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

SPECIAL (POCSO) CASE NO. :- 08 of 2014

(Under Section 376 of IPC and 6 of the POCSO Act, arising out of G.R. Case

No. 2187 of 2014)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

**Tezpur** 

Prosecutor :- State of Assam

-Vs.

Accused :- Sri Haren Nath

Son of Late Kanak Nath Resident of Monai Bishnupur Police Station – Sootea Dist:- Sonitpur, Assam

Date of framing Charge :- 19/08/2016.

Date of Recording Evidence :- **07/11/2016,09/11/2016,** 

25/01/2017,06/03/2017 28/04/2017,09/05/2017 30/05/2017 & 19/06/2017.

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

- 07/06/2016.

Date of Argument :- 18/08/2017 & 24-08-2017

**Date of Judgment** :- 31-08-2017.

Counsel for the Prosecution :- Mr. Munin Chandra Baruah,

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. S. Misra, Advocate.

#### **JUDGMENT**

- 1. In this case accused Sri Haren Nath is put for trial for allegation of charge under Section 376 of the IPC read with section 6 of the POCSO Act, 2012.
- 2. The factual matrix according to the FIR, in brief, is that in the evening of 6 p.m. of 06-09-2014 accused called the minor daughter of the informant to his house and committed rape on her as a result, she sustained severe injury. Due to the injuries sustained by victim she had to treat at Tezpur Civil Hospital. Hence, this prosecution case.
- 3. The ejahar was filed by informant Sri Dhan Nath before the Incharge of Itakhola Police Out Post on 07-09-2014. On receipt of the ejahar, the I/C of Itakhola Police Out Post by giving the GD Entry No. 117 dated 07-09-2014 at about 12 noon forwarded the same to O/C Sootea Police station for registering a case. On being receipt the ejahar, the O.C Sootea P.S. registered the case vide Sootea P.S. Case No. 111/2014 under Section 379 of the IPC. After completion of usual investigation, the O/C of Sootea PS sent up the case for trial against the accused Sri Haren Nath by filing charge sheet under Section 376 of the IPC read with section 4 of POCSO Act.
- **4.** On being appeared the accused before this Court, after hearing both parties, framed charge under section 376 of the IPC read with section 6 of POCSO Act, 2012 against the accused Sri Haren Nath and particulars of the charge was read over, explained to the accused to which he pleads not quilty and claims to be tried.
- **5.** To substantiate the case prosecution examined as many as 15 (Fifteen) numbers of witnesses and also one court witness.
- **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. To buttress the defence accused has examined two witnesses as DW 1 and DW 2.
- **7.** I have heard the argument put forwarded by the learned counsels of both sides.

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

1. Whether on or about 6 p.m. of 06-09-2014 at village Bishnupur under Sootea Police station, accused committed rape on the victim (8 years of age) and thereby committed an offence punishable u/s 376 of IPC read with section 6 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 Dhan Nath @ Deepak, the complainant of this case, stated that the victim is his 8 years minor daughter. The incident took place about two years ago. The incident took place at about 6.30 p.m. At the relevant time he was in the village Namghar for the rehearsal of "Bhouna". He was reported by the accused that as a result of rape his daughter was bleeding. Therefore he rushed to his house where he noticed bleeding from the private parts of his daughter. While he asked the accused, the accused told him not to worry, he took his daughter to the hospital for treatment with his cost. The accused confessed his guilt. Immediately, his wife Munu Devi informed this matter to the public of Namghar. Then the public came to the house of the accused and held him. His daughter was taken to hospital by his wife and he filed the ejahar. Ext. 1 is the ejahar and Ext. 1(1) is his signature. The local public confined the accused in the Namghar and then police arrested the accused. His daughter was initially taken to Dhalaibil hospital, then to Tezpur where she had been hospitalized for three days. After that the statement of the victim was recorded through the learned Magistrate. At the relevant time his daughter was studied at class IV standard at Bapuji LP School.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to on being came to know about the incident he went to his house and saw the bleedings of his minor daughter from her private parts, while he asked the accused, the accused admitting his guilty stating that he will take the girl to hospital with his own cost has remained unchallenged.

11. PW 2 Sri Konkon Nath, the minor brother of the victim, stated that the incident took place in the year, 2014. At about 4/5 p.m. accused called him to his home. Accordingly he went there. Accused has also called his sister (victim) to his home for making tea. After having biscuits he returned to home. After a while he again went to the house of the accused and peeping through the window, saw accused after removing the clothes of his sister fell her down, on the bed, gagged her mouth and sleep over his sister doing ups and down in compromise position. Then her sister returned to the house and told the incident to their mother.

Though he has been subjected to long cross-examination, the evidence as to at the relevant time accused called him and his sister to his house, after giving biscuits he returned to his house, thereafter he again went to the house of accused, while he peeping through the window, saw accused after removing the clothes of his sister fell her on the bed and gagged her mouth and sleep over her in compromise position has remained unchallenged.

