Date: 23.12.2019

IN THE COURT OF THE SPECIAL JUDGE, SIVSAGAR

Present – Shri Biprajit Roy, AJS, Special Judge, Sivasagar.

Special (P) Case No. 37/2018

Under section – 376AB and section 6 of POCSO Act.

State -Vs-

Maghuwa Tanti

Advocate appeared :

For the State : - Mr. S. Gogoi, For the accused : - Mr. A.K. Bora,

Date of evidence :- 08.03.2019,02.04.2019,04.04.2019,05.04.2019,

27.06.2019,07.11.2019

Date of argument: - 25.11.2019, 21.12.2019,

Date of judgment: 23.12.2019

JUDGMENT

- 1. The case of the prosecution is that an FIR was lodged by the members of Mahila Samiti of Lakwa Salapather Garmur Gaon on 02.10.2018 in the Lakwa outpost alleging that on 28.09.2018 at about 2.30 p.m. the accused Maghwa Tanti aged about 48 years attempted to commit rape of a minor girl X (name withheld) aged about 3 years but at the relevant time the mother of the victim girl arrived there and the accused fled away. The FIR was signed by 20 women of the locality including Alpana Orang.
- 2. The I/C of Lakwa outpost on receipt of the said FIR vide GD entry no. 20 dated 02.10.2018 and forwarded the same to the OC of Simaluguri PS. The Officer-in-charge of Simaluguri P.S. on receipt of the said FIR registered Simaluguri PS 163/2018 u/s 376AB/511 of IPC read with section 4 of POCSO Act. SI Dulal Gogoi was endorsed with investigation of the case. On completion of investigation charge-sheet was submitted against the accused Maghuwa Tanti u/s 376AB/511 of IPC read with section 10 of POCSO Act.

Date: 23.12.2019

- 3. As the accused was in jail custody, legal-aid-counsel was engaged to defend the accused.
- 4. After hearing Id. counsel of both sides and taking into consideration the materials available on record charge u/s 376AB/511 of IPC read with section 6 of POCSO Act were framed and read over to the accused to which he pleaded not guilty.
- 5. In the course of trial prosecution side examined 9 (nine) witnesses. The defence plea is of denial.
- 6. The accused person was examined u/s 313 Cr.P.C.
- 7. Heard the argument of learned counsel of both sides.
- 8. The points for determination in this case are as follows:
 - (i) Whether the victim X was aged about 3/4 years at the time of occurrence?
 - (ii) Whether the accused person attempted to commit rape of the minor victim?
 - (iii) Whether the accused person committed any offence as alleged in the FIR?

Decision, Discussion and reasons:

Point no. 1:

9. The PW-1 X is the minor victim girl. She stated that her age is 5 years. The victim girl appeared before the Court and her evidence was recorded. Apparently, she was aged about 5 years and accordingly her capacity and competency as a witness tested by this Court and on being satisfied, her evidence was recorded.

The PW-2 Y (name withheld) is the father of the minor victim girl. He stated that his daughter X is aged about 5 years and she is a student of class- I.

The PW- $3\ Z$ (name withheld) who is the mother of the victim girl X stated that she is aged about $5\ years$.

The PW-7 Dr. S. Changmai examined the victim on 03.10.2018 and on the basis of the Radiological report he stated that the victim is aged below 10 years.

The PW-9 Miss Sabina Yasmin, JMFC, Nazira who recorded the statement of the victim girl u/s 164 of Cr.P.C. stated that she was aged about 4 years. Even the accused in his examination u/s 313 of Cr.P.C. admitted that the victim girl is aged about 5 years.

Therefore, the above evidence, it is established that at the time of occurrence the victim girl was aged 4/5 years.

Point no. 2 and 3:

10. From perusal of the Ext. 1 which is the FIR it appears that it was alleged by the members of Mahila Samiti that the accused Maghuwa Tanti attempted to commit rape of the minor victim girl X. The PW-1 X who is the victim girl stated in her evidence that she calls the accused as " Dadu". She stated that the accused on the date of occurrence gave money to purchase morton (chocolate) and then made her lick his buttock. In her cross-examination she stated that on the day of occurrence 'Dadu' gave her one rupee to buy mortan.

