

IN THE COURT OF THE SPECIAL JUDGE

::::::: CHIRANG, KAJALGAON.

Special(P) Case No. 54(S)/2018
U/S 376(AB) IPC R/W Section 6 of POCSO Act.

State of Assam Vs. Md. Asman Ali

.....Accused

PRESENT:

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Mr. B. Choudhury,

Md. B.A. Ahmed, Ld. Advocates

Date of Evidence

: 13.12.18, 20.12.18, 03.01.19,

25.01.19, 15.03.19, 28.03.19, 13.05.19, 07.06.19, 08.07.19

Date of Argument: 06.08.2019

Date of Judgment : 19.08.2019

JUDGMENT

1. The prosecution case as revealed during trial in brief is that on 01.09.2018, at about 8.45. AM, in absence of informant Lakhiram Narzary at his home, a person used to come to their village, who introduced himself as a doctor, for selling medicines and seeing his 11 years old physically challenged daughter Miss 'X' (name is withheld), said person gave a medicine for her treatment. At that moment, his wife told the said person that she had no money to purchase the medicine and for which she went to her neighbor's

house for collecting money. When his wife came back to her home, she saw that said person was committing sexual intercourse with his said daughter in their house situated at northern side. Though his wife raised hue and cry, but said person fled away on his motorcycle. It was alleged that the accused used to visit their village for selling medicines and he gave his mobile phone No. 7635892830 to one of his neighbors for making contact with him if someone falls sick.

2. On the date of occurrence informant lodged FIR before Sidli P.S. After receiving the FIR, the O/C of Sidli P.S. registered a case being numbered as Sidli P.S. Case No. 31/18 U/S 376 IPC R/W Section 6 of POCSO Act and entrusted S.I. Nikhil Ch. Ray to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C, collected the medical report and arrested the accused. After completion of investigation, the investigating Officer submitted charge-sheet against the accused Asman Ali U/S 376(AB) IPC R/W 6 of POCSO Act before this court as offence under POCSO Act is triable by Special Court. Accused was produced before this court after his first remand. Therefore receiving charge sheet, this court furnished the copies of relevant documents to the accused person when he was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge U/S 376AB IPC read with Section 6 of POCSO Act was framed against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. During entire trial, accused remained in judicial custody and he was tried as UTP.

3. In support of the case prosecution side examined as many as 19 (nineteen) witnesses including the M.O.s and I.O. Two witnesses were examined as CWs.

Following witnesses were examined:-

(1) Victim Miss 'X' (name is withheld) as PW 1

- (2) Shri Lakhiram Narzary (Informant) as PW 2
- (3) Smt. Rani Narzary as PW 3
- (4) Shri Maniram Narzary as PW 4
- (5) Shri Pronoy Basumatary as PW 5
- (6) Smt. Swmkhri Basumatary as PW 6
- (7) Smt. Alep Narzary as PW 7
- (8) Shri Sameswar Narzary as PW 8
- (9) Smt. Joysri Basumatary @ Haithu as PW 9
- (10) Smt. Sochita Borgoyary as PW 10
- (11) Shri Bisti Narzary as PW 11
- (12) Shri Birkhang Narzary as PW 12
- (13) Shri Bidaram Basumatary as PW 13
- (14) Smt. Ranjila Basumatary as PW 14
- (15) Sri Pranab Basumatary as PW 15
- (16) Shri Mukta Basumatary as PW 16
- (17) Dr. Paltanga Kungur Brahma (M.O.) as PW 17
- (18) Dr. Lucky Basumatary (M.O.) as PW 18
- (19) S.I. Nikhil Ch. Ray (I.O.) as PW 19
- (20) Mrs. Pranami Goswami J.M. 1st class as CW 1
- (21) Shri Bhaben Das as CW 2
- 4. Seizure lists were exhibited as Ext.1, Ext.3 and Ext.6. Statement of PW 10 Sochita Borgoyary U/S 164 Cr.P.C. was exhibited as Ext.2. OPD prescription card was exhibited as Ext.4. Medical report was exhibited as Ext. 5. Sketch map was exhibited as Ext.7 and charge-sheet was exhibited as Ext.8. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext.9. Statement of PW 3, the mother of victim U/S 164 Cr.P.C. was exhibited as Ext.10. FIR was exhibited as Ext.11.
- 5. Defence plea is of total denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced no evidence.
- 6. Heard argument from both sides. I have perused the entire evidence on record. I have also considered the statement of the accused recorded u/s 313 Cr.P.C.



