

IN THE COURT OF THE ADDITIONAL DISTRICT & SESSIONS JUDGE,
2nd COURT AND THE SPECIAL COURT UNDER POCSO ACT. 2012,
DARJEELING.

Present : Sri Santanu Misra,
Addl. Disrtict & Sessions Judge.

Special Case No. 7 of 2014 / S.T. No. 30 of 2014

Arising out of Kurseong P.S. Case No. 103 of 2013 dt. 13.05.2013
corresponding to G.R. Case No. 152(1) of 2013.

STATE

vs.

Deoraj DewanAccused.

Under Section 8 of the Protection of Children from Sexual Offences Act.

Date of F. I. R.	13.05.2013
Date of Submitting Charge Sheet	20.09.2013
Date of Transfer to this Court	20.03.2014
Charge Farmed on	04.06.2014
Judgment Delivered on	04.12.2014

JUDGEMENT

The prosecution case in a brief is that the Headmaster of Victoria Boys' School, Govt. of West Bengal, Kurseong, Darjeeling lodged a written complaint on 13.05.2013 before the Inspector-in-charge, Kurseong Police station to the effect that Mrs. Reba Sarkar, mother of Debarun Dutta, a border student of class V of his school wrote a letter to him that she had personally witnessed a shameful event of sexual harassment of a minor student by an unidentified male at the kitchen corridor at about 2.45 pm on 12.05.2013. On the basis on that letter the school authority made an inquiry and came to know that Sri Deoraj Dewan, s/o Sri Maniraj Dewan is in the habit of sexually abusing the border students of class V & VI. Thereafter the Headmaster has lodged this F.I.R. for further investigation and necessary action against the said Dewan.

On the basis of the said written F.I.R. Kurseong P.S. No.103/2013 dt. 13.05.2013 was started and the police started the investigation. During investigation police visited the P.O., examined the witnesses, arrested the accused and thereafter submitted the charge sheet after completion of the investigation before the Ld. A.C.J.M. Kurseong where from this case has been transferred to Special Court i.e., the 1st Court of ld. Addl. District & Sessions Judge, Darjeeling who is the Special Court under Child Right Act. Subsequently the Power of Special Court Under the Protection of Children from Sexual Offences Act, 2012 (hereinafter called 'POCSO Act') has been vested to this Court and this case record has been transferred to this Court for trial on 19.03.2014.

This case initially started under section 12 of the POCSO Act 2012, and after receiving this case record on 20.03.2014 date was fixed on 04.06.14 for framing of charges and on that date the charge under section 12 of POCSO Act, 2012, against the accused Deoraj Dewan was framed who pleaded not guilty. But at the time of argument it was

detected that the allegation against this accused was not only pull down the pant of the victim but also hold his private part. This allegation does not fulfill the ingredients of the definition section of 11 of the POCSO Act in which the penal section is 12 of POCSO Act i.e., Sexual harassment. But it fulfill the ingredients of the definition section 7 of the POCSO Act. Section 7 of the Act provides **“Sexual Assault – Whoever, with sexual intent touches the vagina, penis, anus or breast of any 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”**. Here in this case the accused hold the private part of the victim who is male and this accused has the habit to do so as alleged. So he has sexual intention for that act. It is not the penetration but is a sexual assault as per law. The penal section of this definition is section 8 of the POCSO Act. So charge was altered on the consent of the parties. The new charge was read over and explained to the accused. Both the ld. Lawyers of both sides have adopted the examination and cross-examination of the prosecution witnesses.

During trial prosecution has examined 12 witnesses.

P.W.1-- S.I. Bhusan Chattri, who received the written F.I.R.

P.W.2-- Dr. Jayanta Pal, the Headmaster of Victoria Boy's School, Kurseong and the defacto complainant.

P.W.3-- Anuj Kumar Shingh, the victim.

P.W.4-- Sumitra Rai, the employee of the school.

