IN THE COURT OF THE SPECIAL JUDGE, UDALGURI, ASSAM

SPI. (<u>POCSO</u>) Case No.16/2018 (U/S: 365 IPC/4 of POCSO Act)

-State-Versus Ananda Kheruar, S/O- Sri Petra Kheruar, Vill- Dighaljuli, PS-Missamari (Garubandha), Dist-Sonitpur (Assam).

PRESENT: Sri P.Saikia,A.J.S., Special Judge, Udalguri.

APPERANCE:

For the Prosecution: Sri A. Basumatary, P.P., Udalguri

AND

For the accused: Sri J.K. Brahma, Advocate.

Evidence recorded on: 12.7.18, 21.8.18, 4.9.18,

11.10.2018.

Argument heard on: 4.7.2019.

Judgment delivered on: 12.7.2019.

<u>J U D G M E N T</u>

1. The criminal process was set in motion on the strength of the FIR dated 6.2.2018 lodged by Smti. Dhyani Surin with the Officer-In-Charge, Harisinga police station alleging, inter-alia, that her minor daughter (real name is withheld, henceforth referred as the victim) aged 15 years was studying in class X and from 16.2.2018 she was going to appear HSLC examination. On 5.2.2018 at around 8 AM she came out from her home to Harisinga but she did not return home till in the evening.

- 2. On the basis of the FIR the Officer In-charge, Harisinga Police Station registered a case vide Harisinga P.S. case No.5/2018 U/S 365 IPC and entrusted the case for investigation to ASI Kumud Sarma. In course of investigation, the investigating officer visited the place of occurrence, recorded the statement of available witnesses U/S 161 Cr.P.C. and prepared a hand sketch map of the place of occurrence. The victim was recovered alongwith the accused and brought both of them to the police station. The accused was accordingly arrested and sent him up for custody. The victim was sent for medical examination and also got her statement recorded before the Magistrate U/S 164 Cr.P.C. He also seized one birth certificate of the victim. On conclusion of the investigation of the case he handed over the case diary to the Officer-In-Charge of Harisinga police station, Powal Hazarika who eventually laid report U/S 173 Cr.P.C. for the offences U/S 365 IPC R/W Section 4 of POCSO Act appeared to have been committed by the accused for his trial.
- 3. On careful assessment of the documents supplied U/S 173 Cr.P.C. having found a prima-facie case and adequate materials to proceed against the accused Ananda Kheruar U/S 365 IPC/ 4 of POCSO Act, formal charges under the said sections of law were framed against the accused and the same on being read over and explained to him to which the accused pleaded not guilty and claimed to stand trial.
- 4. In order to bring home the charges, the prosecution examined as many as eight witnesses including the informant, victim, M.O and I.O. of the case. The prosecution also relied on some documentary evidence marked as exhibits.
- 5. The defence of the accused is of complete denial. His defence as it would appear from the trend of cross-examination of prosecution witnesses, suggestions and statement recorded U/S 313 Cr.P.C. is that he has been falsely implicated in this case. However, no defence evidence was adduced on behalf of the accused.

- 6. In the light of the above perspective, the point for determination in the present case is set up and framed as:-
- (1) Whether the accused on 5.2.2018 at 2 No. Mantikiri under Harisinga police station kidnapped the victim with intent to be secretly and wrongfully confined as alleged U/S 365 IPC?
- (ii) Whether the accused on the same day committed penetrative sexual assault upon the victim, aged below 16 years as alleged U/S 4 of POCSO Act?
- 7. I have heard argument advanced by the learned counsel of both the sides and also carefully gone through the evidence on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

