HEADING OF JUDGMENT IN SPECIAL CASE

IN THE COURT OF SPECIAL JUDGE BILASIPARA

Present:- Smti S. Bhuyan, AJS

Special Judge, Bilasipara

Special Case No- 08 of 2016

u/s 4 of POCSO Act

STATE

Versus

Mohasen Ali

Accused person

(Corresponding to GR case No- 1010/16 u/s 4 of POCSO Act)

Advocate appeared:-

For the state:- Mr. T. Kr. Bhattacharya, Special P.P.

For the accused:- Mr. N.I Choudhury, Smt Syeda Afruza Akhtar, Advocate.

Date of institution of the case :- 30-06-16

Date of Framing charge :- 07-06-17

Date of prosecution evidence :- 07-02-18,15-06-18,21-06-18,11-07-18

Statement of accused recorded on :- 27-08-18

Date of Argument :- 15-09-18

Judgment delivered :- 29-09-18

Hearing on sentence :- 04-10-18

Sentence pronounced :- 04-10-18

JUDGMENT

Prosecution Case

1. This prosecution case set on motion based on the ejahar filed by prosecutrix on 30-06-16 before i/c Salkocha out post inter alia citing that on 14-06-16 at about 02.00 pm while she was returning home from Salkocha Public ME School, accused Mohasen Ali present near to his house restrained her and by enticing her taken her to an isolated place and then sexual intercourse with her. After committing sexual intercourse with her, accused Mohasen given threatening to her that if she discloses the incident to anyone he will kill her. Out of fear she could not disclose the incident to any other person and left to some other place and her brother Baser Ali brought her back from Haryana and then she disclosed the incident and due to said reason there was delay in lodging ejahar.

Investigation

2. On receipt of ejahar from prosecutrix i/c Salkocha oust post forwarded the same to O/C Chapar PS for registration of the case and O/C Chapar PS registered the police case vide Chapar PS case no. 258/16 u/s 4 of POCSO Act and SI Muktajur Rahman was entrusted to conduct the investigation of the case and after completion of investigation I/O submitted charge sheet against the accused person named herein above u/s 4 of POCSO Act and cognizance taken and upon appearance of the accused person, necessary copies has been furnished to him.

Charge

3. After hearing learned counsel for both sides and perusal of material on record charge u/s 4 of POCSO Act was framed against the accused person Mohasen Ali and when charges are read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

Trial

4. In order to prove the prosecution charges against the accused person, prosecution adduced evidence of all together 8 number of witnesses and exhibited 5 nos. of documents. PW-1 Baser Ali, PW-2 Pastola Khatun, PW-3 Prosecutrix, PW-4 Mofijuddin Mollah, PW-5 Omela Khatun, PW-6 Hunufa Bibi, PW-7 Dr. Muskura Ahmed (M.O) and PW-8 SI Muktajur Rahman (I.O). Ext-1

Ejahar, Ext-2 Statement of victim recorded u/s 164 Cr.P.C, Ext-3 Medical report, Ext-4 Sketch Map and Ext-5 Charge sheet. After closure of the prosecution evidence, statement of the accused person recorded u/s 313 Cr.P.C. Accused plea is denial, however declined to adduced evidence in support of the plea of denial.

5. **POINTS FOR DETERMINATION:-**

- i) Whether victim was below the 18 years of age at the time of incident i.e on 14-06-16?
- ii) Whether accused on 14-06-16 at about 02.00 pm at village Pachim Salkocha under Chapar PS, committed penetrative sexual assault on prosecutrix?

ARGUMENT

- 6. It has been argued by Ld. Addl. P.P that victim who had lodged the case is vital witness and she is aged about 14 years and incident was took place 2 years back when she was only 12 years old and at the time of incident she could not disclose the fact as she was given threatening by the accused person and therefore out of fear and embarrassment suffered by her, she left to Haryana with her relative and she had explained the cause of delay in filing ejahar which is reasonable and sufficient in view of the fact of incident of rape upon the girl who is minor girl of only 12 years. He further submitted victim in her all the statement made consistent statement that when she was coming from school to her home, accused enticing her telling sweet words and then committed rape on her in isolated place behind the bushes. Her statement is fully corroborated by other witnesses and there nothing comes out from her evidence why girl of 12 years old will falsely implicate the accused and her evidence is un-assailable during her cross examination by defence and her evidence alone is sufficient to hold accused guilty but here her evidence is also supported and corroborated by other piece of evidence. He further submitted the report of doctor does not wash away the prosecution case and prosecution charge made against the accused is established beyond all reasonable doubt.
- 7. It has been argued by Ld. defence counsel that the delay of 16 days of lodging ejahar is not properly explained and therefore prosecution case is fatal. Learned counsel further submitted victim leaving to Delhi and Haryana with her pehi shown that she went to Delhi for fun and if in reality the

