IN THE COURT OF THE SESSIONS JUDGE, KARIMGANJ AT KARIMGANJ

Present: Utpal Prasad. AJS Sessions Judge

Karimganj at Karimganj.

SPECIAL SESSIONS CASE NO. 02 OF 2015

u/s. 376D of the Indian Penal Code, 1860; under section 6 of the Protection of Children from Sexual Offences Act, 2012

State of Assam

-Vs-

1. Basir Uddin S/o Shri Ala Uddin

2. Ramjul Hussain

S/o Shri Ansar Ali @ Babu

Rr./o East Gamaria P. S. Ram Krishna Nagar District Karimganj

Date of framing of charge : 13.05.2016, 11.11.2019.

Dates of recording of

Prosecution's evidence : 25.10.2016, 07.12.016, 04.12.2017

29.11.2018, 01.12.2018, 04.02.2019. 29.07.2019, 14.08.2019, 24.09.2019,

25.09.2019.

Date of examination of the

accused u/s 313 of Cr. P. C. : 11.10.2019.

Date of hearing of argument : 11.11.2019.

Date of judgement : 09.12.2019.

LEARNED ADVOCATES WHO APPEARED FOR THE PARTIES

For the State : Mr. B. Deb, Public Prosecutor

For the informant : Mr. M. L. Koiri, Advocate

For the accused no. 1 : Mr. N. K. Nath, Advocate.

For the accused no. 2 : M/s. B. C. Bhattacharjee, D. R. Das,

Advocates.

<u>JUDGEMENT</u>

1. The father of the victim in this case had lodged a written 1st information with the in charge officer of Kallibari police outpost on 09.03.2015 alleging that at around 5:30 PM on that day, when her victim daughter, aged 13 years, was coming back to her residence with her cousin sister, on the way, at an isolated place, the accused number 1 Abdul Basit and two unidentified persons had dragged the victim to nearby jungle on point of a dagger, and had committed penetrative sexual assault on her whereafter, the victim had fallen unconscious and that on getting the information from the cousin of the victim, who had run to the residence and had informed him, he had brought the victim to his residence. The said 1st information, exhibited as Exhibit 1 in this case, also mentions that from the place of occurrence, he had also recovered the slippers of the accused and had submitted the same to the police. It was further alleged in the said 1st information that at the time the victim was recovered, she was almost dying because of injuries. This had led to registration of Ram Krishna Nagar police station case number 33 of 2015 under section 6 of the Protection of Children from Sexual Offences Act, 2012 and after investigation, 4 persons, including the aforesaid 2 accused, were charge sheeted. The other 2 individuals were found to be under 18 years of age at the time of the incident and were forwarded to the Juvenile Justice Board at Karimganj. During investigation, medical examination of the victim was done, her statement was recorded before a Judicial Magistrate, and on the basis of her statement given under section 161 of the Code of Criminal Procedure, 1973, four persons were arrested and test identification parade was held whereafter, the victim had identified the suspects as the miscreants committing gang rape on her.

- 2. During investigation, 12 witnesses were examined by the prosecution. At the time of examination of the victim, as one of the accused was not present, her evidence had too been deferred and when, the 2 accused appeared, the victim was again examined. Due to oversight, even though, initially the victim was examined as prosecution witness number 3, on the subsequent day of the examination, she was referred to as prosecution witness number 8 whereafter, all the subsequent witnesses were numbered wrongly. In this judgement, therefore, the victim has been referred to as prosecution witness number 3, and the prosecution witness numbers 9, 10, 11, 12 and 13 have been referred to as prosecution witness numbers 8, 9, 10, 11 and 12 respectively. The appendix of this judgement also gives the list of witnesses in the same manner. After completion of the evidence of the prosecution and after the accused were examined under section 313 of the Code of Criminal Procedure, 1973, they refused to examine any witness in their support leading the case to travel to the stage of arguments. For the purpose of arguments, the informant appointed his advocate who argued for the prosecution with the consent of the learned Public Prosecutor. The respective learned counsels for the 2 accused also placed their counter arguments.
- 3. Learned Counsel for the informant has argued that the 2 accused being tried

for an offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012 which has been defined under section 5 of the said Act, and the birth certificate of the victim and the medico-legal examination report showing that the victim was a minor at the time of the alleged incident, mandatory presumption of the accused having committed the alleged offence, as provided under section 29 of the said Act has come into play and therefore, in view of the fact that medico-legal injury report of the victim categorically states that penetrative sexual assault was committed on her and the victim has identified the aforesaid two accused persons as two of the three persons who had actually committed sexual intercourse with her, the accused are liable to be convicted of offence punishable under section 376D of the Indian Penal Code and under section 6 of the Protection of Children from Sexual Offences Act, 2012. He has further argued that not only that the victim has unequivocally implicated the aforesaid 2 accused in the offence alleged against them, the statements of the prosecution witness numbers 4, 5, 6 and 7 stating, immediately after the incident, that the victim had stated that rape had been committed on her by more than one person are also relevant in view of section 6 of the Indian Evidence Act. He has stated that the very fact that the accused were not found in their respective residences immediately after the alleged incident, shows subsequent conduct of the two accused and is a relevant consideration against them. He has also pointed out the relevance of the statement made by the victim during investigation and before the learned Judicial Magistrate under section 157 of the Indian Evidence Act and has stated that all these go on to show that there is not even an iota of falsity in the case of the prosecution. He has also stated that there is variance in the stand taken by the accused during cross-examination of the witnesses and during their examination under section 313 of the Code of Criminal Procedure, 1973 which clearly shows that the defence plea is based on falsity and therefore, not at all to be considered probable and therefore, has prayed for the maximum punishment to be given to the accused. He has placed reliance on the judgement of the Honourable Delhi High Court in the case of *State (NCT of Delhi) Vs. Samay Chand passed on 02.07.2018 in Criminal Appeal no.* 474 of 2018.