The PW-2 Y is the father of the victim girl. He stated that the FIR was written by the member of the Mahila Samiti and he put his thumb impression. The PW-2 stated that on the date of occurrence he returned back home at 3.30 p.m. and came to know from his wife Z that the accused took his daughter X inside his house while she was returning from school. His wife went out to see her daughter and went to the house of the accused. As soon as she reached near the door of the house of the accused, the accused ran away from the house. She saw her daughter vomiting and on being asked minor victim told her mother that the accused made her lick his buttock. The PW-2 after coming to know this fact from his wife informed the matter to Gaon Bura and on the next day an FIR was lodged after meeting of the Mahila Samiti in the village.

In his cross-examination the PW-2 denied the suggestion put by the Id. defence counsel. He stated that the accused has a shop in the Tiniali which is 8/10 feet away from his house. The PW-2 was contradicted during his cross-examination and said contradictions were affirmed by the I.O.(PW-8) SI Dulal

Gogoi who stated that the PW-2 did not state before him that the accused took his daughter X inside his house while she was returning from school and when she did not return in time, his wife went out to see her and went to the house of the accused and as soon she reached near the house of the accused, the accused ran away from the house. She saw her daughter vomiting and asked the victim X as to why she was vomiting. The PW-2 stated that he enquired about the incident with his daughter also and came to know about the facts from his daughter and wife. He also stated that prior to the incident his relation with the accused was good. He denied the suggestion that the accused offered money to his daughter out of love and did not do anything wrong. The PW-3 Z is the mother of the victim. She stated that on the day of occurrence at about 2.30 p.m. her daughter was playing after returning from school. Then she heard the accused Maghuwa Tanti calling her daughter. After sometimes when his daughter did not return, she went to the house of Maghuwa Tanti to see what had happened. When she called her daughter, the accused came out and ran away from his house. Then the victim came out from the house and she was vomiting. She asked her daughter as to what had happened. The minor victim girl X informed her that 'Dadu' (Maghuwa) inserted his penis into her mouth. She immediately brought her daughter and cleaned her mouth. At about 3.00 p.m. her husband arrived home and she informed the matter. Then her husband informed the matter to Gaon Bura. The matter was also informed to police. Her daughter was medically examined and she was taken to Nazira Court. At the time of recording her statement in the Court she was present.

In cross-examination she stated that the house of the accused is near their house. She also stated that prior to the incident their relation with the accused was good. She stated that the accused and his wife loved her daughter very much. She also stated that before the I.O. she told that the incident took place on 28.10.2018. The PW-3 admitted that she did not state before the I.O. in the manner she deposed in the Court because the I.O. did not ask her in that manner. She denied the suggestion that the accused did not do anything to her daughter(wrongly written as wife). She also denied that the accused gave money out of love only.

The PW-4 Bobita Tanti stated in her evidence that she came to know about the incident from the parents of the victim girl. The PW-4 stated that she

Date: 23.12.2019

asked the minor girl about the incident and she told that the accused had inserted his penis into her mouth.

In cross-examination she admitted that she did not state before the I.O. that the accused inserted his penis into the mouth of the victim girl.

11. The PW-5 Alpana Orang stated in her evidence that she came to know about the incident from the mother of the victim girl. Then she enquired the matter with the victim girl and she also told that the accused had inserted his penis into her mouth. She stated that at the time of the occurrence the wife of Maghuwa Tanti was not present in the house. She exhibited signature in the FIR which is marked as Ext. 1(1).

In cross-examination she admitted that she did not state before the I.O. that the accused made the victim lick his buttock. She denied the other suggestions put by the ld. defence counsel. She stated that in the evening around 20 women gathered.

12. The PW-6 Mohan Tantabai stated in his evidence that he is the maternal uncle the accused. He stated that hearing hue and cry he came out and came to know from the father of the victim girl that the accused took victim girl inside the shop/house giving mortan (chocolate) and then inserted his penis into her mouth. He stated that he saw the victim vomiting. The victim was taken to hospital.

In cross-examination the PW-6 stated that he did not tell the I.O. that the father of the victim girl informed him that the accused had inserted his penis into the mouth of the victim girl. He also stated that a large number of villagers gathered and the accused fled away. He admitted that he did not know what had actually happened inside the house.

13. The PW-7 Dr. S. Changmai on 03.10.2018 examined the minor victim girl X and found the following:

Menstrual History-

not attained menarche,

General History:

H/O sexual abuse by a neighbour man on 28.09.2018 at his own residence.

General Behaviour - Normal, Mental State :- well oriented,

Findings :- Normal,

GENERL PHYSICAL EXAMINATIOON:-

Built and nutrition- Normal. Weight- 14 Kg.

