IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, Sivasagar.

Spl. (P) Case No. 03 of 2015 U/S 17 R/W Sec. 6 of POCSO Act, 2012 and Sec. 109 IPC R/W Sec. 376 (2) (i) IPC. (Arising out of Amguri P.S. Case No. 14/2015)

State of Assam

-Vs-

- 1. Sri Bidyasagar Baruah,
- 2. Smt. Deborani Baruah

..... Accused persons

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. Anil Ch. Dutta, Advocate

Date of framing Charge : 20.07.2015 & 18.12.2018

Dates of Evidence : 01.09.2015, 25.02.2016, 20.06.2016,

12.08.2016, 31.07.2017, 22.05.2018

Date of S/D : 11.12.2017, 13.12.2017 Date of Argument : 01.02.2019, 11.02.2019

Date of Judgment : 25.02.2019

<u>JUDGMENT</u>

1. Prosecution case in brief is that on 17.01.2015, one Sri B. Gogoi lodged an FIR with O/C, Amguri P.S. alleging, inter alia, that on the previous day, at about 5 PM, accused Deborani Baruah came to his house and by taking consent from the mother of the victim, the victim 'D' (name withheld) to her house on the plea of stay for the night with her as her husband is away. It is also alleged that on that night, at about 11 PM, the victim was allowed to sleep with Deborani and she touched her body and after some time, accused Bidyasagar also came to sleep on the same bed and said Bidyasagar made

physical relationship with the victim. On the next morning, after returning home, victim disclosed the entire incident to the informant and other villagers.

- 2. On receipt of the FIR, Amguri P.S. Case No. 14/2015 u/s 6/17 of POCSO Act was registered and investigated. During investigation, I.O. went to the place of occurrence, prepared sketch map and recorded the statement of the witnesses. During investigation, accused were arrested and forwarded to Court. The victim was medically examined and also sent to Court for recording her statement u/s 164 Cr.P.C. During investigation, I.O. has collected the FSL report, medical report and statement of the victim. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 6/17 of POCSO Act, 2012.
- 3. Upon taking cognizance on the Charge-Sheet and after furnishing copy to the accused persons, vide order dated 20.07.2015, my learned predecessor in office has framed the charges u/s 6/17 of POCSO Act, 2012 against the above named accused persons to which they pleaded not guilty and claimed to stand trial. However on detecting some mistake at subsequent stage, vide order dated 18.12.2018, charges were altered and specific charges u/s 17, read with Section 6 of POCSO Act 2012 and Section 109 IPC read with Section 376(2)(i) IPC were framed against the accused Bidyasagar Baruah and Deborani Baruah to which they again pleaded not guilty and claimed to stand trial. In view of framing fresh charges, accused persons were offered to reexamination or further cross examination, on which both the sides did not press for same and accordingly arguments were heard. During trial, prosecution has examined eleven witnesses including M.O. and I.O.
- 4. Upon completion of the prosecution evidence, accused were examined u/s 313 Cr.P.C. Accused persons shown their willingness to adduce evidence in defence when they were called upon to enter into defence. Accordingly accused persons adduced defence evidence by examining Smt. Binu Bora as DW 1. Defence case is of total denial and false implication.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi Spl (P) Case No. 03/2015 Page 2 of 19

and Mr. Anil Ch. Dutta, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- 6. (i) What was the age of the victim D on the date of incident?
 - (ii) Whether on the night of 16.01.2015, accused Bidyasagar Baruah committed penetrative sexual assault/rape on the victim D at his residence?
 - (iii) Whether accused Deborani Baruah abetted her husband Bidyasagar Baruah to commit penetrative sexual assault/rape on the victim D on the night of 16.01.2015 at their residence?

