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

# SPL(POCSO) CASE NO 34 of 2016

(Under Section 6 of POCSO Act, arising out of G.R. Case No 2899 of 2016)

Present : Sri Ashok Kumar Borah, AJS

Special judge, Sonitpur, Tezpur

Prosecutor : State of Assam

-vs-

Accused : Sri Bablu Sahani @ Babul Sahani

Son of Late Lakshman Sahani,

Resident of Katonibari

Police Station – Biswanath Chariali

Dist: - Sonitpur, Assam.

Date of framing Charge : 08/02/2017

Date of Recording Evidence 22/02/2017, 22/03/2017, 26/04/2017,

16/08/2017 & 30/08/2017

Date of examination of

accused u/s 313 Cr.P.C

10/01/2018

Date of Argument : 11/05/2018

Date of sentence hearing : 25/05/2018

Date of Judgment : 25/05/2018

Counsel for the Prosecution: Mr. Munin Chandra Baruah

Special Public prosecutor, Sonitpur

Counsel for Accused : Mr. Putul Borah, Learned Legal Aid Counsel.

#### J U D G M E N T.

- **1.** In this case accused Sri Bablu Sahani @ Babul Sahani is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.
- 2. The prosecution case according to the FIR in brief is that on 04-09-2016 the minor granddaughter of the informant Miss Anami Devi was kidnapped from the "Haritalika Puja sthali" by some miscreant and committed misdeed to her at the side of the River Brahmaputra which he came to know. Accordingly, the villagers of Hojaigaon searched the victim girl vigorously. After recovery of the victim girl from the side of the river Brahmaputra, she disclosed that she can identify the miscreant, who had sexually assaulted her. Hence, this prosecution case. The FIR was filed by Sri Nil Bahadur Kharka before the O/C of Thelamara Police Station on 04-09-2016.
- 3. On receipt of the aforementioned FIR, the Officer-In-Charge of Thelamara Police Station registered a case being Thelamara P.S. Case No 73/16, under section 4 of the POCSO Act, 2012 and the O/C himself investigate the case. After completion of usual investigation, the O/C Thelamara Police Station sent up the accused for trial by filing charge sheet u/s 4 of the POCSO Act against the accused Sri Bablu Sahani @ Babul Sahani.
- **4.** On being appeared the accused before this Court, after hearing both parties, charge framed under section 6 of the POCSO Act, 2012 against the accused Sri Bablu Sahani @ Babul Sahani and particulars of the charge was read over and explained to the accused to which he pleads not guilty and claims to be tried.
- **5.** To substantiate the case prosecution examined as many as **15 (fifteen)** numbers of witnesses. After completion of prosecution evidence, accused was examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the evidence. To buttress the defence, the accused declined to give defence evidence.

- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -
  - (1) "Whether the accused person on 04-09-2016 at village Hojaigaon, bank of River Brahmaputra under Thelamara PS committed penetrative sexual assault on the victim Miss "X" (5 years) and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

## REASONS, DECISIONS AND REASON FOR DECISION.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW 1,** Dr. Geetumoni Sonowal, stated that **o**n 06-09-2016 she was working as Medical & Health Officer (Casualty) in the Tezpur Medical College & Hospital and on that day at about 12.07 p.m. she has examined Anami Devi, 5 years, D/O Sri Yubraj Kharka of Hojaigaon PS Thelamara, in reference to Thelmara PS GDE NO. 75 dated 04-09-2016 on being escorted and identified by Woman police constable A. Begum. She was examined in presence of one Poli Das. Consent for examination taken from her father Yubraj Kharka. On examination, found the following:

Identification mark – a black mole of pin head size present over right shoulder.

Case history- according to father of alleged victim the person took her near river side and sexually assaulted at around 6 p.m. of 04-09-16 at Hojaigaon.

Height – 103 cm., Weight – 16 Kg, Chest – 56 cm, abdomen – 55 cm, Teeth – temporary 20 permanent 0. Space for teeth – nil. Hairs – scalp hair present blackish in colour about 15 cm length. Auxillary – nil, pubic – nil. Breast – child type. Menstrual history – menarche not attained.

Genital organs developed. Labia majora healthy. Labia minora – one superfacial tear over labia minora in the lower part, size about .5 cm x .1 cm x mucosal deep. Margins are reddish in colour and swollen. Hymen – intact. Vaginal orifice. Narrow not admits tip of little finger. Vaginal canal cannot be examined. Cervix, uterus cannot be examined. Evidence of V.D. not detected clinically. Vaginal swab collected from vaginal introitus. Injury on the body not detected. Wearing garments – evidence of struggle not detected. Evidence of stain not detected.

Mental condition at the time of examination – conscious and oriented, cooperative. Intelligence and memory – normal. Gait – normal.

## **Radiological investigation:**

Epiphysis of lower ends of radius has appeared not fused with parent bone.

Epiphysis of ulna not appeared.

Three carpal bone appeared.

Shoulder joint-

Epiphysis of upper end of humorous not fused with parent bone.

Epiphysis around elbow joint are in process of fusion.

Epiphysis of iliac crest has not appeared.

#### Result:

On examination of vaginal swab spermotozoa not detected.

### **Opinion:**

On the basis of physical examination, radiological and laboratory investigation, she opined that evidence of recent sexual intercourse not seen. Injury present on the private parts (labia minora) as described above is caused by blunt object.

