# DISTRICT – GOLAGHAT. HEADING OF JUDGMENT IN SPECIAL CASES: IN THE COURT OF THE SPECIAL JUDGE AT GOLAGHAT.

Ref. :- Special (POCSO) Case No.12/2017.
U/S 448/376/302/201 of IPC, r/w section 6 of POCSO Act.

Present :- Sri S. Khound. Special Judge, Golaghat.

The State of Assam. ..... Prosecution.

-Vs-

Shri Bhaity Boraik. .... Accused.

#### **APPEARANCE:**

For prosecution/State of Assam : Mr. P. Bora,

Special Public Prosecutor, Golaghat.

For the accused : Mr. T. Bordoloi,

Advocate, Golaghat.

Dates of depositions : 29.07.2017, 11.08.2017,

17.11.2017, 01.12.2017, 08.02.2018, 22.02.2018, 04.04.2018, 16.05.2018,

01.12.2018.

Date of argument : 08.03.2019, 25.04.2019.

Date of Judgment : 09.05.2019.

#### JUDGMENT:

- 1. Accused Shri Bhaity Boraik, son of Shri Boloram Boraik, resident of Silbheta Gaon, under Bokakhat Police Station in the District of Golaghat, Assam, here in this case, put on trial to answer the charges under section 448/376/302/201 of IPC, read with section 6 of POCSO Act.
- 2. The case of the prosecution put in a narrow pivot and as unfolded in the First Information Report (in short FIR) may, in brief, be described as under-

That on 02.03.2017, at about 1'30 P.M., in the afternoon, when the informant and his wife were absent in his house, then the accused taking advantage of their absence, entered into his house and forcefully committed rape on his minor daughter, aged about 4 years and thereafter, the accused killed the minor daughter of the informant by strangulating her neck. It is also stated that when the accused went to the nearby stream to throw the dead body of the victim child, then one Smti. Alka Boraik saw the same and then said Alka Boraik raised hue and cry. Thereafter, the village people apprehended the accused person and then handed over him to police.

3. On receipt of the written ejahar from the informant Shri Laba Boraik, the father of the victim, on 02.03.2017, the O/C of Bokakhat Police Station registered the case being Bokakhat P.S. Case No. 35/2017, u/s 448/376/302/201 of IPC, read with section 6 of POCSO Act and endorsed S.I. Shri Jagadish Deb Nath to investigate the case. During investigation, the I.O. visited the place of occurrence, examined the witnesses and he also prepared sketch map of the place of occurrence. The I.O. found the dead body of the victim child at the place of occurrence and then he sent the dead body to Bokakhat Police Station for holding inquest. Thereafter, the I.O. sent the dead body to Golaghat Civil Hospital for conducting post mortem examination and also collected the report. During investigation, the I.O. also seized one blood stained underwear from the accused person by preparing seizure list. Thereafter, he arrested the accused person and forwarded him to the Court. Then on completion of investigation, the I.O. submitted the charge sheet u/s 448/376/302/201 of IPC, read with section 6 of POCSO Act against accused Bhaity Boraik to stand trial in the Court.

- 4. On being produced the accused person before this court and after hearing learned counsels of both sides and having found prima facie materials against the accused, charges u/s 448/376/302/201 of IPC, read with section 6 of POCSO Act have been framed against the accused and the contents of the charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution side to bring home the charges against the accused, examined as many as 9 witnesses including the M.O. and I.O., whereas, defence examined none. The statement of accused person has been recorded as per provision of section 313 of Cr.P.C. Defence plea was of total denial of the charges.
- 6. I have heard argument advanced by the learned counsels of both sides.

#### NOW THE POINTS FOR DETERMINATION ARE-

- 7. (i) Whether the accused on 02.03.2017, at about 1'30 P.M., in the afternoon, at Silbheta Kakojan Gaon, under Bokakhat Police Station, District Golaghat, committed criminal house trespass by entering into the house of the complainant Shri Laba Boraik with intent to commit sexual assault on his four years old daughter; and thereby committed an offence punishable under section 448 of IPC as alleged?
  - (ii) Whether the accused person on the same day, same time and same place, committed rape on the victim girl; and thereby, committed an offence punishable under section 376 of IPC as alleged?
  - (iii) Whether the accused person on the same day, same time and same place, committed murder intentionally by causing the death of the victim girl; and thereby, committed an offence

punishable under section 302 of IPC as alleged?