DECISION AND REASONS THEREOF

- P.W. 1 Dr. N Choudhury in his evidence deposed that on 7. 17.01.2015, he examined victim D in connection with Amguri PS case No. 14/2015. Radiological Examination report shows: (I) Skiagram of left elbow joint reveals complete fusion of epiphysis. (ii) Skiagram of left wrist joint reveals incomplete fusion of epiphysis. PW 1 expressed his opinion that victim D is of the opinion that her age is below 18 years as per radiological evidence and no sign of recent intercourse detected. He further opined that no any injury detected on her body or in her private parts at the time of examination. He proved his report as Ext. 1. In his cross examination, he stated that he did not find any material of experience of previous sexual intercourse. Generally, if a girl of this age sexually inter-coursed by a full grown person, there may appear some injury in her private parts. If forcefully intercourse is committed on a girl of this age, there would be injury on her private parts, but in this particular case he did not find any injury. He has examined the victim girl within 24 hours. In sexual intercourse, there shall be spermatozoa living or dead.
- 8. P.W. 2 the victim D, in her evidence deposed that on 16.01.2015, while she went out of her house with the wife of Bogadhar, by that time accused Deborani came to her house by searching her and forcibly took her to house for night stay with her on the plea that her husband shall not be available in the house for the night. Accordingly, she went with Deborani for

stay with her. Her house is at a distance of about 1 km from the house of accused. On going there, after taking tea, she saw accused Bidyasagar in the house. Accused Deborani prepared pork and accused Bidyasagar has offered her to take liquor. After taking dinner with both the accused, accused Deborani went to sleep and asked her to see TV with accused Bidyasagar. Thereafter, accused Bidyasagar requested her to give massage on her legs, which she performed. During this, accused tried to touch her breast. On this, she made hue and cry and went to accused Deborani and sleep with her. Accused Deborani also touch her breast and gave rupees 500/- but she refused. After some time, accused Bidyasagar came there and open her pants and committed sexual relation with her by gagging her mouth. Deborani was sleeping nearby. She got pain. On the next day morning, Deborani told her not to tell about this to others. On returning home, she informed the mater to her mother. After making hue and cry, her mother took her to police station and lodged the FIR. Police got her medically examined. She also gave her statement in court vide Ext. 2. Police seized her panties vide Ext. 3 seizure list. She identified the said panties as M. Ext. 1. In her cross examination, she admitted that she wear the said panties for two days till seizure. She attains puberty 7/8 months prior of the incident and her menopause period was regular. On the next day morning she get up at 6 AM and after taking tea and calling the accused persons, she left the house at 9 AM. Her parents used to work at the residence of the accused persons and she also used to purchase goods from the shop of the accused persons. She admitted that she has worked at the residence of Meghali Gogoi for about 3 years. One Romesh has his shop in front of the shop of the accused. Said Meghali was related to Romesh. She left the job at the residence of Meghali about 3 months back. For going to the residence of Meghali, she had to go through the court yard of the accused. However the accused persons closed the said road. The accused persons have 3 children. The elder daughter was reading in class nine (IX) and two sons who were reading in school. She denied the defence suggestion that due to bed relation with the accused and Romesh, she deposed falsely on being treated by Romesh. She denied the

defence suggestion that the accused neither offered her to take liquor nor asked her to give massage. She also denied that accused did not attempted to touch her breast. After committing misdeed by the accused, she did not force to return home. She did not inform the matter of committing misdeed by the accused to nearby residences of the accused. Accused is a man of having landed properties. She has handed over her panties to police. She did not hand over her school papers. In her school certificate her age is mentioned. However, she cannot say her date of birth. She has one elder sister.

- 9. P.W. 3 Smti P. Gogoi, mother of the victim, in her evidence deposed that at the time of incident victim D was aged about 13 years. On the date of incident accused Deborani took the victim to her house for night stay, on the plea that her husband will be absent. On the next day at about 6 AM, victim D returned home crying and informed her that on the previous night while she stayed at the residence of the accused, Bidyasagar has committed misdeed with her. She saw blood strain on the panty of her daughter. On knowing this, neighboring peoples asked her to lodge FIR and accordingly, her husband lodged the FIR. In her cross-examination she admitted that her daughter was taken from the road, while she went out with another woman of the village. She cannot know the name of the women with whom her daughter went for walking. Even after knowing the incident, except seeing the panty, she did not go there. Victim D has not told any other matter to her. On seeing the blood strain on the panty of her daughter, she informed the matter to local public and her husband. On their advice the case was filed. Her marriage was performed at the age of 16 years and after 8 years, her daughter was born. She denied that at the time of incident victim D was not aged about 13 years. While giving statement to police, she has not stated that victim D went with one lady for walking and therefrom the victim was kept by the accused. She and her daughter works at the house of others.
- 10. P.W. 4 Shri Bikul Gogoi, the father of the victim, in his evidence deposed that at the time of incident her daughter was aged about 13 years. On the next day of incident her wife told him that accused persons by keeping Spl (P) Case No. 03/2015 Page 5 of 19