Age of injury - 24 to 48 hours. Her age is about above 3 and below 5 years.

Ext. 1 is the Medical Report and Ext. 1 (1) to 1(3) are her signatures.

In cross-examination, the doctor admitted that she has mentioned skiagram Number of the X-ray in the report. Ext. 1 is original report. Such type of injury may be caused by any blunt object.

10. PW 2, Sri Nil Bahadur Kharka, complainant and the grandfather of the victim, has stated that he knows the accused Babul Sahani. At the time of occurrence, victim was only 4 years 7 months. On 04-09-2016 Haritorika Brata was celebrated under a Peepal tree near Hojaigaon primary school. To enjoy the said celebration his victim granddaughter went there along with her mother. At about 6.30 p.m. his grand daughter was found missing. They have vigorously searched her in their villages. They have also searched her towards the bank of the river where "Bisharjan" was done. But did not find her there. Then they searched her towards western side of the Brahmaputra River. They found the victim at the side of the river Brahmaputra where she was standing. On being asked his granddaughter, she told him that accused took her from said Puja Pandal luring to give a chocolate. Then the accused took her towards the side of western side of River Brahmaputra. Accused threatened her not to shout and then accused put his penis into her vagina and then to her mouth. The victim also complained him that she has suffering pain in her private parts and neck. His granddaughter told him that she can be identified the person. On that day, he has filed the ejahar before the O/C Thelamara PS. The ejahar was written by VDP Secretary Chandra Bahadur according to his instruction. After writing the ejahar, the content of the ejahar was read over to him and on his satisfaction he put signature thereon. Ext. 2 is the ejahar and Ext. 2(1) is his signature.

Though he has been exposed to long cross examination, except giving many suggestions, the evidence that at about 6.30 PM his victim grand daughter was missing and on vigorous search the victim was recovered from the side of the river Bhahmaputra, on making enquiry, the victim told him that accused took her towards the western side of the river Brahmaputra with lure of giving chocolate, where accused

;threatened her not to shout and then accused put his penis into her vagina and then to her mouth has remained unchallenged.

11. PW 3, Smti Rinkimoni Devi, who is the mother of the victim girl, has stated that she knows the accused Babul Sahani who resides in the house of his father-in-law. On 04-09-2016 Haritorika Brata was celebrated under a Peepal tree near Hojaigaon primary school. At the time of occurrence, victim's age was only 4 years 7/8 months. To enjoy the said celebration she went there at about 3 p.m. along with her daughter. Her daughter along with other children including the kid of the accused were playing there. Accused was sitting in a chair along with his baby. After completion of puja and distributing Prasad all of a sudden electricity was shut down and almost darkness set in. But her daughter was found missing. She started to crying. Then the local public including her husband and father-in-law recovered her daughter from the side of the River Brahmaputra. The girl was handed over to her. Her victim girl told her that accused inserted his penis into her private parts and mouth. By removing her clothes, she has noticed slight reddish on her private parts. The local people suspected the accused in involving in the aforesaid offence. On the very day her victim daughter was taken to Thelamara Police station. At the police station her victim daughter identified the accused.

Though she has been exposed to long cross examination, except giving many suggestion the evidence as to at the evening time her victim daughter was missing from Puja Mandap and on vigorous search the victim was recovered from the side of the river Brahmaputra, the victim told her that accused inserted his penis into her private parts and mouth has remained same.

**12. PW 4, Sri Mohan Jadav,** stated that he knows the accused who resides in the house of his father-in-law. He also knows the victim. The incident took place in the year 2016 on the day of Teez festival. The festival was celebrated under a Peepal tree near Hojaigaon primary school in front of his house. When he was at home at about 6.30 p.m., he came

to know from the aunty of the victim that their niece was missing. Then he along with other villagers went to search the victim to the river bank of the Brahmaputra. They have also searched her towards the bank of the river where "Bisharjan" was done. At the site of the Brahmaputra in the western side near a cremation ground they noticed the victim girl was standing there alone and they recovered her. On being asked, she reported to her father that accused has taken her with a lure to give chocolate and then she was forced to take towards river site. The victim stated to her mother that the accused has put his penis into her vagina and then to her mouth. On removing her clothes by her father they noticed a swelling on her private parts. Since the day of incident, accused was absconded from their village.

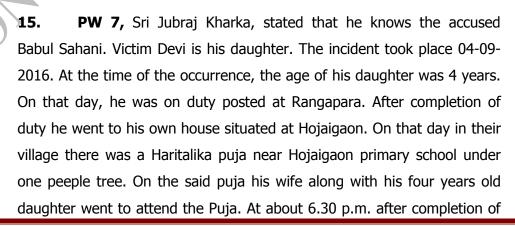
In cross-examination, he admitted that the police interrogated him specifically on the point of place of recovery of the victim.

