IN THE COURT OF THE SPECIAL JUDGE (POCSO): KAMRUP(M), AT GUWAHATI SESSIONS CASE NO.14/17

(Under Section u/s 376 of the IPC, r/w Section 4 of the POCSO Act, 2012)

Present: S.P. Moitra,

Special Judge

Kamrup(M), Guwahati

State of Assam

-Vs -

Mahananda Das

.....Accused Person

Appearance for the Parties:

For the State : Smt. Deepa Bezbaruah

.....Learned Special Public Prosecutor

For the accused : Sri Satyanarayan Nath, Lalit Kr Nath, B. Devi, D. Talukdar

.....Learned Advocates

Date of recording evidence: 05.12.2017, 30.01.2018, 03.03.2018, 25.05.2018,

25.06.2018, 28.08.2018,

Date of Argument : 20.09.2018

Date of Judgment : 28.09.2018

<u>JUDGMENT</u>

1. The facts constituting the case of the prosecution, as emanated from the written FIR (Ext.3), lodged by the informant (name withheld to conceal the identity of the victim), are that on 26.08.2015, at about 1:30 pm, while the victim (name withheld and

here in after referred to as Miss X), a minor girl of 8 years old was alone in the house, the accused person named above induced her to go to his rented house and thereafter committed penetrative sexual assault on her. When her mother came back to the house, she came to know about the incident from the minor victim.

- 2. On the basis of the written FIR (Ext.3), Gorchuk P.S Case No. 141/15 was registered u/s 4 of the Protection of Children from Sexual Offence Act, 2012, in short, POCSO Act, 2012. During investigation of the case, I/O recorded the statement of the witnesses, including the victim. The victim was sent for medical examination and her statement was also recorded u/s 164 of the Cr.P.C. The accused person was arrested and he was forwarded to judicial custody. On completion of the investigation, the accused person was charge sheeted u/s 376 of the IPC, r/w Section 4 of the POCSO Act, 2012.
- 3. The accused person, who was on Court bail, entered appearance after receiving the summons. Copies of the relevant documents were furnished to the accused, in compliance to the provision of Section 207 of the Cr.P.C. On consideration of charge, charge u/s 4 of the POCSO Act, 2012, r/w Section 376 of the IPC was framed. Charge was read over and explained to the accused to which he pleaded not guilty and stood to face the trial.
- 4. To bring home the charge, prosecution examined, as many as, 8 witnesses on its behalf including the M/O and I/O. Prosecution also exhibited some of the documents. The multicolour frock and the body colour panty of the victim were exhibited as material exhibits. The defence plea was of complete denial of any guilt. The statement of the accused was recorded u/s 313 of the Cr.P.C, in which too, the accused person pleaded his innocence and stated that he was implicated falsely in this case. Defence adduced the evidence of two witnesses on its behalf.
- **5.** I heard the argument advanced by the Learned Counsel for the parties.

6. Points for determination

Whether on 26.03.2015, at about 1:30 pm, the accused person at his rented house, situated at Gorchuk, behind SBI Gorchuk Branch, committed penetrative sexual assault on the victim (name withheld) aged about 8 years?

Decision and Reasons thereof

- 7. I have gone carefully through the entire evidence on record and the materials placed before me. To establish the offence u/s 4 of the POCSO Act, 2012, the prosecution must prove the following ingredients:-
 - 1. That the victim is a child below the age of 18 years;
 - 2. That the accused person had committed sexual assault on the child victim;
 - 3. That there was penetration of his penis to any extent, into the vagina of the child victim.
- 8. Now, let me consider, how far the prosecution remained successful in establishing the ingredients of the offence, punishable u/s 4 of the POCSO Act. PW.1 is the victim, who was aged about 9 years on the date of her examination. A preliminary examination was done to ascertain whether she had the ability to understand the questions and to give rational answers. On being so satisfied, her testimony was recorded. As she was below 12 years of age, she was not administered the oath. Her testimony reveals that about 10 months back or more, one day, there was no school and she was in the house. Her testimony further reveals that her mother went out for work and in the afternoon, she went out for playing with her friend Mamoni. She testified further that they were playing 'par-pani' and when she was coming back, she found petla (the accused person) on the road. She stated that she had no knowledge about his good name, but the accused person used to give her chocolate sometimes. She further testified that on that day too, the accused person asked her to go with him with the assurance of giving her chocolate. She deposed that she went with the accused person and added that the

