DISTRICT: DHUBRI

IN THE COURT OF THE SPECIAL JUDGE, DHUBRI

Special Case No. 13 OF 2017

U/S 376 IPC, r/w section 4 of POCSO Act

Corresponding to G.R. Case No.4936/2016

State of Assam

Versus

Anowar Hussain @ Betu

PRESENT:- Dipak Thakuria,
Special Judge,
Dhubri.

APPEARANCES:-

Sri B.R. Basumatary, Spl P.P. for the Prosecution. Sri Jamsher Talukdar, Advocate, for the Defence.

Date (s) of Evidence: 22-11-2017, 24-04-2018,

17-05-2018, 07-08-2018,

10-04-2019

Date of Argument: 29-06-2019

Date of Judgment: 12-07-2019

JUDGMENT

- **1.** The accused Anowar Hussain @ Betu stands trial for the offences punishable under Section 376 of the IPC read with section 4 of POCSO Act for committing rape or penetrative sexual assault on the minor daughter of the complainant on 26-11-2016 at about 10 a.m. at village Bagulamari under Dhubri police station.
- **2.** The facts of the case, in brief, as appeared from the ejahar are as follows: That, the complainant on 26-11-2016 lodged a written ejahar before I/C, Bazar T.O.P.

Dhubri, under Dhubri Police Station with an allegation that on that day i.e. 26-11-2016, at about 10:00 A.M. the accused took his four year old minor daughter to his house and committed rape on her.

- **3.** On receipt of the ejahar, the In-Charge of Bazar TOP forwarded the ejahar to the Officer-In-Charge of Dhubri Police Station for registration of a case. Accordingly, Officer-In-Charge of Dhubri police station registered a case against the accused as Dhubri P.S. case no. 1257/16 u/s 376 (2) (i) IPC, r/w section 4 of POCSO Act.
- **4.** After registering the case, Police started investigation. During investigation, The I.O. sent the victim girl to Dhubri Civil Hospital for her Medical examination and collected its report. The statement of the victim was recorded in the court u/s 164 Cr.P.C. and also recorded the statements of other witnesses u/s 161 Cr.P.C. The I.O. arrested the accused and forwarded him in the court and by completing the investigation submitted charge sheet against the accused under section 376 (2) (i) IPC, r/w section 4 of POCSO Act.
- **5.** After filing the charge sheet my learned predecessor was pleased to release the accused on bail.
- **6.** After taking cognizance of the case, copies were furnished to the accused and after hearing both the parties and perusal of the case record and case diary, my learned predecessor was pleased to frame formal charge against the accused u/s 376 IPC read with section 4 of POCSO Act. Charge so framed was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.
- **7.** The prosecution examined nine witnesses including the medical and investigating officers and closed the evidence.
- **8.** After completion of the prosecution evidence, 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.

9. Heard argument advanced by learned counsels of the parties and perused the evidences on record.

Following points have been set up for determination:

- i. Whether the accused on 26-11-2016, at about 10:00 am, at village Bagulamari, under Dhubri PS committed rape on the minor daughter of the informant and thereby the accused is liable to be punished u/s 376 IPC?
- ii. Whether the accused on the same day, time and place committed penetrative sexual assault on the victim, a child under 18 years of age and thereby the accused is liable to be punished u/s 4 of POCSO Act?

DISCUSSION ON THE POINTS FOR DETERMINATION AND DECISION ARRIVED THEREON WITH REASONS

- 10. In order to establish the charge framed against the accused, the prosecution has examined altogether nine witnesses. Among them P. W. 1 is the complainant who is the father of the victim girl whom the prosecution has examined as P. W. 7. PW-5 is the mother of the victim girl. The prosecution examined three relatives of the complainant as PW-2, PW-4 and PW-8. PW-6 Sultan Ali is the independent witness. PW-3 Dr. Muskura Ahmed and P. W. 9 Bijit Dadhara are medical and investigating Officers respectively.
- **11.** On the other hand, the defence examined none. The plea of defence is total denial of the case.
- **12.** For proper appreciation of the evidence on record let us reproduce material parts of the oral testimonies of the prosecution witnesses.