**13.** PW 5, Sri Mitra Sharma, stated that he knows the accused Babul Sahani. He also knows the Victim. The incident took place 04-09 2016 at about 6/6.30 p.m. On the day there was a Teez festival. The festival was celebrated under a Peepal tree near Hojaigaon primary school in front of his house. The Puja was commenced at about 3 O' clock in the evening. During Puja he went there. The people were busy in performing puja. Children were playing. During that time he has noticed the accused sitting in a chair and also saw the victim girl near the accused. At about 6 p.m. the victim was missing. Local public came to his shop in search the missing girl. Then he along with other villagers and guardian of the victim girl went to search the victim to the river bank of Brahmaputra. Then they noticed a girl standing alone near the cremation ground at the site of Brahmaputra. The victim girl was handed over to her father. On being enquired, the victim stated that the person who has taken her is known to her. She was taken by that person with a lure of giving chocolate. The victim stated that the accused has put his penis into her vagina and then to her mouth. Immediately after reporting the matter by the girl they

searched the accused but he was found absconded. Accused resides in his father-in-law's house Budhu Sahani.

14. PW 6, victim Miss X, who was examined before the court after making proper enquiry to test as to her capacity of understanding and rationality, stated that accused enticing her with a lure of giving chocolate took her to the side of the river. Accused touched her mouth and private parts with his male sexual organ as a result she sustained pain and it become whitish. Accused threatened her that ghost has flashed light. Thereafter, the accused left the place stating that he feels natur's call. Prior to that while she was crying, accused threatened her to cut. Identifying the accused in the court, she stated that the bald man present in the dock is the said accused. Many villagers along with her father rescued her and she narrated the whole incident to her father and other people. Thereafter, her parents noticed reddish on her private part. She was taken to the doctor. Thereafter, her statement was recorded through the learned Magistrate.

Though, she has been exposed to long cross-examination except giving many suggestions, the evidence as to accused enticing her with a lure of giving chocolate took her to the side of the river, touched her mouth and private parts with his male sexual organ as a result she sustained pain and it become whitish, accused threatened her that ghost has flashed light and thereafter, the accused left the place stating that he went to toilet, while she was crying, accused threatened her to cut, Identified the accused in the court has remained unchallenged.



Puja his wife found missing of their minor daughter. Then they vigorously searched the minor daughter in and around the village. Thereafter he along with relatives and other villagers went to the bank of the Brahmaputra where he noticed his minor daughter standing alone near the cremation ground. His daughter informed him that she was taken by one known person and thereafter said person inserted his penis to her private parts and also inserted his penis into her mouth. Then he took her to Thelamara Police station.

Though she has been exposed to long cross examination except giving many suggestions, the evidence as to at about 6.30 PM his minor daughter was missing from Puja Mandap, while he and villagers vigorously search, they recovered her daughter from the side of the river Brahmaputra on enquiry the victim told them that accused took her to the side of the Brahmaputra and he inserted his penis into her private part and also inserted his penis on her mouth remained unchallenged.

16. PW 8, Sri Hari Sarmah, stated that he knows the accused. Victim is his neighbour. The incident took place on 04-09-2016. On that day in their village there is a "Haritalika puja" near Hojaigaon primary school under a peeple tree. The said puja started from 3.p.m and completed 6.30 p.m. After completion of puja, at about 6.30 p.m. they came to know that the victim was missing. Then they searched the victim in an around the village. Then searched the victim towards the bank of river Brahmaputra where they found the victim standing alone near the cremation ground. He heard from the mouth of victim while she reported to other persons that at about 6.30 p.m. there was a Sun set, one black complexion person taken her with a lure of giving chocolate and the said person inserted his penis to her private parts and also inserted his penis into her mouth.

Though he has been exposed to long cross-examination, except giving many suggestions, the evidence as to at about 6.30 PM the victim was found mission, on vigorous search the victim was recovered from the side of the Brahmaputra, the victim reported that after sun set a black

complexion person took her with lure of given chocolate, the said person inserted his penis into her private part and mouth remained unchallenged.

- 17. PW 9, Sri Ramlal Sahani, stated that he knows the accused. Victim is his neighbour. The incident took place about 10 months ago. A few days back the said accused shifted from their village. Police after tracking Mobile, arrested the accused from Jahajghat of Tezpur. He has also accompanied the police. He was wanted by police with an allegation of committing rape to a minor girl.
- **18. PW 10, Sri Chiraj Chetry**, stated that he went to police station along with Brij Kishor Sahani. When police taking Ramlal he heard that accused committed some misdeed (Badmasi). Police recovered the accused after mobile tracking.
- **19. PW 11, Sri Brij Kishor Sahani**, stated that police searched the accused Babul Sahani but did not find him and taken away Ramlal about 8/9 months ago.
- PW 12, Sri Raju Boro, stated that the incident took place on 20. 04-09-16. On that day in their village a Pooja was held which was observed by Nepali community of their village. Accordingly, Hari Talikar festival was performed by disciple particularly Nepali community. The victim was missing from the pooja mandap. During that time the age of the victim was about 5 years. They have vigorously searched the victim. They have searched her for about three hours. At last they have recovered the said girl from the side of a stream of Brahmaputra. They have recovered the girl and brought her to her house. Then, she was taken to PS. On questioned her by public, she stated that the person who kidnapped her is known to her. The victim also reported that the said person inserted his male organ into her mouth and her private parts. The person who had kidnapped the victim is the said person who is present in the dock. Then the victim was taken to hospital for medical examination. The victim was also taken to the court to record her statement.

In cross-examination, he admitted that the accused was travelling in his vehicle before two months of incident. At the place where the girl was recovered, they have seen only the victim girl.

