

IN THE COURT OF THE SPECIAL JUDGE :::::::::

CHIRANG, KAJALGAON.

Special (P) Case No. 17(RKT)/2017U/S 376(2)(i)/354A of IPC R/W Section 4 of POCSO Act.

State of Assam

Vs.

Sri Mitinga Narzary Sri Jisoya Champramary

.....Accused

PRESENT:

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Sri N.I. Siddique, Ld. Advocate

Date of evidence

: 19.04.18, 11.06.18, 30.06.18

Date of Argument

: 21.07.2018

Date of Judgment

: 04.08.2018

Special Judge. Chirang. Kajalgaon

JUDGMENT AND ORDER

1. The prosecution case in brief is that on 30th April, 2017, the informant Sri Rajendra Brahma, lodged an FIR before Runikhata P.S. alleging that on 30.04.2017 at about 2.30 a.m., accused Mitinga Narzary and Jisoya Champramary took away Miss 'A', Miss 'B', Miss 'C' and Miss 'D' (names are withheld), on their motorcycles from the Bihu function held at Bengtol and took them towards Runikhata. On the way, the accused persons, on the pretext of rain, took the girls to the forest quarter of NGO worker Bimal Borgoyary and requested him to allow them to stay there till cessation of rain. It is alleged that during their stay in the said forest quarter, the accused

persons forcefully committed rape on Miss 'A' and Miss 'B' and molested other two girls.

2. The matter was informed to the O/C, Runikhata Police Station who accordingly registered a case being numbered as Runikhata P.S. Case No. 07/2017 U/S 376(2)(i) IPC read with Section 6/8 of POCSO Act and S.I A.B. Sheikh was entrusted to investigate the case. Accordingly, the I.O. arrested the accused persons, visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victims for medical examination, got recorded their statements u/s 164 CrPC and after completion of investigation, submitted charge-sheet against the accused persons, namely, Mitinga Narzary and Jisoya Champramary U/S 376(2)(i) IPC read with Section 6/8 of POCSO Act. Later on, accused Jisoya Champramary was released on bail. After receiving charge sheet, copies of relevant documents were furnished to the accused persons. Accused Mitinga Narzary was produced before the court from jail and accused Jisoya Champramary appeared before this Court. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge was framed U/S 376(2)(i)/354A of IPC R/W Section 4 of POCSO Act against accused Mitinga Narzary and Jisoya Champramary separately. Charge was read over and explained to the accused persons to which they denied to plead guilty. After framing of charge, accused Mitinga Narzary was released on bail.

3. In support of the case prosecution side examined as many as 12 (twelve) witnesses including the I.O. and M.O.

- Following witnesses are examined:-
 - (1) Victim as PW 1
 - (2) Victim as PW 2
 - (3) Victim as PW 3
 - (4) Victim as PW 4
 - (5) Sri Rajendra Brahma as PW 5
 - (6) Sri Pinnai Basumatary as PW 6
 - (7) Sri Rang Kumar Goyary as PW 7
 - (8) Sri David Basumatary as PW 8

Special Juage Chirang. Kajalgaon

- (9) Sri Sukumar Goyary as PW 9
- (10) Sri Prabul Narzary as PW 10
- (11) Dr. Meena Hazarika (M.O.) as PW 11
- (12) SI Abdul Barik Sk. (I.O.) as PW 12
- 5. Statements of the victims U/S 164 Cr.P.C. were exhibited as Ext.1, 4, 5 and 6. Seizure list were exhibited as Ext.2 and 3. FIR was exhibited as Ext.7, Medical reports were exhibited as Ext.8 & 9, sketch map was exhibited as Ext.10 and Charge-sheet was exhibited as Ext.11. Seized two jangias were exhibited as Material Ext-1.
- 6. Defence plea is of total denial. Defence adduced no evidence.
- Heard argument from both sides.
- 8. Now points for consideration:-

For the offence U/S 376(2)(i) of IPC

1. Whether on 30.04.2017, at about 2.30 A.M. at village Runikhata Forest Range Quarter under Runikhata P.S., the accused Mitinga Narzary committed rape on Miss 'B' (name is withheld), a woman under age of 16 years?

For the offence U/S 354A of IPC

2. Whether on the same date, time and place, the accused Mitinga Narzary committed physical contact and advanced involving unwelcome and explicit sexual overtures/made a demand or request for sexual favours against the will of a woman, namely, Miss 'D' (name is withheld)?

For the offence U/S 4 of POCSO Act

3. Whether on the same date, time and place, the accused Mitinga Narzary committed penetrative sexual assault on Miss 'Miss 'B' (name is withheld), a minor girl under the age of 18 years?

