

CAUSE TITLE

Special (POCSO) Case No.29/2016.

Informant : 'Y'

Accused : Sri Indra Bora.

ADVOCATES :

For the State : Mr. Madhab Gogoi, learned Spl. Public Prosecutor.

For the Defence : Mr. Biman Bora, learned Advocate.

**IN THE COURT OF SPECIAL JUDGE : LAKHIMPUR,
AT NORTH LAKHIMPUR.**

P R E S E N T - S.P. Khaund, (MA Economics, LLB),
Special Judge,
Lakhimpur, North Lakhimpur.

Special (POCSO) Case No.29/2016.

State of Assam.

-versus-

Sri Indra Bora.

Charges : Under Section 8 of the POCSO Act.

Dates of evidence. : 22.02.2017, 04.04.2017, 17.05.2017,
28.06.2017, 09.08.2017 and 04.12.2017.

Date of argument. : 28.01.2021 and 30.03.2021.

Date of Judgment. : 08.04.2021.

J U D G M E N T

1) The prosecution case, in a narrow compass, is that on the night of 'Diwali' on 29.10.2016, under the cover of darkness, Indra Bora (hereinafter the accused) grabbed the victim 'X' on the lonely road in front of his house and committed sexual assault on her. The accused threatened the victim with death and discouraged her from divulging about the incident. Adding to her woes, the traumatized victim was sexually assaulted by the accused on two other occasions inside his shop. The victim was young enough to be his grand-daughter. Thereafter, the accused further sexually assaulted the victim by threatening her to tarnish her image by spreading rumours against her. Initially, the

Contd...

victim did not divulge about the incident. The terrified victim was tormented, and she could hold back no longer and informed about her plight to her mother. The victim's mother, 'Y' lodged an ejarah (First Information Report) with the police at Panigaon Police Station, which was registered as Panigaon P.S. Case No.142/2016 under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short).

2) The Investigating Officer (I.O. in short) embarked upon the investigation. He forwarded the victim to the Magistrate, who recorded her statement u/s 164 of the Code of Criminal Procedure (CrPC for short). He also forwarded the victim for medical examination. He went to the place of occurrence and prepared the sketch map of the place of occurrence and recorded the statements of the witnesses. On finding prima facie case, the I.O. submitted charge-sheet against the accused u/s 8 POCSO Act.

3) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge u/s 8 POCSO Act was framed, read over and explained to the accused. The accused abjured his guilt and claimed innocence.

4) To substantiate its stance, the prosecution adduced the evidence of 8 (eight) witnesses including the Medical Officer (M.O. in short) and the I.O. The tenor of the answers of the accused to the questions u/s 313 CrPC depicts an acrimonious relationship between him and the victim's family. The accused vigorously contested the case and cross-examined the witnesses in extenso. The accused garnered his defence with the evidence of three witnesses, which includes his evidence as DW.1.

SUBMISSIONS :

5) The Special Public Prosecutor, Mr. Madhab Gogoi, laid stress in his argument that this case is an open and shut case. No reason is fathomable why a minor victim will cast aspersions against an old man. The victim's evidence is convincing. The accused deserves stringent punishment. On the contrary, the defence counsel, Mr. Biman Bora emphasized through his argument that this case is fraught with discrepancies. The accused deserves a benefit of doubt. The explanation of delay in lodgment of the F.I.R. is not satisfactory. Despite the fact that the distance of the Police Station was only a few kilometers away from the place of occurrence, there was a delay of 12 days in lodgment of the F.I.R. To avoid prolixity, the submissions of the defence counsel will be discussed while analysing the evidence.

POINTS FOR DETERMINATION :

6) On the backdrop of the rival contentions proponed at the bar, the following point is apposite for proper adjudication of this case.

i) Whether the accused continuously on and after 29.10.2016, committed sexual harassment on the minor victim 'X' ?

On F.I.R.

