

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE

:::UDALGURI

**Present: Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.**

**Special (POCSO) 30/2017
Under Section 08 of POCSO Act**

State of Assam

-Vs-

Sujan Namodas.....Accused.

For the Prosecution : Mr. R. Sarmah, Addl. Public Prosecutor.

For the Accused : Mr. Dwijen Kr. Boro, Learned Advocate.

Date of Evidence : 10-09-18: 08-10-18: 30-11-18:
09-01-19: 26-02-19: 20-03-19.

Date of Argument : 26-07-2019.

Date of Judgment : 08-08-2019.

J U D G M E N T

1. The prosecution case in brief is that on 13-06-17, in the morning, at about 09 am while the victim girl was going to her school by riding her school near the office of PHE accused Sujan Namodas coming on a cycle from the opposite direction taking advantage of absence of other person on the road touch on the chest of the victim and caused her fall down from the cycle. At that time Gadu Namodas was also coming from the opposite direction on a cycle. In connection with the incident on 16-06-17, the father of the victim lodged an FIR with the In-Charge of Bhergaon Police Out Post.

2. On the basis of the FIR, Tangla PS Case No. 78/17, under Section 8 of POCSO Act was registered and after completion of investigation Police submitted charge-sheet under Section 8 of POCSO Act against the accused person Sujan Namodas.
3. In consideration of the submission of the learned counsel for both the parties and materials on record and having found sufficient grounds for presuming that the accused person had committed offence under Section 8 of POCSO Act, learned Special Judge framed charge thereunder and the ingredients of charge under Section 8 of POCSO Act were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Thereafter, the learned Special Judge vide Order dated 17-06-19, transferred the case to this court for disposal.
4. The prosecution in order to prove its case examined the following 08(eight) witnesses:
 - PW1- Dr. Hiranya Kumar Gayari.
 - PW2- Pradip Barman.
 - PW3- Victim-A.
 - PW4- Maitrai Barman.
 - PW5- Puspa Das.
 - PW6- Nayanti Mandal.
 - PW7- Namita Das.
 - PW8- Indra Dev Goswami.
5. The statement of the accused person had been recorded U/S 313 Cr.P.C. The defence plea was of total denial. Defence had declined to adduce defence evidence.
6. Situated thus, the point for determination in the instant case is set up as follows:-

- (I) Whether the accused person committed sexual assault upon Victim-A who is a minor girl aged about 13 years?

DISCUSSION, DECISION AND REASON FOR DECISION:

7. I have heard learned Addl. PP Mr. R. Sarmah for the prosecution and learned defence counsel Mr. Dwijen Kr. Boro.
8. Learned Addl. P.P. has submitted that the prosecution has adduced cogent, reliable and consistent evidence to bring home the charges leveled against the accused. The accused had committed evidence of sexual assault upon the minor girl and he is liable to be punished under Section 8 of POCSO Act.
9. Per contra learned defence counsel has argued that prosecution has failed to examine the eye witness of the incident raises a reasonable doubt as to the prosecution case. There is delay of four days in filing the FIR. There is no explanation as to the cause of delay in filing the FIR which is fatal to the prosecution case. Learned defence counsel has further argued that in her statement under Section 164 Cr.P.C. the victim stated that the incident happened near L.P. School while as per the contents of the FIR the incident happened near office of PHE. He has further argued that as per medical evidence the age of the victim is 16-17(sixteen-seventeen) years. The accused is entitled to get the benefit of margin of error of two years in determination of age of the victim on the basis of radiological report, and as such the age of the victim cannot be considered below eighteen years. Hence, the victim is not a child under the provision of POCSO Act.
10. Before appreciating the arguments put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsel, I would like to discuss the evidence adduced by the prosecution.

