IN THE COURT OF THE SPECIAL JUDGE AT JORHAT

Present:- Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS Special Judge, Jorhat

JUDGMENT IN SPECIAL CASE NO. 69 OF 2017 (G.R. Case No. 432 of 2017) Borholla P.S. Case No. 61 of 2017

Transmitting Magistrate:-

S.U. Ahmed Pathan, Sub-Divisional Judicial Magistrate, Titabar Sub-Division, Jorhat District

State of Assam

-Versus-

Md. Aftabuddin Ahmed @ Aktabuddin, Son of Late Hussain Ali, Resident of Borholla Chari-Ali, P.S. Borholla, District-Jorhat.

.... Accused

APPEARANCES:

For the State : Sri Muhidhar Dutta, Learned Special P.P., Jorhat For the Accused: Sri Rintu Goswami, Learned Advocate, Jorhat

CHARGE FRAMED UNDER SECTION 376 [1] OF INDIAN PENAL CODE READ WITH SECTION 6 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 22-09-2017

Date of prosecution evidence: 16-11-2017; 06-03-2018; 20-04-2018;

25-07-2018 & 18-12-2018

Statement of Accused

 Recorded on
 : 10-01-2019

 Date of Argument
 : 17-01-2019

 Date of Judgment
 : 22-01-2019

<u>JUDGMENT</u>

1). The prosecution story, in brief, is that **Borholla P.S. Case No.** 61/2017 under Section 6 of The Protection of Children From Sexual Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Smt. Renu Keot, mother of the victim girl [hereinafter referred to as 'X'].

In the aforesaid **F.I.R.** dated 13/08/2017 **[Exhibit-3]** the informant Smt. Renu Keot [PW-3] who is the mother of the victim girl [X] alleged, *inter-alia*, that on the same day at about 2.00 P.M. while her 09 [nine] years minor daughter [PW-2] went towards the shop of accused Md. Aftabuddin Ahmed @ Aktabuddin for marketing, the accused took her minor daughter inside the shop premise and thereafter grabbed her and rubbed coconut oil in her private part. Thereafter, the accused committed rape upon her. It is further version of the informant in her ejahar that the accused also tried to give money to her minor daughter but somehow she came out of the shop premise of accused. The accused assaulted her minor daughter, for which, she had to flee away from the shop premise of accused. Hence, she lodged ejahar against the accused.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Borholla P.S., the same was registered vide **Borholla P.S. Case No. 61/2017** under Section 6 of The Protection of Children From Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under Section 164 of Cr.P.C. was recorded by the learned Magistrate. Police on completion of investigation filed charge-sheet in the case against the above named accused Md. Aftabuddin Ahmed @ Aktabuddin u/S. 6 of The Protection of Children From Sexual Offences Act, 2012 vide Charge-sheet No. 46/2017 dated 31/08/2017.

2). The learned Sub-Divisional Judicial Magistrate, Titabar Sub-Division, District-Jorhat, transmitted the case to this Court. Copy was furnished to accused by the undersigned, in due course.

- 3). Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in this behalf, charges were framed against the accused under Section 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012. The charges were read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.
- **4).** During the course of trial, **09** [nine] witnesses including the victim, her mother-cum-informant of the case, the Medical Officer and the I.O. were examined on behalf of the prosecution to prove the charge u/S. 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. and the accused stated that he has been falsely implicated in the case. The accused pleaded innocence. No witness was adduced by the accused in defence.

- I have heard Sri Muhidhar Dutta, learned Special Public Prosecutor for the State as well as Sri Rintu Goswami, learned Counsel for the accused who is facing trial for commission of offence u/S. 376 [1] of IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012.
- **6).** Now the points for determination before this Court are as follows:-
 - 1) Whether on 13/08/2017 the accused committed rape on the minor girl of the informant and thereby committed an offence punishable under Sections 376 [1] of IPC?
 - 2) Whether on the date of occurrence the accused named above committed aggravated penetrative sexual assault upon the victim girl and thereby committed an offence punishable under Section 6 of The Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF:

7). First of all, let us see what are the relevant provisions of law with regard to the alleged charges against accused.