incident of rape was took place with her then by naturally she cannot go outside for fun and her pleasurable fun tour with the pehi shown that this is totally false case against the accused. He further submitted that prosecution could not prove that on the day of incident victim went to attend school and she returned from the school and her presence at school is not proved by adducing evidence of school attendance register. He further submitted that three persons went to Haryana to bring back victim girl but prosecution did not produce the evidence of all the three persons and victim was brought from Haryana is also not established by adducing cogent evidence and simply PWs stated that victim went to Haryana and then she was brought back from Haryana is not a true fact and this fact is not established. If she went to Haryana then prosecution has to establish the same by showing the train ticket/ flight ticket etc but prosecution did not dispense the same. He submitted there is no missing report lodged by the parents prior to the incident and bringing her from Haryana and no statement was recorded by police when victim was brought from the Haryana and these are nothing but lame excuse made by the prosecution only to cover the delay and the case is not at all established. He submitted the victim mother not stated that prosecutrix was missing and she did not report her son about victim's departure to Haryana and her pehi Monowara is not examined with whom victim went to Haryana. Therefore victim's departure to Haryana is not proved and she was at her home. He further submitted there is no believable evidence coming out from the mouth of prosecutrix and other witnesses which can be acted upon to hold accused guilty and the witnesses are related witness and therefore their evidence cannot be acted upon and this case is lodged only because accused raised objection when victim's family wanted to give marriage of victim girl who is a minor girl and therefore they sent victim to Haryana and they brought up a story of rape against the accused which is clearly evidence from the delay of lodging of the ejahar which is lodged without showing and explaining sufficient reason of delay and therefore prosecution case not all established and accused entitled benefit of doubt and prays for acquittal.

PROSECUTION EVIDENCE

8. Evidence of PW-1 Baser Ali is that prosecutrix is his sister and he knows the accused person present before the court. He deposed he being rickshaw puller, was present at Guwahati at the time of incident. Getting

information that his sister was missing, he came to his house and made search of his prosecutrix sister and over phone he got information from his relatives that his sister is found at Haryana. Accordingly he along with his brother Islamuddin and dewani Aman Ali went to Haryana and bring prosecutrix to their house. Thereafter on being asked, his prosecutrix sister told before him that on the day of incident while she was going to school, accused Mohasen Ali took her and committed rape on her and accused also given threatening to her. Thereafter his prosecutrix sister lodged ejahar. **In** cross he stated his sister lodged ejahar after one week of the incident and his prosecutrix sister went to the Haryana with Monowara who hails from their village. He stated they call Monowara "phupi" and long back Monowara got married at Haryana. He stated his prosecutrix sister was studied at Salkocha M.E School and she went to school to attend her class alone. He stated his house stands less than one mile distance from accused's house and Rias, Sujal and Sahar Ali were his neighbour. He stated he was staying at Guwahati for his work and his wife, prosecutrix, his parents, his other sisters and one mentally sick brother live in their house. He further stated he informed police and lodged ejahar about missing of his victim sister. He stated police recorded his statement and he made statement before police that on getting information that his victim sister went to Delhi, he proceeded to Delhi and there he got to know that his victim sister was at Haryana and accordingly he went to Haryana and bring her back from Haryana. He denied they give prosecutrix to marriage at Haryana, thereafter brought her at their house and falsely lodged case against the accused; as it is a decision making case, ejahar was lodged after too much delay; his victim sister went to Haryana of her own; accused did not commit rape on his victim sister.

9. PW-2 Pastola Khatun deposed prosecutrix is her daughter and she knows accused person. She deposed at the time of incident her victim daughter was studied in Salkocha ME School. She deposed when her daughter returning back home from her school, accused Mohasen dragged her daughter towards jungle and committed rape on her and said fact was told to her by her victim daughter. She deposed accused given threatening to her victim daughter that if she would disclosed the commission of rape on her by accused, then accused would kill her and because of said threatening her victim daughter went to Haryana at her relative Monowara's house. Thereafter they informed Baser Ali. Accordingly Baser Ali came home and then went to Haryana and brought back her victim daughter from Haryana

and thereafter her victim daughter lodged ejahar. She further deposed during investigation her victim daughter was brought to Magistrate and she made statement before the Magistrate. **In cross** she stated at the time of incident her victim daughter was studied at Salkocha Pachim ME School and her victim daughter left home for her school at 08.00 am alone. She stated her victim daughter also return back from school alone and she does not have any friend. She stated Monowara married at Haryana and she lived there. She stated her victim daughter did not tell her at the time of living her to Haryana that accused Mohasen committed rape on her. She stated her victim daughter told her about the incident after returning from Haryana and she knew that her victim daughter went with the company of Monowara to visit Haryana. She stated her victim daughter returned back after 8/9 days of her leaving to Haryana and there was no discussion took place at their home about the incident during those 8/9 days stay of her victim daughter at Haryana. She stated one village chalisa was held to discuss the incident and in the said bichar Nur Islam, Sabor Ali, Aman Ali and other neighbours of her houses were present. She denied they sent prosecutrix i.e 'her victim daughter to Haryana with Monowara to give marriage of prosecutrix at Haryana; as marriage of prosecutrix was not held at Haryana, after bringing her at their home, they lodged false case against the accused Mohasen; no village chalisa held'.

