### IN THE COURT OF THE SESSIONS JUDGE ::::: BONGAIGAON



### **Special (P) Case No. 10(BGN)/2017.**

U/S 6 of POCSO Act.

(Arising out of Bongaigaon P.S Case No. 463/2017)

State of Assam

 $V_{S}$ .

Sri Anil Barman ....Accused.

<u>PRESENT</u>:- Smti. I. Barman, Special Judge (under POCSO Act), <u>Bongaigaon.</u>

Appearance:-.

For the State: Sri R. Barman Public Prosecutor.

For the accused: Sri K.Chakraborty, Legal aid counsel.

Date of Argument: 12.03.2018, 26.3.2018.

Date of Judgment: 27.03.2018.

### JUDGMENT AND ORDER

Special Judge,

1. The factual matrix of the prosecution case, in short, is that on 11.06.2017 at about 11.00 AM, when the informant's (PW 5) 5 years old daughter went to her paternal uncle's (PW 2's) house, accused Anil Barman, who was working as mason in the house of PW 2, lured the victim by giving chocolate and sexually assaulted her.

FIR on the incident was lodged on 22.06.2017 by the mother of the victim (PW 5) before the O/C, Bongaigaon Police station. On receipt of the FIR, the O/C, Bongaigaon Police Station, registered a case being Bongaigaon Police Station Case No. 463/2017 under section 4 of POCSO Act and entrusted S.I. Khirode Dey to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, got the statement of the victim recorded U/S 164 Cr.P.C, sent her for medical examination, arrested the accused and on completion of investigation, laid charge-sheet against the accused Anil Barman under section 4 of POCSO Act.



3. On perusing police report and hearing both sides, having found a prima facie case, charge under section 6 of POCSO Act was framed against the accused. The accused pleaded innocence when charge was read over and explained to him and claimed for trial.

#### Points for determination:-

Whether on 11.6.2017, at village Deoripara under Bongaigaon police station, accused Anil Barman committed aggravated penetrative sexual assault on the victim and thereby committed an offence punishable under section 6 of POCSO Act?

Species Judge.

Rongaigaon.

4. In this case, to bring home the charge against the accused, prosecution has examined as many as 11 witnesses. Statement of the accused was recorded U/S 313 Cr.P.C in which, he denied all the allegations levelled against him and pleaded that since 7.6.2017 till

11.6.2017 he worked in the house of advocate's clerk 'Medhi' and prior to that only, he worked in the house of PW 2, the paternal uncle of the victim. He pleaded that during the period, he worked in the house of PW 2, the victim's mother asked him not to work in the house of PW 2 otherwise threatened to implicate him in bad case for which thereafter from 7.6.2017 to 11.6.2017 he worked in the house of Medhi and then this case was filed falsely against him. Defence examined none to prove his plea.

### Discussion, decision and reasons there of:-

Mr R. Barman, the learned Public Prosecutor strenuously argued that the materials on record undoubtedly project a case of sexual harassment on minor girl. He further submitted that the evidence of the victim child is enough to convict the accused person.

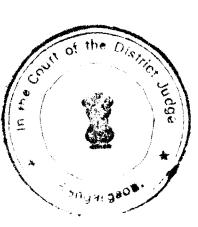
- 6. Controverting the said argument, Mr K. Chakraborty, the learned legal aid counsel appearing for the accused person, submitted that the delay in lodging the FIR coupled with not being supported the case by medical evidence create doubts on prosecution case. He also submitted that the victim's mother wanted to oust the accused from working in the house of her brother-in-law (PW 2) and hence he has been falsely implicated in the case.
- 7. In view of the rival submission advanced by the learned counsels appearing for the parties, let us go through the entire evidence on record.

Special Judgo.

Court

8. PW 1 is the victim herself. She deposed that on the day of incident when she went to her father's elder brother's (PW 2) house ( whom she called as Dadago), then accused Anil Barman laid her upon the floor and by removing her jangia, put his penis upon her vagina and inserted it to a little extent, at which she raised alarm on feeling pain. Thereafter, she returned home. She further deposed that the accused person made her laid upon the ground and committed wrong acts with her. She stated that at the time of incident, her uncle (Dadago) was preparing mortar outside his house and her aunty was also within house. During cross she stated that at the time of incident, the accused was working in the house of her uncle (Dadago). She denied the suggestion that the fact of inserting the penis by the accused into her vagina was not stated before police.