Height- 30 cm, Teeth-

Development of hair-

Axillary & Pubic hair- absent,

Breast development & Findings- proportionate with age,

Mark of violence on the body— No violence marks on her body. Multiple papule over whole body at different stage of healing.

Examination of genitalia -

Development of genitalia- Developed

Pubic hair– absent. Clitoris–

Labia, majora and minora- Developed,

Fourchette-No tear seen,. Hymen- Absent.

Vagina – No injury seen, Injury – absent

Discharge and stains- Absent.

Abdominal Examination- soft, PS positive,

Internal Examination-

<u>Laboratory investigation:</u>

No spermatozoa seen at vaginal smear,

Radiological examination:

Date: 23.12.2019

X- ray of left wrist and left elbow shows age below 10 years.

Opinion:

On examination of Deepti Bhumij, I am of the opinion that - (i) Her age is below 10 years, (ii) No evidence of injury on her body and private parts, (iii) No evidence of sexual intercourse(recent).

Ext. 2 is the medical examination report and Ext. 2 (1) is my signature.

In cross-examination the PW-7 stated that he had not mentioned the police case number and GD entry number in the medical report. He also stated that at the time of examination the behaviour of the victim was normal and she was not vomiting.

14. The PW- 8 SI Dulal Gogoi stated in his evidence that he had conducted investigation of the case and some part of the investigation was done by SI Tapan Talukdar on his transfer. On completion of the investigation charge-sheet was submitted against the accused Maghuwa Tanti u/s 376AB/511 of IPC read with section 10 of POCSO Act. Ext. 4 is the charge-sheet wherein Ext. 4(1) is the signature of SI Tapan Talukdar which he can recognize.

In cross-examination he admitted that he has not submitted the GD entry number 20 dated 02.10.2018. He also admitted that out of the 20 people who had put their signatures in the Ext. 1, he examined only two people.

15. The PW-9 Smt. Sabeena Yasmin in her evidence stated that on 03.10.2018 she recorded the statement of the victim girl X aged about 4 years in connection with Simaluguri PS case no. 163/2018 by observing all the formalities. Ext. 5 is the said statement wherein Ext. 5(1) is her signature.

In cross-examination she admitted that she did not take the signature of the guardian of the victim girl.

- 16. In his examination u/s 313 of Cr.P.C. the accused denied all the allegations levelled against him and stated that the informant had lodged this case falsely with intention to occupy his land.
- 17. From the evidence discussed above it appears that the victim girl in her statement under section 164 Cr.P.C. (Ext.5) clearly stated that the accused

made her lick his buttocks after giving her Rs. 1/- to buy chocolate. In her evidence before the Court also she narrated the same incident. The PW-2 came to know about the incident from his wife as he was not present at the relevant time of occurrence. The PW-3 admitted that she did not state before the I.O. in the manner she stated before Court because she was not asked by the I.O. she stated in her evidence that when she saw her daughter inside the house of the accused, she was vomiting. The victim girl in her statement (Ext. 5) stated that the accused made her lick his buttocks. The other prosecution witnesses in their evidence stated that the accused had inserted his penis into the mouth of the victim girl but the victim girl told that the accused made her lick his buttocks. But the said difference cannot be fatal to the prosecution case. TheHon'ble Supreme Court in State of U.P. -Vs- Anil Singh reported in AIR 1988 SC 1998 observed as follows:

"It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

The Hon'ble Supreme Court of India in AIR1983SC753-Bharwada Bhoginbhai Hirjibhai-Vs-State of Gujarat while dealing with the point of appreciation of evidence in a rape case held as follows:

- "(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of

surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person,
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.
- (8) Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

From the above observations of the Hon'ble Supreme Court it can be said that the discrepancy in this case is not fatal to the prosecution case because the substance of the allegation remained same i.e. the accused committed sexual assault on the minor victim.

