THE COURT OF THE SPECIAL JUDGE, SONITPUR AT TEZPUR

SPL(POCSO) CASE NO. :- 14 of 2017

(Under Section 8 of POCSO Act, arising out of G.R. Case No 1375

of 2017)

Present :- Sri Ashok Kumar Borah, AJS

Special judge, Sonitpur,

Tezpur

Prosecutor :- State of Assam

-Vs-

Accused :- Sri Gajendra Das,

Son of Late Nripendra Das, Resident of Ex-police line, Police Station – Tezpur Dist: - Sonitpur, Assam.

Date of framing Charge :- 19/07/2017

Date of Recording Evidence : 02/08/2017, 25/08/2017,

20/09/2017, 23/11/2017'

& 06/12/2017.

Date of examination of

accused u/s 313 Cr.P.C

:- 01/02/2018.

Date of Argument :- 12/03/2018

Date of Judgment :- 22/03/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor, Sonitpur

Counsel for Accused :- Smt. Dulumoni Sinha, Advocate

JUDGMENT

- **1.** In this case accused Sri Gajendra Das is put for trial for allegation of charge under Section 8 of POCSO Act.
- The various facts leading to this case according to FIR in brief is that the accused resided at a rented house under the same landlady of informant. The informant has two daughters Smt. Majoni Baishya, 12 years and another one is Smt. Nita Baishya, 7 years. It is also stated that the accused out of affection called informant's both the daughters to his rented room. Accordingly, his both daughters used to visit the accused's room frequently. On 19-04-2017 at about 3 p.m. taking the advantage of absence of informant accused took informant's elder daughter into his room, laid her down with intent to do misdeed. The son of landlady Sri Tinku Mandal on being seen the incident raised alarm. Thereafter, he came to know from her younger daughter that about three days ago accused also did such act to her. Out of fear she could not disclose the incident. Hence, this prosecution case. The ejahar was filed by informant Sri Khagen Baishya before the O/C of Tezpur PS on 20-04-2017.
- 3. On being receipt the ejahar, the O/C Tezpur P.S. registered the case, vide Tezpur PS Case No. 703/17, under Section 8 of POCSO Act. After completion of usual investigation, the O/C Tezpur Police station sent up the case for trial against the accused Sri Gajendra Das under Section 8 of POCSO Act.
- 4. On being appeared the accused person before this Court after hearing both parties, framed charge under section 8 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 11 (eleven) 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 19-04-2017 and prior to 2/ 3 days before 19-04-2017, at about 3 p.m. at Dorokialgaon under Tezpur Police station, accused committed sexual assault on victim, aged about 12 years of age and thereby committed an offence punishable under section 8 of POCSO Act?

Reasons, Decisions and reason for decision

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- PW- 1 Sri Khagen Baishya stated before the court that he 9. knows the accused. They called him as "Nisha". Victim is his daughter. She is aged about 12 years. The incident occurred about three months ago. On the day of incident, he was not at his house. Next day he came back to his house from his works. On arrival at home, he came to know from his wife and others that the accused Nisha had committed misdeed on his daughter Miss "X". On the day of the incident, when the local public asked the accused, then he confessed about his guilt. On being asked by him, his daughter/victim informed him that the accused had committed rape to her. Next day of the incident, he filed the ejahar before police which was written by a scribe. The scribe has written the said ejahar as per his dictation. Ext. 1 is the ejahar and Ext.1(1) is his signature. Police recorded his statement. After instituting the case police arranged to examine his daughter through the doctor. She was also sent to the court to record her statement u/s 164 Cr.P.C.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to in the next day of incident, when he came to his house he came to know from his wife and others that accused "Nisha" had committed misdeed to his

daughter Miss X, on the day of incident, when the local public asked the accused he confessed about his guilt and on being asked his daughter, his daughter/victim informed him that accused has committed rape upon her has remained unchallenged.

10. PW- 2 Smt. Mamu Baishya who stated before the court that victim is her daughter. Victim is aged about 12 years. The incident occurred about 2/3 months ago. Accused and they resided at a rented house under the same landlady. On the day of incident she went to a house of their neighbor in the evening time. During that time, victim and other daughter was alone at their house. The other daughter was in sick so she was in bed. Accused called both of her daughters with a lure of giving money. As the little daughter Gitanjali was in sick so she did not go there but the victim/daughter go to the room of the accused and accused committed rape on her. She was also threatened not to disclose about the incident to them. In the next day, in the evening her husband came and she reported the incident to him. The brother of landlady told her that she has not seen the incident. The landlady also told her that the incident was witnessed by her brother. Then she turned hostile.