- (iv) Whether the accused person on the same day, same time and same place, knowing or having reason to believe that the offence of murder has been committed, caused certain evidence, connected with the said offence of murder, to disappear the dead body of the victim girl with intention to screen the offender from legal punishment; and thereby, committed an offence punishable under section 201 of IPC as alleged?
  - (v) Whether the accused person on 02.03.2017, at about 1'30 P.M., in the afternoon, at Silbheta Kakojan Gaon, under Bokakhat Police Station, District Golaghat, committed aggravated penetrative sexual assault upon the victim child, aged about four years while her family members were absent in the house; and thereby, committed an offence punishable under section 6 of POCSO Act as alleged?

#### **DECISION AND REASONS THEREOF**

- 8. To arrive at a judicial decision of the case, let the evidence on record be appreciated.
- 9. P.W.1 Shri Laba Boraik is the father of the victim as well as informant of the case. His evidence reveals that the accused is the son of his uncle. The occurrence took place in the year 2017, on one day, at about 2 P.M., in the evening before Holi, in the house of the accused. Boloram and accused Bhaity Boraik were staying in the same house. At the time of occurrence, he was present at Karbi-Anglong for his work and at that time, his younger brother Ratul went to his work place at Karbi-Anglong and informed him that accused killed his victim daughter by committing rape and strangulating her neck and Ratul also informed him that the accused torn up the stomach of the victim. Then immediately, he (P.W.1) came to his house and saw

the dead body of his victim daughter. Thereafter, he went to the Police Station and verbally informed the matter to police. Thereafter, police personnel came to the place of occurrence along with him and got the dead body of the victim inquested by a Magistrate. P.W.1 also deposed that he saw blood was oozing out from the vagina of the victim and he also saw ligature mark on the neck of the victim. P.W.1 further deposed that his younger brother Ratul told him that the accused killed his victim daughter after committing rape on her and thereafter, the accused put the dead body into a 'Gamla' (plastic tub) and then thrown the dead body of the victim stealthily into the Silbheta stream. Thereafter, his sister-in-law Alka Boraik when went to the said stream after responding to nature's call then she found the dead body of the victim in the stream and then took the dead body to his house. P.W.1 also deposed that his younger brother Ratul saw the accused when the accused went to the stream by carrying a 'Gamla' (plastic tub) on his head. His sister-in-law Alka also told the said fact to him (P.W.1). At the time of occurrence, the victim girl went to the house of the accused for playing and at that time, the accused was alone in his house. On the day of occurrence, he lodged the written ejahar at Police Station. At the time of occurrence, the age of the victim was four years and at that time, she was reading at Anganwadi Centre.

In cross examination, P.W.1 has stated that there are seven brothers of his father and he has also seven brothers including himself. There are 25/30 houses of other people near his house. During day hours, 25/30 children of his family members used to live in the house. P.W.1 also stated that he has two children. On the day of occurrence, he (P.W.1) was working at a distance of 8 K.M. from his house. His younger brother Ratul informed him regarding the occurrence by walking 8 K.M. He did not know what was written in the ejahar. P.W.1 further stated that Alka Boraik did not see who had thrown the dead body of the victim girl into the stream. The parents of the accused and his three nephews were used to live in the house at day time. P.W.1 denied defence suggestion that he did not state before police that he saw that blood was oozing out from the vagina of the victim girl. He did not state before police that Ratul and Alka informed regarding the occurrence to him. P.W.1 further denied defence suggestion that Ratul and Alka did not state before him that they saw the accused when the accused was proceeding to the stream by putting the dead body of the

victim into a 'Gamla' (plastic tub). On the day of occurrence, his two children were staying together. He also denied defence suggestion that the accused is not entangled with the occurrence.

10. P.W.2 is the Medical Officer Dr. Rajiv Kr. Prasad, who deposed in his evidence that on 03.03.2017, he was working at K.K. Civil Hospital, Golaghat as Senior Medical & Health Officer. On that day, he conducted post mortem examination on the dead body of deceased Majani Boraik, aged about 4 years, female, Hindu, daughter of Shri Laba Boraik of Silbheta Gaon, under Bokakhat Police Station, in reference to Bokakhat P.S. Case No.35/2017, at 12'45 P.M., on being escorted and identified by UBC-435 Shri Pranab Saikia and relative Shri Laba Boraik and Shri Kusha Boraik and found the following -

# **EXTERNAL APPEARANCE:**

A dead body of a little girl of about 4 years of age, well built, long hairs, eyes were partly opened with portusion of eye ball and tongue. Face was highly congested and cynosed. Rigor mortis present.

#### **INJURIES**:

- (i) Presence of a ligature mark of about 1/2" wide at the label of Thyroid cartilage. It was circular, continuous, abraded and contused. On section, the underneath sub-continuous tissue was contused and torn at few places with gross extravasation.
- (ii) There was lacerated injury of Labia majora and Labia minora up to the posterior commissar.
- (iii) Inner aspect of both thighs are blood stained.