4. On the other hand, learned Counsel for the accused number 2 has stated that the 1st information, lodged immediately after the incident, excludes the possibility of any exaggeration or omission and therefore, ought to be taken to be a complete narration of the incident meaning thereby that the accused Ramjul Hussain, who has not been named in the said 1st information, and is a major, is not involved in the alleged incident and has been falsely implicated in this case. He has brought notice of this Court to the fact that the Exhibit 1 1st information mentions the name of the accused number 2 and two more persons having committed penetrative sexual assault/rape on the victim and that the very fact that two more persons, found to be minors at the time of the alleged incident, are facing enquiry before the Juvenile Justice Board at Karimganj in connection with the same incident, excludes the possibility of the accused number 1 being involved in the incident. He has further pointed out that the statements of the victim made under sections 161 and 164 of the Code of Criminal Procedure, 1973 mentions about the involvement of only three persons: Basir Uddin and two minors and therefore, the accused number 1 ought not to be held guilty in this case. He has also stated that even though the case of the prosecution is that the victim and her cousin were carrying rice bags with them, which they claim to have purchased from a shop, when the incident had taken place, the investigating officer has stated that he had not found rice grains and rice bags at the place of occurrence and that this proves that the case of the prosecution is a pure concoction of story. He has stated that the description of the place of occurrence given by the prosecution witness number 4 does not tally with the description shown in the Exhibit 16 sketch map. He has stated that the victim has stated in her evidence that while 3 persons committed penetrative sexual assault on her, one more person was with them who was standing near the place of occurrence but had not done anything to her and has submitted that there is every possibility of the said 4th person being the accused number 1. He has also questioned the manner of proving the Exhibit 6, the birth certificate of the victim, stating that nonexamination of the issuing authority makes the said certificate not proved. He has stated that the school certificate of the victim has not been proved to show the date of birth of the victim meaning thereby that the prosecution could not prove that the victim was a minor at the relevant time. He has also pointed out that the victim has very cleverly avoided the contradictions sought to be brought in by the accused by pleading loss of memory. He has placed reliance on the judgement of the Honourable Gauhati High Court delivered in the case of Pradip Chakma Vs State of Tripura as reported in 2007 (3) GLT 218 in questioning the reliability of the test identification parade held in this case which was conducted after a delay of 25 days which has not been explained. He has also stated that the investigating officer having admitted that he had not taken any precautions to conceal the identity/face of the suspects and therefore, in view of the judgement of the Honourable Gauhati High Court in the case of *Md. Abdul Noor Vs. State of Assam as reported in 1996 (2)* **GLT 368**, the test identification was vitiated and cannot be placed reliance on. Countering the submissions made by the learned Counsel for the informant, he has further argued that the prosecution has to stand upon its own legs and cannot base its case on the weakness or unreliability of the case of the defence.

He has submitted that the prosecution has failed to discharge the burden under section 101 of the Indian Evidence Act, 1872. Borrowing the arguments advanced on behalf of the accused number 2, learned Counsel for the accused number 1 has further pointed out that the prosecution witness number 2 is a fictitious witness as name of a different shopkeeper, from whose shop the victim is stated to have been coming after purchasing rice, has been mentioned in the 1st information. He has argued that this shows that the stand of the accused, during their examination under section 313 of the Code of Criminal Procedure, 1973 that the 2 accused persons have been implicated as a result of grudge is highly probable. He has also stated that even though the 1st information mentions that the miscreants had used the dagger to threaten the victim and to drag her into the jungle for committing rape on her, in her evidence, she has not alleged use of any weapon. He has also stated that the claim of the victim and her father that she had become senseless after the incident has been disputed by the prosecution witness number 6. He has also stated that the evidence led by the prosecution shows that the place of occurrence is at 20 minutes' walk from the residence of the victim and as her cousin is stated to have gone running to her house to inform about the alleged incident, less than or around 10 minutes were available for commission of the alleged offence and that in the said period of time, it is an impossibility that three persons could have committed penetrative sexual assault on the victim. He states that the aforesaid goes on to show that the case of the prosecution is not believable. Based on the said arguments, the learned counsels for the 2 accused have prayed for their acquittal.