7. **POINTS FOR CONSIDERATION**:-

For the offence U/S 376AB of IPC

1. Whether on 01.09.2018, at about 8.45 AM, in the house of the informant situated at Village Aminpara under P.S. Sidli, the accused committed rape upon Miss 'X' (name is withheld), minor daughter of the informant aged below 12 years?

For the offence U/S 6 of POCSO Act

2. Whether on same date, time and place, the accused committed aggravated penetrative sexual assault upon Miss 'X' (name is withheld), minor daughter of the informant aged below 12 years?

DISCUSSION, DECISION AND REASONS THEREFOR:-

- 8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned both points simultaneously for the sake of convenience.
- 9. PW 1 is the victim Miss 'X' (name is withheld). The witness expressed her reply through gesture only. Her mother explained the meaning. She stated through gesture that the person touched her breast and that the person committed sexual assault by pointing to her vagina and gagged her (pointing her mouth with her two hands).
- 10. PW 2 is the informant as well as father of the victim. He deposed that age of his daughter was about 11 years but she could not speak properly due to disease. Occurrence took place on 01.09.201. At that time, he was at Karigaon market and when he returned from the market, his wife reported him that a Muslim boy committed sexual intercourse with his daughter. When he reached his home, the person had already fled away. His daughter was sleeping and she could not stand properly. On being asked, she

told through gesture that accused gagged her and committed sexual intercourse with her. He searched the person but could not find hm. Accused visited his house for three times prior to the incident to supply some medicines for recovery of his daughter. At the time of occurrence, his daughter and wife were present in his home. At that time, he did not know the name of the accused but after the incident he knew his name from other villagers as Asman Ali. During cross-examination, he deposed that he had three children. Khwmta Narzary is his eldest son and his age is about 15 years. Victim is his second child. He saw blood stain in the bed on which victim was sleeping and he also saw blood stain on her wearing apparels.

11. PW 3 is the mother of the victim as well as eyewitness of the occurrence. She deposed that she knew the accused but did not know his name. The accused visited their house three times prior to the incident. Age of her daughter is about 11 years but she could not speak properly due to disease since her childhood. Occurrence took place on 01.09.2018. On that day, in the morning, her husband went to market. She was present along with victim and her youngest daughter. At about 8 AM, accused visited their house and showed a bottle of medicine for brain and price of which was about Rs. 1000/-. She decided to purchase the medicine for which he along with her youngest daughter went to the house of one Haithu for collecting money. After 15/20 minutes, she returned to her home but she did not find both the accused and victim in verandah. Then she entered his house and saw that both accused and victim were in naked state within their bed room. Victim was lying on the bed and accused was standing in naked state. She pushed the accused but he immediately put on his dress and fled away. When she asked the victim about the incident, she told through gesture that accused gagged her and committed sexual intercourse. She also told her that she felt pain on her private part and this witness saw that blood was oozing from private part of the victim. When she made hue and cry, villagers came to her house and at about 9 AM, when her husband returned, she reported the matter to him. During cross-examination, she deposed that bottle of the medicine was showed to the villagers. At Sidli P.S., lady police officer interrogated her and victim. Later on, she deposed that a male police officer interrogated her and victim at Sidli P.S. Police did not seize any bag containing

medicine from her house. When her husband returned to their home, there were three persons in her house. Bidaram along with two women were present at that time. It was suggested that she did not state before police as well as Magistrate that when she entered the house she saw that both accused and victim were in naked state but same was denied by this witness. It was also suggested that due to ill-advice of some persons, this case was filed narrating a false story but same was also denied by her.

12. PW 4 is the younger brother of the informant. He deposed that he know the accused. Occurrence took place on 01.09.2018, at about 8 AM. At that time, he was in Karigaon market and when he returned to his home at about 3.30 PM, he heard from the mother of the victim that accused committed sexual intercourse with the victim. At that time, age of his niece was about 11 years. When he asked the victim, she through gesture stated that accused had committed sexual intercourse with her. Accused visited the house of the informant for three times prior to the incident for selling medicine. He used to visit their village for selling medicine. During cross-examination, he deposed that his brother accompanied him to Karigaon bazaar. His statement was recorded by police personnel of Garubhasa Out Post but he did not state before the police that accused visited to their village to sell the medicine and he came to the house of the informant three times prior to the incident.