#### **CRANIUM AND SPINAL CORD**:

Brain: Brain is congested with presence of haemorrhagic spot.

Membrane, Vertebrae, Skull and Scalp were healthy.

#### THORAX:

Larynx and Trachea were congested with presence of petechial haemorrhagic spot in mucous membrane.

Both lungs were extremely congested with presence of abundant of haemorrhagic spot.

Walls, Ribs, Pleurae, Pericardium and Vessels were healthy.

Heart was healthy, right side full of blood and left side was empty.

#### ABDOMEN:

Portusion of tongue from the mouth and pharynx and oesophagus were congested .

All organs like Liver, Spleen, Kidneys were congested.

Stomach was healthy and contains some undigested food.

Small intestine was healthy and contains some semi-digested food.

Large intestine was healthy and contains faecal matter.

Bladder was healthy and contains some urine.

Examination of genital organ :- Lacerated injury of Labia majora and Labia minora up to the posterior commissure.

# **MUSCLES, BONE AND JOINT:**

Injury as already described including fracture of the superior horn of Thyroid cartilage. There was no any disease or deformity or dislocation.

# **MORE DETAILS DESCRIPTION OF INJURIES:**

A dead body of a little girl with a ligature mark around the neck.

There were lacerated injuries on the Labia majora and Labia minora up to the posterior commissure with presence of blood stain on both the inner aspect of the thigh.

She has 20 Nos. of teeth, 10 Nos. in upper jaw and 10 Nos. in lower jaw.

Her age was ascertained by X-Ray of wrist joint and elbow joint, and was above 4 years and below 6 years.

Vaginal smear for spermatozoa was found negative.

All the findings were ante mortem in nature.

Vaginal smear collection was done in presence of lady Doctor, namely – Dr. Mrs. Manjula Hazarika and Gynecology examination was done by Dr. Uttam Pd. Dutta.

After examination, the Doctor, P.W.2 has opined that the cause of death was due to asphyxia as a result of strangulation sustained by the deceased. Accordingly, P.W.2 issued Ext-1, the post mortem report and Ext-1(1) is his signature. Ext-1(2) is the signature of Dr. Manjula Hazarika, Lady Doctor and Ext-1(3) is the signature of Dr. Uttam Pd. Dutta, Gynecologist. Ext-1(4) is the signature of Dr. Nizara Devi, Superintendent of S.K.K. Civil Hospital, Golaghat and Ext-1(5) is the signature of Dr. Nila Kt. Pegu, Joint Director of Health Services, Golaghat. Ext-2 is the report of Radiologist and Ext-2(1) is the signature of Dr. Vikash Sarmah, Radiologist, which he knew. Ext-3 is the vaginal smear examination report and Ext-3(1) is the signature of Dr. Rupak Borah, Pathologist.

In cross examination, P.W.2 has stated that he has not mentioned in his report regarding duration of examination of the dead body.

11. P.W.3 Smti. Alka Boraik has deposed in her evidence that accused is her younger brother-in-law. The occurrence took place on 02.03.2017. On the day of occurrence, when she went to the Silbheta river to wash clothes of her father, then in the water of the river, she saw that a cloth was floating and then she lifted the said cloth and saw that the dead body of the victim Majani Boraik was also came on floating in the said cloth. Thereafter, she handed over the dead body of Majani Boraik to her parents. P.W.3 also deposed that when the parents of victim Majani Boraik saw the dead body, then they saw that blood was oozing out from the vagina of the victim. P.W.3 further deposed that before washing clothes in the Silveta river, she saw that accused was also washing clothes with a 'Gamla' (plastic tub) at a little distance from her in the said river. At the time of occurrence, the age of victim Majani Boraik was 4 years.

In cross examination, P.W.3 has stated that many people used to wash clothes in the Silbheta river. When she came to the house of the informant after getting the dead body of Majani Boraik, then she did not disclose the matter to anyone. P.W.3 denied defence suggestion that she deposed false evidence.

12. P.W.4 Smti. Maina Nayak has deposed in her evidence that she knows accused Bhaity Boraik, informant Laba Boraik and the deceased Majani Boraik. The occurrence took place at about 12 noon. At the time of occurrence, she went to the river along with her aunt Alka and at that time, she saw that accused Bhaity Boraik had thrown Majani into the river from a 'Gamla' (plastic tub). At that time, her aunt Alka was washing clothes in the river and she was sitting on the bank of the stream. Thereafter, her aunt Alka lifted Majani from the river and then took Majani to her house.

