IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

Spl. POCSO Case No. 01 of 2018

U/S - Sec. 4 of POCSO Act, 2012.

State

- Versus -

Adhay Malakar.

: Accused person.

Present: Sri L.K. Saikia, Additional Sessions Judge, Bajali, Pathsala.

Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons :Sri Dipak Das, Sri Giridhar Choudhury.

Ld. Advocate.

Dates of recording evidences : 27-04-18, 04-05-18, 18-05-18

12-06-18, 08-10-18, 16-11-18,

& 22-11-18.

Date of recording statements u/s 313 Cr.P.C. : 01-12-2018.

Date of Argument : 05-05-2019 & 31-05-2019.

Date of Judgment : 14-06-2019.

J U D G M E N T

- 1. The prosecution case in brief, is that, one Dibakar Bharali lodged an ejahar on 12-02-2018 with the Officer-In-Charge Patacharkuchi Police Station alleging, *inter-alia*, that on 12-02-18 at about 6 pm while his niece came out to the gate way/ courtyard from the house with a view to see her father then accused Adhay Malakar by gaging her mouth took her away at far and committed bad act. After that while the victim was crying in the bed then her aunt asked the reason and then she told that her life has ruined by the accused. Later on, he came to know about the occurrence from the family members. Hence, this case.
- **2.** Accordingly the FIR was registered as Patacharkuchi P. S. Case No. 101/18 u/s 4 of POCSO Act, 2012.
- During investigation police visited the place of occurrence, recorded the statements of witnesses including the victim girl, sent her for medical examination and collected medical examination report, produced before the Court wherein the Ld. Magistrate recorded the statement of the victim u/s 164 Cr.P.C, arrested the accused person and forwarded him to the court and after completion of investigation, having been found *prima-facie* case, the I/O sent up the accused for trial by filing charge sheet u/s 4 of POCSO Act, 2012.
- 4. On being produced the accused from jail, the copies were furnished to him. After hearing both the parties, my predecessor-in-office, framed charge under section 4 of POCSO Act, 2012 and the accusation of charge was read over and explained to him, to which he pleaded not guilty and claimed to be tried. Thereafter he was enlarged on bail and the trial commenced.
- The prosecution in order to prove its case examined altogether 10 (ten) PWs including M.O. and I.O. The defence plea is of total denial. While the accused person was examined u/s 313 of Cr. P. C. with regards to the incriminating materials available in the evidence of the witnesses he repeated his denial. The defence side has not

adduced any defence evidence.

6. Heard strenuous argument advanced by the learned Addl. P. P. and the learned defence counsel. Perused the record.

7. POINTS FOR DETERMINATION

(i) Whether the accused person on 12-02-2018 at village Dubi Malipara under Patacharkuchi P.S. of district Barpeta, while the victim was standing in front of her gate, then the accused person took her forcefully by the side of the gate and committed penetrative sexual assault and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

EVIDENCE OF WITNESSES

- **8.** To arrive at the judicial decision, let me see what the witnesses have stated.
- 9. PW - 1 Sri Dhiraj Bharali stated that informant Sri Dibakar Bharali is his elder brother, victim is his daughter and at the time of occurrence she was 15 years old and a student of class X. On 12.02.2018 in the evening he came to purchase medicine at Dubi Chowk for his wife who had been suffering from illness and after sometimes his daughter Niva Bharali informed that accused Adhay Malakar forcefully took away his elder daughter as well as the victim to the back side of his house near the bushes of bamboos groves by gagging her mouth and forcefully committed sexual intercourse with her. After getting the information he immediately came to the house and saw victim was weeping. On being asked the victim told that accused Adhay Malakar forcefully raped on her by taking her into the back side of their house as well as near the bushes of bamboos and in the mean time, the neighbouring people rushed to his house and thereafter he brought the victim to the Patacharkuchi PS along with his

wife, informant Dibakar Bharali and others. His brother Dibakar Bharali as well as informant lodged the ejahar and police has recorded statement of him as well as victim and others. On the next day morning again police brought the victim to FAAMCH, Barpeta for her medical examination and after completion of the medical examination she was brought to the Bajali Court and in the Court Magistrate had recorded her statement and thereafter she was handed over to him. The police had seized a panty, laggings, frock and semiz (inner).

