

IN THE COURT OF SPECIAL JUDGE (POCSO)
NALBARI

SPL. (P) CASE NO. 33/2018

U/S 10 of the Protection of Children from Sexual Offences Act, 2012

State of Assam

- Vs -

Jiyaur Rahman

..... Accused

Present

Smti Munmun B.Sarma

Special Judge (POCSO),

Nalbari

Counsel for Prosecution : Mr.K.K.Sarma, Spl. PP

Counsel for Defence : Mrs. Deepali Baruah, Advocate

Evidence : 27/06/2019, 25/07/2019, 26/07/2019

Argument : 11/03/2020

Judgment : 05/06/2020 (*Delayed due to Covid-19 Pandemic Lockdown*)

JUDGMENT

1) On 15/08/2018 the informant Kalpana Das lodged a FIR at Tihu PS, stating inter alia that, on 15/08/2018 while she was busy in kitchen, her 11½ year-old daughter 'X' went to bath. Accused Jiyaur Rahman came & touched 'X's breast from back-side. The accused did it 2-3 times & informant's daughter shouted. Hearing 'X's shouts the informant & other people came and confronted the accused. Informant immediately informed

her husband and he came along with a policeman and took the accused to the police station. Hence, the FIR was lodged.

2) On receipt of the FIR it was registered as Tihu PS Case No. 145/18 u/s 10 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) against accused Jiyaur Rahman. The police went to the place of occurrence and examined the available witnesses. Statements of the witnesses were recorded, medical examination of the victim 'X' was done and her statement u/s 164 CrPC was duly recorded. On completion of investigation, a prima facie case having appeared against the accused, the IO submitted charge sheet against accused Jiyaur Rahman u/s 10 of POCSO Act.

3) Cognizance was taken u/s 10 POCSO Act and the accused Jiyaur Rahman appeared before the court to face trial. Necessary copies were furnished to him. After considering the materials available on Case Record and Case Diary and prima facie case having appeared u/s 10 POCSO Act, charge was framed and the content of the offence was read over and explained to the accused Jiyaur Rahman, to which he pleaded not guilty and claimed to be tried.

4) To prove the offence u/s 10 POCSO Act against the accused person, the prosecution side examined the following 12 (twelve) witnesses & exhibited 6 documents. To substantiate his claim, defence did not examine any witness. The accused person's case, as could be ascertained from cross-examination of the prosecution witness was that of total denial.

5) The **points for determination** is "*Whether on 15/08/2018 at about 12:45 PM, the accused Jiyaur Rahman committed aggravated sexual assault upon victim 'X' (aged 11 years 6 months).*"

Arguments Forwarded by Both Sides –

6) Ld. Special Public Prosecutor argued that the evidences of the witnesses are clear that the accused did in fact sexually assaulted the victim 'X'. Medical evidences proved that the victim was above ten years but below 13 years at the time of incident & the Age Certificate showed that the victim was in fact 10 years few months. He prayed that maximum punishment should be given.

7) Ld. Counsel for the accused argued that evidence of all the witnesses revealed that they heard the shout of only the mother of the victim and the victim was absolutely silent. Thus, the PWs didn't support the claim of PW6/victim's mother that the accused pressed the breast of the victim 'X'. Ld. Counsel also argued that the victim & the other witnesses reside in a Hindu tenanted premise and therefore, they were unhappy that Jamuna had employed a Muslim person (the accused), and therefore, victim's mother concocted this false story so that he is not allowed to enter the tenanted premises & removed from employment.

DISCUSSIONS, DECISIONS & REASONS THEREOF –

8) I heard the arguments forwarded by the Ld. Special Public Prosecutor and ld. counsel for the accused. I have also gone through the

materials available in the Case Record & the Case Diary. The charge u/s 10 POCSO Act is analyzed herein below in view of the materials available on record and the argument forwarded by both side.

9) To be convicted u/s 10 POCSO Act it must be proved that the accused Jiyaur Rahman committed aggravated sexual assault on the victim 'X', who was a minor & aged about 11 years 6 months at time of incident. 'Sexual assault' has been defined u/s 7 POCSO Act as follows -

"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."