10. PW-3 is the prosecutrix. Her evidence is that she knows accused. Incident was took place about 1 year 8 months back and at the time of incident she was studied at Pachim Salkocha ME school and classes were over at 02.00 pm. She deposed after school while she was returning back to home, accused was present near his house and accused dragged her towards the jungle behind the back of his house and then committed rape on her. Thereafter accused given her threatening not to disclose the matter to anyone and if she disclosed the incident he would kill her. After that she went to Haryana with her pehi Monowara and her brother Baser Ali getting information brought back her from Haryana. She stated her brother and other village people asked her what happened to her to which she narrated the incident of rape committed by accused to other family members and neighbours. She deposed one village chalisa was held to discuss about the incident but as accused did not accept the verdict of village chalisa, she lodged ejahar. She further deposed after lodging of the ejahar police produced her before the doctor for medical examination, produced her before the Magistrate and she made statement before the Magistrate. She deposed Ext-1 is ejahar and Ext-2 is her statement recorded u/s 164 Cr.P.C and Ext 1(1), 2(1), 2(2) are her signatures. **In cross** she stated she studies in school and still she is studying in Pachim Salkocha ME School. She stated she went to school with her sister Firoza and they reach school on foot which is one mile away from their house. She stated she did not go to school in the public carrier vehicle. She stated village market is about 2/3 farlong away from her house. Thereafter several shops present at the village market and if she go from the village market, then first accused's house is reached and thereafter her house. She stated she cannot say whether her sister and sister in law were present at house at the time of incident. She stated after commission of rape by the accused on her, she went home and on that day she told incident to her khala Amena and Amena told her mother. She stated on the day of incident she did not tell the incident of rape to her mother, her sister in law and her sisters and she did not disclose the incident of rape to anybody on the day of incident. She stated she went to Haryana with her pehi Monowara and stayed there three days in the house of Monowara at Haryana and she told her parents that she is going to Haryana with her pehi Monowara. She stated she did not shout when accused dragged her and committed rape on her as accused did not allow her to raise alarm. She stated she lodged ejahar after returning home from Haryana. After returning from Haryana, bichar was called but as bichar not held, she lodged ejahar. She stated ejahar was read over to her after writing and thereafter she put her signature. She stated her brother Baser accompanying Tahej went to Haryana to bring her back and neither she narrated the incident of rape to her pehi Monowara nor to her brother Baser at Haryana. She again stated on the day of incident she did not narrate the incident to her khala Amena, she told her subsequently. She denied she deposed falsely that accused had committed rape on her; her parents, brother sent her to Haryana with Monowara to give her marriage; as her marriage was not held at Haryana, she returned back to her hometown and falsely lodged this case against accused.

11. Evidence of PW-4 Mofijuddin Mollah is that he knows prosecutrix and accused person. He deposed about 2 years back when he came to his house from Nagaland, police came to his house and took his name and address and asked him if he knows anything about the incident to which he replied that he has no knowledge about the incident. Defence declined to cross examine him.

- 12. PW-5 Omela Khatun deposed she knows prosecutrix and accused person. She deposed prosecutrix told her that accused called her while she was taking bath but she did not disclose what accused did with her. She deposed she made statement before police that prosecutrix later on disclose her that she was hold (saboti dhorisil) by accused and accused Mohasen raped and ravished her dragging in her in the jungle. In cross she stated house of prosecutrix is near to her house and accused's house is after 2/3 house from her house. She stated she heard that prosecutrix went to the house of Monowara at Haryana. She stated her children studied at school but her children did not go to school with the company of prosecutrix. She stated prosecutrix disclose the incident to her after her returning from Haryana after the case and when prosecutrix disclose her about the incident, she informed the same to the mother of prosecutrix and she did not hear any incident prior to the disclosure of the same by the prosecutrix after her returning from Haryana. She stated she has no knowledge about holding of village bichar in respect of the incident. She denied prosecutrix did not told her that accused Mohasen called her while she was taking bath and accused raped and ravished her; she did not made statement before police that accused hold (saboti dhorisil) prosecutrix and committed rape on her dragging her in the jungle and prosecution disclose this fact to her.
- 13. Evidence of PW-6 Hunufa Bibi is that she knows prosecutrix and accused person. She deposed she heard from prosecutrix that when prosecutrix was returning home from her school, accused Mohasen dragged her holding her hand and accused embraced her (asami e prosecutrix ok hath dhori jongolot tani pasra pasri korisil buli amak jonai) and prosecutrix told her said fact after her returning from Haryana. She deposed prosecutrix told her that as accused dragged her in the jungle and embraced her, she went to Haryana. In cross she stated Baser Ali is her husband and prosecutrix is her sister in law. She stated sisters of prosecutrix also attend their school and all the three sisters studied in different school and they went to their school by using different route and all of them used to attend their school on foot. She stated she heard the incident when prosecutrix narrated the incident to other person in her presence and the incident was not discussed at her in law's house when prosecutrix went to Haryana. She stated prosecutrix went to Haryana in the house of Monowara and prosecutrix was first not allowed to visit Haryana but prosecutrix did not listen and went to Haryana in the house of Monowara. She stated her husband was not present when prosecutrix

visited Haryana and her husband was working at Guwahati and they informed her husband Baser Ali that something happen to prosecutrix and she did not disclose same to them and went to Haryana inspite of their restriction. She denied she deposed falsely as prosecutrix is her sister-in-law.