In cross-examination by defence she admitted that she has not seen the incident. Under the landlady Bina Mandal, there are many persons resides as tenant. They have not any cordial relation with any of the other tenants of Bina Mandal. She did not know the name of the person from whom she visited at the time of incident. But they called them as "Khura" and "Khuri". On the day of incident her husband went to do labour at "Usha Pendal" near Mahila Samity and he resides there at night. Next day, in the morning at about 8/9 a.m. her husband came back to their home. While he came she met him on the road just near their house when she went to bring bettlenut.

11. PW 3, Miss X, the victim, who was examined after making enquiry to test her intelligence and ability to give rational answers, stated before this court that the incident took place at about 3 months ago in the evening time, Her mother went to a house of

neighbor and her father went out to do his work. She and her younger sister Gitanjali were there. As her younger sister Gitanjali was not feeling well so Dadu (accused) called her to his house. Accused by opening her pant fingering her private parts and then he touched her whole body. The accused asked her not to disclose the matter to her parents. Her sister entered into the house of the accused in search of her. During that time, Tinku, the son of landlady entered into the house of Dadu (accused). In the house of Dadu (accused), Dadu and his sister was found sleeping together in a bed. Tinku asked her whether Dadu had committed any misdeed to her. Then she reported to Tinku that accused fingering her private parts. Then Tinku took out Dadu to outside. On being hearing about the incident local public gathered there and she also reported the matter to local public that accused committed bad act to her. In the next day, she reported the matter to her father. Then her father has filed this case. After instituting the case, she was examined by doctor and her statement was also recorded through the Magistrate.

Though she has been exposed to long cross-examination, the evidence as to on the day of incident while her younger sister was in ill accused called her to his house where accused opening her pant fingering her private parts has remained unchallenged.

12. PW 4, Miss Gitanjali Baishya, younger sister of the victim, who was examined after making enquiry to test her intelligence and ability to give rational answers stated that the incident took place about three months ago. At the relevant time her parents were not in their house. She and her elder sister were only there. She was sleeping in their house as she was not feeling well. Dadu called her to his room. Though she refused to go initially but Dadu forcefully took her by holding her hands. Dadu laid her on bed. Thereafter, Dadu took her elder sister to his room. After instituting the case by her father, her statement was recorded through the Magistrate.

In cross-examination, she admitted that she has not reported to her mother that Dadu (accused) forcefully took her into his room and laid her down in the bed.

13. **PW 5** Smt. Bina Mandal stated that she knows the accused Gajendra Das. She also knows the complainant Khagen Baishya. Both the complainant and the accused resided at her rented house. Gajendra Das resides in her rented house since two months ago from the date of incident. The incident took place about 4/5 months ago. As he did not pay the rent therefore, on the day of incident, she sent her son Tinku Mandal to him to ask for rent. When her son went to the room of Gajendra he saw accused doing bad act with the girl namely Miss X, aged about 12/13 years, who is the daughter of Khagen Baishya. She has not attained puberty. Accordingly, her son informed her about the incident. On being came to know about the incident, she informed the matter to another tenant Kajal Das. Then, neighboring people came and assaulted both the daughters of the complainant. Thereafter, Khagen Baishya filed the ejahar.

Though she has been exposed to long cross-examination, the evidence as to the incident took place about 4/5 months ago, as the accused did not pay her rent, therefore, she sent her son Tinku Mandal to ask the rent, when her son went to the room of the accused, he saw accused doing bad act with the girl namely Miss X, aged about 12/13 years, who is the daughter of Khagen Baishya and she did not attain puberty, accordingly and her son informed her about the incident has remained unchallenged.

14. PW 6 Sri Tinku Mandal stated that he knows the accused Gajendra Das who resides in their tenanted house. He also knows the complainant Khagen Baishya. The incident took place about 3/4 months ago. As the accused did not pay rent therefore, on the day of incident, he went to room of rented house of the accused to ask the rent. He saw the accused and Miss X/victim girl in the bed. Both were sleeping together. While his mother asked about the incident to the victim, she stated to his mother that the accused committed

misdeed to her. Then the father of the victim filed this case. Thereafter, the victim was sent for medical examination by police and also sent her to the court for recording her statement.