accused person took her to a nearby jungle like place. However, she immediately deposed that she had forgotten the place and added that the accused person took her to his house. The witness narrated that on going there, the accused person asked her to lie down on the bed and thereafter he did all the bad works with her. She stated that the accused person also lied over her and she felt pain. The witness stated that there was bleeding and after doing all the evil things, the accused person left her on the road. She added that she then went back to her house and reported the incident to her mother. She testified that her mother took her to the police station and her father also went there. She added that police took her to the hospital and she was examined by the doctor. She also added that on the next day, she was taken to a Magistrate and she narrated everything there. She proved Ext.1 as her statement before the Magistrate and Ext.1(1) and Ext.1(2) as her signatures. She added that she took medicine for about four months. She also revealed that at the police station, she saw petla and added that police brought him there. She disclosed that she did not go to school for about 3 months. During cross examination, she denied the suggestion that she deposed before the Court under the instruction of her mother and on being tutored by her. She also stated that the jungle is at a distance of about 20 mins walk from their house. She stated that petla came to her house and added that he had a visiting term with her house. She further stated that before the incident her parents had no any dispute with petla. But after the incident they had a quarrel with petla. She stated further that petla has two wives and four daughters and added that they were not in the house.

9. If her testimony is considered with her previous statement before the Magistrate, it will be seen that she stated broadly in the same tune before the Ld. Magistrate, rather she stated more clearly before the Magistrate, because the statement was recorded only after 10 days of the occurrence and she had a fresh memory regarding the entire incident. She had stated that on the date of occurrence, she had gone to the house of the accused to play with his daughter and the accused person had sent his daughter to a shop giving her 5 rupee note and thereafter he opened her (victim) pant and had inserted his penis in her vagina(the witness described in her own language). She had also stated before the Magistrate that getting pain, she cried, but the accused person

gagged her mouth with his hand. She had also stated that as the daughter of the accused came back the accused person had left her and thereafter somehow she could manage to go back to her house. The minor inconsistencies appeared in her evidence are most natural at her age, particularly when the evidence was recorded before the Court after almost 3 years. When the occurrence had taken place, she was about 6/7 years old and it is most natural that she forgot the details of the incident and only she could remember the broad things which had happened to her. The Ld. Defence Counsel also tried to discredit her evidence by putting question whether there were tigers, bears in the said jungle and she with her self imagination imagined a situation and stated that in the jungle tiger and bears are there. For that reasons only her testimony could not be disbelieved. I find that her evidence is fully trustworthy and the defence failed to disprove her evidence.