11. PW1 is Dr. Hiranya Kr. Gayari. In his evidence PW1 had deposed that on 17.6.17, he examined the victim at Udalguri Civil Hospital. On examination, he found the following:-
Radiological age 16-17(sixteen-seventeen) years. As requested by parents private parts were not examined. Ext.1 is the report and Ext.1(1) is the signature of PW1. In cross-examination, PW1 had stated that he had not mentioned in his medical report as to who had escorted the victim for her examination before him.
12. PW2 is Pradip Barman, informant and father of the victim. In his evidence PW1 had deposed that the occurrence took place on 13.6.17 at around 9 AM. After returning from school his daughter informed him that on that day, in the morning, at around 9AM while she was proceeding to school riding her bicycle, at that time accused Sujan Namodas was coming from the front side with one Gado on a bicycle. When accused Sujan Namodas crossed her suddenly he touched her breast as a result she fell down from her bicycle. On getting this information PW2 lodged an FIR with the police. At the time of the incident his daughter was 13 years. Ext.2 is the FIR and Ext.2[1] is the signature of PW2. In cross-examination, PW2 had stated that his daughter narrated him the incident after returning from school at about 5 PM. PW2 lodged the FIR with the police after three days of the incident and he had not explained in his FIR as to cause of delay in lodging the FIR. PW2 did not witness the incident. PW2 had denied the suggestion that on the day of occurrence accused did not misbehave with his daughter.
13. PW3 is Victim-A. She had adduced evidence corroborating the evidence of the informant. In her evidence PW3 had deposed that at the material time on the day of incident she was going to school riding her bicycle at around 9AM. At that time from the opposite direction accused was coming on a bicycle and at the time of crossing of her bicycle the accused touched her breast and she fell down. Then she proceeded to her school. After returning from school she narrated the incident to her father. At the time of occurrence she was 13

years old. PW3 had not submitted any school certificate to prove her age. She knew the accused since before the incident though she had no talking terms with him. She was examined by doctor and her statement was got recorded U/S 164 Cr.P.C. Ext.3 is the statement U/S 164 Cr.P.C. wherein Ext.3[1] is the signature of PW3. In cross-examination PW3 had stated that her school is at a distance of about 3 KM from her house. On the day of occurrence she was going by bicycle to school alone. The road by which she goes to school is frequented by many people. On the day of occurrence it was raining cats and dogs and the road condition was deplorable. Accused Sujjan was alone in his bicycle at the time of occurrence. In another bicycle one Gadu was coming and he witnessed the incident. PW3 had denied the suggestion that on the day of occurrence the accused while crossing her bicycle did not touch her breast and that on the day of occurrence it was raining incessantly and while accused was coming in his bicycle suddenly slipped and as a result he fell down near her bicycle.

14. PW4 is Maitrai Barman, mother of the victim. In her evidence PW4 had deposed that on the day of occurrence she was at her home. On that day her daughter went to school at about 9 AM. After returning from school her daughter narrated that while she was proceeding to school in her bicycle on that way accused was coming from opposite direction on a bicycle and at the time of crossing her the accused suddenly touched her breast and behind the accused one Gadoi was coming in another bi-cycle and seeing the incident he started to laugh. At the time of incident her daughter was 14 years old and she was reading in class 7 at Majikuchi ME School. In this regard her husband lodged an FIR against the accused. In cross-examination, PW4 had stated that her daughter school is situated about 2 KM away from her home. Sometime the victim used to go to school with colleagues and sometime alone. The occurrence took place on the road about ½ KM from her home. There are dwelling houses away from the place of occurrence. PW4 did not visit the place of occurrence. It was raining on the day of occurrence. PW4 had denied the suggestion that on the day of occurrence her daughter at the time going

to school fell down on the road due to slippery road and that on the date of occurrence the accused did not touch the breast of her daughter while going to school. PW4 had denied the suggestion that she had deposed falsely.

15. PW5 is Puspa Das. In her evidence PW5 had deposed that she only heard about the incident on the next day of occurrence that one girl fell from her bicycle. Except this PW5 cannot say anything about the incident. Cross-examination of PW5 had been declined by the defence.
16. PW6 is Nayanti Mandal. In her evidence PW6 had deposed that one year ago on the date of occurrence in the afternoon she heard from the local people that while the victim was returning from school to her home at that time the accused Sujan Das was also moving in a bicycle from opposite direction and when they were about to cross each other at that time the accused touched the breast of the victim and as a consequence the victim fell down from the bicycle. In cross-examination, PW6 had stated that the place of occurrence which is a village path is about 400 meters away from her home. On the day of occurrence it was raining for the whole day and the village path became slippery. She did not witness the incident. She heard about the incident in the afternoon on the date of occurrence. She did not meet the victim. PW6 had denied the suggestion that no such incident had occurred in the day of occurrence.
17. PW7 is Namita Das. In her evidence PW7 had deposed that she knew nothing about the incident. She did not know as to why police cited her as a witness in this case. She did not hear anything at the material time about any incident as regards this case. Cross-examination of PW7 had been declined by the defence.
18. PW8, ASI Indra Dev Goswami, the Investigating Officer of the case. In his evidence PW8 had deposed that on 16-06-17 he was posted as IC of Bhergaon OP. On that day one Pradip Barman lodged an FIR. On receipt of

