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

**SPL(POCSO) CASE NO.** :- 17 of 2016

(Under Section 10 of POCSO Act, arising out of G.R. Case No 1344

of 2016)

Present :- Sri Ashok Kumar Borah, AJS

Special judge, Sonitpur,

**Tezpur** 

Prosecutor :- State of Assam

-vs-

Accused :- Sri Kalicharan Doom @

**Kalicharan Basfor** 

Son of Chandreswar Doom Resident of Budagaon, LOkra Police Station – Chariduar Dist :- Sonitpur, Assam.

Date of framing Charge

**:-** 11/08/2016

Date of Recording Evidence

**:-** 14/09/2016, 26/04/2017,

18/08/2017 & 15/09/2017.

Date of examination of accused u/s 313 Cr.P.C

**:-** 12/10/2017

Date of Argument :- 15/11/2017

Date of Judgment :- 29/11/2017

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor, Sonitpur

Counsel for Accused :- Mr. A.K. Mahanta, Learned Advocate

## **JUDGMENT**

- **1.** In this case accused Sri Kalicharan Doom @ Kalicharan Basfor is put for trial for allegation of charge under Section 10 of POCSO Act.
- 2. The various facts leading to this case according to FIR in brief is that on 2<sup>nd</sup> May, 2016 around 6 p.m. the informant's wife Mrs Sobha Devi informed him that his daughter Miss X, aged about 6 years, student of class I standard of Assam Rifle School, has been sexually harassed at around 1.15 p.m. - 1.30 p.m. in the school premises she she has gone to relieve herself at bathroom. He immediately told his wife to meet the school authorities on 3<sup>rd</sup> May, 2016 and to investigate the matter. On 3<sup>rd</sup> May, 2016 at around, 11 a.m. his wife approached the school authorities to investigate the matter and also informed the matter to class teacher. The victim identified the culprit who as an employee of their school as a sweeper and his name is Kalicharan Doom. Hence, this prosecution case. The ejahar was filed by informant Subudh Kumar Bhatt who is a Rifle man on General Duty before the O/C of Chariduar PS on 03-05-2016.
- **3.** On receipt the ejahar the O/C Chariduar P.S. registered the case, vide Chariduar PS Case No. 64/16, under Section 10 of POCSO Act. After completion of usual investigation, the O/C Chariduar Police station sent up the case for trial against the accused Sri Kalicharan Doom @ Kalicharan Basfor under Section 10 of POCSO Act.
- **4.** On being appeared the accused person before this Court after hearing both parties, framed charge under section 10 of POCSO Act. Particulars of the charge are read over and explained to which he pleads not guilty and claimed to be tried.
- **5.** To substantiate the case prosecution examined as many as 9 (nine) numbers of witnesses. Accused pleads total denial while his statement was recorded u/s 313 Cr.P.C. All the allegation made against the accused and evidence appears against the accused are

put before him where he deny the evidence and decline to give defence evidence.

**6.** I have also heard argument put forward by the learned counsel for both parties.

# 7. The point for decision in this case is that:

(i) Whether on or about 1.15 – 1.30 p.m. on 02-05-2016, at School premises of AR Schol at Lakra under Chariduar Police station, accused committed aggravated sexual assault on victim, aged about 6 years of age, student of class- 1 standard of AR school and thereby committed an offence punishable under section 10 of POCSO Act?

# Reasons, Decisions and reason for decision

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW- 1** Dr. Tutumoni Handique stated before the Court that on 03-05-2016 she was posted as working as Medical & Health Officer-1 in the Kanaklata Civil Hospital, Tezpur and on that day at about 1.30 p.m. in the labour room complex of KCH, she examined Miss X, 6 years, female, D/O Subudh kr. Bhatta of AR School, Lokra, on police requisition, in reference to Chariduar PS Case NO. 64/16 dated 03-05-2016, on being escorted and identified by IPS(P) Aparna Natarajan, vide Hospital registration No. 21419/16 dated 03-05-2016. She was examined in presence of GNM Anna Merry. Consent in writing before examination was taken from her mother.