5. This Court has given anxious consideration to the rival arguments advanced and has also gone through the evidence on record. In view of the same, following questions arise for consideration by this Court:

- i. Whether identification of the accused by the victim in the test identification parade held in this case can be relied on? If answer to this is in the negative, does it go in favour of the accused or any of them?
- ii. Whether the prosecution has been able to prove that the victim was minor aged 13 at the time of the alleged incident?
- iii. Whether the prosecution has been successful in proving the foundational facts for making the presumption under sections 29/30 of the Protection of Children from Sexual Offences Act, 2012 to come into play?
- iv. Whether the prosecution has been able to prove, beyond all reasonable doubts, that the aforesaid 2 accused had, in association with 2 more, committed gang rape/gang penetrative sexual assault on the victim?
- 6. In the case of *Pradip Chakma Vs State of Tripura as reported in 2007* (3) GLT 218, on which the learned Counsels for 2 accused have placed reliance in support of their argument that the delay in holding the test identification parade was unexplained and has vitiated the same, the test identification parade was held after 20 days of arrest of the accused and it was held that the said delay was fatal to the case of the prosecution. In the said case, it was also observed that between the day of arrest of the suspect and the holding of test identification parade, the suspects were produced twice before the concerned learned Court and it was admitted, by the learned Magistrate conducting the test identification parade, that during the aforesaid dates of production of the accused, face of the accused/suspect was not covered. On almost similar grounds, the case of *Md. Abdul Noor Vs. State of Assam as reported in 1996 (2) GLT 368*, which is also been relied on by the 2 accused, test identification parade of the accused was held not worthy

of reliance by the Honourable Gauhati High Court.

7. Learned Judicial Magistrate, First-Class, examined as prosecution witness number 8, has stated in his evidence the first order for test identification parade passed by the learned Special Judge, Karimganj was on 13.03.2015 and the test identification parade was actually held on 07.04.2015. He has stated that on 07.04.2015, learned Chief Judicial Magistrate, Karimganj had directed him to conduct a test identification parade in connection with Ram Krishna Nagar police station case number 33 of 2015, which corresponds to the instant case, and, on the same day, he had passed an order scheduling the test identification parade at 4:30 PM on 07.04.2015 itself whereafter, the investigating officer of the said case had appeared before him at around 11:30 AM. He has stated that thereafter, he had conducted the test identification parade in the District Jail at Karimganj. On reaching the District Jail at 4:40 PM on 07.04.2015, he had directed positioning of 9 persons, and one accused in a row and in the same manner, had formed four rows consisting of 9 other individuals and one accused/CCL (Child in Conflict with Law) each. According to him, the suspected accused/CCL to be identified were Ramjul Hussain, Basir Uddin, Abdul Hannan and Badrul Hussain. He has further stated that the witness (victim) was called for the first round of parade and was asked to identify the suspects from those 40 persons and she had identified Ramjul Hussain, Basir Uddin and Abdul Hannan. Learned Judicial Magistrate has stated that in the 2nd round, she had identified Abdul Hannan, Ramjul Hussain and Basir Uddin and in the 3rd round, she had identified Ramjul Hussain, Basir Uddin, Abdul Hannan and Badrul Hussain. He has stated that each of the rows consisted of persons of similar looks and heights; that before every fresh round of parade, the witness was sent to a room separate from the accused/CCL and the dresses and positions of suspects were changed; that the police personnel were excluded from inside the jail premises; that it was also ensured that the witness stayed in a room free from police personnel. He has further stated that the test identification parade was conducted in presence of the Head Warder Kajal Chakraborty and Sudip Banerjee, Assistant Jailor, District Jail, Karimganj. He identified the report of the test identification parade as Exhibit 5 and has stated that the witnesses to the test identification parade had also put their signatures thereon. He has also stated that after completion of the test identification parade, he had passed Ext. 9 order (order dated 07.04.2015) containing the detail of the manner of the test identification parade and then, had forwarded the case record with the TIP Form to the learned Chief Judicial Magistrate, Karimganj.

8. During cross-examination, the accused number 1 Basir Uddin took the plea that the witness did not know any of the suspects before the test identification parade and therefore, there was no occasion for identification of the suspects by the witness which has been denied by the prosecution witness number 8. The aforesaid shows the hollowness of the plea of defence on behalf of the said accused and it is seen that he has not questioned the correctness and validity of the test identification parade. The accused number 2 Ramjul Hussain, by way of cross-examination of the said witness, has taken the plea that the Exhibit 5 does not mention that each of the four rows of suspects and other individuals contained one suspect each; that the exact position of each of the suspects in each of the rows after each of the three rounds of test identification parade; that Ext. 5 does not mention whether the suspects had changed their clothes in the row itself or in some separate room. However, a perusal column 6 of Exhibit 5 belies the plea taken by the said accused except the fact that Exhibit 5 does not mention the exact position of each of the suspects in each of the rows. Further, that is not a mandatory requirement for a test identification parade to be valid. The said accused has also pointed out that Exhibit 5 does not mention as to when the 2 children in conflict with law were brought from observation home at Silchar and that if the said learned Judicial Magistrate had asked the victim if she knew the suspects already. The accused has extracted from the mouth of this witness that the witness had not stated to him as to which part of the offence against her was committed by which of the suspects. The stand of the said accused is that the test identification parade was not conducted properly.

