated that when he recorded the statement of the victim, the other police personnel were present there. He did not seize any wearing apparels of the accused or the victim or any other articles. He admitted that he did not sent the accused for medical examination whether he is capable of doing sexual offence.

19. PW 9 Miss Aklima Begum, the then Judicial Magistrate, 1st class, Tezpur recorded the statement of the victim u/s 164 Cr.P.C. in

presence of mother of the victim and after recording the statement of the victim, obtained the signature of the mother of the victim.

It is already discussed that as per ocular evidence as well as 20. medical evidence, the child victim is below the age of 12 years. Bearing in mind the above findings as regards the age of the victim, let me, now turn to the question of alleged offence of sexual assault on the child victim below the age of 12 years. While considering this as part of the matter, it is worth noticing that it is the testimony of the victim which has brought the allegation of anal sex against the accused person. The victim boy PW 4 stated that while he was playing under a Bakul tree in front of his house, accused came there and by luring to give some fishing rod took him inside the jungle and asked to touch his sexual organ. The accused also threatened him showing a dao that if he did not touch his sexual organ he would cut him. Thereafter, the accused asked him to open his (PW 4) pant. The accused laid his wearing gamosa on the ground and inserted his penis into the anus of the victim, as a result blood was oozing out from his anus. Thereafter the accused asked the child to put on the pant. The victim also noticed some jelly type substance emitted from the penis of the accused. After the incident the accused gave him one fishing rod. Then he came home, changed clothes and later on informed the matter to his father. Corroborating his evidence, PW 1, the informant as well as the mother of the victim, testified that on the day when her son was playing under a Bakul tree in front of her house, accused Hem Keot was doing work near the said tree. At that time the accused called her son towards the bamboo groves luring to give him fishing hook and thereafter asked her son to touch his penis. Though at first her son refused but the accused threatened him with a dao. The accused made the child laid upon the ground and committed carnal sex on him. After the incident, the accused offered him a fishing hook and luring to give Rs. 10/- asked him not to disclose the matter to others. She also stated that when she and her husband returned home from work, the victim did not respond as

usual and lateron the child reported the incident. During cross, she also stated that she noticed bleeding from the anus of her child and back side of the clothes were also wetted. PW 2, the father of the victim, in the tune of PW 1 made the same version. PW 3, PW6 and PW7 are neighbours and hearsay witnesses who also heard that the accused committed carnal sex with the victim under bamboo groves. So, there is corroborating evidence that the accused on the day taking the victim child to the jungle, took off his pant, made him laid upon the ground and then committed carnal sex on him (PW 4). The victim made the same version in his statement u/s 164 Cr.P.C. Ext.2 wherein he stated that the accused inserted his penis in his anus for about four times as a result he felt pain. The evidence of the victim's mother that on the day while she returned home from work found the victim not responding as usual also corroborated by the victim in his statement made u/s 164 Cr.P.C. wherein he clearly stated that usually when his parents returned home, he and his brothers and sisters ran to them but on that day he did not go to them and feeling unwell was lying on bed and hence his parents came to him and on being asked, later on he reported the incident. Though the statement u/s 164 Cr.P.C. is not a substantive piece of evidence but in the case the victim in deposition made the same version. Although there are no other witnesses from the scene of crime, which is also not expected as this kind of offence are not committed within anyone's view, the unflinching evidence of the victim with corroboration from his parents without any discrepancies, strengthened the case of the prosecution.

21. Learned defence counsel pointed me out that as per evidence of the victim blood was oozing out from his private part and P W 1, the mother of the victim, the most natural witness also during cross stated that she noticed blood emitted from the anus of the child and the back side of the clothes of the victim child were also wetted but injury report does not support the same. In this case, the victim was medically examined after two days and doctor found no any

injury on the private part or any other parts of the victim. During cross the Medical Officer stated that if a minor boy was anal intercoursed, there must be some injury over his private part. In this case no injury was detected. In my opinion, being a child of 9 years he might not know what is penetration or what was going on with him. But the facts remained that on the day the accused by luring took the victim under bamboo groves, asked the child to touch his (accused) penis and opening the pant of the child touched the anus by the penis of the accused and in that case injury may not be found

22. The Learned Defence Counsel also urged that the blood stained clothes of the victim as alleged was not seized by the police for sending it to the FSL to ensure that there was any semen or blood of the victim on the clothes worn by the victim due to injury. The obvious reason may be that those clothes were washed off. The father of the victim is a Rickshaw puller and mother is a day labour. They might have no knowledge that those clothes have to be kept in order to produce before police. Now, the question is, whether the accused will have to be acquitted on that score?