- 13.1 PW-1 is the complainant and the father of the alleged victim. He has deposed that he knows the accused. His daughter is about five years old. At the time of occurrence, he was not present in his house. When he returned home, he heard that the accused had committed rape on his daughter. Therefore, he filed the ejahar. He has exhibited the ejahar which is marked as Ext-1 and authenticated his signature which is marked as Ext-1(1). In his cross examination, he has deposed that having learned about the incident, he went to the A.M.Co. Road Police outpost and there, he met his daughter, his wife, brothers and others. The accused is his neighbour. He has a large family. The accused is a rickshaw puller. Having learnt about the incident from his wife and brother, he has filed this case against the accused. He has denied the suggestion of the defence that he had land dispute with the accused, so he deposed falsely. He has further denied the suggestion of the defence that at the time of the incident the accused was not in his house and he was playing rickshaw in the market.
- 13.2 PW-2, the cousin brother of the complainant, has deposed that he knows the accused. At the time of incident, he was not present in his house. When he returned home, he saw that the mother of the victim girl was crying. He then asked her what the matter was. She told him that the accused lured the victim girl to go to his home in the pretext of showing magic and in his house the accused committed rape on the victim girl. The mother of the victim girl showed him the panty of the victim girl and he found there some lubricating substance. Thereafter, while he was proceeding to the Police Station along with the victim girl, on the way, the son of the accused, namely Mohibul waylaid him and snatched away the panty of the victim girl from him. Thereafter, the informant filed the FIR of this case against the accused. In cross-examination he has denied the suggestion of the defence that he did not disclose before I. O. that the mother of the victim girl gave him the panty of the victim and he found there some lubricating substance. He has also denied the suggestion of the defence that he did not disclose before the I. O. that the son of the

- accused Mohibul waylaid him and snatched away the panty of the victim girl from him. He has denied the suggestion of the defence that they had land dispute with the accused; so, deposed falsely and the mother of the victim girl did not tell him that the accused lured the victim girl to his home in the pretext of showing magic and in his house committed rape on her.
- P. W. 3 Dr. Muskura Ahmed is the medical officer. She has deposed 13.3 that on 26-11-2016, she was posted at the Dhubri Health & Maternity Centre as Sr. Medical & Health Officer. On that day, she examined the victim girl. The victim was a small girl and she could not say anything. Then her attendant Momina Bibi told that one old man took her in a room and wanted to show magic and physically assaulted her. On examination, she found the patient was normal. She did not find any mark of injury on her body. She also did not find spermatozoa in the vaginal smear. She did not find any evidence of recent sexual intercourse on the victim at the time of examination. According to radiological report, the age of the victim is 3/4 years. She has exhibited her report which is marked as Ext-2 and authenticated her signature which is marked Ext-2 (1). Ext-3 is the radiological report. In cross examination, she has deposed that she did not ascertain the age of the victim.
- 13.4 PW-4, the relative of the complainant, has deposed that on the day of incident, his son informed him that accused committed rape on the victim girl, the daughter of the complainant. At that time, the victim girl was six years old. Thereafter, he visited the house of the complainant and the complainant told him that the family members of the accused threatened him and his family members. Thereafter, the complainant filed the ejahar. In cross examination, he has deposed that the house of Akbar Ali, Khaimuddin, Aktar Ali, Jalil Hoque are near to the house of the complainant. Accused has his wife and other seven family members. The accused has a shop in his residence. He did not ask the victim girl about the incident. The complainant lodged the ejahar after consultation with him.