In cross examination, PW 1 stated that on the day of the occurrence he got the information over phone about 6.30 pm while he was at Dubi Chowk which is about $1\frac{1}{2}$ km away from his house. There is a furniture shop belongs to the accused in-front of his house as well as across the road and there are about 30 houses of other neighbours around the house of him and the accused. At the time of occurrence, the furniture shop was closed. There is no street light in their village and on the day of occurrence in the evening while he rushed to his house then he saw a gathering of about 50 persons in his house and he found the victim was of semi-conscious position and he saw his sisterin-law was pouring water on her head. The police came to their house on the next day of the occurrence. Police had seized the cloths belonging to the victim after 7 days of the occurrence. He did not know any Pranjit Malakar @Moni. He denied the suggestion that he know Pranjit Malakar who had love affair with the victim. He also denied the suggestion that there is a cow shed in the back side of his house and there is no any house adjacent to the bamboo groves as well as the place of occurrence and it is about 150 feet away from the house of the accused to the place of occurrence. He also denied that no cloths of the victim had been seized.

10. PW - 2 Dibakar Bharali stated that on 12/02/2018 in the evening about 6 pm while he was in the back side of his house suddenly he heard hue and cry in his courtyard then he immediately came to his courtyard and saw elder aunt of the victim as well as his sister-in-law Kabita Bharali was raising hue and cry and then on being asked his sister-in-law, Kabita Bharali told him that on that day in the

evening accused Adhay Malakar forcefully took away the victim by gagging her mouth in the back side of his furniture shop near the bushes of bamboo wherein he raped on her. On being heard about the occurrence he along with the victim and her parents and the co-villagers went to Patacharkuchi P.S. and informed the matter and lodged the ejahar with the police.

In his cross examination PW 2 stated that the father of the victim is a businessman and on the day of the occurrence he was out of his house in relating to his business purpose. The main road in front of house is visible from their house and it is audible if there is any hue and cry on the main road. They have been giving good teaching to the victim since her childhood as such she understood what the good or what is bad and she was born and brought up at their guidance. He have forgotten the date of marriage of the parents of victim and victim is the elder daughter of his brother. He had not mentioned in the ejahar that the police has neither ask the birth certificate of the victim nor seized the same. He know the contention of the ejahar.

He had not stated in the ejahar while he was in the backside of his house and was busy bathing then hearing hulla and he came to the courtyard and saw Kabita Bharali was raising hulla and on being asked by Kabita Bharali, the victim told to her that she was raped by accused Adhay Malakar. He had not asked the victim directly about the alleged occurrence. He also had not stated in ejahar the accused forcefully brought the victim in the back side of his furniture shop and raped on her near the bamboo bushes. He stated that that he neither inquired nor asked to the victim whether there is any physical relation of her with anybody. PW 2 stated that he did not ask anything to the victim in relating to the incident.

11. PW – 3 victim stated that the occurrence took place on 12.02.18 and in that year she was attended HSLC examination. On the day of occurrence, in the evening at about 6 pm, while she was standing in-front of their house and waiting for her father who went to purchase medicine for her mother then accused Abhay Malakar called her but she did not go near to him so he came to her and clasped her

by gagging her mouth and forcefully took her away in the backside of his furniture shop and thereafter took her to the nearer of the bamboo bushes. After that he pull her cloth forcefully and committed raped on her. He also threatened her not to make any hue and cry otherwise he would kill her and after committing rape he left her and then she came to their home. She had felt uneasy and also fell in the courtyard. She told the entire facts of the matter to her aunt, mother and other family members and after sometime her parents, aunt and her elder uncle brought her to Patacharkuchi police station wherein her elder uncle lodged a complain. The police had recorded her statement and since it was night she was kept at Tapbaon, a child welfare centre and on the next day she was brought to FAAMCH, Barpeta wherein she was medically examined and also provided treatment and after completion of the medical examination she was brought to Bajali Court wherein her statement was recorded by the Magistrate.

In cross-examination PW 3 stated that she understood what is good or what is bad and she has no boyfriend. Before this occurrence there was no any instance having any physical relation to any person. On the next day of the occurrence she was medically examined at FAAMCH, Barpeta and the doctor had examined her whole body including her private parts. The doctor had seen injury in her private part. The cloth which she was wearing at the time of occurrence the police had seized the same and there was stain of semen. While the police had seized the cloth the semen stain was in her cloth. There was no any mark or injury sustained in her face. She tried to escape from the clutch of the accused and she also used force against him. There was no any injury in the body part of her whole body except in the private part. She denied the suggestion that there was no any injury in her private part at the time of examination and she is a habituated with sexual intercourse. She also denied the suggestion that she has adduced false evidence with intent to harass the accused and there was no any force used by the accused sexually with her.