9. In her testimony, the victim has stated that she already knew Basir Uddin, the accused number 1, at and before the time of the incident as he used to work in her habitat as a labour. She has also stated that she used to notice the accused number 2 even before the incident when he used to go to the College but did not know his name then. From her testimony, it is clear that she came to know of his name after the incident and the test identification parade. She has further stated that the accused number 1 and 2, along with another person, had pushed her from behind felling her down whereafter, her sister had fled from the place and the 3 miscreants had dragged her to inside of the jungle, had removed her cloths, that the accused number 2 had grabbed her both of the hands by spreading the two hands on the two sides, the 3rd unidentified accused had grabbed her legs by spreading them apart and the accused number 1, Basir Uddin, had committed rape on her by inserting his penis into her private part and that thereafter, each of the other two had committed penetrative sexual assault on her in the similar manner. During crossexamination, the accused number 1 book the plea that both the present accused belong to her village. The accused Ramjul has taken the stand that he belongs to the village of the victim. The accused Basir Uddin took the plea that he and his father used to work in the victim's house. Clearly, the identification of the 2 accused by the victim, as per the stand taken by the 2 accused, is independent of the test identification parade. The 2 accused have taken the stand that they are known and were known to the victim since prior to the incident.

- 10. In the case of Chandra Prakash Vs State of Rajasthan, as reported in (2014) 8 SCC 340, test identification parade was held after 15 days of arrest of the suspect. In the said case, the Honourable Supreme Court has pointed out that in the decision in Ramanand Ramnath v. State of M. P. [(1996) 8 SCC 514], wherein identification parade was held within a period of one month from the date of arrest, the Honourable Supreme Court had observed that there was no unusual delay in holding the test identification parade and has also quoted a portion of the judgement of the same Honourable Court in the case of State of Maharashtra v. Suresh [(2000) 1 SCC 471] as follows:
 - "22. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."
 - 35. The said legal position has been reiterated in Anil Kumar v. State of U.P.[(2003) 3 SCC 569] Recently, in Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh through Public Prosecutor, Hyderabad, Andhra Pradesh[(2012) 6 SCC 174], a two-Judge Bench has observed thus: -
 - "66. There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all

cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade."

36. In view of the aforesaid, the submission that there has been delay in holding the test identification parade does not really affect the case of the prosecution. It is also noteworthy that the witnesses had identified the accused persons in court, and nothing has been elicited in the cross-examination even to create a doubt. Thus, we repel the submission advanced by the learned counsel for accused Abdul Hamid and Raies Beg."

- 11. The Honourable Supreme Court, in the judgement delivered in the case of State of Maharashtra Vs. Suresh as reported in (2000) 1 SCC 471, had stated as follows:
 - "20. The last reasoning of the division bench is based on a criticism of the modus adopted by the Executive Magistrate who held the Test Identification Parade. The aforesaid criticism was based on the evidence of two witnesses who said that the accused were taken on foot from police station to the place where the parade was conducted and that their faces were not covered during such transit.
 - 21. Ext. 17 is the minutes of the Test Identification Parade conducted by the magistrate who himself was examined as PW-2. It contains the details of the steps adopted by him. Seven other persons were kept ready in the room and the witnesses were kept in another room from where they could not see the suspect. Thereupon the suspect was brought from the lock up with the help of

two respectable persons and all precautions were taken that the witnesses could not see the suspect during such transit. Then the suspect was permitted to stand anywhere among the 7 persons. It was thereafter that the witnesses were brought with the help of the same respectable persons and the witnesses were then asked to identify the person whom they saw on the crucial day.

22. If potholes were to be ferreted out from the proceedings of the magistrates holding such parades possibly no Test Identification Parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated, every Test Identification Parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So, the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held, [vide Budhsen v. State of Uttar Pradesh (1970) 2 SCC 128; Ramanathan v. State of Tamil Nadu (1978) 3 SCC 867.

23. When we scanned through Ex.17 minutes of the Test Identification Parade we feel that the safeguards adopted by PW-2 Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably fool proof manner. We feel that the division bench niggled on unimportant details and

came to the wrong conclusion that the Test Identification Parade was irretrievably vitiated. The reasons by which the testimony of those three witnesses had been jettisoned by the division bench were fatuous and we cannot support them."

12. Clearly, as is seen from the above, the prosecution witness number 8, learned Judicial Magistrate also took all the requisite steps for ensuring sanctity of the test identification parade. The record reveals that the investigating officer had not caused any delay in making the prayer for test identification parade. It is also seen from the cross-examination of the learned Judicial Magistrate that initially, the order for test identification parade was passed on 13.03.2015. However, it is also seen that the learned Chief Judicial Magistrate at Karimgani had directed the said prosecution witness only on 07.04.2015 for holding of the test identification parade and it was held on the same day. The record of the corresponding police station case reveals that the then learned Additional Chief Judicial Magistrate, Karimganj, Shri S. S. A. Rahman, who was entrusted with the duty to hold the test identification parade had not conducted the said parade for reasons best known to him whereafter, the order dated 07.04.2015 directing the prosecution witness number 8 to hold such a parade was made. Clearly, the delay so caused cannot be attributed to the investigating officer nor can it be attributed to the prosecution. As has been pointed out above, all the requisite precautions were taken by the prosecution witness number 8 and nothing material could be brought out from his cross-examination to show that the test identification parade indeed is vitiated. In view of the law laid down by the Honourable Supreme Court, as stated above, it is held that the two judgements of the Honourable Gauhati High Court, relied on by the defence, does not help the defence. In the result, it is held that the test identification parade for identification of the two accused facing trial and other suspects are reliable. However, it is also held that the identification of the two accused by the victim is not, in the instant case, only on the basis of the test identification parade. It is the case of the two accused themselves that the victim knew both of them since before the incident. As such, no doubt remains as to identity of the present two accused as miscreants in the case. The question under reference is, therefore, decided in favour of the prosecution.