In Visveswaran v. State Rep. By S.DM of the Supreme Court reported in (2003) 6 SCC 73 in para 12, the Hon'ble Supreme Court held that-

"Further it is also required to be kept in view that every defective investigation need not necessarily result in acquittal. In a case of defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to the rejection of the case of the prosecution when it is otherwise proved."

In the instant case when there is corroborative evidence of the victim and his parents on material particular regarding touching the

anus of the child by the penis of the accused as discussed above, non seizure of blood stained clothes and not sending it to FSL, the prosecution story cannot be thrown away overboard which is otherwise established.

23. Another argument of the defence is that the victim is a tutored one. Settled law is that a child witness is required to be considered with care and caution and possibility of being tutored is required to be 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 guestion 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.

- **24.** Defence taking the plea that the child is tutored one, suggested that he stated before the Magistrate and before the Investigating Officer as per instruction of other person which the victim clearly denied. In this case the victim made the same version in court whatever he stated before the Magistrate u/s 164 Cr.P.C. and his evidence has been corroborated by his parents. Evidence of the victim is found spontaneous and trustworthy without inviting any suspicion of being tutored. I find nothing to disbelieve his evidence.
- 25. Again, it is pertinent to note down that there was no animosity between the parties. In fact, the victim called the accused as "kaka" (grandfather). Nothing in the record throws any light on any kind of animosity between the victim's family and the accused. There is no basis for the minor child to bring a charge of anal sex against the accused person unless it was true. There would be no reason to malign his name by exposing himself as a victim of sexual assault unless he was offended by a man touching his private part. On the very day, on being asked, he reported the incident to his father and then though his father and mother went to the house of the accused but did not find him and then FIR was lodged on the next day. I find nothing why should a boy depose falsely against the accused regarding sexual assault. To disbelieve his evidence would be tantamount to adding insult to physical and mental injuries already inflicted on him. The evidence of the victim is convincing as it carries quality and adequate reliability. A clear and dispassionate scrutiny of the evidence of the victim shows that his evidence remain undoubted regarding causing of sexual assault by the accused and therefore his evidence cannot be brushed. I find nothing to discredit his evidence. Though in absence of any injury, it cannot be held that there was penetration but the corroborative evidence of the child victim and his parents it is established that with sexual intent the

accused by his penis touched the anus of the child below the age of 12 years.

- **26.** From the evaluation of the prosecution material discussed above, it is abundantly clear that the evidence brought on record contained positive proof, credible sequence of events and factual truth that the accused Hem Chandra Keot asked the victim to touch his sexual organ and touched the anus of the child by his (accused) penis and the child being below the age of 12 years, it comes within purview of section 9 (m) of POCSO Act for committing the offence of aggravated sexual assault punishable u/s 10 of POCSO Act. Accordingly, accused Hem Ch. Keot is held guilty for the offence punishable u/s 10 of POCSO Act and convicted accordingly.
- **27.** I have heard the accused Hem Ch. Keot on the point of sentence. His statement is recorded where he stated that he has his wife and two sons, aged about 14 years and 21 years and he is the only bread earner of his family hence, prayed for leniency.
- **28.** I gave my anxious consideration on the aspect of quantum of sentence. Section 10 of POCSO Act prescribes punishment up to 7 years but the same shall not be less than 5 years.
- **29.** In the instant case, the offence committed by the accused is sexual assault against a child of 9 years. Accused mentioned his age as 80 years. Considering the submission of the accused, I am of the considered opinion that the minimum punishment provided by law for the offence u/s 10 of POCSO Act will meet the ends of justice.
- **30.** Considering all aspects, I sentence the convict Hem Chandra Keot to undergo Rigorous Imprisonment for 5 years and also to pay a fine of Rs. 5,000/- in default to undergo Simple Imprisonment for another 2 months for the offence punishable u/s 10 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. His bail bond stands cancelled and surety be discharged.

- **32.** Convict/accused convict Hem Chandra Keot 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 **10**th day of July, **2019**.

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

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur

APPENDIX

Prosecution witnesses.

1. PW 1 : Mother of the victim/informant

2. PW 2 : Father of the victim3. PW 3 : Gobinda Deka

4. PW 4 : Victim

5. PW 5 : Dr. Nabajit Barman 6. PW 6 : Phulen Rajbongshi.

7. PW 7 : Atul Barman.

8. PW 8 : Sura Ch. Doley, I.O.

9. PW 9 : Miss Aklima Begum (JMFC)

Exhibits.

Ext. 1 : FIR

Ext. 2 : 164 Cr.P.C. statement of the victim

Ext. 3 : Medical report.

Ext. 4 : Sketch map

Ext. 5 : charge sheet.

Ext. 6 : Case diary.

Ext. 7 : Magistrate's Order dated 01-09-2017

(I.Barman) Special Judge, SONITPUR: TEZPUR