12. PW - 4 Smti. Kabita Bharali stated on 12/02/2018 when

she was siting in their courtyard victim went towards the gate to see her father and in the meantime, she entered into the house but the mother of the victim told her to call the victim. At that moment Niva Bharali (younger sister of victim) also came out from the house and asked her to go to the gate to see the victim and then Niva and she came in front of the gate but the victim was found missing in front of their gate. After sometime they noticed the victim was running towards their house from the Eastern side and suddenly she fell on the courtyard and then she asked her what happened to her, then the victim told them that accused Adhay Malakar forcefully took her away near the bamboo bushes of his furniture shop and by gagging her mouth and committed rape on her. On hearing the occurrence they made hulla and the villagers rushed to their courtyard. At the time of occurrence the victim was 15 years old and she had to appear HSLC examination. The police had recorded their statement and since it was night as such, on the next day victim was brought to FAAMCH, Barpeta for medical examination.

In her cross examination PW 4 stated that she did not know the date of birth of victim since she got married after her birth and they are staying in the same compound as such she know the conduct of the victim in the day to day life. She knows very well that victim had no any affair with any person and she did not maintain any physical relation with any person. They had noticed the blood stained as well as semen in her panty and the police had seized her panty, long-pant and frock. The stained as well as semen were visible and they had not noticed her private parts but she told us that she felt pain in her private part. The victim was examined by the doctor at FAAMCH, Barpeta at about 1/1.30 pm. Their 5 (five) families have been staying nearer to each other and all are their relatives and in the police station on that very night they and the victim explained the facts to the police verbally. At the time of occurrence the father of the victim went to purchase medicine for his wife and informant Dibakar Bharali knew that at the time of occurrence the father of the victim went to purchase medicine for his wife and informant Dibakar Bharali had seen the father of victim while he was going to purchase medicine. They brought the

victim to the Patacharkuchi PS in the same dress which she was wearing at the time of occurrence. Though, they told to the police about the stained in the cloth of the victim but they did not take any interest to see or noticed the stained. The police had recorded the statement of the persons present at the police station along with the victim and on that very day of the occurrence the police brought them along with the victim SMR Sub-Divisional Civil Hospital, Pathsala. She did not know the exact time when informant lodged the ejahar. The police asked them to lodged FIR and she did not know where the FIR was written. She denied the suggestion that accused did not commit rape to the victim rather the victim maintains sexual relation with other person.

13. PW - 5 Smti. Himani Bharali stated that on 12.02.2018 she had been suffering from fever for which she was lying on bed and her husband went to purchase medicine for her. Since her husband did not return she called her daughter (victim) to see her father where he has come or not, but victim also did not return then she called Kabita Bharali (sister-in-law) to know where was the victim. Then she heard Kabita Bharali called the victim by her name but she did not find her whereabouts. Then she also got up from the bed and came out to the courtyard and after sometime she noticed the victim running towards house and she fell on the courtyard and got senseless for sometime. After sometime she regain her sense and she was brought inside the house and on being asked what happened to her, she told them that accused Adhay Malakar forcefully took her away by gagging her mouth near the bamboo bushes in the back side of the furniture shop of accused and forcefully raped on her. Then they searched her body cloth and noticed blood stained and semen in her panty, pant and frock and she was immediately brought to the Patacharkuchi P.S. and they explained the entire facts of the occurrence to the police. The police on that very night brought her to SMR Sub-Divisional Civil Hospital, Pathsala but since it was a rape case the doctor had advised to bring her FAAMCH, Barpeta and since it was night as such, on the next day morning the victim was brought to FAAMCH, Barpeta and she was accompanied by her, Kabita Bharali, her husband Dhiraj Bharali along

with police person. After completion of medical examination she was brought to Bajali Court and her statement was recorded before the Magistrate. Thereafter she was handed over to them and at the time of occurrence the victim was 15 years old and she has got birth certificate of the victim.

In her cross examination she stated that they went to police station at about 6.30 to 7.30 pm with the family and stated the entire facts of the occurrence to the O/C of Patacharkuchi P.S. and the police had also recorded her statement. At the time of occurrence she was lying on the bed since she had been suffering from fever and she heard Kabita called the victim by her name in high sound, the neighbouring people may also heard of shouting of Kabita Bharali while victim was called and that moment nobody came to their house. She had not seen while the victim fell on the courtyard and the victim was lying in the courtyard for half an hour. She got married about 20 years back and she knew that several villagers rushed to their courtyard but she could not say their names and the villagers knew about the occurrence who were not their relatives. Informant knows that Dhiraj Bharali is his brother as well as the father of victim who went to purchase medicine for his wife. Since her husband stays outside the house the entire possibility falls upon her to see and maintain upon her daughters and she advice to her daughters what is good or what is bad and what to do in the society however, she is giving advice of morality so that they can make their life beautiful. She also advice her while her daughters was out of the resident to maintain her morality among the public and accordingly she complies her advises and she also discussed if any problem she faces. She had noticed slight injury in private parts of victim. The stained in the cloth were visible and the injury in the private parts was also visible. She denied the suggestion that accused did not commit rape to the victim rather the victim maintained sexual relation with other persons. At SMR Sub-Divisional Civil Hospital, Pathsala the doctor advice them as well as to the police station to bring the victim to Barpeta since that was an allegation of rape. She did not know whether the doctor of SMR Sub-Divisional Civil Hospital, Pathsala had recorded the statement of the victim or not. She

also denied the suggestion that she did not state before the police that while the victim running towards their house she fell on the courtyard and got senseless but after sometime she regain her sense. The road in front of their house used by the pedestrian, cyclist as well as drives vehicles. She denied the suggestion that she did not state before the police that at the time of occurrence victim was 15 years old and the victim was born 22/09/2002.