In cross examination, P.W.4 denied defence suggestion that she did not state before police that at the time of occurrence, she saw accused Bhaity Boraik had thrown Majani into the river from a 'Gamla' (plastic tub). In the said river, the village people used to take bath and also used to wash clothes. She did not state before other persons that accused Bhaity Boraik had thrown Majani into the river, but stated the same before police. P.W.4 denied defence suggestion that on the day of occurrence, she did not go to the river.

13. P.W.5 Shri Ratul Boraik has deposed in his evidence that the informant is his younger brother and deceased Majani Boraik was his niece. The occurrence took place about one year back, at about 12 noon. On the day of occurrence, at noon, he came to his house for taking meal after doing work at tea garden. P.W.5 also deposed that before entering into his house, he saw that accused came out by carrying a plastic 'Gamla' (plastic tub) on his head. After a while, his younger sister-in-law Alka Boraik saw that the dead body of Majani Boraik was floating in the river and then Alka Boraik lifted the deceased Majani Boraik from the river and then took her to their house. P.W.5 also deposed that he suspected that the accused had killed Majani Borak in his house and thereafter the accused put the dead body of Majani Borain into a 'Gamla' (plastic tub) and then thrown the same into the river. After the occurrence, the nearby people gathered at the place of occurrence. Thereafter, his younger brother informed the matter at Police Station and then police came to the place of occurrence and took the accused person to the Police Station.

In cross examination, P.W.5 has stated that there are 30 houses of people near his house. He along with his three other brothers used to live together as family members by sharing a common court-yard and there are 12 children in their family members. He did not see what was carried by the accused in the 'Gamla' (plastic tub).

14. P.W.6 Shri Sanjit Proja has deposed in his evidence that the occurrence took place about one year back. On the day of occurrence, Lakhi Boraik, i.e. the mother of the deceased Majani Boraik informed him that the dead body of Majani Boraik was lying by the side of the river. Thereafter, he along with other people went to the place of occurrence and saw the dead body of Majani Boraik. One village woman told him that before the occurrence, the accused went to the river by taking a 'Gamla' (plastic tub) and thereafter, the said woman found the dead body of Majani Boraik.

In cross examination, P.W.6 has stated that in the said river, the village people used to take bath and also used to wash clothes. The house of the informant is situated at a distance of about half Kilometer from the Silbheta river where the occurrence took place. He did not see the occurrence.

15. P.W.7 Shri Moneswar Proja has deposed in his evidence that the occurrence took place in the year 2017. On the day of occurrence, at about 1'30 P.M., in the afternoon, he heard hue and cry in the house of the informant and then he went there. When he asked, then the village people told him that the accused killed Majani Boraik and thereafter, the accused thrown the dead body of Majani Boraik into the river. P.W.7 also deposed that police seized one blood stained undergarment of the accused by preparing seizure list. Ext-4 is the seizure list and Ext-4(1) is his signature. M. Ext-1 is the seized blood stained undergarment of the accused.

In cross examination, P.W.7 has stated that police did not show him the blood stained undergarment of the accused when police seized the same. He put his signature in the seizure list as told by police. P.W.7 also stated that at the time of occurrence, he was in his house. When police came to the house of the informant,

then as Gaonbura, he went to the house of the informant.

16. P.W.8 Shri Bimol Proja has deposed in his evidence that The occurrence took place about one year back. At the time of occurrence, the victim Majani Boraik was 6/7 years old. After the occurrence, he went to the house of the informant and saw the dead body of Majani Boraik there. The people who were present there told him that the accused killed Majani Boraik. Thereafter, police came there and arrested the accused person. Police seized one blood stained undergarment by preparing seizure list and took his signature thereon. Ext-4 is the seizure list and Ext-4(2) is his signature.

17. P.W.9 is the I.O. Shri Jagadish Debnath. His evidence reveals that on 02.03.2017, he was working as Attached Officer at Bokakhat Police Station. On that day, in the evening, the informant Shri Laba Boraik has lodged an ejahar before the O/C of Bokakhat Police Station and on receiving the same, the O/C of Bokakhat Police Station registered the case being Bokakhat P.S. Case No.35/2017, u/s 448/376/302/201 of IPC, read with Section 6 of POCSO Act and endorsed him to investigate the case. During investigation, he visited the place of occurrence, examined witnesses and he also prepared sketch map of the place of occurrence. On being found the dead body of Majani Boraik at the place of occurrence, he sent the dead body to Bokakhat Police Station for holding inquest. Thereafter, he sent the dead body to Golaghat Civil Hospital for post mortem examination and he also collected the report. During investigation, he seized one blood stained undergarment (Jangia) of the accused. Then on completion of investigation, he submitted charge sheet u/s 448/376/302/201 of IPC, read with Section 6 of POCSO Act against accused Bhaity Boraik to stand trial in the Court. Ext-5 is the ejahar and Ext-5(1) is the signature of Shri Pabitra Pran Bora, O/C of Bokakhat Police Station. Ext-6 is the charge sheet and Ext-6(1) is his signature. Ext-4 is the seizure list and Ext-4(3) is his signature. Ext-7 is the sketch map and Ext-7(1) is his signature. P.W.9 also deposed that he seized one 'Gamla' (plastic tub) from the accused by preparing seizure list. Ext-8 is the said seizure list and Ext-8(1) is his signature.