victim D in their house and committed misdeed. On this, he informed the matter to police and villagers. On being asked by the villagers, he lodged the FIR, which is written by Prabhat Neog. He has not made any inquiry from victim D about the incident. In his cross he admitted that his wife has informed that on the date of incident Deborani took the victim after taking permission from her. He also did not go to the house of the accused in spite of knowing of her stay at the residence of the accused. On the next day at about 8 AM, victim D returned home alone. He cannot say about the contents of the FIR. Victim D is his fourth child. He denied that at the time of incident victim D is aged about 18 years. He denied that on the alleged night of incident victim D was not stayed at the residence of the accused.

- 11. P.W. 5 Smti Labonya Gogoi in her evidence deposed that on the date of incident, she has seen accused Deborani in taking the victim D with her. On the next day morning victim D after returning home with cry informed that on the previous night, accused persons has committed misdeed with her. People gathered there. She asked the matter to the mother of the victim. Victim also informed her about the incident. In her cross, she admitted that her residence is near to the house of the accused. She did not interrogate her while going with the accused Deborani. Residence and shop of the accused are different. On the next day morning, at about 7 - 7.30 AM, she has seen that victim D was coming out from the shop of the accused. She came to know about the incident from the mother of the victim and on that basis she asked her parents to file a case. She has not seen the victim staying at the residence of the accused. While giving statement to police she did not state regarding seeing the victim coming out from the shop of the accused and seeing the accused Deborani in taking away the victim D with her.
- 12. P.W. 6 Smti Jayanti Gogoi in her evidence deposed that on next day of the incident on seeing the victim while crying at her residence, she and other people asked her and the victim informed them that on the previous night, while she went to the house of the accused, accused Bidyasagar committed misdeed with her. On this, they advice to informed the matter to Spl (P) Case No. 03/2015 Page 6 of 19

police. In her cross she stated that her residence was near the house of victim D. She cannot say whether the victim stayed at the residence of Bidyasagar. While giving statement to police she has not stated that on the next day at 7 AM, she has seen victim D at her residence. Victim D did not tell her as what misdeed accused has committed with her. She even cannot say the meaning of misdeed.

- 13. P.W. 7 Meghali Gogoi in her evidence deposed that on 16.01. 2015, her husband Shri Jugen Gogoi has informed her regarding commission of misdeed on victim D by the accused Bidyasagar and that they went to the police station. On this, she also went to police station and victim D told her that on the previous night she stayed at the residence of accused and accused Bidyasagar after consuming liquor to her, committed misdeed with her. At that time victim D was aged about 13 years. Police also seized panty of victim D vide Ext. 3 seizure list. In her cross examination, she admitted that victim D used to stay at her residence but at the time of incident, she returned home. She admitted that before police, she has not stated about getting information from her husband Shri Jugen Gogoi and that at police station victim D told her regarding commission of misdeed by the accused. She has not seen the victim either going to the house of the accused or staying there. She cannot say the date of birth of the victim and stated the age on assumption. She has not seen the seized articles and signed the seizure list on being requested by police.
- 14. P.W. 8 Juri Boruah in her evidence deposed that she heard regarding arrest of accused Bidyasagar by police. She has no knowledge about the incident.
- 15. P.W. 9 Shri Romesh Gogoi in his evidence deposed that about one and half years back police came to the house of the accused and apprehended accused and took his signature in Ext 3 seizure list. Police seized one underwear vide Ext. 3 seizure list. In his cross, he admitted that police has not seized any articles in his presence.
- 16. P.W. 10 Shri Khetradhar Gogoi in his evidence deposed that while Spl (P) Case No. 03/2015 Page 7 of 19

he came to police station, he saw accused Bidyasagar at the police station and police informed him that accused Bidyasagar committed misdeed with victim D. Police seized one underwear vide Ext. 3 seizure list. In his cross he stated that he has not seen seizure of any articles. He has not stated before police regarding knowing the incident from the father of victim D.