- 13.5 PW-5, the mother of the alleged victim, has deposed that her daughter is seven years old. She knows the accused person who is her neighbour. On the day of incident, at about 09:00 am her daughter visited the house of accused with a view to play with his granddaughter. While her daughter returned home, she noticed that the panty of her daughter was removed. She asked why the panty was removed, then her daughter told her that accused took her inside a room with a promise to show magic. The accused removed her panty and inserted his penis. Then she told the incident to Afzal Hoque. At that time, her husband was not at their residence. He was informed about the incident. They visited A.M.Co. Road Police outpost. In the meantime, her husband also visited the police out post. From there, her daughter was sent to the hospital. The son of accused snatched away the panty of her daughter from her hand. In her cross examination, she has deposed that her daughter was playing with Mousumi. There are houses of other persons near to their house. There are seven members in the house of the accused. After two days, her statement was recorded by I.O. in the police station. Police seized nothing. While her daughter returned home from the house of the accused, she noticed the panty of her daughter was just above the knee. She has denied the suggestion of the defence that before I. O. she did not disclose that her daughter told her that the accused removed her panty and inserted his penis to her. She has further denied the suggestion of the defence that the son of the accused did not snatch away the panty from her hand and there was land dispute between her husband and the accused.
- 13.6 PW-6 Sultan Ali, who is the only independent witness of this case, has deposed that he knows nothing about the incident.
- 13.7 PW-7, the alleged victim, has deposed that she knows the accused. One day, she was playing with her friends in front of the shop of accused. Accused told her that he would show magic, so she entered into his house. The accused opened her panty and touched her private part with his private part. In cross examination, she has deposed that on the day of the incident Mousumi and one of her

friends were playing with her. Betu called them one after another to his room.

- PW-8, one of the relatives of the complainant, has deposed that he 13.8 knows the accused. On 26-11-2016, at about 09:30 / 10:00 a.m. he was in his residence. His maternal aunty over phone asked him to go to her house which is situated just 1 km away from his house. He immediately rushed to the house of her maternal aunt. He saw the victim was sleeping. Her mother told him that the accused took her inside a room with a promise to show magic. The accused removed her panty and committed rape on her. Mother of the victim further told him that the sons of accused snatched away the panty of the victim. In cross examination, he has deposed that he is a tailor. His shop is at A.M.Co. Road, Dhubri. He did not disclose before I.O. that his maternal aunt called him to her house over phone. He could not say the number of the mobile phone of his maternal aunt. While he visited the house of his maternal uncle he noticed a gathering of 100 persons. He could not say the names of the persons present there. He has denied the suggestion of the defence that the mother of the victim girl did not tell him that the accused took her daughter inside a room to show magic and the accused removed her panty and committed rape on her and the son of the accused snatched away the panty of the victim. He has further denied the suggestion of the defence that he did not disclose before the I. O. that mother of the victim girl did not tell him that accused took her daughter inside a room to show magic and the accused removed her panty and committed rape on her and the son of the accused snatched away the panty of the victim.
- 13.9 PW-9 Bijit Dadhara is the Investigating Officer. He has deposed that on 26-11-2016, he was working as In-charge at Bazar TOP under Dhubri Police Station. On that day, at about 10:45 am, the informant visited the TOP and verbally informed that on that day at about 10:00 am the accused who was 60 years old induced his four years daughter that he would show Magic to her and took her to his house and committed rape on her. Then he opened G.D. Entry being Bazar

TOP G.D.E. No. 448 dated 26-11-2016 and moved to the place of occurrence. The complainant took his daughter to Police Outpost. So, he sent the girl to Dhubri Civil Hospital for examination and treatment. He inspected the place of occurrence, prepared sketch map of place of occurrence and recorded the statements of witnesses. On that day, the complainant lodged formal ejahar which he received and forwarded the same to O/C, Dhubri P.S. for registration of a case. After filing the ejahar the accused was arrested and produced him in the court. On 28th November 2016 the statements of the victim and her mother were recorded in the court u/s 164 Cr.P.C. Thereafter, by completing the investigation he has submitted charge sheet against the accused u/s 376(2)(i) IPC, r/w section 4 of POCSO Act. He exhibited the Extract copy of G.D. Entry No. 448 dated 26-11-2016 as Ext-4, Sketch map of place of occurrence as Ext-5 and Charge sheet as Ext-6. He has authenticated his signatures which are marked as Ext-4(1), Ext-5(1) and Ext-6(1). In cross examination, he has deposed that he did not examine the ejahar writer. He did not seize wearing apparels of the accused and the victim girl. He did not examine Jahirul Islam and Hashem Ali who escorted the victim to the Hospital. The complainant and his mother were present at the time of sending the victim to hospital. He did not send the accused to hospital with a view to collect evidence medically. He did not examine Akbar Ali, Rahimuddin, Aktar Ali and Jalil Hoque as witness. At the time of incident lady police officer was posted at Sadar Thana, but no lady police officer was posted at TOP. He prepared the sketch map at place of occurrence, but he did not mention the same in the sketch map. Witness Afjal Hoque did not disclose before him that mother of the victim girl gave him the panty of the victim girl and he found some lubricating substance and the son of the accused namely Mohibul stanched away the panty of the victim girl from him. He did not examine Moushami. Witness Sajida Khatun did not disclose before him that her daughter told her that accused removed her panty and inserted his penis to her.