- **12. PW 3** Sri Tultul Saikia turned hostile. The unhostile portion of his evidence is that he knows the victim and the accused. The victim is the daughter of Dhan Nath. The incident took place about two years ago. In the next day of the incident, he came to know in the house of Dhan Nath that accused committed rape on the victim.
- Nath. He also know the victim. The incident took place about two years ago in the evening. Next day of the incident, he went to the house of Dhan Nath. He came to know from the grand-mother of the victim that accused committed sexual acts on the victim after removing her clothes.
- **14. PW 5** Sri Rinku Borah @ Bubu Borah has stated that at the relevant time he along with the local people were busy in rehearsal of "Bhouna" at Nijarapar Namghar. In the mean time, the mother of the victim along with one woman of their village came to them, informed them that accused committed rape on the victim. Immediately, they

rushed to the place of occurrence. He noticed bleedings of the minor girl. The victim also reported that accused committed rape on her. When the accused tried to fled away but the public caught him and then accused confessed his guilt. During investigation, police has seized one blue coloured panty used by the victim at the relevant time. Police has also seized one navy blue grown and one green white blouse vide Ext.2 seizure list and Ext. 2(1) is his signature.

He has been duly cross-examined by the defence but except giving many suggestions the evidence as to on being came to know about the incident from the mother of the victim and one woman of their village, he came to the house of the complainant and had seen bleedings of the minor girl, the victim girl also stated that accused committed rape on her and the accused confessed his guilt has remained unchallenged.

**15. PW 6** Sri Ghana Das stated that at the relevant time he was also busy in rehearsal of "Bhouna" at their local Namghar. In the mean time, mother of the victim informed them that accused committed rape on their girl. So, they went to the house of the complainant and noticed bleedings of the private parts of the victim. While they searched accused, accused at first tried to flee away but lateraon they apprehended the accused and took him to Namghar and interrogation he admitted that he cannot say what he had done. During investigation police seized some clothes used by the victim at the relevant time through Ext.2 siezure-list and Ext. 2(2) is his signature.

It appears that the said PW 6 has been exposed to long cross-examination but except giving suggestions the evidence as to while he was in rehearsal of "Bhouna" at Nijarapar Namghar the mother of the victim complained them that accused has committed rape on her minor daughter, then he along with others rushed to the house of the complainant, noticed bleedings from the private parts of the victim, though accused tried to fled away but he was caught, took him to the local Namghar where accused stated that he cannot say what he had done has remained unshaken.

16. PW 7, Miss "X", the victim, stated that accused is known to her. The incident took place at about 6 O'clock in the evening. She was called by accused to their home for making tea. During that time, wife of the accused was absent. After giving biscuits to her brother, she again went to the house of the accused and gave tea to the accused (Bordeuta). Then she went to the site of the Well to wash utensils. Accused took her to the bed. During that time no one has seen the incident. She also did not raise any alarm as she did not think the consequence of the act of the accused. Accused opened her panty, He also opened his pant. He inserted his sexual organ into her private parts. As he gagged her mouth with his hands so she could not raise alarm. She sustained hurt. Bleedings her private parts. Then accused go towards backside and she went to her own house. She informed about the incident to her mother. Then her mother called the accused, asked him why he did such an act but accused did not state anything. Thereafter, the accused consoled them not to worry and he will took the victim to the hospital in a vehicle. Then her father called the accused and local people took the accused to the Namghar. Initially, police took her to Dhalaibil hospital but the hospital authority refused to admit her so she was sent to Tezpur Civil Hospital. The doctor stitches her private parts and she was given injection. She has been hospitalized from Saturday to Monday. Then she was sent to the court for recording her statement u/s 164 Cr.P.C and Ext. 3 is her statement and Ext. 3(1), 3(2), 3(3) and 3(4) are her signatures. Police seized her wearing apparels i.e. frock, pant, skirt. Material Exhibit 1 is the said seized clothes.

Though she has been exposed to long cross-examination, but the evidence as to at the relevant time she was called by the accused to make tea and after making tea she gave it to the accused and also gave some biscuits to her brother and while she was at the site of the Well to wash utensils, accused forcefully took her to his bed, opening his pant and her pant, inserted his sexual organ into her private parts, as a result she sustained hurt and her private parts was bleedings has remained unshaken.

17. PW 8 Sri Jintu Borah, stated that in the evening time on the day of incident while he was in the rehearsal of "Bhouna" at Nijarapar Namghar, the mother of the victim came to them and informed them that her 7½ years old daughter was raped, then he rushed to the house of the complainant and noticed bleedings from the private parts of the victim. Though the accused initially tried to flee away but he has been caught and took to the Namghar and handed over the accused to police.

It appears that he has been duly cross-examined by defence but the evidence as to at the relevant time while he was busy in rehearsal of "Bhouna", on being came to know about the incident from the mother of the victim they went to the house of the complainant and noticed bleedings of victim has remained unchallenged.

**18. PW 9** Sri Bhupen Nath, who was also in the rehearsal of "Bhouna" at Nijarapar Namghar, on being came to know about the incident from the mother of the victim he along with other persons rushed to the house of the complainant where he noticed bleedings from the private parts of the victim and victim also stated that the accused committed rape on her.