21. PW 13, Mrs. Meenakshi Sarmah, has stated that on 08-09-2016 he was posted as a Judicial Magistrate, 1<sup>st</sup> class, Sonitpur at Tezpur. On that day, in reference to Thelamara pS Case No. 73/16 u/s 6 of the POCSO Act she recorded the statement of one victim Miss X (5 years old), D/O Yubraj Kharka of Hojaigaon under Thelamara PS. As the victim was only 5 years minor therefore, she had made an enquiry by putting some questions to her and on answered, she has statisfied as to her intelligence and rational answer and thereafter the statement of the victim was recorded in presence of her father. The victim was escorted and identified by Must Ainub Begum, WPC 02 of Thelamara PS. She has recorded the statement of the victim in the court chamber. The victim made her statement voluntarily. The victim understands and speaks only Nepali Language. Since the language is not familiar to her so she called the interpreter Mrs. Hima Poudal, a Woman constable of the learned Addl.CJM, Sonitpur, Tezpur to interpret the language of the victim. After recording her statement, she has read over to her and on acceptance she had stated yes. She had also administered the oath of the interpreter Mrs. Hima Poudal. Ext. 2 A is the statement of the said victim u/s 164 Cr.P.C. and Ext. 2 A (1) is her signature. Ext. 3 is the order dated 08-09-2016 of the learned CJM, Sonitpur, Tezpur and Ext. 3(1) is the signature of Sri Kaushik Kr. Sharma, learned Addl. CJM, Sonitpur, Tezpur. In the same dated Ext. 3(2) is the signature of Mr. Rashmita Das, the learned CJM, Sonitpur, Tezpur. Ext. 3(3) is her order dated 08-09-2016 and Ext. 3(4) is her signature.

**PW 14, Sri Prasanna Saharia,** stated that on 04-09-2016 he was posted as i/c of OC, Thelamara Police Station. On that day an ejahar was filed by one Nil Bahadur Kharka before the Thelamar PS. On receipt of the ejhar, he has registered the case being Thelamara PS Case No 73/16 under Section 6 of POCSO Act and he himself took the charge of

investigation. Ext.2 is the said ejahar and the Ext.2(2) is his signature with note. As there was a late night on the day of receipt of the ejahar, so, in the next morning, he proceeded to the place of occurrence and drew two sketch maps as place of occurrence. First one is a place of occurrence from where the Puja held i.e. the first missing place. Ext. 4 is the said sketch map and Ext.4(1) is his signature. Ext.5 is the sketch map of the place where the victim was recovered where Ext.5(1) is his signature. Accordingly, he examined the witnesses and recorded their statement under Section 161 of the CrPC. The victim was sent for medical examination and thereafter, the victim was produced before the Court for recording her statement under Section 164 CrPC. He also collected the medical certificate along the required document in connection with this case. Then, he arrested the accused and forwarded him before the Court. During investigation, he has seized one callbar Mobile Handset with SIM No 8136083863 of accused vide Ext.6 where Ext. 6(1) is his signature. He has also seized another Samsung Duos Mobile Handset from the possession of Sri Ramlal Sahani vide Ext.7 where Ext. 7(1) is his signature. Thereafter, on perusal of case diary, Circle Inspector Sri Sangkha Swargiary filed charge sheet against the accused under Section 4 of POCSO Act. Ext. 8 is the charge sheet and Ext. 8(1) is the signature of Circle Inspector Sangkha Swargiary which he knew on official communication.

In cross-examination, he stated that in Ext. 8 i.e. the chargesheet the address of the accused is shown as Bablu Sahani @ Babul Sahani, S/O Late Laxman Sahani, village Katonibari, PS Zinjia, Dist. Biswanath. In the sketch map, Ext. 4, the place of occurrence is shown as village Hojaigaon, PS Thelamara, Dist. Sonitpur. Though accused's house is at Jinjia but his father-in-law's house is at Hojaigaon. Accused resides in the house of his father-in-law. At the time of investigation he did not found the son of accused. The black coloured man as stated by the victim in her statement u/s 164 Cr.P.C. is the accused which he came to know in the investigation.

23. PW 15, Sri Sangkha Swargiary, stated that on 11-09-2016, he was posted as an Inspector of Police at Missamari Police Station. On that day in reference to Missamari PS Case No 73/16, he has perused the case record and it appears that TIP was not done. Therefore, he has identified the accused on photo by the victim through the IO. He has also collected the medical report of the victim. Thereafter, on perusal of the case diary, he filed charge sheet against the accused Bddablu Sahani under Section 4 of POCSO Act. Ext.9 and Ext.10 are the photographs of accused Bablu Sahani and Ext. 9(1) and Ext. 10(1) are his signatures on the photographs.

In cross-examination he stated that he has collected the Ext. 9 and Ext. 10, the photographs of accused Bablu Sahani from the IO and therefore, he has identified the said photographs of the accused through the victim. Photographs are collected from the IO and it was found in hand calf. The victim specifically identify the photographs of the accused. Other than this identification, he has collected the medical report and filed the charge sheet.