In cross-examination he admitted that the accused did not pay their rent from very beginning till the date of occurrence. So they repeatedly asked him to vacate the rented room. Due to default of payment of rent his mother becomes angry upon the accused. For the said reason, altercation took place in between us.

15. PW 7 Sri Deba Hazarika, stated that he knows the accused as he resides at the side of his house but does not knows his name. The incident took place on or about 3/4 months ago. At the relevant time, the accused was found assaulting by son of their landlady and neighbours for alleging him indulging in some misdeeds. On being came to know about the incident, he went to the said place. Then he intervened, asked the boys not to assault the accused. When he asked the accused about the allegation, he confessed his guilt. He also asked the victim girl who also stated that the accused committed mis deeds to her.

Though he has been exposed to long cross-examination, the evidence as to at the relevant time the accused was found assaulting by son of their landlady and neighbours for alleging him indulging in some misdeeds, on being came to know about the incident, he went to the said place, then he intervened, asked the boys not to assault the accused, when he asked the accused about the allegation, he confessed his guilt and he also asked the victim girl who also stated that the accused committed mis-deeds to her has remained unchallenged.

16. PW 7 Smti Kumkum Das, who stated that she knows the accused as he resides in a rented house in their village. The incident took place on or about four months ago. She also knows the victim. They called her as "Dangor moina". The father of the victim has two daughters, one is "Dangor Maina" and the other is "Saru Maina". The title of the father is some Baishya. The name of the mother of the victim is Mamu Baishya. They are their neighbor.

They are living there in a rented house for a long time in the house of one Bina Mandal. On the day of incident, there was a screaming and shouting that "Dangor Maina" was raped by the accused. On being heard about the incident, she rushed to the place of occurrence and she asked the accused and the accused confessed his guilt and praying for apology. As accused is an old man so they did not assault her. When she asked the victim, she also stated that accused touched her body and doing mis-deeds. Thereafter, the complainant Mr. Baisshya filed the case. Police recorded her statement.

Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to on the day of incident there was a screaming and shouting that "Dangor Maina" was raped by the accused, on being heard about the incident, she rushed to the place of occurrence and she asked the accused and the accused confessed his guilt and praying for apology, as accused is an old man so they did not assault her, when she asked the victim, she also stated that accused touched her body and doing mis-deeds and thereafter, the complainant Mr. Baisshya filed the case has remained unchallenged.

17. PW 9 Dr. Amarjit Kaur stated that on 20-04-2017 she was posted as working as Sub-Divisional Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day at about 2 p.m., in the labour room complex of KCH, she examined Rekhamoni Baishya, 12 years, D/O Sri Khagen Baishya of Nalbari Marua, Dist. Nalbari, C/O Smti Binu Mandal, W/O late Harekrishna Mandal, village Darikialgaon, PS Tezpur in reference to Tezpur PS Case NO. 703/17 u/s 8 of POCSO Act, on being escorted and identified by WHG Madhumita Kotoki vide Hospital Registration No. 8046/E/17. She was examined in presence of GNM Kamala Talukdar. On examination she found the following:

She had attained puberty on 09-04-2017. History of sexual assault on 19-04-2017 at 3 p.m.

Height – 126 cm, Weight – 26 kg.

At the time of examination, she was well dress little girl. Her Secondary sexual character yet to develop. Breast developing. Pubic and auxillary hair absent. Vulva and vagina healthy. Vaginal smear was taken and sent for examination.

Investigation advised and report:

 Vaginal smear report – sperm not seen. KCH lab No. 48/17 dated 20-04-2017.

X-ray -reports:

Union of epiphysis of lower end of ulna are not yet complete.

Epiphysis of medial epicondyle of the humerous are also not united with respective shafts.

Epiphysis of the iliac crest has not appeared.

Inference: Age of the person under investigation appears to be not above 16 years.

- **OPINION:** 1. There was no signs and symptoms of recent sexual intercourse.
 - 2. No mark of violence was seen on her body as well as in her private parts.
 - 3. Actual Age of the victim under investigation appears to be not above 16 years.

Enclos: Hospital registration card and vaginal smear report and X-ray plates and reports.

Ext.2 is the Medical Report and Ext. 2(1) is her signature. Ext. 3 is the vaginal smear report of KCH and Ext. 3(1) is the signature of technician of KCH, Tezpur. Ext. 4 is the X-ray report and plates and Ext. 4(1) is the signature of Dr. P.K. Barman, Radiologist. Ext. 5 is the advice slip and Ext. 5(1) is her signature.