According to victim, on 02-05-2016 while she was in school toilet, the clearner asked her to touch her private parts and exposed genital before the child.

On examination, she found the following:

Identification mark – mole on lower lip.

Height - 111 cm., Weight - 16 Kg, Teeth - 5 in all four quadrants. Average built, normal gait. No sign of injury marks and

violence in her private parts as well as on her boy. Hymen intact. Superficial smear from vagina taken and sent for examination. Investigation report:

Vaginal smear for spermatozoa – negative for spermatozoa.

## **OPINION:**

- 1. No injury marks on her body/private parts.
- 2. No penetrative sexual assault.

#### **Enclosures:**

Vaginal smear report.

Ext. 1 is the Medical Report and Ext. 1 (1) is her signature. Ext. 2 is the vaginal smear report. Ext. 3 is the police requisition and Ext. 3(1) is her signature on receipt of police requisition.

PW-2 Sri Subodh Kr. Bhatt stated that he knows the accused Kali Charan Doom. Victim Miss "X" is his daughter. The incident took place on 2<sup>nd</sup> May, 2016. At the time of incident, his daughter was 6 years of age and she studied in class I standard at Assam Rifle School, Lokra. On that day he was on duty. At about 5.30/6.00 p.m., he returned to his quarter and came to know from his wife that the cleaner of the school toilet was cleaning while their daughter/victim went to toilet and then accused exposed his private parts and asked the victim touched his private parts. His wife also reported that his daughter told his wife not to disclose the matter to him. Next day, he along with his wife went to the school and complaint to the Head Master of Assam Rifle School by stating whole the matter. Thereafter, he lodged the FIR before police. Ext. 4 is the FIR and Ext. 4(1) is his signature. The FIR was written by their Major Monish Biswas as per his instruction. Then, police recorded the statement of his daughter, took her to doctor for medical examination and also sent to learned Magistrate for recording her statement. At the time of recording the statement of his daughter by the Magistrate his wife Mrs. Sobha Devi was present.

In cross-examination, he admitted that on his request, Major Monish Biswas typed the ejahar as per his instruction. The date of birth of his daughter was 16-02-2011. She was admitted in the school 25<sup>th</sup> or 26<sup>th</sup> April, 2016 in KG class. On the day of occurrence she was a student of Class I.

11. PW-3 Smt. Sobha Devi, mother of the victim, stated that she knows the accused Kali Charan Doom. The incident took place on 2<sup>nd</sup> May, 2016. At the time of incident, her daughter was 6 years of age and she studied in class I standard at Assam Rifle School, Lokra. On that day she was at her guarter. After returning from school she asked her daughter for changing her school clothes. Then she told her that she wanted to tell something and asked her not to tell her father about the said incident. Her daughter told her that while the cleaner of the school toilet was cleaning she went to toilet and then accused exposed his private parts and asked her to touch his private parts. Thereafter, she returned from toilet. In the evening time when her husband returned she narrated the whole story to him. In the next day, she informed about the matter to the class teacher of her daughter's class and her husband reported the matter to the Head Master of the School. Then her husband filed the FIR before the police station. Then, police recorded statement of her daughter, took her to doctor for medical examination and also sent to learned Magistrate for recording her statement. At the time of recording the statement of her daughter by the Magistrate she was present and then her daughter was gave custody to us.

In cross-examination, she admitted that she has seen the accused today for the first time. She does not know the name of the accused. She also does not know what he is doing. Her daughter used to go to school through the School Bus. Next day in the evening Police recorded her statement at her home. Her daughter did not make any such complaint before the said incident.