P.W.5-- Rupa Gurung, the employee of the school.

P.W.6-- Nil Kamal, the student of the school.

P.W.7-- Sohil Rana, the student of the school.

P.W.8-- Kousik Ghosh, the student of the school.

P.W.9-- Rudraksh Roy, the student of the school.

P.W.10-- Badal Bhujel, the student of the school.

P.W.11-- Reba Sarkar, who lodged the complaint before the Headmaster of the school regarding the sexual offence.

P.W.12-- A.S.I. Birendra Chattri, the I.O. In this case.

The prosecution also proved the documents as follows:

Exbt. 1-- Endorsement of P.W.1 on the written complaint.

Exbt. 1/1-- Original Written Complaint.

Exbt. 2-- Original Letter of P.W.11 to the Headmaster.

Exbt.2/1-- Signature of the P.W.11 on the letter.

Exbt. 3-- Formal F.I.R.

Exbt. 4-- Rough Sketch Map

Exbt. 4/1-- Index.

After alteration of the charge from sec 12 to sec 8 of the POCSO Act, option was given to both the parties to adduce further evidence if any or further cross examination of the witnesses. But both the ld. P.P. and the defence counsel has adopted the chief and cross of the prosecution witnesses.

The accused was examined u/s 313 Cr.P.C. But he did not adduce any evidence on his part.

The points for adjudication:

- a) whether this has committed the offence of sexual assault upon the victim?
- b) Whether the prosecution has been able to prove this case beyond all reasonable doubt?

DECISION WITH REASONS

In this case the allegation is that this accused Deoraj Dewan being a contractual employee of the Victoria Boys School, Govt. Of West Bengal, Kurseong has committed the sexual assault upon a minor student of class V of that school inside the school premises and one guardian of the a student has witnessed the same and she lodged the complain before the school authority then and there.

In this case the vital witness is the victim himself i.e., P.W. 3. This P.W.3 has stated in his evidence that in the month of May 2013 he attended the school. At about 2.45 p.m. after lunch he was playing cricket in the corridor with other boys. Deoraj dada (accused) and another person were also playing with them and thereafter the accused Deorajdada removed his track suit and also hold his private part. One time the accused touched his private part. This witness identified the accused in the court. He further stated that the mother of Debarun Dutta witnessed the said occurrence. In his cross examination this witness said that their play time is 1.30pm to 3.00pm. He was not playing in the playground but he was playing in the corridor of the dinning hall. He denied that when the accused caught hold of his plant accidentally the accused touched his private part. He also denied that at the time of playing his track suit became wet by water. The evidence of this witness reveals the he categorically stated that this accused removed his track suit at the time of playing and also caught hold of his private part. The cross examination did not destroy the evidence of this witness.

Another vital witness is P.W. 11, Smt. Reba Sarkar, who saw the incident at first and protested and then wrote the complaint before the school authority. This P.W.11 was the mother of Debarun Dutta who was studied in that school and this witness came there to meet her son. She stated that on 12.05.2013 while she along with her were walking in front of kitchen for dinning hall she saw that one person tried to remove the pant of Anuj at the corridor of the kitchen she protested. That person told her that the father of the victim asked him to take care of him. This witness did not state the name of the accused and did not identify the accused but she stated that person is the employee of the school and she has proved her letter and also proved her signature (Exbt. 2 & 2/1). According to her evidence as well as Exbt. 2 it appears that this witness saw the sexual harassment of a minor student by an unidentified staff of the school and her evidence as well as her letter have corroborated the incident of sexual assault upon the victim.

P.W. 4 Sumitra Rai, the Staff of Dinning Hall of that school has stated that on 12.05.2013 she saw that Deoraj Dewan opened the pant of the P.W.3 (victim) by way fun. In her cross she has denied that the paint of the victim was wet or not. This witness has also corroborated the incident although she tried to say that it was fun but I find it is nothing but to save her colleague. But she has proved the date, time, place of incident and also the has proved the incident.

