# IN THE COURT OF ADDITIONAL SESSIONS JUDGE, FTC, BISWANATH CHARIALI, SONITPUR, ASSAM

## Spl. (POCSO) Case No. 12/2016

u/s Sec. 4 of POCSO Act, 2012

State of Assam

-VS-

Sri Jogesh Kurmi

..... Accused person

Present:

Sri Dipankar Bora, MA, LL.M., AJS,

Additional Sessions Judge, FTC,

Biswanath Chariali, Sonitpur.

### Advocates Appeared:-

For the prosecution: Smti J. Kalita, learned Addl. P.P

For the defence

: Mr. P. P. Borah, learned Counsel

Dates of recording Evidence: 28.02.2019, 25.03.2019, 17.05.2019.

Date of Argument

: 28.06.2019.

Date of Judgment

: 12.07.2019.

#### JUDGMENT

- 1. The prosecution case in brief is that on 26.06.2016 the informant Sri Pitar Kand lodged an FIR with the OC, Biswanath Chariali PS stating inter alia that on the same day at 11 AM, his daughter (name is withheld) went to the house of one Saju Mahara in order to pick dates. At that relevant time, the accused Jogesh Kurmi took her with him with a promise to show her video film. The accused, however, took her to the house of one Dinesh Baruah in order to show her TV and cinema and closed its door and thereafter, showed her bad and illicit films on his mobile phone and committed rape on her. Later, his daughter came weeping to his house and told about the incident to her uncle Moneswar Kand. When Moneswar Kand went to the house of the accused in order to ask him about the incident, the accused Jogesh Kurmi along with the accused Sagar Kurmi physically assaulted him and on being thrown a bicycle on him, Moneswar sustained grievous injury on his left leg.
- 2. Receiving the same, the police registered a case and investigated the matter. After investigation, the police submitted charge-sheet against the accused Jogesh Kurmi u/s 4 of the POCSO Act.
- 3. Later in due course, the accused appeared before this court to face trial. The copies of the

relevant documents were furnished to him. After hearing both the sides on the point of charge, taking note of the materials furnished u/s 173 CrPC, as my learned predecessor found grounds for presuming that the accused had committed an offence u/s 4 of the POCSO Act, the charge was accordingly framed against him, read over and explained to which he pleaded not guilty.

4. During trial, the prosecution examined six witnesses in all including the Medical Officer as PW 5 and the Investigating Officer as PW 6. The accused was thereafter examined u/s 313 CrPC. His plea was of total denial. He refused to adduced any evidence on his behalf. The case was thereafter argued by both the sides.

#### **Points for determination**

Whether the accused on the day of the alleged occurrence committed penetrative sexual assault on the said victim, who is a child below the age of 18 years?

### Discussion, Decision and Reasons thereof

- 5. PW 1 is the informant and the father of the alleged victim. According to him, the incident took place about  $1\frac{1}{2}$  years back. On that day at 11 AM, his daughter-the victim went to the house compound of Sanju Mahara in order to pick dates and there the accused called her to witness films. He took her to the house of Dinesh Baruah and after closing of the door of the house and after disrobing her, committed rape on her by playing an english video on his mobile phone. PW 1 stated that the accused had touched his penis on her body. His daughter thereafter, making noise came running to her house. His brother Moneswar Kand met her and asked her about the incident. After knowing about the incident from her, his brother out of anger went to the house of the accused and indulged quarrel with him. There the accused had thrown his bicycle on the body of his brother which resulted fracture of his leg. Thereafter, he came to the police station along with his daughter and lodged the FIR. According to him, the police seized the garments of his daughter and got her medically examined. He proved his FIR as Ext. 1. In his crossexamination, he stated that the house of Dinesh Baruah is situated near his house and there was on one in the house of Dinesh Baruah on the said day. He could learn about the incident from his daughter. He also stated that the house of Dinesh Baruah and Sanju Mahara are situated near one another. He further stated the victim had reported about the incident at first to his brother Moneswar.
- 6. PW 2, Moneswar Kand stated that on the day of the said occurrence, the victim was playing in the house of Sanju Mahara and it was about 11 AM then. The accused Jogesh Kurmi had called the victim in order to show her cinema and took her to the house of Dinesh Baruah where he showed her blue film. The accused there disrobing the victim committed rape on her. The victim came running and informed him about the incident. He

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thereafter went to the front of house of Dinesh Baruah to ask the accused about the incident, where, the accused and he had a scuffle. He stated that the brother of the accused, namely, Sagar Kurmi then came and thrown one bicycle on his leg. Thereafter, he came with the victim to the police station he and his brother jointly filed the FIR, he stated. According to him, the victim was 7 years old at that relevant time. In his cross-examination, he stated that Dinesh was his paternal aunt's son. He also stated that at the time when the victim returned, his elder brother-the informant, he and his wife Reshma were present in the house.

- 7. PW 3 Joymati Teli stated that the incident took place about 3 years back. The house of the informant is situated some distance away from their house. On that day at about 11 AM, the victim came weeping to the house of the informant and informed about the incident. She stated that the accused took her to the house of Dinesh Baruah in order to show video on his mobile phone. She could know about the incident from the victim. She was picking dates at that relevant time. The victim had told her that the accused after disrobing her, committed rape on her. He could learn about the incident after she heard noise on the road. In her cross-examination, she stated that both the informant and the victim had told her about the incident. She however stated that she did not state before police during investigation that she was informed by the victim that the accused wanted to commit rape on her.
- 8. PW 4 is the victim, who is about 7 years old as per her statement. Oath was not administered on her, taking note of her tender age. She stated that her father Pitar Kand had lodged the FIR. According to her, about 3 years back on a day she went to the house of Sanju Mahara in order to pick dates. There the accused called her to show her video cinema. She went with him to the house of Dinesh Baruah, where the accused disrobed her and inserted his urinating organ in to her urinating organ. She stated that the accused asked her not to inform about the incident to any one or else he threatened and to kill her. Coming to her house, she told about the incident to her parents. Later, her father lodged the FIR and on the next day, police came. She categorically stated that the accused had committed 'rape' on her. She further stated that the police collected her clothes and got her medically examined, wherein she had put her thumb impression. In her cross-examination, she had stated that there is quarrel between the brother of the accused namely, Sagar with her uncle.
- 9. PW 5 the Medical Officer, Dr. Mitali Borborah examined the victim on 26.06.2016 at about 6.45 PM. On examination of the victim, she found the victim conscious and she stated that there was history of attempt of sexual assault. She found no signs of injury anywhere on her body. Further she found no injury on her private parts, i.e., vulva, vagina. No blood clot or any other stain was found on her body, clothing or on her private parts. She testified

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that per vagina examination was not done as the victim refused to undergo the examination. PW 5 further stated that x-ray of elbow joint and wrist joint and pelvis for age determination was done and according to her, the victim was 6 years old. She stated that no signs of rape or injury marks were found on her body. She proved her medical examination report as Ext. 3. She stated in her cross that the history she had recorded was based on what had been stated to her by the parents of the child.

- 10. PW 6 is the Investigating Officer, Indreswar Bordoloi conducted the investigation of the case and after investigation he submitted charge-sheet -Ext. 7 against the accused. In his cross-examination, he stated that he did not seize the frock of the victim. He further stated that the witness of Joymati Teli did not state before him during the investigation of the case that the victim was taken by the accused when she was busy picking dates. Further, he stated that the said witness did not state before him that the accused tried to commit rape on the victim. He also stated that he did not record the statements of Kalabati Marji, Maju Mahara and Kuldeep Majhi, whose houses are situated near the place of occurrence.
- 11. When we scrutinize the evidence of all these witnesses as examined by the prosecution, we find the victim PW4 has categorically deposed against the accused stating that the accused had committed 'rape' on her. The FIR- Ext.1 and the informant and the father of the victim too has supported the PW1 in that regard. PW1 and other PWs- PW2 & PW3 have deposed against the accused on the basis of what the PW1 and the victim PW4 had stated to them. It shows that the other PWs could know about the incident on being informed by the PW4.
- 12. PW5- The Medical Officer Dr. Mitali Borborah had examined the victim on the same day of the incident at 6.45 p.m. The incident allegedly took place at 11 a.m. on that day. PW4 has deposed that the accused disrobed her and inserted his urinating organ in to her urinating organ. According to the PW5, the victim was a girl of about 6 years old at that relevant time. If the testimony of the victim is to be believed, taking note of her tender age, we can expect that the victim might have sustained some injury at least on her private parts, as according to her, the accused had committed penetrative sexual assault on her. But on the contrary, the PW5 testified that she did not find any sign of injury on her private parts, i.e., vulva, vagina. According to her, no blood clot or any other stain was found on her private parts. She clearly testified that no signs of rape or injury mark was found on the body of the victim. She proved her medical examination report as Ext.3.
- 13. Thus we see that the PW5 has totally contradicted the version of the victim- PW4, on whose information, the FIR was lodged by the PW1 and the other witnesses have deposed. Further the PW5 stated in her cross that the history she recorded on the Ext.3 was on the basis of what the parents of the child stated to her. She noted in the Ext. 3 that there was history of attempt of sexual assault, which again contradicts the prosecution case.

- 14. Moreover, in the Ext1, the informant alleged that the accused Jogesh Kurmi along with the accused Sagar Kurmi physically assaulted PW2 Moneswar Kand and on being thrown a bicycle on him, Moneswar sustained grievous injury on his left leg. PW1 in his evidence exaggerated the occurrence and stated that the left leg of his brother, Monreswar got ffractured in the incident. Ext.2- Medical injury report and the evidence of PW5, on the other hand, reveal that PW2 had only sustained simple injury on his left leg.
- 15. From the evidence as discussed above, we find the PW4 stating in her cross that her uncle-PW2 has quarrel with the brother of the accused, namely, Sagar.
- 16. Thus we find that the contradictory evidence of PW5 with the other prosecution witnesses make the prosecution case weak and undependable. We too have noted exaggerating evidence of PW1 with regard to the injury sustained by the PW2. PW2 himself is found to be silent with regard to any injury he sustained in the incident. Under such circumstances, I find that benefit of doubt should go in favour of the accused. The prosecution has failed to prove its case against the accused beyond all reasonable doubt. As such I acquit the accused person from the offence charged against him on benefit of doubt and set him liberty forthwith. His bail bond stands discharged. The provision u/s 437-A CrPC is not complied with, taking note of the evidence on record. A copy of the judgment be forwarded to the District Magistrate, Sonitpur in compliance with the sec. 365 Cr.P.C. The case is disposed of.

Given under my hand and seal of this court on this the 12th day of July, 2019.

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Additional Sessions Judge, FTC, Biswanath Chariali, Sonitpur, Assam.

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#### **ANNEXURE**

### Witnesses examined by the Prosecution:

PW1- Sri Pitar Kand

PW2- Sri Moneswar Kand

PW3- Smti Joymati Teli

PW4- Victim

PW5- Dr. Mitali Borborah (M.O.)

PW6- Sri Indreswar Bodoloi (I.O.)

# Exhibits proved by the prosecution witnesses:

Ext.1- FIR

Ext.2 & 3- Medical injury reports of the victims.

Ext.4- Seizure List

Ext.5 Sketch Map

Ext.6- Statement of the accused u/s 164 CrPC

Ext.7- Charge sheet

## Witnesses examined by the Defence:

None.

# Documents exhibited by the Defence:

None.

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