**12. PW- 4** Sri Dinesh Chandra Sundariyal, Head Master of Assam Rifle School, Charduar, LOkra, stated that he is the Head Master of Assam Rifle School since 20<sup>th</sup> December, 2015. Accused

Kali Charan Doom is known to him who was doing sweeper in their school. Victim Miss "X" was a student of Class I standard of their school at the time of the incident. Next day of the incident, on 3<sup>rd</sup> May, 2016 the class teacher of class of victim, namely Mrs. Sanju Rai informed him about the incident. The teacher informed him that when victim went to toilet, the accused exposed his private parts and asked her to touch his private parts. On the same day, the guardian means the mother of the victim came to him and asked that she wants to meet the class teacher of class I, then he asked her to go and to meet the class teacher. Next day of the incident, the father of the victim informed him over telephone. On that very day he informed the matter to the Authority and on the next day, father of the victim physically came to him and reported about the incident.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to the class teacher of victim informed him, when victim went to toilet accused exposed his private parts and asked her to touch his private part has remained unchallenged.

class teacher of Class – I of Assam Rifle School since 7<sup>th</sup> April, 2016. In their class in the relevant time there were 40 numbers of students. She knows the accused who was doing sweeper in their school. Victim Miss "X" was a student of Class I standard of their school at the time of the incident. The incident took place on 2<sup>nd</sup> May, 2016. In the next day of the incident, on 3<sup>rd</sup> May, 2016, the mother of the victim informed her about the incident. She informed her that when Manvi went to toilet, the accused exposed his private parts and asked her to touch his private parts. Then she asked Miss "X" personally about the incident. Then she took Miss "X" to outside where the accused was sitting. Miss "X" identified the accused that it is he who did such misdeed to her. On 2<sup>nd</sup> May, 2016 Miss "X" was present in the class and last hour she asked her for toilet and

she permit her. Thereafter, she informed about the incident to their Head Master D.C Sundariyal.

In cross-examination, she admitted that when Miss "X" went to toilet there was about five to ten minutes to complete the school class. When the school was over, students were going out, then Miss "X" came back from toilet to collect her bag, during that time she was present and she saw Miss "X" went out with her school bag. Before leaving, Miss "X" good bye to her. Police recorded her statement. During her service, she heard such type of allegation against the accused for the first time. In the next day of the alleged occurrence, the accused was present and doing his duty.

14. PW 6, the victim who was examined after making enquiry to test her intelligence and ability to give rational answers. She stated before this court that she knows the accused as he was a sweeper of their school. The incident took place about four months ago. On the day of incident, she went to school. At the relevant time she went to toilet with the permission from their class teacher. Then accused came to the bath room. Accused asked her to hold his toilet. She clearly stated that toilet means the organ by which one discharged toilet. Then without touching the toilet she came back to her class room. After the school was over, while she went to home she narrated the whole incident to her mother. Her mother informed the matter to her father. Then her mother went to school to complain about the matter to her class teacher. After instituting the case she was examined medically. She was also sent to the learned Magistrate to record her statement. Ext. 5 is her statement u/s 164 Cr.P.C. and Ext. 5(1) to 5(4) are her signatures. While her statement was recorded, her mother was in outside but after giving her statement her mother entered in the room where she gave statement. In the statement u/s 164 Cr.P.C., her mother also put signature. Ext. 5(5) is the signature of her mother.

Though she has been exposed to long cross-examination, the evidence as to at the relevant time while she went to toilet with permission of her class teacher, accused appeared before her and asked her to hold his organ whereby he discharged urine but she did not hold his said organ instead she returned to her class and on her arrival at home when the school was over, she narrated the whole incident to her mother has remained unchallenged.