18. PW-10 Sri Ranjit Borah, I.O. of this case, has stated that on last 20-04-2017 he was posted as ASI of police at Tezpur Police station. On that day, one Khagen Baishya filed an ejahar before the police station and after receipt of the ehahar the then O/C Ranjit Saikia registered the case vide Tezpur PS Case No. 703/17 u/s 8 of the POCSO Act and entrusted him to investigate the case. Ext. 1 is

the said ejahar and Ext.1(2) is the note and signature of the then O/C Ranjit Saikia. Accordingly he visited the place of occurrence, prepared the sketch map of the place of occurrence. Ext. 6 is the sketch map and Ext. 6(1) is his signature. Thereafter, he recorded the statement of witnesses u/s 161 Cr.P.C. Then he arrested the accused and forwarded him to the court. The two victims were sent for medical examination and thereafter, the victims were produced before the court for recording their statement u/s 164 Cr.P.C. On completion of investigation, finding prima-facie materials against the accused he has filed the chargesheet against the accused u/s 8 of POCSO Act. Ext. 8 is the charge-sheet and Ext. 8(1) is his signature.

Witness Mamu Baishya stated before him that "then I went to the room and asked my daughter Miss X about the incident where she stated that said Sri Gajendra Das has committed misdeeds to her"

Ext. 9 is the case diary of Tezpur PS case No. 703/17 and Ext. 9(1) is the relevant portion of statement of Mamu Baishya in the case diary and Ext. 9(2) is his signature.

In cross-examination he admitted that on 19-04-2017 before receiving the FIR, he has visited the place of occurrence in connection with GD entry No. 777 dated 19-04-2017. On that day, he has recorded the statement of informant Khagen Baishua, Mamu Baishya, Tinku Mandal, Bina Mandal, Kumkum Das and Deba Hazarika. He has sent the victim girls for medical examination on 20-04-2017 at about 12 o' clock noon. He has also sent the victim girls for recording their statements u/s 164 Cr.P.C. He recorded the statement of both the victims girls on 20-04-2017 in an isolated room of the PS in presence of woman police. The room is meant for female person.

19. PW 11 Miss Aklima Begum stated that on 20-04-2017 she was working as Judicial Magistrate, 1st class, Sonitpur, Tezpur and on that day in reference to Tezpur PS Case No. 703 /17 u/s 8 of the POCSO Act, she has recorded the statement of one victim

Rekhamoni Baishya, D/O Khagen Baishya, aged about 12 years, u/s 164 Cr.P.C. As the witness was 12 years old minor, so she has enquired as to her intelligence and ability to give rational answer. Thereafter, the said victim was examined in her court chamber on being escorted and identified by WPC 38 Chitralekaha Das. The statement made by victim voluntarily. The statement was recorded in presence of mother of victim Smti Mamu Baishya. As the victim does not know how to put signature so she has taken the thumb impression of mother Smti Mamu Baishya in her statement. Ext. 9 is the statement of victim Miss Rekhamoni Baishya and Ext. 9(1) is her signature and 9(2) is the signature of

WPC 38 Chitralekaha Das.

On the said day and under the same above reference he has also recorded the statement of other victim Smti Gitanjali Baishya, D/O Khagen Baishya, aged about 8 years, u/s 164 Cr.P.C. As the witness was 8 years old minor so she has enquired as to her intelligence and ability to give rational answer. Thereafter, the said victim was examined in her court chamber on being escorted and identified by WPC 38 Chitralekaha Das. The statement made by victim voluntarily. The statement was recorded in presence of mother of victim Smti Mamu Baishya. As the victim does not know how to put signature so she has taken the thumb impression of mother Smti Mamu Baishya in her statement. Ext. 10 is the statement of victim Smti Gitanjali Baishya and Ext. 10(1) is her signature and Ext. 10(2) is the signature of WPC 38 Chitralekaha Das.

On 21-04-2017 under the same above reference she has recorded the statement of witness Sri Tinku Mandal, S/O Late Harekrishna Mandal, village Dorokial gaon, PS Tezpur, aged about 27 years, u/s 164 Cr.P.C. She has recorded the statement of said witness in her court chamber. The said witness made statement voluntarily. The said witness was escorted and identified by Home Guard Ghanashyam Nath. After recording his statement, the statement was read over to him and on acceptance he put his

signature thereon. Ext. 11 is the statement of witness Sri Tinku Mandal and Ext. 11 (1) is her signature. Ext. 11(2) is the signature of Home Guard Ghanashyam Nath and Ext. 11(3) and Ext. 11(4) are the signature of Sri Tinku Mandal.