17. P.W. 11 Padmakanta Bora, the i/o of this case, in his evidence deposed that on 16.01.2015, one written FIR was received from Bikul Gogoi and he investigated the case. Exbt. 4 is the FIR. During investigation, he went to the place of occurrence i.e. residence of accused Bidyasagar Barua. Accused Bidyasagar Barua and Deborani Barua were apprehended and sensing law and order problem they were taken out from the PO and sent to PS. Thereafter, on being shown the victim D, he drawn a sketch map of the PO. Exbt. 5 is the said sketch map. On the same day, victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. Accused persons were arrested and produced in court. During investigation, he seized panty of the victim D. Exbt. 3 is the seizure list. M. Exbt. 1 is seized panty of the victim. He sent the seized panty to FSL. During investigation, he collected FSL report, medical report and statement given by victim in court. Exbt. 6 is the forwarding letter of FSL sending the report. Exbt. 7 is the FSL report. Exbt. 7 shows that the Exbt. No. sero 3446/A human blood and semen could not be determined due to heavy blood. On completion of investigation, he has submitted charge sheet against the accused u/s 6/14 of POCSO Act. Exbt. 8 is the charge sheet. In his cross-examination, the I/O admitted that he has not examined the scribe of the FIR as witness. During his investigation, he has not seized any bed sheet or any other article of the bed used in committing the crime. He did not give any requisition for medical examination of the accused u/s 53A Cr.P.C. for examination of his genitalia. He has not seized any wearing apparel of the accused Bidyasagar Barua. As per medical report, the medical officer did not find any sign of recent sexual intercourse on the victim. He relied the age of the victim only on medical report. The panty of the victim was seized at police station on being handed over by victim. The incident was of 16.1.2015. Panty

was seized on 17.01.2015 at 2.10 PM. He did not patch any paper on the blood stains seen on the panty. He sent the panty to FSL with a forwarding given by Addl. SP HQ. In the forwarding letter, the specimen seal used in sealing the box was not given. Panty was sent to FSL for determining existence of human semen and vaginal swab. The panty sent by him contains small blood stain. In Exbt. 7 FSL report, there was mention of heavy blood. During investigation, he found mother of the accused Bidyasagar, his school going children. Witness Punya Gogoi in her evidence did not state that on the date of incident, victim D went with one woman for visit and accused took victim to her house. He did not investigate regarding year of marriage, number of children etc. about the parents of the victim. He did not go to her school for collecting her date of birth recorded in school register.

18. DW - 1 Smt. Binu Bora, mother of the accused Bidyasagar Barua in her evidence deposed that her son has two daughters and one son. Eldest daughter has appeared in HS final examination. She along with the grand children lived with the accused persons in same house. Victim D, is known to me. Victim D never comes to her house for work for domestic help. In the year 2015, at the time of Magh Bihu, she was at her residence. Her house has three rooms. In one room her son and his wife and their children stays. The middle room is used as drawing room. In the other room, she reside. On 16.01.2015 and during the entire Bihu period, except her family members none one came to stay for night in the house. They have agricultural lands. Meghali Gogoi, Labnya, Jayanti and Ramesh were demanding for a road from their cultivable land. In the year 2015, her eldest grand daughter was a student of class X. In her cross-examination by prosecution, she admitted that on the matter of land dispute, she or her son has not filed any case before police or any other civil court. During my husband's life time, there was some case with the family members of Meghali Gogoi, Labnya, Jayanti but she has not filed any document to that effect. Meghali Gogoi, Labnya, Jayanti and Ramesh are residents of neighbouring village. She denied that, she deposited falsely to the fact that none came to stay in her house on Bihu days. She also denied that victim D

was called by her daughter-in-law to their house and by keeping her in the house for the night, her son has committed rape on the victim and Deborani helped him in doing so. Prior to this case, her family members have no quarrel with the family of the victim. She used to go to bed at 8-9 PM. On rare occasions, she go to the room of her son in night hours for bringing betel nut, if found necessary. TV was kept in drawing room i.e. in the middle room. Servant room is near to the store room and outside of our house.