- **15. PW 7,** Sri Meghnath Sona, who was also a school chowkidar of the school where the incident took place stated that at the relevant time he was doing labour at the Lokra Army School. In the said school accused was also doing works. He was working outside of the school so he cannot say what happened inside the school.
- PW 8, the Investigating Officer, Aparna Natarajan, stated **16.** before this court that on last 03-05-2016 she was posted as IPS Probasoner at Chariduar Police station as Incharge. On that day, she received a written ejahar from one complainant Sri Subodh Kumar Bhatt, Rifle man/General duty, Assam Rifles alleging that on 2<sup>nd</sup> May, 2016 at about 6 p.m. his wife Mrs. Subha Devi informed him that his minor daughter, aged about 6 years, Miss Manvi Bhatt, student of Class- 1 standard, had been sexually harassed at around 1.15 to 130 p.m. in school premises when she had gone to relieve herself in the bathroom. The name of the accused is mentioned as Kalicharan Doom, S/O Chandreswar Doom of No. 3 Tea garden, Lokhra, Chariduar. On being receipt the ejahar it was registered vide Chariduar PS case 64/16 u/s 10 of POCSO Act and she herself took up the investigation of this case. Ext. 4(2) is her signature with note. After registration of the case she has proceeded to the place of occurrence i.e. the Assam Rifles School, Lokhra. She has prepared the sketch map. Ext. 6 is the sketch map and Ext. 6(1) is her signature. She has recorded the statement of victim and other witnesses at the place of occurrence. She has also sent the victim for medical examination. She has also sent the victim for recording her statement u/s 164 Cr.P.C. through her prayer Ext. 7 and Ext. 7(1) is her signature. Then she has also arrested the accused and forwarded him to judicial custody. After completion of all the formalities of the investigation, she has filed the charge-sheet

against the accused Kalicharan Doom u/s 10 of POCSO Act. Ext. 8 is the said charge-sheet and Ext. 8(1) is her signature.

In cross-examination, she admitted that at the relevant time she was incharge of the General Diary of the Police station. She being the senior Officer of that police station she was incharge of the said police station. By virtue of incharge, she has registered the said case. She put her signature in Ext. 4(2) as O/C of Police station. The time of occurrence is around at around 1.15 to 130 p.m. on 2<sup>nd</sup> May, 2016 as it reveals from Ext. 4. Ext. 4 is received by her at about 2.30 p.m on the next day i.e. about after 24 hours of occurrence. The accused is an FIR named person. She has recorded the statements of all the witnesses according to their version. She came to know from investigation that accused is a sweeper of the school and in the school there are two numbers of sweepers. The victim identified this accused in presence of her mother. She has also interrogated the other sweeper.

**17.** PW 9 Smt. J. Sarmah is the learned Judicial Magistrate who recorded the statement of victim, stated that on 04-05-2016 she was working as Sub-Divisional Judicial Magistrate, Sonitpur, Tezpur and on that day in reference to Chariduar PS Case No. 64/16, she has recorded the statement of minor witness Miss Manvi Bhatt, aged about 6 years, D/O Sri Subodh Bhatt of Assam Rifles, PS Chariduar. The said witness was a student of class -I. As the said witness was a minor of 6 years old so she has recorded her statement after enquiry to test her intelligence and to give rational answers. After making proper enquiry, she has recorded her statement without on oath. At the time of recording her statement, her mother Shobha Bhatt was also present. The witness was identified by WPC 685 Jyotshna Borgohain. The said witness made statement voluntarily. After recording her statement, she has read over the contents of the statement to her and on satisfaction she put her signature thereon. Ext. 5 is the statement of witness Manvi Bhatt and Ext. 5(6) is her signature thereon. Ext. 9 is the relevant order of Special Judge, Sonitpur, Tezpur dated 04-05-2016 and Ext. 9(1) is her order and Ext. 9(2) is her signature.