Ext. 12 is the order of learned Chief Judicial Magistrate, Sonitpur, Tezpur and Ext. 12(1) is the signature of learned Chief Judicial Magistrate, Sonitpur, Tezpur Smti Rashmita Das. Ext. 12(2) is her order and Ext. 12(3) is her signature. Ext. 12(4) is her order and Ext. 12(5) is her signature.

Ext. 13 is the order of learned Chief Judicial Magistrate, Sonitpur, Tezpur and Ext. 13(1) is the signature of learned Chief Judicial Magistrate, Sonitpur, Tezpur Smti Rashmita Das. Ext. 13(2) is her order and Ext. 13(3) is her signature.

- **20.** These much is the evidence of prosecution
- **21.** Defence plea is total denial while his statement was recorded u/s 313 Cr.P.C.
- 22. 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 statement of the victim is not supported by PW 6 Sri Tinku Mandal, the son of landlady of the accused. Thirdly, there are many contradictions in the statements of the witnesses.
- 23. 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 Special 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 1 and 2 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.**

- **24.** 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.
- **25.** 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 in the next day to her father which are corroborated.

According to PW 1, informant and father of the victim, stated that on the day of incident he was not at his house. Next day he came back to his house from work. On arrival at home, he came to know from his wife and others that the accused Nisha had committed misdeed on his daughter Miss "X". On the day of the incident, when the local public asked the accused, then he confessed about his guilt. On being asked by him, daughter/victim informed him that the accused had committed rape upon her. Though he stated that on the day of incident when the local public asked the accused, the accused confessed his guilt but he himself was absent on that day. However, he came to know from his wife PW 2 who stated that accused and they resided at a rented house under the same landlady. On the day of incident she went to a house of their neighbor in the evening time. During that time victim and other daughter was alone at their house. The other daughter was in sick so she was in bed. Accused called both of her daughters with a lure of giving money. As the little daughter Gitanjali was in sick so she did not go there but the victim/daughter

go to the room of the accused and accused committed rape on her. She was also threatened not to disclose about the incident to them. In the next day, in the evening her husband came and she reported the incident to him. The brother of landlady told her that she has not seen the incident. The landlady also told her that the incident was witnessed by her brother. Then she turned hostile.

PW 3, the victim, stated that on the day of incident her younger sister Gitanjali was suffering from illness but accused called her to his house where accused by opening her pant fingering her private parts and thereafter accused touched her whole body. The accused also asked her not to disclose the matter to her parents. When her younger sister entered into the house of the accused by searching her, Tinku, the son of landlady entered into the house of Dadu (accused). In the house of Dadu (accused), Dadu and his sister was sleeping together in a bed. Tinku asked her whether Dadu had committed any misdeed to her. Then she reported to Tinku that accused fingering her private parts. Then Tinku took out Dadu to outside where many people gathered there and she also reported the matter to local public that accused committed bad act to her. Her evidence is corroborated with the statement made before the police u/s 161 Cr.P.C. and also before the learned Magistrate u/s 164 CR.P.C. Though she has been exposed to long cross-examination but her evidence as to accused took her to his house where by opening her pants fingering her private parts has remained unchallenged.

- **26.** 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 Birth certificate of victim to ascertain the age. Therefore, the case cannot be stated to be fallen under POCSO Act.
- **27.** 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 12/

13 years at the time of incident. But the PW 9, the Doctor stated that the actual age of the victim appears to be not above 16 years, The victim was examined before this court on 02-08-2017. On that day, according to her statement, her age was 12 years. The incident took place on 19-04-2017. Therefore, from her statement it appears that at the relevant time she was about 12 years of age. That has not been challenged by defence at any point of time. Therefore, it can safely be held that the victim was a minor.

- 28. 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.
- **29.** In this case, the victim and her parents categorically stated the age of the victim was about 12 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, 3 and 9 in respect of age of the victim remains unchallenged.
- **30.** 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 her younger sister was ill so she slept in their room accused called her to his room, accused by opening her pant fingering her private parts thereby committed sexual assault to her. While her younger sister entered into the house of the accused in searching her, Tinku Mandal, the son of their landlady also entered. On being found the accused and younger sister of the victim in a same bed, he took out the accused to the outside and asked the

victim, the victim reported about the incident to him. The victim also made such statement before the learned Magistrate u/s 164 Cr.P.C. which was confirmed by learned Magistrate (PW 11). 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 her younger sister was ill so she slept in their room, accused called her to his room where accused by opening her pant fingering her private parts 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.