- **13.** From the evidence of the investigating officer Bijit Dadhara (P. W. 9) it appears that on 26-11-2016 at about 10.45 a.m. the complainant visited Bazar Town Police Outpost and verbally informed him that on that day at about 10 a.m. Anowar Hussein @ Bitu a 60 year old person induced his four year old daughter that he would show magic to her and took her to his house and committed rape on her. After getting the information he opened Bazar TOP G. D. Entry No. 448 dated 26-11-2016. The prosecution exhibited the extract copy of G. D. Entry No. 448 dated 26-11-2016 and marked the same as Ext. 4 and the investigating officer proved the same by exhibiting his signature thereon as Ext. 4 (1). The contents of the Ext. 4 corroborate the deposition of the investigating officer. From the Ext. 4 and the oral testimony of the investigating officer it appears that on that day he (I. O) sent the victim girl to Dhubri Civil Hospital for her medical examination. The investigating officer has further deposed that on that day the complainant lodged the ejahar which he received and forwarded to Dhubri police station for registration a case. The complainant (P. W. 1) has deposed that on the day of the incident he was not present at his residence and he was informed about the incident and immediately he returned home and filed the ejahar which the prosecution has exhibited and marked as Ext. 1. He has authenticated his signature as Ext. 1 (1). From his cross-examination it reveals that after hearing about the incident he went to A. M. Co. Road police outpost where he met his wife, his brother and daughter. (Bazar TOP is also known as A. M. Co. Road police outpost).
- **14.** The defence categorically cross-examined the investigating officer; but had not put any question on the extract copy of G. D. Entry No. 448 dated 26-11-2016. So, the Ext. 4 remains unchallenged.
- **15.** On careful perusal the contents of the Ext. 4 it appears that the allegation against the accused was that on that day i.e. 26-11-2016 at about 10 a.m. in his house he committed rape on the daughter of the complainant who was just a 4 year old girl. The formal complainant was lodged on that day by filing a written ejahar (Ext. 1) and there is no ambiguity between the contents of the Ext. 4 and Ext. 1.

- **16.** In a case registered under the provisions of POCSO Act, the age of the victim is very important. The prosecution examined the parents of the victim girl as P. W. 1 and P. W. 5. The father of the victim girl (P. W. 1) has deposed that his daughter was 5 years old. The mother of the victim girl (P. W. 5) on the day of recording her deposition in the Court during trial i.e. on 24th day of April 2018 has deposed that on that day her daughter was 7 year old. The alleged incident took place two years prior to the recording her deposition. So, as per P. W. 5 on the day of the alleged incident her daughter was just 5 years old. Dr. Muskura Ahmed (P. W. 3), the medical officer has also deposed that as per radiological report the victim girl was 3/4 years old. P. W. 3 has exhibited the report of radiologist and marked the same as Ext. 3. In cross-examination the medical officer has admitted that she did not ascertain the age of the victim. The defence does not challenge the radiological report (Ext. 3). From Ext. 3 it appears that the radiologist did x-ray and ultimately opined that approximate radiological age of the victim was 3 to 4 years. Two x-ray plates have been enclosed with the report. There is a possibility of variation of age of two years either side. If two years is added with the radiological age of the victim girl still it is found that at the time of the alleged incident the victim girl was just 6 years old. Besides it, the parents are the best persons to say the age of their children. So, there is no ambiguity of the oral testimonies of the parents of the victim girl so far her age is concerned. So, without any hesitation it can be concluded that at the time of the alleged incident the victim girl was a child as defined under section of section 2 (d) of POCSO Act.
- a.m. in the house of the accused. During investigation the investigating officer visited the place of occurrence and prepared the sketch map of the place of occurrence which the prosecution has exhibited and marked as Ext. 5. The investigating officer authenticated his signature thereon and marked the same as Ext. 5 (1). In cross-examination the investigating officer confirmed that he prepared the sketch map at place of occurrence. He has admitted that he has not mentioned the same in the sketch map. The investigating officer in his sketch map (Ext. 5) indicates the place of occurrence as "A" which is the house of the accused. At the time of the alleged incident except P. W. 5 other non-official