- 19. Basing on the above evidence, let me decide the points formulated here-in-before.
- 20. Point No. 1: So far age of the victim is concerned, from the evidence of PW 1 the M.O., it appears that as per X-ray report on radiological examination, left wrist joint reveals incomplete fusion of epiphysis and basing on radiological evidence M.O. opined that the victim was below 18 years of age. PW 2 the victim while adducing evidence claimed her age as 13 years. In her cross examination she admitted that her age was mentioned in school certificate, but same was not handed over to police. She denied that her age was above 18 years. PW 3 and PW 4, the parents of the victim in their evidence stated that victim was aged about 13 years. In her cross PW 3 admitted that her marriage was performed at the age of 16 years and after eight years of her marriage, the victim born. PW 3 also admitted that school certificate of victim was given to police. Both PW 3 and PW 4 denied that victim was aged above 18 years. From the evidence of PW 11 the I.O., it appears that during investigation he has not seized any document on age of the victim. Even he did not go to school of the victim for collecting the date of birth of the victim as per school register. Under these facts and circumstances, except the medical evidence, I found no other material to determine the age of the victim. As stated earlier, if we rely on the evidence of PW 3, mother of the victim then the age of the victim is more than 18 years. Learned Advocate for the accused by relying on the reported case of 1982 Cr.L.J. 1777 has argued that the medical opinion is variable by two years on either side and as such, in this case the age of the victim may be taken as above 18 years. However from the medical evidence, it Spl (P) Case No. 03/2015 Page 10 of 19

appears that the opinion of the M.O. (PW 1) is based on radiological report regarding incomplete fusion of left wrist joint and complete fusion of left elbow joint and as per medical jurisprudence in such cases the age of the victim should be in between 16 to 18 years. As such, I am of the considered opinion that two years benefit on age cannot be given to accused in this case. Apart from above, it is a case of alleged forcible sexual intercourse on the victim who is above the age of 16 years but below 18 years and not a case of consenting party, the age of the victim is immaterial except for application of Section 29 of POCSO Act, if the victim appears to be minor. Keeping the above facts in mind, let me go for the role of the accused persons in committing the alleged crime.

21. So far role of the accused persons is Point No. II & III: concerned, in the course of argument hearing, learned Special P.P. has submitted that evidence of the victim is found reliable and trustworthy and by taking the help of Section 29 of POCSO Act 2012, accused persons should be held guilty. On the other hand, learned Advocate Mr. Anil Ch. Dutta in his pain taking lengthy argument by taking me through the entire evidence on record and the various relevant legal provisions and also by relying reported case of 2015 (3) GLJ 333 and 2015 (3) GLT 89 has argued that the entire case is full of doubt, ambiguity, concoction and exaggeration. It is further argued that even if, Court held the age of the victim below 18 years, then also from the cross examination of the witnesses will reveal that the presumption was rebutted and prosecution has failed to prove the case beyond reasonable doubt. It is further argued that there are several flaws in this case right from taking the victim by the accused Deborani Baruah to her house, return of the victim, informing the matter to the villagers and seizure of the wearing apparels of the victim. It is further submitted that medical evidence clearly indicates that though the victim was examined by the M.O. (PW 1) within 24 hours of the alleged incident, he did not find any mark of injury or sign of recent sexual intercourse on the victim and interestingly hymen of the victim was found intact, which nullify the entire incident of penetrative sexual assault by the accused Bidyasagar Baruah. It is also argued that, as per the FIR, the victim was taken with the consent of the

mother of the victim, but the evidence says otherwise. Though the incident happened at night, the victim admittedly stayed at the residence of the accused persons up-to 9 AM, took breakfast with accused and their family members, but did not disclose the fact of rape on her to other villagers while returning home. Though the victim stated that accused Deborani gave her Rs. 500/- for not to disclose the incident to others, but said amount was not seized by police. Even police did not seize the bed-sheet etc. from the house of accused where the alleged incident took place. Though the undergarment was shown to have been seized but no mark of human semen was found. Admittedly the I.O. did not investigate/examine the mother and children of the accused persons who were present at the said night in their house. Learned Advocate for the defence has also pointed out that the FIR was lodged due to some enmity between the accused persons and the villagers of the victim's village on blocking of one road and as such there is every possibility of false implication. I have considered the submission of both the sides and gone through the evidence on record.

