THE COURT OF THE SPECIAL JUDGE, SONITPUR AT TEZPUR

SPL(POCSO) CASE NO. :- 16 of 2015

(Under Section 10 of POCSO Act, arising out

of G.R. Case No 2870 of 2012)

Present :- Sri Ashok Kumar Borah, AJS

Special judge, Sonitpur, Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Ramani Medhi

Son of Late Mohan Medhi Resident of Mulanpukhuri Police Station – Rangapara Dist: - Sonitpur, Assam.

Date of framing Charge :- 27/07/2015

Date of Recording Evidence :- 14/12/2015, 20/01/2016, 04/03/2016,

19/04/2016,

09/12/2016, 08/06/2017, 17/08/2017 & 24/10/2017

Date of examination of accused u/s 313 Cr.P.C

:- 08/12/2017

Date of Argument :- 23/05/2018

Date of Judgment :- 31/05/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor, Sonitpur

Counsel for Accused :- Mr. P.Singh Sethi, Learned Advocate

<u>J U D G M E N T</u>

- **1.** In this case accused Sri Ramani Medhi is put for trial for allegation of charge under Section 10 of POCSO Act.
- 2. The various facts leading to this case according to FIR in brief is that on or about 5 p.m. of 29-11-2012 the accused by enticing the informant's daughter Miss X, aged about 4 years, took to his house and by opening her clothes committed sexual assault on her. At the relevant time his wife Pranita Tanti searched their daughter and found the accused and the victim girl in naked condition. In this regard a village meeting was held on 01-12-2012 and during the meeting the sister of the accused namely Lakhi Das misbehaved his wife and assaulted her. Hence, this prosecution case. The ejahar was filed by informant Rana Tanti before the then 1/C of Chariduar Police Out Post on 01-12-2012.
- 3. On receipt the ejahar the I/C Chariduar P.S. forwarded the same to O/C Rangapara Police station for registering a case. On receipt of the said FIR, Rangapara PS registered the case, vide Rangapara PS Case No. 205/12, under Section 342/417/376(2(F)/294/323/34 of the IPC. After completion of usual investigation, the O/C Chariduar Police station sent up the case for trial against the accused Ramani Medhi u/s 342/376(2)(F)/511 of IPC read with Section 7 of POCSO Act.
- **4.** On being appeared the accused person before this Court after hearing both parties, my learned predecessor-in-Court, framed charge under section 10 of POCSO Act against the accused. Particulars of the charge are read over and explained to which he pleads not guilty and claimed to be tried.
- **5.** To substantiate the case prosecution examined as many as 11 (eleven) numbers of witnesses. Accused pleads total denial while his statement was recorded u/s 313 Cr.P.C. All the allegation made against the accused and evidence appears against the accused are put before him where he denied the evidence and declined to give defence evidence.
- **6.** I have also heard argument put forward by the learned counsel for both parties.

7. The point for decision in this case is that:

(i) Whether on or about 6 p.m. on 29-11-2012, at Mulanpukhuri in the house of the accused, under Chariduar Police station, accused committed aggravated sexual assault on victim, aged about 4 years of age, and thereby committed an offence punishable under section 10 of POCSO Act?

Reasons, Decisions and reason for decision

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW- 1, Miss X,** the victim who was examined after making enquiry to test her intelligence and ability to give rational answers. She stated before the court that she called the accused as "Borpa". At the relevant time she was reading in class L.K.G and aged about four years. The incident took place in the evening time. Her Borpa called her from the road to his room. He opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual organ. When she was in naked condition in bed, her mother found her and taken her. She was medically examined and brought to the court and gave statement in the court.

Though she has been exposed to long cross-examination except giving many suggestions the evidence as to at the relevant time accused called her from the road to his room where he opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual organ has remained same.