In cross examination, P.W.9 has stated that he did not send the seized jangia to the F.S.L. He denied defence suggestion that the seized jangia does not belong to accused Bhaity Boraik. He also did not send the finger print to the F.S.L. P.W.9 denied defence suggestion that the seized articles are not connected with this case. Witness No.1 Laba Boraik did not state before him that he saw blood in the vagina of deceased Majani Boraik. Witness No.3 Alka Boraik also did not state before him that she saw blood in the vagina of the deceased Majani Boraik. Witness No.4 Maina Nayak did not state before him that she saw that accused had thrown Majani Boraik into the river from a 'Gamla' (plastic tub).

- 18. Above are the evidence led by the prosecution side in support of its case against the accused.
- 19. To prove the charge u/s 448 of IPC, the prosecution is to prove that-
  - (i) There must be an unauthorized entry into or upon property against the will of the person in possession; or
  - (ii) An authorized entry lawfully obtained but unlawfully remaining therein; and
  - (iii) Such entry or unlawful stay must be with an intention-
    - (a) to commit an offence; or
    - (b) to intimidate, insult or annoy the person in possession of the property.
- 20. To prove the charge u/s 376 of IPC, the prosecution is to prove that the accused had sexual intercourse with the victim -
  - (i) Against her will,
  - (ii) Without her consent,
  - (iii) With consent obtained under fear of death or of hurt,
  - (iv) With consent but given under misconception of fact that the man was her husband,

- (v) Consent given by reason of unsoundness of mind, or under influence of intoxication or any stupefying or unwholesome substance,
- (vi) Woman under sixteen years of age with or without consent.
- 21. To prove the charge under Section 302, IPC, the prosecution has to establish beyond reasonable doubts:-
  - (i) That the death of some human being was caused,
  - (ii) That such death was neither suicidal nor accidental but it was homicidal,
  - (iii) That it was accused whose act or the consequence of his act, caused such death,
  - (iv) That the accused had no legal excuse or defence for causing such death or for causing such injury.
  - (v) That the accused did such an act :-
    - (a) with the intention of causing death or
    - (b) with the intention of causing such bodily injury,
      - (i) as the accused knew it likely to cause death or
      - (ii) (a) that such an injury was sufficient in the ordinary course of nature to cause death or;
        - (b) that the accused caused death by doing an act which he knew, in all the probabilities, to cause death.
      - (iii) or the accused caused such bodily injury to such person as was likely to cause death.
- 22. To prove the charge under Section 201 of IPC, the prosecution has to establish the following ingredients -
  - (I) An offence has been committed;
  - (II) The accused knew or had reason to believe that an offence has been committed;
  - (III) The accused (i) caused any evidence of the commission of offence

- to disappear, or (ii) gave any information relating to the offence which he knew or believed to be false;
- (IV) The accused did so intending to screen the offender from punishment, whether that offender be himself or another person; and
- (V) The offence in question was punishable with :
  - (a) death; or
  - (b) imprisonment for life, or
  - (c) punishable with less than 10 years of imprisonment.
- 23. To prove the charge of aggravated penetrative sexual assault, the prosecution is to prove that-

Accused penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person, or he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person, or he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person, or he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person is said to commit penetrative sexual assault.

24. In the instant case, it is seen that there is no eye witness of the alleged occurrence. So, let it be seen whether there is any circumstantial evidence or not, regarding involvement of the accused with the alleged occurrence. In the case of **State Vs. Mohammad Yakub, reported in AIR 1980 SC 1111**, the Hon'ble Apex Court held that -

The definition of proof does not draw any distinction between circumstantial and other evidence.

25. In the case of *Gambhir Vs. State, AIR 1982 SC 1157* and in the case of *Dhananjoy Chatterjee Vs. State (1994) 2 SCC 220*, the Hon'ble Apex Court held that-

The law regarding circumstantial evidence is well settled. When case rests on circumstantial evidence it must satisfy three tests -

- (i) circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of definite nature and tendency unerringly pointing towards the guilt of the accused, and
- (iii) the circumstances taken cumulatively should form a chain so complete in itself that there is no escape from the conclusion that within on human probability, crime was committed by the accused and none else.