Though the defence has duly cross-examined him but the evidence as to at the relevant time on being came to know about the incident when he went to the house of the complainant, he noticed bleedings from the private parts of the victim and the victim reported them that accused committed rape on her has remained unchallenged.

- **19. PW 10** Sri Babul Borah who turned hostile stated that he came to know about the incident in the evening of that day. He was busy in his tea stall at the relevant time. VDP Secretary Prakash Nath informed him over telephone that a "hulasthul" took place in their village so he went there and saw the accused was tied in Namghar. Then he turned hostile.
- **20. PW 11** Dr. Jharna Kakoti, deposed that on 07-09-2014 she was posted as working as Sr. Medical & Health Officer in the Kanaklata Civil

Hospital, Tezpur and on that day at about 3 A.M. in the labour room complex of KCH, she examined Miss "X", 8 years, female, D/O Sri Dipak Nath of Military Block, PS Sootea, in reference to Itakhola OP GDE No. Nil Dated 06-09-2014. On examination I found the following:

Identification mark – A mole on the left side of the hairline on forehead. Menstrual history – menarche not attained. History of sexual assault on 06-09-14 around 5 p.m. At the time of examination she was well dressed, neat and tidy. Her gait was normal. Height – 122 cm., Weight – 20 Kg, Teeth – 6/6 5/5. Pulse – 90/min, BP – 90/60. Her secondary sexual characters are not developed. Breasts not developed. Auxillary and public hairs absent. Tear of hymen at 6 O' clock. There was a 1<sup>st</sup> degree perineal tear 1 cm x  $\frac{1}{2}$  cm. Simple, fresh and caused by blunt object, extended from the site of tear of hymen (i.e. 6 O'clock). Vaginal smear for spermatozoa was taken. There was no mark of injury on her other parts of the body. The patient was admitted at the M & G Ward and referred to gynaecologist for further treatment.

Investigations advised and reports-

- 1.Vaginal smear for spermatozoa not seen. Done at KCH Laboratory, Lab No. 95 dated 07-09-2014.
- 2. X-ray of wrist joint, elbow joint, hand and hip joint, pelvis and spine:
- i) Epiphysis of the lower end of radius and ulna, head of radius and both epicondile of upper end of the left humerus are open.
- ii) In the left hand, epiphysis of the bases of proximal phalanges and heads of all metacarpal and base of fifth metacarpal bones are open.
- iii) Epiphysis of greater trochanter and femoral capital. Epiphysis are open. Age of the person under investigation is below 10 years. Report given by Dr. P.K. Barman, Radiologist, done at Assam X-ray clinic & Laboratory. Patient ID No. AX 21654 dated 08-09-2014.

## **OPINION:**

1. Age of the person under investigation appears to be below 10 years.

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2. There is injury on her private parts. There is a  $1^{st}$  degree perineal tear, 1 cm x 1/2 cm , simple, fresh (less than 12 hours) and caused by blunt object, extend from the site of tear of hymen i.e. 6 O'clock position.

Ext. 4 is the Medical Report and Ext. 4 (1) is her signature. Ext. 5 is X-ray report along with plates and Ext. 5(1) is the signature of Dr. P.K. Barman, Radiologist, which is known to her. Ext. 6 is the laboratory report. Ext. 7 is the advice slip and Ext. 7(1) is her signature.

In cross-examination the doctor admitted that in her report GD entry mentioned as Nil but date was there. The injury sustained by the victim may be caused by any type of blunt object.

- 21. **PW 12** Smt. Barnali Sarmah, deposed that on 09-09-2014 she was working as Judicial Magistrate, 1st class, Tezpur. On that day, in reference to Sootea PS Case No. 111/14 u/s 376 of the IPC, she has recorded the statement u/s 164 Cr.P.C. of one eight years old victim Miss "X", D/O Sri Dipak Nath at court chamber as Elaka Magistrate. Since the witness was eight years old minor, so she has put some questions and on her answers she is satisfied that she is able to understand the question put to her and to give rational answer accordingly, she has recorded her statement. The witness made statement before her voluntarily. After recording her statement she has read over the contents of the writings and on her acceptance she put her signature thereon. Ext. 8 is her order dated 09-09-2014 in GR Case No. 2187/14 and Ext. 8(1) is her signature. Ext. 3 is the statement of the victim Ila Devi recorded by her on 09-09-2014 and Ext. 3(5) is her signature.
- **22. PW 13** SI Munindra Kr. Nath, deposed that on 28/05/2016 he was posted as SI of police at Itakhola Police Out Post. On that day, he received the case diary of GR case No. 2187/14. On perusal of the case diary it appears that previous I.O. has almost completed the investigation and he has only collected the medical report of the victim and also applied for Hon'ble court for registered the case under POCSO Act. Thereafter, he filed the chargesheet against the accused Haren

Nath u/s 376 of IPC r/w section 4 of POCSO Act. Ext. 9 is the chargesheet and Ext. 9(1) is his signature.