10. PW 2 Smti Pranita Tanti, the mother of the victim girl stated that the incident occurred on 29-11-2012 at about 4.30- 5 p.m. At that time her daughter was 4 years old. At that time her daughter was playing near the road side. She was not wearing any sweater. Therefore, she went to her house to bring a sweater. But when she came there she did not find her. She searched here and there and then she went to the house of Ramani Medhi which is a little distance from the road. She searched everywhere by calling her name. She saw her

"chandal" near the door of the house of Ramani Medhi. She entered inside his house and saw both the accused and her daughter in a naked condition on the bed. On seeing her, the accused covered himself with a "gamosa". Thereafter, she took her daughter on her lap. She was shivering with fear. She slapped her and asked her what happened. She told her that accused whom she called "Borpa" has removed her clothes and put his private part on her private part. She informed her husband over telephone as he was not present in the house. She scolded the accused but he did not uttered a single word. She also informed her brother-in-law. On the next day, i.e. on 01-12-2012 a village meeting was called. In the meeting the sister of the accused assaulted her. On the same day, her husband lodged an FIR at Chariduar Police Out Post. They used to call their victim daughter as "Munu" in their house. Police medically examined her daughter in Tezpur Civil Hospital on the next day of filing FIR. Her daughter was also brought before Magistrate for recording her statement. Her statement was also recorded by Magistrate. Ext. 1 is her statement u/s 164 Cr.P.C and Ext. 1(1) to 1(4) are her signatures.

Though PW 2 has been exposed to long cross-examination except giving many suggestions the evidence as to at the relevant time her daughter was playing near the road side, as her daughter did not wearing any sweater, she went to her house to bring a sweater, when she came there she did not find her daughter and continuously searched her daughter and then she went to the house of the accused where she saw her daughter's "chandal" was near the door of the accused's house, on being entered she saw both the accused and her daughter in naked condition on the bed, on seeing her, accused covered himself with a "Gamosa" and thereafter she took her daughter in her lap, she was shivering with fear, she slapped and asked her daughter what happened then she told her that accused removed her clothes and touched her private parts through his private parts has remained same.

11. PW 3 Dr. Ila Rajkhowa stated that on 03-12-2012 she was posted as Sr. Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day, in the emergency outdoor, labour room complex of KCH, Tezpur, she examined Miss X, 4 years, D/O Sri Rana Tanti of village Molanpukhuri, PS- Rangapara, on being escorted and identified by Woman Home Guard Bina Bora. On physical examination she found the following:

She is neat and tidy and well dressed. Her gait is normal. Since she is child cannot verify her secondary sexual character. There are no violence or injury marks in any parts of her body or in her private parts.

Investigation advised and reports:

Since she is a child she does not co-operate for PV examination therefore vaginal smear could not be collected.

Urine for HCG test – negative.

X-ray for age determination – Age of the person under investigation appears to be below 6 years.

Opinion:

- 1. There is no sign of violence on her body as well as on her private parts.
 - 2. There is no sign of recent sexual intercourse.

Ext. 2 is the Medical Report and Ext. 2(1) is his signature. Ext. 3 is the Sonography report. Ext. 4 is the X-ray report.

12. PW-4 Sri Rana Tanti, father of the victim and complainant of this case, stated that the incident occurred on 29-11-2012 at about 5 p.m. At that time her daughter was 4 years old. At the time of the incidence he was at his shop at Balipara. His wife Pranita Tanti informed him over telephone that the accused had taken his daughter Munu to his house and after removing her clothes tried to sexually molest her. He immediately came to his house. His wife informed that she has found their daughter in a naked condition on the bed of the accused. The accused was wearing only a "Gamosa" and in that condition his wife brought back her daughter. Her daughter also told him about the incident. The villagers after coming to know about the incident, called a village meeting on 01-12-2012 at about 5 p.m. In that village meeting,

the sister of the accused namely, Lakhi Medhi came and assaulted his wife and the matter could not be discussed in the village meeting. Therefore, he lodged an FIR in the Chariduar Police Station. The FIR was written by a person whose name he did not know, as per his instruction. The delay in lodging FIR was due to the fact that he was hopeful for getting decision in the village meeting. But as nothing could be decided in the village meeting, he lodged the FIR. Ext. 5 is the FIR and Ext. 5(1) is his signature.