- **18.** These much is the evidence of prosecution
- **19.** Defence plea is total denial while his statement was recorded u/s 313 Cr.P.C.
- **20.** Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. **Firstly,** the sole evidence of the victim cannot be relied on as her statement made before the court is not tallied with the statement recorded u/s 164 Cr.P.C. **Secondly,** the victim could not be able to identify the accused in any stage. **Thirdly,** there are many contradictions in the statements of the witnesses.
- 21. On the other hand, learned Special Public Prosecutor has submitted that the prosecution has ably proved the case against the accused beyond any reasonable doubt, hence, accused is required to be convicted under the charged section. Learned PP also submitted that in fact there is no enmity in between the accused and the complainant. Even if there is any strange relation between the accused and complainant, it would not be expected from the complainant to involve his own minor daughter in such a hatred cases.

Learned Special PP again submitted that PWs 2 and 3 are the father and mother of the victim, therefore, question may arise to their interestedness to succeed the case. To rely the interested witnesses in convicting the accused, learned Special PP submitted the case of **Gali Venkataiah Vs. State of Andhra Pradesh** reported in **2008 Crl.L.J. 690.** In regard to minor discrepancies, learned Special PP also submitted the case law of **State of UP V. Krishna Master & ors** reported in **2010 Crl.L.J.3889.** 

- **22.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **23.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is no eye witness to the incident,

but after the incident, the victim informed about the incident to her mother and lateron her mother informed the matter to her father which are corroborated.

According to PW 2, the father of the victim, he knows the accused. The incident took place on 2<sup>nd</sup> May, 2016. At the time of incident, his daughter was 6 years of age and she studied in class I standard at Assam Rifle School, Lokra. On that day he was on duty. At about 5.30/6.00 p.m., he returned to his quarter and came to know from his wife that while the cleaner of the school clean the toilet their daughter/victim went to toilet and then accused exposed his private parts and asked the victim to touch his private parts. His wife also reported that his daughter told her not to disclose the matter to him. Next day, he along with his wife went to the school and complaint to the Head Master of Assam Rifle School by stating whole incident. Thereafter, he lodged the FIR before police. Ext. 4 is the FIR and Ext. 4(1) is his signature. The FIR was written by their Major Monish Biswas as per his instruction. Then, police recorded the statement of his daughter, took her to doctor for medical examination and also sent to learned Magistrate for recording her statement. Similarly, PW-3, mother of the victim, stated that she knows the accused Kali Charan Doom. The incident took place on 2<sup>nd</sup> May, 2016. At the time of incident, her daughter was 6 years of age and she studied in class I standard at Assam Rifle School, Lokra. On that day she was at their quarter. After returning from school she asked her daughter for changing her school clothes. Then her daughter told her that she wanted to tell something and asked her not to tell her father about the said incident. Her daughter told her that while the cleaner of the school was cleaning toilet she went to toilet and then accused exposed his private parts and asked her to touch his private parts. Thereafter, she returned from toilet. Similarly, the victim also narrated that she knows the accused present in the dock. He is a cleaner of bath room of their school. On the day of incident, she went to school. At the relevant time she went to toilet with the permission from their

class teacher. Then accused came to the bath room. Accused asked her to hold his toilet. She clearly stated that toilet means the organ by which one discharged toilet. Then without touching the toilet she came back to her class room. After closing of the school at home she informed to her mother about the incident. Accordingly, her mother informed the matter to her father. Her mother also informed the matter to her class teacher. Her statement is also corroborated with the statement of other reporting witnesses i.e. PW 2 and 3. Though all the aforesaid witnesses PW 2 and 3 were exposed to long cross-examination but the evidence as to the victim on the day of incident after closing of school informed about the incident to her mother (PW 3) and then her mother reported the matter to her father (PW 2) has remained unchallenged.