26. It is seen from the evidence on record that P.W.1 Laba Boraik in his evidence clearly deposed that on the day of occurrence, his four years old minor victim daughter went to the house of the accused for playing and at that time, accused was alone in his house. Defence did not cross examine P.W.1 on this point, as such, that part of evidence remained intact and unrebutted. Thereafter, P.W.5 Ratul Boraik when returned home for having lunch at about 12 noon, then he saw the accused coming out of his house, carrying a 'Gamla' (plastic tub) on his head. Defence did not cross examine P.W.5 on this point and that part of evidence that the accused at the time of occurrence came out of his house by carrying a 'Gamla' (plastic tub) on his head remained unchallenged.

27. Evidence of P.W.4 Smti. Maina Nayak further corroborates the evidence of P.W.5 by deposing that at the time of occurrence, at about 12 noon, she went to the Silbheta river along with P.W.3 Alka Boraik and then she saw the accused throwing the body of deceased Majoni Boraik into the river, where her aunt Alka Boraik

(P.W.3) was washing clothes. So, P.W.4 has further corroborated the evidence of P.W.1 and P.W.5 that on the day of occurrence, victim went to the house of the accused and thereafter, accused carried one 'Gamla' (plastic tub) on his head and proceeded to the Silbheta river and had thrown the dead body of the victim girl into the river water where P.W.3 Alka Boraik was washing clothes.

- 28. Suggestion was put to P.W.4 by the defence that she did not see the accused throwing the body of the deceased to the river which was allegedly carried by the accused which was denied by P.W.4. P.W.4 admitted that she did not disclose the aforesaid fact to anybody else after the occurrence, but she stated the same to the police.
- 29. Defence during cross examination of I.O. (P.W.9), put the said statement of the P.W.4 to the I.O., where from it reveals that P.W.4 did not state before the I.O. that she saw the accused throwing the dead body of the minor victim girl to the river water. But in my opinion, the evidence of P.W.4 can not be fully brushed aside solely on the ground that she did not disclose that part of evidence to anybody else including I.O. since evidence of P.W.1 and P.W.5 lends support to the above mentioned testimony of P.W.4 which is otherwise found to be worthy of credence.
- 30. Evidence of P.W.1, P.W.5 and P.W.4 are further corroborated by P.W.3 Smti. Alka Boraik who immediately after the occurrence, recovered the dead body of the minor victim girl Majani Boraik which was floating on a piece of cloth in the river and P.W.3 brought the dead body to the house of P.W.1. It is seen from the above mentioned evidence of P.Ws. that entire circumstances and events form a complete chain of circumstances which points towards guilt of the accused that the victim at the time of occurrence came to the house of the accused and at that time, he was alone. After a while, accused carried a 'Gamla' (plastic tub) on his head and thrown the dead body of the victim to the river where and when victim was recovered from the river then she was found dead. Admittedly, at the time of occurrence, victim went to the house of accused to play but subsequently, her dead body was recovered from the river by P.W.3. Defence failed to explain the circumstances on the point that what

happened to the victim after her arrival into the house of the accused on the day of occurrence. P.W.3 also corroborated the evidence of P.W.4 by deposing that at the time of occurrence, accused was also seen by P.W.3 washing clothes in the river.

- 31. P.W.6, P.W.7 and P.W.8 did not see the occurrence, but all of them witnessed the dead body of the deceased Majani Boraik after the occurrence, and P.W.7 and P.W.8 witnessed seizure of undergarment (Jangia) of the accused with blood stain.
- 32. Defence failed to explain regarding presence of blood stain in the seized undergarment of the accused. Though said seizure article was not sent to the F.S.L. even then presence of blood stain in the seized undergarment of the accused further indicates and lends supports to the evidence of P.W.1, P.W.4 and P.W.5 indicating involvement of the accused with the cause of death of the minor victim.
- 33. Regarding cause of death of the minor victim Majani Boraik, P.W.2 Dr. Rajib Kumar Prasad has clearly opined that cause of death as reveals from post mortem report (Ext-1) is due to asphyxia as a result of strangulation. P.W.2 during post mortem examination of the minor deceased found a ligature mark around the neck. Medical Officer also found fracture of superior horn of Thyroid cartilage.
- 34. From the aforesaid opinion of the Medical Officer, it is crystal clear that on the day of occurrence, the minor victim girl died due to strangulation and her Thyroid cartilage was also fractured.
- 35. As discussed earlier the entire evidence on record and circumstantial evidence clearly establishes that it was none but the accused Bhaity Boraik caused death of the victim by strangulating her neck and thereafter, had thrown the dead body into the Silbheta river with intention to disappear evidence of commission of offence of murder of the minor victim, who came to the house of the accused to play when accused was alone in his house.