8. PW1 is the victim of the case. She has testified to the effect that the accused present in the dock is known to her. On 5.2.18 she went to attend tuition class. While she was proceeding for tuition class the accused rang her up on her mobile phone and asked her to accompany him to go to Udalguri as he had already reached the Harisinga railway station. Then she expressed her unwillingness to accompany the accused due to her ensuing examination. When the tuition class was over the accused called her on her mobile phone and urged her to come to the Harisinga railway station. Accordingly she proceeded to Harisinga railway station and met the accused waiting for her. The accused again urged her to accompany him to Udalguri, but she repeated by saying that her examination was ensuing and, as such, she would not accompany him. Thereafter, she agreed to accompany the accused when the accused assured her that they would return immediately from Udalguri. Accordingly, she boarded a train alongwith the accused and when they reached Udalguri railway station the accused restrained her from getting down from the train rather threatened her that if she try to get down she would be thrown out in the railway track. Out of fear she remained in the train. Thereafter, she alongwith accused proceeded to Michamari. After getting down at Michamari railway station, the accused took her to his uncle's house. As she was reluctant to stay at the accused uncle's house with the accused and, as such, she informed her parents. Police informed Michamari police station and she was rescued from the uncle's house of the accused with the help of police of Harisinga police station. Both of them were then brought to police station. While she was staying with the accused at Michamari, the accused ravished her against her will and consent. Police produced her before the Magistrate where her statement was got recorded U/S 164 Cr.P.C. She was medically examined by the doctor. She was 16 years old at the time of occurrence. When she was staying with the accused, the accused used to commit penetrative sexual assault on her regularly. She has marked her statement recorded U/S 164 Cr.P.C. as Ext.1 wherein Ext.1(1) and Ext.1(2) are her signatures.

9. In cross-examination, she has divulged that she used to talk with the accused over mobile phone since before 6 months from the date of occurrence. While she was coming to Udalguri by train she met many passengers. While the train moved from Udalguri railway station to Michamari railway station and when the accused did not allow her to get down at Udalguri, at that time there were many passengers in the train but she did not tell any of the passengers that the accused was forcefully taken her to Michamari. After getting down at Michamari railway station they travelled to the uncle's house of the accused in an Auto rickshaw. After travelling some distance they left the Auto rickshaw and again proceeded on foot to the uncle's house of the accused. While she was staying at the uncle's house of the accused she was allowed to move freely but a man was engaged with her so that she could not escape. She has denied that she had not stated before the police that she informed her family over mobile phone that she was staying with the accused at Michamari and that when she wanted to get down at Udalguri at that time accused threatened her that if she got down from the train she would be thrown down in the railway track. She has denied the defence suggestion that due to prior love affairs with the accused accompanied the accused voluntarily on the day of occurrence to go to Udalguri and then to Michamari.

- 10. PW2, Smti. Dhyani Surin is the first informant of the case. Her evidence displays that the occurrence took place on 5.2.18. On that day in the morning her daughter went to attend her tuition class. Her daughter usually used to return from her tuition class at around 11 AM. When her victim daughter did not return within the as usual time they conducted search of her whereabouts but she remained traceless. Thereafter, they lodged an FIR regarding missing of her victim daughter. Subsequently police recovered her victim daughter on 12.2.18 and produced her at the Harisinga PS. Her daughter was recovered from a place called Dighaljuli village under Michamari PS. Her daughter also informed her over mobile phone about her staying at Michamari and this information was conveyed to the Harisinga PS. On the basis of her information her daughter was recovered from Dighaljuli village. After recovery of her daughter, her daughter narrated about the incident disclosing that the accused molested her sexually.
- 11. In cross-examination, she has revealed that she does not remember the date of birth of her daughter but she has school certificate as regards of her date of birth. She did not witness when the accused had taken away her daughter. The tuition place of her daughter is about 4 KM away from their home. She has denied that she had not stated before the police that her daughter informed her over mobile phone that she was staying with the accused under Michamari P.S.
- 12. PW3, Bibek Lohar is the seizure witness. He has deposed that the incident occurred in the last part of February, 2018. Police in connection with the incident seized one birth certificate of the victim girl. He put his signature in the seizure list. Ext.2 is the seizure list wherein Ext.2(1) is his signature. Ext.3 is the photocopy of birth certificate.
- 13. In cross-examination, he has stated that police called him to the police station to put his signature in the seizure list. He does not know the date of birth of the victim girl.