13. PW 5 is Sri Pronoy Basumatary, who deposed that occurrence took place on 01.09.2019. On that day, at about 8 AM, he was returning from Dotoma to his home. On the way, in front the house of the informant, he found some persons were loitering and searching some person who allegedly committed rape upon the 11 years daughter of the informant. He went to the house of the informant and found the victim. He and other persons wanted to know the actual fact of the case from the mother of the victim because victim could not speak properly. He knew that someone committed rape upon the victim but he did not know the person who allegedly committed rape upon the victim. He also knew that a person used to visit the house of the informant to sell some medicines and that person committed the rape as reported by the mother of the victim. During cross-examination, he deposed that he stated

before the I.O. that his house was situated at Bhur Tiniali. He was coming alone on motorcycle. He knows Bidaram. He did not witness the occurrence but he heard from the mother of the victim and Bidaram.

14. PW 6 is Smt. Swmkhri Basumatary, who deposed that age of the victim is about 11 years. Occurrence took place on 1st day of Assamese moth of 'Bhadra'. At that time, she was in his home which is situated adjacent to the house of the informant. Occurrence took place on Saturday, at about 8 AM. On hearing cry of the victim, she came to the house of the informant and saw that accused fled away on his motorcycle. She also noticed that blood was oozing from the private part of the victim. The mother of the informant told her that accused committed rape upon the victim and she showed the private part of the victim. Victim was in weak. During cross-examination, she deposed that she stated before the villagers that she went to the P.O. after one hour and knew about the incident from the mother of the informant. She deposed before this Court as tutored by the villagers.

- 15. PW 7 Smt. Alep Narzary deposed that age of the victim is about 11 years. Occurrence took place on 01.09.18, at about 8 AM. At that time, she was in her home. When she heard that victim was crying, then she came to the house of the victim. Then mother of the victim showed the private part of the latter. She saw there was dirt on her private part. During cross-examination, she deposed that she came to know that a doctor committed rape upon the victim.
- 16. PW 8 Someswar Narzary deposed that occurrence took place on 01.09.2018. At that time, he was absent. When he returned from his work at about 3 PM, then the village headman told him that police would come to the house of the informant on next day for which he would be present thereon. On the next day, he went to the house of the informant. Then the mother of the informant told him about the incident.
- 17. PW 9 is Smt. Joysri Basumatary @ Haithu, who deposed that she knew the informant as well as victim. She knew the accused when he came to her house to sell medicine for one time. Age of the victim was about

11 years. Occurrence took place on 01.09.18, at about 8.30 AM. She was in her house. Then mother of the victim came to her home for want of money but she did not pay. She returned to her home. After that she called her by shouting. He saw the accused fled away on the motorcycle. When she reached the house of the victim, her mother reported her that at the time of her returning, she saw that accused had committed sexual intercourse with her. Then she along with mother of the victim put off her panty and found dirty on her private part. During cross-examination, she deposed that on the date of occurrence, her husband and son were present in her home. There are two houses in between her home and the house of the informant. Those houses are belonged to Pujam Basumatary and Swmkhri. Swmkhrwi was present in her home but other family members were absent.

- 18. PW 10 Smt. Sochita Borgoyary deposed that occurrence took place on 01.09.2018, at about 8.30 AM. At that time, she was present in her home. Then mother of the victim called her and asked her to give the phone number of the accused. She had the mobile phone number of the accused because he gave her a receipt when she purchased medicine. She supplied the phone number through the receipt. When she reached the house of the informant, there were several villagers gathered thereon. Then she heard that accused had committed sexual intercourse with the victim. She came to know from the victim that accused committed sexual intercourse with her. She was in serious condition. During cross, she deposed that she had mobile phone number of Airtel Company. She could not say the phone number of the accused. She further stated that police wrote the phone number of the statement. No receipt was exhibited by prosecution through this witness.
- 19. PW 11 is Shri Bisti Narzary, who deposed that he knows the informant as well as the victim. He also knows the accused because he used to visit their village to sell medicine. Age of the victim was about 11 years. Occurrence took place on 1.9.18, at about 7/8 AM. He was busy with fishing near his home. Then he heard that mother of the victim made hue and cry stating that her daughter was raped by a person who was coming on

motorcycle. He saw that accused was riding a motorcycle and left the place. He informed one Bidaram through mobile phone to catch the person.