7) To decide this case in its proper perspective, it is necessary to delve into the evidence. The victim 'X' testified as PW.1 that the incident occurred on 29.10.2016 at about 6.30 pm. At that time, she went to her neighbour's house to bring back her younger

Contd...

brother, who was about 10 years of age. While she was proceeding, the accused called her and she went near the accused and he grabbed her and groped her chest. The accused pushed his finger into her vagina after removing her panties. The accused kissed her and bit her on her lips. When she tried to escape from his clutches, the accused held her back. At that time, they noticed a person approaching on a motorcycle, and then the accused released her, threatening her not to divulge about the incident. She retorted that her parents will be informed about the incident, but she held back because of the threats exercised by the accused. After five days, the accused again called her to his shop and as she was terrified of the accused, she went to his shop and the accused again molested her in a similar manner. She was terrified of the accused because she was wary of the fact that the accused person's father once hacked a man and she was apprehensive. She was scared that the accused person may kill her parents. However, after 11 days, she informed her mother about the matter. Her father, who used to work in Chennai reached home on 10.11.2016, and she informed her mother about her plight on 09.11.2016. Her mother lodged the ejahar (F.I.R) on 10.11.2016. Her father accompanied her mother to the Police Station to lodge the ejahar. The police recorded her statement and forwarded her to the Magistrate, who recorded her statement. Ext.1 is her statement and Ext.1(1) to 1(5) are her signatures. At that time, she was a student of class-V. She was also forwarded for medical examination.

8) The defence counsel, Mr. Biman Bora laid stress in his argument that the delay in lodgment of the F.I.R. was not

Contd...

satisfactorily explained. I would like to rely on the decision of the Hon'ble Supreme Court in *Munshi Prasad and others -vs- State of Bihar, AIR 2001 SC 3031*. In this case, the Hon'ble Supreme Court was pleased to dismiss the appeal even though the Appellant argued against the delay in the lodgment of the FIR with the allegations against him.

9) It was observed by the Hon'ble Supreme Court that, **“fabricated and delayed FIR as a matter of fact has been the basic submission in support of the appeal. It is, now, however, well settled and we need not dilate on this score over again that mere delay cannot be said to be fatal to a criminal prosecution. First Information Report cannot but be termed to be the starting point and thus sets in motion of criminal investigation. In this context, the observation of this Court in *Apren Joseph alias Current Kunjukunju & others -vs- The State of Kerala* seems to be rather apposite, wherein it has been observed that, First Information Report is a report relating to commission of an offence given to the Police and recorded by it under section 154 CrPC. As observed by the Privy Council in *Emperor -vs- Khwaja* the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation. Nor does the statute provide that such Information Report can only be made by an eye witness. First Information Report under section 15 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in Court. But this information when recorded is the basis of the case set up by the informant.**

Contd...

It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue or unreasonable delay in lodging the FIR, therefore, inevitably gives rise to suspicion which puts the Court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the court in each case. Mere delay in lodging the First Information Report with the police, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case."

10) In the instant case, the delay in lodgment of the FIR was explained in the FIR as well as through the evidence of the witnesses. The evidence reveals that the accused is a person of formidable character and he prevailed upon a minor victim and convinced her that he is indeed a dangerous threat. The victim, PW.1 and her mother, PW.2 could gather courage only when the victim's father, head of the family returned from Chennai. As soon as the victim's father returned from Chennai, this case was promptly lodged. It has to be borne in mind that PW.1 was naive and she opted to conceal her ordeal.

Contd...

11) Considering the facts and circumstances of this case, it is thereby held that the delay in lodgment of the FIR does not thwart the evidence against the accused. The evidence of the victim's mother (PW.2) also depicts that her daughter did not disclose the incident because, she was terrified of the accused. In this case, the incident occurred on 29.10.2016 and the F.I.R. was lodged on 10.11.2016. The facts and circumstances surfacing in the evidence clearly depicts the reasons why the victim did not promptly inform her mother about the incident which took place on 29.10.2016. Even after 29.10.2016, the accused is alleged to have assaulted the victim. The victim was reluctant to divulge about the incident because she was speculative of the ramifications.

Contradictions :

12) I have compared the statement of the victim u/s 164 CrPC to her testimony in the court. Her statement was recorded on 16.11.2016. Assuming the victim to be under 11 years of age, oath was not administered to the victim by the Magistrate. However, her intelligence was ascertained on the basis of the rational answers given by the victim to the queries by the Magistrate, who recorded her statement u/s 164 CrPC. This court recorded PW.1's evidence in the year, 2017, and her age was recorded as 13 years and her evidence was recorded on oath.