witnesses were not present. So, the evidence of the mother of the victim girl (P. W. 5) is very important so far place of the offence is concerned. She (P. W. 5) has deposed that on the day of the incident her daughter visited the house of the accused at about 9 a.m. with a view to play with his granddaughter. Her daughter told her that the accused took her inside his room.

- 18. The defence while cross-examining the complainant (P. W. 1) put a suggestion to him that at the time of the incident the accused was not at his residence, he was playing rickshaw in the market. The complainant denied the suggestion. The accused at the time of recording his statement under section 313 Cr. P. C. has not taken the plea that at the time of the incident he was not at his residence rather he was playing rickshaw in the market. Except that suggestion the defence has failed to show any evidence in support of the plea that at the time of the incident he was playing rickshaw in the market. Undoubtedly the victim girl is the most important witness. She has deposed that the accused told her that he would show magic to her; so, she entered into his house.
- 19. The oral testimonies of the victim girl and her mother and the sketch map (Ext. 5) are sufficient to come to a safe conclusion that the alleged incident took place in the house of the accused. The time was around 10 a.m. So far date of the occurrence is concerned the contents of the ejahar and the extract copy of G. D. Entry are sufficient to hold that the date of the incident was 26-11-2016.
- **20.** Now the most crucial point is whether the accused committed rape or penetrative sexual assault to the victim girl or not.
- 21. 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.

- 22. During the course of argument learned Special Public Prosecutor has submitted that the victim girl on the day of the incident told about the incident to her mother. Her mother noticed that the panty of her daughter was removed. On being asked to her daughter, her daughter told her that the accused removed her panty and inserted his penis. P. W. 2 has also deposed that he found some lubricating substance in the panty of the victim girl. The prosecution could not seize the panty as the same was snatched away by the son of the accused. The oral testimony of the mother of the victim girl is sufficient to hold that the accused committed rape on the victim girl.
- 23. On the other hand learned defence counsel has submitted that the allegation of rape on a minor girl is very serious and law provides very stringent punishment to the wrongdoer. Under such circumstances the prosecution has to establish the charge of rape against the accused beyond all reasonable doubt. In the case in hand there was no eye witness. Though it is claimed that the victim girl was playing with the granddaughter of the accused; but the investigating officer had not examined her. The victim girl while deposed in the Court has not stated that the accused inserted his private part to her. On the 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. As per Medical Jurisprudence, if there was forceful rape on the victim, the medical officer who examined the victim girl without delay would have been detected mark of violence on her body. But the medical officer detected no injury on the body of the victim girl.
- **24.** Learned defence counsel has further submitted that the investigating officer violated the mandatory provision of section 24 of the POCSO Act as the statement of the victim girl was not recorded by a woman Police Officer not below the rank of sub-inspector.
- 25. Learned defence counsel has relied on following decisions:-