10. Lending corroboration, PW.2 Bulu Begum, the mother of the victim, testified that the occurrence took place about 3 years back and on the date of occurrence, her husband went out in the morning for his work. She added that she also went out at about 10:00 am along with one of their neighbour Bina for going to Sonapur. She added that her daughter was aged about 7/8 years at that time and she told her to remain in the house. She added that accused Mahananda Das was their neighbour at that time and in between their house, there was a path. She stated further that his (accused) wife was also not in the house as she was working as maid. The witness further testified that she came back from Sonapur at about 7 pm and after coming back she called her daughter, but her daughter replied that she was not in a position to get up. She testified that she helped her to come and saw blood in her frock and panty. She deposed that on being asked, she (Miss X) told her that petla had done all the things to her. The witness clarified that her daughter had no knowledge about the actual name of accused Mahananda Das and she knew him as petla. The witness corroborated that she told her (PW.2) that petla had taken her to his house and thereafter he had committed sexual assault on her. PW2 stated that blood was still oozing from her private part and then she took her to the house of Bina Bharali, another tenant and Janu Begum also came there. She stated that they all saw her condition and thereafter advised her to go to the PS. The witness stated that she informed her husband over phone, who was then driving the vehicle of O/C, Paltanbazar. She added that her husband came to Gorchuk PS and lodged the FIR. She also stated that the police immediately came and arrested accused Mahananda Das. Her testimony also reveals that they all went to the P.S and at the P.S one woman officer asked her daughter about the incident. The witness disclosed that her daughter was in a semi conscious state and on seeing her condition, the officer told her to take her immediately to the hospital. She added that her (victim) blood stained frock and panty were seized by the police. He proved Ext.2 as the seizure list and Ext. 2(1) as her signature. She added that police took her to GMCH and after her examination, she was given medicines etc and the woman officer arranged for her shelter and treatment in an Ashram like place at or around Ulubari Majar. She stated that her daughter was kept there for about 1 month and about 3 days after, from that place, she was produced before the Court for recording her statement. She proved Ext.1 as the statement of her daughter and Ext.1(1) and Ext.1(2) as the signatures of her daughter. She testified that her daughter was not in a position to go to school for about 3 months and for her treatment and subsequent look after, they had to spend more than Rs. 50,000/-. During cross examination, the witness testified that after the incident, the accused person approached them to settle the matter amicably. She stated that the victim and her twin sister are the daughters of her previous marriage. She added that her first husband died and thereafter she got married with Azad Ali and he has been looking after since their age of 1 and half years. She also testified that the rented house where the occurrence had taken place, was surrounded by other houses and there were many other neighbours. But she hastened to add that at the day time, everyone goes out of the house. She stated that although her daughter was allowed to come to the house after one month, the doctor advised them not to send her to school.

11. Thus, I find that this vital witness fully corroborates the testimony of the victim. She gave a vivid description of the entire incident, she heard from her daughter immediately after the occurrence. Although she was not an eye witness of the occurrence, she narrated that she had seen blood stains at her frock and at her panty and blood was still oozing out from the vagina of the victim girl. She stated that the

victim girl was in a semi conscious state at that time and she was not even in a position to stand without help and assistance. Her testimony further reveals that she (victim) suffered for more than one month of the alleged occurrence. I find nothing to disbelieve the testimony of this vital witness. The defence could not disprove her testimony nor could bring anything that they had any inimical relationship with the accused for which, they might be interested to give evidence against him.

12. PW.3 (name withheld) is the informant of the case. He is the step father of the victim girl and he testified that Miss X is presently aged about 9/10 years. Broadly in the same tune, this witness stated that about 2 years back, the occurrence had taken place and at that time, he was driving the police vehicle of Paltanbazar P.S. He testified that on the day of occurrence, like other days he came out in the morning to his duty and his wife and his daughters were in the house. He also added that in the afternoon at about 3:30 pm, while he was going towards Birubari with the officer of Paltanbazar PS, suddenly he received a phone call from his wife. The witness testified that his wife told him to come back to the house hurriedly and then he thought that there must have been something and he asked her. He further testified that she (PW.2) told him that accused Mahananda Das @ Petla had committed sexual assault on his minor daughter. The witness stated that he reported the incident to his officer and he allowed him to go to the house immediately. The witness added that he also told him that he would inform Gorchuk P.S and immediately PW.3 returned back to his house and on going there he found that Gorchuk P.S had already taken his daughter to the P.S with his wife. He added that accused Mahananda Das @ Petla had also been taken to the P.S. The witness stated that thereafter he went to Gorchuk P.S and hearing about the incident in detail from his wife, he lodged the FIR. He proved Ext.3 as the FIR lodged by him and Ext.3(1) as his signature. The witness stated that after filing of the FIR, police took his daughter to GMCH and after her examination at GMCH, she was given medicine etc. and from there police officer took her to a place opposite to Nehru Stadium. He testified that she was kept there for about 1 day and thereafter she was taken to a place near Rupnagar. He added that young children are kept there and his daughter was there for 3/4 days. The witness testified that thereafter he took her back to the house. He added further that her statement was also recorded in the Court. He deposed that his daughter