On the other hand, 'aggravated sexual assault' has been defined u/s 9 POCSO Act and describes over 22 different circumstances when 'sexual assault' is considered as 'aggravated sexual assault'. The different circumstances are defined from sub-clause (a) – (v), and the circumstance attracted in this present case is defined in sub-clause (m) & it reads as follows –

"(m) whoever commits sexual assault on a child below twelve years"

10) Before going further, it is pertinent point out two important sections under the POCSO Act, which would be essential for appreciation of evidence in cases under POCSO Act, same being, s.29 & s.30 POCSO Act.

While s.29 POCSO Act is regarding 'presumption as to certain offences', s.30 POCSO Act is regarding 'presumption of culpable mental state of the accused'. These sections reads as follows –

"29. Presumption as to certain offences -

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 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."

"30. Presumption of culpable mental state - (1)

In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

There has been loads of confusion as to how s.29 POCSO Act comes into effect, and the answer lies in the language of the section itself. It uses the word 'shall presume', and therefore, it is a case of reverse onus. It is

imperative to understand that there is marked difference between provisions of presumption provided under POCSO Act and those provided under Negotiable Instruments Act, Prevention of Corruption Act, etc. Under the POCSO Act, there is no other requirement to be complied with by the prosecution to raise presumption u/s 29 POCSO Act, except to show that the accused has been prosecuted for any of the offences as enumerated u/s 29 POCSO Act. In view of this discussion, the evidences of the witnesses are discussed below.

11) In the present case, the **victim 'X' deposed as PW8**. Considering her age, the Court put general questions to ascertain her capacity to adduce evidence, and once satisfied, the evidence of PW8 was recorded. PW8/victim deposed that the accused was working in the tea stall of PW Jamuna, who resides nearby. On the day of the incident when the victim went for bath & was collecting the soap from the veranda, the accused caught hold of her hand and touched her breast. The victim raised *hulla* and then victim's mother & Jamuna arrived at the scene. The defence-side cross-examined the victim on the line that it was Independence Day & that she was at school at the time of the alleged incident. The victim was also cross-examined that she didn't state in her 164 statement that the accused caught her hand when he touched her breast. However, victim denied the same. Perusal of the statement of the victim u/s 164 CrPC reveals that in her statement she mentioned that the accused touched her breast from behind and squeezed it twice. The statement is silent regarding the accused catching hold of her hand. In later part of the discussion I will deal

with the question whether this amounts to an omission or to a contradiction.

12) Coming to the evidence of the other PWs, as per evidence of victim/PW8 her mother/informant & Jamuna Gogoi were first witnesses at the place of incident. Victim's mother **Kalpna Das deposed as PW6**. She stated the same things mentioned by victim/PW8. PW6 further stated that hearing PW8's cry, PW8, Jamuna (PW3) & other witnesses arrived at the scene and seeing them the accused left victim's hand was standing next to her. PW6 told that the accused had grabbed her and squeezed her breast twice. Cross-examination of PW6 failed to dislodge her case.

13) **Jamuna Devi deposed as PW3** and she confirmed that the accused was working in her tea stall and at the time of the incident her was present in the place of incident as he had come to collect lunch for her husband. PW3 further deposed that hearing PW6's shouts PW3 came out and enquired and was informed that the accused had touched the body of the victim. When PW3 charged the accused as to why he is in the house of the victim, he told that he went to enquire about TV channel. Evidence of PW3 further revealed that the accused had joined her tea stall only 2 days prior.

14) Perusal of the evidences of the other witnesses reveals that PW2 Sri Dipjyoti Kalita, PW4 Sri Khagen Goswami, PW5 Smti Bindu Rahang, PW9 Smti Padumi Boro, PW10 Smti Bhanu Kalita & PW11 Smti Chitra Medhi

have not seen the incident personally and were told about the incident by PW6 Kalpana Das. However, **PW9 Smti Padumi Boro, PW10 Smti Bhanu Kalita & PW11 Smti Chitra Medhi** did rush to the place of incident hearing *hulla* and saw that PW6 had caught hold of the accused and the victim was also present. PW6 told them that the accused had touched PW8's breast. PW8 was present when her mother/PW6 narrated the incident to these witnesses. **PW7 Sri Kandarpa Das** is the father of the victim & he was told about the incident by the victim & also by PW6.