- **24.** Learned counsel for the accused submitted that the prosecution has failed to prove the age of the victim as they have not been seized any school certificate or date of Birth certificate of victim to ascertain the age. Therefore, the case cannot be stated to be fallen under POCSO Act.
- **25.** It is true that in the present case there is no documents like Birth certificate or age certificate or any certificate issued by the School authority where the victim last studied or any certificate issued by local Panchayat etc. to prove the victim that she was 6 years at the time of incident. But the PW 1, the Doctor stated that she examined the victim, 6 years old female girl but her statement does not show that she opined her age after proper scientific ossification test. That has not been challenged by the defence at any point of time. Therefore, it can safely be held that the victim was a minor.
- **26.** In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD) No.98 of 2015**, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual

is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

- 27. In this case, the victim and her parents categorically stated the age of the victim as 6 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs 1, 2 and 3 in respect of age of the victim remains unchallenged.
- 28. In the case in hand, the victim has been consistent on the material particulars with regard to the incident that on the day of incident, while she went to toilet with the permission of class teacher where the accused was cleaning the toilet. Accused exposed his private part, asked her to touch his private parts but she without doing so return to class, thereby accused attempted to commit sexual assault to her. After closing the school she (victim) narrated the whole incident to her mother, thereafter, her mother reported about the incident to her father. The victim also made such statement before the learned Magistrate u/s 164 Cr.P.C. which was confirmed by learned Magistrate (PW 9). She has also made such statement before the I.O. while her statement was recorded u/s 161 Cr.P.C. Though the victim has been vigorously cross-examined by the learned counsel for the accused but the evidence as to while she went to toilet she found accused in cleaning the bath room and she was asked by the accused to touch his private parts by exposing but she did not doing so instead went to her class room and after closing of the school she narrated the whole incident to her mother and her mother informed the matter to her father has remained unchallenged. There is nothing in the evidence of the PWs that the accused had any enmity or quarrel with the complainant to file the case falsely against the accused. Therefore, defence of false allegation is not made out.

- 29. The Hon'ble Supreme Court in **State of Rajasthan Vs. Babu Muna (2013) 4 SCC 206**, has observed as under :-
- **"9.** We do not have any slightest hesitation in accepting the broad submission of Mr. Jain that the conviction be based on the sole testimony of the prosecutrix, it found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be clarified into three categories, namely, (i) wholly reliable, (ii) whole unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of single witness, the conviction can be found without corroboration. This principle applies with greater in terms in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of single witness but the court has no option to acquit the accused."
- **30.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **31.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and
- Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.
- **32.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:

- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- Similarly whenever any law prescribes that the Court shall 33. presume the existence of culpable mandatory state or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. Certainly, it does not discharge the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume". Thus, as per Section 29, if a person is prosecuted for committing or abating or attempting to commit any offence u/s.3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abated or attempted to commit the said offence as the case may be unless the contrary is proved. However, in the present case, the accused has completely failed in discharging his burden even by preponderance of probabilities much less beyond reasonable doubt.
- **34.** Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? Such issue was dealt by the Hon'ble Apex Court in **Virendra Vs State of U.P., (2008) 16 SCC**, which are reproduced as under:

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

- **35.** 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.
- **36. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341**, it was held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.
- **37.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.

**38.** In the present case, at the time of examination of the victim, some questions were put to her and she replied the same without any hesitation and this Court hold that the victim was able to give rational answers and thereafter her statement was recorded without oath. Apart from that, other witnesses including the parents of the victim i.e. PW 2 and 3 also supported the evidence of PW 6 (victim).

Here in the present case as discussed above, the victim after closing the school at home she reported the matter to her mother and then her mother reported her father. Besides, that, PW 4, the School Head Mater of the school also stated that next day of incident, the class teacher of the victim Smt. Sanju Rai informed him that when the victim went to toilet accused exposed his private parts and asked the victim to touch his private parts and on the same day, the guardian means the mother of the victim came to him and asked that she wants to meet the class teacher of class 1 and then he allowed her to meet the class teacher and accordingly, she (mother of the victim) narrated the story to class teacher. The class teacher(PW 5) also stated that the accused was their sweeper and the victim was their student. The incident took place on 2<sup>nd</sup> May, 2016. In the next day i.e. on 3<sup>rd</sup> May, 2016 the mother of the victim informed her that while the victim went to toilet, the accused exposed his private parts and asked her to touch his private parts. On being came to know about the incident, she personally asked the victim about the incident. Then she took the victim to outside where the victim identify the accused that it is he who did such misdeed to her. She also stated that at the last hour of the school of 2<sup>nd</sup> May, 2016 she allowed the victim to go for toilet therefore, the class teacher also supported the prosecution case.