was ill for about one month thereafter and was under treatment. He also added that up to 6 months, they had to provide treatment to her. He specifically stated that accused Mahananda Das, through others, offered him Rs. 1, 00,000/- to settle the case. During cross examination, the witness stated that he lodged the FIR on that very day. He added that he went to the P.S at about 4/4:30 pm. He also stated that it might be that FIR was lodged at 9 pm after the treatment of his daughter. He could not say how much time his wife was not in the house. He stated that he saw his daughter at the P.S and he asked his daughter too about the incident. He stated that she was crying all along and on his question, she indicated accused Mahananda Das, by raising her finger. During further cross examination, the witness stated that when he came to Guwahati to stay in that campus on rent, he met Mahananda Das and in between the two families, there was cordial relationship.

- any of his testimony before the Court. Of course, there is a time gap. He stated that he was informed at 3:30 pm, while he was driving the police vehicle and arrived at the house at about 4/4:30 pm. Save and except this discrepancy regarding the time of information, there is not even a single contradiction or omission in his testimony. He was a driver by profession and he went out in the morning to his job. Being the driver of a police vehicle, he remained busy and as such there may be discrepancies in disclosing the time. Particularly when the information was received, then also he was driving the police vehicle with an officer to take him to Birubari. Thus merely because there is a discrepancy in disclosing the time of receipt of the information, his entire evidence cannot be disbelieved, particularly when his evidence could not be otherwise disproved.
- 14. PW.4 Binu Bala Bharali is a neighbour of both the accused person and the victim girl. She has been residing in that campus for about 13/14 years and has been running a petty business there. She knew the accused person from before as the accused person was residing in the said campus as tenant. She also knows the victim and her mother. She testified that the occurrence took place about 3 years back and lending corroboration to the testimony of PW.2, she stated that she went to Sonapur on that day

and the mother of the victim also accompanied her. She further lends corroboration by stating that they came back to Gorchuk at about 6/6:30 pm. She added that her room is at the front and she entered into her room and the mother of the victim was staying in the last room of the line. She added that immediately after 10 minutes, she came to her room and requested her to go to her room. She added that she went there and in her presence, the mother of the victim asked the victim about what had happened and the victim told her mother that accused Petla @ Mahananda Das had sexually assaulted her. She added that hearing the same, she came back and thereafter they lodged the FIR and police arrested Mahananda Das. During cross examination too, she corroborated PW.2 by stating that they went to Sonapur at about 9:30/10 am and they came back in the evening.

- that the victim with her family used to reside in the inner side of the campus and she (PW.7) was residing by the road side. She testified that the occurrence took place about 3 years back and on the date of occurrence, she took her son to private tuition and came back to the house at about 5:30/6 pm. The witness testified that she played games with her son for sometimes and thereafter went to take him to study. She added that at that time, mother of the victim came to the house of Bina Bharali and was talking loudly. She added that hearing the same, she also went there and she heard from her (PW.2) that she was not in the house and after coming back, she made tea and thereafter called her daughter. She added that the mother of the victim also reported that as the victim was not coming out, she went to see and saw that she was lying in an unnatural way. The witness testified that mother of the victim came there to call Bina Bharali to her house to see what had happened to her daughter. This witness was not cross examined even.
- 16. The testimonies of Bina Bharali and this particular witness corroborated the testimony of mother of the victim. Although PW.7 was not an eye witness of the occurrence, she specifically corroborated the testimony of PW.2 that immediately after coming to the house and talking to her daughter, she rushed back to the house of Bina Bharali and reported the incident to her. Bina Bharali also lent corroboration to the

evidence of PW2 that in her presence, the victim was asked by her mother and the victim had told them that accused Petla @ Mahananda Das had sexually assaulted her.