Special Judge.

For the offence U/S 376(2)(i) of IPC

4. Whether on 30.04.2017, at about 2.30 A.M. at village Runikhata Forest Range Quarter under Runikhata P.S., the accused Jisoya Champramary committed rape on Miss 'A' (name is withheld), a woman under age of 16 years?

For the offence U/S 354A of IPC

5. Whether on the same date, time and place, the accused Jisoya Champramary committed physical contact and advanced involving unwelcome and explicit sexual overtures/made a demand or request for sexual favours against the will of a woman, namely, Miss 'C' (name is withheld)?

For the offence U/S 4 of POCSO Act

6. Whether on the same date, time and place, the accused Jisoya Champramary committed penetrative sexual assault on Miss 'Miss 'A' (name is withheld), a minor girl under the age of 18 years?

DISCUSSION, DECISION AND REASONS THEREFOR:-

- 9. Now, I want to discuss and appreciate the prosecution evidence on record regarding the all points mentioned above simultaneously for the sake of convenience.
- 10. I have already mentioned that in support of the case, prosecution side examined as many as 12 witnesses including M.O. and I.O.
- 11. PW 1(B, name is withheld), PW 2(A, name is withheld), PW 3(C, name is withheld) and PW 4(D, name is withheld) are the victim girls. PW 1 deposed that on the date of occurrence, she along with other victims went to Bengtol to enjoy Bihu festival. She deposed that at that time, she was reading in Class IX. She did never fail in any class. After enjoying the Bihu function, they were proceeding to the house of maternal aunt of another

Special Judge.
Chirang, Kajalgaon

victim, PW 3. On the way, both accused persons met them. Then they forcefully took all the victims in their motorcycle. PW 1 and PW 3 were taken by accused Mitinga Narzary and PW 2 and PW 4 were taken by accused Jisoya Champramary on their motorcycle respectively. According to PW 1, they got up the motorcycle at about 7.00 p.m. After that they were loitering in different places in the motorcycle and ultimately they were taken to a forest quarter at about 2.30 a.m. situated at Runikhata. It is alleged by PW 1 that accused Mitinga Narzary took her to a particular room and committed sexual intercourse three times. After that on next day, they were kept in a room by the accused persons. Accused Mitinga Narzary was also present in said room along with them. Other accused Jisoya Champramary fled away. Then members of ABSU, particularly PW 6 along with other members of the ABSU caught them within the room and took to their office. The members of ABSU informed the guardians of the victim girls. Accordingly, they went to the ABSU office and knew about the incident. This witness stated same fact before the Magistrate when her statement was recorded U/S 164 Cr.p.c. Learned defence counsel gave suggestion that at the time of incident, age of PW 1 was above 18 years but same was denied by her. According to learned defence counsel, PW 1 and other victim girls went with the accused persons willfully and accused did not commit sexual intercourse with her but same fact was also denied by the PW 1. It is revealed from the cross-examination of PW 1 that she knew accused Mitinga Narzary three months ago. According to PW 1, initially accused took them on long drive. When there was raining, then they entered the forest quarter situated at Runikhata. This witness also stated that other accused Jisoya Champramary also committed sexual intercourse with PW 2. The PW 1 did not admit the suggestion given by learned defence counsel that other accused did not commit sexual intercourse with PW 2.

Special Judge, Chirang, Kalalgaon

PW 2 also stated same facts as stated by PW 1. According to PW 1 and PW 2, after entering the forest quarter at Runikhata, accused persons separated them. The younger victim girls, particularly PW 3 and PW 4 were kept in a separate room. Accused Mitinga Narzary took PW 1 into a particular room and other accused Jisoya Champramary took PW 2 into another room. According to PW 1, Mitinga Narzary committed sexual intercourse with her and according to PW 2, accused Jisoya Champramary

committed sexual intercourse with her. During cross-examination, it is revealed that PW 1 and PW 2 did not make any hue and cry during their stay at forest quarter, Runikhata. They also did not inform on next day to anybody else though they can open the door and windows of the room where all victims were kept by the accused.