On the point of appreciation of evidence of minor victim the Hon'ble Delhi High Court in Lokesh-vs-State, Criminal Appeal No. 487/2016 decided on 07-06-2019 taking into consideration various judgments of the Hon'ble Supreme Court and other High Courts observed as follows:

- "42. Evaluation of the evidence of child witnesses, especially where the child is the prosecutrix herself/himself, is always a tricky affair. Combating, and, at times, conflicting, considerations come into play in such cases. On the one hand, there exists a presumption that a child of tender years would not, ordinarily, lie. The applicability, or otherwise, of this presumption, would necessarily depend, to a large extent, on the age of the child. No dividing line can be drawn in such cases; however, one may reasonably presume that a child of the age of four, or thereabouts, would be of an age at which, to questions spontaneously put to the child, the answer would ordinarily be the truth. As against this, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily tutored. The possibility of a small child, whose cognitive and intellectual faculties are yet not fully developed, being compelled to testify in a particular manner, cannot be easily gainsaid. Even so, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value.
- 43. This Court has, in the not-too-distant past, had an occasion to examine the jurisprudential contours of appreciation of evidence of child witnesses, in its judgment in Sanjay Kumar Valmiki v. State, 2018 SCC Online Del 9304. The following passages, from the said judgment which stands affirmed, by dismissal of SLP (Crl) No. 3050/2019 preferred, there-against may be reproduced:
- 57. The child witness, like the child himself, has ever remained, criminologically speaking, a jurisprudential enigma. The judicial approach, to such evidence, has,

at times, advocated wholesome acceptance of such evidence, subject to the usual precautions to be exercised while evaluating any other evidence; however, the more prevalent approach appears to prefer exercise of cautious consideration by the Court, while dealing with such evidence. The raison d'etre for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts have consistently held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence. As has been often emphasised by courts in this context, no express, or even implied, embargo, on a child being a witness, is to be found in Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under:

118. Who may testify. --

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.-- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

58. Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him, or from giving rational answers to such questions, by reason of his age. A duty is, therefore, cast, by the statute, on the judge faced with the responsibility of taking a decision on whether to allow, or disallow, the testimony of the child witness, to arrive at an informed decision as to whether the said evidence is vitiated on account of the child having failed to understand the questions put to him, or to provide rational responses thereto. If the answer, to these two queries, is in the negative, there is no justification, whatsoever, for discarding, or even disregarding, the evidence of the child witness.

59. This Court has, in a recent decision in Latif v. State, 2018 SCC OnLine Del 8832, observed as under, with respect to the evidence of child witnesses:

16. At this stage, it is necessary to recapitulate the law regarding the appreciation of the evidence of the child witness. In Dattu RaMr. ao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 the Supreme Court explained:

A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

17. In Ranjeet Kumar Ram v. State of Bihar, 2015 (6) Scale 529, it was observed:

Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."

18. In Nivrutti Pandurang Kokate v. The State of Maharashtra, (2008) 12 SCC 565, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make- believe. Though it is an established principle that child witnesses are

dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. (Emphasis supplied)

- 60. In Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195, the Supreme Court held thus, with respect to the evidence of child witnesses:
- 22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law.

(See Prakash v. State of M.P., (1992) 4 SCC, Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667, Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287, Dattu RaMr. ao Sakhare v. State of Maharashtra, (1997) 5 SCC 341, State of U.P. v. Ashok Dixit, (2000) 3 SCC and Suryanarayana v. State of Karnataka, (2001) 9 SCC 129.

- 23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (vide Panchhi v. State of U.P., (1998) 7 SCC 177) (Emphasis Supplied)
- 61. One of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial Court itself, regarding the demeanour, carriage and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court would be loath to disregard the evidence of the child witness, where the Trial Court has found it to be credible, convincing and reliable. [Ref. Satish v. State of Haryana, (2018) 11 SCC 300]

62. In State of Madhya Pradesh v. Ramesh, (2011) 4 SCC 786, the following principles, regarding assessment of the evidence of child witnesses, have been enunciated:

- 7. In Rameshwar v. State of Rajasthan, AIR 1952 SC 54 this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p. 56, para 11) 11. ... it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.
- 8. In Mangoo v. State of M.P., AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.
- 9. In Panchhi v. State of U.P., (1998) 7 SCC 177, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring"

10. In Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565, this Court dealing with the child witness has observed as under: (SCC pp. 567-68, 10. ... 7. ... The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

- 11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (vide Himmat Sukhadeo Wahurwagh v. State of Maharashtra, (2009) 6 SCC 712)
- 12. In State of U.P. v. Krishna Master, (2010) 12 SCC 324, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same

inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

- 13. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (vide Gagan Kanojia v. State of Punjab, (2006) 13 SCC 516.)
- 14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. (Emphasis supplied)
- 63. The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements:
- (i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.
- (ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.
- (iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

- (iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.
- (v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether."
- 18. In the instant case, from perusal of the evidence of the victim girl it appears that before recording her evidence, her capacity and competency as a witness was tested and on being satisfied, her evidence was recorded. She clearly stated that the accused gave her money and made her lick his buttocks. She stated in the similar manner in her statement recorded under section 164 Cr.P.C. the evidence on record also clearly shows that when the mother of the victim girl reached near the house of the accused, the accused ran away from his house. She saw her daughter/victim vomiting. These circumstances clearly indicate that the victim girl was made to eat/lick something which had induced her vomiting. In his examination under section 313 Cr.P.C., the accused simply denied the circumstances appearing in evidence against him but failed to give any plausible explanation. He stated that the FIR was lodged falsely to grab his land but in the course of trial, the defence failed to bring on record any such material. Hence, I do not find any reason to disbelieve the minor victim girl.
- 19. Section 29 of the POCSO Act, 2012 says that where a person is prosecuted for committing or abetting to commit any offence under section 3, 5, 7 and 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. The Hon'ble Gauhati High Court in (2017)3 GLR 50 held that the presumption raised under section 29 of the Act is rebuttable one. So the reverse burden is on the defence to rebut the presumption once the prosecution is successful in shifting the initial burden upon the accused. In this case from the evidence on record it is clear that the prosecution has adduced sufficient evidence to discharge its burden and proved that on the date of occurrence the accused took the victim girl inside his house and gave her money to buy chocolate and then sexually assaulted her and when the mother of the victim arrived in search of the victim, the accused ran away from his house.

- 20. From the discussion made above it is clear that the case does not come within the purview of section 376AB of IPC or section 6 of POCSO Act but attracts section 9 of the POCSO Act. Section 7 of the POCSO Act, 2012 defines sexual assault according to which 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. Section 9 (m) of the said Act provides that whoever commits sexual assault on a child below 12 years is said to commit aggravated sexual assault which is punishable under section 10 of the POCSO Act.
- 21. Accordingly the accused Maghuwa Tanti is held not guilty under sections 376AB of IPC and section 6 of POCSO Act and acquitted from the said charges but at the same time, exercising power under section 222 of CR.P.C. he is held guilty under section 10 of POCSO Act and convicted.
- 22. Before sentencing the accused I have considered the applicability of the Probation of Offenders Act, 1958 or section 360 of Cr.P.C. to the accused. Taking into consideration the age of the victim and the age of the accused and the nature of the offence and the manner of commission of the offence, I do not find the accused fit to get the benefit under the said provisions of law.
- 23. Heard the accused on the point of sentence. His statement is recorded in a separate sheet. I have also heard the ld. advocates of both sides.

Date: 23.12.2019

Accordingly the accused Maghuwa Tanti is sentenced to undergo rigorous imprisonment (RI) for 05(five) years for committing the offence punishable under section 10 of POCSO Act, 2012 and also to pay a fine of Rs. 1,000/- (one thousand) only, in default, to undergo simple imprisonment for one month. As the accused contested the case through legal-aid counsel due to this poor economic condition, lesser amount of fine is imposed upon him.

- 25. Considering the fact of imposing minimum amount of fine due to poor financial background of the convict, no order is passed for payment of compensation to victim U/S 357 Cr.P.C.
- 26. The convict is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial, if any.
- 27. Let a free of cost copy of the judgment be given to the convict immediately as per the provisions of Section 363(1) Cr.P.C.
- 28. Convict is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or through legal aid panel advocate or by way of Jail Appeal.
- 29. Send a copy of the judgment to learned District Magistrate, Sivasagar under section 365 Cr.P.C.

Given under my hand and seal of this Court on this 23rd day of December, 2019.

Special Judge, Sivasagar.

APPENDIX

1. <u>Prosecution witnesses</u>:

PW-1 - X

PW-2 - Y

PW-3 - Z

PW-4 - Babita Tanti,

PW-5 - Alpana Orang,

PW-6 - Mohan Tantabai,

PW-7 - Dr. S. Changmai,

PW-8 - SI Dulal Gogoi,

PW-9 – Smti. Sabeena Yasmin.

2. Exhibits by prosecution -

Ext.1 - FIR,

Ext.2 – Medical examination report,

Ext.3 – Sketch map,

Ext.4 – Charge-sheet,

Ext.5 - Statement of X u/s 164 of Cr.P,C.

3. Defence witness: NIL

4. Defence exhibits: NIL

5. Court witness: NIL

Special Judge, Sivasagar