Section-375—Rape — A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First-Against her will.

Secondly-Without her consent.

<u>Thirdly</u>—With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

<u>Fourthly</u>—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

<u>Fifthly</u>—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

<u>Sixthly</u>—With or without her consent, when she is under sixteen years of age.

<u>Explanation</u>—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

<u>Exception</u>—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Section-6 — Whoever commits aggravated penetrative sexual assault shall be punished with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

- **8).** To decide the above points and sections of law let us examine, analyze and appreciate the evidence of the witnesses along with the relevant documents.
- **Dr. Ritu Saikia** [PW-1] who examined the victim on 14/08/2017 gave opinion that victim is above 12 years and below 14 years and there was no evidence of recent sexual intercourse as well as injuries on the person of victim. Further, there was no evidence of pregnancy detected as per USG examination. She exhibited her report as Exhibit-1 and her signatures thereon as Exhibit-1 [1] to Exhibit-1 [3].

Defence declined to cross-examine the doctor.

9). PW-2 is the victim girl [X], who during her deposition in Court stated that on the date of incident while she was proceeding towards the house of Suna master the accused called her to his residence and took her inside his bathroom. Inside the bathroom the accused opened his pant and rubbed coconut oil on her private part. It is further version of the victim that, the later, then touched his penis on her private part. Thereafter, she pushed the accused and came out of the bathroom and bolted the door of the bathroom from outside. Further version of the victim is that the accused broke the hook and came out of the bathroom and assaulted her by giving her slap. She then went to the house of Md. Hasan Ali who used to reside near accused's house. Wife of Hasan Ali directed her not to disclose the incident to anyone. Further version of the victim is to the effect that after that people assembled at the place of occurrence and her father came and took her towards police station. Police took her before a doctor for medico legal check-up. She was also produced before the Magistrate for recording her statement under Section 164 Cr.P.C. She marked Exhibit-2 to be her statement where she put her signatures vide Exhibit-2 [1] to Exhibit-2 [3].

During cross-examination, she denied defence suggestion that she did not state before police that "while going to the house of Suna master accused called her; that she came out after pushing the accused and locked him from outside; that accused rubbed coconut oil on her private part; that accused touched her private part with his penis; that accused came outside by breaking the lock of the door of his bathroom;

that accused slapped her after coming out of the bathroom and after that she went to the house of Md. Hasan Ali; that wife of Md. Hasan Ali told her not to disclose the fact to anyone and that after the incident many people assembled and her father came and took her to the police station".

10). PW-3 is Smt. Renu Keot who is the mother of the victim girl [X] as well as informant of the instant case. This witness during her deposition in Court deposed in the same tune as that of her ejahar. It is further stated by this witness that, on the date of incident, she was present at her work place. She returned back home at about 4.00 P.M. On the way she heard hue and cry. She got down from the vehicle and witnessed many people gathering near the house of Md. Hasan Ali. Thereafter, she also rushed to the house of Hasan Ali and then her victim daughter [PW-2] came out from the house of Hasan Ali who did not disclose anything before her but kept weeping. In the meantime, police arrived and then she went to police station. Her husband also came at the house of Hasan Ali and took her victim daughter. Her daughter was produced before a doctor for medico legal check-up. Thereafter, her daughter was produced before the court for recording statement by the learned Magistrate. Further version of this witness is to the effect that her victim daughter divulged before her that at the relevant time the accused took her to the bathroom and rubbed coconut oil on her private part and touched her private part with his penis. She then came out from the bathroom after pushing the accused. Her victim daughter further stated before her that she was slapped by the accused. She then lodged ejahar before police.