- PW 3 is another victim girl. She also accompanied PW 1, PW 2 13. and PW 4. She stated same facts as narrated by PW 1. She accompanied PW 1 on the motorcycle driven by accused Mitinga Narzary. According to PW 3, when they entered the Runikhata forest quarter, one person opened the door and he also touched her body. This person was not made as accused in this case by the I.O. It is revealed from the evidence of the PW 1, PW 2 and PW 3 that person was belonged to forest department and he was the care taker of the said quarter where accused persons took the girls.
- PW 4 is the youngest victim, who deposed that she and PW 2 were taken by accused Jisoya Champramary on his motorcycle at about 7.00 p.m. at Bengtol when they were proceeding to the maternal aunt of PW 3 after enjoying Bihu function. She deposed that accused person took them to Runikhata and they entered into a forest quarter. After that she along with PW 3 were kept in a particular room. Accused Mitinga touched her breast. After that Mitinga Narzary took PW 1 into a particular room. Other accused Jisoya Champramary took PW 2 to another room. On next day, she along with PW 1, PW 2 and PW 3 were kept in a room. Accused Mitinga Narzary was also present along with them in said room. They were caught by ABSU members on next day at about 3.00 p.m. After that some of the ABSU members manhandled them. The ABSU members took them to ABSU office. Then their parents came to the spot and they stated all these facts to them. According to PW 2, at that time, she was reading in Class IX. She also stated that she never failed in any class. PW 3 stated that at the time of occurrence, she was reading in Class VIII and she failed in Class VII. PW 4 deposed that at the time of occurrence, she was reading in Class VII and she also never failed in any other class.

Bowlood 18 Special Judge. Chirang Kajalgaon

14.

- PW 5 is the informant, who lodged the FIR. He deposed that he 15. knew accused Mitinga Narzary prior to the incident. He deposed that their President Pinnai Basumatary went to the forest office where victim girls along with the accused Mitinga Narzary were found. He knew from the members of the ABSU and went to the ABSU office and found the victim girls along with the accused Mitinga Narzary. He interrogated the victim. Then he knew that accused Mitinga Narzary committed sexual intercourse with PW 1 and accused Jisoya Champramary committed sexual intercourse with PW 2 within the forest office. Both PW 1 and PW 2 reported them about the incident. According to PW 5, the house was a vacant quarter belonged to forest department. At that time, he was Regional President of ABSU. Therefore, he lodged the FIR. FIR was proved as Ext.7. Learned defence counsel during the cross-examination, pointed out that this witness did not state before the I.O. that victim girls, particularly PW 1 and PW 2 had reported him about the incident. This witness further deposed that he found PW 1 and PW 2 were weeping but according to learned defence counsel, this fact was not stated by him before the I.O. I.O. also confirmed this point. According to PW 5, he heard from the members of the ABSU, therefore, he had no direct knowledge about the incident.
- PW 6 is the person who recovered the girls from the forest quarter. He deposed that he knew the accused persons. One day, he was in his office. Then villagers reported that two boys along with four girls were staying in the forest quarter on previous night. Then he proceeded to the quarter along with some other persons. He found that one room was closed from outside. After opening the door, he found four girls along with accused Mitinga Narzary. Then he interrogated the girls. After interrogation, PW 1 and PW 2 reported him that both accused persons committed rape upon them. The accused Mitinga tried to flee away but some of the members of ABSU caught him. They brought all of them to their office. According to PW 6, accused Mitinga confessed his guilt before them. Other accused Jisoya Champramary fled away for which they could not catch him. After that PW 5 Rajendra Brahma came to their office and lodged the FIR. Learned defence counsel pointed out that this witness did not state before the I.O. that accused Mitinga confessed his guilt but same fact was not confirmed by the I.O. during his cross-examination. During the cross-examination, PW 6 stated

A outoglies Chirang, Kajalgaon

16.

that he found the victim girls within a room in forest quarter. They did not state anything about the incident. When they interrogated them thoroughly then only, victim girls told about the incident. It is also revealed from the cross-examination of PW 6 that the all the windows of the room were closed from inside. Only door was closed from outside.

PW 7 is Rong Kumar Goyary. He is the father of PW 1. He knew 17. from ABSU members that his daughter along with some girls was caught with two boys. He immediately rushed to the office of ABSU situated at Runikhata. He met his daughter at ABSU office. He asked her about the incident. Then PW 1 told him that two boys had committed sexual intercourse with her. According to PW 7, at the time of incident, age of his daughter was about 16 years. His daughter was born in the year 2003. He further deposed that he gave original birth certificate of his daughter to the Investigating Officer and Investigating Officer returned the same after making a photo copy of it. During the cross-examination by learned defence counsel he deposed that the birth certificate was obtained through ASHA kormy. He further deposed that he supplied the date of birth correctly. Learned defence counsel gave suggestion that at the time of occurrence, age of his daughter, PW 1 was above 18 years but same was denied by PW 7. It is also revealed from the cross-examination of PW 7 that his daughter and PW 2 were reading in same class but they were not of same age group. PW 2 is one year elder than PW 1. Learned defence counsel suggested that accused did not commit any sexual act with his daughter but PW 7 denied. During his cross-examination, PW 7 further deposed that he interrogated his daughter, PW 1 in his home then she admitted that accused had committed sexual intercourse with her.