- Moinul Haque and others vs. State of Assam (2001) 1 Gauhati Law Reports 516.
- 2. Lukba Rime vs. State of Arunachal Pradesh (2010) 3 Gauhati Law Reports 312.
- 3. Abdul Aziz vs. State of Assam (2012) 2 Gauhati Law Reports 539.
- 4. Atab Uddin Atias Aftabuddin vs. State of Assam (2013) 4 Gauhati Law Reports 180.
- 5. Anthony Lalnunsiama vs. State of Mizoram (2014) 4 Gauhati Law Reports 621.
- 6. Sh. Laldawngliana vs. State of Mizoram (2016) 3 Gauhati Law Reports 763
- 7. Jairam Jaiswal vs. State of Assam (2016) 4 Gauhati Law Reports 580.
- 8. Sudhansu Sekhar Sahoo vs. State of Orissa 2003 Supreme Court Cases (Cri) 1484.
- **26.** On perusal the decision of the Hon'ble Supreme Court of India passed in Sudhansu Sekhar Sahoo vs. State of Orissa 2003 Supreme Court Cases (Cri) 1484 the Hon'ble Supreme Court has opined and the Courts should be vigilant to protect the society from such evil. But it is equally important that there must be fairness to all sides.
- 27. The Hon'ble Gauhati High Court in Moinul Haque and others vs. State of Assam (2001) 1 Gauhati Law Reports 516 has opined that if there was full and vital contradiction, then it is not to safe rely the evidence. In Lukba Rime vs. State of Arunachal Pradesh (2010) 3 Gauhati Law Reports 312 has opined that the conviction can be based solely on the testimony of the prosecutrix when the court is convinced about the truthfulness of the prosecutrix. In Abdul Aziz vs. State of Assam (2012) 2 Gauhati Law Reports 539, Atab Uddin Atias Aftabuddin vs. State of Assam (2013) 4 Gauhati Law Reports 180, Sh. Laldawngliana vs. State of Mizoram (2016) 3 Gauhati Law Reports 763 and Jairam Jaiswal vs. State of Assam (2016) 4 Gauhati Law Reports 580 the Hon'ble High Court has opined that the statement of the prosecutrix can be relied if her version is supported by the medical evidence.

- **28.** The Hon'ble Gauhati High Court in Anthony Lalnunsiama vs. State of Mizoram (2014) 4 Gauhati Law Reports 621 has given emphasis on the laboratory report. It is held that suspicion however strong, cannot take place of proof.
- 29. In the case in hand the vital witnesses for the prosecution to prove the charge of rape and penetrative sexual assault to the victim girl are the mother of the victim girl, the victim girl herself and the medical officer. The mother of the victim girl (P. W. 5) has deposed that on the day of the incident her daughter visited the house of the accused with a view to play with his granddaughter. While her daughter returned home, she noticed that the panty of her daughter was removed. She asked her daughter why she did remove her panty, then her daughter told her that accused took her inside a room with a promise to show magic, he removed her panty and inserted his penis. In cross-examination she has denied the suggestion of the defence that she did not disclose before I. O. that her daughter told her that the accused removed her panty and inserted his penis to her. The investigating officer in his cross-examination has stated that the mother of the victim girl did not disclose before him that her daughter told her that the accused after removing her panty inserted his penis.
- **30.** On the day of the incident the medical officer examined the victim girl. But she detected no injury on her body and also not found any evidence of sexual intercourse on her. The victim girl is a young girl just 5 to 6 years old. If the accused penetrated his private part into her private part definitely the medical officer would have been detected the sign of penetration. So, the evidence of the medical officer does not help the prosecution anyway so far the allegation of rape or penetrative sexual assault is concerned.
- **31.** From the evidence of P. W. 2 it appears that the panty of the victim girl was handed over to him by the mother of the victim girl. He found some lubricating substance on it. Thereafter he proceeded to police station along with the victim girl. On the way, the son of the accused Mohibul waylaid him and snatched the panty from him. From the evidence of the investigating officer it appears that before him he had not disclosed that fact. But the mother of the victim girl (P. W.