36. Regarding the alleged offence of punishable u/s 376 of IPC, read with Section 6 of POCSO Act, the facts and circumstances narrated by P.W.1, P.W.3, P.W.4 and P.W.5 clearly indicates that prior to murder, the minor victim was raped by the accused in his own house by penetrating his penis into the vagina of the minor victim, who was below 6 years of age as opined by the Medical Officer. In the case of *Radha Krishna Negesh Vs. State of Andhra Pradesh, reported in (2013) 11 SCC 88*, the Hon'ble Apex Court held that -

# Penetration it self proves offence of rape and even if there is no penetration, it does not necessarily mean that there is no rape.

Though Medical Officer found no spermatozoa in the vaginal smear of the victim, but found lacerated injuries on the Labia majora and Labia minora up to the posterior commissure with presence of blood stain on both the inner aspect of the thigh.

- 37. P.W.3 Alka Boraik also deposed that she saw after recovery of the dead body of the victim that blood was oozing out from the vagina of the victim and that part of evidence fully backed by medical opinion. Seizure of underwear of the accused sustaining blood stain further corroborates the prosecution case that it was the accused who committed rape of the victim and committed her murder by strangulation and thrown the dead body into the river water.
- 38. Motive behind the crime is a relevant fact of which evidence can be given. In the instant case, it clearly transpires that on the entire evidence on record as discussed above that motive of the accused was to commit rape on the minor child and to cause her death thereafter. Not only that he had also thrown the dead body of the minor victim girl into the river water by carrying it secretly in a bowl.
- 39. In the case of **Rajender Vs. State, reported in AIR 1966 SC 1322**, the Hon'ble Apex Court held in a case of murder of a child by the accused where conviction rested mainly on circumstantial evidence, that the motive behind a crime is a relevant fact of which evidence can be given. The absence of motive is also a circumstance which is relevant for assessing the evidence. The circumstances which

are advanced as proving the guilt of the accused are not weakened by the fact that the motive could not be established.

40. In the case of **State of Hariyana Vs. Sher Singh, reported in AIR 1981 SC 1021**, the Hon'ble Apex Court held that -

"The prosecution is not bound to prove motive of any offence in a criminal case in as much as, the motive, if any, is known only to the perpetrator of the crime and may not be known to others. In case motive is proved by prosecution, the Court has to consider if it is adequate."

- 41. In the instant case, the motive behind the crime is also proved to be adequate.
- 42. Regarding the offence u/s 448 of IPC, it is seen that entire occurrence took place in the house of the accused, as such, I found no material against the accused u/s 448 of IPC and he is acquitted from the aforesaid charge of offence u/s 448 of IPC.
- 43. However, on careful scrutiny of entire facts and circumstances of the case, under the backdrop of foregoing discussions, I am of the view that the prosecution has proved its case against the accused u/s 302/376/201 of IPC, read with Section 6 of POCSO Act beyond all shadow of doubts. Accordingly, I hold accused Bhaity Boraik guilty u/s 302/376/201 of IPC, read with Section 6 of POCSO Act.
- 44. I have heard the accused on the point of sentence u/s 235(2) of Cr.P.C. The accused stated that he has to maintain his poor family. Therefore, the accused prayed for leniency.
- 45. Now, coming to the quantum of sentence, I find following aggravating and mitigating factors, which are discernible from the facts and circumstances of the case.

# **Aggravating Factors**:

- (i) The accused is a matured person.
- (ii) The deceased was a minor child of 4 years of old.
- (iii) The deceased was raped and thereafter murder was committed in brutal and diabolic manner and accused tried to cause disappearance of evidence by throwing the dead body into the river water by carrying it secretly in a bowl.
- (iv) There was premeditation.
- (v) He is not remorseful of his conduct.
- (vi) The crime committed is not heinous simplicitor but is a brutal and inhuman crime where the accused committed rape on 4 years old minor girl and intending to destroy entire evidence and the possibility of being identified, he killed the minor child.
- (vii) The accused has shown most unfortunate and abusive facet of human conduct.

#### **Mitigating Factors**:

- (i) The accused has no antecedent of criminal activities.
- (ii) No previous conviction is proved against him by the prosecution side.
- (iii) He has to look after his poor family.
- (iv) He is a young person having chance for reformation.