23. **PW 14** SI Uttam Tamang, deposed that on 06-09-2014 he was working at Itakhola Out Post as Officer Incharge. On that day, at about 10.30 p.m. he has got an information from some unknown person that one minor girl was raped by one person at Jaysidhi Military Block and the accused was assaulted by local public. On being receipt the information he made GD Entry vide Itakhola Out Post GDE NO. 105 dated 06-09-2014 at 10.30 p.m. and he visited the place of occurrence. According to local public the said accused raped one Ila Devi at about 6 p.m. Then he proceeded to the house of the victim girl. Immediately, with the help of WPC Sumitra Dutta they sent the victim to Dholaibil PHC. There he has seized one blood stained panty (blue colour) put by the victim girl in presence of witnesses. By Ext.2, the seizurelist he has seized one blood stained panty (blue colour), one skirt and one frock which are Material Ext. 1, 2 and 3 and Ext. 2(3) is his signature. Thereafter, he has recorded the statement of the witnesses.

On 07-09-2014 he prepared sketch map. Then he returned to Itakhola Out Post. On that day, one Dhan Nath, S/O late Khagen Nath of village Bishnupur Military block filed an FIR and after receiving the same, he made GD Entry vide Itakhola OP GDE NO. 117 dated 07-09-2014 at 12 noon and forwarded the same to O/C Sootea PS for registering a case. He has already been taken up the investigation of the case. After receiving the FIR O/C Sootea PS Homendra Hira registered a case being Sootea PS Case No.111/14 u/s 376 of the IPC. Ext. 1 is the said FIR and Ext. 1(2) is his signature with note and Ext. 1(3) is the signature of Homendra Hira, O/C of Sootea PS. Then he went to Sootea PS where accused was kept in safe custody and after interrogation he has arrested the accused and forwarded him to Tezpur Court. On being referred by Doctor of Dholaibil PHC, victim Miss "X" was admitted at KCH, Tezpur. On 09-09-2014 he sent the victim to the court for recording her statement u/s 164 Cr.P.C. On his transfer he has handed over the case diary to O/C Sootea PS.

He has recorded the statement of Tultul Saikia who stated before him that "on hearing commotion at about 7 p.m. I went near the Namghar and had noticed many people gathered there. I came to know from the gathering that Haren Nath called Ila Devi to his home to prepare tea and then committed rape on her. On being seen the critical condition of the girl local public caught Haren Nath, assaulted and handed over to police."

He has also recorded the statement of Babul Bora who stated before him that on hearing commotion at Bishnupur Military block he came there today in the evening and came to know from local public that Haren Nath committed rape on Miss "X". Thereafter, local people searched the accused Haren Nath but he fled away behind his home and people by chasing him and caught him. On being asked he confessed his guilt that he committed rape on Miss "X". He came to know that he in earlier occasion also involved in such scandal related to women. Ext. 9 is the case diary of GR Case No. 2187/14 and Ext. 9(1) is the relevant statement of Tultul Saikia and Ext. 9(2) is his signature. Ext. 9(3) is the relevant statement of Babul Bora and Ext. 9(4) is his signature.

- **24. PW 15** SI Budhiar Muktiar deposed that on 26-05-2017 he was posted as Incharge of Itakhola Police Out Post. On that day upon the requisition of the Court of District & Sessions Judge, Sonitpur, Tezpur he has submitted the extract copy of GDE being GDE NO. 105 dated 06-09-2014. He has certified the aforesaid copy of GDE copied from the original GDE which he brought today. Ext. 10 is the said certified copy of GD Entry and Ext. 10(1) is his signature. Ext. 11 is the original General Diary Entry maintained in the Itakhola Police Out Post under Sootea Police station from 11-08-2014 to 19-09-2014 and Ext. 11(1) is his signature.
- **25.** These much is the evidence of the prosecution.
- **26.** While the accused was examined u/s 313 Cr.P.C. he stated that he is innocent. In fact a quarrel took place in between them and the

father of the victim for a plot of land. So, on grudge complainant filed this false case against him

- **27.** To buttress the defence, the accused examined two defence witnesses.
- 28. DW 1, Sri Nirmal Nath stated that he knows the accused Haren Nath and the complainant Sri Dhan Nath. Victim is the daughter of complainant Sri Dhan Nath. His house is situated near the house of accused Haren Nath. At about 2 years 8/9 months ago, he along with accused Haren Nath were busy in making furniture from about 8 a.m. till 7.30 p.m on that day. During that time none has come to the place where they were busy in making furniture. During that time victim, daughter of complainant Dhan Nath also did not came to the house of Haren Nath. There is a strange relation in between Dhan Nath and Haren Nath. Even they do not have any visiting terms. Due to land dispute the said guarrel took place. Dhan Nath forcefully occupied one bigha of land from Haren Nath that led to contention. At the relevant day, the wife of the Haren Nath was not present in their house. On hearing hulla in the house of Haren Nath, at about 9/9.30 p.m., he went to the house of Haren Nath and saw that some people assaulted Haren Nath. The said people not belong to their village. There are houses of Dipali Devi, Dhan Nath etc. near the house of Haren Nath.