PW 2 is the elder brother of the victim's father in



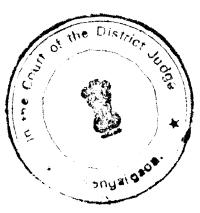
9.

whose house the alleged incident occurred. He deposed that at the time of incident the accused was working in his house as mason and he helped him as labour. He stated that one day the villagers handed over the accused to police and then only he came to know that accused Anil Barman put his penis in the vagina of the victim girl inside his newly constructed house when he had gone to the shop for purchasing construction materials. During cross he denied the suggestion that in connection with land and construction of his house, he had dispute with mother of the victim. However, he admitted that sometimes they had some petty quarrels. He further deposed that the accused told him that his age is 70 years. He stated that until police had taken the accused,

neither the victim nor her mother informed him about the incident.

Species Judge.

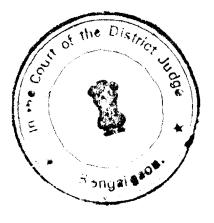
10. PW 3 is the wife of PW 2. She deposed that on the day of incident she went to bank and from her neighbour, she heard that accused Anil Barman attempted to commit something to the victim. During cross she admitted having petty quarrel with the victim's family with regard to some domestic matter. She also stated that neither the victim nor her mother reported her about the incident.



11. PW 4 Leena Singha, the president of Bongaigaon Zila Parishad, stated that on 19.6.2017, the mother of the victim, at around 5 P.M came to her house and reported that on 11.6.2017 accused Anil Barman, who was working in PW 2's house as mason, had committed sexual intercourse to her 5 years old daughter. Then on being asked, the victim was found to be unwell. Hence she asked the victim affectionately as to whether anything had been done to her, to which the victim girl, by removing her pant, had shown that accused Anil Barman put his penis in her vagina forcefully as a result of which she felt pain and had been suffering while urinating. Hearing the incident, on next day, she called a meeting and as per decision of the meeting, F.I.R was lodged and accused was handed over to police. During cross she stated that on asking the victim's mother as to why she reported the incident so late, the informant told her that at first they thought that for some other reason her daughter might have felt burning in her private part and accordingly they got her treated by a doctor. Though she denied the suggestion that the fact of reporting by the victim and her mother regarding sexual intercourse was not stated before police but she clarified that she had stated before police that the victim reported to her that

Species Judge.

the accused by removing her pant explained the bad act committed on her by the accused person.



12.

PW 5 is the mother of the victim. She deposed that on 11.6.2017 at around 11 A.M while she was at home, her victim daughter came to her weeping and told her that accused Anil Barman made her laid upon the floor of the newly constructed house of PW 2, removed her pant and put his penis in her vagina forcefully causing swelling in her private part. After that, PW 6 the paternal aunty of the victim came there and both of them noticed swelling in the private part of the victim. Then when they asked the accused, about the act committed by him, the accused kept mum and glared at the mother. Thereafter, they took the victim to doctor of Chaprakata wherefrom again she was taken to civil hospital, but she did not get well and felt burning while urinating. After that, there was 3 days AAKRSU bandh and when the bandh was over, they had taken the victim to civil hospital but she did not get cured and due to financial constraint, she was unable to get better treatment. Hence she informed the matter to villagers to which the villagers got the victim girl treated in Lower Assam hospital and she filed the FIR, Ext 1. Police also seized the birth certificate of the victim vide Ext 2. During cross she stated that the accused was working in the house of PW 2 for about 20/25 days and PW 2 helped him in his work. She stated that in the house of PW 2, he and his wife resided and on the day of incident PW 2 worked in other place and returned at 4.00 P.M. On that day the wife of PW 2 went to market and returned at 3 P.M and the accused worked alone. She further stated that on the day of incident the accused worked whole day in the house of PW 2 and thereafter, for several days

he worked there. PW 5 noticed the victim girl at 11 A.M but immediately she did not take her to hospital.

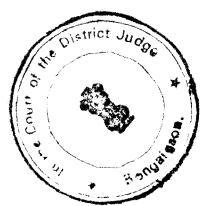
13. PW 6 is the aunty of the victim. She deposed that her house is just on the backside of the house of PW 2 where the alleged incident occurred. According to this witness, on the day of incident, after returning home, through window, she saw that accused Anil Barman making the victim laid upon floor of the newly constructed house of PW 2, inserted his penis in the vagina of the victim and seeing her, the accused got shocked and lifting the victim from the floor, pretended to be swining her. Then she reported the incident to the mother of the victim and after 2 days the victim told that accused put his penis in her She also stated that the accused lured the victim by giving chocolate and asked her not to raise alarm. She stated that due to the incident, the victim felt burning in urinating and had taken treatment at Chaparakata, Bongaigaon civil hospital and Lower Assam hospital. During cross she denied the suggestion that the fact of witnessing the incident was not reported to police.