15) Thus, what can be understood from the above evidences is that, when the incident happened the victim/PW8 & the accused were the only persons present and there were no other eye-witnesses. The evidence of PW8/victim is consistent with her statement u/s 164 CrPC & furthermore, despite defence-side's attempts no contradictions appeared in the evidence of the victim/PW8. In her statement before the I/O the victim may not have stated that the accused caught hold of her hand when he squeezed her breasts, however, we have to understand that the victim is a minor and had to go through a sexual assault within the safety of her own house, hence, at the time of statement to I/O this omission is not major in nature, and therefore, doesn't amount to a contradiction. It's important to remember that all omissions are not contradictions & the following tests can ascertain whether a particular omission amounts to contradiction –

- (i) An omission is not a contradiction unless what is actually stated contradicts what is omitted to be said; and

- (ii) Whether the sentence or assertion is irreconcilable with the deposition in the Court.

In the case of **Tahsildar Singh & Anr. Vs State of Uttar Pradesh, 1959 AIR 1012**, the Hon'ble Supreme Court, while discussing when omission amounts to contradiction, held that, "*It was incorrect to say that all omissions in regard to important features of the incident which were expected to be included in the statement made before the police, should be treated as contradictions. An omission in the police statement could amount to a statement and be used as a contradiction only when (i) it was necessarily implied from the recital or recitals found in the statement, (ii) it was negative aspect of a positive recited in the statement or (iii) when the statement before the police and that before the Court could not stand together.*"

16) Perusal of the evidence of the other PWs reveals that, hearing the victim's shouts, victim's mother/PW6 was the first person to reach the place of incident and seeing her the accused let go of the victim's hand. Both PW6 & PW8 deposed that PW8 narrated the incident to PW6 & PW6 caught hold of the accused. PW3/ Jamuna reached the place of incident immediately after and she charged her employee/accused, and he said he was in the house of the victim to ask about TV Channel. Pertinent to mention that none of this evidences could be assailed during cross-examination. PW9 Smti Padumi Boro, PW10 Smti Bhanu Kalita & PW11 Smti Chitra Medhi resides nearby and on hearing *hulla* they also came to

the place of incident and saw the accused standing next to the victim and PW6 narrated the incident to them in presence of the victim/PW8. Cross-examination of the witnesses failed to show any valid reason for the accused being in the vicinity & house of the minor victim, who is a complete stranger to him. Cross-examination of these witnesses also failed to show any reason to cast a doubt on the story narrated by PWs. Furthermore, there is nothing in the evidences of the other PWs that makes the evidence of PW6 & PW8 doubtful. Thus, evidence of the victim/PW8 & the informant/PW6 is found credible, believable & corroborated.

17) Another point to be noted is that the evidence of PW3 (employee of accused), PW6 & PW8 revealed that the victim & her family didn't know the accused at all as he was employed by PW3 only a few days prior to the incident. There is nothing in the evidences or during cross-examination of any of the witnesses, or in the statement of the accused u/s 313 CrPC, that could reveal any ground for a minor girl & her family members to falsely accuse the accused of the heinous crime. Ld. Counsel for the accused argued that the victim & the other witnesses reside in a Hindu tenanted premise and therefore, they were unhappy that Jamuna had employed a Muslim person (the accused), and therefore, victim's mother concocted this false story so that he is not allowed to enter the tenanted premises & removed from employment. However, the defence failed to bring out anything during the cross-examination of any of the PWs that would support this line of argument. Furthermore, the suggestion itself is so absurd that a mother will drag her 10/12-year-old child into a sexual

assault allegation simply to prevent a stranger from another community entering the tenanted premises. It would be justified to refer to the case of **Manoj Kumar Vs. The State of Uttarakhand, (2019) 5 SCC 667**, wherein, Hon'ble Supreme Court held that –

"In the absence of any existing enmity between the accused and the witnesses there exists no ground to question the veracity of the witnesses or to raise a ground of false implication..."