22. So far taking of the victim with accused Deborani Baruah to her house is concerned, on careful reading of the evidence, particularly from the evidence of PW 2 the victim, it appears that while she went with another woman of her village, accused Deborani Baruah came to her house and thereafter she was forced to go with her for night stay. PW 3, mother of the victim stated that accused Deborani took the victim to her house for night stay and she was informed the matter of taking the victim by the wife of Bogadhar. In her cross she further admitted that while the victim went to visit another house in their village, accused Deborani took her from the said place and the lady with whom the victim went for visit informed the matter of taking the victim by the accused Deborani. PW 4, the informant in the FIR as well as in his cross examination admitted that his wife informed him that accused Deborani took the victim with her after taking permission from his wife (PW 3). PW 5 has seen the accused Deborani while taking the victim with her. PW 6 and PW 7 has stated about the incident after return of the victim. So from the above, it appears that the evidence of the PW 2, PW 3, PW 4 and PW 5 is contradicting

as to where from the victim was taken by the accused Deborani. DW 1, mother of the accused Bidyasagar Baruah in her evidence stated that on the alleged date of incident, the victim did not come to their house for night stay. Thus the evidence of PW 2, PW 3, PW 4 and PW 5 regarding going of the victim with accused Deborani to the house of accused persons appears to be doubtful.

- 23. Now coming on the allegation of the alleged incident of penetrative sexual assault/rape on the victim by the accused Bidyasagar Baruah on being abetted by his wife accused Deborani Baruah, it appears that as discussed earlier the M.O. (PW 1) did not find any sign of recent sexual intercourse on the person of the victim. It may be noted here that the alleged incident took place at about 11 PM of 16.01.2015 and the victim was medically examined at 4 PM on 17.01.2015 i.e. within 17 hours of the alleged incident. PW 1 the M.O. clearly indicates that the organ of genitalia found normal and hymen was found intact. No spermatozoa seen in the vaginal smear. In his cross examination M.O. has admitted that if a girl of below 18 years of age was sexually inter-coursed by force, there must be some injury in her private parts.
- 24. During investigation, the I.O. has seized the panty of the victim and sent the same to FSL. The FSL report was collected by I.O. (PW 11) and proved as Exbt. 7. On going through Exbt. 7 the FSL report, it appears that though Exbt. 7 gave positive test of human blood but presence of semen could not be determined due to heavy blood. In cross, the I.O. has admitted that seized panty was sent to FSL for determining existence of human semen and vaginal swab. The panty sent by him contains small blood stain. In Exbt. 7 there was mention of heavy blood. Thus this aspect also did not support the prosecution version of alleged penetrative sexual assault on the victim. It may be mentioned here that in a case of this nature i.e. rape, medical opinion cannot be taken as gospel truth and if the evidence of victim is found reliable and trustworthy, non-finding of any injury on the private parts of the victim or sign of rape by the M.O. during examination will not debar the Court to hold the accused guilty. As such, let me now come to the circumstances of the alleged incident of rape.