13) The statement of the victim u/s 164 CrPC is consistent to her testimony in the court. This witness was cross-examined in extenso. No contradictions could be elicited **as per dispensation of Section 145 of the Indian Evidence Act, 1872 (Evidence Act for short)** through the extensive cross-

Contd...

examination of this witness vis-a-vis her statement u/s 164 CrPC. A streak of animosity surfaced through her cross-examination. The defence counsel did not miss this opportunity to magnify the enmity between both the parties. It is submitted that due to this acrimonious relationship, a case was foisted to vilify the accused.

14) The victim affirmed in her cross-examination that she stated before the I.O. that she was terrified of the accused. She assertively denied omission to state before the I.O. (u/s 161 CrPC) that after five days of the first occurrence during absence of her family members in her house, the accused again called her to his shop and threatened her and he then pushed his hands under her frock and groped her breasts and removed her panties and poked his finger in her vagina and kissed her on her lips. This contradiction was not affirmed by the I.O. SI Utpal Sarma is the I.O. and he testified as PW.8. However, when he was cross-examined, he was not asked about the subsequent incident, which took place, five days, after 'Diwali'. The astute defence counsel ingeniously cross-examined the I.O. in a tricky manner. When an astute lawyer cross-examines a witness, it is the duty of the court to separate the grain from the chaff. When the I.O. was not cross-examined about the subsequent incident, which took place, five days after 'Diwali' night, his cross-examination cannot be compared to the statement of a naive victim u/s 161 CrPC. It is thereby held that the cross-examination of the victim relating to the incident which took place after five days was not as per dispensation of Sections 145 and 155 of the Evidence Act. This cannot be termed as a contradiction. The credit of the victim could not be impeached when the I.O. (PW.8) was faced with a tacit question. It is clear from the remaining part of the cross-examination of the I.O. that no contradictions could be culled out

Contd...

because, the questions which were asked to the I.O. to impeach the credit of the witness u/s 155 of the Evidence Act were not asked to the victim as per Section 145 of the Evidence Act. Both PW.1 and the I.O.(PW.8) failed to withstand the tacit cross-examination. However, the nuances did not go unnoticed by this court.

15) PW.1 has admitted in her cross-examination that the accused once sprayed 'Gobar-Pani' (water containing dung) in their field and so their mother could not graze their cattle due to the dung present in the field. This incident triggered the animosity between her family and the accused person.

16) The demeanour of this witness was noted. The victim 'X' (PW.1) was crying while her evidence was recorded in the court. When the defence asked her about her statement u/s 164 CrPC, the victim reproduced her statement u/s 164 CrPC, verbatim, without the slightest deviation. The argument of the defence counsel that the incident allegedly occurred in the night of 'Diwali' as well as on other days, but the statement u/s 164 CrPC depicts only one incident, holds no water.

17) The evidence of the victim was found to be credible. The victim's mother 'Y' testified as PW.2 that the victim 'X' (PW.1) was only 11 years at the time of the incident and she was a student of class-VII. She came to know about the incident on 09.11.2016. On that day, she was about to attend her school, as she was a school teacher. Her daughter 'X' (PW.1) dissuaded her from going to school. When she asked, why she was dissuading her from going for the classes, her daughter (PW.1) disclosed that the accused used to call her to his shop. Then, she (PW.2)

Contd...

rebuked her daughter (PW.1) for going to the accused person's shop at his '*beck and call*'. Then, her daughter (PW.1) replied that the accused threatened to kill her (PW.2) and her son if she did not go to his shop.

18) The evidence of PW.2 (Y) further proceeds that her husband, who used to work in Chennai returned home on 10.11.2016, and when her daughter 'X' learnt that her father was returning home, then she braced herself and gathered courage to disclose the matter of sexual assault. She narrated the incidents of sexual assault in detail. 'X' (PW.1) informed her that on the night of 'Diwali', she (X) went to bring back her younger brother from their neighbour's house, when the accused waylaid her, grabbed her and bit her on her cheeks and lips and inserted his hands under her panties, and then, he warned her not to disclose about the incident and threatened her with dire consequences. Her daughter 'X' (PW.1) told her that she was terrified of the accused because the accused was a criminal with an antecedent of killing a person.