P.W.5 Rupa Gurung another employee of that school, has stated that on 12.05.2013 before the tea time this victim was playing and he fell down and became wet due to rain and his

pant was slipping down and Deoraj put it up in its original position. This witness was declared hostile by the prosecution as she did not corroborate the case. I find that this witness is the colleague of the accused for that reason she did not disclose the fact. She was not cross examined by the defence. But one thing is very clear from her evidence that this accused hold the pant of the victim on that date, time and place either to remove the same or to put up in its original place. It is well settled principle of law that only positive part of the evidence of a hostile witness can be taken for consideration.

From these evidence of the prosecution it appears that on the date of incident this victim was playing in corridor of the kitchen prior to tea time and this accused removed the pant of the victim. P.W.3,11,4 and to some extent 5 have corroborated the same. The victim himself has stated that this accused hold his private part. The victim is best witness of this offence. The defence has taken the plea that due to rain the victim was fell down on the ground and his pant became wet and the pant was slipped down and this accused put the pant up in its normal position. But the defence did not cross examined to any witness whether there was any rain at the time of incident or prior to that or the rain water was on the corridor of the kitche. For the sake of argument if the pant of the victim became wet and it was slipped down then the victim himself had the capacity to put it up in its position as the victim was the student of class V and was residing at the school hostel. Why this accused came forward to do that thing. The answer is nil. Then the strong probability is that this accused opened the pant of the victim at the time of playing and hold the private part of the victim and there is no other alternative.

In this case the prosecution has examined several students of the said school. P.W. 6 Nil Kamal who is the student of that school, has stated that while he was the student of class V this accused was playing with them and sometime he touched their private parts. The accused touched his private part one time. P.W. 7 Sohil Rana stated that in the year of 2012 he was the student of class V of this school. While he was coming to the dinning hall for taking water after playing this accused Deoraj pulled down his pant. P.W.8 Kousik Ghosh stated that in the month of may 2013 while he was going to dinning hall the Deoraj (accused) touched his private part over his pant. While he asked the accused he said that he was joking. P.W. 9 Rudraksh Roy stated that in the month of April 2013 this accused Deoraj gave some fruits and when he went to dinning hall to cut the fruits the accused opened his pant. P.W.10 Badal Bhujel has stated that in the month of May or June 2013 he was playing cricket in the ground with his friends. Deoraj came there and opened his pant and touched his private part. So the evidence of the other students shows that this accused Deoraj Dewan has the habit to open the pant of the minor students and touch or hold the penis or the private part of the student. This evidence of the other students also create the strong presumption that on the date of incident this accused opened the pant or track suit of the victim at the play time and hold the private part of the victim as because the accused has the habit to do so.

P.W.2 Dr. Jayanta Pal the Headmaster of the school has stated that after receiving the letter from the mother of D. Dutta, a student, he inquired the matter from the students to find out the truth and he came to know that this accused Deoraj Dewan committed the offence upon the victim then he filed the written F.I.R. (Exbt. 1). the Exbt. 1 has corroborated the evidence of the P.W.2. In the said Exbt. 1 it is clearly mentioned that this accused is in the habit of sexual abusing the boarder students of Class V & VI. In his cross this P.W.2 has said that he inquired the matter from the victim, D. Dutta and other students of class V & VI. He has flatly denied the existence of any Union of the staff except one Association of non teaching staff. He also denied

that this accused was the president of that association and demand the enhance of the salary. He admitted that prior to this incident no complain was received from any student.

Ld. Public Prosecutor argued that this accused is an contractual employee of a reputed School and he is in the habit to sexual abuse to the students of Class V & VI. The students who are the victim of this type of sexual abuse did not disclosed the matter to school authority either fear as the accused is the employee or as it was a shameful event. That not means that this type incidence is going on and this accused will continue the sexual abuse with the students years together taking the advantage that nobody lodge any complain for any reason. The reputation of the school is going down due that incident.