During cross-examination, she denied defence suggestion that she did not state before police that "while she was coming from her work place she noticed many people gathering at the house of Md. Hasan Ali; that she could hear that one girl was weeping and that girl was her victim daughter; that her husband came earlier to the house of Md. Hasan Ali; that he met police at the house of Md. Hasan Ali and that victim stated before her that accused rubbed coconut oil on her private part".

11). The evidence of Md. Ritu Ali [PW-4] is to the effect that on the date of incident he came out of his house towards the shop premise of accused to buy diesel. At that time it was raining. He witnessed two persons namely Babu Bhuyan and Bharat Mirdha who were uploading sand in one truck vehicle. All of them witnessed the incident. This witness further stated that he witnessed the accused applying coconut oil over the buttocks of the victim. Seeing the incident he returned back to the shop of his owner and divulged the fact before the Manager Sri Moon Phukan and another worker Debojit Saikia. After coming to know about the incident people raised hue and cry. Further version of this witness is that victim was not found in the shop premise of accused. After two hours victim girl was recovered from the house of accused's younger brother.

This witness during cross-examination denied defence suggestion that he did not state before police that "he witnessed the accused inserting coconut oil over the buttocks of the victim and seeing the incident he returned back to the shop premise of his owner; that he narrated the incident before the Managers of the shop namely Sri Moon Phukan and Sri Debajit Saikia".

12). Sri Babu Bhuyan [PW-5] stated that on the date of incident he was loading sand in the vehicle and witnessed the accused dragging the victim towards his shop premise. At that time another labour Bharat Mirdha who was working with him also witnessed the incident. Both of them went to the shop premise of accused and peeped outside the shop one after another.

This witness was declared **hostile** by the **prosecution** and during cross-examination by prosecution side he denied to have stated before police that Md. Ritu Ali went to the shop premise of accused to purchase diesel for his vehicle; that Md. Ritu Ali witnessed the accused indulging in sexual act with the victim inside his shop premise.

This witness denied all the defence suggestions put to him during cross-examination, more particularly, that "at the time of incident he was loading sand in the truck vehicle alongwith one Bharat Mirdha and that he witnessed the accused dragging the victim inside his shop premise".

13). Sri Bharat Mirdha [PW-6] deposed in the same tune as that of Sri Babu Bhuyan [PW-5].

Prosecution declared this witness <u>hostile</u>. During cross-examination by prosecution, this witness denied to have stated before police that he witnessed the accused indulging in bad work with the victim inside his shop premise.

During cross-examination by defence side, this witness admitted to have stated before police that "on the date of incident he was loading sand in the vehicle; that the accused dragged the victim by holding her hand inside his shop premise and that he witnessed accused in indulging bad work with the victim inside his shop premise. This witness further stated that he did not state before police that he witnessed Md. Ritu Ali coming towards the shop premise of accused to purchase diesel".

14). The evidence of Smt. Rumena Khatun [PW-7] is to the effect that on the date of incident she was watching television in her house. At that time one monkey came and some boys also rushed towards her house and told that one girl is hiding behind her house in her bathroom. Accordingly, she searched for the girl but she was found missing. This witness further stated that after about 3 ½ hours she went to use her bathroom which was locked from inside. She asked to open the door of the bathroom and the victim came out of the bathroom. At that time the victim was alone. On being asked, the victim divulged before her that some boys assaulted her for no reason and forced her to speak against accused. She then told the victim to go out of the house but she told before her that she is not willing to go as the boys will assault her again. Further version of this witness is that she went to call her father whom she met on the way who was altercating with the accused. She then handed over the victim to her father.

Defence side cross-examined this witness. This witness stated that one of the boys who came to her residence in search of the victim was the son of Rahim and one was known as Gela Mobile and one was the relative of the victim. She admitted that victim entered into her house as she was being forced by the

boys to speak against the accused. Victim did not state anything before her and people that accused had raped her.