- 5) has deposed that the son of the accused snatched the panty of her daughter from her hands. Actually it is not known from whose hand the panty of the victim girl had been snatched away by the son of the accused. During investigation the investigating officer did not try to recover the panty of the victim girl from the hands of the son of the accused and also not attempt to apprehend the son of the accused to ascertain the facts that he had snatched away a vital piece of evidence of the prosecution. So, it is difficult to accept the oral testimony that the son of the accused snatched away the panty of the victim girl.
- 32. During investigation the statement of the victim girl was recorded under section 164 Cr. P. C. At that time the victim girl was just 4 years as mentioned in the statement by the Judicial Magistrate. It appears that learned Judicial Magistrate recorded her statement on oath. A girl of tender age just 4 to 5 years old does not know the consequence of oath. Besides it before recording the statement of the victim girl her maturity was also not tested by learned Judicial Magistrate. Apparently her statement was not recorded as per law and hence the same is not considered.
- **33.** From the evidence of the investigating officer (P. W. 9) it appears that on the day of the incident after filing the ejahar he arrested the accused. There is no evidence that after arrest of the accused, the investigating officer produced the accused before medical officer to obtain evidence under section 53-A of the Cr. P. C.
- **34.** 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.
- **35.** Now let us examine whether the act of the accused falls any of the offence under Indian Penal Code or POCSO Act or not.
- **36.** 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.

- 37. During trial the testimony of the victim girl was recorded in the Court and before recording her evidence her maturity of understanding was tested by putting some questions. The victim girl replied the questions to put her satisfactorily and it was held that she attained sufficient maturity of understanding. As she was a minor girl just seven years old, she was exempted from taking oath. She has deposed that on the day of the incident she was playing with her friends in front of his shop. Accused told her that he would show magic; so, she entered into his house. The accused opened her pant and touched her private part with his private part. The defence was allowed to cross-examine her to test the veracity of her deposition. In cross-examination she has stated that on that day she was playing with Mousumi and one of her friends. The accused called them one after another. She has denied the suggestion of the defence that she deposed as she was tutored by her mother.
- **38.** From the evidence of the mother of the victim girl it appears that after the incident the victim girl immediately told her about the incident. At that time the father of the victim girl (P. W. 1) was not at his residence. The mother of the victim girl (P. W. 5) immediately informed the incident over phone to P. W. 8 who is her nephew. He immediately rushed to the house of the complainant where the mother of the victim told him about the incident. In the meantime P. W. 2 who is one of the relatives of the complainant visited the house of the complainant who noticed that the mother of the victim was crying and on being asked she told him about the incident. Thereafter P. W. 2 and P. W. 5 took the victim girl to Bazar TOP and informed about the incident to the complainant and the complainant directly visited the police outpost. The sequences of the incident

show that on the day of the incident the accused misbehaved the victim girl. The defence tried to project that there was land dispute between the accused and the complainant. The defence put a suggestion to the complainant and his wife to that extent which they denied. The defence has failed to establish that there was land dispute between the complainant and the accused. While the accused was examined under section 313 Cr. P. C. he has not stated anything having land dispute with the complainant. He has simply stated that a false case was filed and he was falsely implicated.

- 39. As per section 24 of the POCSO Act the statement of the victim girl shall be recorded at her residence or at a place where she usually resides or the place of the child of his/her choice as far as practicable by a woman police officer not below the rank of sub-inspector. In this case the statement of the victim was recorded by the investigating officer who is a male sub-inspector. The investigating officer has stated nothing where he recorded the statement of the victim girl and the defence has also raised no question on this point. The investigating officer in cross-examination has stated that at that time there was no lady police officer posted at the police outpost. The lady police officer was posted at Sadar Thana. On perusal section 24 of the POCSO Act it appears that the statement of the victim shall be recorded by woman SI as practicable. The words "as practicable" are important. As there was no lady police officer was posted at police outpost; so, it was not practicable to record the statement of the victim through woman SI. Besides it violation of that procedure of recording the statement of the victim will not prejudice anyway to the accused.
- **40.** After meticulous scanning the evidence on record, particularly the oral testimonies of the victim girl and her mother and subsequent events it transpires that the accused called the victim girl to his room under the pretext of showing magic and the victim girl who was just a 4 to 5 year old girl believed him and entered into his room where the accused removed her panty and touched her private parts with his private parts.
- **41.** 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 in his room. The accused removed her pant and touched her private parts with his private part. The act of the accused that he removed the pant of the victim inside his 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.