In reply Ld. Advocate for the defence argued in his written argument that the evidence of the P.W.5 is very much clear that the pant of the victim became wet as he fell down on the ground and this accused put it up in its original position. According to him the evidence of P.W.5 is much trustworthy as she is the employee of the school. He further argued that the P.W.2 inquired the matter upon the students but the students stated that they did not disclosed the matter to any one. That apart the investigation was conducted by an A.S.I. of police who recorded the statement of the victim but section 24 of the POCSO Act provides that this statement u/s 161 Cr.P.C. should be recorded by an Officer not below the rank of Sub-inspector and the I.O. did not take any attempt for recording the statement of the u/s 164 of Cr.P.C. He further argued that P.W.11 who the eye witness and who submitted a letter to the P.W.2 has failed to identified the accused and she stated in her cross that there were other male persons at that time. According to him the prosecution has failed to prove this case and the investigation was defective.

Considering the argument of both the parties as well as the evidence of the prosecution this Court finds that that the P.W.11 the mother of one student, who saw the incident and lodged the complain before the headmaster (P.W.2), occasionally visited the school to meet her son. It is not possible for the guardian of the student to know the name of every employees of the school. The occurrence was taken place in the month of May 2013 and at that time her son was studying in that school. At present her son is not the studying in that school. She adduced evidence before the Court on 31st October, 2014 just after 17 months. So it is quit natural for her to forget the face of that person. She (P.W.11) said “ At this moment I cannot identify that person, but he was the employee of the school”. In her letter (Exbt. 2) she did not disclosed the name of that person. It indicates that at the relevant time she did not know the name of that person. But one thing is very clear from her letter that she saw such of incident occurred on that date for which she was complied to take away her son from the school to overcome his mental trauma. Non identification of the accused by P.W.11 is no matter in this case as because the victim (P.W.3) himself and the two employee of the school (P.W.4 & 5) have identified this accused who committed the incident on that date. That apart the other witnesses of the school (P.W. 6 to 10 & 2) have identified this accused as he has the habit to commit the sexual assault upon the students. The defence has banked upon the evidence of the P.W.5. But it has already been discussed that this witness has been declared hostile by the prosecution. This witness has made a new story that this victim was fell down on the ground and his pant became wet and it slipped down and this accused put up his pant in its original position. But this evidence has no corroboration. There is no evidence that there was rain on that date and the corridor of kitchen became wet due to rain water. So the defence did not get any support of the evidence of P.W.5. The evidence of this witness is not believable. But one thing is very clear from her evidence that on that date, time and place of

occurrence this accused Deoraj Dewan caught hold the pant of the victim either to pull down or to put up in its position. The other witnesses did not corroborate the evidence of P.W.5 that this accused put up the pant of the victim. They stated that he opened the pant of the victim. The P.W.4, who is another employee, said that Deoraj opened the pant of the victim out of fun. Both the P.W. 4 & 5 being the colleague of the accused tried to save him for that reason they did not disclose the entire fact. Although both of them have admitted that on the date, time and place this accused hold the pant of the victim either to open or to put up in its position. But the victim himself stated that the accused not only opened his pant but also hold his private part. There is no reason to disbelieve this fact when that other students have stated that this accused has the habit of sexual assault by committing similar type of incident to the students of class V & VI.

Now the very import question has raised by the defence that this case was investigated by an Officer in the rank of A.S.I. From the Exbt. 3 it is evident that this case was endorsed to this I.O. who is A.S.I. of police. During investigation this I.O. examined the victim and recorded his statement u/s 161 of Cr.P.C. But the POCSO Act does not give any permission to an A.S.I. Of police to examine the victim. Section 24 (1) of that Act says that the examination of the victim should be done by the Officer not below the rank of S.I. It is a technical defect done by the investigating agency. The investigating agency was very casual during investigation. They did not follow the law as prescribe in that POCSO Act, 2012 regarding investigation the I.O. did not make prayer before the Court for recording the statement u/s 164 Cr.P.C. But it is a settled principle of law that due to the defect of investigation the accused whose guilt has been proved otherwise shall not get any benefit. Here the prosecution evidence has proved the offence of this accused then due to the technical defect of the investigating agency and latches from their part he will not get any benefit.