- 14. PW4, Sanjoy Sick Chouhan is the brother-in-law of the victim girl. It is his evidence that the incident occurred in the month of February, 2018. On the day of occurrence he was not at his home as he had gone to Dimakuchi in connection with a personal matter. The victim is my sister-in-law. After returning from Dimakuchi to his home the mother of the victim girl told him that the victim was found missing. Then they made search for the recovery of the victim girl but she could not be located. Hence, the mother of the victim lodged the FIR with the police. After one week of the incident victim was recovered by the police from Michamari and brought to the Harisinga PS. he does not know as to how the victim went to Michamari. He also did not witness the incident of kidnapping of the victim by the accused. When the victim was recovered and kept at the Harisinga P.S. at that time he saw the accused at the police station.
- 15. In cross-examination, he has stated that when the victim was found missing he came to know from the neighbours that the victim had love affairs with the accused.
- 16. PW5, is Luis Bhengra. He is a reported witness. According to his evidence the incident occurred in the last part of February, 2018. On the day of occurrence, he was not in his home as he had gone to attend a village committee meeting. After returning from the meeting he came to know that the daughter of the informant was found missing. In this regard the informant lodged an FIR with the police. After seven days of the incident the victim was recovered at Michamari and she was taken to Harisinga P.S.
- 17. PW6, Sri Powal Hazarika is one of the investigating officers of the case. He has deposed to the effect that on 6.2.18 he was posted as Officer-In-Charge at Harisinga PS. On that day he received one FIR from informant Smti. Dhyani Surin. Basing on the FIR he registered a case being Harisinga PS case No. 5/18 U/S 365 IPC and entrusted the case for investigation to ASI Kumud Ch. Sarma. ASI Kumud Ch. Sarma recorded the statement of witnesses U/S 161 Cr.P.C., recovered the victim and also got her statement recorded before the Magistrate U/S 164 Cr.P.C. The victim was also sent for medical examination and obtained

her medical examination report. On conclusion of investigation of the case ASI Kumud Ch. Sarma handed over the case diary to him. On perusal of the case diary, he found that the victim was minor as per her birth certificate and as such he had given prayer before the court to add Section 4 of the POCSO Act and the same was accordingly accorded by the learned court. Thereafter, having found a prima-facie case and sufficient ground to proceed against the accused he laid the charge-sheet U/S 365 IPC R/W Sec.4 of POCSO Act against the accused. Ext.4 is the FIR. Ext.4(1) is his note alongwith his signature. Ext.5 is the charge-sheet. Ext.5(1) is his signature. His cross was declined by the defence.

- 18. PW7, Sri Kumud Ch. Sarma is the another investigating officer of the case. He has stated that on 6.2.18 while he was posted as ASI of police at Harisinga PS. the Officer-in-charge of Harisinga PS received one FIR from the informant Dhiyani Surin. On the strength of the FIR Harisinga PS case No.5/18 U/S 365 IPC was registered and he was entrusted to investigate the case. During the course of investigation, he visited the place of occurrence, recorded the statement of witnesses U/S 161 Cr.P.C. and prepared a hand sketch map of the place of occurrence. He seized one birth certificate of the victim of the case. On 13.2.18 a message was sent from Michamari PS that accused of the case and the victim had been detained in that police station. On getting the information he went to Michamari police station and arrested the accused and also recovered the victim. Later, both of them were brought to Harisinga PS. The victim was sent for medical examination and also got her statement recorded U/S 164 Cr.P.C. The accused was sent to judicial custody. On completion of investigation of the case, he handed over the case diary to the Officer-in-charge of Harisinga PS. Later, SI Powal Ch. Nath submitted the charge-sheet against the accused U/S 365 IPC R/W Section 4 of POCSO Act. He has proved and marked the seizure list as Ext. 2 wherein Ext.2(1) is his signature. Ext.6 is the sketch map. Ext.6(1) is his signature.
- 19. In cross-examination, he has stated that the FIR was lodged on the allegation that victim was found missing from the house of the informant. He did not examine any witness at Michamari wherefrom the victim was recovered

alongwith the accused. He found the victim and the accused detained in the Michamari PS. He seized the original birth certificate of the victim and later the original copy was returned to the zimma of the mother of the victim keeping Xerox copy thereof with the case record without certifying by him that the Xerox was made from the original certificate.

20. PW8, Dr. Bhagirath Dey is the Medical Officer, who examined the victim on 14.2.2018 in reference to Harisinga P.S. case No.5/18 U/S 365 IPC and found the following:-

Identification Mark:- Scar over just below left knee joint.