19) The evidence of PW.2 (Y) further proceeds that when her husband returned home, she informed him about the incident and lodged the ejarah with the police at Panigaon P.S. Ext.2 is the ejarah (FIR) and Ext.2(1) is her signature. The FIR was written by her husband.

20) I have carefully scanned the evidence of PW.2. Her evidence corroborates and substantiates the evidence of her daughter 'X' (PW.1). No contradictions as per the dispensation of Section 145 of the Evidence Act could be elicited through the extensive cross-examination of this witness. The defence counsel, however, did not miss the opportunity to confront PW.2 regarding the animosity arising out of a dispute between them and the accused

person. PW.2 admitted that the accused person sprinkled 'Gobar-Pani' in her field, which created a hurdle in grazing their cattle in their field. It is true that PW.2 mentioned about the incident that occurred on 'Diwali' night. She did not mention about any other incident described by the victim. This cannot be considered as a major contradiction or discrepancy. At this juncture, it is apt to mention that it was the prosecution's duty to put forward the evidence. Although, the conduct of the prosecution appears to be apathetic yet, spontaneous narration of PW.2, clearly implicates that the accused is complicit.

21) I would like to reiterate that PW.1 is PW.2 and PW.4's daughter. The evidence of PW.1 and PW.2 is also fortified by the evidence of PW.4. The victim's father, 'Z' testified as PW.4 that the incident occurred on 29.10.2016. At that time, he was in Chennai. He arrived from Chennai on 10.11.2016. He noticed that his wife and children were in a pensive mood and he asked them the reason, but at that time, they did not disclose the reason of their despair. Later, at night, while he was retiring to the bed, his wife 'Y' (PW.2) told him that during 'Durga Puja', while their daughter 'X' (PW.1) was proceeding to their neighbour's house, the accused called her near him and groped her breasts and undid her panties. When the accused noticed one motorcycle approaching, he left his daughter (X) and fled. While fleeing, the accused threatened his daughter not to divulge about the incident, lest he would kill her mother (PW.2). The accused also threatened his daughter not to inform about the matter to her mother (PW.2). Then he went to Panigaon P.S. and his wife (PW.2) lodged the FIR. At the time of the incident, his daughter was 11 years old and was a student of class-VII.

Contd...

22) As the evidence cornered the accused, the defence took the last resort. The defence counsel emphasized through his argument that PW.4 mentioned that the incident occurred during 'Durga Puja' days. I do not accept this slight deviation as a contradiction. It has to be borne in mind that 'Durga Puja' and 'Diwali' is celebrated around the same time. PW.4 was in Chennai when the incident occurred. His evidence reveals that the incident occurred during 'Durga Puja' days, which spans over the the period during the autumn season. This cannot thus be considered as a contradiction to jettison the accused out of legal action.

23) The evidence of PW.3 supports the fact that the accused committed an offence. Sri Lekhan Gayan testified as PW.3 that after the day of the incident, when the accused committed the illegal offence with the victim, the victim's parents asked him as a co-villager to decide the matter. No contradictions could be elicited through the cross-examination of this witness (PW.3) also. It is apt to mention at this juncture that PW.3 is not a related or partisan witness.

24) The evidence of PW.1, PW.2, PW.3 and PW.4 is also fortified by the evidence of Smt Dimpi Rajkhowa who testified as PW.5 that the incident occurred about 4 /5 months ago during 'Diwali'. She came to know about the incident on the next day from the victim's mother, who stated that at about 6 .30 pm, the accused misbehaved with the victim near E & D embankment. The accused groped the victim and tried to remove her panties. She heard that when the victim went to Bedanta's house to bring back her younger brother, the accused called her and committed rape on her. Ext.4 is the sketch map prepared by the I.O. (PW.8).

Contd...

It is clear from the Ext.4 that the place of occurrence marked as 'A' is near the embankment. PW.5 came to the court as a witness in the year, 2017 while the incident occurred in the year, 2016. She is not aware of the entire incident in detail. She heard about the incident from the victim's mother. She is not supposed to know the exact date of the incident. I do not find her evidence contradictory. Although this incident is not regarding rape, yet the evidence of PW.4 about an incident of penetrative sexual cannot be considered as embellishment. Her evidence cannot be discarded in toto. On the contrary, the evidence of PW.5 can be given credence because of the fact that she has more accurately described the place of occurrence to be the path flanked by the E & D embankment.