District Judge

14. PW 7 Renuka Ray deposed that she heard that on 11.6.2017 accused Anil Barman committed sexual intercourse to the victim girl and later on, the incident was informed to their Mahila Samitee by the mother of the victim. She stated that on 22.6.2017 police seized the birth certificate of the victim in presence of her vide seizure list Ext 2.

15. PW 8 Dr. Hafiza Ahmed examined the victim on 22.6.2017 and found as follows:



Conscious and oriented. Vitals – Normal.

Dentition 5|5

5 | 5

Secondary sex characters not developed.

# Local examination:

No redness, swelling or tenderness over vulva. No semen stain found. No injury over any part of body. Hymen – Intact. Vaginal smear - No spermatozoa seen.

## **Investigation**:

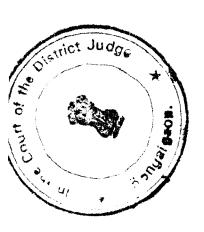
Clinically her age appears to be 5 years.

She opined that from the history and examination, it could not be ascertained if she was raped or not. She proved the medical report as Ext.3. During cross she stated that the victim stated history of assault by Anil Barman but she did not find any injury on her person.

on 11.6.2017 his sister (PW 5) alongwith the victim girl came to his house and said that the victim felt burning in her private part while urinating. Then he sent the victim with his brother to doctor, but as it was a Sunday, hence on next day i.e on 12.6.2017 his brother took the victim to Chaprakata civil hospital. But doctor referred the victim to Bongaigaon civil hospital. Then on being enquired the victim's mother, as to what happened actually, she told him that 3 / 4 days ago, the accused who was working in the house of PW 2 as mason, committed rape on her. On 13.6.2017, there was bandh called by AAKRSU and only in the afternoon they came to know that bandh was withdrawn. Hence on 14.06.2017 they took the victim to Bongaigaon civil hospital

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and on narrating the incident, doctor asked as to whether any case was lodged or not. Then he informed the incident to the villagers of the informant and thereafter his sister filed the case. During cross, he stated that though the victim had not cried when she came to his house but she felt pain. He further stated that after knowing about the incident, at first he informed the villagers and thereafter asked his sister to file the case. He denied the suggestion that seeing construction of new house of the victim's paternal uncle, her mother lodged the case falsely, out of grudge.

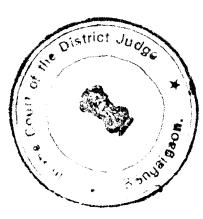


17. PW 10, SI, Khirod Dey is the Investigating Officer. He deposed that on receipt of an FIR from the informant on 22.6.2017, he was entrusted to investigate the case and accordingly he visited the place of occurrence, prepared the sketch map of the place of the occurrence, Ext 5, recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded U/S 164 Cr.P.C, arrested the accused and at the close of investigation submitted charge sheet against the accused U/S 6 of POCSO Act vide Ext.7. He also seized the birth certificate of the victim vide Ext 2. During cross, he stated that the cause of delay in filing the F.I.R was mentioned in the F.I.R as non disclosure of the incident by the victim girl. He stated that as per version of the accused, he mentioned the age of the accused as 58 years in the forwarding letter. He also stated that though the victim's mother told that the victim was treated by private doctor at Lower Assam hospital but no document was collected by him in that respect.

Species Judge.

18. PW 11 Binod Ch Ray, the then Bench Assistant of the Court of the learned SDJM(S), Bonogaigaon deposed that on 23.06.2017 the victim girl was produced before the Court for recording

her statement U/S 164 Cr.P.C and accordingly the learned SDJM(S), Bongaigaon Smti S. Handique recorded her statement vide Ext 6 wherein the victim put her thumb impression which was taken by him. He proved the same as Ext 6(1) to Ext 6(5). He also proved the signature of the then learned SDJM(S), Bongaigaon, Smti S. Handique as Ext 6(6). During cross he stated that the victim was produced in the Court by woman police and the statement was recorded in the chamber of the officer. After recording statement, he took the thumb impressions of the victim.