In summing up the above discussion we find that the testimony of the victims and other witnesses are very much reliable and trustworthy. There is no material on record requires drawing of an inference that the entire incident was improbable or imaginary. Minor contradictions or insignificant discrepancies or the defect of investigation should not be a ground for throwing out an otherwise reliable prosecution case.

The prosecution has proved the case by cogent evidence and without any reasonable doubt. It is, however, firmly established that accused Deoraj Dewan committed sexual assault upon the minor victim. Offence committed by this accused is punishable under section 8 of the POCSO Act 2012. I hold accused Deoraj Dewan is guilty of committing the offence under section 8 of POCSO Act, 2012 and convict him accordingly in terms of provision of Cr..P.C.

Hence, it is

ORDERED

That the accused Deoraj Dewan is held guilty for the offence punishable under section 8 of the Protection of Children from Sexual Offences Act, 2012. He is convicted accordingly in terms of section 235 of Cr.P.C.

There is no reason to proceed in accordance with the provision under section 4 of Probation of Offenders Act or Section 360 of Cr.P.C. as the offence committed by the convict is heinous one and he committed sexual assault upon a minor Child of a reputed School. If he is released on probation that a bad message will go to the society or the guardian of the students of

that school. The reputation of the school is also involved.

I have explained that the punishment of the offence is not less than three years and it may be extended to five years and also fine. He will be heard on the point of sentence on 05.12.2014 and the pronouncement of the sentence is suspended till tomorrow i.e., on 05.12.2014. The convict is remanded to J/C till tomorrow.

To 05.12.2014 for imposing sentence.

Dic. and Corrected by me

Judge,
Special Court under POCSO Act.
04.12.2014

Judge,
Special Court under POCSO Act
04.12.2014

Further Judgment dt. 5th day of December, 2014

The convict Deoraj Dewan is produced from J/C.

I have heard the convict on the point of sentence. I have informed him again that the maximum punishment of the offence which may be imposed upon them. He replied:-

I have old parents at my residence. There is no one to look after them. There is no one to earn money. My children are school going. So, my sentence be reduced.

Heard.

Considered the submission of the convict.

The convict was an contractual employee of a reputed school like Victoria Boys' School, Govt. of West Bengal, Dowhill. He committed sexual assault upon the minor students of class V of that inside the school premises. This school has a very good reputation not only in India but also in abroad. The offence committed by this convict inside the school premises upon the boarder student and for that reason the reputation of the school has been lower down. The offence like sexual assault upon minor student is very serious one. This Court finds that sufficient punishment should be awarded to this convict.

Hence, it is

ORDERED

THAT the Convict Deoraj Dewan is sentenced to Simple Imprisonment for 4(four) years and is also sentenced to pay fine of Rs. 2000/- i.d., to S.I. for six months for committing the offence punishable under section 8 of the POCSO Act, 2012.

The total detention period undergone by this convict during investigation, inquiry and trial of this case is to be set-off from his total sentence under section 428 Cr.p.c.

A copy of this judgement be provided free of cost to the convict. The convict is also informed that he has the right to prefer appeal against this order of conviction and sentence.

Let a copy of this judgement be also forwarded to the Ld. District Magistrate, Darjeeling in terms of section 365 of Cr.P.C.

Dic. & Corr. By me.

Special Court,
under POCSO Act, 2012, Darjeeling.
05.12.2014

Special Court,
under POCSO Act, 2012, Darjeeling.
05.12.2014