- 20. PW 12 Birkhang Narzary deposed that occurrence took place on 01.09.2018, at about 8.30 AM. At that time, he was busy with ploughing at field about 100 metre away from the P.O. He heard that mother of the victim made hue and cry stating 'dhar' 'dhar'. Then she came to the house of the informant where the mother of the victim reported him that accused had committed sexual intercourse with her daughter. He found the victim in weeping condition. During cross, he deposed that he knew about the incident after police came.
- 21. PW 13 is Shri Bidaram Basumatary @ Haithu, who deposed that he knows the informant as well as the victim. He also knows the accused as he used to come to their village to sell medicine. Occurrence took place on 01.09.2018, at about 8.00 AM. He was in his home. He heard about the incident from the mother of the victim. She told him that on the date of occurrence, accused came to the house of the victim to sell medicine for recovery of disease of the victim. At that time, mother of the victim had no money for which she went to the house of one Joysrhee to collect money. When she returned from the house of Joyshree, she saw that accused was committing sexual intercourse with the victim within their house. She could not catch the accused, he fled away on his motorcycle and after hearing 'hulla', he came to the house of the victim. During cross, he deposed that he did not hear the incident from any other person except parents of the victim.
- 22. PW 14 Smt. Ranjila Basumatary deposed that occurrence took place on 01.09.2018, at about 8.00 AM. She was in her home. Hearing the hue and cry raised by the mother of the victim, she visited the place of occurrence. At that time, the age of the victim was about 11 years. She along with the mother of the victim and other women noticed bleeding on the private part of the victim. She also saw that accused was going on a motorcycle. She also heard from the mother of the victim that accused had committed sexual intercourse with victim for which blood was oozing from her private part. During cross, she deposed that she along with four/five women

came to the house of the victim and saw the bleeding on her private part. Joyshree Basumatary was also present and she accompanied her and she also noticed the bleeding injury on the private part of the victim.

- 23. PW 15 Shri Pranab Basumatary deposed that occurrence took place on 01.09.18 but he does not know about the actual incident. He was called by Sidli P.S. and he put his signature upon a seizure list by which a school bag was seized. During cross-examination, he deposed that he put his signature upon the seizure list at day time but he could not remember whether he put his signature upon a blank paper or filled up seizure list. He does not know the contents of the seizure list.
- 24. PW 16 Sri Mukta Basumatary deposed that he saw the accused when police arrested him. He saw the accused on 1st September, 2018, at about 9/9.15 AM. They also followed the police and accused on same date and went to Sidli P.S. On same day, at about 12 noon, he put his signature upon the seizure list by which police seized Ayurvedic medicine, mobile and a school bag. He put his signature upon the seizure list after it was written by police. During cross-examination, he deposed that he did not read the contents of the seizure list but he put his signature. When he put his signature on seizure list, there was no any other person at Sidli P.S. except Pranab Basumatary.
- 25. PW 17 is the Medical Officer before whom the victim was first brought for treatment. He deposed that on 03.09.2018, he was working as Sr. Medical & Health Officer at JSB Civil Hospital, Kajalgaon, Chirang. On that day, one patient, namely Miss 'X' (name is withheld), aged about 12 years, female of village Aminpara came to OPD JSB Civil Hospital, vide OPD registration No. 16213 dated 03.09.18 and he attended her. She was accompanied by her mother. Her mother complained about her vaginal injury. On the basis of said complain, he prescribed some medication and advised her to consult with a gynecologist. During cross-examination, he deposed that he did not examine the patient. He only referred her to concerned gynecologist. He does not know about the nature of injury or how it was caused. He only heard from the mother of the victim.

26. PW 18 is another Medical Officer, who examined the victim. She deposed that on 01.09.2018, he was working as Gynecologist at JSB Civil Hospital, Kajalgaon. On that day, she examined Miss 'X' (name is withheld) S/O of Shri Lakhiram Narzary of village Aminpara under P.S. Kokrajhar, Dist. Kokrajhar in connection with Sidli P.S. Case No. 31/2018 U/S 376 IPC R/W Section 6 of POCSO Act escorted by WHG Aleya Khatun of Sidli P.S.