17. Coupled with this, ocular testimonies of the witnesses received full corroboration from the testimony of the doctor. Dr. Anurupa Choudhury, an Asst. Professor in the Department of Forensic Medicine, GMCH, Guwahati examined the victim girl on the very next date of the occurrence, i.e, on 27.03.2015 in connection with Gorchuk P.S Case No. 141/15. Her evidence discloses that on physical examination, it was found that her (victim) height was 119 cm, weight was 20 kg, the chest girth was 55 cm, abdominal girth was 52 cm. She added that the victim had 20 teeth and all were temporary. She further added that her (victim) auxiliary hair and public hair did not develop and breast was childlike and she did not attain her menarche. She discloses further that on her genital examination, she found that her genital organs were developed. Her testimony disclosed that both labia majora were abraded (reddish scab) and outer aspect of both labia minora were abraded (reddish scab) and inner aspect of both labia minora were contused, bluish in colour. She added that hymen was intact, but red coloured, abrasions with oozing present at the margin of the hymnal orifice and it was tender to touch. Her evidence further reveals that cervix could not be examined, uteras was not palpable per abdominal and for detection of venereal disease, she was referred to ICTC, GMCH for needful. She testified that vaginal swabs were collected from hymen and labia minora. She added that there was no evidence of struggle on the wearing garment and blood stain was present on her under garment. She also added that no abnormality was detected on her mental condition. She discloses that on radiological investigation, X-ray of wrist, elbow and shoulder joint did not show epiphyseal union. She stated that there were six carpel bones on the wrist joint. She discloses that on laboratory investigation, microscopic examination of vaginal smears showed presence of spermatozoa, but no gonococci. In her opinion the victim was above 6 years and below 8 years, there was evidence of recent sexual intercourse, detected on her person, injuries detected on her private parts and the girl was referred to ICTC GMCH and Gynecological OPD for needful. She proved Ext.5 as the medical report and Ext.5(2), Ext.5(3) are her signatures. She also proved Ext.5(4) as the signature of Dr. R Chaliha, Head of the Department of Forensic Medicine, GMCH. During cross examination, she stated that it is not possible that such type of injuries might even be caused by dash against sharp object. Thus, the evidence of the doctor and the medical report gave clear finding of penetrative sexual assault on the minor victim. There was nothing abnormality that the doctor did not find any evidence of struggle on the wearing garment, because those garments had already been seized by the Investigating Officer for forensic examination, rather blood stain found by the doctor on her under garment at the time of examination are sufficient to show the correctness of the finding of the doctor that the blood was still oozing at the margin of the hymnal orifice, which is clearly suggestive of penetration.

18. The prosecution case also received further corroboration from the testimony of PW.6 Renu Bora Handique, Scientific Officer, Serology Division, Department of Forensic Science, Kahilipara. Her evidence discloses that on 04.04.2015, she was working as Scientific Officer, Serology Division, DFS, Kahilipara and on that day, she received a parcel in connection with Gorchuk P.S Case No. 141/15 from Departmental In charge for scientific examination. She stated that the parcel consisted of two exhibits. She described the articles as one mutli colour frock, which contains stain of suspected semen marked as A, which was again marked by her as Sero 3481/A, one body colour panty, containing stain of suspected semen marked as B, which was again marked by her as Sero 3481/B. She disclosed the result of examination as Ext No. Sero 3481/A and Sero 3481/B gave positive test for human spermatozoa. She proved Ext.6 as her report and Ext.6(1) as her signature. She also proved Ext.7 as the forwarding report issued by Director M.N Bora and Ext.7(1) as the signature of Director M.N Bora. She added that along with the forwarding report, the exhibits were also returned back. She also stated that SI Pallabi Saikia received back the exhibits along with the report on 05.06.2015. During cross examination, the witness stated that the exhibits which she had examined are not before the Court at the time of her examination. She stated that she received the exhibits on 04.04.2015. She further stated that the exhibits were brought to the DFS by special messenger. She stated that she opined that the stains were of human spermatozoa, but she cannot say nor she examined, who was responsible.