In cross-examination by the prosecution he admitted that on that day, he had his lunch which was taken from his house. Tea also provides to the place by his wife. His house is situated about 20 ft away from the house of Haren Nath i.e. to the other side of the house of Haren Nath. There were about 20 houses in and around his home. There are also a Namghar in the name of their village. There is also a Namghar situated at Nijarapar which is situated at a distance of about 1½ km from the house of Haren Nath. At the relevant day, there were no gathering in our local Namghar. At the time of arrival of police he was not there. There is no any civil case for the land dispute in between the parties as stated above. He does not know the Dag and Patta No. of the disputed land.

**29. DW 2** Smt. Dipali Devi stated that she knows the accused Haren Nath and the complainant Sri Dhan Nath. Victim is the daughter of complainant Sri Dhan Nath. His house is situated near the house of accused Haren Nath. On 06-09-2014 Nirmal Nath and Haren Nath were preparing furniture in the house of Haren Nath till 7.30 p.m. On that day, the wife of Haren Nath was not present in their house. At about 9 p.m. on hearing hulla they came out and rushed to the house of Haren Nath and saw some people assaulted Haren Nath. The said people not belonged to their village. There are houses of Nirmal Nath, Bipul, herself etc. near the house of Haren Nath. Due to land dispute, quarrel took place in between Dhan Nath and Haren Nath. Dhan Nath always used to threaten the accused. At the relevant day, victim girl was fishing in a nearby drain. She warned her not to enter in the drain as there were leeches. As per her knowledge the victim was bite by leeches.

In cross-examination by prosecution she admitted that her house is situated on the western side of the house of Nirmal Nath. The Namghar situated on the eastern side of the house of the Haren Nath. Victim girl was fishing in a nearby drain. Her brother was playing. They have two children. The drain where the girl was fishing contain less then knee deep water. She has seen the victim in the said drain at about 3 p.m.

She cannot say whether accused committed rape on the victim or not. Due to boundary dispute, quarrel took place in between Dhan Nath and Haren Nath. She cannot say the area of the disputed land. There is a drain in between the house of Dhan Nath and Haren Nath. There is no case for the land dispute in between the parties and no meeting was convened for the said dispute. Sura Devi and Bimal Nath are still alive and reside in their village. She cannot recall the time when police arrived. After hearing the incident all people of Namghar came to the place of occurrence. She has not received any notice from the Court.

**30.** Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. **Firstly,** other than the victim none has supported the prosecution case. The alleged eye witness PW 2 could not state about the incident clearly.

**Secondly,** though the doctor who examined the victim stated that on examination she found a tear of hymen at 6 O' clock and there was a  $1^{st}$  degree perineal tear 1 cm x  $\frac{1}{2}$  cm. Simple, fresh and caused by blunt object, extended from the site of tear of hymen (i.e. 6 O'clock). But the doctor admitted that such type of injury may be caused by any blunt object and **Thirdly,** there is a clear evidence that due to boundary dispute quite often quarrel took place in between Dhan Nath and Haren Nath which was ably proved by DW 1 and DW 2 therefore, the complainant has falsely implicated the accused in such a heinous crime that has to be considered.

- **31.** Per contra, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt, as such, accused is required to be convicted under the charged section of law.
- **32.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case as follows.
- **33.** A close scanning of the record including the evidence it appears that to substantiate the case prosecution has examined as many as 15 numbers of witnesses. Out of 15 (fifteen) numbers of witnesses, 4 (four) are official witnesses and remaining 11 (eleven) are non-official witnesses. It appears that about the incident not only the victim has stated but there is other evidence of PW 2, the brother of the victim who is also eye witness to the occurrence. His presence at the place of occurrence cannot be ruled out from the facts and circumstances of the case.
- **34.** Let me discuss the evidence adduced by other non-official witnesses including the victim and brother of the victim. PW 1 who is the father of the victim, stated that at the relevant time at about 6.30 p.m. he was in rehearsal of "Bhouna" in their local Namghar where accused himself informed him that an incident took place in his house. He also stated that as a result of rape, bleeding occurred from his minor daughter. Then he rushed to his house where he noticed bleeding from

the private parts of his daughter. While he asked the accused, accused told him that not to worry, he took his daughter to the hospital for treatment at his cost. He also admitted that he has committed rape on her and immediately his wife informed the matter to the public of the Namghar. Then the public came to the house of the accused and held him. Then he filed the jeahar Ext. 1 and Ext.1(1) is his signature.

PW 5 Sri Rinku Borah, PW 6 Sri Ghana Das, PW 8 Sri Jintu Borah and PW 9 Sri Bhupen Nath who were in rehearsal of "Bhouna" at the relevant time at their local Nijarapar Namghar with complainant-PW 1. While they were busy in rehearsal of "Bhouna", the mother of the victim along with one lady came to Namghar and informed them that accused raped her daughter. On being come to know about the incident, they rushed to the house of the complainant. They noticed bleedings from the private parts of the victim. The victim also reported them that the accused committed rape on her. When the accused tried to flee away but the local public caught him and then he confessed his guilt. Thereafter, the accused was taken to their Namghar. Though all the aforesaid witnesses were exposed to long cross-examination the evidence as to at the relevant time while they were busy in rehearsal of "Bhouna" at Nijarapar Namghar, they have been informed by wife of the complainant that accused has committed rape on the victim and on being came to know about the incident they rushed to the house of the complainant where they noticed bleedings from the private parts of the victim and accused had confessed his guilt has remained unshaken. Though accused initially wants to flee away but he was caught and lateron taken to Namghar has also remained same.

**35.** PW 7 Miss "X", the victim who was examined after making enquiry by putting some questions to test her ability to understand and give rational answers stated that the incident took place at about 6 O'clock in the evening. She was called by accused to their home for making tea. During that time, wife of the accused was absent. After giving biscuits to her brother, she again went to the house of the accused and gave tea to the accused (Bordeuta). Then she went to the

site of the Well to wash utensils. Accused took her to the bed. During that time no one has seen the incident. She also did not protest as she did not think the consequence of the act of the accused. In the house of the accused, he removed her panty and also opened his pant. Accused inserted his sexual organ into her private parts. As accused gagged her mouth with his hands so she could not raise alarm. She sustained hurt and bleedings from her private parts. Then accused go towards backside. Thereafter, she went to her own house and informed about the incident to her mother. Her mother asked the accused why he did such a heinous act but accused did not state anything. Thereafter, the accused console them not to worry stating that he took the victim to the hospital in a vehicle. Then her father called the accused and local people took the accused to the Namghar. Initially, police took her to Dhalaibil hospital but the hospital authority refused to admit her so she was sent to Tezpur Civil Hospital. The doctor stitches her private parts and she was given injection. She has been hospitalized from Saturday to Monday. Then she was sent to the court for recording her statement u/s 164 Cr.P.C and Ext. 3 is her statement and Ext. 3(1), 3(2), 3(3) and 3(4) are her signatures. Police seized her wearing apparels i.e. frock, pant, skirt. Material Exhibit 1 is the said seized clothes. Though she has been exposed to long cross-examination, except giving many suggestions, the evidence as to at the relevant time she was called by the accused to make tea and after making tea she given it to the accused and also giving some biscuits to her brother and while she was at the site of the Well to wash utensils, accused forcefully took her to his bed, by removing his pant and her pant, inserted his sexual organ into her private parts, as a result bleedings her private parts and she sustained injury has remained unchallenged. Her evidence is also supported by another eye witness PW 2 Sri Konkon Nath, minor brother of the victim. PW 2 stated that at the relevant time, at about 4/5 p.m. accused called him to his home. Accordingly he went there. Accused has also called his sister (victim) to his home to prepare tea. After having biscuits he returned to home. After a while he again went to the house of the accused and peeping through the window, he seen accused after

removing the clothes of his sister fell her on the bed and gagged her mouth and sleep over his sister doing ups and down in compromise position. Though he has been subjected to long cross-examination, the evidence as to the relevant time accused called him and his sister to his house, after giving biscuits he returned to his house, thereafter he again went to the house of accused, while he peeping through the window and saw accused after removing the clothes of his sister fell her on the bed and gagged her mouth and sleep over his sister in compromise position has remained unchallenged.

- **36.** While assessing and evaluating this eye witness, PW 2, it appears that the circumstances of the case was possible for PW 2 to be present at the scene of occurrence and there is nothing inherently improbable and unreliable his presence. Besides that on scrutinizing the evidence of PW 1 and PW 7, it appears that they are consistent with one another so far as the place of occurrence, the fact of inviting them by the accused to prepare tea, the manner of sexual act by the accused to the victim and nothing has been brought out in their cross-examination to impeach their testimony. The evidence of injury of the victim in her private parts is fully corroborated by the medical evidence.
- 37. In this case, the victim, her brother, her father and independent witnesses vividly described the whole incident. Their statements are corroborated with each other. During their cross-examination, the same has not been disputed at all by the defence. The victim has been consistent with regard to the fact that on the day of incident accused called her to his house to prepare tea, accordingly, she went there, gave tea to the accused and after giving biscuits to her brother, she went to the site of the Well to wash the utensils, from there accused took her to his bed, undressed her and committed rape on her where she was bleeding and sustained injury on her private part has corroborated. The victim has also stated such before the learned Magistrate while her statement was recorded u/s 164 Cr.P.C. and before the police u/s 161 Cr.P.C. The un rebuttable evidence of Doctor is that on examination she found tear of hymen at 6 O' clock, there was a 1st

degree perineal tear 1 cm x  $\frac{1}{2}$  cm. Simple, fresh and caused by blunt object, extended from the site of tear of hymen (i.e. 6 O'clock) on the victim. Though the doctor in cross-examination admitted that the injury sustained by the victim may be caused by any type of blunt object, but there is no any evidence adduced by the defence that the victim sustained such injury on her private parts through a blunt object. It also appears that victim has not been cross-examined by the defence on the point of injuries sustained by victim in her private parts any other means with a blunt weapon. Nor any suggestion has been made to the victim that she sustained injury on her private parts by any blunt object. Due to forceful intercourse such type of injury i.e.  $1^{st}$  degree perineal tear 1 cm x  $\frac{1}{2}$  cm, simple, fresh and caused by blunt object, extended from the site of tear of hymen (i.e. 6 O'clock) on the vagina of the victim cannot be ruled out.

In the present case, the victim was examined without taking oath by testifying her ability to give rational answers. Apart from victim, PW 1 and PW 2 respectively father and brother of the victim have supported the evidence of the victim. There is nothing in the cross-examination of any of the said prosecution witnesses which could suggest that they were deposing falsely in any manner. Though they have suggested to vigorous cross-examination, but all the witnesses vehemently denied.

**38.** The another point is to be discussed in the present case is that PW 1 and 2 are respectively father and brother of the victim, therefore, the question may arise as to the interestedness of their evidence.

**In state of Uttar Pradesh Vs.** Jag Deo reported in AIR 2003 SC 660 it has been held that –

"Most of the times eye witnesses happen to be family members of close associates because unless a crime is committed in a public place, strangers are not likely to be present at the time of occurrence. Ultimately eye witnesses have to be persons who have reason to be present on the scene of occurrence because they happened either to be friends or family members of victim.

The law is long settled that for the mere reason that an eye witness can be said to be an interested witness, his/her testimony need not be rejected. For the interest of which an eye witness may have, the court can while considering his or her evidence exercise caution and give a reasonable discount, if required. But this surely cannot be reason to ignore the evidence of eye witness."

- **39.** Coming to the present case, it is true that PW 1 and 2 are respectively father and brother of the victim. As stated above, PW 2 is eye witness to the incident. The incident took place inside the house of the accused where it is only PW 2 seen the occurrence by peeping through the window. The fact of extra-judicial confession made by the accused before the PW 1, PW 5 and PW 6 are cannot be ruled out. Besides that, on being came to know about the incident the aforesaid witnesses rushed to the house of the complainant where they witnessed the bleedings from the private parts of the victim. PW 5 and PW 9 have also heard from the mouth of the victim that accused has committed rape on her. Therefore, the evidence of PW 1 and PW 2 cannot be thrown overboard simply on the ground of interestedness of their evidence.
- **40.** Another point is to be discussed in the present case is that in statement u/s 313 Cr.P.C. the accused stated that a quarrel took place in between them and the father of the victim for a plot of his land. So, on grudge complainant filed this false case against him. To substantiate his plea the accused has examined two defence witnesses i.e. DW 1 and DW 2. It appears that both the DWs have appeared before the court not on summons. They have come to give evidence at the request of the accused. Besides that, the evidence of DWs cannot be relied on and convincing because DW 1 though stated in examination-in-chief that there was a strange relation between Dhan Nath and Haren Nath due to land dispute. But, he admitted in cross-examination that there is no civil case for the land dispute in between the parties as stated above. He even does not know the Dag and Patta number of the alleged disputed

land. He even not know the boundaries of alleged disputed land. Similarly, DW 2 though stated in examination-in-chief that due to boundary dispute a quarrel took place between the parties where the complainant always used to threatened the accused. But in crossexamination she admitted that she cannot say the area of the alleged disputed land. Besides, there is no any case for alleged disputed land and no meeting was convened for the said alleged dispute. It is interesting to note that the DW 2 stated that at the relevant time the victim was fishing in nearby a drain and she was warned as there were leeches. As per her knowledge the victim was bite by leeches. But the defence has failed to cross-examine the victim as to biting of leeches while she was in fishing at the relevant time. Though the defence tried to project an absurd story as to the injury of the victim by biting of leeches and also by stating a strange relation in between the complainant and the accused but it is impossible to think that one cannot falsely give evidence by implicating their own minor daughter involving in such a heinous crime. That apart, there appears no any reason that the complainant being the father of the victim put his own minor daughter at stake by falsely pressing commission of sexual offence. Besides, even if injury caused due to biting of a leech, that can be a piercing injury. But such injury cannot be caused by blunt object as held by Doctor. Under such circumstances, both the evidence of DWs cannot be relied on.

- **41.** 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.
- **42.** 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.

- **43.** 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.
- **44.** Coming to the present case, whether the conviction can be recorded on the sole testimony of a child witness or not?

Such type of 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."

- **45.** 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.
- **46. 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.

- **47.** 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.
- **48.** In the present case as stated above, the victim was examined after testifying her rationally by putting some questions where she without hesitation makes statement. Besides another eye witness PW 2 has vividly narrated the whole incident.