- **24.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- **25.** I have heard the arguments put forwarded by Learned Counsel of both the sides.
- Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. **Firstly**, other than the victim none has supported the prosecution case. Even the statement of the victim, there is no any direct evidence as to the alleged offence. **Secondly**, the victim herself did not recognize the accused as there was no Test Identification Parade was held to identify the accused. **Thirdly**, the statement of the victim was recorded very lately but cause of late examination of the victim u/s 164 Cr.P.C. was not clearly explained by the I.O. Lastly, the prosecution story is such that, the victim was missing while she was playing with the little kid of the accused and others at the

Haritalika Brata Puja Mandap but it is difficult to believe that accused by leaving his own baby at the Puja Mandap took the victim to the side of the river to satisfy his sex.

- 27. Per contra, learned Public Prosecutor, Sonitpur, submitted that the prosecution has ably proved the case beyond any reasonable doubt, as such, accused is required to be convicted under the charged section of law. Firstly, the victim supported the case clearly. Her evidence clearly reveals that at the relevant time she has been taken to the side of the river by accused enticing her with a lure of giving chocolate where accused touched her mouth and private parts with his male sexual organ as a result she sustained pain and it become whitish. Accused threatened her that ghost has lighted a torch. Thereafter, the accused left the place stating that he feels nature's call. Prior to that while she was crying, accused threatened her to cut. Indentifying the accused in the court, she stated that the bald man present in the dock is the said accused. Her statement is corroborated with the FIR, statement u/s 161 and 164 Cr.P.C. Learned Magistrate who recorded her statement u/s 164 Cr.P.C. clearly stated that victim made statement voluntarily. Lastly, the doctor PW 1 who examined the victim found that one superfacial tear over labia minora in the lower part, size about .5 cm x .1 cm x mucosal deep. She also saw marks of reddish in colour and swollen. There is no any evidence that the victim has sustained such type of injuries by falling. Beside the doctor admitted that such type of injury may be caused by any blunt object.
- **28.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case.
- **29.** A close scanning of the record including the evidence of the aforesaid witness, it is seen that except the victim there is no eye witness to the occurrence. There is an evidence of prosecutrix that at the relevant time accused enticing her with a lure of giving chocolate where accused touched her mouth and private parts with his male sexual organ as a result she sustained pain and it become whitish and accused threatened

her that ghost has lighted torch. Thereafter, the accused left the place stating that he feels nature's call. Prior to that while she was crying, accused threatened her to cut. It appears that her statement was not only supported by PW 2 – grandfather, PW 3 – mother of the victim and PW 7father of the victim but her statement was also supported by other independent witnesses i.e. PW 4 Sri Mohan Jadav, PW 5 Sri Mitra Sharma and PW 8 Sri Hari Sarmah. Complainant PW 2 stated that at the relevant time of occurrence victim's age was only 4 years 7 months. On 04-09-2016 "Haritorika Brata" was celebrated under a Peepal tree near Hojaigaon primary school. To enjoy the said celebration his victim granddaughter went there along with her mother. At about 6.30 p.m. her grand daughter was found missing. They have vigorously searched her in their village. They have also searched her towards the bank of the river where "Bisharjan" was done. But did not find her. But at last they recovered the victim from the side of the river Brahmaputra. On being asked, the victim told them that accused took her from said Puja Mandap with luring to give a chocolate. Then the accused took her towards the side of western side of River Brahmaputra. Accused threatened her not to shout and then accused put his penis into her vagina and then to her mouth. The victim also complained him that she has suffering pain in her private parts and neck.

Similarly, PW 3 – the mother of the victim also stated that to enjoy the said "Haritorika Brata" celebration she went there at about 3 p.m. along with her daughter. Her daughter, along with other children including the kid of the accused were playing there. Accused was sitting in a chair along with his baby. After completion of puja and completion of distributing Prasad all of a sudden electricity was shut down and almost darkness set in. But her daughter was found missing. She started to crying. Then the local public including her husband and father-in-law recovered her daughter from the side of the River Brahmaputra. The girl was handed over to her. Her victim girl told her that accused inserted his penis into her private parts and mouth. By removing her clothes, she has noticed slight reddish on her private parts.

PW 4 Sri Mohan Jadav also stated that at about 6.30 p.m. of the day of incident, he came to know from the aunty of the victim that their niece was missing. Then he along with other villagers went to search the victim to the river bank of Brahmaputra. They have also searched her towards the bank of the river where "Bisharjan" was done. At the side of Brahmaputra, near a cremation ground they found the victim girl standing there alone and recovered her. On being asked, she reported to her father that accused has taken her with a lure to give chocolate and then she was forced to take towards river side. The victim stated to her mother that the accused has put his penis into her vagina and then to her mouth. On removing her clothes by her father they noticed a swelling on her private parts. Since the day of incident, accused was absconded from their village.

PW 5 also stated that on the relevant day, there was a "Teez" Festival and the people were busy in performing puja. During that time, children were playing. In that time he has noticed the accused sitting in a chair and also saw the victim girl near the accused. At about 6 p.m. the victim was missing. Local public came to his shop in search the missing girl. Then he along with other villagers and guardian of the victim went out to search the victim to the bank of the Brahmaputra. Then they noticed the victim standing alone near the cremation ground at the side of Brahmaputra. The victim girl was handed over to her father. On being enquired, the victim stated that the person who has taken her is known to her. Similarly, PW 8 Sri Hari Sarmah stated that on the day of Haritalika Puja at about 6.30 p.m. after completion of puja, they came to know that the victim was missing from the Puja Mandap. The villagers searched the victim and recovered the victim from the side of river Brahmaputra where they noticed the victim standing alone near the cremation ground. He heard from the mouth of victim that at about 6.30 p.m. while there was a Sun set, one black complexion person taken her with a lure of giving chocolate and the said person inserted his penis into her private parts and also into her mouth.