19. PW.8 Rinkumoni Kalita is the Investigating Officer of the case. At the relevant point of time, she was posted at All Women P.S, Panbazar. She testified that on that day on the basis of requisition from O/C Gorchuk P.S and the telephonic instruction from DCP, Central, she went to the Gorchuk P.S and she was entrusted to do the investigation on the basis of the FIR lodged by Md. Azad Ali. She proved Ext.3 as the said FIR and Ext.4 as the printed form of FIR, wherein she was instructed in writing to do the investigation of the case. She deposed that she found the victim and the informant at the P.S and immediately she examined them and recorded their statement. She also testified that on that very night, she took the victim girl to GMCH for medical examination, but on that night she could not be examined due to shortage of forensic medicine doctor. Her testimony also reveals that on that night, she seized the wearing apparels of the victim girl for forensic examination. She specifically stated that her frock and the panty were seized vide Ext.2 seizure list and proved Ext.2(2) as her signature. She further disclosed that she found the accused at the P.S on that very night and recorded his statement. She also disclosed that as the victim had clearly identified him as the assailant, she arrested the accused person for commission of offence u/s 4 of the POCSO Act. The witness also stated that on that very night, the victim was sent to Child line, Guwahati and the accused person was kept at Gorchuk P.S for the night and on the next morning she visited the place of occurrence and prepared a sketch map of the P.O. She proved Ext.8 as the sketch map of the P.O. She added that she also recorded the statement of other witnesses and thereafter she took the victim to GMCH for her medical examination. She added that it took two days for her medical at GMCH and after medical examination of the victim, she was forwarded to the Court on 30.03.2015 for recording her statement. She disclosed that the Ld. CJM instructed her to produce the victim to this Court for recording her statement and accordingly, the victim was produced in this Court on 31.03.2015 for recording her statement. She added that on that day too, it was not done and thereafter she came to the Court on 01.04.2015 for recording the statement of the victim. She disclosed that on 01.04.2015, the Ld. Special Judge passed an order directing the Ld. CJM for recording her statement u/s 164 of the Cr.P.C and accordingly it was recorded on 06.04.2015. The witness stated that during the entire period, the victim was placed at Child line, Guwahati and thereafter under the instruction of the Court, she was handed over to her guardian, i.e, to her father. The witness also deposed that on 04.04.2015, the seized apparels of the victim were sent to FSL, Kahilipara for examination and added that she collected the report of the FSL. She added that the seized articles were also returned back by the FSL in sealed condition. She proved Material Ext.1 as the frock of the victim and Material Ext.2 as the seized panty of the victim. Her testimony also reveals that finding sufficient materials against accused Mahananda Das, she submitted the charge sheet against him u/s 4 of the POCSO Act. During cross examination of the witness, the prosecution could not disprove her testimony. Her testimony fully corroborates the fact that the seizure of the frock (Material Ext.1) and the panty (Material Ext.2) of the victim girl and subsequent forwarding of the same to FSL, Guwahati. Her testimony also reveals that the victim specifically identified the accused person. She also corroborates the testimony of the witnesses that the victim was kept in the custody of the Child line till 06.04.2015, i.e, for about 10 days.