46. When mitigating and aggravating factors are placed in juxtaposition then it is found that the mitigating factors are sufficient to take it away from the rarest of rare category. In the case of *Lehna Vs. State of Hariyana, reported in (2002)*3 SCC 76, the Hon'ble Apex Court held that -

The death sentence is ordinarily ruled out and can only be imposed for "special reason" as provided in section 354(3) of IPC.

47. In my view, the sentence of death can be awarded only if an alternative option unquestionably foreclosed and there is no probability of reform or rehabilitation of the accused.

48. In the instant case, the prosecution could not prove any record against the accused of previous heinous crime and also there is no evidence that the accused will be a danger of the society. On the other hand, conduct of the present accused exhibits total disregard for human values showing no concern for a helpless child and extinguished the flame of life of the child to satisfy his lust. But even then considering the tender age of the accused and principle of the rarest of rare case in the light of the guide lines of the Hon'ble Apex Court as mentioned in the case of *Bachan Singh Vs. State of Pubjab, reported in (1980) 2 SCC 684*, I am of the view that the act of the accused imports deliberate design of a particularly brutal and cruel character and thereby he must be adequately dealt with.

49. Regarding measure of punishment, the Hon'ble Supreme Court in the case of *Dhananjoy Chatterjee @ Dhanu Vs. State of West Bengal (1994) 2*SCC 220 held that -

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminal. Justice demand that Court should impose punishment befitting the crime so that the Courts reflect public abhorrence to the crimes. The Court must not only keep in view the rights of the criminal, but also the rights of the victim of the crime and the society at large while considering imposition of appropriate punishment."

50. In the backdrop of foregoing discussions and guide lines as mentioned above and also keeping in mind facts and circumstances of the case, I am of the view that the balance could be maintained by sentencing the accused to undergo rigorous imprisonment for life and also to pay fine of Rs.2,000/- (Rupees two thousand) only, and in default of payment of fine, to undergo simple imprisonment for another 1 (one) month for the offence u/s 302 of IPC which will meet the ends of justice. Regarding offence u/s 376 of IPC, read with Section 6 of POCSO Act, the prosecution has successfully proved both the offences beyond all reasonable doubts.

Though there is a provision u/s 42 of POCSO Act for alternative punishment, but in the instant case, I find it expedient to hold accused guilty u/s 6 of POCSO Act and accordingly, he is sentenced to undergo rigorous imprisonment for 10 (ten) years and to pay fine of Rs.2,000/- (Rupees two thousand) only, and in default of payment of fine, to suffer simple imprisonment for another 1 (one) month which will meet the ends of justice. Regarding the offence u/s 201 of IPC, the accused is also sentenced to suffer rigorous imprisonment for 4 (four) years and also to pay fine of Rs.1,000/- (Rupees one thousand) only, and in default of payment of fine, to suffer simple imprisonment for another 1 (one) month. All sentences shall run concurrently. The period of detention of the accused in jail hazoot during investigation and trial be set off u/s 428 of Cr.P.C.

51. Seized articles, if any, be destroyed in due course of time.

52. Furnish a free copy of judgment to the accused immediately and send a copy of the judgment to the District Magistrate, Golaghat as per provision of Section 365 of Cr.P.C.

Given under my hand and seal of the Court on this the  $9^{th}$  day of May, 2019.

(S. Khound), Special Judge, Golaghat

Dictated & corrected by me.

Special Judge, Golaghat.

# **APPENDIX**:

# **WITNESSES FOR THE PROSCUTION**:

- 1. P.W.1 Shri Laba Boraik.
- 2. P.W.2 Dr. Rajiv Kr. Prasad, M.O.
- 3. P.W.3 Smti. Alka Boraik.
- 4. P.W.4 Smti. Maina Nayak.
- 5. P.W.5 Shri Ratul Boraik.
- 6. P.W.6 Shri Sanjit Proja.
- 7. P.W.7 Shri Moneswar Proja.
- 8. P.W.8 Shri Bimal Proja.
- 9. P.W.9 Shri Jagadish Debnath, I.O.

# WITNESS FOR THE DEFENCE : - Nil.

#### **EXHIBITS FOR THE PROSCUTION:**

- 1. Ext-1 Post mortem report.
- 2. Ext-2 Report of Radiologist.
- 3. Ext-3 Vaginal smear examination report.
- 4. Ext-4 Seizure list.
- 5. Ext-5 Ejahar.
- 6. Ext-6 Charge sheet.
- 7. Ext-7 Sketch map of the place of occurrence.
- 8. Ext-8 Seizure list.
- 9. M. Ext-1- One seized blood stained Jangia.

## **EXHIBITS FOR THE DEFENCE**: - Nil.