- 14. PW-7 Dr. Muskura Ahmed is M.O. Her evidence is that on 30-06-16 she examined prosecutrix under reference GD entry no. 596 of Salkocha out post and found- general physical examination- no abnormality detected; examination of injuries- no abnormality detected; local examination of genital parts- external genitalia- no abnormality detected; hymen- torn; vagina and cervix- no abnormality detected; anus- no abnormality detected; menstrual history- normal; vaginal swab sent for clinical examination- no spermatozoa was found. According to her opinion patient was not consistent with recent sexual intercourse. **In cross** she stated as the patient was 12 years old, she was unable to speak the history. She stated at the time of examination no injury was detected on the body of patient.
- 15. PW-8 SI Muktajur Rahman is the I.O of the case. His evidence is that on 30-06-2016 he was posted at Salkocha out post as in-charge. On that day, prosecutrix lodged written ejahar at Salkocha O.P. and after making G. D. Entry 596 dated 30-06-2016 in the General diary kept in the police outpost he had forwarded ejahar to O/C Chapar P.S. for registration of the police case. Accordingly O/C Chapar PS registered Chapar PS Case No. 258/16 u/s 4 of the POCSO Act and endorsed him to investigate the case. He deposed during investigation he had recorded the statement of the informant/victim, produced her before the doctor at Dhubri Civil Hospital for her medical examination thereafter produced her before the court to record her statement u/s 164 Cr.P.C. He further deposed he had visited place of occurrence, drawn sketch map, recorded statement of the available witnesses. Accused Mohasen Ali surrendered before him at Salkocha O.P. on 08-08-2016. Accordingly after interrogating him, finding material against him he had arrested accused Mohasen Ali and forwarded him before the court. Thereafter after collecting medical report of the victim and finding sufficient incrementing material against the accused he have submitted charge sheet against the accused Mohasen Ali vide Ext.5. In cross he stated prosecutrix studies in Pachim Salkocha M. E. School but he did not ask her distance of the school from her home. He stated he did not record statement of the Headmaster of the school, to find out whether prosecutrix attend her school on the date of incident or not and prosecutrix and her relative not stated

before him who accompanied victim to her school. He stated incident was took place on 14-06-16 and FIR was lodged on 30-06-16 and he had taken the reason of delay from the family member of the victim but not from the victim. He stated he did not visit Delhi in connection with this case and recorded statement of Monowara. He stated victim did not stated reason of her visit in Delhi after the incident but her one brother stated that due to the incident victim went to Delhi. He stated house of accused Mohasen Ali is near to the house of victim in the same village and in his case diary and in Ext.4 sketch-map he had mentioned the mark A, B, C, D and P. He stated he neither collect the age certificate of the victim from the school nor collect the admission register of the school. He stated witness Hunufa not stated before him that prosecutrix told her that accused dragged her inside the jungle holding her hand and embarrassed (pasra-pasri kore). He stated when he produced victim before the doctor for her examination he made prayer for ascertaining age of the victim.

DISCUSSION, DECISION & REASON THERE OFF:-

- 16. This is a case of penetrative sexual assault on girl of 12 years old at the time of incident by the accused. According to the ejahar Ext-1 incident was took place in isolated place behind the bushes/jungle. Admittedly there is no eye witness. In offence of sexual assault on girl/woman there is no witness present and offender commit the offence when girl/woman is found alone at their house or in isolated place so to flee from the incident easily and so that none could see the incident and can easily suppress the incident and this is a case of no eye witness. In cases when there is no eye witness the circumstances appear in the case plays pivotal role and in the case of sexual assault/rape on woman/girl the statement of the evidence of prosecutrix (victim) is most vital to determine the fate of the case. As there is no eye witness in this case, let me scrutinize the evidence on record and let me find out whether evidence of victim girl is believable, derived confidence free from biasness and in consistent with her earlier statement and trustworthy and unassailable to hold accused guilty of the prosecution charge.
- 17. PW-3 is the victim girl of this case and therefore she is star witness of this case. Now let me scrutinize her evidence. At the time of adducing her evidence she stated her age as 14 years. According to her, incident was took place 1 year 8 months back. The victim girl at the time of lodging ejahar

mention her age as 12 years. At the time of making statement before the ld. Magistrate, she stated her age 12 years when she was produced before the ld Magistrate court to record her statement u/s 164 Cr.P.C and IO of the case in his forwarding stated age of victim as 12 years. PW—7, MO of the case in cross stated victim was aged about 12 years. Accused in his 313 Cr.P.C stated victim was minor at the time of incident. The defence plea is that as victim was minor and her marriage was fixed so accused restrained her guardian to give her in marriage and therefore this case has been filed against him. The fact appears from the defence plea is that victim girl of the case was minor at the time of incident and she was a student of ME school. When minority of the victim is admitted by accused no other proof of age of the victim is required and that victim was 12 years of age is proved beyond all reasonable doubt and she was under the age of 18 years and was a minor at the time of incident and was 12 years of age at the time of incident is established.

- 18. PW-3 victim in her evidence stated after school when she was returning back, accused who was present near his house dragged her towards the jungle behind the back of his house and committed rape on her thereafter accused given her threatening not to disclose the incident to anyone and if she disclose she will be killed. After that she went to Haryana with her pehi and her brother getting information brought back her from Haryana and on her returning back to her village, village people and her brother asked her what happened to her and then she narrated the incident of rape by accused to them and other family members and neighbour. Thereafter, one village chalisa was held to discuss about the incident but accused did not accept the decision of the village chalisa. Thereafter she lodged ejahar and during investigation she was medically examined by the doctor and she made statement before the Magistrate. Ext-1 is ejahar. Ext -2 is her statement recorded u/s 164 Cr.P.C. Ext 1(1), 2(1) are her signatures.
- 19. In the ejahar victim alleged that on 14-06-16 while she was returning home from school on foot, accused restraining her enticed her and taken her to isolated place of jungle and then sexual intercourse with her. Thereafter accused given her threatening to kill her if she disclose the incident. Resulting she did not disclose the incident to any other person and left to some other place and her brother Baser Ali brought her back from Haryana and then she disclosed the incident. In chief PW-3 victim of the case made statement whatever she had stated in her ejahar that at the time of incident while she was returning home from the school, accused Mohasen took her from the

road towards the jungle and then committed rape on her and then accused threatening her to kill if she disclosed the incident and for this reason she left her home. Ext-2 is her statement recorded u/s 164 Cr.P.C. In her statement recorded u/s 164 Cr.P.C she stated at the time of incident about 1 month back from the date of recording her statement, accused taken her from the road to the back side of his house in the jungle and then committed rape on her and given her threatening to kill her if she disclose the incident and then she left to Delhi with her pehi Monowara. She stated she narrated the incident to Amela and Amela narrated the incident to her mother. Thus shown that in her 164 Cr.P.C statement, victim made similar statement what she had made in her ejahar. Before court she made same consistent piece of statement. In her 161 Cr.P.C statement she stated at the time of incident after her school while she was returning home, accused dragged her towards the jungle present at the back side of his house and then committed forceful sexual assault with her and given her threatening not to disclose the incident. Thereafter she went to Delhi with her pehi Monowara and her brother Baser brought back her from Haryana. It is seen from reading of the statement of victim that she has made similar statement in all the stages and there is no addition and no making and concoction. Her piece of statement remain intact in all the stages and she does not deviate from her earlier statement and I find her piece of statement consistent with her all earlier piece of statements and same is trustworthy.

20. During cross examination by the defence she stated still she is school student. At the time of recording her examination she was student of class VIII. She stated at 07.00 am she went to Mukteb thereafter she went to school with her sister Firoza which is about 1 mile away from their house and they went to school on foot. In cross she further stated she did not board public vehicle to reach the school. She stated village market is about 2/3 farlong away from their house where several shops were present and about 7/8 other people living near her house. Her cross shown that when she has to go from the village market accused house is reach first thereafter her house came and her house is near the house of accused in the same line. She stated after rape she went home and told incident to her khala Amena and her khala Amena told the same to her mother but she did not told incident of rape to her mother, her sister in law and her sisters and not disclose the incident of rape to anybody after the incident. She stated she went to Haryana with her pehi where she stays for 3 days in the house of pehi and she told her parents she was going Haryana with her pehi Monowara. Her cross shown while accused was dragging and committing rape on her, she was alone and she could not raise alarm as accused did not allow her to raise alarm. She denied defence suggestion that she lodged false case against the accused and therefore she did not disclose the incident to anybody. Her cross is that after returning from Haryana one bichar was called but as bichar was not held she lodged the ejahar and she put her signature on the ejahar after writing the ejahar and at the time of lodging ejahar her father and brother were also present and ejahar was read over to her after writing and thereafter she put her signature. Her cross is that her brother Baser accompanying Tahej went to bring back her and Tahej is her cousin brother but she did not disclose the incident of rape to her pehi and not disclosed the incident of rape at Haryana to her brother Baser. She denied defence suggestion that her parents, brother sent her to Haryana with Monowara to give her marriage and as her marriage was not held at Haryana, she returned back to home town and falsely lodged case against the accused.

- 21. On the close scrutiny of the statement of PW-3 it is seen that she went to Haryana after the incident is clearly appearing from the cross examination of the defence. Thus, the submission of ld. defence counsel that prosecution failed to prove that victim girl went to Haryana is not proved is beyond the cross examination of defence and the defence plea. The victim at the time of incident is 12 years old and accused at that time was man of aged about 46+. Scanning of her evidence shown that accused given her threatening not to disclose the incident to any other person and if she discloses she will be killed. One 12 years old girl is getting threatening from a man of 46+ after committing sexual intercourse with her so, it is easily imaginable what would be the after math of said 12 years old girl and what would be her psychology, mental condition so thus when accused given her threatening to kill her if she disclosed the incident it is quite natural for the victim that out of fear she did not disclose the incident to anyone and when she get chance to go outside with her pehi, she went outside to relieve herself from the pain strain, stress that she had been suffering from the time of commission of rape on her. The tender age of the victim girl is the answer itself not to disclose the incident immediately to other when she get threatening from accused after the incident.
- 22. PW-1 in his evidence stated that he used to reside at Guwahati being rickshaw puller at the time of incident and getting information of his sister

missing he came to his native house and got information that his victim sister is at Haryana. Accordingly he along with his brother Islamuddin and dewani Aman Ali went to Haryana and bring his victim sister to home. Thereafter when they asked what happened to her, she replied that on the day of incident accused Mohasen Ali took her and committed rape on her and also given her threatening. The victim PW-3 stated that after returning from Haryana she narrated the incident to her brother Baser Ali and it was her brother Baser Ali with other went to Haryana to bring back her. The conjoint reading of the statement of PW-1 with PW-3 shown that both of them corroborated each other statement on the material point that after the incident prosecutrix went to Haryana and then she was bring back by her brother and after that she narrated the incident that accused had committed rape on her while she was coming from school and accused given threatening to her. Cross of PW-1 pointed victim girl went to Haryana with one Monowara hails from their village. Victim girl also stated she went to Haryana with Monowara after the incident due to threatening given by accused. Cross of PW-1 further pointed at the time of incident victim girl was student of Salkocha ME School and she went to school alone. This again establish the statement of the PW-3 that she was student of Salkocha ME School at the time of incident and went to school alone on the date of incident. The house of accused is on west side of PW-1's house. Evidence of PW-3 further pointed that to reach their house from school, she had to cross the house of accused. Thus again establish from the cross examination of PW-1 and PW-3 the victim of the case that accused house is near to their house and accused house reached first if victim come from school to her home and on the date of incident victim went to school and incident was took place when she was returning home from the school. In cross PW-1 denied defence suggestion that they give prosecutrix in marriage at Haryana, thereafter they brought her at their house and falsely lodged case against the accused. While cross examining victim, defence put suggestion to PW-3 victim that she was send to Haryana for her marriage and as her marriage not held at Haryana she returned to her native village and lodged the case. Thus, shown defence plea itself is contradictory and conflicting one to another. Cross examination of PW-1 revealed that defence totally failed to distract from his stand and he made similar consistent statement in all the stages that on the date of incident victim went to her school. Incident was took place on her returning

home from school. Accused given her threatening and thereafter victim went to Haryana.

- 23. PW-2 stated victim girl is her daughter. She knows accused and about 1 and 8 months ago from the day of adducing her evidence incident was took place and at that time her victim daughter was studying in Salkocha ME School. When her victim daughter was returning home from her school, accused Mohasen dragged her towards the jungle and then committed rape on her daughter and her daughter disclose the incident to her. Her further evidence pointed accused had given threatening to her daughter if she disclose the incident to anyone, accused will kill her and because of said threatening her daughter went to Haryana at their relative Monowara's house.
- 24. The victim at the time of incident studied at Salkocha ME school is established from the evidence of PW-1, PW-2 and PW-3 and other PWs. PW-2 in her cross as well as in her chief stated accused given threatening to her daughter not to disclose the incident. It is reveal form the record that at the time of incident victim was minor girl of 12 years and accused given her threatening to kill her if she disclose the incident to other and accused restrained 12 years old victim girl not to disclosed the incident to other on threatening to kill her so thus, it is quite possible that out of fear to die, she did not disclose the incident to other and went to Haryana with her relative Monowara to relieve herself from the pain, strain, trauma and mental condition. PW-1, PW-2 stated that after bringing her from Haryana by PW-1 Baser Ali, the brother of victim, victim girl disclosed the incident when her brother Baser asked about the fact of her leaving to Haryana and at that time she got courage to disclose the same as her elder brother is with her and after meeting all the family members she narrated the incident as by this time she was able to collect sufficient mental courage to disclosed the incident of rape to other. It is reveal that at the time of incident her brother Baser was not present and Baser Ali questioned to her what happened to her when they reached at their native house. So on way she did not stated incident of rape to him as he did not ask her anything at that time. When incident of rape occurred to 12 years minor girl it is easily understood the trauma, mental condition of the girl and she has received threatening to get killed if she disclose and this is sufficient reason at that time PW-3 victim did not disclosed the incident. But she did not disclose the incident at that time does not mean that she is lying before the court. PW-3 in all her statement

categorically and specifically stated that she was raped by the accused Mohasen after dragging her into the jungle on the back side of his house while she was returning home from the school and was given threatening not to disclosed the same to others and if she disclosed he will kill her.

- 25. Both PW-1 and PW-2 denied defence suggestion that they sent victim girl to Haryana with Monowara to give her marriage at Haryana. PW-1 and PW-2 further denied that they lodged false case against the accused as marriage of victim girl was not held at Haryana. Cross of PW-1 pointed that one village chalisa was held to discuss about the incident which was held after returning back of victim girl from Haryana.
- 26. Evidence of PW-5 shown that she made statement before police that PW-3 victim later on disclose to her that accused held her (saboti dhorisil) and accused committed rape on her dragging her to jungle. The statement admitted by PW-5 while adducing her evidence on oath made crystal clear that victim at one point disclose the incident of rape committed by accused to her before PW-5. PW-3 stated she narrated the incident to Amela after the incident. Thus the piece of statement made by PW-3 that she narrated the incident to one Amela on the very first day after the incident is again corroborated by the statement made by PW-5 in her in chief. The facts once admitted need not to be proved again. PW-5 admitted in her in chief that she made statement before the police about the disclosing of the incident to her by PW-3. Her cross reveals that when victim girl narrated the incident to her, she narrated the same to her mother. Victim girl also stated while adducing her evidence that she narrated the incident to one Amela and Amela narrated the same to her mother. Cross of PW-5 strengthen the statement made by PW-3 before the court and there is nothing to presume against the PW-3 that she had falsely implicate the accused. Victim girl stated she went to school alone. Her mother also stated she went to school alone. Cross examination of PW-5 also shown that her daughter did not go to school with victim girl and victim girl also studied in school. She also known that victim girl went to the house of Monowara at Haryana. The cross examination of PW-5 by the defence pointed that victim went to Haryana with Monowara and the fact which accused admitted while cross examining the witnesses that victim went to Haryana cannot turn down at the time of argument that she did not went to Haryana and her visiting Haryana is not established and proved because of non-submission of train ticket, flight ticket etc. The fact that she went to Haryana is admitted fact and again fact once admitted need no prove.

- 27. PW-6 also stated in her evidence that she heard from victim girl that while she was returning home from school, accused Mohasen dragged her holding her hand and embraced her. PW-6 stated accused had held the hand of prosecutrix and did pasra pasri with prosecutrix. The word pasra pasri stated by the PW-6 shown that victim was sexually assaulted by the accused. The girl of 12 years old was dragged by man of 46+ years and he did pasra pasri with the poor little girl mean nothing but sexual assault on her. In appropriate touching of a minor girl by a man is nothing but sexual assault in penetrative form. PW-6 further stated the victim also told her that accused dragged her in the jungle and embraced her. The statement of PW-6 makes it abundantly clear that accused sexually assaulted victim which is penetrative in nature. The words spoken by the PW-6 only goes to show that PW-3 is the victim of sexual assault in the hands of accused Mohasen. Her evidence further pointed victim girl narrated the incident to other persons in her presence. Her further evidence shown her husband Baser Ali was not present when incident of rape took place on victim and victim girl went to Haryana and he was informed about the incident after the incident. The victim in all the statement specifically stated that she went to Haryana out of fear and because of incident of rape. Reason of victim to visit Haryana is carefully explained by victim and corroborated by other PWs. The allegation of the victim made against the accused has been fairly corroborated by the PW-6. The case of the prosecution is not of kidnapping of victim as such none of the PWs including PW1 stated that victim was kidnapped and therefore no case of kidnapping was lodged. Prosecution case is of committing penetrative sexual assault on victim by accused and victim narrated this incident of penetrative sexual assault on her by accused to all the PWs and same has been corroborated by all the PWs except the PW-4 who shown ignorance about the incident.
- 28. It is easily understood the mental condition of rape victim after the rape incident. When rape incident took place on a girl, a girl mentally and physically broke down because of loss of her chastity, loss of honour, loss of her inner voice of womanhood and it is insult and injury of the womanhood and when 12 years old girl is rape under threatening, so her condition and mental status is even worse and very miserable and here in the case in hand the poor victim girl who was aged about only 12 years only to forget the incident of rape that took place on her, she went to Haryana. On the very beginning victim stated her reason to visit to the Haryana and she reasonably

stated the reason of delay in filing the ejahar because of the aforesaid fact of threatening she received from the accused after the incident for which she went to Haryana and when her brother brings back her from Haryana and asked her reason of her leaving to Haryana, she narrated the incident and when village salisa was failed she lodged the ejahar. The reason of delay which have been coming out from the evidence on record under the facts and circumstances is reasonable ground of delay in filing the ejahar.

- 29. Hon'ble Apex court in State of Punjab vs Gurmeet Singh & Ors, (1996) 2 SCC, 384 observed "The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged". In Tulshidas vs State of Goa, AIR 2004 SC 978 It is held that Prosecution case cannot be discarded solely on the ground of delay.
- 30. In the case in hand I find prosecution fairly able to explain the reason of delay in filing the case and I do not find any adversary for 16 days delay in filing the case when victim and her family member lives in village where social stigma present and victim is a girl of only 12 years and it is a case of rape on 12 years old minor girl and minor girl of 12 years is giving threatening call by accused to end her life.
- 31. It has been argued by learned defence counsel that evidence of PWs are hearsay evidence and not an admissible piece of evidence and PW-1, PW-2, PW-5 PW-6 are close relative of victim so their evidence is not acceptable.
- 32. Cross examination of PW-1, PW-2 PW-3, PW-5 and PW-6 revealed that all of them heard incident from PW-3, the victim of the case. Evidence of PW-1, PW-2, PW-5 and PW-6 further pointed victim went to school to attend her class alone and evidence of PW-6 further shown all the three sister of victim girl attended their school and studied in different school and they went to their school by using different route and all of them went to school on foot. She again stated whatever statements she made before the court are disclosed to her by victim girl. Thus when their piece of testimonies reflect they stated what they had been heard from the victim is not the hearsay evidence but primary evidence.
- 33. **Section 60 of the Evidence Act** say oral evidence must of direct. Oral evidence must, in all cases whatever, be direct; that is to say— If it

refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

- 34. Reading of section 60 of the Evidence Act and perusal of testimonies of the PW-1, PW-2, PW-5 and PW-6, I find their piece of testimonies covered with the provision of section 60 Evidence Act and they have stated whatever they heard from the victim and their evidence is not hearsay evidence and it is primary evidence and submission of learned counsel not accepted.
- 35. Upon meticulous scrutiny of the evidence of PW-1, PW-2, PW-5 and PW-6 it is seen that during lengthy cross examination of all the aforesaid PWs by the defence, defence failed to bring a single words, reason as to why they would falsely implicate the accused of raping one 12 year minor girl. When there is nothing to show on record of their being falsely implicate the accused of raping one 12 years old girl, the mere fact that PW-1, PW-2 and PW-6 being relative of the victim their evidence cannot be taken into account is not acceptable one and therefore submission of learned defence counsel get no force.
- 36. From the medical report the hymen of the victim found torn. Recent sign of rape not found as she was medically examined after several days of incident. Even if doctor did not find recent sign of sexual assault on victim, the evidence of victim cannot be thrown out when her piece of testimonies derives confidence and unassailable piece of evidence and credit worthy and truthful honest piece of evidence.

- 37. The Hon'ble Supreme Court in State of Himachal Pradesh vs Sanjay Kumar @ Sunny (2017) 2 SCC 51 held that "By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix- has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it is difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell as woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance."
- 38. The Hon'ble Apex Court in State of HP Vs. Asha Ram (2005) 13 SCC 766 held that "It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

- 39. Rape is a crime not only against victim but also against entire society. It is a crime against the basic human right. Rape killed the soul of the girl/woman and rape victim suffered social and mental stigma every second in her rest of life.
- 40. Evidence on record clearly pointed that accused Mohasen committed penetrative sexual assault (rape) on victim finding her alone under threat and her evidence is un-impeached and her evidence alone is sufficient to book accused guilty of commission of the prosecution charge u/s 4 of the POCSO Act against accused. More so in the case in hand evidence of victim is corroborated by the evidence of other PWs and there is no rebuttal of the prosecution evidence. Section 29 of the POCSO Act draws presumption that if sexual assault is alleged by a minor unless it is rebutted by the accused it is presumed that accused had committed sexual assault on the minor as alleged. In the case in hand victim in a cogent manner in specific words stated that accused committed rape on her forcefully and rape amounted to penetrative sexual assault within the meaning of section 3 of the POCSO Act and same is punishable under section 4 of the POCSO Act and I do not find any space/room to disbelief the evidence of victim of the case and her piece of evidence is accepted beyond all reasonable doubt against the accused. Accordingly I come to my considerate judicious finding that prosecution fairly able to establish the charge of section 4 of the POCSO Act against the accused Mohasen beyond all reasonable doubt and I hold him guilty u/s 4 of the POCSO Act and accordingly accused Mohasen Ali is convicted u/s 4 of the POCSO Act. Bail of accused Mohasen Ali stands cancelled.
- 41. Considering the facts and circumstances of the case and nature of the offence committed by the convicted accused Mohasen Ali, he is not entitled the benefit of Probation of Offender Act or section 360 I.P.C. Accordingly, convicted accused is heard on the point of sentence.

HEARING ON SENTENCE

- 42. I have heard accused and his counsel and prosecution side on the point of sentence. Accused pleaded mercy and his sentence is written in a separate sheet enclosed with the case record.
- 43. Ld. Accused counsel prayed for leniency considering the fact that accused is poor person and only earning member of the family. Ld. Addl. P.P submits that accused be sentenced in accordance with law.

- 44. Considering the tender age of the victim girl and nature of the offence and facts and circumstances under which accused have committed the offence of rape on victim girl, spoiling of her life, loss of chastity and womanhood, mental agony suffered by the victim in view of the rape and her future agony because of the rape committed on her, her status and future life in the society because of the rape, and increasing number of sexual assault on child, I am of the opinion that accused does not deserve any leniency and he is to be dealt with exemplary punishment.
- 45. Accordingly, convicted accused Mohasen Ali is sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 25,000/- i/d another 1 year RI u/s 4 of the POCSO Act.

ORDER

- 46. Accused Mohasen Ali is found guilty u/s 4 of the POCSO Act and he is convicted u/s 4 of the POCSO Act and he is sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 25,000/- i/d another 1 year RI u/s 4 of the POCSO Act. Period under detention is set off u/s 428 Cr.P.C. Let furnish free copy of Judgment to convicted accused Mohasen Ali. Fine, if paid, be pay it to the victim. The surety of accused Mohasen Ali stands discharged.
- 47. The convicted accused is told that he has right to appeal against the judgment and order of this court before Hon'ble High court through the jail authority or independently of his own. Convicted accused is further informed that he is entitled free legal aid to prefer appeal before the Hon'ble High court.
- 48. Right to life and protection is a fundamental right and none can snatch it and state duty is to protect life of person and his property. Increasing number of crime in the society means failure on the part of state to protect the life and property of the citizen of the State and State has to compensate the same to the victim of the case. From the evidence on record it is appeared that PW-3 who is a minor is a victim of rape sexual assault case and due to rape on her she immensely suffered mental agony which is evident from her statement that because of rape with threatening she had to leave her native village and because of the rape her esteem is effected and her agony is not stopped and she is suffering all the time. Rape is murder of the inner soul of the girl/woman and its pain is unaccountable and cannot be seen by other. In murder case person is killed but in respect of rape/sexual on assault victim, the very soul of the victim killed, she lost her chastity which is the most valuable assets of the girl/woman, her dignity, esteem in the

society lowered and she is made to suffer and she is looked in other ways for no fault of her and therefore, she being victim of rape case needs rehabilitation for her future security and therefore, I find victim of this case PW-3 entitled compensation u/s 357 A Cr.P.C under Victim Compensation Scheme and secretary DLSA, Dhubri will determine the quantum of the compensation payable to the PW-3 victim of this case.

- 49. Send copy of judgment and order to Ld. Secretary DLSA, Dhubri for determination of the quantum of compensation under the victim compensation scheme under section 357 (A) Cr.P.C.
- 50. Send copy of judgment to learned District Magistrate Dhubri u/s 365 Cr.P.C.
- 51. Given under hand and seal of this Court on this 04th day of October, 2018 at Bilasipara, Dist- Dhubri.

(Smti S. Bhuyan)

Special Judge, Bilasipara

Dictated and Corrected by me,

(Smti S. Bhuyan)

Special Judge, Bilasipara

Typed by,

Swmkhwr Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

PW-1 Baser Ali,

PW-2 Pastola Khatun,

PW-3 Prosecutrix, (victim)

PW-4 Mofijuddin Mollah,

PW-5 Omela Khatun,

PW-6 Hunufa Bibi,

PW-7 Dr. Muskura Ahmed (M.O) and

PW-8 SI Muktajur Rahman (I.O).

PROSECUTION EXHIBIT:-

Ext-1 Ejahar,

Ext-2 Statement of victim recorded u/s 164 Cr.P.C,

Ext-3 Medical report,

Ext-4 Sketch Map and

Ext-5 Charge sheet

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT EXHIBITS :- NIL

COURT WITNESS :- NIL

(Smti S. Bhuyan)

Special Judge, Bilasipara