HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 19/2018

UNDER SECTIONS: 376 IPC

READ WITH SECTION 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

NIBASH CHANDRA BHAKAT

PRESENT:- DIPAK THAKURIA, B.A., LL.M., AJS
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
A. U. AHMED, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 22-06-2018, 21-07-2018, 27-08-2018, 13-09-2018, 21-02-2019.

DATE OF ARGUMENT:- 12-04-2019.

DATE OF JUDGMENT :- 24-04-2019.

JUDGEMENT

1. Accused Nibash Chandra Bhakat stands trial for the offences punishable under section 376 IPC read with section 4 of the POCSO Act for allegedly committing rape or penetrative sexual assault to a minor girl on 03-05-2017 at about 1.30 p.m. in her school under Golokganj police station.

- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 03-05-2017 the complainant lodged a written ejahar before the in-charge of Halakura police check post against accused Nibash Ch. Bhakat with an allegation that on that day while her 12 year old minor daughter at about 1.30 p.m. entered into the wash room at her school, then the accused entered into the wash room, locked the room from inside, gagged her mouth and by force fulfill his lust. The daughter of the complainant somehow able to rescue her from the clutch of the accused and informed about the incident to the head mistress of the school.
- **3.** After receiving the ejahar, in-charge of Halakura police check post forwarded the ejahar to Golokganj police station where a case as Golokganj P. S. Case No. 375/2017 under section 354-A of IPC read with section 8 of the POCSO Act was registered.
- **4.** On 09-05-2017 the Officer-in-charge of Golokganj police station filed a petition before the Special Judge with a prayer to substitute section 376 IPC read with section 4 of POCSO Act instead of section 354-A IPC read with section 8 f POCSO Act. My learned predecessor vide his order dated 09-05-2017 allowed the prayer of the Officer-in-charge.
- **5.** The I. O arrested the accused, produced him before the Court and the Court remanded him to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C. Also recorded the statement of the victim girl under section 164 Cr. P. C. By completing the investigation, I. O. has submitted charge sheet against the accused person to prosecute him under sections 376 IPC read with section 4 of POCSO Act.
- **6.** During investigation the accused was granted bail.
- **7.** Cognizance of the case was taken in charge sheeted sections and issued the Court process against the accused. The accused appeared in the Court and he was allowed to remain on previous bail.
- **8.** Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under section 376 IPC read with section 4 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **9.** The prosecution examined eight witnesses including investigating officer and closed the evidence.

- **10.** Judicial Magistrate K. Bora who recorded the statement of the victim girl and two medical officers were examined as Court witness.
- **11.** During trial the accused defaulted and NBW/A was issued against him. The accused was arrested by police and he was remanded to judicial custody.
- **12.** After completion of the prosecution evidence and recording the statements of Court witnesses the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence .
- **13.**Heard learned counsels appearing for the parties and perused the evidence on record.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 03-05-2017 at about 1.30 p.m. at the premise of Jinkata Nidhiram Bhakat M. V. School under Golokganj police station committed rape on the minor daughter of the complainant and thereby the accused is liable to be punished under section 376 IPC?

Whether the accused on the same day time and place committed penetrative sexual assault on the minor daughter of the complainant and thereby the accused is liable to be punished under section 4 of the POCSO Act?

DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

14.In order to establish the charges framed against the accused, the prosecution has examined eight witnesses. Among them P. W. 1 Dr. Mahammad Laskar Ali who ascertain the age of the victim girl and exhibited his report as Ext. 1 and the X-ray plate as Ext. 2. P. W. 2 Dr. Muskura Ahmed is the medical officer who examined the victim girl on 04-05-2017 at Dhubri Civil Hospital in connection with the case and exhibited her report as Ext. 3. P. W. 3 is the complainant and the mother of the victim girl who exhibited the

- ejahar as Ext. 4. P. W. 4 is the victim girl who exhibited her statement recorded under section 164 Cr. P. C. as Ext. 5. P. W. 5 Basanti Sarkar and P. W.6 Anjali Ray are the head mistress and the choukider respectively of the school where the victim girl studied, P. W. 7 Jadu Nath Bhakat is the member of the Jinkata Nidhiram Bhakat M. V. School and P. W. 8 Satin Singh is the investigating officer who exhibited the seizure list as Ext. 6, Sketch map of place of occurrence Ext. 7 and charge sheet as Ext. 8.
- **15.**Community Health Officer Mintan Ch. Pradhani was examined as C. W. 1, Dr. Asmat Ali Sheikh who was the medical officer of Halakura hospital was examined as C. W. 2 and K. Bora is the Sub-Divisional Judicial Magistrate Dhubri who recorded the statement of the victim girl under section 164 Cr. P. C. was examined as C. W. 3.
- **16.** The defence examined none. Plea of the defence is total denial of the case.
- 17. Learned Special Public Prosecutor B. R. Basumatary has submitted that the victim girl at the relevant time was a student of class VII of Jinkata Nidhiram Bhakat M. V. School. On the day of the incident she went to wash room of school and then the accused who was working in that school as plumber committed rape on the victim girl. The victim girl immediately informed the matter to the head mistress of the school and she was sent to her home. Her mother was informed about the incident. The mother of the victim girl asked her daughter what had happened and the victim girl disclosed everything. The complainant immediately called a doctor whom the Court examined as Court witness No. 1. As per advice of C. W. 1 the victim was taken to Halakura hospital where the victim was examined by C. W. 2. The complainant lodged the ejahar without wasting time. The witnesses examined by the prosecution and Court witnesses supported the case of the prosecution. The victim girl described how she was molested by the accused. The statement of the victim girl given before Judicial Magistrate and the deposition given by her in the Court are found consistent and trustworthy. There is nothing to disbelieve the prosecution witnesses as well as the Court witnesses. The prosecution is able to establish the charges framed against the accused beyond all reasonable doubt. So, has prayed to hold the accused guilty under framed charges and impose adequate punishment to him.
- **18.** On the other hand learned counsel appearing for the defence A. U. Ahmed has submitted that the charges framed against the accused are very serious in nature. It is the duty of the prosecution to establish the charges against the accused beyond all

reasonable doubts. On the next day of the incident the victim girl was produced before the medical officer at Dhubri Civil Hospital for her medical examination. The victim was examined by a lady gynecologist; but she found nothing abnormal. On the previous night the complainant called two medical practitioners whom the Court examined as C. W. 1 and C. W. 2. C. W. 1 did not examine the victim girl and C. W. 2 is an Ayurvedic doctor. He is not expert to say whether there was rape or not. As the medical officer does not support the case of the prosecution; so, question of committing rape by the accused does not arise. Besides it the alleged incident took place at about1.30 p.m. in school compound. It is not believable that the accused would dare to commit rape on a girl in presence of teachers and students. The evidences led by the prosecution are not sufficient to constitute the charges framed against the accused. The prosecution has failed to establish the charges against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.

- **19.**Before we proceed, let us reproduce the material parts of the witnesses examined by the prosecution during trial and the deposition of Court witnesses.
 - **19.1** P. W. 1 Mahammad Laskar Ali is the medical officer of Dhubri Civil Hospital. He has deposed that on 04-05-2017, he was posted as Medical & Health Officer-I at Dhubri Civil Hospital, Dhubri. On that day, he examined the victim escorted by WHG Tapati Ray in connection with Halakura PP GDE no. 63 dated 03-05-2017. To ascertain the age of the girl, X-ray was done and after perusal of the X-Ray plate he find the followings:

<u>Left wrist joint</u>: Lower end epiphysis of radius is not fused which means the age of the girl is less than 16 years.

<u>Left elbow joint</u>: Radial head epiphysis is fused which means the age of the girl is more than 14 years.

<u>Left iliac crest</u>: Iliac crest epiphysis is not fused which means the age of the girl is less than 17 years.

<u>Impression</u>: Approximate Radiological age of the girl is 15 years. Ext-1 is the report prepared by him and Ext- 1 (1) is his signature therein. Ext-2 is the X-ray plate. In cross examination he has stated that the word Radius is not mentioned in his report.

19.2 P. W. 2 Dr. Muskura Ahmed is the Sr. Medical Officer who examined the victim girl. She has deposed that on 04-05-2017, she was posted at Civil Hospital, Dhubri as Sr. Medical & Health Officer, Dhubri. On that day, she

examined the victim girl in connection with Golokganj PS case no. 63/17. The victim was brought by WHG Tapati Bala Ray. According to the victim, on previous date she went to school toilet and then one person entered into the toilet and did physical assault to her by force. On examination, she found the patient was normal. She detected some scratches and abrasions over her both hands. She did not find any evidence of sexual intercourse / assault on the victim at the time of examination. Ext-3 is the report prepared by her and ext-3 (1) is her signature therein.

19.3 P. W. 3 is the complainant and the mother of the victim girl. She has deposed that her daughter on the day of recording her deposition in the Court was just 13 years. She knows the accused. Her daughter is a student of Jinkata Nidhiram Bhakat M.V. School. Last year she was studying in class VII. On 03-05-2017, at about 03:30 PM she met Bhadoi Pathak who is a teacher of the school of he daughter. She told her that an incident had taken place with her daughter in the school. She had not disclosed in details. She immediately visited the school of her daughter and met the Head Teacher Basanti Sarkar. On being asked, the Head Teacher of Jinkata Nidhiram Bhakat M.V. School told her that she engaged one Nibash Ch. Bhakat to repair the bathroom fittings in the school toilet. She has also disclosed that her daughter told her that while her daughter went to the school toilet then the accused caught her, removed her dress and committed rape on her. As on that time, the school time was over, so her daughter returned home. She immediately returned home and found that her daughter was crying. On being asked, she told her that while she went to school toilet during school hours then the accused Nibash Bhakat caught her and committed rape on her. She examined her daughter and found blood stains in her clothes. Her daughter was suffering from waist pain and unable to walk. Thereafter, she called Dr. Mintan Ch. Pradhani. Said doctor examined her daughter. Thereafter, she took her daughter to Halakura PHC where Dr. Asmat Ali examined her. On that day, she lodged a written ejahar before I/C, Halakura Police outpost. The I.O. recorded her statement. Next day, the I.O. produced her daughter for medical examination at Dhubri Civil Hospital. The statement of her daughter was also recorded in the court. She handed over the panty of her daughter to police. Police seized the birth certificate of her daughter and given jimmah to her. Her daughter is suffering from epilepsy and neurological problem. Her

- memory is not sharp. She has exhibited the ejahar lodged by her Ext-4 and also authenticated her signature therein as Ext-4(1).
- 19.4 In cross-examination she has denied the suggestion of the defence that she did not disclosed before the I.O. that she was informed about the incident by Bhadoi Pathak on the day of incident, in her residence she noticed that her daughter was crying and also noticed blood stains in the cloths of her daughter. She has also denied the suggestion of the defence that she did not disclose before the I.O. that her daughter was examined by Dr. Asmat Ali of Halakura PHC. She has denied the suggestion of the defence that she did not hand over the panty of her daughter to police and she detected injury marks in the waist of her daughter and her private parts.
- 19.5 P. W. 4 is the victim girl. She has deposed that complainant is her mother. She is studying in class VIII at Jinkata Nidhiram Bhakat M.V. School. In the last year, one day, she went to school toilet and then the accused Nibhas Bhakat entered into the toilet and removed her cloths, touched her body and committed rape on her and told her that if she disclosed the incident to anyone, he would kill her. Thereafter, she told the incident to school teacher and also told the incident to her mother. She was examined by doctor and her statement was recorded in the court. She has exhibited her statement as Ext-5 and also authenticated her signatures thereon as Ext-5(1) and 5(2).
- 19.6 In cross-examination she has stated that students and teachers were present in the school on the day of incident. There are two toilets in her school. At the time of incident, she raised alarm, but none had come to the bathroom. She told the incident to her Head teacher Basanti Sarkar and one Baneswar Ray. The bathroom can be bolted from the inside. She has denied the suggestion of the defence that the accused did not misbehave her and also not threatened to kill her.
- 19.7 P. W. 5 Basanti Sarkar is the head teacher of the school where the victim girl studies. She has deposed that she knows the complainant. She knows the accused. The victim is the daughter of the complainant. On 03-05-2017, she was working at Jinkata Nidhiram Bhakat M.V. School as Head Teacher. At that time, the victim was studying in her school in class VII. On that day, at about 2:15 PM the victim came to her chamber and told her that on that day while she went to wash room then accused Nibash Ch. Bhakat misbehaved her by touching her breast. Then she informed the matter to Baneswar Roy

who was working in the school as Asstt. Teacher. Thereafter, she informed the matter over phone to the President of School Governing Body Upendra Nath Bhakat and Member Jadu Bhakat. As the President of School Governing Body Upendra Nath Bhakat was out of station, he could not come. Member Jadu Bhakat immediately came to the school. Thereafter, mother of the girl visited school and she informed her about the incident.

- 19.8 In Cross-examination she has stated that there are two toilets in the school campus. The toilets can be blocked from inside. When the victim told her about the incident then she was alone. She has denied the suggestion of the defence that she did not disclose about the incident to Upendra Nath Bhakat, Jadu Bhakat and Baneswar Roy and the victim did not disclose anything to her.
- P. W. 6 Anjali Ray is the Chowkidar of the school. She has deposed that she knows the complainant and accused. Victim is the daughter of the complainant. On 03-05-2017, she was working at Jinkata Nidhiram Bhakat M.V. School as Chowkidar. At that time, victim was studying in their school. On that day, at about 2:15 PM victim was crying in the Verandah of school toilet. She asked her what had happened and then she told her that the person who was repairing the pipe of toilet misbehaved her. During that period, accused was engaged to repair the pipes of school toilet. When victim told her the incident then she had not seen the accused on spot. Thereafter, she brought the victim to the chamber of Head Teacher Basanti Sarkar.
- **19.10** In cross-examination she has denied the suggestion of the defence that the victim did not disclose anything to her. At the time of incident teachers and students were in the school.
- 19.11 P. W. 7 Jadu Nath Bhakat was one of the members of School Managing Committee. He has deposed that he knows the complainant, accused and the victim girl. On 03-05-2017, at about 02:15 PM Head Teacher Basanti Sarkar of Jinkata Nidhiram Bhakat M.V. School over phone informed him that accused Nibash Bhakat who was working as plumber in the school misbehaved the victim. He immediately came to the school and informed the matter to the mother of the victim.
- **19.12** In cross-examination he has denied the suggestion of the defence that Head Teacher Basanti Sarkar of Jinkata Nidhiram Bhakat M.V. School did not disclose anything to him.

- **19.13** P. W. 8 Satin Singha is the investigating officer. He has deposed that on 03-05-2017, he was working at Halakura Police Check Post under Golokganj P.S. as In-charge as on that day the In-charge was on leave. On that day the complainant lodged a written ejahar before the Halakura PCP which he received and forwarded the same to Golokganj P.S. for registration of a case. The complainant in her ejahar stated that her 12 year old daughter was a student of Nidhiram Bhakat M.E. School. On that day at about 01:30 pm while her daughter went to the urinal then accused Nibash Bhakat inside the toilet gagged her mouth and did bad work with her. Her daughter was somehow able to run away and informed the matter to her Head Mistress. After receiving the ejahar O/C, Golokganj P.S. registered a case as u/s 354A IPC read with section 8 of POCSO Act and entrusted him to investigate the case. On the day of incident after receiving the ejahar he visited the house of the complainant situated at Gharialdanga Pt-II. He recorded the statement of the complainant and the victim girl. He brought the victim girl to Halakura CHC. Dr. Asmat Ali Sk examined the victim. He had not collected report from Halakura CHC. On that day at about 10:10 pm birth certificate of the victim girl was seized by him. The date of birth of victim was shown as 19-07-2005. The birth certificate was given jimmah to the complainant. Next day, at about 06:00 am he visited the place of occurrence i.e. Jinkata Nidhiram Bhakat M.V. School, inspected the place of occurrence and prepared a sketch map of place of occurrence. He recorded the statements of witnesses u/s 161 Cr.P.C. The victim was again sent to Dhubri Civil Hospital for examination and also sent to Dhubri court for recording her statement u/s 164 Cr.P.C. On that day the accused was arrested and produced him in the court. Thereafter, he collected the report from Dhubri Civil Hospital. During investigation, O/C, Golokganj P.S. filed a petition in the court with a prayer to substitute section 376 IPC, R/w section 4 of POCSO Act and the court allowed the prayer of O/C, Golokganj P.S. After completing the investigation, he submitted charge sheet against the accused u/s 376 IPC, R/w section 4 of POCSO Act. Ext-6 is the seizure list and ext-6(1) is his signature. Ext-7 is the sketch map and ext-7(1) is his signature. Ext-8 is the charge sheet and ext-8(1) is his signature.
- **19.14** In cross-examination he has stated that the complainant did not disclose before him that she was informed about the incident by Bhadoi Pathak on the day of incident and in her residence she noticed that her daughter was

- crying. The complainant did not disclose before him that she noticed blood stain in the cloths of her daughter. He seized no wearing apparel of the victim and the accused. He seized no document from school.
- 19.15 C. W. 1 Mintan Ch. Pradhani has deposed since 2012 he has been working as Community Health Officer at Halakura CHC. He knows the complainant. On 03-05-2017, at about 05:00 pm, the complainant called him to her house to examine her daughter who was just 12 years old. At that time, the girl was crying. She complained lower abdomen pain. On examination, he found mild bleeding from her private part. On being asked, the girl told him that in school one person named Nibash Bhakat in the bathroom sexually harassed her. He did not prescribe any medicine and advised mother of the patient to take her to CHC for better treatment.
- **19.16** In cross-examination he has stated that he is a Diploma holder in Medicine and Rural Health Care. He has not produced his appointment letter in the court. The complainant called him over phone. There were MBBS Doctors at Halakura CHC on that day. There was no Gynecologist at Halakura CHC. He found 3/4 persons in the house of the complainant. I.O. did not examine him. He has denied the suggestion of the defence that the victim girl did not tell him that in school one person named Nibash Bhakat in the bathroom sexually harassed her.
- **19.17** C. W. 2 Dr. Asmat Ali Sheikh has deposed that on 03-05-2017, he was working at Halakura CHC as Medical Officer (Ayurbedic). He received court notice and he brought Medico Legal Register of Halakura CHC and the prescription given by him to the victim. On that day, at 10:55 pm, he examined the victim, a girl of 12 years old at Halakura CHC. As per history of the patient there was forceful sexual intercourse on 03-05-2017 at about 01:30 pm. On examination, he found abdominal pain with mild per vagina bleeding. He also detected pain and swelling in her left forearm. He prescribed medicine and referred the patient to Dhubri Civil Hospital. He has exhibited the Medico Legal Register of Halakura CHC w.e.f. 24-01-2017as Ext-I. Ext-I (1) is the relevant page. Ext-I (2) is his signature. Ext-II is the prescription issued by him. Ext-II (1) is his signature.
- **19.18** In cross-examination he has stated that he is not a Gynecologist. In case of emergency OPD ticket is not necessary. He has denied the suggestion of the defence that he did not examine the victim and found no abdominal pain on

her and mild bleeding and also not issued prescription to her.

- 19.19 C. W. 3 K. Borah has deposed that on 04-05-2017, she was working as Sub Divisional Judicial Magistrate (S), Dhubri. On that day, she recorded the statement of victim girl aged about 12 years, in-connection with Golokganj P.S. Case No 375/2017 u/s. 354A IPC, r/w. Section 8 of POCSO Act, 2012 and she was escorted by WHG Tapati Ray. The victim girl was of a tender age and she asked some questions in order to ensure that she was fit to depose. The answers of the questions put to her ascertained that victim girl was found fit to depose and accordingly her statement was recorded u/s. 164 (5) Cr.P.C. She stated before her that Nibash Bhakat is known to her. On 03-05-2017 when she went to the toilet during school hours, Nibash Bhakat suddenly came from behind. Nibash Bhakat forcefully opened her salwar, pants and her undergarments and then touched her all over and raped her. She was hurt between her legs and it also started to bleed. Nibash Bhakat touched her all over her body and then threatened to tell her teacher that she is a bad girl who does bad things and ordered her not to say anything to anyone. He then went away. The bathroom was lonely. Then she went and told Basanti Bhakat about the incident. The statement of the victim girl has been recorded by her on the voluntary deposition of the victim and the same was read over and explained to the victim girl by her. Ext-5 is the statement of the victim recorded by her and ext- 5 (3) is her signature therein.
- **19.20** In cross-examination she has stated that the victim was escorted by WHG Tapati Ray. Her mother though was with her but at the time of recording her statement she was outside of the court. She has denied the suggestion of the defence that the victim gave her statement before her as she was tutored by her mother. She has further denied the suggestion of the defence that the victim was not able to understand the court procedure.
- 20. On perusal the evidence on case record it appears that the alleged incident took place in the wash room of the school compound of Jinkata Nidhiram Bhakat M. V. School. All the non-official witnesses have deposed that the place of the incident was the school toilet. The investigating officer on the next day of the incident visited the place of occurrence i.e. Jinkata Nidhiram Bhakat M. V. School and after inspection prepared the sketch map of the scene which the I. O. has exhibited as Ext. 7 and proved the same by

authenticating his signature thereon as Ext. 7 (1). On perusal the Ext. 7 it appears that the Head Mistress of the school showed the place of occurrence to the investigating officer. The defence raised no dispute regarding the place of occurrence. So, it is clear that the alleged incident took place in the wash room of Jinkata Nidhiram Bhakat M. V. School.

- **21** In a case under the provisions of POCSO Act the age of the victim girl is important. Section 2 (d) of the POCSO Act defines that a child under the age of 18 is child as per the Act. The complainant (P. W. 3) who is the mother of the victim girl has deposed that on the day of recording her deposition in the Court during trial i.e. on 21-07-2018 her daughter was 13 years old. The alleged incident took place on 03-05-2017. So, on the day of the incident the victim was 12 years old. During the investigation the I. O. seized the birth certificate of the victim girl vide Ext. 6 seizure list. In the seizure list the description of the birth certificate has been given where the date of birth of the victim is shown on 19-07-2005. The investigating officer has deposed that after seizing the birth certificate it was given zimma to the mother of the victim. But the prosecution has failed to produce the same during trail. The defence does not challenge the seizure list (Ext. 6) and its contents. Arithmetical calculation shows that on the day of the incident the victim girl was just 11 years 9 months 14 days old. To ascertain the age of the victim girl ossification test was done by P. W. 1 at Dhubri Civil Hospital. As per P. W. 1 the radiological age of the victim was 15 years. He has exhibited his report as Ext. 1 and the X-ray plate as Ext. 2. The defence does not challenge the report of the medical officer. There may be two years variation on the opinion of the radiologist. If two years is added with the opinion of doctor still the age of the victim girl is found 17 years on the day of the incident. So, there is no iota of doubt that on the day of the incident the alleged victim was below the age of 18 years and as such she is a child as defined under section 2 (d) of the POCSO Act.
- 22 The allegation against the accused is that on the day of the incident the accused committed rape on the victim girl inside the school wash room. The victim girl in her deposition given in the Court during trial has deposed that when she went to the toilet and then the accused entered into the toilet, removed her cloths, touched her body and committed rape on her. The accused told her that if she disclosed the incident to anyone, he would kill her. She told the incident to the school teacher and her mother. Basanti Sarkar (P. W. 5) who was the head mistress of the school has also deposed that

on the day of the incident the victim girl came to her chamber and told her that the accused misbehaved her in the toilet by touching her breast. The head mistress informed the matter over phone to the Governing Body Member Jadu Bhakat. Said Jadu Bhakat (P. W. 7) confirmed the same. Another witness Anjali Ray (P.W. 6) who was working as Chowkidar of the school has deposed that on the day of the incident she noticed that the victim girl was crying in the veranda of the school toilet. On being asked she told her that the person who was repairing the pipe of toilet misbehaved her. Then she took the victim girl to the chamber of head mistress.

- 23 From the evidence of the complainant (P. W. 3) it appears that she was informed about the incident by one Bhadoi Pathak. Though Bhadoi Pathak did not disclose everything to her but she came to know that some untoward incident had taken place in the school with her daughter. She immediately visited the school and head teacher of the school told her about the incident. Thereafter she returned home and came to know about the incident from her daughter.
- 24 Here we have to consider the presence of the accused on the spot at the relevant day and time. Jadu Nah Bhakat (P. W. 7) has deposed that at the relevant time the accused was engaged as plumber. Anjali Ray (P. W. 6) has also deposed that while she noticed that the victim girl was crying in the veranda of the school toilet then the accused was engaged to repair pipes of the school toilet. When the victim told her about the incident then the accused was not on spot.
- **25** From the evidence of the P. W. 6 and P. W. 7 it transpires that on the day of the incident the accused was engaged to repair of pipes of the school toilet. When the victim was crying then P. W. 6 had not seen the accused on spot. It means the accused after the incident left the place.
- 26 During argument learned defence counsel has pointed out some discrepancies of the prosecution witnesses that the complainant was informed about the incident by one Bhadoi Pathak in the market; but the head mistress disclosed that she told the incident to the complainant and so on. The discrepancies pointed out by leaned defence counsel are considered. The Hon'ble Supreme Court in Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat Cr. L. R. (S. C.) 1983 has observed that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities"

factor" echoes in favour of the version narrated by the witnesses. The discrepancies pointed out by learned defence counsel will not shake the basic version of the prosecution case and it is natural to occur such type of minor discrepancies in criminal trial.

- 27 In this case the victim girl is the vital witness for the prosecution. As per section 118 of the Indian Evidence Act all persons are competent to testify unless the Court considers them to be unable to understand the questions put to them or unable to give rational answers due to tender years, old age, disease whether of body or mind or any other cause of the same kind. The victim being a child is most vulnerable witness. The evidence of child witness has to be subjected to closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the questions put to her and she is capable to give reasonable answers. A child witness by reason of his/her tender age, is pliable witness. The child can be tutored easily either by threat, coercion or inducement. During the investigation the investigating officer produced the victim girl before medical officer for medical examination and in the Court for recording her statement. The prosecution examined the medical officer Dr. Muskura Ahmed (P. W. 2). The medical officer before examining her took the history from the girl who told her that on previous day i.e. on the day of the incident she went to the school toilet and then one person entered into the toilet and did physical assault to her by force. Though the medical officer did not find any evidence of recent sexual intercourse or assault on her; but her deposition is important as the victim girl disclosed the incident to her. The medical officer exhibited her report as Ext. 3 which she proves by authenticating her signature thereon. The defence does not challenge the report of the medical officer. In the report (Ext. 3) the medical officer jotted down whatever the victim girl told her.
- 28 From the evidence of Judicial Magistrate K. Bora (C. W. 3) it appears that the victim girl was produced before her on 04-05-2017. Before recording the statement of the victim girl under section 164 Cr. P. C., learned Judicial Magistrate tested her maturity of understanding by putting some questions to her and the victim girl replied satisfactorily and learned Magistrate after being satisfied recorded her statement under section 164 Cr. P. C. (Ext. 5).
- **29** From the evidence on record it appears that there was no enmity between the accused and the family members of the victim girl. So question of falsely implicating the accused by the complainant and the victim girl does not arise. The accused was engaged as

plumber in the school and the head mistress, chowkider and the member of Governing Body of School have deposed against the accused. The defence has failed to show any reason of falsely implicating him by the complainant and the victim. While the accused was examined under section 313 Cr. P. C. he simply denied the allegations and evidence on record.

- **30** The oral testimony of the victim girl is found consistent as she disclosed the same story before the medical officer and the Judicial Magistrate. Another important witness for the prosecution is the mother of the victim girl. Her evidence is also found trustworthy. The oral testimonies of the member of School Governing Body, the head teacher and the chowkider of the school are also found believable. The defence though categorically cross-examined the witnesses; but failed to discard their evidence given in chief. Learned defence counsel has submitted that the prosecution witnesses tried to develop the case during trial by saying new facts which they did not disclose before the investigating officer during investigation. If the so called improvement statements of the prosecution witnesses, as shown by learned defence counsel, are not considered even it is proved that on the day of the incident the accused misbehaved the victim girl. Evidence of the child witness can be relied upon if the Court comes to the conclusion that the child is not tutored and her evidence has a ring of truth. In this case the victim girl initially disclosed the incident to her head teacher, then her mother, thereafter to the medical officer and the Judicial Magistrate and ultimately deposed in the Court during trial. This Court carefully examined her and the Judicial Magistrate (C. W. 3) also carefully examined her at the time of recording her statement under section 164 Cr. P. C. After scanning the evidence on record of the victim girl, head teacher, the chowkider of the school, her mother, the medical officer and the Judicial Magistrate it is found that the victim girl's evidence is true.
- **31** Initially the case was registered under section354-A IPC read with section 8 of POCSO Act. Subsequently on the prayer of Officer-in-charge of Golokganj police station my learned predecessor substituted section 376 IPC read with section 4 of POCSO Act. The investigating officer submitted charge sheet (Ext. 8) under section 376 IPC read with section 4 of the POCSO Act. Charge against the accused was framed under section 376 IPC and section 4 of the POCSO Act.
- **32** To establish the charge under section 376 IPC the prosecution has to establish any of the circumstances mentioned in section 375 IPC. Likewise to constitute the offence

punishable under section 4 of POCSO Act the prosecution has to establish the requirements under section 3 of the POCSO Act. The main requirement of the offence of rape and penetrative sexual assault, the accused has to penetrate his penis, to any extent, into vagina, mouth, urethra or anus of woman or child. In the case in hand the victim girl has stated that the accused committed rape on her.

- **33** Learned defence counsel during the course of argument submitted that on the next day of the incident the victim was examined at Dhubri Civil Hospital by a gynecologist and she found nothing abnormal and in clear words has reported that there was no sign of sexual intercourse or assault on the victim girl.
- **34** Evidence of P. W. 2 Dr. Muskura Ahmed shows that on the next day of the incident she examined the victim girl and after examination she formed an opinion that that there was no consistent with recent sexual intercourse/assault on the victim girl. Her report (Ext. 3) shows that she did not examine the victim girl properly. She simply filled up the printed medical form. Unfortunate thing is that she did not examine the hymen of the victim girl. Even her opinion has also not written by her own handwritings. She simply put tick mark in one of the option out of three probable clinical opinions.
- 35 As per Modi's Medical Jurisprudence and Toxicology, 21st Edition pages 373 to 377 during examination of the victim the medical officer should examine the clothes of the victim, marks of violence on the body, the genitals. To examine the genitals for the evidence of rape the female should be kept in the lithotomy or knee chest position in good light and the thighs should be well separated. In children either due to noncooperation or due to the fact that the separation of the thighs is very painful, it may be necessary to apply either local anesthetic solution to the parts, or to administer general anesthesia. During the examination the medical officer should noted 1. In grown up females, if the pubic hairs are found matted due to the presence of semen, they should be cut off with a pair of scissors and examined for the presence of human spermatozoa or they should be preserved to be forwarded to the Chemical Examiner for the same purpose. 2. Recently effused or dried blood may be found upon the genital organs or in the neighbourhood, and in recent cases there may be bleeding from the vagina, which is usually very slight. It should not be forgotten that the bleeding may be due to menstruation, which is possible to be induced by sexual intercourse. 3. Bruising and laceration of the external genitals may be present with redness, tender swelling and inflammation. 4. In nubile virgins the hymen, as a result of complete sexual intercourse,

is usually lacerated, having one or more radiate tears, the edges of which are red, swollen and painful, and bleed on touching, if examined within a day or two after the act.

- **36** After considering the report of the medical officer (P. W. 2) it appears that in the name of medical examination the doctor (P. W. 2) did nothing.
- 37 From the oral testimony of the mother of the complainant it appears that her daughter told her that the accused committed rape on her. She examined her daughter and found blood stain in her cloths. She immediately called C. W. 1 who has also deposed that the victim girl complained abdomen pain. On examination he found mild bleeding from her private part. As per his advice the complainant took her daughter to Halakura hospital where Dr. Asmat Ali Sheikh (C. W. 2) examined and he also found abdominal pain with mild per vagina bleeding. He prescribed medicine and referred the victim girl to Dhubri Civil Hospital.
- **38** C. W. 1 is the Community Health Officer and C. W. 2 is an Ayurveda doctor. They simply noticed mild bleeding from the private part of the victim girl and abdomen pain. They have stated nothing whether there was any sign of penetration into the vagina of the victim girl or not. As stated above the prosecution has to establish that the accused penetrate his penis, to any extent, into the vagina of the victim girl. But from the evidence on record it is not established that the accused penetrated his private part into the private part of the victim girl.
- 39 From the evidence of the complainant it appears that she handed over the panty of her daughter to the investigating officer. Record shows that the investigating officer did not seize the same. The accused was arrested on the next day of the alleged incident. The investigating officer after seizing the panty of the victim girl and collecting sample of the accused could have been sent it to the forensic laboratory and then it would have been clear whether accused committed rape on the victim girl or not. But due to perfunctory investigation from the side of investigating officer and casual examination by the doctor of Dhubri Civil Hospital the actual truth could not come to the surface.
- **40** In view of the above discussion and observation it is clear that the charge of rape and penetrative sexual assault to the victim girl has not been established.

- **41** Now let us examine whether the act of the accused falls any of the offence under Indian Penal Code or POCSO Act or not.
- 42 From the evidence of the victim girl it transpires that the accused after entering into the toilet removed her cloths, touched her body. C. W. 2 while examine the victim girl detected pain and swelling in her left forearm. P. W. 2 while examined the victim girl on the next date also detected some scratches and abrasion over her both hands. P.W 5 the head mistress has also deposed that after the incident the victim girl told her that the accused misbehaved her and touched her breast. Anjali Ray (P. W. 6) has also deposed that the victim girl told her that accused misbehaved her. At the time of incident the victim was studying in Class VII. So, she will feel comfortable to share her uncomfortable experience with her mother and her mother (P. W. 3) deposed that her daughter told her that the accused removed her cloths and committed rape on her.
- **43** After meticulous scanning the evidence on record it transpires that the accused caught the hands of the victim girl inside the toilet and for that reason the victim girl received injuries in her both hands. Thereafter the accused removed her cloths and indecently touched her body and private parts. It appears that the accused on the day of the incident disrobe the victim girl inside the wash room of Jinkata Nidhiram M. V. School.
- **44** Section 354-B IPC deals with the offence of assault or use of criminal force to woman with intent to disrobe her. For the purpose of this section, the act of disrobing contemplates either the intention of disrobing or compelling her to be naked. Therefore when a person has the intention of either disrobing a woman or compelling her to be naked, and in pursuance to this intention, if that person either himself uses assault or criminal force, or abets the use of assault or criminal force, he becomes liable for punishment under this section. It is irrelevant whether the accused was successful in either disrobing the woman or compelling the woman to be naked. Merely required action on the part of accused in either use or abetting the use of assault or criminal force will be sufficient for the purpose of mischief defined in this section. From the evidence of the victim girl it transpires that at the time of the incident she was alone. The accused put her inside the school wash room and the accused by holding her hands removed her cloths. The act of the accused that he removed the cloths of the victim inside the wash room shows his criminal intention and without any hesitation it can be concluded that the accused committed the offence of disrobing to the victim girl as defined under section 354-B IPC.

- **45** From the evidence on record it transpires that the accused touched the breast of the victim girl and her private parts. Sexual assault defines under section 7 of the POCSO Act. As per section "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault." The act of the accused shows that he sexually assaulted the victim girl.
- **46** Sections 29 and 30 of the POCSO Act are important. Section 29 of the Act deals with mandatory presumption against the person prosecuted for committing or abetting or attempting to commit any offence punishable under section 3, 5, 7 and 9 of the Act that such person committed or abetted or attempted to commit that offence. Likewise section 30 of the Act deals with the presumption of culpable mental state of the accused.
- **47** The presumption means "to believe or accept upon probable evidence" (State of Maharastra vs. Som Nath Thapa (1996) 4 SCC 639). The expression 'shall presume' leaves no discretion with the Court and there is legislative command to it to raise a presumption and regard such fact as proved unless and until it disproved. However, it is rebuttable and cannot be held to be synonymous with 'conclusive proof.'
- **48** In the case in hand, a girl of class VII went to wash room to response her nature's call. The accused who was engaged by the school authority to repair bathroom pipes removed her cloths and indecently behaved with her. The accused has not taken any specific plea in his defence. There was no enmity between the accused and the family of the victim girl. So, question of implicating him falsely by the complainant does not arise.
- **49** In view of the above discussion and observation it is concluded that the prosecution is able to establish the requirements of the penal provisions under sections 354-B IPC and section 8 of the POCSO Act.
- **50** Though the charges under section 354-B IPC and section 8 of POCSO Act have not been framed; but the prosecution is able to establish the charges against the accused under said sections beyond all reasonable doubts. There is no bar in holding the accused is guilty under section 354-B IPC instead of section 376 IPC and section 8 of POCSO Act instead of section 4 of POCSO Act vide provision of section 222 (2) Cr. P. C.

- **51** Hence, it is held that the prosecution is able to establish the charges against the accused under section 354-B IPC and section 8 of the POCSO Act beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **52** The accused/convict is a person of 55 years old and the victim girl is just like his daughter. The act of the accused gave her mental shock. It is the high time to protect the children from such person. Considering the nature of the case and its mode of execution I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **53** Heard accused/convict on quantum of sentence.
- **54** Also heard learned counsels appearing for the parties.
- **55** Accused/convict has stated that this was his first offence. He is the only earning members of his family. His family will suffer a lot if he is heavily punished. So, has prayed to excuse him and he will not repeat such type of offence in future.
- **56** Learned counsel for the prosecution has submitted that the accused/convict should be given adequate punishment so that it becomes an example for the wrongdoer.
- **57** On the other hand learned counsel for the defence has submitted that the prosecution has failed to show any criminal antecedent of the accused; so, has prayed to deal with him leniently considering his family burden.
- **58** Prescribed punishment under section 354-B IPC is imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.
- **59** Prescribed punishment under section 8 of the POCSO Act is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.
- **60** The accused/convict is a person of 55 years and the victim girl is just like his daughter. His criminal act does not deserve any kind of mercy. So, it is decided to impose following punishment.

ORDER

- **61** The prosecution is able to establish the charges against the accused Nibash Chandra Bhakat under section 354-B IPC and section 8 of POCSO Act beyond all reasonable doubts and accordingly he is found guilty and convicted under said sections.
- **62** The accused/convict is sentenced to undergo rigorous imprisonment for 7 (seven) years and also pay fine of Rs. 5,000/ (rupees five thousand) in default rigorous imprisonment for 2 (two) months under section 354-B IPC.
- **63** The accused/convict is further sentenced to go rigorous imprisonment for 5 (five) years and also pay fine of Rs. 3,000/ (rupees three thousand) in default rigorous imprisonment for 1 (one) month under section 8 of POCSO Act.
- **64** Both the sentences will run concurrently.
- **65** Fine amount, if realized, shall be given to the victim as compensation.
- **66** The period underwent during investigation and trial shall be set off as per law.
- **67** Return the seized birth certificate to the mother of the victim girl after expiry of appeal period.
- **68** Furnish a free certified copy of the judgment and order to the accused/convict as per provision of law forthwith.
- **69** Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

- **70** The victim girl who was a minor girl at the time of incident and a student of class VII faced such a situation which cannot be explained and I am of the view that the victim girl is entitled to get compensation under section 357-A Cr. P. C.
- **71** So, District Legal Services Authority, Dhubri is asked to determine appropriate amount of compensation to the victim girl as per victim compensation scheme and pay the same as early as possible.

- **72** The bench assistant is directed to provide the name of the victim girl, her mother's name and address to the Secretary DLSA, Dhubri in a sealed envelope so that DLSA, Dhubri can communicate with the victim or her legal guardian.
- **73** Send a copy of this judgment and order to the Secretary DLSA, Dhubri for information and necessary action.
- **74** Given under my hand and seal of this Court this the 24th day of April 2019.

(D. Thakuria) Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 19/2018

UNDER SECTIONS: 376 IPC READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

NIBASH CHANDRA BHAKAT

APPENDIX

A. Prosecution exhibits:

Ext. 1 : Radiological report.

Ext. 2 : X-ray plate.

Ext. 3 : Medical report.

Ext. 4 : Ejahar.

Ext. 5 : Statement of the victim u/s 164 Cr. P. C.

Ext. 6 : Seizure list.

Ext. 7 : Sketch map of place of occurrence.

Ext. 8 : Charge sheet.

B. Defence Exhibits: Nil.

C. Court Exhibits :

Ext. I : Medico Legal Register of Halakura CHC.

Ext. II : Prescription issued to victim.

D. Prosecution Witnesses:

P. W. 1: Dr. Mahammad Laskar Ali,

P. W.2: Dr. Muskura Ahmed,

P. W.3: Complainant,

P. W.4: Victim,

P. W.5: Basanti Sarkar,

P. W.6: Anjali Ray,

P. W.7: Jadu Nath Bhakat &

P. W.8: Satin Singha.

E. Defence Witness: Nil.

F. Court Witness:

C. W. 1: Mintan Ch. Pradhani,

C. W. 2: Dr. Asmat Ali Sheikh &

C. W. 3: K. Borah.

(D. Thakuria)

Special Judge, Dhubri.