Special Judge. Chirang. Kajalgaon

- 18. PW 8 is the father of PW 3. According to him, age of PW 3 was about 14 years and she failed in Class IV. At that time, she was reading in Class VII. This witness stated that police did not seize birth certificate of his daughter. According to learned defence counsel, at that time, age of PW 3 was above 18 years but same suggestion was denied by PW 8.
- 19. PW 9 is the father of PW 2. According to this witness, PW 2 was reading in Class IX and her age, at the time of evidence, was 19 years.

During his cross-examination, this witness clearly stated that at the time of incident, age of his daughter was above 18 years. He further deposed that when interrogated his daughter, PW 2 then she told him that accused Jisoya Champramary committed rape upon her. There was no love affection between his daughter and accused Jisoya Champramary. According to PW 9, birth certificate of PW 2 was not collected by police. His daughter, PW 2 failed two times in lower classes.

- 20. PW 10 is the father of PW 4. He deposed that at the time of occurrence, PW 4 was reading in Class V. At the time of giving evidence, age of PW 4 was about 14 years. There is no birth certificate of PW 4 as stated by PW 10. He could not state the date of birth of his daughter. Learned defence counsel during the cross-examination of PW 10 stated that at the time of occurrence, age of PW 4 was above 18 years but same fact was denied by PW 10.
- 21. PW 11 is the Medical Officer, who conducted medical examination upon PW 1 and PW 2. She deposed as follows:

On 02.05.2017, she was working as M. & H.O. at JSB Civil Hospital, Kajalgaon under NRHM. On that day, she examined victim, PW 1, 16 years, D/O of Sri Rang Kr. Goyari of village Salbari, P.S. Amguri in connection with Runikhata P.S. Case No. 07/2017 U/S 376 IPC R/W Section 6 of POCSO Act escorted by Woman Police Constable Sonali Barman and UBC Kayum Bhuyan.

There was history of sexual assault on 01.05.2017 at 3 a.m.

On examination, she found the following:-

She was conscious. Build – average. Auxillary hair – present. Breast – developed. No injury marks on her body. No. of teeth 7/7, 7/7. Perineum injury marks – absent. Stain of semen – absent. Pubic hair – present. Per vaginal examination – Stain of semen – absent, Mucosal tear – absent, hymen – absent. Vaginal swab examination – No spermatozoa seen. Urine for pregnancy test after one month – negative.

Special Judge. Chirang. Kajalgaon Radiological examination – not done. According to birth certificate, date of birth is 17.11.2003.

On the same day, she also examined another victim, PW 2, D/O of Sri Sukumar Goyari of village Salbari, P.S. Amguri in connection with Runikhata P.S. Case No. 07/2017 U/S 376 IPC R/W Section 6 of POCSO Act escorted by Woman Police Constable Sonali Barman and UBC Kayum Bhuyan.

There was history of sexual assault on 01.05.2017 at 3 a.m.

On examination, she found the following:-

She was conscious. Build – average. Auxilliary hair – present. Breast – developed. No injury marks on her body. No. of teeth 7/7, 7/7. Perineum injury marks – absent. Stain of semen – absent. Pubic hair – present. Per vaginal examination – Stain of semen – absent, Mucosal tear – absent, hymen – absent. Vaginal swab examination – No spermatozoa seen. Urine for pregnancy test after one month – negative.

Radiological examination – not done. According to birth certificate, date of birth is 16.11.2003.

- 22. It is found from the evidence of PW 11 that she did not perform her duty properly. On the basis of Photostat copy of the birth certificate, she determined the age of the victim girls, particularly PW 1 and PW 2. Medical Officer could not ascertain the sexual intercourse as alleged by victim girl. Though PW 11 stated that there was history of sexual assault on 01.05.17 but in FIR date of occurrence was mentioned as 30.04.17.
- 23. PW 12 is the Investigating Officer. He deposed that on 01.05.2017, he was serving as Second Officer in Runikhata P.S. At that time, FIR was lodged by one Rajendra Brahma. He was entrusted for investigation. He examined the victim girls at police station along with the informant. He went to the P.O. According to him, P.O. is a forest range office situated at Runikhata half kilometer away from the police station. He sent the victims to JSB Civil Hospital for their medical examination but due to absence of lady