In cross-examination, he admitted that in the FIR he has not mentioned about the delay in lodging the FIR. The FIR was written by a "Mohori" of the police Station. The FIR was lodged after the meeting. The FIR was filed in the evening at about 6-30 to 7 p.m. on 01-12-2012. His daughter used to call the accused as "Borpa". He knew that the accused was suffering from ailments since 1996-1997 but he did not know about the nature of the ailments.

- **13. PW-5** is Sri Ghana Borah, who is turned hostile. The unhostile portion of his evidence is that he knows the accused Ramani Medhi. The incident occurred about three years ago. He came to know about the incident in the evening. He also knows the victim. He heard the incident from the villagers that the accused committed rape on the victim. Pranita did not tell anything to him about the incident.
- **14. PW-6** Smti Sitarani Biswas, stated that accused Ramani Medhi is her neighbour. The informant Rana Tanti is also her neighbour. The occurrence took place in the month of November, 2012. She was working in her kitchen garden. She had heard that the mother of the victim girl was loudly crying in the road. She came out to see and met Pranita Tanti. On being asked, Pranita told that the accused had committed rape upon her four years daughter. She also told that the accused had committed the said act in his house.

Though she has been exposed to long cross-examination by defence except giving many suggestion the evidence as to when she was working in the kitchen garden she heard the crying of the mother of the victim and when she came out and on being asked, the mother of

the victim Pranita told that accused had committed rape upon her four years old daughter has remained unchallenged.

Ramani Medhi is her neighbour. The informant Rana Tanti is also her neighbour. The occurrence took place about four years ago. It was about 5 p.m. The mother of the victim was shouting loudly. On hearing she came out of her house. She told that the accused had removed the clothes of her daughter and was about to commit rape upon her daughter. She further told that she had gone to the house of the accused at that point of time and on seeing the aforesaid fact she raised hue and cry. After two days of the said occurrence, a meeting was held in their village to discuss about the matter. In the said meeting the sister of the accused had quarreled with the mother of the victim girl.

Though she has been exposed to long cross-examination by defence except giving many suggestion the evidence as to on being hearing the shouting of mother of the victim while she came out, she came to know from her that accused had removed the clothes of her daughter and was about to commit rape upon her daughter has remained unchallenged.

- **16. PW 8,** the Investigating Officer, Sri Kulendra Bharali, stated before this court that on last 05-09-2014 he was posted as SI of police at Chariduar Police station and he was entrusted to investigate the Chariduar PS case NO. 152/13. It appears that SI Hasen Ali has almost completed the investigation of this case, so finding sufficient materials against the accused he filed chargesheet against the accused Ramani Medhi u/s 342/376(2)(F)/511 of IPC read with section 7 of POCSO Act. Ext. 6 is the chargesheet and Ext. 6(1) is his signature.
- **17. PW 9,** the Investigating Officer, Sri Hasen Ali, stated before this court that on last 16-12-2012 he was posted as SI of police at Chariduar Police station and he was entrusted to investigate the Rangapara PS case NO. 205/12 u/s 417/376 of IPC by the O/C. During investigation, he arrested the accused on 17-12-2012 and recorded his statement. In the statement of the accused, he confessed his guilty. Thereafter on receiving his transfer order, he handed over the case diary to the O/C.