Physical examination:-

Height- 167 cm, weight- 38 Kg, teeth- 27 Nos., axillary hair- absent, breast-poorly developed, hymen- ruptured, vaginal injury- small $(1 \times .5)$ cm abrasion, marks of violence- Nil, clothing- normal, LMP- 1.1.18.

Smear examination: No spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray examination of the right wrist, elbow and iliac crest shows radiological age 18 to 19 years.

Urine for pregnancy test on 14.2.18 shows negative.

Ultrasonography of abdomen on 14.2.18 by Sinologist, Radhika X-Ray and Imaging Centre, Mangaldai reported as no pregnancy.

The doctor opined as follows:-

- 1. Pregnancy test negative.
- 2. Post vaginal injury present.
- 4. Age of the victim is 18-19 years.

Ext.7 is his report. Ext.7(1) is his signature.

21. Before embarking on further, it is appropriate to point out at this stage the material facts as submitted by the learned Public Prosecutor for the State, Sri Aranindra Basumatary during his argument to convince the court is that there is cogent, consistent and corroborative evidence on record not only tendered by the victim(PW1) being the victim of sexual assault albeit as per the settled legal principle that in a case of rape conviction can be recorded on the sole testimony of the prosecutrix if her evidence inspires confidence and beyond the reproach and there is absence of circumstances which militate against her veracity yet in this case the other evidence on record including that of the medical evidence of PW 8 has fully bolstered the involvement of the accused with the alleged charges levelled against him. It is further contended by the learned Public Prosecutor for the State that the testimony of the prosecution witnesses including the victim of the case manifestly discloses that though they were subjected to incisive cross examination yet nothing could be elicited to discredit their evidence in regards the implication of the accused alone but none else with the alleged crime. Therefore, the prosecution has been able to prove the case beyond all reasonable doubt.

- 22. In refutation to the submission of the learned Public Prosecutor for the State, the learned counsel, Sri Jayanta Kumar Brahma, appearing on behalf of the accused in his argument has tried to impress us that the prosecution witnesses are interested witnesses and their evidence has suffered from material discrepancies and contradiction which are self effacing to each other and, therefore, the prosecution evidence on record cannot be taken into consideration to bring home the guilt of the accused beyond all reasonable doubt. That being the position, the inconsistent testimony of the prosecution witnesses including the victim in support of the material particulars of the case carries no weight at all and liable to be thrown overboard.
- 23. For what has been submitted by the learned counsel for the parties and having given anxious consideration to their submissions, it is expedient at this stage to cast a glance at the deposition of the prosecution witnesses for appraisement in its proper perspective to find out whether the prosecution has proved its case to the hilt.

- 24. On critical analyses of the evidence on record as discussed above alongwith the surrounding facts and circumstances of the case what has emerged that this being a case of penetrative sexual assault/rape the evidence of the victim (PW1) assumes cardinal significance inasmuch as in principle a victim of sex offence cannot be put on par with an accomplice. She is undoubtedly a competent witness U/S 118 of the Evidence Act and her evidence must receive the same weight as is attached in an injury in physical violence. If the evidence of the victim does not suffer from any basic infirmity and the probability factor does not render it unworthy of credence as a general rule there is no reason to insist on corroboration.
- 25. Rule of corroboration is not a rule of law. It is only a rule of prudence. Insistence of corroboration is advisable, but it is not compulsory in the eye of law. The nature and extent of corroboration necessarily varies with the fact of each case if narration of the corroboration is natural, wholly reliable and inspires confidence and strikes the judicial mind as probable. The myth of corroboration now stands explode in catena of judgments rendered by the Hon'ble Apex Court in this aspect.
- 26. In Bharwada Bhoginbhai Hirjibhai VS State of Gujrat, AIR 1983 SC 753 the Apex Court held that " while corroboration in the form of eye witness account of an independent witness may often forth coming in physical assault cases, such evidence cannot be expected in sex offence, having regard to the very nature of the offence. It would therefore, adding insult to injury to insist on corroboration drawing inspiration from the rule devised by the Court in western word. If the evidence of the victim does not suffer from any basic infirmity, the probability "factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where having regard to the circumstances of the case, medical evidence can be expected to be forth coming.
- 27. In State of Orissa VS Thakara Besra and another, AIR 2002 SC 1963, the Hon'ble Apex Court held that rape is not mere a physical assault, rather it

often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the back ground of the entire case and in such cases, non examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offences.