Smt. Najima Sultana Rahman [PW-8] stated that she was present in her shop where she witnessed the victim standing nearby the shop. She then asked the victim as to why she was standing there. To her query, the victim stated that she will go but she did not leave the place. After sometime, she heard hue and cry and many people assembled there. Later on, she came to know that police had taken both of them to the police station.

This witness during cross-examination by defence side stated that she does not have any personal knowledge about the incident and only witnessed the victim standing near her shop.

16). The evidence of Sri Dipanta Phukan [PW-9] who is the investigating officer of the case is that on 13/08/2017 he received information through Sri Sanjib Gogoi over telephone that near Borholla Chari-Ali one person from Muslim community was found in illegal activity in a shop and asked them to visit the aforesaid place. On receipt of the above information, he entered the same in G.D. Entry Register vide G.D. Entry No. 188. Then he alongwith his staff proceeded towards the place of occurrence and brought the victim girl to the police station who was found near the shop of accused. Accordingly, he interrogated both the victim as well as accused alongwith three persons of tea garden community. The informant lodged ejahar before police vide Exhibit-3 wherein Exhibit-3 [1] is his signature. He deposed about the routine steps taken by him during investigation of the case after ejahar being lodged by the mother of the victim. He also stated that he arrested the accused in connection with the case and on completion of investigation submitted charge-sheet against the accused vide Exhibit-5 wherein Exhibit-5 [1] is his signature. This witness further stated that he drew Sketch Map of the place of occurrence with index vide Exhibit-4 wherein Exhibit-4 [1] is his signature.

He confirmed that witness **Sri Babu Bhuyan** [**PW-5**] during his statement under Section 161 Cr.P.C. stated before him that "Md. Ritu Ali went to the shop premise of accused to purchase diesel for his vehicle; that Md. Ritu Ali

witnessed the accused indulging in sexual act with the victim inside the shop premise.

The I.O. further confirmed that witness **Sri Bharat Mirdha** [**PW-6**] during his examination under Section 161 Cr.P.C. stated before him that "he witnessed the accused indulging in bad work with the victim inside his shop premise".

During cross-examination by defence side, the I.O. admitted that he did not record statement of Sri Sanjib Gogoi who first informed the matter before him as the later declined to give his statement; that he did not record statement of Sri Mukut Bora who was having a shop near the place of incident. It is further admission of the I.O. that he did not record statement of Md. Muhibur Rahman.

Victim [PW-2] during her statement under Section 161 Cr.P.C. did not state before him that "while going to the house of Suna master accused called her; that she came out after pushing the accused and locked him from outside; that accused rubbed coconut oil on her private part; that accused touched her private part with his penis; that accused came outside by breaking the lock of the door of his bathroom; that accused slapped her after coming out of the bathroom and after that she went to the house of Md. Hasan Ali; that wife of Md. Hasan Ali told her not to disclose the fact to anyone and that after the incident many people assembled and her father came and took her to the police station".

Smt. Renu Keot [PW-3] during her statement under Section 161 Cr.P.C. did not state before him that "while she was coming from her work place she noticed many people gathering at the house of Md. Hasan Ali; that she could hear that one girl was weeping and that girl was her victim daughter; that her husband came earlier to the house of Md. Hasan Ali; that he met police at the house of Md. Hasan Ali and that victim stated before her that accused rubbed coconut oil on her private part"

Witness Md. Ritu Ali [PW-4] during his statement under Section 161 Cr.P.C. did not state before him that "he witnessed the accused inserting coconut oil over the buttocks of the victim and seeing the incident he

returned back to the shop premise of his owner; that he narrated the incident before the Managers of the shop namely Sri Moon Phukan and Sri Debajit Saikia".

The I.O. further confirmed that witness **Sri Babu Bhuyan [PW-5]** during his statement under Section 161 Cr.P.C. did not state before him that "at the time of incident he was loading sand in the truck vehicle alongwith one Bharat Mirdha and that he witnessed the accused dragging the victim inside his shop premise".