13. The victim has stated, in her evidence, that at the time of the incident, she was studying in class VII in a school named Haricharan School. She has exhibited her birth certificate as Exhibit 6 but has stated that she does not remember her date of birth. Exhibit 6 shows her date of birth to be 20.05.2002. During cross-examination, the accused Basir Uddin has not disputed the said exhibit and has also not disputed that she was a minor at the relevant time. The accused Ramjul Hussain has raised the point that even though the victim has stated, in her examination in chief, that she was studying in the aforesaid school in class VII, she has not submitted any document to substantiate the same. Suggestion has been made, by him, that the victim was above 18 years at the time of the incident. However, this accused has also not raised any finger on the Exhibit 6 birth certificate. Clearly, the said birth certificate remains unimpeached. Prosecution witness number 9, the Doctor who had conducted medical examination of the victim including the examination for determination of her age, has stated that as per the radiological examination, the victim was between 13 and 14 years of age at the time of examination on 09.03.2015. During his cross-examination, the accused Ramjul Hussain took the stand that as no specialist radiologist had conducted age determination test of the victim, the report and inference given by the said witness was not worthy of reliance. However, he has not questioned the competence of the said witness, who was working as a Medical and Health Officer in the S. K. Roy civil hospital in

Hailakandi district at the time of the said examination, as to his ability to conduct such a test and to give an opinion. The said accused could not bring anything substantial on record to doubt the competence of the said Doctor, who was working in a government civil hospital, for the purpose of assessing the age of the person. At the time of arguments, his learned Counsel failed to show any specific rule necessitating such an examination invariably by a specialist radiologist. The accused did not put any question to the witness to show that he was not trained in the radiology. He has also taken the stand that Exhibit 13, which is the x-ray report of the victim, mentions the surname of the person examined as Khasia which has been admitted by the said Doctor. However, perusal of the Exhibit 10, which is the medicolegal injury report of the victim, shows that the surname of the victim examined has been written as Stunga. It is also seen that the vaginal swab report of the victim, exhibited as Exhibit 12, mentions the surname of the victim as 'Khasia (Stunga)'. Examination in chief of the victim indicates that she belongs to Khasi tribe. As such, the same cannot be said to be a discrepancy striking at the root of the medicolegal report. The said accused has succeeded in extracting from the concerned Doctor that Exhibit 13 does not mention the clinical findings. However, it is to be noted that the 3 x-ray plates vide skiagram number 1671 of the S. K. Roy Civil Hospital at Hailakandi has been exhibited as Exhibit 14 (collectively). Exhibit 13 mentions the said reference number. Exhibit 10 shows, in this column number 5, that the x-rays of right wrist joint, right elbow joint, and right Iliac Crest were taken of the victim. Exhibit 13 mentions the outdoor registration numbers 14358 and the same number in Exhibit 10. As such, the stand of the accused Ramjul Hussain, during cross-examination of the prosecution witness number 9, that the radiological examination did not make it clear that the x-ray plates exhibited in this case were of the victim does not sustain itself. The accused Basir Uddin has, during cross-examination of the prosecution witness number 9, pointed out that the police requisition, exhibited as Exhibit 11, on the basis of which the said witness had conducted medical examination shows that it was received on 09.03.2015 at 11 PM and the Exhibit 10 shows that the victim was examined on 09.03.2015 at 10:45 PM and has stated, at the time of arguments, that Exhibit 10 is a fabricated document. However, the same is only an insignificant discrepancy inasmuch as in view of the seriousness of the incident and the condition of the victim, as evident from Exhibit 10, that she was not able to walk properly at the time of the examination, it was very appropriate not to wait for formalities and therefore, the possibility of the Doctor having begun the examination of the victim prior to formal receipt of the letter of requisition cannot be ruled out. Most importantly, the accused Basir Uddin had not questioned the finding of the Doctor as to age of the victim.

14. Honourable the Supreme Court, in the case of *State of Madhya Pradesh Versus Anoop Singh (Criminal Appeal number 442 of 2010), in the judgement dated 03.07.2015,* has laid down that for proof of age of the minor victim of rape, the document for evidence to be first relied on is matriculation or equivalent certificate. In absence thereof, the date of birth certificate from the school the victim first attended, in absence thereof birth certificate given by a Corporation or a municipal authority or a panchayat and in the event of absence of all those, a report of a medical board assessing the age of the victim has to be relied on. Exhibit 6, the birth certificate of the victim, shows that at the time of the alleged incident, the victim was aged less than 13 years. Exhibit 10 corroborates the same. As has been stated above, none of the 2 accused have questioned the genuineness of Exhibit 6. It is not the case of the prosecution that the victim had appeared in matriculation

examination. As such, it is her birth certificate that has to be relied on for the purpose of proof of her age. It is to be noted, even though at the cost of repetition, that the medical report also supports the age indicated by Exhibit 6. As such, it is held that the prosecution has succeeded in proving that the victim was less than 13 years of age at the time of the incident. The 2nd of the questions posed above is answered accordingly.

15. Section 29 of the Protection of Children from Sexual Offences Act, 2012 lays down as follows:

"Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 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."