18. PW 10, the Investigating Officer, Sri Lakhi Kanta Borah, stated before this court that on last 01-12-2012 he was posted as I/C at Chariduar Police Out Post under Rangapara Police station. On that day at about 6 p.m. the complainant Rana Tanti filed a written ejahar stating that on last 29-11-2012 at about 5 p.m. his co-villager Ramani Medhi by enticing his daughter took to his house and by opening her clothes sexually assaulted her. Ext. 5 is the ejahar and Ext. 5(2) is his signature with note. He made GD Entry being No. 16 dated 01-12-2012 at about 6 p.m. and forwarded the ejahar to O/C Rangapara Police for registering a case. O/C of Rangapara PS registered the case vide Rangapara PS Case No. 205/12 u/s 342/417/376(2)(F)/294/323/34 of the IPC and Ext. 5(3) is the signature of O/C of Rangapara PS Sri Lambit Gogoi. He has recorded the statement of the complainant at the police station. He visited the place of occurrence at Mulanpukhuri and prepared sketch map vide Ext. 6 A and Ext. 6 A(1) is his signature. He recorded the statement of the victim and other witnesses. The victim was medically examined and the statement of the mother of the victim was also recorded u/s 164 Cr.P.C. As he did not found the main accused Ramani Medhi so he could not arrest him but he arrested the co-accused Smti Lakhi Das. On his transfer he handed over the case diary to the then O/C Rangapara Police station.

He confirmed the statement of witness Ghana Kanta Bora, who stated before him that — "on last 29-11-2012 at about 5 p.m. I was thrashing paddy at my house. My house is situated near the house of Sri Rana Tanti. At the relevant time the Pranita Tanti wife of Rana Tanti came and informed me that the co-villager Ramani Medhi took her minor daughter (four years old) Munu to his house and in his bed did bad act on her by opening her clothes."

Ext. 7 is the statement of witness Ghana Kanta Bora u/s 161 Cr.P.C. and Ext. 7(1) is his signature.

19. PW 11 Mr. M. Dekadoloi is the learned Sub Divisional Judicial Magistrate (M), Bojali stated that on 04-12-12 she was working as Judicial Magistrate, 1st class, Tezpur and on that day in reference to Rangapara PS Case No. 205/12, she has examined one witness i.e. the

victim namely Miss Pomi Tanti, D/O Sri Rana Tanti, aged about 4 years as per direction of the then i/c CJM, Sonitpur, Tezpur. As the victim was only 4 years old, so to ascertain the understanding of the victim, she asked her some questions and make an enquiry and after satisfaction as to her ability and to give rational answer and intelligence, she has recorded her statement u/s 164 Cr.P.C. at her court chamber. After recording her statement she has read over the contents of the statement and on satisfaction she put her thumb impression in presence of her. On the same date and same reference she has also recorded the statement of one Pranita Tanti, mother of the victim, W/O Sri Rana Tanti under section 164 Cr.P.C. in the court chamber. After recording her statement, she has read over the contents of the statement to her and on acceptance she put her signature thereon. Ext. 7 A is the statement of the victim and Ext. 1 is the statement of the mother of the victim Pranita Tanti. Ext. 7 A(1) and Ext. 1(5) is her signature. Ext. 8 is the relevant order dated 03-12-12 and Ext. 8(1) is her signature. Ext. 9 is the order dated 04-12-12 for recording the statement u/s 164 Cr.P.C. and Ext. 9(1) and 9(2) are her signatures

In cross-examination, she admitted that Ext. 7 is silent as to the identifier of the victim. She has fully satisfied about the quarry made to the victim girl whether she will be able to give statement before her in a maturity.

- **20.** These much is the evidence of prosecution
- **21.** Defence plea is total denial while his statement was 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 a vast discrepancy in the statement among the prosecution witnesses. Thirdly, there is also many contradictions among the statements of the prosecution witnesses. Fourthly, there is no corroboration among the statement of witnesses. Fifthly, accused was not clearly identified by victim. And Lastly, there is no any evidence of penetrative sexual

assault even there is no any evidence to implicate the accused in the offence of sexual assault. Hence, accused is required to be acquitted.