Special Judge. Chirang, Kajalgaon doctor, examination could not be performed on that day. On next day, they were examined medically at about 11 a.m. after more than 32 hours from the date of incident. He visited the P.O. and drew sketch map. He interrogated the witness at the place of occurrence. He collected the medical reports. He also seized two undergarments worn by PW 1 and PW 2 but same were not sent to Forensic Science Laboratory. He arrested the accused persons. He did not seize the birth certificates of the victim girls. He did not visit the school of the victims. Only photostat copy of two birth certificates regarding date of birth of PW 1 and 2 were taken but these were not seized. No any birth certificate was seized by the I.O. According to PW 12, he submitted charge sheet U/S 376(2)(i) IPC R/W Section 6/8 of POCSO Act. It is found from the entire evidence of PW 12 that he did not investigate the matter properly. What was done by the PW 12 is nothing but perfunctory investigation. Both official witnesses failed to perform their duties according to law.

- 24. Due to lacunae committed by these two witnesses, prosecution story cannot be suffered. Therefore, I want to give more emphasis regarding ocular evidence than that of documentary evidence. It is an admitted fact that no any document regarding age of the victim girls was collected by the Investigating Officer. Medical Officer also did not perform her duty properly for which their age was not determined radiologically and clinically. Father of the PW 1 clearly stated that PW 1 was born in the year 2003. He also stated that he supplied the date of birth of PW 1 correctly. The suggestion given by learned defence counsel was also denied by PW 7, the father of PW 1. He vehemently denied the suggestion given by learned defence counsel that at the time of occurrence, age of victim girl, PW 1 was above 18 years. He further deposed that age of the PW 2 is greater than that of age of his daughter. According to PW 7, PW 2 is one year elder than PW 1.
- 25. Heard the learned counsels on this point during argument and it is admitted by both sides that there is no documentary evidence on record regarding age of the victim girls. Learned defence counsel submitted a particular case law of Hon'ble Gauhati High Court regarding evidentiary value of photostat copy of a document. I also agree with the judgment. Therefore, photostat copy of document is not admissible in evidence. So, I agree with

Special Judge, Chirang, Kajalgaon both sides that there is no documentary evidence regarding age of the PW 1, PW 2, PW 3 and PW 4.

26. Medical evidence performed by PW 11 is scanty. From the medical examination, it was not ascertained what was the age of the victim girls at that time. PW 11 clearly stated that she examined only PW 1 and PW 2. PW 3 and PW 4 were not examined by Medical Officer. It is also found from the medical report that no radiological examination was done upon PW 1 and PW 2. The age was determined by Medical Officer on the basis of Photostat copy of birth certificate. So, medical evidence is insufficient and it is not admissible. As there is no documentary proof, medical evidence, hence, I want to discuss the ocular evidence given by the fathers of the victims. It was alleged that accused Mitinga Narzary committed sexual intercourse with PW 1. On the other hand, it was alleged that other accused Jisoya Champramary committed sexual intercourse with PW 2. PW 7 is the father of PW 1. PW 9 is the father of PW 2. According to PW 9, at the time of occurrence, age of PW 2 was above 18 years. On the other hand, PW 7, father of PW 1 clearly stated that his daughter was born in the year 2003. Occurrence took place on 30.04.2017. After calculating entire year of 2003, I have found definitely, on the date of occurrence, age of victim, PW 1 was below 18 years. According to PW 7, at the time of occurrence, age of his daughter was about 16 years. He vehemently opposed the suggestion given by learned defence counsel that at the time of occurrence, age of PW 1 was above 18 years. So, considering the evidence of PW 7 as reliable, I have found that age of the victim, PW 1 was below 18 years.

Special Judge. Chirang, Kajalgaon

Other victim girls except PW 2 were below 18 years because they were reading in Class VII and Class V respectively. It was not proved that they failed more than 4/5 times. Then only it can be presumed that there age was above 18 years on the date of occurrence. They failed 1/2 times only. It was not revealed that they failed more than 3 times or 4 times etc. PW 2 is found to be major at the time of occurrence. According to evidence given by her father (PW 9), she was above 18 years on the date of occurrence. PW 7 also stated that she is one year elder than PW 1.