- 16. Section 30 of the said Act lays down as follows:
 - "(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 the 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 special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
 - Explanation:-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."
- 17. The expression "shall presume" has been defined in section 4 of the Indian Evidence Act as follows:

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

18. Section 3 of the Indian Evidence Act lays down the following:

"Proved" - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved"- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

19. As section 29 of the Protection of Children from Sexual Offences Act, 2012 mandates a Special Court to presume that the accused, being prosecuted for having committed, or having abetted, or having attempted to commit an offence defined under sections 3, 5, 7 and 9 of the said Act, has committed or abetted or attempted to commit the offence with the reverse burden on the accused to prove the contrary for an inference that he has not committed or abetted or attempted any such offence. As it is settled law that a negative cannot be proved, in order to prove the contrary of something, it is necessary that that 'something' is proved first. If we read this with the definition of the word "proved" as given in section 3 of the Indian Evidence Act, 1872, it transpires that for raising the presumption under section 29 of the Protection of Children from Sexual Offences Act, 2012, foundational facts have to be proved. As the definition of the word "proved" enjoins that belief of the Court of existence of a fact with sufficient degree of probability so as to enable a prudent man to act upon it has to be based upon the evidence on record and

not merely because charge has been framed against an accused with the allegation of the accused having committed any of the offences defined in sections 3/5/7/9 of the Protection of Children from Sexual Offences Act, 2012 it becomes clear that section 29 of the said Act does not require that the prosecution's case has to be taken as gospel truth and no reference is required to be made of the evidence on record howsoever improbable it may be. However, once the foundational facts for raising such a presumption are proved, it would be on the accused to prove the contrary. [See Sahid Hossain Biswas Vs. State of West Bengal 2017(3) Cal. L.T. 243]. It is to be noted that in subsection 2 of section 30 of the Protection of Children from Sexual Offences Act, 2012, it has been enjoined that absence of culpable mental state has to be proved by an accused beyond reasonable doubt and not merely by a preponderance of probability. No such condition or stipulation is seen in section 29 of the said Act. This means that while proof of the contrary to guilt of the accused has to be given by an accused, the said proof need not be beyond reasonable doubt and therefore, can be achieved on preponderance of probability. This can be achieved either by leading defence evidence or by rebutting the prosecution evidence or by impeaching the creditworthiness of the prosecution witnesses.

20. In her evidence, the victim has stated that the accused Basir Uddin used to work as a labour in her locality known as Khasia Punji (habitat). She has stated that she knew the accused Ramjul Hussain by his face as she used to see him when the said accused used to go to the college, and that prior to the incident, she did not know his name. She has stated that she could know his name only after the incident. She has further stated that the incident had taken place on 09.03.2015 at around 5:30 PM when she was coming back from a ration shop, situated at a distance of 30 minutes' walk from her residence, with her mother's

sister's daughter named June, and that both of them were coming back to the residence via a shorter route which passes through the jungle. She has stated that on the way back to the residence, 3 persons had come and had stopped in front of her and that amongst them, one was the accused Basir Uddin and the other was Ramjul. She has stated that she could not identify the 3rd miscreant. According to her, the miscreants had pushed her from behind felling her down whereafter her cousin had fled from the place and the 3 miscreants had dragged her inside the jungle, had removed her clothes. She has further stated that thereafter, the accused Ramjul had grabbed both of her hands by spreading them on two sides, that the 3rd an unidentified miscreant had grabbed her legs by spreading them apart and that then, the accused Basir had committed rape on her by inserting his penis into her vagina. She has also stated that thereafter, the other 2 miscreants had also committed rape on her one after another and the miscreants had scratched her breasts and chest. She has stated that as a result of the repeated rape on her, her private parts had bled. She has stated that even though she had resisted, the miscreants had overcome her and after committing rape on her, had thrown her and had escaped from the place of occurrence. She states that she had become senseless and had regained her senses only in her house. She has also stated that in her residence, she could know from her father that he had brought her to the house and that then, she had narrated the incident to her parents. She has also stated that her medical examination was done at Hailakandi Civil Hospital on the same day and that on the next day, her statement was recorded by a Magistrate in Karimganj. She has identified the record of the said statement as Exhibit 4. She has also identified her signatures thereon. She has further stated that the clothes she was wearing at the time of the incident were seized by the police and she had put my signature on the seizure list. She has