- 28. In the similar line in Shyam Narian VS State of NCT Delhi: (2013) 7 SCC 77, the Hon'ble Supreme Court has elaborately dealt the issue as discussed in Madan Gopal Kaakar VS Naval Dubey and another :(1992) 3 SCC 204, State of Andhra Pradesh VS Bodem Sundra Rao: AIR 1996 SC 530 has held that:
- "It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The court must, while evaluating evidence framed 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."
- 29. In the context of the above principle, now we come to the present case in hand. The moot point involves is whether the evidence adduced by the victim (PW1) as to her kidnapping and eventual sexual assault on her by the accused at the material time is trustworthy, credible and worthy of reliance.
- 30. In order to test the veracity of the evidence of the prosecutrix (PW1) it needs to be discussed threadbare. According to her graphical testimony as regards the incident she has deposed that on 5.2.18 she went to attend tuition class. While she was proceeding for tuition class the accused gave her call on her mobile phone and asked her to accompany him to go to Udalguri and he also told her that he had reached Harisinga railway station. She expressed her unwillingness to accompany him due to her ensuing examination. When the tuition class was over the accused again called her on her mobile phone and urged her to come to the Harisinga railway station. Accordingly she came to Harisinga railway station and met the accused who was waiting for her. Then

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the accused again urged her to accompany him to Udalguri, but she refused by saying that her examination was ensuing and, as such, she was unable to accompany him to Udalquri. But the accused persisted her in going to Udalquri with the assurance that they would return from Udalguri immediately. She agreed to go with the accused. Accordingly they boarded a train and when they reached Udalguri railway station she wanted to get down from the train but the accused restrained her from getting down by threatening her that if she tried to get down she would be thrown out in the railway track. Out of fear she remained in the train. Thereafter, she alongwith accused got down at Michamari railway station. The accused then took her to his uncle's house. She informed her parents. Police informed Michamari police station and she was rescued from the uncle's house of the accused with the help of police of Harisinga police station where her mother had already lodged an FIR as to her missing. Both of them were then brought to police station. While she was staying with the accused at Michamari, the accused committed penetrative sexual assault on her against her will and consent. She was 16 years old at the time of occurrence. The evidence of the testimony of the victim (PW1) has been substantiated by her U/S 164 Cr.P.C. statement recorded before the Judicial Magistrate vide Ext.1.

31. On the close heels of the testimony of the victim (PW1) is the testimony of her mother (PW2). Dhyani Surin. Her evidence lends assurance to the core of the prosecution case that on 5.2.18 when her victim daughter did not return from her tutorial class within the as usual time she made search of her whereabouts but she remained traceless till in the evening. Thereafter, she lodged an FIR regarding missing of her victim daughter on the next date that is on 6.2.2018. Subsequently police recovered her victim daughter from the custody of the accused on 12.2.18 and produced her at the Harisinga PS. Her daughter was recovered from a place called Dighaljuli village under Michamari PS. When her victim daughter was with the accused at Michamari she informed her over mobile phone and this information was conveyed to the Harisinga police station and recovered her daughter from Dighaljuli village. Her daughter narrated her about the incident that the accused under false pretext took her to

his uncle's house and molested her sexually. Though in cross examination PW2 has admitted that she had not seen the accused kidnapping her daughter and commission of rape on her, but her testimony in the facts and circumstances of the case corroborates the implicit evidence of the victim (PW1) as to her kidnapping and commission of rape on her by the accused.