the FIR PW8 recorded the GD entry No. 246 dated 16-06-17 and took up the preliminary investigation of the case and sent the FIR for registration of the case to OC Tangla PS. On receipt of the same the OC Tangla PS registered the case vide Tangla PS case No. 78/2017 U/S 8 of POCSO Act and endorsed in his name for investigation of the case as PW8 had already took up the preliminary investigation. During the investigation PW8 had visited the place of occurrence on the same day of the lodgment of the FIR, recorded the statement of available witnesses U/S 161 CrPC. and prepared the sketch map thereof. On 17-06-17, he recorded the statement of victim U/S 161 CrPC and sent her for medical examination. He also got the statement of the victim recorded before the magistrate U/S 164 CrPC. After completing the investigation PW8 submitted the case diary to the OC Tangla PS for taking necessary action. Subsequently Inspector cum OC Tangla PS laid the charge-sheet against the accused U/S 8 of POCSO Act. The OC Tangla PS did not further investigate the case and he only submitted the charge-sheet. PW8 knew his handwriting and signature. During investigation he did not seize any articles in connection with this case. Ext. 4 is the extract copy of GD entry. Ext. 4(1) is the signature of PW8. Ext. 5 is the sketch map of the place of occurrence. Ext. 6 is the charge sheet. And Ext. 6 (1) is the signature of Inspector cum OC Dharendra Kalita which is known to PW8. In cross-examination, PW8 had stated that he visited the place of occurrence on 16-06-17 and 17-06-17. He recorded the statement of witnesses near the place of occurrence. The incident occurred on 13-06-17 and the FIR was received on 16-06-17.

19. Before analyzing the evidences on record in its true perspective I would first like to go through the evidence of the prosecution regarding the age of the victim as to attract the offences punishable under the POCSO Act the victim must be a child. Section 2 (1)(d) of the Act lays down that "child" means any person below the age of eighteen years. In this case no school certificate or birth certificate of the victim has been produced in evidence by the prosecution. The medical evidence disclosed that radiological age of the victim

is 16-17(sixteen-seventeen) years. According to PW 2, the father of the victim at the time of incident the age of the victim was thirteen years. The victim also deposed that her age was thirteen years. PW 4 the mother of the victim had testified that at the time of incident her daughter was 14 years old and she was reading in class 7 at Majikuchi ME School. It is not in dispute that at the time of incident victim was a student of school. The evidence of the victim and her parents has not been disputed by the defence. In such a situation ocular evidence with regard to the age of the victim prevails over medical evidence. Though in the evidence of father and mother of the victim there is a variation of one year about the age of the victim but the same is not a significant discrepancies so as to disbelieve their testimony with regard to the age of the victim as while stating about age variation of one year normally occurred to many people because after completion of present age a person enters into his or her next age such as, after completion of 13 years a person enters into his next age i.e. 14 years. In the decision reported in **2007 (1) GLJ 687 Niman Sonowal Vs. State of Assam**, the Hon'ble Gauhati High Court observed that when there is clear evidence of parents about the age of their daughter the medical evidence cannot override the evidence of the parents, particularly, when their evidence have remained unchallenged and undisputed and there is nothing in their evidence to indicate that their assertions as regards the age of their daughter are incorrect or false.

20. In view of the clear evidence of the victim and her parents about the age of the victim, which have remained unchallenged and undisputed by the defence while cross examination of them I am not at all hesitant to accept that the victim is a child below 18 years of age. The cogent and clear evidence of the prosecution witnesses in this regard cannot be allowed to be overridden by the medical evidence. Therefore, I find no force to the contention of learned defence counsel that the age of the victim is not below eighteen years.
21. Learned defence counsel has argued that as per the contents of the FIR and evidence of the victim at the time of incident one Godoi was present but he

was not examined by the prosecution which raised a reasonable doubt as to the prosecution case. In this regard it appears that the victim in her cross examination had revealed that at the time of incident on another bicycle one Gadu was coming and he witnessed the incident. PW 4, the mother of the victim had deposed that at the time of incident behind the accused one Godoi was coming on another bi-cycle and seeing the incident he started to laugh. It is appeared from the evidence of PW 1, the informant and father of the victim, that Godoi was present at the time of incident and he had seen the incident. What has been transpired from the evidence on record is that though Godoi @ Godo was present at the time of incident but having seen the incident he laughed and offered no help to the victim who had fallen down with her bicycle. Such conduct of laughing seeing the incident and offering no help to the victim even though she fell down from the cycle shows that he had an implied consent to the act of the accused. One cannot expect from such a person to depose about the true incident.

22. It is settled position of law that in a case of sexual assault corroboration is not required. The Hon'ble Supreme in various decisions re-iterated and re-affirmed the said principle. The conviction of accused can be based on sole testimony of the victim girl if her evidence is found inspiring confidence and worthy of credence. In the instant case the victim has narrated about the incident in a cogent and straightforward manner. Her evidence before the court is consistent with her previous statement recorded U/S 164 Cr. P.C. Learned defence counsel has argued there are discrepancies in the contents of the FIR and the statement of victim girl U/S 164 Cr. P.C. as to the place of occurrence. As per the FIR the incident had taken place near the office of PHE while the victim in her statement recorded U/S 164 Cr. P.C. stated that the incident had taken place near the LP School of her locality. In this regard while going through the statement of victim recorded U/S 164 Cr. P.C. it appears that she stated that the incident happened near the LP school of her locality. The place of occurrence is a public road and usually there exists residential houses, office etc. by the side of the road. While describing a

particular place of road different people may use different landmark of the area. Moreover no suggestion was put to the victim by the defence during cross examination that the LP School is not situated near the place of occurrence. On careful scrutiny of the evidences adduced by the victim before the court and her statement recorded U/S 164 Cr. P.C. it is found that there is no improvement and discrepancies in her evidence with her previous statement recorded U/S 164 Cr. P.C. with regard to alleged incident of sexual assault upon her. There is no patent or inherent infirmities and improbabilities in her evidence so as to render the prosecution case false or impossible. The evidence of the victim is corroborated by her parents to whom she narrated about the incident after returning home from school. The parents of victim requested the doctor not to examine her private parts which is reasonable considering the nature of the case. The act of touching the breast of a girl cannot be expected to be found through medical evidence.

23. Though PW5 did not depose anything about the incident of sexual assault upon the victim but she had also corroborated the fact that she had heard that on the date of occurrence one girl fell from her bicycle. Moreover, PW6, who is an independent witness of the case had heard from the local people that on the road the accused touch the breast of the victim and as a consequence she fell down from her bicycle. In cross-examination, PW6 had also revealed that on the date of occurrence it was raining for whole day and the village path became slippery. Thus from the evidence of PW5 and PW6 it appears that people of the locality had heard about the incident. Apparently on the date of occurrence it was raining and at the time of incident there was no other person present on the road except the accused, one Gado on another bicycle and the victim. Though the victim in cross-examination revealed that the road by which she goes to school is frequented by many people but defence has failed to extract from her mouth that some other persons were present at the time of occurrence. In a rainy day people normally remains inside the house and one cannot accept presence of many people on the road in such a day. The evidence of the victim about the facts

and circumstances of the case as to how and when the incident have taken place is inspiring confidence and this Court find no inherent improbabilities in her testimony.

24. Learned defence counsel has argued that prosecution has failed to give proper explanation for delay in lodging the FIR which raises a reasonable doubt as to the truthfulness of the prosecution case.
25. Definitely when an incident of sexual assault occurred, the victim as well as her near relatives hesitated at the first instance to make it public. So in a case of sexual assault delay in filing the FIR is normal and in such a case delay in filing FIR does not require heavy explanation from the prosecution. In (2004)7SCC775, **Sri Narayan Saha and Anr. Vs. State of Tripura**, the Hon'ble Supreme Court while dealing with a case of rape upon woman stated that merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women. It casts doubt and shame upon her rather than comfort and sympathy with her. Therefore, the delay in lodging complaint in such cases does not necessarily indicate that her version is false.
26. In the case in hand the victim is a school going minor girl. The parents of minor girl would definitely give deep thought before lodging FIR before the police disclosing the fact of sexual assault upon their minor daughter. In such circumstances three days delay in lodging the FIR does make the prosecution case false.
27. The Protection of Children from Sexual Offences Act, 2012 has been enacted by the legislature for effectively addressing the cases of sexual exploitation and sexual abuse of child. The purpose of the act is to protect children from offences of sexual assault, sexual harassment and pornography which is necessary for the proper development of the child.