14. PW - 6 Sri Aban Malakar stated that on 12.02.2018 in the evening while he rushed to his house from his working place and heard hue and cry in the house of Dhiraj Bharali and hearing hue and cry he rushed to the house of Dhiraj Bharali and came to know that accused Adhay Malakar committed rape on the victim girl as well as daughter of Dhiraj Bharali.

In his cross examination he stated that he did not state before the police that on that day in the evening while he rushed to his house from his working place he heard hulla in the house of Dhiraj Bharali and hearing hulla he rushed to the house of Dhiraj Bharali and then came to know accused Adhay Malakar committed rape on the victim girl as well as daughter of Dhiraj Bharali.

He also stated that there was no light at the time of the occurrence even no street light in their village. He only heard commotion but he did not see the victim girl. He had forgotten whether he had stated before the police or not that on the day of occurrence he had seen the victim was running toward his house. As he knows rape means illegal act and he did not ask anything to the mother of victim in relating to the allegation, even he did not discuss anything with the family of the victim.

15. PW – 7 Sri Brajen Bharali stated that on 12.02.2018 at about 7 pm while he rushed to his house from his working place then he saw a gathering in their courtyard and he came to know that accused Adhay Malakar committed rape his niece as well as victim girl by bringing her nearer to the bamboo bush. In the meantime his brother and the victim went to the Patacharkuchi P.S. The police had

seized on frock, one leggings, one semiz and one panty of the victim in presence of him.

In cross examination, PW 7 stated that he do not know how to read and write English as such he cannot translate the contents of the Ext. 1. The police did not read over to him the contents of the seizure list. On the day of occurrence he was working at Pathsala Kalighat, while he saw the gathering in their courtyard amongst them he did not see the victim, her father and mother. At the gathering he had seen most of the women. The police did not ask him anything except the seized articles in relating to the occurrence and the police had seized the articles after 3 (three) days of the occurrence. He denied the suggestion that on the next day of occurrence there was no any gathering in their courtyard in relating to the allegation.

16. PW – 8 Dr. Anima Boro deposed that on 13-02-2018 she was discharging as Lady Medical Officer at Fakharuddin Ali Ahmed Medical College & Hospital, Barpeta and on that she examined victim girl in connection with Patacharkuchi PS Case No. 101/2018 u/s 4 of POCSO Act, 2012. The victim was escorted by 649 Tulika Roy.

On genital examination she found hymen was tear and vaginal walls is red in colour. Cervix and uterus: Uterus not palpable per abdominally. Forchetee and Perineum: Normal. Vaginal Swab collected from posterior fornix. Result of vaginal swab smear examination: No spermatozoa is seen on microcosmic examination of vaginal swab slides.

Opinion: On the basis of physical (including dental) examination, laboratory and radiological investigation done on the victim she opined that-

- 1. There is no recent sign of sexual intercourse, but victim is accustomed to sexual intercourse.
- 2. There is no recent sign detected of penis into vagina/mouth/urethra/anus.
- 3. There is no recent sign detected of insertion of any object or

any part of body into vagina/mouth/urethra/anus.

- 4. There is no recent sign detected of body of the victim so as to cause penetration into vagina, urethra, anus or any part of the body of the victim.
- 5. There is no sign detected of application of mouth of vagina, anus urethra of the victim.
- 6. There is no injury on the body of the victim.
- 7. Victim is not suffering any physical/mental disability.
- 8. There is no foreign particle found on her cloth/body.
- 9. According to X-ray report the victim is above 16 years and below 18 years old.

She proved her medical examination report as Ext. 4 and 4 (I) is her signature.

In cross-examination, PW 8 stated that as per history of the alleged victim that the occurrence took place on 12-02-2018 at around 6 pm. She stated that if any woman has been examined immediately just after the occurrence then there would be sign of rape. She further stated that if any woman has been examined within 24 hours of the allegation of rape then it probably come out the sign of rape. PW 8 stated that the victim whom she examined was an unmarried woman. She further stated that she was accustomed with sexual intercourse. She also stated that there was no such material of any violence of having sex.