25. It is the PW 2 the victim, who in her evidence as mentioned earlier has stated that after going to the house of accused, which is at a distance of about one mile, she found the accused Bidyasagar in his house, consumed liquor with him and take dinner with both the accused persons. Thereafter accused Deborani went to bed and asked her to watch TV with her husband Bidyasagar. Thereafter, on being requested, she gave massage on the legs of accused Bidyasagar and while he attempted to touch her breast, she called accused Deborani and went to sleep with her. Accused Deborani also touched her breast, gave her Rs. 500/- and thereafter accused Bidyasagar came there and committed rape on her in presence of his wife Deborani. On the next day morning, she took breakfast and accused Deborani requested her not to divulge the matter to her family members. But in her cross the victim admitted that she got up from bed at 6 AM, took breakfast with the accused persons and stayed at the residence of the accused persons till 9 AM. Thereafter she came to her own house and informed the matter to her mother (PW 3), who on making cry gathered people. Defence during cross-examination denied all these allegations. She also admitted that while returning to her house she did not inform the matter to neighbours of the accused. If we look at the evidence of PW 3, the mother of the victim, it appears that at about 6 AM in the morning her daughter victim 'D' returned home with cry and informed her about the alleged incident of rape on her by accused Bidyasagar. She also saw blood stain on her panty. However in her cross examination PW 3 stated that except showing the panty, the victim did not disclose about the incident before her. PW 3 further admitted that after informing the matter to her husband and the villagers about seeing blood stain on her panty, her husband filed this case on being asked by the villagers. PW 4, father of the victim stated that he came to know about the incident of rape on victim from his wife and accordingly he informed the matter to the villagers. He further admitted that he did not ask about the incident from the victim. In his cross he admitted that victim returned home at about 8 AM in the morning and he cannot say about the contents of the FIR.

26. Thus it appears that though victim claimed to have stated about Spl (P) Case No. 03/2015 Page 14 of 19

the incident of rape on her by the accused Bidyasagar to her mother, but her mother (PW 3) in her cross admitted that except showing her panty, the victim did not disclose the incident to her. PW 4, father of the victim also admitted that he did not ask the victim about the incident, but interestingly the villagers were informed by PW 4 about the incident of rape on the victim. Apparently PW 4 is a hearsay witness through his wife, but the wife (PW 3) has no knowledge about the incident of rape on victim. All these makes their evidence untrustworthy so far getting knowledge of the incident of rape from the victim.

- 27. The other witnesses of this case are the villagers. Though PW 5 has stated that on the next morning, after returning home victim informed her about the alleged incident of rape. But in her cross PW 5 admitted that she came to know about the incident from the mother of the victim and on this she asked to filed a case. PW 6 also deposed in similar line. Though in her evidence stated that on seeing the victim crying in her house, on asking victim informed her about the incident, but in her cross examination PW 6 admitted that before police she has not stated regarding seeing the victim crying in her house and further admitted that victim did not inform her about the alleged misdeed. PW 7 deposed about going to Police Station only and knowing of the incident from the victim at Police Station. But in her cross PW 7 admitted that before police she did not disclose about knowing of the incident from the victim. PW 8 has no knowledge about the incident. PW 9 is a seizure witness. PW 10 is a seizure witness and knowing of the incident from police only. PW 11 is the I.O. of this case who did the routine investigation.
- Thus from the above materials on record, it appears that though victim stated that she informed her mother (PW 3) about the incident, but PW 3 declined to support that part of evidence of the victim. PW 5 and PW 6 though in their evidence-in-chief has stated about knowing the incident of rape from the victim, but in their cross they have admitted that they came to know about the incident from the mother of the victim. Interestingly, the victim nowhere stated that she has informed the matter to PW 5 and PW 6. So the evidence of PW 5 and PW 6 cannot be taken as relevant to support the fact of alleged SpI (P) Case No. 03/2015

incident of rape on the victim. If we look at the evidence of the victim only as discussed earlier, none of the witnesses has supported her regarding informing the matter of alleged rape on her by the accused at the earliest point of time.