Though it appears that all the aforesaid PWs i.e. PW 4, PW 5, PW 7 and PW 8 were exposed to long cross-examination but their evidence as to after completion of Puja at about 6.30 p.m. while the victim was missing from the Puja Mandap local villagers vigorously searched and at last recovered from the side of River Brahmaputra near a cremation ground and after recovery the victim reported to her parents that the accused took her with a lure of giving chocolate and there he inserted his penis into her private parts and mouth has remained unchallenged.

- **30.** In this case, the victim and her parents including the grandfather and also the independent witnesses categorically stated about the incident. Their statements are corroborated with each other. During their cross-examination same has not been disputed at all by the defence. The victim has been consistent with the material particular with regards to the incident that on the day of incident in the evening time she was taken by the accused with a lure of giving chocolate to the side of the River Brahmaputra, near a cremation ground, accused inserted his sexual organ into her vagina as well as into her mouth. The victim also stated so before the Learned Magistrate when her statement was recorded u/s 164 Cr.P.C. and before the police while her statement was recorded u/s 161 Cr.P.C.
- **31.** The unrebuttable evidence of doctor is such that at the time of examination of the victim, the doctor found one superfacial tear over labia minora in the lower part, size about .5 cm x .1 cm x mucosal deep. Margins are reddish in colour and swollen was found in her private part. Therefore, the doctor has also supported the evidence as to the injury sustained by victim due to sexual assault.
- **32.** In the present case at the time of examination of victim some questions were put to her and she replied the same without any hesitation and this court has held that the victim has able to give rational answers thereafter her statement was recorded without oath. Apart from that, other witnesses including the parents and grandfather of the victim also supported the evidence of the victim. Besides, as stated earlier PW 4, PW 5

and PW 8 all were supported the prosecution case. Their statements are corroborated with each other including the statement of complainant, victim and her parents. There is nothing in the cross-examination of any of the prosecution witnesses which could suggest that they were deposing falsely in any manner. Though they have been subjected to vigorous suggestions but all the witnesses vehemently denied. The evidence of the victim is cogent and reliable. There cannot be any doubt to disbelieve the evidence of the victim. On the other hand, at the time of recording of statement u/s 313 Cr.P.C. all incriminating evidence appears against him are duly put to accused where he denied the evidence and allegation. He simply stated that he is an innocent person.

- 33. Learned counsel for the accused submitted that the victim could not identify the accused as she simply stated that a black complexion person has took her to the side of the river Brahmaputra where accused touched her mouth and private part with his male organ as a result she sustained pain, therefore the victim could not identify the accused. Besides that there is no Test Identification Parade was conducted by the Investigating Officer to identify the accused. Hence, raised doubt.
- 34. In the present case the statement made before the police except witness Mitra Sharma none of the prosecution witnesses named the accused but in the court, the complainant PW 2 Sri Nil Bahadur Kharka, PW 3 Smti Rinkimoni Devi- mother, PW 5 Sri Mitra Sarmah and PW 7 Sri Jubraj Kharka father of the victim all were identified the accused even by stating the name of the accused. The victim PW 6, who has identified the accused in the court by stating that the "bald man present in the dock is the said accused".
- **35.** Coming to the present case as stated above, Sri Mitra Sarmah PW 5 while made statement before the I.O. he mentioned the name of the accused. That apart, informant PW 2, PW 3 mother of the victim, PW 4 Sri Mohan Jadav an independent witness, PW 7 Sri Jubraj Kharka –father of the victim, PW 8 Sri Hari Sarmah and PW 9 Ramlal Sahani, all were stated in the same tune that they knew the accused. They have not been

cross-examination on the point of identification of the accused by the learned counsel for the defence. Besides that, victim herself identified the accused in the court stating that the bald man present in the dock is the said accused. There is no any evidence which create doubt as to identify the accused in the case. Under such circumstances, as submitted by learned counsel for the accused that there is a doubt in identification of the accused in the case cannot be accepted.

In this connection, I have cited a case law viz, **Heera & Another**, **petitioner Vs. State of Rajasthan**, **respondent**, on 20 June, 2007 reported in **Appeal (Crl) No. 1307 of 2006** wherein it is held -

"It seems to us that it has been clearly laid down by this court, in Parkash Chand Sogani V. The State of rajasthan (supra) (AIR Cri LJ), that the absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

In Ramanbhai Naranbhai Patel & others Vs. State of Gujrat (2000 (1) SCC 358) Hon'ble Apex court observed :-

"It becomes at once clear that the aforesaid observations were made in the light of the peculiar facts and circumstances wherein the police is said to have given the names of the accused to the witnesses. Under these circumstances, identification of such a named accused only in the court when the accused was not known earlier to the witness had to be treated as valueless. The said decision, in turn, relied upon an earlier decision of this court in the case of State (Delhi Admn,) v. V.C. Sukla (AIR 1980 SC 1382) wherein also Fazal Ali, J. Speaking fror a

three Judge Bench made similar observations in this regard. In that case the evidence of the witness in the court and his identifying the accused only in the court without previous identification parade was found to be a valueless exercise. The observations made therein were confined to the nature of the evidence deposed to by the said eye witnesses. It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eye witness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case. It is, of course, true as submitted by learned counsel for the appellants that the later decisions of this court in the case of Rajesh Govind Jogesha V. State of Maharashtra (AIR 2000 SC 160) and State of H.P. v. Lekh Raj (AIR 1999 SC 3916), had not considered the aforesaid three-Judge Bench Judgments on the facts and circumstances examined by the Court while rendering these decisions. But even assuming as submitted by learned counsel for the appellants that the evidence of, these two injured witnesses i.e. Bhogilal Ranchhodbhai and Karsanbhai Vallabhbhai identifying the accused in the court may be treated to be of no assistance to the prosecution, the fact remains that these eye witnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identify would well within imprinted in their minds especially when they were assaulted in broad day light. The could not be said to to be interested in roping in innocent persons by shielding the real accused who had assaulted them"

**36.** In Munna Kr. Upadhaya @ Munna Upadhaya Vs. State of Andhra Pradesh reported in **2012 Crl.L.J. 3068**, the Hon'ble Apex Court pleased to held –

"Statement made by the accused u/s 313 Cr.P.C. serves a dual purpose. Firstly, to afford to the accused an opportunity to explain his conduct and secondly, to use denial of established facts as incriminating evidence against him if the accused given incorrect or false answers during the course of his statement u/s 313 Cr.P.C., the court draw an adverse inference against him"

In the instant case the absurd explanation as to his conduct and to deny the established fact by the accused can easily drawn an adverse inference against him.

- **37.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **38.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.
- **39.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental

state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- **40.** Coming to the present case, whether the conviction can be recorded on the sole testimony of a child witness or not?

Such type of issue was dealt by the Hon'ble Apex Court in **Virendra – Vs – State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that who may testify — all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

- **41.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- 42. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341, it was held that –

"a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

- **43.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.
- **44.** In the present case as stated above, the victim was examined after testifying her rationally by putting some questions where she without hesitation makes statement.

It appears according to the prosecution story after recovery of the victim, she narrated the whole incident to her grandfather –PW 2, mother PW 3, father PW 7 in presence of PW 4, PW 5, PW8 and in court all the aforesaid witnesses supported the version of prosecutrix.

**45.** Another point raised by learned counsel for the accused is that PW 2 is the grandfather of the victim, PW 3 and PW 7 are the mother and father of the victim respectively, therefore, the question may rise as to the interestedness of their evidence.

Law is well settled that the interested witnesses are not necessarily false witness. Though the fact that those witnesses have personal interest or stake in the matter must put the court of its guard, that the evidence of such witnesses must be subjected to close scrutiny as the court must assess the testimony of each important witness and indicates the reasons

for accepting or rejecting it and that no doubt should be at once discarded simply because, it came from interested parties. [Vide – (a) Siya Ram Rai Vs, State of Bihar (1973) 3 SCC 241; (b) Sarwan Sing Vst. state of Punjab (1976) 4 SCC 369; (c) Birbal Vs. Keder AIR 1977 SC; (d) Anvaruddin Vs. Shakoor JT (1990) 2 SC 83].

- **46.** Coming to the present case, it is true that PW 2 grandfather of the victim, PW 3 and 7 respectively are mother and father of the victim. As stated above, there is no eye witness except the victim as the incident took place at the remote place at the side of the river Brahmaputra so it would be futile to expect for prosecution to produce any independent outsider as a witness. More so, in the instant case, it is not that only PW 2, 3 and 7 who have supported the prosecution case, there are other independent witnesses i.e. PW 4, PW 5 and PW 8 who also supported the prosecution case. Therefore, the evidence of PW 2, 3 and 7 cannot be thrown overboard simply on the ground of interestedness of their evidence.
- 47. In the present case it appears that neither the prosecutrix nor any of the witnesses has been examined on any bitter enmity in between family members of victim and the accused. There is no any evidence that there is any quarrel which led to enmity in between the family members of the victim with the accused. Even if there is any enmity, it is not expected as to why the victim of sexual assault would blame accused sparing the real culprit. That apart, there is no any reason that the complainant being the grandfather of the victim would put his minor granddaughter at stake by falsely pressing commission of penetrative sexual intercourse. Therefore, the statement of victim is found to be worthy of credence, convincing and reliable.
- **48.** In this case, the other circumstances relied by the prosecution are as follows:

**First** incriminating circumstance is that - after completion of Puja held for Haritalika Brata at about 6.30 p.m. the victim was found missing. All the villagers including most of the witnesses searched the victim and at last they recovered the victim at the side of river Brahmaputra near a

cremation ground. **Second** incriminating circumstance is that - after recovery of the victim she reported about the incident to her grandfather, mother and father in presence of PW 5 and PW 8. **Third** incriminating circumstance is that – from the Puja Mandap accused enticing the victim with a lure of giving chocolate, took her to the side of river Brahmaputra where accused touched her mouth and private parts with his male sexual organ as a result she sustained pain in private part and it becomes whitish. **Fourth** incriminating circumstance is that – after disclosing about the incident by the victim to her grandfather, mother and father, the mother while removing her clothes they noticed slight reddish and swelling on her private parts. Fifth incriminating circumstance is that - the doctor who examined the victim stated that on examination of the victim, he found one superfacial tear over labia minora in the lower part, size about .5 cm x .1 cm x mucosal deep. Margins of reddish in colour and swollen. Sixth incriminating circumstance is that – there is no enmity appears in between the family members of the victim with the accused, seventh incriminating circumstance is that since the day of incident, the accused was also abscond from their village and last incriminating circumstance is that accused simply denied his guilty that gives no explanation of the incident while his statement was recorded u/s 313 of Cr.P.C.

- **49.** All these facts taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probabilities that it is none but accused who committed penetrative sexual assault to the victim at the side of river Brahmaputra near a cremation ground. These established circumstances did not admit of explanation of any other hypothesis then that of the guilt of the accused Bablu Sahani @ Babul Sahani.
- **50.** In view of the aforesaid discussions, I am of the opinion that from the evidence of the victim, other witnesses, medical report and other documents available in the record, the prosecution has successfully proved the guilt of the accused Sri Bablu Sahani @ Babul Sahani for aggravated

sexual assault punished under Section 10 of POCSO Act, but, failed to prove the guilt for aggravated penetrative sexual assault.

- **51.** The accused is heard on the point of sentence. He has submitted that he is the only earning member of his family. Hence, praying for leniency.
- **52.** The learned defence counsel for the accused submits that the convict Bablu Sahani @ Babul Sahani is a man of 40 years and he is a businessman. He was not previously convicted in any offence and he is one of the main earning members of their family. Hence, praying for leniency.
- **53.** I have carefully considered the submissions made by learned Special Public Prosecutor, Sonitpur as well as learned defence counsel. I have also gone through the case record.
- 54. Turning to the guestion of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of the victim and to her family members, but considering the mitigating circumstances, the accused was hardly 40 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. The statute stated u/s.10 of POCSO Act prescribes minimum punishment for a term of 5(five) years with fine. When the intention of the legislator is to impose stringent punishment for not less than ten years, this court has no option but to impose minimum punishment of ten years.

#### ORDER

**55.** I convict the accused Bablu Sahani @ Babul Sahani u/s. 10 of POCSO Act and sentence him to Rigorous Imprisonment for 5 (five) years and also to pay a fine of Rs.5000/- (Rupees five thousand only), in

default, Rigorous Imprisonment for 1 (one) month for the offence u/s 10 of POCSO Act. The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him according to the procedure of 428 of Cr.P.C.

- **56.** As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs. 25,000/- (Rupees twenty five thousand) only is awarded as compensation. The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the father of the victim after proper enquiry.
- **57.** A copy of this judgment be furnished to the accused free of cost and a copy thereof be sent to the District Magistrate, Sonitpur, Tezpur, as per provisions of law.

Send a copy of this Judgment to the Central Jail, Sonitpur, Tezpur.

Given under my Hand and Seal of this Court on this the 25<sup>th</sup> day of May, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

#### A- N-N-E-X-U-R-E

### 1. PRESECUTION WITNESSES

PW 1 :- Dr. Geetumoni Das, M.O.

PW 2 :- Sri Nil Bahadur Kharka, complainant.

PW 3 :- Smti Rinkimoni Devi,
PW 4 :- Sri Mohan Jadav
PW 5 :- Sri Mitra Sharma
PW 6 :- Miss X (victim)
PW 7 :- Sri Jubraj Kharka,

PW 8 :- Sri Hari Sarmah,
PW 9 :- Sri Ramlal Sahani
PW 10 :- Sri Chiraj Chetry

PW 11 :- Sri Brij Kishor Sahani

PW 12 :- Sri Raju Boro

PW 13 :- Mrs Meenakshi Sarmah, Judl. Magistrate.

PW 14 :- Sri Prasanna Saharia, I.O. PW 15 :- Sri Sangkha Swargiary, I.O.

# 2. WITNESSES FOR DEFENCE :- NIL

### 3. PROSECUTION EXHIBITS:

Exhibit 1 :- Medical report

Exhibit 1(1) to (1) :- Signatures of M.O.

Exhibit 2 :- Ejahar

Exhibit 2(1) :- signature of the complainant.

Exhibit 2 A :- statement of victim u/s 164 Cr.P.C.

Exhibit 3 :- order of learned Addl.CJM, Sonitpur.

Exhibit 3(1) :- Signature of learned Addl.CJM, Sonitpur.

Exhibit 3(2) :- signature of learned CJM, Sonitpur.

Exhibit 3(4) and 2 A(1) :- Signature of Mrs Meenakshi Sarmah,

Judl. Magistrate.

Exhibit 4 & 5 :- Sketch maps

Exhibit 6 & 7 :- seizurelists

Exhibit 8 :- Chargesheet.

Exhibit 2(2), 4(1),5(1),6(1),7(1):- signatures of I.O. Prasanna Saharia.

Exhibit 9 & 10 :- Photographs of accused Bablu Sahani Exhibit 8(1), 9(1) and 10(1) :- Signatures of I.O. Sangkha Swargiary.

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- 4. **DEFENCE EXHIBITS:** NIL
- 5. **COURT WITNESSES:** NIL

(A.K. Borah)
Special Judge,
SONITPUR: TEZPUR

SOMITION: TEEFOR