**39.** On appreciation of the evidence given by the victim, her parents and other independent witnesses i.e. the Head Master of the School and class teacher, I find that the accused attempted to sexual assault on the victim. As it appears from the statement of the victim and other witnesses that accused exposed his private parts and asked the victim to touch his private parts but the victim

did not touch so, the offence of sexual assault is not completed but the accused attempted to cause sexual assault.

- **40.** In regard to the age of the victim, it appears that though doctor stated that her age is 6 (six) years but that opinion is not given after proper ossification test or on the basis of Radiological report. That apart, the prosecution has failed to collect any of the date of birth Certificate or Age Certificate of the victim.
- **41.** Considering that aspect, the offence of the accused cannot be stated to be attempted to commit aggravated sexual assault but attempt to commit sexual assault. Therefore, accused Kalicharan Doom @ Kalicharan Basfor is convicted u/s 18 of the POCSO Act.
- **42.** The accused is heard on the point of sentence where he praying for leniency stating that he is the only bread earner of his family, he has married just two days ago hence, praying for leniency.
- **43.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.
- Turning to the question of sentence, it is the settled law that 44. while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 35 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.18 of POCSO Act a punishment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

## ORDER

**45.** I convict the accused Kalicharan Doom @ Kalicharan Basfor u/s. 18 of POCSO Act and sentence him to Rigorous Imprisonment for Fifty seven days and to pay a fine of Rs. 20,000/- (Rupees twenty thousand only) in default Rigorous Imprisonment for another one month.

It appears from the record that the accused has been in custody since 04-05-2016 to 30-06-2016 i.e. for 57 days.

The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him.

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

Given under my Hand and Seal of this Court on this the 29<sup>th</sup> day of November, 2017.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

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

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

# **APPENDIX**

#### **Prosecution Witness**

1. Prosecution Witness No.1 :- Dr. Tutumoni Handique.,

2. Prosecution Witness No.2 :- Sri Subodh Kr. Bhatta, complainant

3. Prosecution Witness No.3 :- Smt. Sobha Devi,

4. Prosecution Witness No.4 :- Sri Dinesh Chandra Sundariyal, .

5. Prosecution Witness No.5 :- Mrs Sanju Rai,

6. Prosecution Witness No.6 :- Victim

7. Prosecution Witness No.7 :- Sri Meghnath Sona 8. Prosecution Witness No.8 :- Aparna Natarajan, I.O.

9. Prosecution Witness No.9 :- Mrs J. Sarmah, Judicial Magistrate.

# **EXHIBITS.**

Exhibit 1 :- Medical report.

Exhibit 2 :- Vaginal smear report, Exhibit 3 :- Police requisition Exhibit 1(1) and 3(1) :- Signatures of M.O.

Exhibit 4 :- FIR

Exhibit 4(1) :- Singautre of complainant Sri Subodh Kr. Bhatta

Exhibit 5 :- 164 Cr.P.C. statement of victim.

Exhibit 5(1) to 5(4) :- signatures of the victim

Exhibit 5(5) :- Signature of Smti Sobha Devi.

Exhibit 6 :- Sketch map

Exhibit 7 :- Prayer of I.O. to record 164 cr.P.C. statement

Exhibit 8 :- Chargesheet. Ext. 6(1),7(1)& 8(1) :- Signature of I.O.

Ext. 9 : - Relevant order of Special Judge, Sonitpru.

Ext. 9(1) :- Order of learned Magistrate Ext. 9(2) :- Signature of Magistrate.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR