### IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>38 OF 2016</u>

(Under Section 4 of the POCSO Act, arising out of G.R. Case No.

3839/2016)

Present :- Sri Ashok Kumar Borah, AJS

**Special Judge, Sonitpur** 

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Daku Bhakta @ Dulen

Son of late Monohar Bhakta,

Resident of Solagaon Police Station – Tezpur Dist:- Sonitpur, Assam

Date of framing Charge :- 14/03/2017

Date of Recording Evidence : 18/04/2017, 19/08/207,

04/09/2017, 19/12/2017 22/12/2017 & 06/03/2018

Date of examination of accused :- 06/03/2018.

u/s 313 Cr.P.C

Date of Argument :- 26/03/2018

Date of Judgment :- 06/04/2018

Counsel for the Prosecution :- Mr. M.Ch. Baruah,

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. A.K. Saikia, Legal Aid

counsel.

#### **JUDGMENT**

- **1.** In this case accused Sri Daku Bhakta @ Dulen is put for trial for allegation of charge under Section 4 of the POCSO Act, 2012.
- 2. The factual matrix according to the FIR, in brief, is that on or about 3 p.m. of 10-11-2016 while informant's 12 years old minor daughter went to the house of the accused to have a glass of water, accused by gagging her mouth committed rape on her. Hence, this prosecution case. The ejahar was filed by the informant Sri Dilip Kurmi before the Incharge of Salonibari Police Out Post on 11-11-2016.
- 3. On receipt of the ejahar, the I/C of Salonibari Police Out Post after giving the GD Entry being No. 322 dated 11-11-2016 at 8.30 a.m., forwarded the same to Officer-In-Charge of Tezpur Police Station for registering a case. On being receipt the ejahar, O/C Tezpur Police Station registered a case being Tezpur P.S. Case No. 2039/16 under section 4 of the POCSO Act. After completion of usual investigation, the O/C Tezpur Police Station sent up the case for trial against the accused Sri Daku Bhakta @ Dulen u/s 4 of the POCSO Act.
- **4.** On being appeared the accused before this Court, after hearing both parties, framed charge under section 4 of POCSO Act, 2012 against the accused Sri Daku Bhakta @ Dulen and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- **5.** To substantiate the case prosecution examined as many as 11 (eleven) numbers of witnesses which includes the informant, victim, other material witnesses and the Investigating Officer and Judicial Magistrate.
- **6.** After completion of prosecution evidence accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the evidence and allegation and declined to give defence evidence.
- **7.** I have heard the argument put forward by the learned counsels of both sides.

# 8. The point for decision in this case is that:

1. Whether on 10-11-2016, at about 3 p.m. at Solagaon, Gelaphukuri, under Tezpur Police station, accused committed penetrative sexual assault on Miss X (aged about 12 years) and thereby committed an offence punishable u/s 4 of the POCSO Act?

## Reasons, Decisions and reason for decision.

- **9.** To arrive at the judicial decision, let me appreciate the evidence on record.
- 10. PW- 1 Sri Dilip Kurmi, father of the victim, who has stated that they called the accused as "Mama". The incident took place about 5 months ago. The incident took place at about 12 to 2 p.m. At the relevant time he went out to search his work. After 2 p.m. when he came to his house, he saw his victim daughter was crying. When he asked his daughter and wife, they told that when his daughter went to the house of accused Daku, accused Daku hold her opening her pant. In the next day of the incident, he has filed the ejahar before the I/C Salonibari Police Out Post. The ejahar was written by Gaonburah as per his dictation and his victim daughter. After writing the ejahar by Gaonburah he put thumb impression therein. At the relevant time his victim daughter was 12 years of age.

Though he has been exposed to long cross-examination except giving many suggestions, the evidence as to on the day of incident while he returned home after 2 p.m. from his work he saw his victim daughter was crying, when he asked his daughter and wife, they told him that when his daughter went to the house of the accused to have a glass of water, accused Daku hold her opening her pant. In the next day of the incident, he has filed the ejahar before the I/C of Salonibari police Out Post has remained unchallenged.

11. PW-2 Smt. Bijuli Gorait, the neighbour of the victim, stated that accused Dulen Bhakta @ Daku @ Munindra is her neighbour. She also knows the victim. The incident took place about 6 months ago. The incident took place on forenoon of that day. While she returned from meeting she

saw a gathering of women where the victim was found crying. On being asked the victim, the victim stated that at the relevant time she went to drink a glass of water to the house of the accused. During that time accused dragged her inside his home, fell her down in the bed and committed rape on her by opening her pant. During that time she along with father of the victim and Rina Karmakar etc. were there. Then the father of the victim searched the accused in his house but he came to know that the accused fled towards the paddy field. Father of the victim caught accused from the paddy field and took him. Siya is her daughter. She reported her that while she opening the door, she saw accused was lying on the victim.

Though she has been exposed to long cross-examination the evidence as to about 6 months ago, at forenoon, while she returned from meeting she saw a gathering of women where the victim was found crying, on being asked the victim, the victim stated that at the relevant time she went to drink a glass of water to the house of the accused, during that time accused dragged her inside his home, fell her down in the bed and committed rape on her by opening her pant, during that time she along with father of the victim and Rina Karmakar etc. were there, then the father of the victim searched the accused in his house but he came to know that the accused fled towards the paddy field, father of the victim caught accused from the paddy field and took him and Siya, who is her daughter reported her that while she opening the door, she saw accused was lying on the victim has remained unchallenged.

12. PW-3 Smt. Rina Karmakar stated that accused Dullen Bhakta @ Daku is her neighbour. She also knows the victim. The incident took place about 6 months ago. The incident took place on forenoon of that day. While she returned from school after attending photo sessions, she saw a gathering of women where the victim was found crying. On being asked, the victim stated that at the relevant time she went to the house of the accused. During that time accused dragged her inside his home and committed rape on her by opening her pant. Siya reported that she saw the incident while

she suddenly opened the door of the house of the accused. Then she came to know about the incident.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to while she returned from school after attending photo sessions, she saw a gathering of women where the victim was found crying, on being asked, the victim stated that at the relevant time she went to the house of the accused, during that time accused dragged her inside his home and committed rape on her by opening her pant and Siya reported that she saw the incident while she suddenly opened the door of the house of the accused has remained unchallenged.

- **13.** PW-4 Smti Bharati Bhumik stated that accused Munindra @ Dullen Bhakta @ Daku is her neighbour. Victim is also her next neighbour. The incident took place about 6 months ago at forenoon, while she went to fair price shop, children playing there saw accused kept victim inside his home. On being seeing them, she also went to the house of the accused and on opening the door she saw the accused was lying on the victim. Though the victim did not state about the incident initially but lateron the victim stated that while she went to the house of the accused, accused took her inside and committed "kharap kam" (misdeed) by opening her pant.
- 14. PW- 5 the victim Miss X who was examined after making enquiry to confirm about the intelligence and ability to give rational answers and also ability to administer oath, stated that the incident took place in the day time, During that time she went to the house of the accused to have a glass of water where accused dragged her inside his house by gagging her mouth, closed the door, fell her down, undressed her, accused lifted her gown and opening her pant, he inserted his sexual organ into her private parts. In the mean time while Siya seen the incident by opening the door raised alarm and after committing misdeed accused went to the paddy field and slept there. At the time of incident, there was no other persons present in the house of the accused. She called the accused as "Nana". Then Siya informed the matter to Renuka Kaki. Then she was taken. She also reported the matter to her father and Renuka Kako. On being came to know about the

incident, her father assaulted her at paddy field. Thereafter, her father filed this case. After instituting the case she was examined medically and also sent her to the learned Magistrate to record her statement u/s 164 Cr.P.C. There is no any quarrel with the accused prior to the incident.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time she went to the house of the accused to have a glass of water where accused dragged her inside his house, gagged her mouth, closed the door, laid her down in bed and by opening her dress, accused touches her private parts through his male sexual organ which is seen by Siya has remained unchallenged.

**15.** PW-6 Sri Munna Kurmi stated that victim is his niece. Complainant is his elder brother. The incident took place before the Last Magh Bihu. On the date of alleged incident while he was returned from work, he heard that accused raped his niece.

Though he has been exposed to long cross-examination the evidence as to on the day of incident while he was returning from his work he heard that accused raped his niece has remained unchallenged.

**16.** PW- 7 Miss Siya Gorait who stated that the incident took place or about 9/10 months ago at about 2/3 p.m. Sarmila, the daughter of the accused is her friend. At the relevant point of time she went to the house of the accused to bring back her clothes which are taken by the daughter of the accused, while she opened the door of the house of the accused she saw accused Daku was sleeping upon the victim, the clothes of her lower portion was lifted and accused's pant was also half open, on being seen her accused fled away towards the paddy field. During that time the victim came out by crying. The victim reported to her that while she went to have a glass of water went to the house of the accused, accused gagged her mouth, dragged her inside forcefully committed misdeed on her.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time at about 2/3 p.m. 2/3 p.m., when she entered into the house of accused by opening the door to bring back her clothes taken by the daughter of the accused, she saw the accused was lying sleeping upon the victim, the lower portion of

clothes of the victim was found lifted and accused's pant was found half portion and on being seen her accused fled away towards paddy field has remained unchallenged.

**17.** PW 8, Dr.Tutumoni Handique stated that on 11-11-2016 she was posted as working as Sr. Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day, in reference to Tezpur PS Case NO. 2039/16 u/s 4 of the Special POCSO Act, 2012, she has examined one patient/victim namely Miss X, aged about 12 years, D/O Dilip KUrmi, resident of Solagaon (gelabil), PS tezpur on being escorted and identified by HG(W) Biju Koch. Consent of examination was taken in written from father of the victim. On examination, she found the following:

According to victim on 10-11-2016, she was assaulted by known old person. Menstrual history: Menarche attained two months back.

O/E:- Height - 147 cm., Weight - 34 Kg, Teeth - 6/6, 7/6.

Identification mark: Mole on left side forehead. At the time of examination, she is well dressed, neat and tidy. Gait is normal, secondary sexual characters are in developing stage. Hymen absent. No injury seen in her body as well as on her private parts.

Investigations advised and reports-

- 1.Vaginal smear no sperm. Done at KCH Laboratory, Lab No. 121/16.
- 2. Urine for HCG negative. Done at Assam X-ray Clinical & Laboratory, Patient ID 31851, Pathologist Dr. D. Mahanta.
- 3.X-ray for age determination Age of the person under investigation is below 18 years. Done at Assam X-ray Clinical & Laboratory, Patient ID AXC 3073, Radiologist Dr. P. K. Barman.
- 4. Ultra sonography of abdomen- normal USG with non gravid uterus. Done at Assam X-ray Clinical & Laboratory, , Radiologist Dr. P. K. Barman.

# **OPINION:**

1. No sign and symptom suggestive of recent sexual intercourse.

- 2. No mark of violence seen on her body as well as on her private parts.
- 3. Victim is not pregnant.
- 4. Age of the victim is below 18 years.

#### **Enclosures:**

Urine report, vaginal smear report, X-ray & U/S report, X-ray plate and USG plate.

Ext. 1 is the Medical Report and Ext. 1 (1) is her signature. Ext. 2 is the Urine report and Ext. 2(1) is the signature of Dr. D. Mahanta, Pathologist which she knew. Ext. 3 is the vaginal smear report done at KCH and Ext. 3(1) is the signature of laboratory technician of KCH which she knew. Ext. 4 is the Ultra sound and X-ray report with plates. Ext. 4(1) is the signature of Dr. P.K. Barman, Radiologist, which she knew.

18. PW- 9 Sri Lakhi Prasad Kachari, stated that on 11-11-2016 he was posted as I/C Salonibari Out Post under Tezpur. On that day, one Dilip Kurmi filed an ejahar before the Out Post where he put thumb impression. After receipt of the ejahar by giving a GD Entry No. 322 dated 11-11-2016 at about 8.30 a.m. forwarded the same to O/C, Tezpur PS for registering a case under proper section of law. Accordingly, the O/C Tezpur PS registered a case being Tezpur PS Case No. 2039/16 u/s 4 of POCSO Act and entrusted him to investigate the case. Ext. 6 is the said ejahar and Ext. 6(1) is his signature and Ext. 6(2) is the signature with note of the then O/C Nareswar Nath. He recorded the statement of victim and complainant at the Out post on that day. Thereafter, he visited the place of occurrence, prepared the sketch map on the place of occurrence. Ext. 7 is the sketch map and Ext. 7(1) is his signature. Thereafter, he examined the witnesses and recorded their statement u/s 161 Cr.P.C. Then he arrested the accused and forwarded him to the court. The victim was sent for medical examination and thereafter the victim was produced before the court for recording her statement u/s 164 Cr.P.C. Ext. 8 is the statement of the victim recorded u/s 164 Cr.P.C. He also collected the medical certificated along with the required documents in connection with this case. On completion of investigation, finding prima facie materials against the accused he has filed the chargesheet against the

accused u/s 4 of POCSO Act. After discussion of the superior officer he has sent the chargesheet before the court for trial. Ext. 8 is the charge-sheet and Ext. 9(1) is his signature.

In cross-examination, the I.O. stated that in Ext. 7 (sketch map), the place of occurrence is shown in the house of the accused Daku but it is not specifically stated how many rooms are there and how many doors and windows are there in the said house. The incident took place about 3 p.m. He has not seized any clothes of the victim as the incident took place on the previous day.

Witness Dilip Kurmi did not state before him that "at the relevant time I went out to search my work. After 2 p.m. when I came to my house, I saw my victim daughter was crying. When I asked my daughter and my wife, they told me that when my daughter went to the house of accused Daku, accused Daku hold her opening her pant."

Witness Bijuli Gorait did not state before him that "on being asked the victim stated that at the relevant time she went to drink a glass of water to the house of the accused. During that time accused dragged her inside his home, fell her down in the bed and committed rape on her by opening her pant, father of the victim searched the accused in his house, but, he came to know that the accused fled towards the paddy field. Father of the victim caught accused from the paddy field and took him."

Witness Bharati Bhumik did not state before him that "while I went to fair price shop, children playing there saw accused kept victim inside his home. On being seeing them I also went to the house of the accused and on opening the door I saw the accused was lying on the victim."

Witness Swapna Kurmi did not state before him that "accused closed her mouth by clothes, Siya saw the incident by opening the latch of the door, she stated the incident to Bharati, Rine and Renuka.

Witness Siya Gorati did not state before him that "the door was found closed when it was opened she saw accused lying upon Swapna and

the clothes of lower portion of Swapna was found open and the accused was also found half open and the accused was also found half open his pant and then Swapna came out crying, she informed the matter to Renuka."

**19.** PW- 10 Mrs Jyotishmita Sarmah, stated that on 11-11-2016 she was posted at Tezpur as SDJM(S), Tezpur and on that day in reference to Tezpur PS Case No. 2039/16 u/s 4 of POCSO Act, she has examined one witness i.e. the victim, D/O Dilip Kurmi. She has recorded the statement of the victim u/s 164 Cr.P.C. in her court chamber in presence of Renuka Kurmi. The victim made statement voluntarily and after recording her statement, she has read over the contents of the statement and on satisfaction, she and her sister-in-law Renuka put their thumb impression thereon. The witness was identified by WHG Biju Koch. Ext. 10 is the statement of the victim recorded u/s 164 Cr.P.C and Ext. 10(1) is her signature. Ext. 11 is the order of learned CJM, Sonitpur, Tezpur and Ext. 11(1) is the signature of learned CJM, Sonitpur, Tezpur. Ext. 11(2) is her order and Ext. 11(3) is her signature.

In cross-examination she admitted that the women belong to Adibashi community. She has not put any question as to whether she could speak Assamese or not. Similarly, she has not put any question as to whether she could speak or understand English or not. She has recorded her statement in English. She has not given any certificate that the statement of the victim was translated to English. According to statement, the place of incident is in the house of the house of victim.

- **20.** PW- 11 Dr. Pradip Kr. Barman stated that on 14-11-2016 he was at Assam X-ray Clinic and Laboratory as a Radiologist (MD). On that day as referred by Dr. T Handique of KCH, Tezpur one patient Ms Swapna Kurmi, patient ID AXC 3073, female was duly examined by following procedure:
- **1.** AP of lateral views of left wrist elbow, 2. Elbow joint and iliac crest.

#### On examination, he found:

- Union of epiphysis of lower end of radius and ulna are found completed.
- 2. All epiphysis of the bones around the elbow joint have fused.

3. Epiphysis of the iliac crest has appeared but not fused.

USG of whole abdomen:

Uterus is normal in size and shape. There is no gestational sact or product of conception in the uterus.

Final impression: Age of the person under investigation appears to be below eighteen years and normal USG with non gravid uterus. Ext. 4 is the radiologist report and Ext. 4(1) is his signature.

In cross-examination he admitted that he has given his report after ossification test.

- **21.** These much is the evidence of the prosecution case. Defence plea is of total denial while his statement is recorded u/s 313 Cr.P.C.
- 22. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, there is only one eye witness in this case. Secondly, there is vast discrepancy in between the prosecution witnesses such as, according to FIR the incident took place at about 3 p.m. of 10-11-2016. On the other hand, PW 1, father of the victim stated that the incident took place at about 12 to 2 p.m. Again PW 2 admitted that the incident took place on forenoon on that day. On the other hand, PW 4 admitted that the incident took place at about 9/10 a.m. The victim stated that the incident took place at the noon time. **Thirdly,** there is also many contradictions among the statement of prosecution witnesses, such as, the victim PW 5 stated that when she went to the house of the accused to have a glass of water accused took her inside the house by gagging her mouth, during that time accused closed the door. On the other hand PW 7 Siya Gorait who stated that at the relevant time when she went to the house of the accused to bring clothes from his daughter Sarmile, the door was found closed, by opening the door she entered into the house, then she saw accused was slept with victim. Learned counsel for the accused submitted that if the door was closed by the accused, how PW 7 entered into the room by opening the door. **Fourthly,** there is no corroboration among the statement of witnesses. Fifthly, accused was only suspected while he was found in his room with the victim. Law is well settled suspicion however may be gave cannot take place of evidence. Lastly, the victim was only 12

years old at the time of incident. The incident took place on 10-11-2016 and the victim was examined by doctor on 14-11-2016 after four days of incident. The doctor PW 8 who examined the victim stated that there is no sign and symptom suggestive of recent sexual intercourse, no mark of violence seen on her body as well as on her private parts and age of the victim is below 18 years. If a person forcefully committed rape upon a tender aged girl she might have sustained injury not only in the private parts but also in her body. But here in this case, the victim sustained no any injury not only in her private parts but also in her body.

**23.** On the other hand, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond all shadow of doubt, as such required to be convicted under the said section of law. Learned Special Public Prosecutor also submitted that in fact there is no enmity in between the accused and the complainant to file a false case. Even if there is any strange relation between the parties, it would not be expected from the complainant to involve his own minor daughter in such a hatred cases.

Learned Special P.P. again submitted that PW 1 and other witnesses are close relatives of the victim, so they are interested witnesses. To rely the interested witnesses in convicting the accused, learned Special P.P. submitted the case of **Gali Venkataiah Vs. State of Andhra Pradesh** reported in **2008 Crl.L.J. 690.** In regard to minor discrepancies, learned Special PP also submitted the case law of **State of UP V. Krishna Master & ors** reported in **2010 Crl.L.J.3889.** 

- **24.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **25.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is other eye witness to the incident. PW 7 Siya Gorait who has also seen the incident. On being seen the incident said Siya Gorait first informed about the matter to Renuka Kaki thereafter, she reported the matter to her father. On being came to know her father assaulted her. The victim stated that on the day of incident when she went

to the house of the accused to have a glass of water accused took her inside the room by gagging her mouth, closed the door, laid her down, opened her clothes including pant, accused touched her private parts through his male sexual organ. During that time Siya entered into the room by opening the door and on being seen the incident she raised alarm. During that time accused committed bad act by opening his half pant. Immediately, accused fled away towards the paddy field. PW 7 Siya Gorait also stated that while she went to the house of the accused to bring her clothes from the daughter of the accused by opening the door she saw accused Daku was slept over the victim. She also noticed the clothes of lower portion of victim was lifted and accused was found in half opening pant. On being seen her accused fled away towards the paddy field. She immediately informed the matter to Renuka mami. She was reported by victim that while she went to have a glass of water to the house of the accused, accused forcefully took her inside the room and forcefully attempt to do bad act. Though the aforesaid witnesses were exposed to long cross-examination the evidence as to while PW 7 went to the house of the accused to collect her clothes from the daughter of the accused and opened the door she seen the accused person was lying on the body of the victim where half pant of the accused was found half opened and lower portion of the clothes of the victim was found lifted has remained unchallenged.

- **26.** Learned counsel for the accused submitted that the FIR filed by the informant on 11-11-2016 whereas the incident took place on 10-11-2016 but the FIR did not disclose as to any explanation for one day delay in lodging the same.
- The court cannot over looked the fact that in sexual offence, delay in lodging the FIR can be due to variety of reasons particularly the reluctant of the prosecutrix or her family members to go to the police and complained about the incident which concern 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 assault is generally lodged."

In the instant case, the complainant, PW 1 Sri Dilip Kurmi, the father of the victim, filed the ejahar on 11-11-2016 on being came to know about the incident from her victim daughter though the incident took place on the previous day i.e. on 10-11-2016 at about 3 p.m. Here in the present case the informant lodged the ejahar on the very next day of the incident when he came to know about the incident. Therefore, simply one night delay of lodging the ejahar cannot be fatal to the prosecution case as the prosecution case is proved by not only the victim witness but also by another eye witness and reported witnesses. Under such circumstances, one night delay in lodging the ejahar cannot be a ground to discard the prosecution story.

- **28.** Learned counsel for the accused argued that the victim is a minor girl and changed her version in different times, before the police, before the Magistrate and even in the Court as such, her statement cannot be considered to convict the accused.
- 29. Here in the present case, as details discussed herein before, the victim stated that while the victim went to the house of the accused to drink a glass of water accused took her inside his room by gagging her mouth, thereafter, laid her down, opened her clothes, touches her private parts through his male sexual organ. While the PW 7 suddenly came to the house of the accused by opening the door she seen the accused by half opening his pant lying upon the body of the victim where the lower portion of victim's clothes were also found lifted. Therefore, it is not that only the victim stated about the incident but PW 7 also seen the incident.

Besides, it appears that the statement of the victim is corroborated with the statement made before the police and also before the learned Magistrate u/s 164 Cr.P.C. Though she has been exposed to long cross-examination but her evidence as to at the relevant time when she went to the house of the accused to drink a glass of water, accused took her inside his room by gagging her mouth, thereafter, laid her down, opened her clothes, touches her private parts through his male sexual organ has remained unchallenged.

- **30.** Learned counsel for the accused submitted that the prosecution has failed to prove the age of the victim as they have not been seized any school certificate or Birth certificate of victim to ascertain the age. Therefore, the case cannot be stated to be fallen under POCSO Act.
- **31.** It is true that in the present case there is no documents like Birth certificate or age certificate or any certificate issued by the School authority where the victim last studied or any certificate issued by local Panchayat etc. to prove the victim that she was 12 years of age at the time of incident. But the PW 8, the Doctor who opined that the age of the victim is bloe 18 years of age. The victim was examined on 18-04-2017 who stated that age was 12 years. That has not been challenged by defence at any point of time. Therefore, it can safely be held that the victim was a minor.
- 32. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD) No.98 of 2015**, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.
- **33.** In this case, the victim and her parents categorically stated the age of the victim was about 12 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs 1 and PW 5 in respect of age of the victim remains unchallenged.
- **34.** In the case in hand, the victim has been consistent on the material particulars with regard to the incident that on the day of incident, while the victim went to the house of the accused to drink a glass of water, accused forcefully took her inside his room, laid her down in bed, opened her clothes,

touches her private parts through his male sexual organ, while PW 7 suddenly came to collect her clothes, she also witnessed that accused was found half necked lying over the body of the victim wherein the clothes of lower portion of victim was also lifted. Immediately, said PW 7 reported the matter to Renuka Kaki, Renuka Kaki informed the matter to the mother of the victim, on being asked the victim by her mother she reported the whole incident to her mother, while her father came to know about the incident, her father assaulted her. The victim also made such statement before the I.O. while her statement was recorded u/s 161 Cr.P.C. and she has also made such statement before the learned Magistrate when her statement was recorded u/s 164 Cr.P.C. Though the victim has been vigorously crossexamined but the aforesaid evidence that at the relevant time while she went to the house of the accused to drink a glass of water, accused forcefully took her inside his room, laid her down in bed, opened her clothes, touches her private parts through his male sexual organ, while PW 7 suddenly came to collect her clothes, she also witnessed that accused was found half necked lying over the body of the victim wherein the clothes of lower portion of victim was also lifted has remained unchallenged. There is nothing in the evidence of said PWs that accused had any enmity or quarrel with the complainant to file the case falsely against the accused. Therefore, defence of false allegation is not made out.

# 35. The Hon'ble Supreme Court in **State of Rajasthan Vs. Babu Muna** (2013) 4 SCC 206, has observed as under :-

"9. We do not have any slightest hesitation in accepting the broad submission of Mr. Jain that the conviction be based on the sole testimony of the prosecutrix, it found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be clarified into three categories, namely, (i) wholly reliable, (ii) whole unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of single witness, the conviction can be found without corroboration. This principle applies with greater in terms in case the nature of offence is such that it is committed in seclusion. In case

prosecution is based on wholly unreliable testimony of single witness but the court has no option to acquit the accused."

- **36.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **37.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and

Section 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.

- **38.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.

**39.** Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? Such issue was dealt by the Hon'ble Apex Court in **Virendra – Vs – State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that 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."

- **40.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- 41. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341, it was held that 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 u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer 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.
- **42.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions 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.

**43.** In the present case, at the time of examination of the victim, some questions were put to her and she replied the same without any hesitation and after confirming the value of oath, she was administered oath, then this court recorded her statement. Apart from that, other witnesses including the eye witness PW 7 and reported witnesses PW 3 and PW 4, all were supported the evidence of victim PW 5.

Here in the present case as discussed above, the evidence as to at the relevant time while the victim went to the house of the accused to drink a glass of water accused forcefully took her inside the room, closed the door, opened her clothes, touches her private parts through his male sexual organs by opening his half pant in the mean time while PW 7 came to the house of the accused to bring back her clothes from the daughter of the accused while opening the door she noticed accused with half necked lying upon the body of the victim and lower portion of clothes of the victim was also found lifted.

- **44.** On appreciation of the evidence given by the victim, her friend PW 7, PW 1 father of the victim and other independent witnesses i.e. PW 3, PW 4 and 6, it comes to the conclusion that it is the accused who attempt to commit sexual assault to the victim. The doctor clearly stated that there is no any sign and symptoms of recent sexual intercourse and no mark of violence was seen on her body as well as in her private parts. Therefore, I think that the prosecution has failed to prove the ingredients of section 8 of the POCSO Act.
- **45.** In regard to the age of the victim, it appears that as stated above, the victim as well as parents of the victim all were stated that the victim is about 12 years of age but there is no documentary proof as to her age. Under such circumstances, it cannot be sated to be attempted to commit the offence of aggravated sexual assault.

- **46.** Considering the aforesaid aspect, the offence of the accused cannot be stated to be attempted to commit aggravated sexual assault but attempt to commit sexual assault. Therefore, accused Sri Daku Bhakta @ Dulen is acquitted from the alleged charge u/s 8 of the POCSO Act but accused Sri Daku Bhakta @ Dulen is convicted u/s 18 of the POCSO Act.
- **47.** The accused is heard on the point of sentence where he praying for leniency stating that he has his wife, children and he is the only bread earner of his family and he has been in custody for long time, hence, praying for leniency.
- **48.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.
- Turning to the guestion of sentence, it is the settled law that while 49. deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 56 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.18 of POCSO Act a punishment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

#### ORDER

**50.** I convict the accused Sri Daku Bhakta @ Dulen u/s. 18 of POCSO Act and sentence him to Rigorous Imprisonment for 1 (one ) year 6 (six) months and to pay a fine of Rs. 5000/- (Rupees five thousand only) in default Rigorous Imprisonment for 1(one) month.

It appears from the record that the accused has been in custody since 11-11-2016.

The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him.

- **51.** As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs. 20,000/- (Rupees twenty thousand) only is awarded as compensation. The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the father of the victim after proper enquiry.
- **52.** A copy of this Judgment be furnished to the accused free of cost and a copy thereof be sent to the District Magistrate, Sonitpur, Tezpur, as per provisions of law.

Given under my Hand and Seal of this Court on this the 6<sup>th</sup> day of April, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah)
SPECIAL JUDGE,
SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

# **APPENDIX**

# **Prosecution Witness**

1.	Prosecution Witness No.1	:-	Sri Dilip Kurmi, complainant
2.	Prosecution Witness No.2	:-	Smt. Bijuli Gorait
3.	Prosecution Witness No.3	:-	Smt. Rina Karmakar,
4.	Prosecution Witness No.4	:-	Smt. Bharati Bhumik
5.	Prosecution Witness No.5	:-	Victim.
6.	Prosecution Witness No.6	:-	Sri Munna Kurmi
7.	Prosecution Witness No.7	:-	Smti Siya Gorait
8.	Prosecution Witness No.8	:-	Dr. Tutumoni Handique,
9.	Prosecution Witness No.9	:-	Sri Lakhi Prasad Kachari, I.O.
10.	Prosecution Witness No.10	:-	Smt. J. Borah, Sub Judicial Magistrate,
			Titabor.
11.	Prosecution Witness No.11	:-	Dr. Pradip Kr. Barman, Radiologist.

# EXHIBITS.

Exhibit 1,2,3,4	( :-	Medical	report,	Urine,	vaginal	smear,
	15	Ultra sound & X-ray reports.				

Exhibit 6 :- Ejahar

Exhibit 7 :- sketch map

Exhibit 8 :- 164 Cr..P.C. statement of the vicitm

Exhibit 9 :- Chargesheet.

Exhibit 11 :- Order of learned CJM, Sonitpur.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

<u>Spl POCSO Case No. 38 of 2016</u>
Page 22