28. Now, I want to come to the other reason raised by learned defence counsel. It is found from the entire evidence on record that all victim girls met the accused persons at Bengtol at about 7 p.m. After that, they were loitering along with the accused persons on their motorcycles till 2.30 a.m. Then it was raining for which they entered the forest quarter at Runikhata. It is also found from their own statement that PW 3 and PW 4 were sitting in a room and other two victim girls PW 1 and PW 2 entered into two different rooms along with two accused. PW 1 entered in a room along with accused Mitinga Narzary. PW 2 entered into different room along with accused Jisoya Champramary. It is revealed that they did not make any hue and cry during their stay for several hours in that room. All doors and windows were closed. They were staying without uttering any word. The PW 2 stated that accused gagged her with a cloth but no evidence was revealed during investigation that any cloth was used by accused Jisoya Champramary within the room. They found different persons during their riding on motorcycle but did not make any complaint to anyone. On next day morning also, they did not make any hue and cry. It reflects that they went with the accused to the quarter according to their own will. PW 1 and PW 2 entered the room with different accused persons with their consent that means PW 1 and PW 2 were consenting party. According to medical evidence, no sign of forceful sexual intercourse was found. In case of PW 2 consent play vital role because she was major according to her father, PW 9. Regarding PW 1, consent plays no role because she was minor. No any allegation of sexual intercourse was found regarding other victims. PW 4 only stated that accused Mitinga touched her breast. She also stated this fact to the Magistrate when her statement was initially recorded U/S 164 Cr.P.C. She also stated the same fact before the I.O. PW 3 did not raise any allegation against the accused persons.

Special Judge. Chirang. Kajalgaon

29. Learned defence counsel pointed out that the I.O. did not seize the school certificate or birth certificate. The Medical Officer also did not perform her duty to ascertain the actual age of the victim girls. This conduct of I.O. is fatal to the prosecution case. According to learned defence counsel, on the basis of oral evidence of PW 1 and PW 7, Court cannot convict the accused by taking the view that PW 1 was minor.

- 30. On the other hand, learned P.P. stated that perfunctory investigation done by the I.O. is not fatal to the prosecution case. Because of that, court cannot deny the justice to the victim.
- 31. Regarding perfunctory investigation, Hon'ble Supreme Court in the case of "Hema Vs State through Inspector of Police, Madras reported in AIR 2013 SC 1000" opined as follows:

"8. It is settled law that not only fair trial, but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Accordingly, investigation must be fair, transparent and judicious and it is the immediate requirement of rule of law. As observed by this Court in Babubhai v. State of Gujarat and Ors., MANU/SC/0643/2010 : 2010 (12) SCC 254, the Investigating Officer cannot be permitted to conduct an investigation in a tainted and biased manner. It was further observed that where noninterference of the Court would ultimately result in failure of justice, the Court must interfere. Though reliance was placed on the above decision by the Appellant, it is not in dispute that in that case, the High Court has concluded by giving detailed reasons that the investigation has been totally one-sided based on malafide. Further, in that case, the charge-sheets filed by the Investigating Agency in both the cases were against the same set of accused. This was not the situation in the case on hand. Though the State Crime Branch initiated investigation, subsequently, the same was taken over by the CBI considering the volume and importance of the offence.

special Judge Chirang, Kajalgaon

9. In this regard, Mr. Rawal, learned ASG by drawing our attention to the relevant provisions of the Delhi Special Police Establishment Act, 1946 submitted that the course adopted by the CBI is, undoubtedly, within the ambit of the said Act and legally sustainable. Section 5 of the said Act speaks about extension of powers and jurisdiction of special establishment to other areas. Section 5 of the Act is relevant for our purpose which reads as under:

5. Extension of powers and jurisdiction of special police establishment to other areas.--(1) The Central Government may by order extend to any area (including Railway areas), in a State, not being a Union Territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under Section 3.

(2) When by an order under Sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject of any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police station.

(3) where any such order under Sub-section (1) is made in relation to any area, then, without prejudice to the provisions of Sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.

Special Judge. Chirang. Kajalgaon

Sub-section (3) which was inserted with effect from 18.12.1964 by Act 40 of 1964 makes it clear that on the orders of the Central Government, any member of the Delhi Special Police Establishment is permitted to exercise the powers of the officer in charge of a police station in that area and while exercising such powers, he shall be deemed to be an officer in charge of a police station concerned discharging the functions of such officer within the limits of his station. In the light of the mandates as provided in Sub-section (3), we are of the view that learned ASG is right in contending that there is no

infirmity or flaw in continuing the investigation by the officers of the CBI in spite of the fact that the State Crime Branch registered a complaint and proceeded with the investigation to a certain extent.

10. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In C. Muniappan and Ors. v. State of Tamil Nadu, MANU/SC/0655/2010: 2010 (9) SCC 567, the following discussion and conclusion are relevant which are as follows:

55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

Special Judge Chirang, Kajalgaon

- 11. In Dayal Singh and Ors. v. State of Uttaranchal, MANU/SC/0622/2012: 2012 (8) SCC 263, while reiterating the principles rendered in C. Muniappan (supra), this Court held thus:
- 18... Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the

accused persons to the extent that they would be entitled to an order of acquittal on this ground....

12. In Gajoo v. State of Uttarakhand, MANU/SC/0747/2012: 2012 (9) SCC 532, while reiterating the same principle again, this Court held that defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused should not be an aspect of material consideration by the Court. Since, the Court has adverted to all the earlier decisions with regard to defective investigation and outcome of the same; it is useful to refer the dictum laid down in those cases:

20. In regard to defective investigation, this Court in Dayal Singh v. State of Uttaranchal while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36)

27. Now, we may advert to the duty of the court in such cases. In Sathi Prasad v. State of U.P. this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in Dhanaj Singh v. State of Punjab, held: (SCC p. 657, para 5)

5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

28. Dealing with the cases of omission and commission, the Court in Paras Yadav v. State of Bihar enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct

Special Judge, Chirang, Kajaigaon of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In Zahira Habibullah Sheikh (5) v. State of Gujarat, the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

42. Legislative measures to emphasize prohibition against tampering with witness, victim or informant has become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this Courts have a vital role to play.

Special Judge.
Chirang. Kajalgaon

(Emphasis in original)

30. With the passage of time, the law also developed and the dictum of the court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

- 31. Reiterating the above principle, this Court in NHRC v. State of Gujarat held as under: (SCC pp. 777-78, para 6)
- 6... 35... The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators." (Zahira Habibullah case, SCC p. 395, para 35)'

Special Judge.
Chirang, Kajalgaon

- 32. In State of Karnataka v. K. Yarappa Reddy this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)
- 19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations

demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. The criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.

33. In Ram Bali v. State of U.P. the judgment in Karnel Singh v. State of M.P. was reiterated and this Court had observed that: (Ram Bali case 15, SCC p. 604, para 12)

12... In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective.

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a

Special Judge.
Chirang, Kalalgaon

perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a 'fair trial', the court should leave no stone unturned to do justice and protect the interest of the society as well."

32. Though in this case Medical Officer failed to ascertain any sexual intercourse of PW 1 and PW 2 during her examination, but both PW 1 and PW 2 stated that accused persons committed sexual intercourse. After going through the entire evidence on record, it is found that PW 1 and PW 2 were consenting party as I already decided. I have also decided that PW 1 is a minor girl. After considering the evidence of her father, it is not established that age of the PW 1 was above 18 years. Therefore, consent does not play any role. She clearly stated that accused Mitinga Narzary committed sexual intercourse in three times. Though she did not state before the Magistrate, but then also she stated that accused Mitinga Narzary committed sexual intercourse with her within the forest quarter at Runikhata. In a case of rape or sexual offence, evidence given by prosecutrix or victim is very much important and on the basis of her sole evidence, accused can be convicted if she is found wholly reliable.

Special Judge.
Chirang, Kajalgaon

33. Penetrative sexual assault is defined U/S 3 of POCSO Act as follows:

"3. Penetrative Sexual Assault.— A person is said to commit "penetrative sexual assault" if -

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."
- In present case at hand, PW 1 stated all the incident thoroughly. Though in some occasion she became confused, but considering her age, I have found that she went with the accused to Runikhata and accused committed sexual intercourse with her. As she was minor at that time, therefore, her consent bears no value. After considering the entire evidence on record, I have found that she was below 18 years. It is not proved beyond all doubt that she was below 16 years because her father deposed that PW 2 is one year elder than PW 1. Therefore, Section 376(2)(i) of IPC is not attracted in this case. On the other hand, Section 4 of POCSO Act is established against accused Mitinga Narzary beyond all reasonable doubt.
- 35. Sexual harassment is defined U/S 354A IPC which runs as follows:

"354A. Sexual harassment and punishment for sexual

harassment: (1) A man committing any of the following acts:

- physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) a demand or request for sexual favours; or
- (iii) showing pornography against the will of a woman; or
- (iv) making sexually coloured remarks,shall be guilty of the offence of sexual harassment.

Special Judge.