identified Exhibit 2 as the said seizure list and Exhibit 2(2) thereon as her signature. She has also identified the frock she was wearing at the time of the incident and which was seized vide Exhibit 2 as material Exhibit 1. She has identified the short she was wearing as material Exhibit 2. She has also stated that during investigation, she was either taken to court or to jail where the number of persons were lined up together which included the accused Ramjul and that she had identified him as one of the miscreants. She has stated that in the similar fashion, she had identified 2 more miscreants. She has further stated that one of the persons in the group of miscreants was standing at some distance at the time of the incident and that he had not done anything to her. She has identified her signatures on the Test Identification Form exhibited as Exhibit 5. During her cross-examination, the accused Ramjul Hussain has taken the stand that the 1st information, lodged in this case, does not mention that 4 persons were involved in the incident. She has reiterated that after she had narrated the incident to her father, her father had lodged the 1st information. The said accused has also taken the stand that in her statement before the learned Judicial Magistrate, she had stated that apart from the accused Basir Uddin, the other 2 accused were aged around 15-16 years. This accused has also taken the stand that in her statement before the investigating officer and before the learned Judicial Magistrate, she had not stated that four miscreants were involved in the offence. The accused has also taken the stand that she had not described the incident in so great detail before the learned Judicial Magistrate as she has done during her evidence in this Court. The said accused has also given the suggestion that of the 3 persons actually committing rape on her, only one is being tried in this case in this court and that the said accused, namely, Ramjul is not involved in the incident and has been falsely implicated in this case which has been denied by the victim. This shows that the fact of rape having been committed on the victim by 3 persons has been admitted by the accused Ramjul. In examination in chief also, she has stated that the 4th person was standing nearby but had not done anything to her. It cannot be called unnatural if she did not name the said 4th person as one of the miscreants because he actually had not done any sexual assault on her. A child of 13 years of age cannot be expected to understand that to constitute gang rape or gang penetrative sexual assault, it is not necessary that all the persons alleged to have committed gang rape or gang penetrative sexual assault must indulge in sexual act. It suffices if only one person commits the actual act of forced sexual intercourse and other accomplices merely assist him in doing so or abet or encourage him. A common man of even mature understanding may also not be expected to know the legal definition of gang rape or gang penetrative sexual assault. In view of the fact that the victim has identified this accused during test identification parade and during her testimony in Court as one of the persons actually committing sexual intercourse with her, it cannot be said that identity of this accused is in doubt. Perusal of Exhibit 1 1st information and testimony of the prosecution witness number 10 indicates that the written 1st information was lodged at Kalibari out post on the day of the incident itself pursuant to which general diary entry number 115 dated 09.03.2015 was made at Kalibari police outpost. It is seen that Exhibit 1 was lodged by the father of the victim. The victim has stated that the incident had taken place at 5:30 PM. Exhibit 10 medicolegal injury report shows that she was examined at 10:45 PM on the same day. This means that the 1st information was lodged without any delay and it can be understood that being father of the victim who was subjected to sexual assault, he must have been emotional shocked and therefore, cannot be expected to give every bit of detail about the incident in the 1st information in a balanced and meticulous manner.

It is also noteworthy that the 1st information was lodged on the basis of what was stated by the victim who herself had just recovered from unconsciousness after facing sexual assault. As such, it cannot be said to be unnatural if she missed to describe any part of the incident or to mention about any miscreant. It is the settled position of law that a 1st information is not supposed to be an encyclopaedia of the events leading to its lodgement and it suffices if it discloses commission of an offence. For the same reason, omission to mention about the 4th miscreant, in her statement made before the learned Judicial Magistrate can also not be termed a material contradiction in this case because the said omission was as a result of mistake of fact that the person, who had actually not committed penetrative sexual assault on the victim, was an innocent person. In the case of *Tahsildar Singh and Another Vs. State of U.P. as reported in AIR 1959 SC 1012, a five-judge bench of the Honourable Supreme Court of India*, in paragraph 26, had held the following:

"From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but

in the witness box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied i. e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement: illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together: illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing i. e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false." [Emphasis supplied by me.]

21. Further, in paragraph 52 of the said judgement, the Honourable Supreme Court stated as follows:

"The word "contradict" has various meanings, and in the Oxford English Dictionary it is stated as "To be contrary to in effect, character, etc.; to be directly opposed to; to go counter to, go against" as also "to affirm the contrary of; to declare untrue or erroneous; to deny categorically" and the word "contradiction" to mean "A state or condition of opposition in things compared; variance; inconsistency, contrariety". In Shorter Oxford English Dictionary, "contradict" is said to mean "To speak against; to oppose in speech; to forbid; to oppose; to affirm the contrary of; to declare untrue or erroneous; to deny; to be contrary to; to go counter to and go against" and "contradiction" to mean

"A state of opposition in things compared; variance; inconsistency". The meaning given to the words "contradict" and "contradiction" in these Dictionaries must at least include the case of an omission in a previous statement which by implication amounts to contradiction and therefore such an omission is a matter which is covered by the first proviso to S. 162 and questions in cross-examination can be put with respect to it in order to contradict the witness. It is difficult to say as an inflexible rule that any other kind of omission cannot be put to a witness in order to contradict him, when the proper foundation had been laid for putting such questions. The words "to contradict him" appearing in S. 145 of the Evidence Act must carry the same meaning as the words "to contradict such witness" in S. 162 of the Code. In a civil suit, where the provisions of S. 162 of the Code of Criminal Procedure have no application, would it be correct to say that only questions concerning omissions of the kind suggested by our learned brother could be put and none other? We cannot see why a question of the nature of cross-examination regarding an omission with respect to a matter which the witness omitted to make in his previous statement and which, if made, would have been recorded, cannot be put. The facts and circumstances of each case will determine whether any other kind of omission than that referred to by our learned brother could be put to a witness in order to contradict him. It would be for the Judge to decide in each case whether in the circumstances before him the question could be put. The purpose of cross-examination is to test the veracity of the statement made by a witness in his examination-in-cheif as also to impeach his credit. Not only is it the right of the accused to shake the credit of a witness, but it is also the duty of the Court trying an accursed to satisfy itself that the witnesses are reliable. It would be dangerous to lay down any hard and fast rule."