- **42.** From the evidence on record it transpires that the accused touched the private part of the victim girl with his private part. 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." Section 9 (m) of the POCSO Act defines "whoever commits sexual assault on a child below twelve years of age the offence is to be considered as commission of aggravated sexual assault". At the time of the incident the victim girl was below the age of twelve years; so, the act of the accused shows that he committed aggravated sexually assault to the victim girl as defined under section 9 of POCSO Act and punishable under section 10 of POCSO Act.
- **43.** 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 10 of the POCSO Act.

- **44.** Though the charges under section 354-B IPC and section 10 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 10 of POCSO Act instead of section 4 of POCSO Act vide provision of section 222 (2) Cr. P. C.
- **45.** Hence, it is held that the prosecution is able to establish the charges against the accused under section 354-B IPC and section 10 of the POCSO Act beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **46.** The accused/convict is a person of 60 years old and the victim girl is just like his granddaughter. 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.
- **47.** Heard accused/convict on quantum of sentence. Also heard learned counsels appearing for the parties.
- **48.** Accused/convict has stated that he is an old man and the only earning member 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.
- **49.** 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. 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 age and family burden.

- **50.** 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.
- **51.** Prescribed punishment under section 10 of the POCSO Act is imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.
- **52.** The accused/convict is a person of 60 years. Considering his old age it is decided to impose prescribed minimum punishment to him which I think will meet the ends of justice.

ORDER

- **53.** The prosecution is able to establish the charges against the accused Anowar Hussein @ Betu under section 354-B IPC and section 10 of POCSO Act beyond all reasonable doubts and accordingly he is found guilty and convicted under said sections.
- **54.** The accused/convict is sentenced to undergo rigorous imprisonment for three (three) years and also pay fine of Rs. 2,000/ (rupees two thousand) in default rigorous imprisonment for 2 (two) months under section 354-B IPC.
- **55.** 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 3 (three) months under section 10 of POCSO Act.
- **56.** Both the sentences will run concurrently.
- **57.** Fine amount, if realized, shall be given to the victim as compensation.
- **58.** The period underwent during investigation and trial shall be set off as per law.

59. The accused/convict is on bail. So, his bail bond is cancelled and he is taken into

custody and sends him to Jail to serve out the sentence as imposed.

60. Furnish a free certified copy of the judgment and order to the accused/convict as

per provision of law forthwith. Furnish another copy of judgment and order to

the District Magistrate, Dhubri for information and necessary action, if any, from

his side.

Victim compensation.

61. The victim girl who was just 5 year old minor girl at the time of incident 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.

62. 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. The bench assistant is directed to provide

the name of the victim girl, her parents' name and address to the Secretary

DLSA, Dhubri in a sealed envelope so that DLSA, Dhubri can communicate with

the victim or her legal quardian.

63. Send a copy of this judgment and order to the Secretary DLSA, Dhubri for

information and necessary action.

64. Given under my hand and seal today on this 12th day of July 2019.

(D. Thakuria)

Special Judge, Dhubri

Dictated & corrected by me.

(D. Thakuria)

Special judge, Dhubri.

APPENDIX

1. PROSECUTION WITNESSES:

PW-1 Complainant

PW-2 Cousin brother of the complainant

PW-3 Dr. Muskura Ahmed, Medical Officer

PW-4 Uncle of the complainant

PW-5 Mother of the victim

PW-6 Sultan Ali, independent witness

PW-7 Alleged victim

PW-8 Cousin brother of the complainant

PW-9 Bijit Dadhara, Investigating Officer

2. PROSECUTION EXHIBIT:

Exhibit-1 Ejahar

Exhbit-2 Medical report

Exhibit-3 Radiological report

Exhibit-4 Extract Copy of G.D. Entry No. 448 dated 26-11-2016.

Exhibit-5 Sketch map

Exhbiit-6 Charge sheet

3. DEFENCE WITNES: Nil.

4. **DEFENCE EXHIBITS:** Nil.

(D. Thakuria)

Special Judge, Dhubri