There was history of sexual assault on 01.09.2018 at 8.45 AM in the house of the victim.

On examination, she found the following:-

On examination, she found the following:-

Height – 4 ft. 2 inch, Weight – 28 Kg, Chest girth – 27.5 inch, Abdomen girth – 25.5 inch, cm, Total number of teeth – 16 Nos. (Temporary teeth 5 Nos. and permanent teeth 11 Nos.). Space for 3rd molar teeth – Present. Scalp hair – Present. Axillary hair – present. Pubic hair – absent. Beards, mustaches and body hairs – absent. Breast budding is seen.

Menarche – Five months back according to mother. Menstrual cycle – regular. Last menstrual period cannot specify the date of LMP.

Genital organs and vulva – normal. Vulva – normal. Hymen is not intact, deficient in the posterolateral part. Vagina – normal. Evidence of veneral diseases – absent.

No injury marks seen on her body or private parts.

The patient already had taken bath and changed the clothes in which she was allegedly assaulted at the time of examination.

General mental condition - Conscious.

Co-operative, behavior is normal. Intelligence is below average. Gait – Normal.

On radiological investigation:-

(i) Right hand X-ray – Ulnar and radial physis present, not fused.

(ii) Right elbow joint – External epicondyle and head of radius not fused.

<u>Pelvic bone</u> – Iliac crest, anterior inferior iliac spine, pubic symphysis and ischeal tuberosity all appeared, not fused.

 $\underline{\text{Hip joint}} \ - \ \text{Lesser trochanter, appearing} \ - \ \text{on process} \ - \ \text{no}$ fusion.

Impression – In viewing the X-ray, films, the provisional diagnosis of age estimation is 11 years but not above 12 years.

According to the Medical Officer, the patient's age according to radiological investigation is above 11 years but not more than 12 years. There was no injury seen over the private parts or body. In the light of fact that the patient is of below average intelligence and there is deficient hymen and the fact that the patient had taken bath and changed her clothes prior to the examination, the possibility of sexual assault cannot be ruled out completely.

During cross-examination, she deposed that she has brought the medico legal register along with her. She has not mentioned registration number in her report. Police directly brought the victim to her. She was not referred any doctor. She further deposed that in a small hole of vagina, if a grown up man forcefully commits intercourse, there should be tears, rupture and laceration and profuse bleeding with severe pain. She cannot walk properly if it was happened. From her findings, she cannot point out immediate forceful penetration but hymen was got ruptured. She only found deficient hymen but not found any immediate rupture of hymen.

27. PW 19 is the I.O who investigated the matter. He deposed that on 01.09.18, he was serving as I.C. of Garubhasa O.P. under Sidli P.S. On that day, at about 4.35 PM, informant Lakhiram Narzary lodged an ejahar before the Sidli P.S. Concerned O.C. entrusted him for the investigation. After taking the charge of investigation, he recorded the statement of the informant, sent the victim to JSB Civil Hospital, Kajalgaon for examination, and recorded the statement of the victim in presence of her mother because victim was below average intelligence and her statement U/S 164 CrPC was also recorded in

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presence of her mother. Initially, the name of the accused was not mentioned in the FIR but his phone number was supplied. He collected the CDR of said phone number and according to given address in the CDR, he searched the accused and it was found that the subscriber of the given phone number was one Ajgar Ali, who was the father of the accused. It was also revealed during investigation that accused used the SIM card belonged in the name of his father Ajgar Ali. He collected the medical examination report of the victim, arrested the accused and Test Identification Parade was done in the district Jail, Kokrajhar. The victim could not identify the accused by her mother identified him. He recorded the statement of other witnesses, sent the mother of the victim to the Court for recording her statement U/S 164 CrPC, seized one piece of paper in which phone number was written, some medicines from the accused, one mobile handset belonged to the accused, one electoral identity photo, one bag from the accused, one bottle of medicine found in the place of occurrence, drew the sketch map of the P.O. and after completion of investigation, submitted charge-sheet against the accused for the offence U/S 376(AB) IPC R/W Section 6 of POCSO Act.