20. The accused person in his statement recorded u/s 313 of the Cr.P.C. denied the allegation and stated that he was falsely implicated. In support of his contention, he adduced the evidence of two witnesses. DW.1 Manju Das is the wife of the accused. She stated that on that morning, her husband went to Nongpo, Meghalaya. She also for the first time stated that prior to the occurrence, mother of the victim had a quarrel with her husband in connection with a mobile and in that connection, a police case was also filed. She tried to establish that out of grudge and previous enmity, the present case was filed. However, the accused Mahananda Das never stated that he had any quarrel with the mother of the victim in connection with any mobile handset or for any other purpose. Rather, he had stated in his statement, recorded u/s 313 Cr.P.C. that one Janu Begum had conspired with others to put him in troubles. Although DW.1 stated about a police case, the defence did not produce any such document to establish the authenticity of such allegation. Thus, the story of quarrel and the consequent lodging of police case could not be proved. During cross examination, DW.1 specifically stated that she has no personal knowledge about the occurrence. She admitted further that police came to her, but she did not state before the I/O that her husband had gone to Nongpo in the morning for his work. During cross examination, she even contradicted her evidence in chief by stating that regarding mobile handset no case was filed earlier and stated that she thinks that a mental difference was created in between them.

- 21. DW.2 Jamuna Barman simply stated that about 3 years back, she heard about the occurrence for which Mahananda Das was arrested. She also stated that she heard that he was falsely implicated in this case. Thus, regarding implicating of the accused falsely was only heard by her and her evidence in his regard remains hearsay. During cross examination she specifically stated that she has no personal knowledge about the occurrence and added that Mahananda Das brought her to adduce evidence. She further stated that the distance of her house from the house, where Mahananda Das was residing at the time of occurrence, was about 1 km. Thus, although the defence adduced evidence of two witnesses, the defence could not disprove the testimony of the prosecution witnesses, nor could destroy the evidence.
- 22. I have already noted that the oral testimonies of the witnesses got corroboration from the testimony of the doctor who had examined the victim on the next morning itself and the evidence of the doctor clearly reflects that there was an evidence of recent sexual intercourse detected on her person and the doctor also reflected the injuries on her private part which is more than sufficient to hold that there was forceful penetration. The ocular testimonies of the witnesses got further corroboration and the prosecution case got further strengthened from the testimony of PW.6, Renu Bora Handique, Scientific Officer, Serology Division, Department of Forensic Science, Kahilipara. The expert clearly reflected that the multicolour frock and one body colour panty were sent to her for examination and the examination of both the exhibits gave positive test for human spermatozoa. The defence also tried to submit that there might be any other person behind the occurrence and further submitted that she was too young to identify the accused. But it is to be remembered that she identified the accused person on that very night and there was no delay. She knew the accused person from before because the accused person was residing just near the rented accommodation where the victim was also residing and she also stated that accused person used to offer her chocolate regularly and on that day too, the accused person lured her to accept the chocolate by

going to his house. It is absurd that the victim, a minor girl of 6/7 years of age would falsely implicate the accused person for committing sexual assault on her to shield the actual culprit, that too without having any reason or rhyme. There was no room for doubt that there was forceful penetration to some extent and as such it is hard to believe that instead of identifying the actual culprit, she would identify another innocent person.

- **23.** Besides Section 29 of the POCSO Act, 2012 creates a statutory presumption in favour of the case of the prosecution. It reads as follows:
 - **"29**. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 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."

Thus, it creates a reverse burden upon the accused. It is a species of such exception to the ordinary rule of presumption of innocence. It is true that the prosecution must lay the foundation by adducing legally admissible evidence, but once the foundation is laid, it becomes incumbent on the accused to rebut the evidence. Here in the present case in hand, the prosecution remained successful to lay sufficient evidence against the accused person to prove that the accused person had committed penetrative sexual assault on the minor victim. Hence the presumption u/s 29 of the POCSO Act, 2012 will come into play. The defence could not discharge its reverse burden. The Ld. Defence Counsel relied upon the decision of the Hon'ble Calcutta High Court in **Sahid Hossain** Biswas Vs. State of West Bengal, reported in 2018 (1) Acquittal 311 (Cal) in support of his contention. But the facts of the case are completely different from the facts of the case in hand. In that case, the medical evidence totally contradicted the testimony of the victim. The defence also remained successful in establishing previous enmity in between the parties and as such, the Hon'ble Calcutta High Court opined that the defence remained successful in rebutting the statutory presumption. The same is clearly not the facts of the present case in hand.