- 29. The post crime conduct of the victim also creates a great suspicion on her evidence. It is in her evidence that she was taken to the house of the accused on the plea that husband of accused Deborani was absent in the house and she has to stay for the night with her. But on going to the house of accused she found the accused Bidyasagar there and did not make any attempt to return back to her house which is just one mile away. Even after the alleged incident of rape on her at 11 PM of 16.01.2015, she got up from bed 6 AM, took breakfast with the accused persons and stayed there till 9 AM and thereafter returned home. PW 3, mother of the victim has stated regarding return of the victim to her house at 6 AM with weeping, but the victim nowhere stated about making any cry while returning home except informing the incident to her mother. PW 5 and PW 6 came to know about the incident after coming to the house of the victim on hearing the cry. However victim is totally silent about making any cry rather she stated that on seeing blood stain on her panty, her mother (PW 3) made hue and cry and gathered villagers. Thus this conduct of the victim appears to be against a normal human conduct.
- 30. Now coming to the other circumstances regarding non-finding of human semen on the blood stained panty creates another doubt. If we scrutinize the evidence of the victim, it appears that there was some land dispute with the villagers due to closing of one road. However this part of fact of land dispute was not brought to the other villagers and hence no importance needs to be given on that aspect.
- 31. Law is well settled that prosecution has to rely on its own case. Section 29 of POCSO Act provides for legal presumption on the evidence of the victim as to its truthfulness, but that presumption is rebuttable as held by Hon'ble Gauhati High Court. In the case in hand, from the facts and circumstances narrated herein before, it clearly indicates that the presumption

stands rebutted and hence burden is on the prosecution to prove the case on the standard of beyond reasonable doubt without the help of the presumption u/s 29 of POCSO Act 2012. As such, I have no doubt to hold that the prosecution has failed to bring home the charges beyond reasonable doubt.

- 32. So far defence evidence is concerned, it is well settled that prosecution has to prove its case beyond reasonable doubt by standing on its own leg and defence has right to keep mum. In this case defence, has examined one Smt. Binu Bora, mother of the accused Bidyasagar Baruah who in her evidence as DW 1 categorically stated that victim never came to their house for work as domestic help. On the day of alleged incident i.e. on 16.01.2015 and during the entire Magh Bihu period except her family members, none came to their house for stay. She lived with the accused persons and they have three children. The eldest daughter of the accused persons has appeared in HS final examination. In the year 2015, her eldest grand-daughter was a student of Class-X. She also deposed regarding demand of a path by PW 5, PW 6 and PW 7 through their agricultural land which they blocked. She was cross examined by prosecution. During cross examination, except giving suggestion of keeping the victim in their house and the alleged incident of rape on her by her son accused Bidyasagar Baruah, prosecution has failed to bring out any substantive materials from DW 1 regarding presence of the victim in their house on the alleged date of incident.
- Considering all above, I am of the opinion that prosecution has failed to prove the ingredients of charges u/s 17, read with Section 6 of POCSO Act 2012 and Section 109 IPC, read with Section 376 (2) (i) IPC against the accused Bidyasagar Baruah and Deborani Baruah. As such, accused Bidyasagar Baruah and Deborani Baruah are acquitted from the charge u/s 17, read with Section 6 of POCSO Act 2012 and Section 109 IPC, read with Section 376 (2) (i) IPC and set at liberty forthwith.
- 34. Bail bonds executed by the accused persons and their sureties stand extended for another six months from today u/s 437-A Cr.P.C.

- 35. Considering the nature of the case, the matter is not referred to DLSA for granting compensation u/s 357-A Cr.P.C.
- 36. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 37. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 25^{th} day of February 2019 at Sivasagar.

Special Judge, Sivasagar

<u>APPENDIX</u>

1. Prosecution witnesses -

- PW 1 Dr. N. Choudhury (M.O.)
- PW 2 Victim 'D'
- PW 3 Smt. Punya Gogoi
- PW 4 Sri Bikul Gogoi (Informant)
- PW 5 Smt. Labonya Gogoi
- PW 6 Smt. Jayanti Gogoi
- PW 7 Smt. Meghali Gogoi
- PW 8 Smt. Juri Baruah
- PW 9 Sri Romesh Gogoi
- PW 10 Sri Khetradhar Gogoi
- PW 11 Sri Padmakanta Bora (I.O.)

2. Defence witnesses:

DW 1 - Smt. Binu Bora

3. Court witnesses: None

4. Exhibits by prosecution -

- Exbt.1 Medical report
- Exbt.2 Statement of the victim given u/s 164 Cr.P.C.
- Exbt.3 Seizure list
- Exbt.4 FIR
- Exbt.5 Sketch map
- Exbt.6 Forwarding letter of FSL
- Exbt.7 FSL report
- Exbt.8 Charge-Sheet
- M. Exbt.1 Seized panty

Special Judge Sivasagar