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CW 1 is Mrs. P. Goswami, the learned JMFC, Chirang, who 28. recorded the statement of the victim and her mother U/S 164 CrPC. She deposed that on 04.09.18, she was serving as Judicial Magistrate, 1st Class, Chirang, Kajalgaon. On that day, she has recorded the statement of victim Miss 'X' (name is withheld) aged about 11 years U/S 164 CrPC who was identified by WHG Aleya Khatun. She proved the statement of the victim as Ext.9 and her signatures therein as Ext. 9(1), 9(2) and 9(3). The victim stated in Boro language and her office peon Anjima Narzary interpreted the same. The statement was recorded in presence of her mother. On the same day, he had recorded the statement of Rani Narzary, the mother of the victim U/S 164 identified by WHG Aleya Khatun. She also stated in Boro language and same was interpreted by her office peon Anjima Narzary. She proved the statement of the mother of the victim U/S 164 CrPC as Ext.10 and her signatures thereon as Ext.10(1), 10(2) and 10(3). During cross-examination, she deposed that in Ext.9, she did not mention in what language the witness stated before him and under what language interpreter explained to her.

- 29. CW 2 is S.I. Bhaben Das, the then O/C of Sidli P.S. who deposed that on 01.09.2018, he was serving as O/C of Sidli P.S. On that day, at about 4.35 PM, one Lakhiram Narzary lodged an FIR before him. After getting the FIR, he registered Sidli P.S. Case No. 31/18 U/S 376 IPC R/W Section 6 of POCSO Act and entrusted S.I. Nikhil Ch. Ray for investigation. He proved the FIR as Ext.11 and his signature thereon as Ext. 11(1).
- After going through the entire evidence on record, I have found 30. that PW 3 Rani Narzary, the mother of the victim stated before this Court that she had witnessed the occurrence and from her other witnesses heard about the incident. Though PW 3, PW 6, PW 7, PW 9 and PW 14 stated that they noticed bleeding injury or dirt on the private part of the victim but Medical Officer, particularly PW 18, who examined the victim on 01.09.2018 at about 5.20 PM, had not seen any bleeding injury. During cross-examination, PW 18 stated that in a small hole of vagina, if a grown up man forcefully commits intercourse, there should be tears, rupture and laceration and profuse bleeding with severe pain. She cannot walk properly if it was happened. From her findings, she cannot point out immediate forceful penetration but hymen was got ruptured. She also explained that she only found deficient hymen but not found any immediate rupture of hymen. No any injury was found by her during the time of examination. Comparing the medical evidence with oral evidence I have found that no any injury or pain or laceration was detected by the doctor who examined the victim on the very day of occurrence at about 5.20 PM witnesses stated that they saw bleeding injury on the private part of victim. No any blood stained cloth was seized by the investigating Officer though P.W.2 stated that he saw blood stain on bed sheet and wearing apparels of the victim. From the record, it is revealed that case was lodged on 01.09.2018 at about 4.35 PM and victim was examined by the doctor at about 5.20 PM i.e. within one hour after filing of the case. After that on 03.09.18, victim was again examined by PW 17, another Medical Officer. He clearly stated that actually he did not examine the victim. He only referred her to Gynecologist because the mother of the victim reported him that PW 1 felt pain on her private part but it was not detected. So, it is found that PW 18, who examined the victim immediately after the alleged incident, did not find any kind of pain, laceration or injury. Therefore, medical evidence did not

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support the oral evidence given by PW 3, PW 6, PW 7, PW 9 and PW 14 and others who allegedly saw the bleeding on the private part of the victim. Interestingly, PW 6, during her cross-examination, stated that she was tutored to how to depose before this Court by the villagers.

- 31. Learned P.P. during the time of argument pointed out that in this case, statement given by the victim is sufficient to convict the accused. Moreover, PW 9 and PW 11 saw the accused when he fled away from the P.O. on motorcycle and considering the evidence of these two eyewitnesses, it is established that at the time of occurrence, accused was present and he fled away from the P.O. on motorcycle.
- As a reply to this point, learned defence counsel Mr. 32. Choudhury, submitted before this Court that in this case, no any motorcycle was seized which linked the presence of accused at P.O. Regarding other point, learned defence counsel agreed with the learned P.P. that in a case of sexual assault, sole evidence of victim is sufficient if she is normal in her intelligence. According to doctor's report, intelligence of the victim is below average. Moreover, she could not speak and hear. So, victim is not a normal girl with average intelligence. At this juncture, the victim may be tutored by her family members and others as intelligence of victim is below average. In this situation, on the sole basis of her testimony, accused cannot be booked for the offence in which severe punishment is given by the legislature. According to learned defence counsel, in this case, victim could not identify the accused during TIP though it was alleged by her mother (PW 3) and other witnesses that accused visited their house three times to sell Ayurvedic medicine. The accused was identified by the mother i.e. PW 3 only, who are not wholly reliable witnesses. In this regard, learned defence counsel pointed to her earlier statement given before the Magistrate U/S 164 Cr.P.C.
- 33. I have gone through it. It is found that at that time, she stated before the Magistrate that when he returned from the house of one Haithu, she saw that the boy had laid on her daughter in their bed and he was having sex with her. She further stated before the Magistrate that she clearly saw that he had inserted his penis into the vagina of her daughter. Then she