- 24. Accordingly, I find that the testimony of the victim and other witnesses are fully trustworthy and believable and as it got corroboration from the testimony of the medical officer, as well as, Scientific Officer, there remains no room for any doubt that on that day, the victim girl was sexually assaulted by none other than the accused person. There was clear evidence of penetration and the section requires that even a slight penetration is sufficient to constitute the offence of penetrative sexual assault. Accordingly, I am constraint to hold that the prosecution successfully establishes the guilt of the accused, removing all shadow of doubt.
- 25. In result, accused Mahananda Das @ Petla is held guilty of offence, punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012, r/w Section 376 of the Indian Penal Code and accordingly he is convicted under the said section of law.
- **26.** Considering the heinous nature of the offence, I do not find it a fit case where the accused person can be granted the benefit of the Probation of Offenders Act or the benefit of Section 360 of the Cr.P.C.
- 27. I heard the convict on the point of sentence. His statement is recorded in a separate sheet, attached to the CR. In his statement, the accused person sought leniency.
- **28.** Keeping in view of the nature and gravity of the offence and other relevant factors for determining the quantum of sentence, I find that the nature of justice will be appropriately met, if the convict is sentenced to rigorous imprisonment for 10 years with fine of Rs.20,000/-, in default, to rigorous imprisonment for another 6 months. The period of imprisonment already undergone by the convict will be set off.

29. The amount of fine, if realized, will be used for payment of compensation to the

victim.

30. The case is also referred to the District Legal Service Authority for payment of

compensation to the victim under the Victim Compensation Scheme.

31. The seized articles (Material Exhibits) are before the Court. The same may be

destroyed after waiting for the appeal period.

32. The convict has been explained his right to prefer the appeal and even jail

appeal.

33. Free copy of the judgment be given to the convict. Also, copy of the judgment be

sent to the District Magistrate, Kamrup (M), Guwahati under the provisions of section

365 of the Cr.P.C.

34. Given under my hand and seal of this Court on this 28th day of September, 2018.

(S.P. Moitra)

Special Judge, Kamrup(M), Guwahati

Dictated & corrected by me.

(S.P. Moitra)

Special Judge, Kamrup(M), Guwahati

APENDIX

(A) Prosecution Exhibits:

Ext-1 : Statement of the victim recorded u/s 164 of the Cr.P.C.

Ext-2 : Seizure list

Ext-3: F.I.R

Ext-4: Printed form of F.I.R

Ext-5 : Report of the doctor

Ext-6 : Report of Serology Division

Ext-7: Forwarding of returning the exhibits

Ext-8: Sketch Map

Ext-9: Charge sheet

Material Ext.1: Multicoloured Frock of the victim

Material Ext.2: Body colour panty of the victim

(B) Defense Exhibit : Nil

(C) Court Exhibit : Nil

(E) Prosecution Witnesses:

PW-1: Janmoni Begum

PW-2 : Bulu Begum

PW-3 : Md. Azad Ali

PW-4 : Binu Bala Bharali

PW-5 : Dr. Anurupa Choudhury

PW-6 : Renu Bora Handique

PW-7: Purnima Biswas

PW-8: Rinkumoni Kalita

(F) Defense Witnesses

DW-1 : Manju Das

DW-2 : Jamuna Barman

(G) Court Witnesses : Nil.

(S.P. Moitra)

Special Judge,

Kamrup(M), Guwahati