- 23. On the other hand, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt. Firstly, the victim clearly narrated about the incident before the I.O., before the learned Magistrate and before this court. Secondly, inspite of the victim, PW 2, the mother of the victim herself seen the accused slept with her minor daughter where both of them were found naked. Despite that, the parents of the victim clearly stated about the incident. 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 no other eye witness but according to the PW 2, the mother of the victim while her daughter was missing, she vigorously searched and when she noticed the chandal of her victim daughter in the front side of the house of the accused, she went there, witnessed accused and victim slept together in a bed without putting any clothes. Thereafter on being seen the PW 2 by the accused, the accused immediately covered himself with a "Gamosa". Then she took her on her lap, she slapped her and asked her what happened, then the victim reported that "Borpa" (accused) has removed her clothes and put his private parts on her private parts. Then she informed the matter to her husband over telephone as he was not present in the house. She scolded the accused but did not utter a single word. She also informed her brother-in-law. On the next day, i.e. on 01-12-2012 a village was called and in the said meeting the sister of the accused assaulted her. On the same day, her husband filed the ejahar before the police station.

After instituting the case her statement was recorded u/s 164 Cr.P.C. through the learned Magistrate. Though the aforesaid PW 2 was exposed to long cross-examination, the evidence as to while the victim was playing near the roadside without putting sweater, PW 2 bring one sweater but she did not find her. She searched her daughter here and there then she went to the house of the accused which is at a little distance from the road, she searched her daughter everywhere by calling her name, she saw the chandal of her daughter near the door of the house of the accused, then she entered inside the house and saw both the accused and her daughter were found in naked on bed and on being seen her accused covered himself with a "Gamosa" has remained unchallenged.

Similarly, though PW1, the victim was exposed to long crossexamination, the evidence as to at the relevant time accused called her form the road to his room when he opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual male organ, when she was in naked condition in bed, her mother found her and taken her has remained unchallenged.

- **26.** Learned counsel for the accused submitted that the FIR filed by the informant on 01-12-2012 whereas the incident took place on 29-11-2012 but the FIR did not disclose as to any explanation for two days delay in lodging the same.
- 27. In state Vs. Gurmit Sing, the Hon'ble Apex Court, stated that

"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 4 Sri Rana Tanti, the father of the victim, filed the ejahar on 01-12-2012 on being came to know about the incident from his wife though the incident took place on

29-11-2012, at about 5 p.m. Here in the present case the informant lodged the ejahar after two days of the incident whereas he came to know about the incident on the very day from his wife. Besides, there is an implied and direct evidence that for the incident they have convened a village meeting in the next day but the matter was not settled. Rather, sister of the accused Lakhi Medhi assaulted the wife of the informant and misbehaved her. Under such circumstances, two nights 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 clearly stated that in the evening time her "Borpa" (accused) called her from the road to his room, he opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual organ, when she was in naked condition in bed, her mother found her and taken her.

PW 2, mother of the victim also stated that at the relevant time the victim was found playing near the roadside without putting any sweater, then she went to her house to bring a sweater but when she came she did not find her daughter. She searched here and there and then she went to the house of accused which is a little distance from the road, she searched everywhere by calling her name at last she saw her "chandal" near the door of the house of accused and she entered inside the house and saw both the accused and her daughter in a naked condition on the bed. On being seen her accused covered himself with a "gamosa". Thereafter, she took her daughter on her lap. Therefore, it is not only the victim but also the PW 2 mother of the victim also seen both the accused and victim slept in a bed without putting any clothes. The incident took place in the winter season, in the last part of month of December. In such a winter season it is surprised to see both the victim and the accused found slept without putting their clothes.