On appreciation of evidence given by the victim, her brother, her father and another independent witnesses and Doctor, I find that the prosecution has able to prove that the accused has committed penetrative sexual assault to the victim as a result she sustained severe injury on her private part beyond any reasonable doubt.

Now, the point is to decide as to what is the exact age of the victim at the relevant point of time. According to the complainant, his victim daughter was a minor. At the relevant time she was about 8 years old. According to the victim, her age was 10 years on the date of deposition and according to the Doctor PW 11 who examined the victim, the age of the victim was below 10 years. But the prosecution has failed to collect any age certificate or birth certificate or the certificate from the Institution where victim initially studied. No doubt, the victim was a minor but the exact age of the victim could not be ascertained by producing any proper authentic age certificate. Therefore, I have come to the conclusion that the prosecution has failed to prove the alleged

charge u/s 6 of the POCSO Act, but prosecution has able to prove the charge u/s 4 of the POCSO Act against the accused beyond all shadow of doubt. As such accused Sri Haren Nath is convicted for the charge u/s 4 of the POCSO Act, but he is acquitted from the charge u/s 376 of the IPC.

- **50.** The accused is heard on the point of sentence. He has submitted that he is the only earning member of his family. He has two children and his wife. Hence, praying for leniency.
- **51.** The learned defence counsel for the convict submits that the convict Sri Haren Nath is a man of 53 years and by profession he is a daily labour. He was not previously convicted in any offence and he is the only earning members of their family. Hence, praying for leniency.
- **52.** I have carefully considered the submissions made by learned Public Prosecutor, Sonitpur, Tezpur as well as learned defence counsel. I have also gone through the case record.
- 53. 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 the victim and to her family members, but considering the mitigating circumstances, the accused was hardly 53 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. The statute u/s.4 of POCSO Act prescribes minimum punishment for a term of seven years with fine. When the intention of the legislator is to impose stringent punishment for not less than seven years, this court has no option but to impose minimum punishment of seven years.

#### ORDER

- **54.** I convict the accused Sri Haren Nath u/s. 4 of POCSO Act and sentence him to Rigorous Imprisonment for 7 (seven) years and also to pay a fine of Rs.5000/- (Rupees five thousand only), in default, Rigorous Imprisonment for 1 (one) month for the offence u/s 4 of POCSO Act. The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him according to the procedure of 428 of Cr.P.C.
- **55.** 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. 50,000/- (Rupees Fifthy 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.

Let a copy of the Judgment be sent to the Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur for her necessary action.

- **56.** A copy of this Judgment be furnished to the accused free of cost immediately.
- **57.** Accused Sri Haren Nath be put to prison to serve the sentence.
- **58.** Let another copy of Judgment be sent to learned District Magistrate, Sonitpur, Tezpur, u/s 365 of Cr.P.C.

Given under my Hand and Seal of this Court on this the **31**<sup>st</sup> day of August, 2017.

(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 Dhan Nath @ Deepak, complainant
2.	Prosecution Witness No.2	:-	Sri Konkon Nath,
3.	Prosecution Witness No.3	:-	Sri Tultul Saikia.
4.	Prosecution Witness No.4	:-	Sri Puna Nath
5.	Prosecution Witness No.5	:-	Sri Rinku Borah @ Bubu Borah
6.	Prosecution Witness No.6	:-	Sri Ghana Das,
7.	Prosecution Witness No.7	:-	Victim Miss X
8.	Prosecution Witness No.8	:-	Sri Jintu Borah
9.	Prosecution Witness No.9	:-	Sri Bhupen Nath
10.	Prosecution Witness No.10	:-	Sri Babul Borah
11.	Prosecution Witness No.11	:-	Dr. Jharna Kakoti, M.O.
12.	Prosecution Witness No.12	:-	Smt. Barnali Sarmah, Judl. Magistrate.
13.	Prosecution Witness No.13	:-	SI Munindra Kr. Nath,
14.	Prosecution witness No. 14	:-	SI Uttam Tamang, I.O.
15.	Prosecution Witness No.15	:-	SI Budhiar Muktiar, I.O.

# **Defence Witness.**

T Defence withess T	Defence witness 1	:- Sri Nirma	ınauı
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2 Defence witness 2. Smt. Dipali Devi

#### <u>EXHIBITS.</u>

Exhibit 1	:-	Ejahar
Exhibit 2	:-	Seizurelist.
Exhibit 3	:-	statement of the victim u/s 164 Cr.P.C
Exhibit 3(1) to 3(4)	:-	signatures of the victim.
Exhibit. 4 ,5 ,6 & 7	:-	X-ray report, Medical report. Laboratory
***	report	and advise slip.
Ext. 4(1) and 7(1)	:-	signature of Doctor.
Ext. 8	:-	order dated 09-09-2014 in GR case
2187/14		
Ext. 8(1), 3(5)	:-	Signatures of Magistrate.
Ext. 9	:-	Chargesheet.
Ext. 9(1)	:-	Signature of SI Munindra Kr. Nath.

(Ashok Kumar Borah)
SPECIAL JUDGE

**SONITPUR: TEZPUR** 

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