18) Coming to the question as to the sexual intent of the accused while squeezing the breast of the victim, I'm of the opinion that this doesn't even need a discussion because under no logical ground would the accused squeeze the breast of the minor victim, other than with sexual intent. Furthermore, as mentioned in earlier paragraph, s.30 POCSO Act makes a presumption of culpable mental state of the accused to commit the crime & the onus is on the accused to prove otherwise. There is nothing in the evidences of the witnesses, cross-examination of witnesses or the statement of the accused u/s 313 CrPC that would show that the accused didn't have a culpable mental state to commit the offence of sexual assault on the victim or that he didn't have any sexual intent when he squeezed the breast of the victim. Thus, I hold that all evidences points to the fact that the accused committed the offence with a sexual intent & culpable mental state.

19) Thus, it is seen that the foundational facts are established by the prosecution that the accused committed sexual assault, as defined u/s 7 POCSO Act, when he squeezed the breast of the victim/PW8. However, to be considered as 'aggravated sexual assault' u/s 9 (m) POCSO Act, it is essential for the prosecution to establish that the victim was below 12 years at the time of the incident. Prosecution produced the Medical Officer Dr. Urmi Devi Choudhury as PW1 and she deposed that radiological evidence (Ext.2) estimated the age of the victim to be above 10 years but below 13 years. Cross-examination of PW1 didn't throw any further light to this matter. Prosecution also produced the Birth Certificate of the victim, wherein, her date of birth is shown as 10-10-2007, thus, making her approx. 10 year 10 months at the time of the incident. The Birth Certificate was seized by I/O and subsequently given in *zimma* of PW7 Kandarpa Das. However, PW7 Kandarpa Das failed to produce the Birth Certificate during his evidence & thus, it remained unproved. Thus, these discussions reveal that at the time of the incident the victim was a minor, however, prosecution failed to prove that she was below 12 years old.

20) Thus, in the present case, prerequisite conditions required to raise presumption u/s 29 POCSO Act is satisfied by the prosecution. The onus to prove innocence or to disprove the allegations cast on the accused is shifted on the accused. As discussed earlier, s.29 POCSO Act puts a reverse onus on the accused when he is being prosecuted for committing an offence, as enumerated in s.29 POCSO Act, and therefore, the Court is directed that it shall presume that the accused has committed the offence,

unless the contrary is proved. While discussing s.29 POCSO Act, Hon'ble Calcutta High Court observed in the case of **Sahid Hossain Biswas Vs. State of West Bengal**, that –

"Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence of his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case."

However, perusal of the cross-examination of PWs & the statement of accused u/s 313 CrPC failed to put forward any material from which it can be inferred that the accused is innocent.

21) Therefore, in view of the above discussions, I hold that prosecution was successful in prove that the accused Jiyaur Rahman committed sexual assault on the victim 'X'. Though the accused was charged u/s 10 POCSO Act for aggravated sexual assault, however, evidences could establish the victim to be between 10 years to 13 years, and no evidence was available

to establish that the victim was below 12 years at the time of the incident. As sexual assault & aggravated sexual assault has the same ingredients that needs to be proved, except for the difference in age of the victim, the accused will not be prejudiced if he is punished for the lesser offence u/s 8 POCSO Act. Thus, I have no hesitation in holding that **prosecution succeeded in proving the guilt of the accused Jiyaur Rahman u/s 8 POCSO Act** beyond all reasonable doubts against the accused.

22) Now, examining whether it is a fit case to release the accused Jiyaur Rahman u/s 360 CrPC or under the Probation of Offender's Act. The accused person has been found guilty of sexually assaulting a minor girl within the safety of her own home. She was saved from further assault & humiliation due to timely intervention of witnesses. During trial the accused has shown no remorse either. Thus, I'm of the opinion that this is not a fit case to released accused Jiyaur Rahman u/s 360 CrPC or under the Probation of Offender's Act.