- 31. 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."
- **32.** 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.

- **33.** 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.
- **34.** 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.
- **35.** 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."

- **36.** 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.
- **37.** In Dattu Ramrao Sakhare Vs -State 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.
- **38.** 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.
- **39.** 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 after confirming the value of oath she was administered oath then this court recorded her statement. Apart

from that, other witnesses including the parents of the victim i.e. PW 1 and 2 also supported the evidence of PW 3 (victim).

Here in the present case as discussed above, the evidence as to on the day of incident while the victim and her younger sister were in their house, their parents were absent, accused called the victim to his house, younger sister of the victim was sleeping due to illness in their house, the accused by opening her pant fingering her private parts are supported by reporting witnesses PW 1 and 2.

- **40.** On appreciation of the evidence given by the victim, her parents and other independent witnesses i.e. PW 5, PW 7 and PW 8 before whom accused confessed his guilt, it comes to the conclusion that it is the accused who attempt to commit sexual assault to the victim. The doctor clearly stated that there is no any sign and symptoms of recent sexual intercourse and no mark of violence was seen on her body as well as in her private parts. Therefore, I think that the prosecution has failed to prove the ingredients of section 8 of the POCSO Act.
- **41.** In regard to the age of the victim, it appears that as stated above, the victim as well as parents of the victim all were stated that the victim is about 12 years of age but there is no documentary proof as to her age. Under such circumstances, it cannot be sated to be attempted to commit the offence of aggravated sexual assault.
- **42.** Considering the aforesaid 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 Sri Gajendra Das is acquitted from the alleged charge u/s 8 of the POCSO Act but accused Sri Gajendra Das is convicted u/s 18 of the POCSO Act.
- **43.** The accused is heard on the point of sentence where he praying for leniency stating that he has his wife and he is the only bread earner of his family, hence, praying for leniency.
- **44.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.

45. Turning to the question of sentence, it is the settled law that 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 50 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.

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46. I convict the accused Sri Gajendra Das u/s. 18 of POCSO Act and sentence him to Rigorous Imprisonment for one 10 (ten) months and to pay a fine of Rs. 200/- (Rupees two hundred only) in default Rigorous Imprisonment for 2 (two) days.

It appears from the record that the accused has been in custody since 20-04-2017.

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

47. 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.

48. 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 22^{nd} day of March, 2018

(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	:-	Sri Khagen Baishya, complainant
2.	Prosecution Witness No.2	:-	Smt. Mamu Baishya,
3.	Prosecution Witness No.3	:-	Victim Miss X
4.	Prosecution Witness No.4	:-	Miss Gitanjali Baishya,
5.	Prosecution Witness No.5	:-	Smt Bina Mandal,
6.	Prosecution Witness No.6	:-	Sri Tinku Mandal,
7.	Prosecution Witness No.7	:-	Sri Deba Hazarika,
8.	Prosecution Witness No.8	:-	Smti Kumkum Das,
9.	Prosecution Witness No.9	:-	Dr. Amarjit Kaur, M.O.,
10.	Prosecution Witness No.10	:-	Sri Ranjit Borah, I.Q.,
11.	Prosecution Witness No.11	:-	Miss Aklima Begum, Judl. Magistrate.

EXHIBITS

Exhibit 1	- Ejahar
Exhibit 2	:- Medical report,
Exhibit 3	:- Vaginal smear report.
Exhibit 4	:- X-ray report
Exhibit 5	:- Advice slip
Exhibit 6	:- Sketch map
Exhibit 7	:- Prayer for recording statement 164 Cr.P.C.
Exhibit 8	:- Charge sheet
Exhibit 9	:- Case diary of Tezpur PS Case No. 703/17.
Exhibit 9	:- statement of the victim u/s 164 Cr.P.C.
Exhibit 10	:- statement of the victim u/s 164 Cr.P.C.
Exhibit 11	:- statement of Tinku Mandal.
Exhibit 12	:- Order of learned CJM, Sonitpur,
Exhibit 13	: - Order of learned CJM, Sonitpur,
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(Ashok Kumar Borah) SPECIAL JUDGE SONITPUR: TEZPUR