19. In the case the evidence of the PWs is that at the time of incident, the victim was 5 years old. As per medical evidence (PW 8) also, the victim appears to be 5 years of age. Age of the victim is not in dispute. As such, I unhesitantly hold that the victim is a child below the age of 12 years at the time of incident.

- 20. Now the question is whether the accused Anil Barman committed an offence.
- The evidence of the victim (PW 1) reveals that at the time of incident, accused Anil Barman whom she called "Dodo" was working in the house of her paternal uncle (PW 2). She stated that on the day of incident when she went to the house of her paternal uncle (PW 2), the accused made her laid upon the floor and had put his penis in her vagina and inserted it to a little extent. At that moment, on feeling pain, she raised alarm. After returning home, she reported the incident to her mother. PW 5 the mother of the victim, the most natural witness, stated that on 11.6.2017 at around 11.00 A.M her victim daughter by crying told

Species Judge.

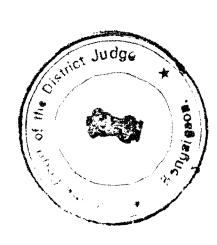
Rongaigaon.

her that the accused made laid her upon the floor of the newly constructed house of PW 2 and put his penis in her vagina by force. As a result, there was swelling in the private pate of the victim due to which she felt burning and pain in her private part. PW 6 the paternal aunt of the victim claimed that she, through the window of newly constructed house of PW 2 witnessed the accused inserting his penis in the vagina of the victim upon floor. But seeing her, the accused lifted the victim and pretended to be swinging her and then she reported the incident to the victim's mother. Though PW 5, the victim's mother, had not corroborated that PW 6 reported what she had seen but PW 5 stated that after the incident, PW 6 came to her house and then both of them had noticed swelling on the private part of the victim. Victim in her statement U/S 164 Cr.P.C, (Ext 6), also stated that her paternal aunt also had seen swelling in her private part. PW 9, the maternal uncle of the victim, stated that victim's mother reported him about commission of sexual intercourse on the victim by the accused. PW 4, the President of Bongaigaon Zila Parishad as well as president of woman organization, also stated that on 19.6.2017 the victim's mother came to her house with her victim child and the victim, by removing her pant, had shown that accused put his penis in her vagina. PW 5 the victim's mother and PW 4 the independent witnesses categorically stated that the victim told that the accused person, by making the victim laid upon ground, removed her pant and put his penis in her vagina with force as a result of which she felt pain in her private part. Though in deposition the victim stated that the accused inserted his penis in her vagina to a little extent but in statement U/S 164 Cr.P.C and in statement U/S 161 Cr.P.C recorded immediately after lodging the FIR, i.e after 11/12 days of the incident,

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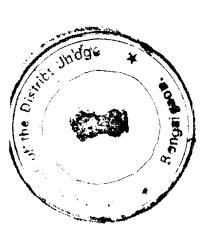
she stated that the accused put his penis in her vagina resulting swelling in her private part.



Species Judge.
Bongaigaon.

22. Further, although the victim's mother stated that after the incident, the victim was treated by private doctor and at Lower Assam hospital, but it was not proved by prosecution by any document. On the other hand, the medical evidence (Ext 3) shows no redness, swelling or tenderness over vulva. The alleged incident occurred on 11.6.2017 and the victim was examined at Bongaigaon civil hospital on 22.6.2017 i.e. after 11 days. So there is no possibility of finding any injury. The statement of the victim for the first time at stage of evidence that the accused inserted his penis in her vagina to a little extent, was not corroborated by other PWs. Her mother is the most natural witness to whom she reported the incident immediately after the occurrence. Even according to deposition of the mother, the victim reported her that the accused put his penis in her vagina but not stated about slightest penetration. A girl of 5 years old, can hardly say what amounts to penetration. If a matured man of 60/65 years, rubs his penis upon vagina of a 5 years old girl, possibility of swelling on private part or feeling pain as complained by the victim cannot be ruled out. Though PW 6 through window, she had seen the accused penetrating his stated that penis in the vagina of the victim and reported it to victim's mother, but victim's mother stated that on the day of incident PW 6 was in her own house and she came to her (PW 5's) house at 3.00 P.M. On the other hand, victim returned home at 11.00 A.M and reported the incident to her mother. PW 5 stated that after she saw swelling in private part of the victim, PW 6 came there and both of them saw the swelling. So, the

evidence of PW 5, the victim's mother does not support that PW 6 had seen the incident. The evidence of PW 6 about seeing the incident appears to be exaggerated. PW 2, the paternal uncle of the victim, in whose newly constructed house the alleged incident took place, also heard that accused forcibly put his penis in the vagina of the victim within his house and at that time he was not present. PW 3, the wife of PW 2, also stated that her neighbour told the accused attempted to do something to the victim and at that time she had gone to the market. So, though the victim stated that at the time of incident PW 2 was preparing mortar outside of his house and PW 3 was at home, but PW 2 and PW 3 themselves stated that at that time they were not at home. However in statement U/S 164 Cr.P.C, the victim stated that at the time of incident, nobody was present in the house of PW 2. Being an infant child of 5 years, she might not remember everything all but her evidence coupled with evidence of other PWs particularly the evidence of mother firmly established that the accused put his penis in her private part.



Special Judge.

Taking the plea of enmity though the learned counsel of defence argued that regarding paternal property, the victim's mother had dispute with PW 2 and hence this case was filed falsely so that she can stop the accused from working in construction of his house, but it is quite unbelievable that a mother for her own jealousness would set up her minor daughter with a false allegation of sexual assault against an innocent who was engaged as a mason for construction of enemy's (PW 2) house. A mother or father cannot put reputation, prestige and dignity of her/his daughter at stake for such family dispute by levelling false charge against an innocent.

24. The learned defence counsel pointed out some discrepancies, in the deposition of PWs but in my opinion such discrepancies do not wipe out the other reliable part of the evidence and the victim can not said to be inconsistent on the main allegation of sexual assault. It is well settled that differences in minor details, which do not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the Court to reject the evidence on minor variation or discrepancies. The evidence of the victim regarding sexual assault is found spontaneous, firm and trustworthy. The evidence of other PWs, particularly the mother of the victim, is corroborative in value.

Somos! Further though in statement U/S 313 Cr.P.C the accused taking the plea of alibi stated that he had worked in the house of the advocate's clerk 'Medhi' from 7.6.2017 till 11.6.2017 and had not worked in the house of PW 2 on the day of alleged incident, but said Medhi was not examined by defence. On the other hand, PW 2 and PW 3 the couple who had family dispute with victim's mother clearly stated that at the time of incident the accused worked as mason in their newly constructed house. There is nothing at all to doubt their deposition in any manner. Therefore, the accused failed to establish his plea. Though the accused claims his age as to be 70 years, but in the forwarding report his age is mentioned as 58 years. Defence did not produce any document regarding age of the accused. The accused, being a person of 60/65 years, was supposed to protect the victim, who is of his grand daughter's age,

25.

26. In this case there is delay of 11 days in filing the

and sexually assaulted her.

from abuse of her childhood, but instead he himself abused her childhood

F.I.R. In this report, the victim's mother, the informant, stated in evidence that at first she took the victim to doctor of Chaprakata and then to civil hospital. Moreover, in the midst there was AAKRSU bandh for three days and at civil hospital, doctor asked to take better treatment and then due to financial constraint, she informed the matter to villagers who helped to take treatment at Lower Assam hospital and thereafter, she lodged the F.I.R. So due to financial constraint, she may not think about filing a case and later on when she had to take help of others, she filed the case. In this respect the Apex Court in Md Ali vs State of Uttar Pradesh reported in (2015) 7 SCC 272, had been held as follows:

"It is opt to mention here that in rape cases the delay in filing the F.I.R by the prosecutrix or by the parents in all circumstances is not of significance. The authorities of this count have granted adequate protection/allowance in that aspect regard being had to the trauma suffered, the agony and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a conservative social milieu. Sometimes the fear of social stigma and occasions the availability of medical treatment to gain normalcy and above all the psychological inner strength to undertake such a legal battle."



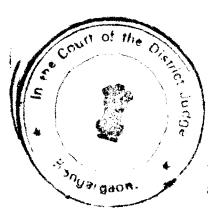
Species Judge.

In the instant case, the victim, being a girl of 5 (five) years, who may not know what happened to her and also considering the facts and circumstances, particularly that of financial hardship as discussed above, and considering the law laid down on the issue, the delay in lodging the ejahar is not fatal to the prosecution.

28.

Situated thus, the conclusion which is irresistible is

that the prosecution has proved beyond all reasonable doubt that accused Anil Barman, on 11.6.2017, while he was working in newly constructed house of PW 2 as a mason, laid the victim on the floor and by removing her pant put his penis upon her vagina and thereby committed the offence of sexual assault. Considering the evidence available on record as discussed above, I am of the opinion that although the evidences adduced by the prosecution do not establish the charge of penetrative sexual assault but prosecution proved beyond reasonable doubt that accused committed sexual assault on the child victim. The victim child being 5 years old, i.e. below 12 years, the act committed by the accused would fall within the ambit of section 9 (m) of the Act, i.e of causing aggravated sexual assault of 5 years old child punishable under section 10 of POCSO Act and not an offence of penetrative aggravated sexual assault U/S 6 of POCSO Act. Considering all, accused Anil Barman is held guilty for the offence punishable U/S 10 of POCSO Act and is convicted accordingly.



I have heard accused Anil Barman on the point of sentence. The accused/convict has stated that he is to look after his wife and two sons and therefore prayed for taking a lenient view. On the other hand, the learned Public Prosecutor submitted that the crime being heinous, the accused should not be dealt with leniency.

Species Judge.

- I gave my anxious consideration on the aspect of quantum of sentence. Section 10 of POCSO Act provides punishment for a term which shall not be less than 5(five) years but which may extend to 7 (seven) years and shall also be liable to fine.
- 31. In Madan Gopal Kakkad V. Naval Dubey and Anr.

(1992) 3 SCC 204, it has been observed as follows:



32. In State of Karnataka V. Krishnappa (2000) 4 SCC 75, the Apex Court opined that " the Court must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced."

Species Judge,

33. In the instant case, the 5 years old girl, was supposed to spend time in cheerfulness. No sexual character is developed on the victim. It is quite natural that the prosecutrix understands nothing about sex or what the accused was doing with her. The act of the accused is nothing but cruel satisfaction of lust. It is reflection of the gruesome criminality in the mind of the accused person that he did not spare a little girl who was of the age of his grand daughter from his lust in pursuit of

his sexual pleasure. She has been traumatized due to such incident which occurred to her at a very tender age. He committed a serious offence against a minor and, therefore, in my considered view he does not deserve a lenient consideration.

- 34. Considering all aspects, I sentence the convict Anil Barman to undergo rigorous imprisonment for 7 (seven) years and also to pay fine of Rs. 10,000/- (Rupees ten thousand), in default to undergo rigorous imprisonment for another 6(six) moths for the offence punishable U/S 10 of POCSO Act. The fine amount on realization be paid to the victim. The period of detention already undergone by the accused shall be set off.
- 35. Convict/accused Anil Barman be sent to District Jail, Abhayapuri to serve the sentence.
- 36. Let a free copy of the judgment be furnished to the convict.
- 37. Also send a copy of the judgment to the District Magistrate, Bongaigaon as per provision of section 365 Cr.P.C.

38. Given under my hand and seal of this Court on this 27<sup>th</sup> day of March, 2018.

(I. Barman)
Special Judge
Bongaigaon.

Special Judge.

Dictated and corrected by me,

(I. Barman) Special Judge

ongaigaon.

## (19)

#### APPENDIX

### Prosecution witness:

PW 1 – Victim

PW 2 – Parental uncle of the victim.

PW 3 - Wife of PW 2.

PW 4 – Leena Singha.

PW 5 – Mother of PW 1.

PW 6 – Paternal aunt of the victim.

PW 7 – Renuka Ray.

PW 8 - Dr Hafiza Ahmed Medical officer).

PW 9- Brother of the victim.

PW 10 – Khirod Dey, I.O.

PW 11- Binod Ch Ray, Bench Asstt. to learned. SDJM(S), Bongaigaon.

#### **Defence Witness:**

Nil.

# **Documents Exhibited by Prosecution:**

Ext-1 F.I.R.

Ext-2 Seizure list.

Ext-3 Medical report.

Ext-4 Vaginal smear examination report.

Ext-5 Sketch map of the place of occurrence.

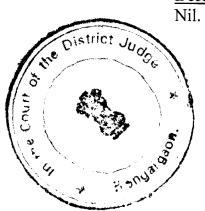
Ext 6 Statement of the victim

Ext 7 Charge sheet.

# Material Exhibited by prosecution:

M. Ext 1 – Birth certificate.

#### **Defence Exhibit:**



(I. Barman)
Special Judge,
Bongaigaon.
Bongaigaon.