immediately rushed to him and the boy hurriedly closed the zip of his pant. In her later deposition, same witness before this Court stated that when she entered her house, saw that both accused and victim were in naked state within their bedroom. Victim was lying on the bed and accused was standing in naked state. She pushed the accused and latter immediately put on his dress and fled away. After comparing these two statements given by PW 3, I have found that in her earlier statement, she did not state that accused was in naked state but he was wearing a pant but opened the chain of his pant. When he saw the PW 3, he immediately closed the zip of his pant and fled away. In her earlier statement, PW 3 stated that he saw that the accused was engaging with sexual intercourse along with the victim. In her later deposition, she stated that accused was standing in naked state only. So, from her later deposition, it is found that she did not witness the actual sexual intercourse between the accused and victim. Other witnesses heard about the incident from the PW 3 as I have already mentioned. Some of the witnesses, therefore, stated that PW 3 told that she saw the accused when he was committing sexual intercourse with the victim. So, in my view, PW 3 is not reliable witness. She altered her version before this Court. The evidence given by PW 6 that she was tutored by the villagers also creates doubt about the actual incident because medical evidence did not support the allegation leveled by PW 3 against the accused. PW 2, the informant saw that bed sheet was blood stained but no such blood stained bed sheet was seized by police.

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In this case, another interesting fact I have noticed is that the accused was not apprehended by the villagers after knowing the incident. Though witnesses stated that they heard hue and cry made by PW 3 and they saw the accused was riding on motorcycle, but not a single person obstructed the accused or stopped the motorcycle on the way. They could not catch him within their village or nearby places. Learned defence counsel rightly pointed out that accused was not caught by the villagers within the area instead of which he was arrested at Chapaguri as alleged by the I.O. Identity of the accused was not confirmed at the time of his apprehension by the I.O. The I.O. during his cross-examination stated that accused was identified from his mobile phone number but mobile number belonged to his father. PW 10 Smt. Sochita Borgoyary stated that she supplied the phone number of the accused

to the mother of the victim through a receipt which was given to her by the accused because she purchased some medicines from him. Said receipt was not seized or produced before this Court. The same witness during her crossexamination deposed that actually police wrote the mobile number and handed over the paper to her. So, identification on the basis of mobile phone number as received from PW 10 is not believable because witness clearly stated that mobile number was supplied to her by police for which no any receipt was seized by the I.O. in connection with mobile number. The defence version is that there was some previous disputes between the Student Organization belonged to accused and some of the witnesses. Because of earlier rivalry, the members of other Student Union made a false case against the accused. The accused was apprehended by police from his home situated at Gauripur under Dhubri district. It is found from the record that accused was arrested at Bijni P.S. The case is under Sidli P.S. but accused was arrested at Chapaguri under Dhaligaon P.S. and shown as arrested at Bijni P.S. This anomalies have created doubt about the actual fact of arrest of the accused in connection with this case. Learned defence counsel further pointed out that the place of occurrence as alleged was not fallen under Sidli P.S. or within the district of Chirang. Actually, P.O. is fallen under district of Kokrajhar for which initially the I.O. wrote the Police Station and District of the witnesses as Kokrajhar which is revealed from the statement of the witnesses recorded U/S 161 CrPC. The PW 2 categorically stated that when he went to Police Station along with some of the witnesses to lodge FIR, on the way, in a tea stall, he met the I.O. Nikhil Ch. Ray and according to instruction of the I.O., FIR was written and he had no knowledge about the contents of the FIR. He only put his thumb impression upon the FIR. The informant had no knowledge about the writings of FIR. The PW 3 is found to be not a reliable witness as mentioned above. Other witnesses heard about the incident from the PW 3. PW 1, the victim is not a normal girl. Her intelligence is below average as pointed out by the doctor during the time of examination. So, her evidence cannot be treated as sufficient to book the accused. Moreover, though different witnesses stated that they had seen bleeding or dirt on the private part of the victim, but same was not found by the Medical Officer (PW 18) during the time of examination. So, evidence given by PW 3, PW 6, PW 7, PW