PW – 9 Shri Nripendra Sarma stated that on 12-02-18 he was discharging as S.I. Of police at Pathsala Police Out Post. On that day he received a telephonic information from one Dhiraj Bharali that a girl was raped by accused Adhay Malakar at village Dubi and the he entered the information as Pathsala OP GDE No. 298 dated 12-02-2018. He proceeded to the place of occurrence but he could not find the victim there and came to know from the people that the victim had already gone to Patacharkuchi PS and then he also rushed there. In the Patacharkuchi PS. The informant lodged an FIR which was registered as Patacharkuchi PS case No. 101/18 u/s 4 of POCSO Act and he was

entrusted to complete the investigation. During investigation he visited the place of occurrence, recorded the statement of available witnesses, prepared sketch map (Ext. 5), seized the cloth of the victim vide seizure list Ext. 1 and accused was apprehended and forwarded to the Court.

In cross-examination, PW 9 stated that the seizure list was not shown to the Ld. Magistrate but it ought to have been done. He has failed to comply to show the seizure list to the Ld. Magistrate. He stated that while they visited the place of occurrence when they were in the uniform. He had not gone thoroughly the POCSO Act. While the informant and victim were in the Patacharkuchi PS then all the police personnel were in uniform. He stated that he in the sketch map it was not mentioned or it was not shown any indicatin that the occurrence took place in the back side of the house of the informant. He also stated that he did not make any prayer to send the seized article to the Forensic Science Laboratory for examination. The victim was medically examined within 24 hours of the occurrence. He stated that he did not seize any long pant from the victim. During investigation he did not collect any school certificate of the victim. He stated that the accused was not produced before the doctor to ascertain his sexual potentiality. There was no any note in the case diary how the victim identified the accused.

18. PW -10 Sri Partha Pratim Biswash stated that on 01-03-2018 he was entrusted to investigate the Patacharkuchi PS case No. 101/18 u/s 4 of POCSO Act. He stated that on perusal of the case diary he found that the investigation has almost completed and the medical report of the victim was lying to be collected and accordingly he collected the medical report of the victim. After completion of the investigation, finding the incident being true submitted the charge sheet against the accused u/s 4 of POCSO Act.

In cross-examination,he stated that he had only collected the medical report of the victim.

DISCUSSIONS. DECISION AND REASONS THEREOF

- 19. Learned counsel for the accused person during the argument contended that the allegation levelled against the accused person is concocted, totally false, fabricated and baseless. The I/O during the investigation has not complied with the mandatory provision of Section 24 of the POCSO Act, 2012. The I.O has also not complied with the section of 102 Cr.P.C. while seizing the cloths of the victim. It is also argued that the seized article has not examined through the FSL to prove the stain of the cloths. Moreover, the seizure list had not shown to the nearest Ld. Magistrate after the seizure. It is also contended that the FIR is silent about the place of occurrence. The sketch map shows that the place of occurrence is the back side of the furniture house but sketch map has not corroborated with the evidence of informant. In-spite of that M.O. PW8 specifically stated that during examination she found the victim accustomed to sexual intercourse and age of the victim has also not been proved as per requirement of law. During investigation I/O kept the victim in Tapobaon, a child welfare home but no any explanation has been given properly. In-spite of that Section 45 of the Evidence Act has also not been complied with. In support of their case they have cited case law of **Hon'ble Supreme** Court reported in (2014) 1 SCC (Cri) 677 (Omission of fact in FIReffect of-affecting probability of case is a relevant factor u/s 11 of Evidence Act), also a case law of Hon'ble Gauhati High Court reported in 1999 (1) GLT 54 (Medical evidence -absence of spermatozoa on vaginal smear-.....) and hence, prays for acquittal.
- **20.** But we are not fully agreed with the contention of the Ld counsel of the accused side.
- 21. Section 4 of the Protection of Child from Sexual Offences Act, 2012 consent is an immaterial Spl. POCSO Case consideration as consent is not an ingredient of offence as defined in Section 3 of the Protection of Child from Sexual Offences Act, 2012. For the sake of convenience, Section 3 of the Protection of Child from Sexual Offences Act, 2012 is quoted herein below:-

- "3. Penetrative sexual assault. A person is said to commit "penetrative sexual assault" if -
 - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
 - (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
 - (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- **22.** From above, it appears that mere penetration is enough to constitute of an offence of penetrative sexual assault against a child and consent is immaterial for commission of the said offence.

Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

23. PW 3 in her evidence specifically stated that On the day of occurrence, in the evening at about 6 pm, while she was standing

in-front of their house and waiting for her father who went to purchase medicine for her mother then accused Abhay Malakar called her but she did not go near to him so he came to her and clasped her by gagging her mouth and forcefully took her away in the backside of his furniture shop and thereafter took her to the nearer of the bamboo bushes. After that he pull her cloth forcefully and committed raped on her. He also threatened her not to make any hue and cry otherwise he would kill her and after committing rape he left her and then she came to their home. She had felt uneasy and also fell in the courtyard. During cross-examination, the defence side neither denied the fact as stated by the PW 3 victim nor put any suggestion on the material point for which the evidence of PW 3 that accused by gagging her mouth forcefully took her away in the backside of his furniture shop and thereafter took her to the nearer of the bamboo bushes and he pull her cloth forcefully and committed raped on her for which this portion of evidence of PW3 remained unchallenged. During the crossexamination to PW 3 the defence side suggested that she was a habituated with sexual intercourse. But to prove the fact the defence side lead no any evidence.

- 24. The evidence of PW 1, PW 2, PW 4 and PW 5 are hearsay. They have not seen the occurrence. Yet as per section 6 of the Evidence Act their evidence that on the day of occurrence accused Adhay Malakar forcefully took away the victim to the back side of his house near the bushes of bamboos groves by gagging her mouth and forcefully committed sexual intercourse with her, cannot be thrown out.
- 25. In the case of State of Punjab Vs. Gurmit Singh & Ors. AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling

reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :- "The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix ? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case......Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury......Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

26. In the case **Vijay** @ **Chinee -vs- State of Madhya Pradesh** of the Hon'ble Supreme Court held that "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her

evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

- 27. Ld. Counsel for the accused has strenuously argued that the medical examination of the victim was conducted within 24 hours of the alleged occurrence but the doctor did not find any sign of recent sexual intercourse or injury on her private part or the body rather the medical officer opined that the victim was accustomed to sexual intercourse and as such, the accused is no any way involved in the alleged occurrence. As such, the medical evidence of the doctor has not corroborated the offence of rape that alleged to have been committed by the accused.
- **28.** Now let us see whether the evidence of victim needs to be corroborated by the evidence of medical officer in the eye of law.
- 29. The Hon'ble Supreme Court in the case of Ranjit

Hazarika vs State of Assam (1998)8 SCC 635 held that "the opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on reasons"."The must, while courts evaluating evidence, remain alive to the fact that in a case of rape, no selfrespecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the

crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

- 30. In the case in hand it is found that though the medical officer did not find any sing of recent sexual intercourse while she examined the victim but on genital examination, PW 8 medical officer found hymen was tear and vaginal walls is red in colour which means it is that without committing any rape there may not be any question of vaginal wall is red in colour. If victim was accustomed to sexual intercourse there should be old rupture of hymen. From the above discussions and findings of the Hon'ble Supreme Court, it can safely held that there is no need for corroboration of medical evidence, if the evidence of prosecutrix found to be reliable. So, in the instant case the Court is of the considered opinion that there is no need for corroboration of the medical evidence of the victim. As such, the judgment of the Hon'ble Gauahti High Court that reported in 1999 (1) GLT 54 cited by Ld counsel for the accused person is not wholly applicable in our case.
- Officer opined that the victim is accustomed to sexual intercourse but during the cross-examination of the victim she has stated that before this occurrence there was no any instance having any physical relation to any other person. But under Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in

her evidence before the court that she did not consent, the court shall presume that she did not consent. In our case, the victim also stated that the accused forcefully raped on her.

- **32.** Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under <u>Sections 3</u>, <u>5</u>, <u>7</u> and <u>9</u> of the 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.
- **33.** So as per section 29 of the act the evidence of PW 3 can be presumed that the accused person had committed the offence unless contrary is proved.
- **34.** PW 3 the victim has categorically stated that on the day of occurrence while she came out from the house to the gate way/courtyard the accused person by gaging her mouth forcefully taken to backside of his shop-house and nearer to bamboo buses and committed rape on her. During cross-examination, the defence side has failed to demolish the credibility of the evidence of victim PW 3.
- 35. The Learned counsel for the accused has argued on the point that the investigating officer has not complied with the provision of the section 24 of the POCSO Act, 2012 and also the provision of Section 102 Cr.P.C. while conducting investigation. It is also argued that while the victim was examined the police personnel were in uniform. The seized material i.e. wearing apparels of the victim which she was wearing at the time of incident had not sent for FSL examination to prove the stain of cloths.
- **36.** Per contra the Ld. Addl. PP. submits that defective investigation is not a reason for disbelieving that fact and circumstance of the case also the evidence of the victim in the circumstances of rape case corroboration of the fact is not so much necessary if the evidence of victim is found reliable and trustworthy. There may be some lacuna on the part of the investigating officer but which means it is not that the fact is not true.

- 37. At this juncture, this Court has follow the case of *C. Muniappan and Others vs. State of Tamil Nadu, (2010) 9 SCC*567, explained the law on this point in the following manner: "There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused.
- **38.** The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded.
- 39. The presumption under Section 29 of the POCSO Act was not rebutted either by bringing out any favourable reply from the evidence of the prosecution witnesses or producing documentary evidence on the side of the defence. On the other hand, in this case, the evidence of P.W.3, who was minor and aged about 15/16 years at the time of occurrence, is crystal clear without giving any room of doubt to test the veracity of the crime committed by the accused.
- 40. The offence u/s 4 of the Protection of Child From Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that mater other offences also under this Act can be committed only on a child. The definition of child u/s 2(d) of the POCSO Act is as follows:

"Child" means any person below age of 18 years.

Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years.

41. In the instant case the victim stated that her age is about 15 years and as per the medical examination report, the doctor opined her age is above 16 and below 18 years. As such, there is no question arises whether the victim was a minor at the time of incident but

accept only that she was a minor girl at the time of occurrence.

- 42. In the case of *Pancchi Vs State of U.P., AIR 1998*SC 2726, it was held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this a child witness is easy prey to tutoring.
- 43. The ratio of above cases is that the testimony of child witnesses is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent. In the present case, the victim has been consistent on the material particulars with regard to the incident when the accused committed penetrative sexual assault upon her. Apart from that, there is no meaningful cross-examination to the witnesses regarding the incident, except denial.
- **44.** In the case of POCSO Act, two provisions are there regarding presumption i.e. 29 and 30 of POCSO Act.
- 45. In the case in hand, the accused has been prosecuted for committing penetrative sexual assault, as defined in Section 3 of the Act. Thus, in terms of Section 29 of the Act, this Court is bound to draw a presumption in favour of the victim that the accused had committed the offence, unless contrary is proved by the accused. In other words, the onus is upon the accused to establish that he had not committed penetrative sexual assault towards the victim. Admittedly, in the instant case, the accused has not rebutted the said presumption in any manner just putting the argument. Thus, this Court has no reason to draw the presumption in favour of the victim.
- **46.** Similarly, u/s.30 of POCSO Act, Special Court has to draw presumption in favour of the prosecution 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 the 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 prosecution."
- 47. Bare perusal of Section 30 of the Act reveals that whenever a question of culpable mental state on the part of the accused is required to prove the guilt of the accused, Court shall presume the existence of said mental state. Though accused can take the defence to prove the fact that he had no such mental state with respect to his act but accused has to prove the said fact beyond reasonable doubt and not by showing its existence by establishing preponderance of probability. Thus, u/s.30 of the Act, liberty is given to the accused to take a defence that he had no such mental state of his act but he has to prove the said fact beyond reasonable doubt.
- **48.** But in the instant case, the accused has neither taken any such defence nor adduced any defene witnesses. Thus, this Court is bound to draw a presumption that the accused had culpable mental state of his act.
- **49**. Culpable mental state" is defined in the explanation to Section 30 of the Act which includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. To bring home the guilt of the accused u/s.30 of the Act, prosecution has to establish sexual intention on the part of the accused but in terms of Section 30 of the Act, Special Court is bound to draw a presumption in favour of the prosecution that accused had such intention unless presumption is rebutted by the accused beyond reasonable doubt.

- The accused person while examined u/s 313 Cr.P.C. took a plea that there was previous enmity between both the families in relating to land dispute and for that reason this case has been brought against him to harass by making this false and concocted story. But on perusal of the case record it appears that there was no suggestion on this point while cross-examined the Pws. Moreover, the accused side lead no evidence to prove this fact as alleged.
- **51.** Even believing the sole testimony of the victim Court can record the conviction. The Hon'ble Apex Court in *Virendra Vs State of U.P., (2008) 16 SCC 582.* The same are reproduced as under: "The Evidence Act, 1872 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:
 - 118. Who may testify All persons shall be competent to testify unless the Court consider 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."
- 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.
- 53. In the case of **Ratansinh 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. In the instant case there is no other element in the evidence of victim except believing her fact as stated by her as true.

- Maharashtra, (1997) 5 SCC 341, it was held as follows: "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 answers 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."
- **55.** In the present case, the deposition of the victim stands well corroborated with the statement recorded u/s 164 Cr.P.C by the Ld. Magistrate. Though the witnesses were cross-examined in full length, but nothing has come on record, which could suggest that the prosecution case is false in any aspect or that the prosecution witnesses are not deposing the truth. PW 3 in her evidence also the statement u/s 164 Cr.P.C. Stated that the accused person forcefully took away her in the backside of the furniture shop and committed rape on her nearer of bamboo bushes. Not mentioning the place of occurrence in the FIR means it is not that there was no any incident as stated by PW 2. Hence, the judgment cited by the Learned counsel for the accused reported in (2014) 1 SCC (Cri) 677 to that effect is not applicable in this case. I find the deposition of the victim and and other witnesses to be cogent, convincing and reliable. Irrespective of any support from Section 29 and 30 of POCSO Act, 2012 the prosecution case in fact stands well proved from the deposition of the victim.