- 32. The victim PW1 was sought to be contradicted by her statement made before the court and her statement recorded U/S 161 Cr.P.C. But the defence has utterly failed to confront the investigating officer (PW6) to prove the contradiction by impeaching the credit of the truth of the oral account of the victim (PW1) that she was subjected to forceful penetrative sexual assault by the accused without her consent.
- 33. The consistent, cogent and implicit evidence of the victim (PW1) is also corroborated by the medical testimony of the doctor (PW8), who after examination of the victim found that as per his opinion there was post vaginal injury on the private part of he victim and the radiological age of the victim is in between 18-19 years.
- 34. Thus, it is amply evident that the medical evidence corroborates the clinching and trustworthy evidence of the victim (PW1) as to the commission of rape on her by the accused as a result of which she sustained post vaginal injury.
- 35. Now the crux of the question is whether the victim was a major girl above 18 to 19 years at the time of occurrence as per the ossification test conducted by PW8 vide medical report Ext.7. It has already been noticed herein before that victim has empathically stated that she was 16 years old at the time of occurrence. The version of the victim (PW1) is also supported by the birth certificate (Ext.3). As per the birth certificate issued by the competent Government authority the date of birth of the victim is recorded as 16.9.2002, whereas, the incident of kidnapping and rape took place on 5.2.2018. Thus, it is discernable that victim was below 16 years when the alleged kidnapping and

rape was committed by the accused. Though there is a discrepancy between the school certificate as to the age of the victim and the ossification test report (Ext.7) as to the age of the victim, the school certificate which is a primary and best evidence will prevail over the radiological age determined by the doctor (PW8) finding the age in between 18-19 years. Ossification test is not a surer test to determine the actual age of the victim. The school certificate (Ext.2) showing the age of the victim below 16 years at the time of occurrence being a pubic document issued by the competent authority nothing contrary to be presumed unless rebutted as to its authenticity. There is no rebuttal evidence to challenge the genuinity of the birth certificate showing the date of birth of the victim on 16.9.2002. if the statements of facts are pitted against the so called expert opinion of the doctor (PW8) with regard to the determinant of age based on ossification test scientifically conducted the evidence of facts of the former will prevail over the expert opinion based on the ossification test. Even as per the doctor's opinion the ossification tests for determination of age, the age varies. Therefore, ossification test cannot form the basis for determination of the age of the victim on the face of witnesses of facts tendered by the victim who is a school going girl supported by unimpeachable document which is the birth certificate of the victim issued by the competent authority of the government of Assam. Hence, it can safely be held that the victim was a minor when the victim (PW1) had been taken away by the accused fraudulently and subjected her to indulge forcible sexual assault by him which resulted injury on her vagina as stated by the doctor (PW8) and in his report (Ext.7).

36. At this juncture, it is worth mentioning that 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 court that she did not consent, the court shall presume that she did not consent whether the victim is minor or major girl in the case of rape.

- 37. The victim (PW1) has been consistent throughout her statement that sexual intercourse was against her will and there was no consent and she had forcefully been caught and subjected to rape by the accused. There is also not even a defence suggestion in her cross-examination that accused had sexual intercourse with the victim (PW1) with her consent.
- 38. In **State of Rajasthan V. N.K. (2005)SCC 30**, the Hon'ble Apex Court held thus:-

"For the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly, the last one being when the woman is under 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that the absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of Section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be under 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable."

39. Again in the case of **Radhu Vs State of Madhya Pradesh (2007)12 SCC 57,** the Hon'ble Apex Court reiterated the legal position thus:

"It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent."

- 40. In the backdrop of the above proposition of law laid down by the Hon'ble Apex Court what is patent from the case in hand is that the factual scenario shows the victim (PW1) was totally unaware of the catastrophe which had befallen to her and act of helplessness, resignation in the face of inevitable compulsion, non resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress cannot be considered to be consent as understood by law. The victim (PW1) being a minor at the time of the occurrence cannot be legally given a consent which would necessarily involve understanding of the fact of such consent as it has to be conscious and voluntary act. There is a gulf of distance between consent and submission, every consent involves a submission but converse does not follow, a mere act of submission does not involve consent for the matter of the fact in order to constitute consent there must be exercised of intelligence based on knowledge of the significance and the moral effect of the act. It is seen from the evidence on record that the victim (PW1), who was admittedly minor cannot be said in law to have indulged in sexual intercourse with consent.
- 41. The learned counsel for the accused endeavoured heard by raising the contention that the prosecution evidence are not only discrepant but also self effacing to each other due to contradictions and discrepancies and, therefore, the veracity of the prosecution witnesses are doubtful. But in our considered opinion they are absolutely minor in nature. The minor discrepancies and contradictions on the trivial matters not touching the core of the matter cannot be discredited to the story of the prosecution as given undue importance to them would amount to adopting a hyper-technical approach.
- 42. In **State of Saravanan and another**, **AIR 2009 SC 152**, while dealing with such an issue, the Hon'ble Apex court observed as under:

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- " while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the Court to reject evidence in its entirety".
- 43. In State of Rajasthan VS Om Prakash AIR 2007 SC 2257, wile dealing with a similar issue, this court held that "irrelevant details which do not in any way corrode the credibility of a witness can not be levelled as omissions or contradictions".
- 44. The learned counsel appearing for the defence has hardly been able to bring to our notice any material contradictions in the statement of the prosecution witnesses. Even small discrepancies or minor contradictions which erupt in the statement of the witnesses because of lapse of time keeping in view the educational and other back ground of the witnesses can not be treated as fatal to the case of the prosecution. While examining the statement in its entirety in correct perspective and in light of the attending circumstances brought on record of the prosecution we find that the prosecution has failed to create any crack in the testimony of the victim (PW1) which has remained cogent and consistent and trustworthy and supplemented by other PWs and it strikes the judicial mind of the court that on the day of occurrence the accused committed rape on the prosecutrix without corroding vitality of the prosecution version. The prosecution has proved its case to the hilt.
- 45. The next plank of submission which has been ambitiously and zealously pyramided by the learned counsel for the accused is that the prosecution witnesses are interested one and, therefore, their evidence cannot be taken as a gospel truth in absence of corroboration from independent source. This contention of the learned counsel for the accused is also not tenable in the facts and circumstances of the case as it has already been noticed hereinbefore that apart from the victim (PW1), the other vital witness, the informant (PW2), who is her mother, and another witness (PW4) is the brother-in-law of the victim. So far as the evidence of PW4, the brother-in-law of the victim is a hearsay one yet his evidence corroborates the factual matrix of the prosecution case. PW2 is though the mother of the victim she cannot be called an interested witness, as

because, as being the natural mother of the victim when the victim did not return home from tuition class she file the FIR to trace out her missing daughter. Therefore, leveling both these two witnesses as interested witness in no way give any benefit to the defence as they are being the most material witnesses in the facts and circumstances of the case.

- 46. It is also pertinent to point out that by no stretch imagination in the present fact and circumstances of the case it can be said that the witnesses are interested witnesses. In **Ashok Kumar Choudhury VS State of Bihar reported in AIR(2008) SC 2436** the Apex Court has held that *the relationship par see does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an interested witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is, somehow or other convicted either he had some animus with the accused or some or other motives.*
- 47. As a last resort the learned counsel for the accused has submitted that the accused has been falsely implicated by the victim (PW1) due to enmity and, therefore, her evidence is not implicitly reliable. I am not at all impressed by the submission of the learned counsel for the accused as the ground of enmity projected in his argument is not at all palatable, as it would be unusual in a conservative society that a woman would be used as a pawn to wreck vengeance. Thus, the ground of enmity as suggested by the learned counsel for the accused is not convincing and, therefore, it cannot be held that the accused has been falsely implicated on account of any enmity inasmuch as the evidence of the victim (PW1) as well as the other witnesses are of sterling worth and their basic version has remained unshaken in cross-examination to discard their evidence.
- 48. Tested on the anvil and touchstone of the aforesaid principle we have found that main evidence of the prosecution witnesses besides the unassailable evidence of the victim (PW1) are the most natural witnesses and there is nothing on record to doubt their version in support of the prosecution case.

Their version is consistent and nothing has been suggested to bring any kind of inherent improbability in their testimony that the victim had been taken deceitfully to his uncle's house and she had been subjected to penetrative sexual assault for some days and she had remained under the constant threat and coercion. She could not share her agony to any person who could help her till her recovery by the police.

49. In this context, we may reproduce a passage from the decision of the Apex Court in **State of Punjab VS Jagir Singh Baljit Singh and Karam Singh reported in 1973 SC 2407**, wherein it is observed thus:-

"A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of inter play of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the accused commission of a crime, the court has to judge the evidence by the yard stick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should have given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

50. In view of the aforesaid analysis of the evidence of the prosecution witnesses we are unable to accept the submission of the learned counsel for the accused that the witnesses are interested one as their evidence evinces credibility in spite of minor discrepancies on trivial matter not touching the core of the matter and their testimony is also so compatible with the credibility of their version as to the commission of rape on the victim (PW1) by the accused which does not jettison their evidence as regard commission of rape on the victim(PW1).

51. On cumulative consideration of the entire gamut of the evidence on record, I am of the considered opinion that the prosecution has proved the charges U/S 365 IPC/4 of POCSO Act against the accused Ananda Kheruar beyond all reasonable doubt and accordingly he is convicted under the above sections of law.

PART II

- 52. Before awarding sentence, I have heard learned defence counsel and recorded the statement of the convict Ananda Kheruar U/S 235(2) Cr.P.C. to consider the question of punishment to be inflicted on him. The accused has implored mercy and drawn my attention to the effect that he is the only bread winner of his family.
- 53. I have also seriously considered the facts and circumstances of the case under which it was committed. The accused has no past blemish but the accused had committed the offence with deliberate intention.
- 54. In my considered view the convict cannot be dealt under section 3/4 of the Probation of Offender's Act,1958.
- 55. The Hon' ble Apex Court in a surfit of judgments have enunciated as to what would be an appropriate sentence especially in cases where a rape is committed upon an woman. In State of **Rajasthan VS Binod Kumar, 2012 SC 2301** Hon' ble Apex Court while dealing with the issues held:

"The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assault female and the gravity of the criminal act. The crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant consideration in sentencing the policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence."

56. Considering the objectivity of the governing punishment and upon drawing a balance sheet of aggravating and mitigating circumstances placed before us, we are of the considered view that some extenuating circumstances are tilted in favour of the convict not to award maximum punishment prescribed by sections under which the convict is found guilty.

ORDER

- 57. In the result, I do hereby sentence the accused Ananda Kheruar to undergo rigorous imprisonment for 4(four) years U/S 365 IPC and to pay a fine of Rs.2000/-(Rupees two thousand), in default to undergo further simple imprisonment for 2(two) months, and also convict him under section 4 of POCSO Act to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs.4000/-(Rupees four thousand), in default to undergo further simple imprisonment for 3(three) months . Both the sentences will run concurrently.
- 58. It is also ordered that the fine amount, if realized be paid to the victim of the case. It is also ordered to pay a compensation of Rs.1,00,000/-(One lakh) only for any loss or injury caused by the offence to the victim in view of the provisions of Section 357(A) Cr.P.C. read with Assam Victim Compensation Scheme. The District Legal Services Authority, Udalguri will provide the same to the victim from the Victim Compensation fund in accordance with law right away.
- 59. It is also ordered that period of jail detention, if any undergone by the convict during the period of investigation, inquiry or trial shall be set off U/S 428 Cr.P.C. against the terms of imprisonment imposed on him.
- 60. Let a copy of the judgment free of cost be furnished to the convict forthwith.
- 61. The convict is informed about his right of appeal against the judgment and order of conviction and sentence.

61. A copy of the judgment and order also be forwarded to the Secretary, District Legal Services Authority, Udalguri to do the needful as ordered herein before.

Given under my hand and seal of this Court this 12th day of July,2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Special Judge, Udalguri.

Sessions Judge, Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Miss Chayanika Surinii)PW2 Smti. Dhyani Suriniii)PW3 Bibek Lohariv)PW4 Sanjoy Sick Chouhan

v)PW5 Luis Bhengra
vi)PW6 Powal Hazarika
vii)PW7 Kumud Sarma
viii)PW8 Dr. Bhagirath Dey

B)Defence witness: Nil.

C)Exhibits:

i)Ext.1 Statement of the victim U/S 164 Cr.P.C..

ii)Ext.2 Seizure list.

iii)Ext.3 Photocopy of birth certificate.

iv) Ext.4 FIR.

v)Ext.5 Charge-sheet. vi)Ext.6 Sketch map. vii)Ext.7 Medical report.

Dictated and corrected by me.

Special Judge, Udalguri