25) It has been observed by Hon'ble the Supreme Court in *Munshi Prasad's* case (Supra) that - **"This Court further observed : (SCC pp. 656 - 57 , paras 25 - 27)"** 25. **It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross- examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness."**

26) Reverting back to this case, I would like to reiterate that no contradictions as per Section 145 of the Evidence Act, could be

Contd...

elicited through the cross-examination of the witnesses. This refutes the emphatically submitted argument of the defence relating to contradictions. I would also like to reiterate that while deposing, a naive victim like PW.1 may fumble. Certain minor contradictions does not thwart the evidence.

27) The defence deviated more towards the incident, which occurred five days after the 'Diwali' night. It was strenuously submitted that PW.1 failed to specifically mention about the continuous assault by the accused after the night of 'Diwali'. It is true that even the evidence of PW.2 and PW.4 does not substantiate the evidence of PW.1 when it comes to the incidents which took place five days after 29.10.2016. It has already been held that there is clinching evidence that the accused assaulted the victim on 29.10.2016. To assert my view, I would like to gainfully refer to the decision of Hon'ble the Supreme Court in '*Dalbir Singh -vs- State of Haryana in Crl. Appeal No.899 of 2008 decided on 15.05.2008*, wherein it was held that **"The case, 'State of Rajasthan vs Smt Kalki & another, AIR 1981 SC 1390' was discussed and it was held in Kalki's case (Supra) that, "Normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and these are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."**

Contd...

28) In the instant case, the discrepancy regarding the allegation of repeated sexual assault by the accused in his house does not corrode the evidence. In this context, it is germane to mention that the accused was not charged with aggravated offence of repeatedly committing sexual assault even after evidence surfaced of such an account. As the evidence is clear regarding the sexual assault on 29.10.2016, this case proceeded only u/s 8 of the POCSO Act. Charge u/s 8, 10 of the POCSO Act was not added or altered at the stage of trial, or at a later stage. The other reason why the accused was not charged u/s 10 of the POCSO Act was that the age of the victim could not be affirmed by the medical officer's evidence. Dr. Sashi Sonowal testified as PW.6 that he could not detect any injury on the private parts of 'X'. The Medico legal report, marked as Ext.3 does not mention the victim's age.

29) After separating the grain from the chaff, it is held that there is overwhelming and homogeneous evidence that the accused waylaid the victim on the lonely path in front of his house, grabbed her hand groped her breasts. He also pushed his finger into her vagina and kissed her and bit her on her lips. This incident was also repeated after five days.

(a) Weight of defence evidence.

(b) Existing animus.

30) The accused, Sri Indra Bora testified as DW.1 that he severed ties with the informant's family in the year, 2016. He has a grocery shop in front of his house. 'Y' used to graze her cattle in front of his shop creating a mess in the area surrounding the grocery shop. So, he asked 'Y' not to graze cattle in front of his

shop, 'Y' ignored his requests. So, he splashed cow-dung dissolved in water around his grocery shop and then 'Y' hurled abuses at him. On 29.10.2016 at about 6.30 pm, he was in his grocery shop and was lighting candles on the occasion of 'Diwali'. He also distributed 'Prasad' to his neighbours who gathered in his shop. He could very well recall that Deba Hazarika and his wife, Debajani Hazarika, were present in his shop at that time. After distribution of 'Prasad', the people including his daughter-in-laws, Janmoni Bora and Swapnali Bora left his shop. He along with his wife, Anumai Bora was in his shop. His daughter-in-laws, Janmoni and Swapnali went to Sanjib Bora's house at about 5 pm and returned at about 8 pm, and then he shut down his shop. The evidence of DW.1, Indra Bora (accused) further proceeds that it has been falsely alleged that on 29.10.2016 at about 6.30 pm, he called the victim to his shop, groped her breasts, removed her panties, pushed his hands into her vagina, and bit her lips and kissed her and did not let her go until the motorcycle approached their vicinity, and then he released the victim and threatened her not to divulge about the incident, lest her mother and brother would get killed by him. DW.1 through his evidence denied that after five days, he called the victim and molested her and committed sexual assault on her. Through his evidence and statement u/s 313 CrPC, DW.1 has vehemently denied the allegation and the charges against him.

31) DW.1's evidence is substantiated by the evidence of his daughter-in-law and wife. The accused person's daughter-in-law, Smt Janmoni Bora testified as DW.2 that they have a strained relationship with the informant's family. Her father-in-law (accused) had a shop in front of their house surrounded by a boundary fence. 'Y' (PW.2) used to graze her cattle by the side of

Contd...

the boundary fence despite resistance from her father-in-law (accused). Then, her father-in-law (accused) sprinkled dung dissolved in water around the grazing area. Then, 'Y' threatened her father-in-law (accused) with dire consequence. Her father-in-law (accused) is innocent. He did not sexually assault the victim (X). On the night of 'Diwali', in the year, 2016, she along with her sister-in-law, her daughter and sister-in-law's son went to Sanjib Bora's house and she met 'X' (victim - PW.1) and 'Y' (PW.2) in Sanjib Bora's house. After 1 1/2 hours, they returned back to their residences. She found her in-laws in the shop.

32) Smt Anumai Bora testified as DW.3 that at the time of the alleged incident, she was in her husband's shop. Her husband (accused) did not assault the victim.

33) After scanning the evidence, it can be culled out that the victim 'X' (PW.1) alleged that on the night of 'Diwali' in the year 2016, the accused assaulted her at about 6.30 / 7 pm. The accused (DW.1), DW.2 and DW.3 tried to dispel the clinching evidence by stating that the accused and his wife were in their own house at about 6.30 / 7.30 pm on the fateful night. DW.2 (daughter-in-law) was in Sanjib Bora's house. The victim (X) and her mother (Y) were also in Sanjib Bora's house at about 6.30 / 7 pm on the night of 29.10.2016. DW.2 met them when she went to Sanjib's house. This evidence of DW.1, DW.2 and DW.3 appears to be orchestrated and scripted to synchronize with the time of the alleged incident and resort to the plea of alibi at the same time. The plea of alibi was that the accused was not on the village byway near the embankment. He did not grope the victim, but on the contrary, he was inside his house, and the victim was not on the lonely path, but she was with her mother in Sanjib Bora's house at that time, and this has been ascertained by DW.2 as

Contd...

defence witness. The defence evidence appears to be too far fetched and sketchy, more so, when the place of occurrence is just at a stones throw away from his house. Plea of alibi prevails only if the distance between the place of occurrence and the place where the accused has claimed to be present makes it impossible for the accused person's presence in the crime scene. Moreover, the accused failed to produce his neighbours, Sanjib, Deba and Debajani as witnesses in support of his plea. The plea of enmity in this case is opposed to common sense and broad probabilities in this case.

34) The age of the victim was recorded as 11 years by the Magistrate while recording her statement u/s 164 CrPC. The victim gave her age as 13 years when her evidence was recorded as PW.1. It is thereby held that the victim was a minor at the time of the incident. I would like to rely on the decision of the Hon'ble Gauhati High Court in *Bhupen Kalita -vs- State of Assam in Crl. Appeal (J)No.87 of 2017*, decided on 05.06.2020, wherein it has been observed that, **“Because of the legal presumption of guilt of the accused under Section 29 of the POCSO Act and language used, a much heavier burden was placed on the appellant to discharge this burden. It was thus incumbent upon the appellant to prove to the contrary that he did not commit the offence charged. In the facts and circumstances of the case this proof cannot be by merely casting a doubt on the prosecution case. He must prove by adducing cogent and reliable evidences.”**

35) In the instant case, the accused person's evidence was found to be too far fetched and sketchy. His evidence was not found to be reliable. The animosity between both the parties after their dispute regarding grazing of cattle and creating a mess cannot

Contd...

be stretched to the extent that it will impel the informant to foist a case by putting her minor daughter's honour at stake. In this part of the country, a girl usually gets scarred for life if there is even any rumour of violation. Her prospects to get married and settle down in life gets affected. So, a family will never even venture to tread a path of disrepute. It will tantamount to self-implication. It is thereby held that the accused person's plea of being slammed with a false case entailing an acrimonious relationship cannot be accepted. No such sinister ploy could be attributed to the aggrieved family. It is held that this case is not foisted.

36) A case under the POCSO Act is embalmed by presumption u/s 29 & 30 of the POCSO Act. Where a person is prosecuted for an offence described u/s 7 of the POCSO Act, the court shall presume such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

37) In the instant case, the accused failed to prove the contrary. The evidence adduced by the accused failed to dispel the clinching evidence adduced by the prosecution. The evidence adduced by the prosecution is held to be impeccable. The accused failed to extricate and exculpate himself.

38) The other statutory presumption engrafted u/s 30 of the POCSO Act is that - in any prosecution for any offence under the POCSO Act, which requires a culpable mental state on the part of the accused, Court shall presume the existence of such mental state, and the accused is required to prove that he had no such mental state.

39) In view of my foregoing discussions, it is thereby held that the accused failed to prove that he had no such mental state with respect to the act charged. The prosecution executed its burden u/s 101 of the Evidence Act and proved this case beyond reasonable doubt.

40) Based on the evidence, the victim is held to be around 11 years of age. The evidence of a minor should be given credence. It has been held by Hon'ble the Supreme Court in *Dattu Ramrao Sakhare and ors. -vs- State of Maharashtra (1997) 5 SCC 341*, that - **“In other words 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 question and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his / her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.”**

41) I would also like to rely on the decision of Hon'ble the Gauhati High Court in *Arun Tanti -vs- State of Assam 2008 (4) GLT 1002*, wherein it has been held that - **“The accused being**

a matured man has indulged himself in such affairs knowing fully well that the victim is a minor one which clearly established that the accused / appellant has culpable mental state to have sexual intercourse with a minor girl, which has rendered him liable for the offence u/s 4 of the POCSO Act. The learned Trial Court has properly appreciated all the matters on record and has taken note of non compliance of provision of POCSO Act mentioned above and also the legal pronouncement that the child witness is a competent witness to depose before the court and conviction can be rest upon such evidence of child witness if found reliable, as has been held in Dattu Ramarao Sakhare -vs- State of Maharashtra (1997) 5 SCC 341, Ratansingh D. Nayak -vs- State of Gujarat (2004) 1 SCC 64."

42) Reverting back to this case, it is thereby held that the evidence against the accused is impeccable and homogeneous. I would also like to reiterate that the traumatized victim hesitantly revealed about her plight to her parents.

43) The I.O. is an official witness, and I would like to succinctly discuss the evidence of the I.O. SI Utpal Sarma testified as PW.8 that on 11.11.2016, after receipt of the FIR, he registered Panigaon P.S. Case No.142/2016 u/s 8 of the POCSO Act and embarked upon the investigation. He recorded the statements of the witnesses and forwarded the victim to the Magistrate, who recorded her statement u/s 164 CrPC. He prepared the sketch map Ext.4, wherein Ext.4(1) is his signature. On completion of investigation, he arrested the accused and forwarded him to

Contd...

judicial custody and finally, he laid charge-sheet against him. He proved the charge-sheet as Ext.5 wherein Ext.5(1) is his signature. The cross-examination of the I.O. has already been discussed.

44) After careful assessment of the evidence, it is concluded that the defence failed to prove that the informant bore animus against him. The enmity between the parties was the focal point. It is implausible that an animosity will be used by the informant for her own advantage to malign her daughter.

45) It is not plausible that parents will mar the reputation of their minor daughter and involve her to be a party in such a deleterious allegation. It is incomprehensible that the victim will spin stories in such an unscrupulous manner. On the contrary, the conduct of the accused is under cloud. He had the audacity to admit in the court venerated by the people that he sprinkled dung in a spiteful manner.

46) The presumption u/s 29 and 30 of the POCSO Act outweighs the evidence of the defence, which was assessed on the preponderance of probabilities. This court is fully alive to the prevailing circumstances. There is a ring of truth in the evidence of the witnesses. The accused is thus held guilty u/s 8 of the POCSO Act. The offence of sexual assault is described u/s 7 of the POCSO Act, which reads, *“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.”*

47) The prosecution could prove beyond reasonable doubt the accused, Indra Bora waylaid the victim on the lonely path in front of his house, grabbed her hand and groped her breasts. He also pushed his finger into her vagina, kissed her and bit her on her lips. This incident was repeated after five days. The accused failed to dislodge the presumption against him. Before concluding, I would like to add that the evidence of the M.O. in this case can be ignored as victim did not complain of injuries.