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. Similarly, the statement of PW 2, mother of the victim also corroborated with her statement made before the police and also before the learned Magistrate u/s 164 Cr.P.C. Though the victim has been exposed to long cross-examination but her evidence as to at the relevant time accused called her form the road to his room when he opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual male 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 4 years of age at the time of incident. But the PW 3, the Doctor who opined that the age of the person under investigation appears to be below 6 years. The victim stated before the learned Magistrate while recording her statement u/s 164 Cr.P.C. she was 4 years old. Again, while her statement was recorded in the court i.e. on 14-12-2015 she stated that she was 7 years old. The incident took place on 29-11-212 so her age would have been according to her statement was about 4 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 4 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 PW 1, PW 2 and PW 4 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 she was playing on the road, accused called her and took her to his room where accused laid her down on a bed and undressed her. He also put off his clothes and touched the victim's private parts through his male sexual organ. While PW 2 searching her daughter came to the house of the accused and both the victim and accused was found naked, slept in the same bed, immediately on being seen her, accused himself covered him with a "Gamosa", then PW 2 taken her daughter on her lap, slapped her daughter and took her daughter to her house where the victim stated about the whole incident to her mother and her mother also informed the matter to her father over telephone. 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. Similarly, the statement made before the I.O. u/s 161 Cr.P.C. by PW 2 and before the Magistrate u/s 164 Cr.P.C. is corroborated. Though both of them have been vigorously crossexamined but the aforesaid evidence as stated by victim and her mother 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 her intelligence and ability to give rational answers, the court has recorded her statement. Apart from that, other witnesses including the eye witness PW 2 and reported witnesses PW 4, PW 5, PW 6 and PW 7, all were supported the evidence of victim PW 1.

Here in the present case as discussed above, the evidence as to at the relevant time while the victim was playing, "Borpa" (accused) called her from the road to his room, he opened her clothes, laid her down in his bed, opened his pant and touched her private parts through his sexual organ and in the mean time while PW 2 in searching her victim daughter entered into the house of the accused, she found both the accused and the victim in bed without putting any dress and on being seen her, accused covered his body with a "Gamosa"I

44. On appreciation of the evidence given by the victim, her mother PW 2, PW 4 father of the victim and other independent witnesses i.e. PWs 5,6 and 7, 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 of violence on her body as well as on her

private parts and there is no sign of recent sexual intercourse. Therefore, I think that the prosecution has failed to prove the ingredients of section 10 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 proved beyond all shadow of doubt that accused attempted to commit the offence of attempt to sexual assault to victim at the relevant time.
- **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 Ramani Medhi is acquitted from the alleged charge u/s 10 of the POCSO Act but accused Sri Ramani Medhi 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.
- **49.** Turning to the question of sentence, it is the settled law that while 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 58 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 Ramani Medhi u/s. 18 of POCSO Act and sentence him to Rigorous Imprisonment for 3 (three) months and to pay a fine of Rs. 10,000/- (Rupees ten thousand only) in default Rigorous Imprisonment for 2(two) months.

It appears from the record that the accused has been in custody since 17-12-2012 to 18-03-2013

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. 25,000/- (Rupees twenty five 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 31st day of May, 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

<u>APPENDIX</u>

Prosecution Witness

1. Prosecution Witness No.1 Victim :-Prosecution Witness No.2 2. Smti Pranita Tanti Prosecution Witness No.3 3. Dr. Ila Rajkhowa, **Prosecution Witness No.4** Sri Rana Tanti, complainant 4. **Prosecution Witness No.5** Sri Ghana Borah 5. Smti Sitarani Biswas, 6. Prosecution Witness No.6 7. Prosecution Witness No.7 Smti Manju Tanti, **Prosecution Witness No.8** Sri Kulendra Bharali, I.O. 8. 9. Prosecution Witness No.9 Sri Hasen Ali, I.O. 10. Prosecution Witness No.10 Sri Lakhi Kanta Borah, I.O. 11. Prosecution Witness No.11 Mrs. M. Dekadoloi, SDJM.

EXHIBITS.

Exhibit 1 :- 164 Cr.P.C. statement of Pranita Tanti Exhibit 2,3 & 4 :- Medical, Sonography and X-ray Report.

Exhibit 5 :- FIR

Exhibit 6 :- Chargesheet. Ext. 6 A :- Sketch map

Exhibit 7 :- statement of witness Ghana Kanta Bora u/s

161 Cr.P.C.

Exhibit 7 A :- 164 Cr.P.C. statement of victim
Exhibit 8 :- relevant order dated 03-12-2012
Exhibit 9 :- relevant order dated 04-12-2012.

(Ashok Kumar Borah) SPECIAL JUDGE SONITPUR: TEZPUR