23) I have heard the accused person Jiyaur Rahman on the point of sentence & he submitted that he hails from very poor strata of society and is young at age. If he is put behind bar his innocent family member would suffer a lot. Hence, accused pleaded for mercy.

ORDER

24) Discussions made in the prior paragraphs revealed that the prosecution succeeded in proving beyond all reasonable doubt the guilt of

the accused for sexually assaulting a minor aged between 10-12 years, and therefore the **accused Jiyaur Rahman convicted u/s 8 POCSO Act.** There appeared no mitigating factors in favour of the accused, and rather the fact that he sexually assaulted a complete stranger aged between 10-12 years, within the safety of her own house, showed how lecherous & aggressive the convicted accused is. Thus, considered all these facts and circumstances of the case and the nature of the offence proved, the **convicted-accused Jiyaur Rahman is sentenced to undergo Rigorous imprisonment for a term of 5 (Five years) and fine of Rs. 10,000/- (Ten Thousand Only), and i/d of payment of the fine, S/I for 3 (three) months.** The period of detention undergone by accused, if any, shall be set off against the term of imprisonment awarded.

25) The minor victim 'X' is also awarded compensation under the Victim Compensation Scheme & the quantum shall be decided by the Secretary, District Legal Services Authority, Nalbari as per norms. The compensation's quantum & mode of dispersal shall be made keeping in mind the age of the victim, her future security & a fail-safe mechanism to ensure that the amount is utilized for the welfare of the victim only.

Zimma of the Birth Certificate is made absolute.

A copy of the judgment be furnished to convicted-accused Jiyaur Rahman free of cost, as provided u/s 363 CrPC.

A copy of the judgment be forwarded to the learned District Magistrate, Nalbari, as provided u/s 365 CrPC.

A copy of the judgment be forwarded to Secretary, District Legal Services Authority, Nalbari for necessary information & action.

Let the case record be consigned to record room after completing the formalities.

Given under my hand and seal of this Court on this the **5th day of June'2020.**

(Smti Munmun B.Sarma)

Special Judge (POCSO),

Nalbari

APPENDIX

(A) **Prosecution Witnesses:**

- a) PW1 – Dr. Urmi Devi Choudhury (Medical Officer)
- b) PW2 – Sri Dipjyoti Kalita
- c) PW3 – Smti Jamuna Devi
- d) PW4 – Sri Khagen Goswami
- e) PW5 – Smti Bindu Rahang (Official Witness)
- f) PW6 – Smti Kalpana Das (Informant)
- g) PW7 – Sri Kandarpa Das (F/o the victim)
- h) PW8 – 'X' (Victim)
- i) PW9 – Smti Padumi Boro
- j) PW10 – Smti Bhanu Kalita
- k) PW11 – Smti Chitra Medhi
- l) PW12 – Sri Kanak Ch. Sarma (IO)

(B) **Prosecution Exhibits:**

- a) Ext.1 – Medical Report
- b) Ext.1 (1) – (3) – Signature of Dr. Urmi Devi Choudhury (MO)
- c) Ext.2 – X-ray Report
- d) Ext.2 (1) – Signature of Radiologist
- e) Ext.3 – FIR
- f) Ext.3 (1) – Signature of PW6 Kalpana Das (Informant)
- g) Ext.4 – Seizure List for Birth Certificate of 'X'
- h) Ext.4 (1) – Signature of PW7 Kandarpa Das
- i) Ext.5 – Statement u/s 164 CrPC
- j) Ext.5(1) and 5(2) - Signatures of PW-8 (Victim)

- k) Ext.6 – Sketch Map
- l) Ext.7 – Charge-sheet
- m) Ext.6 (1) & 7 (1) – PW-12/ Kanak Ch. Sarma (IO) Signature

(C) **Defence Witnesses** : None.

(D) **Defence Exhibits** : None.

(Smti Munmun B.Sarma)
Special Judge (POCSO),
Nalbari