9 and PW 14 that they saw the bleeding is not believable. In the case under POCSO Act U/S 29 and 30, there are statutory presumptions of culpable mental state of the accused but these presumptions do not take away the burden of prosecution to prove their case beyond all reasonable doubt. The first burden upon the prosecution is to prove their case beyond all reasonable doubt. If prosecution proved the case, then only accused has burden to rebut the case or allegation by giving evidence that proof must be beyond reasonable doubt. In present case at hand, prosecution initially failed to establish the case U/S 6 POCSO Act beyond all reasonable doubt. When prosecution failed to establish its case beyond reasonable doubt, then giving of rebuttal evidence from the side of defence does not arise. So, offence of rape U/S 375 IPC is not proved because sexual intercourse as alleged is not proved. On the other hand, penetrative sexual assault is also not proved. As presence of accused and alleged intercourse is not proved beyond all reasonable doubt, accused cannot be booked for the offence either U/S 376AB of IPC or U/S 6 of POCSO Act. The both points mentioned above are remained as not proved beyond all reasonable doubt. Accused cannot be booked for offences mentioned above.

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ORDER

- 35. Prosecution failed to prove the case U/S 376AB IPC R/W Section 6 of POCSO Act against accused Asman Ali beyond all reasonable doubt. Accused is acquitted on benefit of doubt and set at liberty.
- 36. It is found from the record that accused has been languishing in jail since his arrest by police. So, Superintendent District Jail, Kokrajhar is directed to release the accused forthwith if he is not required in any other case.
- Seized article, if any, shall be disposed of according to law.
- 38. A copy of the Judgment shall be given to the District Magistrate, Chirang for information.

39. Given under my sign and seal of this Court on this the **19**th day of **August**, **2019**, at Kajalgaon, Chirang.

Gibyrgyoh Modalla (D.J. Mahanta) Special Judge Chir Chirang

Dictated and corrected by me,

(D.J. Mahanta) Special Judge, Special Judge Chirang.

APPENDIX

Prosecution witness:

PW 1 - Victim Miss 'X' (name is withheld)

PW 2 - Shri Lakhiram Narzary (Informant)

PW 3 - Smt. Rani Narzary

PW 4 - Shri Maniram Narzary

PW 5 - Shri Pronoy Basumatary

PW 6 - Smt. Swmkhri Basumatary

PW 7 - Smt. Alep Narzary

PW 8 - Shri Sameswar Narzary

PW 9 – Smt. Joysri Basumatary @ Haithu

PW 10 - Smt. Sochita Borgoyary

PW 11 - Shri Bisti Narzary

PW 12 - Shri Birkhang Narzary

PW 13 - Shri Bidaram Basumatary @ Haithu

PW 14 - Smt. Ranjila Basumatary

PW 15 - Shri Pranab Basumatary

PW 16 - Shri Mukta Basumatary

PW 17 – Dr. Paltanga Kungur Brahma (M.O.)

PW 18 – Dr. Lucky Basumatary (M.O.)

PW 19 - S.I. Nikhil Ch. Ray (I.O.)

CW 1 - Mrs. Pranami Goswami

CW 2 - Shri Bhaben Das

Exhibit (Prosecution):

Ext-1 Seizure list

Ext-2 Statement of PW 10 Sochita Borgoyary U/S 164 Cr.P.C.

Ext-3 Seizure list

Ext-4 OPD prescription card

Ext-5 Medical report

Ext-6 Seizure list

Ext-7 Sketch map

Ext-8 Charge-sheet

Ext-9 Statement of the victim U/S 164 Cr.P.C.

Ext-10 Statement of PW 3, the mother of victim U/S 164 Cr.P.C.

Ext-11 FIR

Material Exhibit (Prosecution):

Nil.

Defence Witness:

Nil.

Defence Exhibit:

Nil.

(D.J. Mahanta) Special Judge, Chirang