It is further confirmed by the I.O. that witness **Sri Bharat Mirdha** [PW-6] during his statement under Section 161 Cr.P.C. did not state before him that "on the date of incident he was loading sand in the vehicle; that the accused dragged the victim by holding her hand inside his shop premise and that he witnessed accused in indulging bad work with the victim inside his shop premise. This witness further stated that he did not state before police that he witnessed Md. Ritu Ali coming towards the shop premise of accused to purchase diesel".

17). Let us see what the informant has written in her ejahar dated 13/08/2017 [Exhibit-3].

The informant Smt. Renu Keot [PW-3] who is the mother of the victim girl [X] alleged, *inter-alia*, that on the same day at about 2.00 P.M. while her minor daughter [PW-2] went towards the shop of accused Md. Aftabuddin Ahmed @ Aktabuddin for marketing, the accused took her minor daughter inside the shop premise and thereafter grabbed her and rubbed coconut oil in her private part. Thereafter, the accused committed rape upon her. It is further version of the informant in her ejahar that the accused also tried to give money to her minor daughter but somehow she came out of the shop premise of accused. The accused assaulted her minor daughter, for which, she had to flee away from the shop premise of accused. Hence, she lodged ejahar against the accused.

18). The informant Smt. Renu Keot [PW-3] during her evidence before court stated that on the date of incident, she was present at her work place. She

returned back home at about 4.00 P.M. On the way she heard hue and cry. She got down from the vehicle and witnessed many people gathering near the house of Md. Hasan Ali. Thereafter, she also rushed to the house of Hasan Ali and then her victim daughter [PW-2] came out from the house of Hasan Ali who did not disclose anything before her but kept weeping. In the meantime, police arrived and then she went to police station. Her husband also came at the house of Hasan Ali and took her victim daughter. Her daughter was produced before a doctor for medico legal check-up. Thereafter, her daughter was produced before the court for recording statement by the learned Magistrate. Further version of this witness is to the effect that her victim daughter divulged before her that at the relevant time the accused took her to the bathroom and rubbed coconut oil on her private part and touched her private part with his penis. She then came out from the bathroom after pushing the accused. Her victim daughter further stated before her that she was slapped by the accused. She then lodged ejahar before police.

During cross-examination, she denied defence suggestion that she did not state before police that "while she was coming from her work place she noticed many people gathering at the house of Md. Hasan Ali; that she could hear that one girl was weeping and that girl was her victim daughter; that her husband came earlier to the house of Md. Hasan Ali; that he met police at the house of Md. Hasan Ali and that victim stated before her that accused rubbed coconut oil on her private part".

19). The victim [PW-2] who is the star witness to the case divulged during her testimony that on the date of incident while she was proceeding towards the house of Suna master the accused called her to his residence and took her inside his bathroom. Inside the bathroom the accused opened his pant and rubbed coconut oil on her private part. It is further version of the victim that the later then touched his penis on her private part. Thereafter, she pushed the accused and came out of the bathroom and bolted the door of the bathroom from outside. Further version of the victim is that the accused broke the hook and came out of the bathroom and assaulted her by giving her slap. She then went to the house of Md. Hasan Ali who used to reside near accused's house. Wife of

Hasan Ali directed her not to disclose the incident to anyone. Further version of the victim is to the effect that after that people assembled at the place of occurrence and her father came and took her towards police station. Police took her before a doctor for medico legal check-up. She was also produced before the Magistrate for recording her statement under Section 164 Cr.P.C. She marked Exhibit-2 to be her statement where she put her signatures vide Exhibit-2 [1] to Exhibit-2 [3].