QUANTUM OF SENTENCE :

48) I have heard the accused on the quantum of sentence. I do not hesitate to opine that the accused acted in a diabolic manner. The object of criminal justice is to deter people from committing crimes. The idea is not to punish the wrongdoers only, but they should also learn a lesson that commissioning of crime is a bad bargain. Trial of serious offences should be effected with care, so as not to affect 'dispassionate judicial scrutiny'.

49) The plight of the victim is taken into consideration. She was around 11 - 13 years of age. She went through a traumatic experience, which will have a prolonged impact on her psyche. Children with such experience may also sink into despondency by the haunting memories of such a nightmare. She stumbled upon an incident which was beyond her imagination.

50) Suffice it to mention that a sentence of imprisonment for four years will meet the ends of justice. I have considered the answers of the accused on the point of sentence. The accused was remorseful and crestfallen. Indeed, he kept denying his complicity. The accused was in tears when the

Contd...

sentence was pronounced. The prosecution could not assert that the accused was a history sheeter, with a tainted past, as alleged by the aggrieved. No previous antecedents of any offence could be proved against the accused. An exemplary punishment may be a closure for the troubled victim. The accused acted in a perverse manner.

51) The accused has submitted that he is poverty stricken and he is receiving old age pension as a BPL card holder.

52) It has been observed by Hon'ble the Supreme Court that poverty cannot be a mitigating factor.

53) Both the aggravating and ameliorating circumstances of this case are taken into consideration. The accused has given his age as 61 years. His age is also considered as one of the mitigating factors. I believe that Leniency should also be an essence after considering the age and antecedent of the accused.

SENTENCE :

54) The accused, Sri Indra Bora is convicted u/s 8 of the POCSO Act, and is sentenced to undergo Rigorous Imprisonment for 4 (four) years and a fine of Rs.5,000/- (Rupees Five Thousand) only, and in default of payment of fine, to undergo Rigorous Imprisonment for 2 (two) months.

55) The period of detention of the accused during investigation and trial is set off with his custodial sentence. The accused was in custody from 13.11.2016 upto 25.01.2017.

Contd...

56) The fine deposited will be paid as compensation to the victim.

57) This case is recommended for compensation under the 'Assam Victim's Compensation Scheme, 2012'. The compensation can also be paid from the "Nirbhaya Fund".

58) The accused is informed about his right of appeal against this Judgment and Order of conviction.

59) Send a copy of this Judgment & Order to the District Magistrate, Lakhimpur, North Lakhimpur, u/s 365 CrPC.

60) The Judgment is pronounced in the open court.

61) This case is disposed of on contest.

62) The accused is forwarded to custody to serve his sentence.

63) Furnish a free copy of this Judgment to the accused.

Given under the hand and seal of this Court on the 8th day of April, 2021.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

Certified that the Judgment is typed to my dictation and corrected by me and each page bears my signature.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

A P P E N D I X

Special (POCSO) Case No.29/2016.

LIST OF WITNESSES FOR PROSECUTION :

1. PW.1 - Victim 'X'.
2. PW.2 - Informant, 'Y'.
3. PW.3 - Sri Lekhan Gayan.
4. PW.4 - Sri Bokul Dutta.
5. PW.5 - Smt Dimpri Rajkhowa.
6. PW.6 - Dr. Sashi Sonowal, M.O.
7. PW.7 - Miss Shalma Azaz, JMFC, North Lakhimpur.
8. PW.8 - SI Utpal Sharma, I.O.

LIST OF COURT WITNESS :

Nil

LIST OF EXHIBITS FOR PROSECUTION :

- Ext.1 - Statement.
- Ext.2 - Ejahar.
- Ext.3 - Medico legal report.
- Ext.4 - Sketch map.
- Ext.5 - Charge-sheet.

LIST OF MATERIAL EXHIBITS FOR PROSECUTION :

Nil.

LIST OF WITNESSES FOR DEFENCE :

- DW.1 - Sri Indra Bora.
- DW.2 - Smt Janmoni Bora.
- DW.3 - Smt Anumai Bora.

LIST OF EXHIBITS FOR DEFENCE :

Nil.

(S.P. Khaund)
Special Judge,
Lakhimpur, North Lakhimpur.

Transcribed and typed by :

Sri Satyabrata Kshattri, Stenographer.