28. Section 7 of The Protection of Children from Sexual Offences Act, 2012 defines sexual assault. According to Section 7 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.
29. Thus in order to prove the offence under Section 7 of POCSO Act, the prosecution must establish the following ingredients:
- (i). touching of sensitive organs of the child or making the child to touch sensitive organs of others.
 - (ii). the act of the accused is with sexual intent.
 - (iii). the physical contact must be without penetration.
30. The accused had touched the breast of the victim girl which clearly indicates his intent. The victim, who was going to school in a rainy day on a bicycle, the accused taking advantage of absence of persons on the road touched her breast, the act of the accused clearly indicates that with sexual intent he touched the breast of the victim. Though defence has taken the plea that due to rain the bicycle of the accused suddenly slipped and as a result he fell down near the bicycle of the victim but the plea of the defence deserve no importance in view of the fact that defence has failed to show any cogent reason as to why victim would make false accusation against the accused for falling down near her bicycle.
31. Under Section 29 of POCSO Act where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. Thus the Act empowered the Court to presume the guilt of the accused unless the contrary is proved. However, if

the accused is able to create serious doubt on the veracity of the prosecution case, or the accused bring on record materials which would render the prosecution version highly improbable, the presumption would get weakened.

32. In the instant case there is overwhelming evidence adduced by the prosecution that the accused touched the breast of the victim girl on the road on her way to school. While the prosecution has proved its case by adducing cogent and reliable evidence, defence has failed to prove the contrary.

33. Accordingly the accused Sujan Namodas has been held guilty under Section 8 of POCSO Act and convicted under said section. Section 8 of POCSO Act prescribes punishment for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. Hence, considering the nature and gravity of the offence in my considered view no benefit under Section 360 Cr.P.C. or under Section 3/4 of the Probation of offenders Act 1958 can be extended to the convicted accused person.

34. Before passing sentence, I have heard the convicted accused person on the question of sentence under Section 235(2) of the Cr.P.C. and recorded his statement. The accused has pleaded innocence.

35. I have considered the facts and circumstances of the case. The record does not display past blemish of the convict. Considering all, in my opinion imprisonment of the accused for a minimum period prescribed under Section 8 of POCSO Act would meet the ends of justice.

ORDER

36. In the result accused Sujan Namodas is sentenced to undergo 03(three) years rigorous imprisonment under Section 8 of POCSO Act and to pay fine of Rs. 5000/- (five thousand) only, in default rigorous imprisonment for three (3) months.

37. It is ordered that the period of jail detention if any, already undergone by the convicted accused person during the period of investigation, enquiry or trial, shall be set off under Section 428 of the Cr.P.C. against the term of imprisonment imposed on him.
38. The convicted accused person shall be furnished with a copy of this Judgment free of cost forthwith.
39. Let one copy of the Judgment be sent to the learned District Magistrate, Udalguri in view of the provision under Section 365 Cr.P.C.
40. Judgment is signed, delivered and pronounced in the open court today the 08th day of August, 2019.

Dictated and Corrected

(N. Talukdar)
Addl. Sessions Judge
Udalguri.

(N. Talukdar)
Addl. Sessions Judge
Udalguri.

IN THE COURT OF ADDL. SESSIONS JUDGE.....UDALGURI.**SPECIAL (POCSO) 30/2017****APPENDIX**

(A) Prosecution Exhibits:

- Ext.1 : Medical report.
Ext.2 : FIR.
Ext.3 : Statement of victim recorded U/S 164 Cr.P.C.
Ext.4 : Extract copy of GD entry.
Ext.5 : Sketch map.
Ext.6 : Charge-sheet

(B) Materials Exhibits : Nil.

(C) Defence Exhibits : Nil.

(D) Exhibits produced

by witnesses : Nil

(E) Court Exhibits : Nil

(F) Prosecution witnesses:

PW1- Dr. Hiranya Kumar Gayari.

PW2- Pradip Barman.

PW3- Victim-A.

PW4- Maitrai Barman.

PW5- Puspa Das.

PW6- Nayanti Mandal.

PW7- Namita Das.

PW8- Indra Dev Goswami.

(G) Defence witnesses : Nil.

(H) Court witnesses : Nil.

(N.Talukdar)
Addl. Sessions Judge.
Udalguri.