During cross-examination, she denied defence suggestion that she did not state before police that "while going to the house of Suna master accused called her; that she came out after pushing the accused and locked him from outside; that accused rubbed coconut oil on her private part; that accused touched her private part with his penis; that accused came outside by breaking the lock of the door of his bathroom; that accused slapped her after coming out of the bathroom and after that she went to the house of Md. Hasan Ali; that wife of Md. Hasan Ali told her not to disclose the fact to anyone and that after the incident many people assembled and her father came and took her to the police station".

that on the date of incident he came out of his house towards the shop premise of accused to buy diesel. At that time it was raining. He witnessed two persons namely Babu Bhuyan and Bharat Mirdha who were uploading sand in one truck vehicle. All of them witnessed the incident. This witness further stated that he witnessed the accused applying coconut oil over the buttocks of the victim. Seeing the incident he returned back to the shop of his owner and divulged the fact before the Manager Sri Moon Phukan and another worker Debojit Saikia. After coming to know about the incident people raised hue and cry. Further version of this witness is that victim was not found in the shop premise of accused. After two hours victim girl was recovered from the house of accused's younger brother.

This witness during cross-examination denied defence suggestion that he did not state before police that **"he witnessed the accused inserting**

coconut oil over the buttocks of the victim and seeing the incident he returned back to the shop premise of his owner; that he narrated the incident before the Managers of the shop namely Sri Moon Phukan and Sri Debajit Saikia".

21). Sri Babu Bhuyan [PW-5] stated that on the date of incident he was loading sand in the vehicle and witnessed the accused dragging the victim towards his shop premise. At that time another labour Bharat Mirdha who was working with him also witnessed the incident. Both of them went to the shop premise of accused and peeped outside the shop one after another.

This witness was declared **hostile** by the **prosecution** and during cross-examination by prosecution side he denied to have stated before police that Md. Ritu Ali went to the shop premise of accused to purchase diesel for his vehicle; that Md. Ritu Ali witnessed the accused indulging in sexual act with the victim inside his shop premise.

This witness denied all the defence suggestions put to him during cross-examination, more particularly, that "at the time of incident he was loading sand in the truck vehicle alongwith one Bharat Mirdha and that he witnessed the accused dragging the victim inside his shop premise".

22). Sri Bharat Mirdha [PW-6] deposed in the same tune as that of Sri Babu Bhuyan [PW-5].

Prosecution declared this witness <u>hostile</u>. During cross-examination by prosecution, this witness denied to have stated before police that he witnessed the accused indulging in bad work with the victim inside his shop premise.

During cross-examination by defence side, this witness admitted to have stated before police that "on the date of incident he was loading sand in the vehicle; that the accused dragged the victim by holding her hand inside his shop premise and that he witnessed accused in indulging bad work with the victim inside his shop premise. This witness further stated that he did not state before police that he witnessed Md. Ritu Ali coming towards the shop premise of accused to purchase diesel".

23). It is seen from the evidence of Smt. Rumena Khatun [PW-7] that on the date of incident she was watching television in her house. At that time one monkey came and some boys also rushed towards her house and told that one girl is hiding behind her house in her bathroom. Accordingly, she searched for the girl but she was found missing. This witness further stated that after about 3 ½ hours she went to use her bathroom which was locked from inside. She asked to open the door of the bathroom and the victim came out of the bathroom. At that time the victim was alone. On being asked, the victim divulged before her that some boys assaulted her for no reason and forced her to speak against you. She then told the victim to go out of the house but she told before her that she is not willing to go as the boys will assault her again. Further version of this witness is that she went to call her father whom she met on the way who was altercating with the accused. She then handed over the victim to her father.

Defence side cross-examined this witness. This witness stated that one of the boys who came to her residence in search of the victim was the son of Rahim and one was known as Gela Mobile and one was the relative of the victim. She admitted that victim entered into her house as she was being forced by the boys to speak against the accused. Victim did not state anything before her and people that accused had raped her.

24). It is interesting to note herein that the I.O. [PW-9] who investigated the case stated during his evidence that witness **Sri Babu Bhuyan** [PW-5] during his statement under Section 161 Cr.P.C. stated before him that "Md. Ritu Ali went to the shop premise of accused to purchase diesel for his vehicle; that Md. Ritu Ali witnessed the accused indulging in sexual act with the victim inside the shop premise".

The I.O. further confirmed that witness **Sri Bharat Mirdha** [**PW-6**] during his examination under Section 161 Cr.P.C. stated before him that "he witnessed the accused indulging in bad work with the victim inside his shop premise".

During cross-examination by defence side, the I.O. admitted that he did not record statement of Sri Sanjib Gogoi who first informed the matter before

him as the later declined to give his statement; that he did not record statement of Sri Mukut Bora who was having a shop near the place of incident. It is further admission of the I.O. that he did not record statement of Md. Muhibur Rahman.

Victim [PW-2] during her statement under Section 161 Cr.P.C. did not state before him that "while going to the house of Suna master accused called her; that she came out after pushing the accused and locked him from outside; that accused rubbed coconut oil on her private part; that accused touched her private part with his penis; that accused came outside by breaking the lock of the door of his bathroom; that accused slapped her after coming out of the bathroom and after that she went to the house of Md. Hasan Ali; that wife of Md. Hasan Ali told her not to disclose the fact to anyone and that after the incident many people assembled and her father came and took her to the police station".

Smt. Renu Keot [PW-3] during her statement under Section 161 Cr.P.C. did not state before him that "while she was coming from her work place she noticed many people gathering at the house of Md. Hasan Ali; that she could hear that one girl was weeping and that girl was her victim daughter; that her husband came earlier to the house of Md. Hasan Ali; that he met police at the house of Md. Hasan Ali and that victim stated before her that accused rubbed coconut oil on her private part"

Witness Md. Ritu Ali [PW-4] during his statement under Section 161 Cr.P.C. did not state before him that "he witnessed the accused inserting coconut oil over the buttocks of the victim and seeing the incident he returned back to the shop premise of his owner; that he narrated the incident before the Managers of the shop namely Sri Moon Phukan and Sri Debajit Saikia".

The I.O. further confirmed that witness **Sri Babu Bhuyan [PW-5]** during his statement under Section 161 Cr.P.C. did not state before him that "at the time of incident he was loading sand in the truck vehicle alongwith one Bharat Mirdha and that he witnessed the accused dragging the victim inside his shop premise".

It is further confirmed by the I.O. that witness **Sri Bharat Mirdha** [PW-6] during his statement under Section 161 Cr.P.C. did not state before him that "on the date of incident he was loading sand in the vehicle; that the accused dragged the victim by holding her hand inside his shop premise and that he witnessed accused in indulging bad work with the victim inside his shop premise. This witness further stated that he did not state before police that he witnessed Md. Ritu Ali coming towards the shop premise of accused to purchase diesel".

- **25).** From a close perusal of the evidence on record it is seen that the statement of the victim [PW-2] was recorded by the learned Magistrate on 14/08/2017 wherein she has disclosed that the accused took her towards his bathroom and thereafter rubbed coconut oil over his penis and thereafter pressed his penis over her buttocks. She somehow released from the clutches of accused and thereafter locked the door of the bathroom from outside. The accused broke open the door of the bathroom and thereafter assaulted her, for which, she out of fear ran towards the house of Md. Hasan Ali.
- 26). In the case of *Utpal Mishra –versus- State of Assam, 2015*[2] GLR 542, it has been held by the Hon'ble Gauhati High Court in <u>Para No-22</u> of its judgment as follows:

PARA NO-22

The principles of criminal jurisprudence are that:

- a) There should be legal, reliable and unimpeachable evidence to prove that the prosecution story "must be true" rather than "may be true";
- b) It is a settled principle of criminal jurisprudence that more serious the offence, stricter is the degree of proof;
- c) Standard of proof in a criminal case: burden is always on the prosecution and the same never shifts. Prosecution can never derive any benefit from the weakness of the defence version;
- d) Holding a witness "implicitly reliable" leads to denial of judicial consideration of the infirmities in evidence;

- e) Defence witnesses cannot be disbelieved by relying on conjectures and surmises: they are entitled to equal treatment with those of the prosecution;
- f) If two views are possible in a criminal case, the view favourable to the accused should be accepted;
- g) The averment/allegation with respect to the commission of rape has got to be clear and specific for basing a finding of guilt rather than being just inferential. The evidence/averments/allegations must fulfill the ingredients of offence of RAPE as defined under Section 375 of IPC;
- h) The prosecution must prove the case in the manner in which they are alleged to have been caused. It is elementary where the prosecution has a definite and positive case, it must prove the whole of that case;
- i) In a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such situation.
- **27).** Keeping in mind the above rationale as laid down by the Hon'ble Apex Court I am constrained to hold that the evidence adduced by the prosecution in support of its case is nothing shorter than mere conjectures and suspicion.
- **28).** The accused in his statement under Section 313 Cr.P.C. stated that victim has deposed falsely. He is innocent.
- **29).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of *Datttu Ramrao Sakhare-versus-State of Maharashtra*, reported in [1997] 5 SCC 341, the Hon'ble Apex Court has held that — "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian 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 circumstance 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 reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

- The ratio as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent. However, in the present case, the victim [PW-2] has not been found consistent on the material particulars with regard to the incident. Further, there is no corroboration by the witness Smt. Renu Keot [PW-3], independent witnesses namely Md. Ritu Ali [PW-4], Smt. Rumena Khatun [PW-7], Smt. Najima Sultana Rahman [PW-8] and hostile witnesses namely Sri Babu Bhuyan [PW-5] and Sri Bharat Mirdha [PW-6].
- am of the opinion that prosecution has not been able to prove the case against accused Md. Aftabuddin Ahmed @ Aktabuddin under Section 376 [1] IPC as well as under Section 6 of The Protection of Children From Sexual Offences Act, 2012. The circumstance of the case does not inspire the court to take a view that conviction can be sustained based on the testimony of victim [PW-2] alone and in absence of any corroborative material I hold that prosecution side has failed to establish the guilt of the accused beyond reasonable doubt.

32). In the result, accused **Md. Aftabuddin Ahmed @ Aktabuddin** is **acquitted** of the charges under Section 376 [1] IPC read with Section 6 of The Protection of Children From Sexual Offences Act, 2012, levelled against him on benefit of doubt and he is set at liberty forthwith.

Accused is on bail. The bail bond of accused is extended for another **06** [six] months from today as per provision of Section 437-A Cr.P.C.

33). Given under my hand and seal of this Court on this **22nd** day of **January 2019**.

Special Judge, Jorhat

ANNEXURES:-

PROSECUTION WITNESSES:-

PW-1	Dr. Ritu Saikia, Medical Officer of the case.
PW-2	Victim girl.
PW-3	Smt. Renu Keot, mother of the victim-cum-informant of the case.
PW-4	Md. Ritu Ali, driver of 207 vehicle.
PW-5	Sri Babu Bhuyan, daily wage earner.
PW-6	Sri Bharat Mirdha, daily wage earner.
PW-7	Smt. Rumena Khatun, housewife.
PW-8	Smt. Najima Sultana Rahman, housewife.
PW-9	Sri Dipanta Phukan, I.O. of the case

COURT WITNESS:- NIL

EXHIBITS FOR THE PROSECUTION:-

Exhibit-1	Medical Report of victim
Exhibit-2	Statement of the victim recorded by the Magistrate under Section 164 Cr.P.C.
Exhibit-3	Ejahar
Exhibit-4	Sketch Map of the place of occurrence with index
Exhibit-5	Charge-sheet

DEFENCE WITNESSES:- NONE

Special Judge, Jorhat.

Typed & transcribed by:

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)