56. In the considered view of this Court, the prosecution has clearly established in proving beyond shadow of all reasonable doubt that accused Adhay Malakar had committed penetrative sexual assault on the victim. The act of the accused thus falls u/s 4 of POCSO Act. Accordingly, the accused is found guilty and therefore, he is convicted there under.

HEARING ON THE POINT OF SENTENCE

- 57. The accused is heard on the point of sentence. He has submitted before the Court that he is a married person having 2(two) children and wife and old aged parents and his father is about 90 years and mother is about 80 years. He is earning his livelihood from a furniture shop situated near to his house and he is the only sole earning member of his family. If he is sent to jail they will ace great hardship and hence prayed for leniency.
- that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances. The aggravating circumstances relate to the crime and the 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 not only the victim, but that of the entire family members. The stigma, which she is going to carry for ever is not erasable. Thus, the aggravating circumstances are so grave in nature.
- Turning to the mitigating circumstances, the accused was not involved in any other crime, prior to the incident. The statute under Section 4 of POCSO Act prescribes a minimum punishment for a term of 7 (seven) years with fine. When the intention of legislature is to impose stringent punishment for not less than seven years, this Court has got no option except to impose minimum punishment for 7 (seven) years.

O R D E R

- 60. I convict the accused Adhay Malakar u/s.4 of POCSO Act and sentence him to R.I. for 7 (Seven) years and also to pay a fine of Rs. 5,000/- (Rupees Five Thousand only), in default, R.I. For 6 (six) months. The period of detention during investigation and trial be set off from the period of imprisonment imposed on him.
- 61. Now, coming to the aspect of compensation to the victim, who is a minor child, the Hon"ble Apex Court has time and again observed that subordinate Courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victim being an offence against the basic human right and violative of Article 21 of the Constitution of India. In a case titled as Bodhisattwa Gautam - Vs -Subhra Chakraborty, AIR 1996 SC 922, it has been held by the Hon"ble Supreme Court that the jurisdiction to pay compensation (interim and final) has to be treated as a part of the over all jurisdiction of the Courts trying the offences of rape, which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. Even otherwise, the concept of welfare and well being of children is basic for any civilized society and this has a direct bearing on the state of health and well being of the entire community, its growth and development. It has been time and again emphasized in various legislations, international declarations as well as the judicial pronouncements that the children are a supremely important national asset and the future well being of the nation depends on how its children grow and develop, which has been observed in the case of Laxmi Kant Pandey - Vs - Union of India, (1984) 2 SCC 244. Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the Secretary, DLSA, Barpeta to grant compensation to the tune of Rs. 50,000/- (Rupees Fifty Thousand) to the victim. The amount shall be used for the welfare and rehabilitation of the victim under the supervision of District Social Welfare Officer, Barpeta.
- **62.** A copy of the order be sent to the Secretary, DLSA,

Barpeta for necessary action.

- **63.** A copy of this judgment be given to the accused free of cost and a copy thereof be sent to the District Magistrate, Barpeta.
- **64.** The accused/convict has been informed about his right to appeal against this judgment before the Hon'ble Gauhati High Court.
- **65.** The seized article be disposed of after appellate period. A copy of this order be given to PSI, Bajali.
- **66.** The Spl. POCSO Case is disposed of accordingly.
- **67.** Judgment is pronounced and delivered in the open Court in presence of both the parties and I put my hand and seal of this Court on this 14th day of June, 2019.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

APPENDIX:-

Oral evidences:-

- PW-1 Sri Dhiraj Bharali
- PW-2 Sri Dibakar Bharali
- PW-3 Victim
- PW-4 Smti Kabita Bharali.
- PW-5 Smti Himani Bharali
- PW-6 Sri Aban Malakar
- PW-7 Brajen Bharali
- PW-8 Dr. Anima Boro.
- PW-9 Nipendra Sarma
- PW-10 Partha Pratim Biswash

Documentary evidence:-

- Ext. 1 Seizure List
- Ext.-2- Ejahar
- Ext. 3- Statement of victim.
- Ext. 4- Medical Report
- Ext. 5- Sketch Map
- Ext. 6 Charge-sheet.

Material Evidence

- M. Ext.- 1 Frock
- M. Ext. 2 Legign.
- M. Ext.- 3 Semis
- M. Ext.- 4 Panty

Defence evidence.

NIL