- (2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
- (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."
- 36. In present case at hand, accused Mitinga Narzary has committed the offence under clause (i) of sub-section (1) of Section 354A IPC because he touched the breast of PW 4 that means, he made physical contact with her and advanced involving unwelcome and explicit sexual overtures. Therefore, he is also found guilty U/S 354A IPC. PW 3 clearly stated that accused persons did not commit any bad act with her but PW 4 deposed that accused Mitinga touched her breast. She stated this fact before the Magistrate. So, I found her a reliable witness and Mitinga Narzary is also found guilty U/S 354A of IPC for touching the breast of PW 4. The allegations against other accused Jisoya Champramary is not proved as because PW 2 was found to be major at the time of occurrence and she was found to be consenting party. No any evidence was found against him that he touched the body of PW 3 and PW 4. So, charge U/S 376(2)(i)/354A of IPC R/W Section 4 of POCSO Act are not established against accused Jisoya Champramary. So, he is not found guilty for anyone of the offences mentioned above. Point No. 2 and 3 are proved against accused Mitinga Narzary. Point Nos. 1, 4, 5 and 6 are remained as not proved.

Special Judge. Chirang, Kajalgaon

ORDER

37. Prosecution failed to prove the case U/S 376(2)(i) of IPC against the accused persons, namely, Mitinga Narzary and Jisoya Champramary beyond all reasonable doubt. Prosecution further failed to prove the case U/S 354A of IPC R/W Section 4 of POCSO Act against accused Jisoya

Champramary beyond all reasonable doubt. Accused Jisoya Champramary is acquitted on benefit of doubt and set at liberty.

- 38. On the other hand, prosecution proved the case U/S 4 of POCSO Act against accused Mitinga Narzary beyond all reasonable doubt. Prosecution further proved the case U/S 354A of IPC against the accused Mitinga Narzary beyond all reasonable doubt.
- 39. Accused Mitinga Narzary is convicted U/S 4 of POCSO Act and U/S 354A of IPC.
- 40. Heard the accused and his engaged counsel on point of sentence. Hearing is recorded in separate sheet and kept with the case record.
- 41. Accused pleaded mercy of the Court considering his tender age. It is also stated by the accused that this is his first offence.
- 42. I have found that this is the first offence committed by the accused because no previous conviction of the accused was proved by the prosecution during trial.

Special Judge.
Chirang. Kaialgaon

After considering all aspects, accused Mitinga Narzary is sentenced to undergo rigorous imprisonment for a period of 7 (seven) years with a fine of Rs. 10,000/- (Rupees Ten Thousand), in default, 1 (one) year R.I. for the offence U/S 4 of POCSO Act. He is further sentenced to undergo rigorous imprisonment for a period of 2 (two) years with a fine of Rs. 2,000/- (Rupees Two Thousand), in default, 3 (three) months R.I. for the offence U/S 354A IPC. Fine amount shall be given to the victim girls of the offences mentioned above respectively. Both the sentences shall run concurrently. The period already undergone by the accused in jail shall be set off from the sentenced period as per provision of Section 428 CrPC. Accused is committed to the prison forthwith.

- 44. Accused Jisoya Champramary is directed to furnish bail bond of Rs. 10,000/- with one suitable surety of the like amount for a period of six months as required U/S 437(A) Cr.P.C. Till then, he is allowed to remain in previous bail.
- 45. A copy of this Judgment and Order shall be furnished to the accused Mitinga Narzary on free of cost. Another copy of this Judgment and Order shall be given to the District Magistrate, Chirang for information.
- 46. Given under my sign and seal of this Court on this the 4th day of August, 2018, at Kajalgaon, Chirang.

Dictated and corrected by me,

(D.J. Mahanta)

Ble ou los (8

<u>APPENDIX</u>

Prosecution witness:

PW 1 - Victim

PW 2 - Victim

PW 3 - Victim

PW 4 - Victim

PW 5 - Sri Rajendra Brahma

PW 6 - Sri Pinnai Basumatary

PW 7 - Sri Rang Kumar Goyary

PW 8 - Sri David Basumatary

PW 9 - Sri Sukumar Goyary

PW 10 - Sri Prabul Narzary

PW 11 - Dr. Meena Hazarika (M.O.)

PW 12 - S.I. Abdul Barik Sk. (I.O.)

Exhibit (Prosecution):

Ext-1, 4, 5 & 6 Statements of the victims U/S 164 Cr.P.C.

Ext-2 & 3 Seizure lists

Ext-7 FIR

Ext-8 & 9 Medical reports Sketch map

Ext-10 Sketch map

Ext-11 Charge-sheet

Material Exhibit (Prosecution):

M. Ext-1 Seized two jangias.

Defence Witness:

Nil

Defence Exhibit:

Nil

(D.J. Mahanta)

Special Judge
Special Judge
Chirang. Kalalgann