- 22. It cannot be said that the statement of the victim before the investigating officer and before the learned Judicial Magistrate that 3 persons had committed penetrative sexual assault on her and the statement before this Court that of the 4 miscreants, 3 had committed penetrative sexual assault on her and the 4th had remained standing nearby cannot be said to be mutually destructive and not reconcilable. It has already been stated above that even though, very presence of the 4th miscreant would constitute gang rape in the given situation, it is not really uncommon that a layperson would not understand the same and would consider the 4th person to be innocent. As such, it is held that omission to mention about the 4th miscreant before the learned Judicial Magistrate and before the investigating officer, in the special facts and circumstances of this case, does not amount to a contradiction and therefore, does not affect the creditworthiness of the victim and other prosecution witnesses adversely.
- 23. The accused Basir Uddin has taken the stand, during cross-examination of the victim, that the victim and/or her family members had detained the cow belonging to the said accused leading to a quarrel with the accused and that she has lodged this case with false allegations against the said accused because of the said quarrel. The said accused also tried to show that the victim has stated that the grocery shop from which she was coming back to her residence is at a distance of 20 minutes' walk from her residence. At the time of argument, his learned Counsel took the plea that as the incident is said to have taken place midway between the grocery shop and the victim's residence, around 10 minutes or so only can be said to be available to the miscreants and that it was not possible for 3 persons to commit rape on the victim one after the other within the said period. However, learned Counsel for the said accused failed to show any authority suggesting any fixed time for such a dastardly act. He overlooked the fact that section 376D of the Indian Penal Code or section

5/6 of the Protection of Children from Sexual Offences Act, 2012 does not make any such stipulation. Section 375 of the Indian Penal Code, which defines 'rape' does not require a complete sexual intercourse leading to ejaculation to be a requisite for constituting an act to be rape and mere penetration suffices under the said provision. As such, it is held that such a plea does not come to rescue the said accused in any manner. It is further to be noted that this accused has not denied that rape was committed on the victim.

24. Perusal of the evidence of the Doctor, who had conducted medical examination of the victim, shows that the victim was examined at 10:45 PM on the day of the incident itself and she had given the history of rape. The finding of the Doctor shows that marks of violence were found on her body/and private parts and her vulva was reddish and swollen and that laceration over labia minora was also seen. He has stated that microscopic examination of vaginal swab had given positive results for presence of spermatozoa and that RBC was also found present in the vaginal swab. The Doctor concluded that those are indicating of recent sexual intercourse and that marks of violence were also present on her private parts. He also recorded his finding that the victim was not able to walk properly at the time of examination. He gave his medicolegal injury report vide Exhibit 10. His testimony as to the findings and opinion is consistent with the allegations of rape on the victim. None of the 2 accused has denied that the victim had been raped. As has been stated above, while the accused Ramjul Hussain has cross-examined the Doctor to show that the victim was not a minor at the relevant time, the accused Basir Uddin has taken the plea that the Doctor had not examined the victim properly. This shows that the allegation of the victim that she was subject to penetrative sexual assault finds corroboration from the doctor.

- 25. The victim's cousin, who had accompanied her to the grocery shop and was with her at the time she was intercepted by the miscreants, was examined as prosecution witness number 4. She has stated that while she and the victim were returning from the ration shop at around 5:30 PM, on the way, 3 miscreants had caught hold of the victim and the 4th miscreant had not held her. She states that she was able to recognize the accused Basir amongst the miscreants but was not able to recognize other miscreants. She has stated that on being scared, she had left the rice at the place of occurrence and had run to inform the victim's father. In cross-examination, she has stated that she and the victim reside in the same house and that when she was running to go to the residence, she had met the victim's father and had informed him about the incident and that her father was also present at that time. The 2 accused, during her cross-examination, took the stand that she had not stated to the investigating officer that in the alleged offence, 4 miscreants were involved with 3 catching hold of the victim and one miscreant not holding the victim which has found confirmation from the investigating officer. The 2 accused also got the confirmation from the investigating officer that this witness had not stated to him that she was able to identify the accused Basir Uddin. However, keeping in view of the fact that the victim was aged 12 on 07.12.2016 when her examination had taken place, which means that she was around 10 years of age when the incident had taken place, such a discrepancy between her statement before the investigating officer and before the Court cannot be attached much significance.
- 26. The informant has stated to that the prosecution witness number 4 had come running to his house and had told him that some miscreants had restrained and caught hold of the victim whereafter, accompanied by some other persons, he had immediately rushed to the place of occurrence to find the victim

senseless. He has stated that when the victim regained her senses, on being asked, she had told him that 3 miscreants had committed gang rape on her and that she could recognize only one of them but was not able to recognize the other 2. He has stated that however, the victim had told him that she would be able to identify those persons if she saw them. He has stated that thereafter, he had brought the victim to his house and had gone to the police station and had lodged the 1st information. The defence could get confirmation from the investigating officer, through cross-examination, that this witness had not stated to the investigating officer that the victim had told that miscreants had gang raped her. In cross-examination he has stated that he had lodged the 1st information at around 7 PM to 8 PM. He has admitted that there are houses at some distance around the place of occurrence and that the place of occurrence is a tea garden near a temple and that residences are at a distance from the said place. He has named several persons who have shops on the main road near the place of occurrence. He has admitted that he had not seen the incident himself. However, as to his claim that he had reached the place of occurrence immediately after the incident and had found the victim senseless could not be impeached by the accused.

27. Prosecution witness number 6 is victim's mother's sister's son. He has stated that at the relevant time he was coming back to his residence after playing football and on his way back, he had met the victim's father who had told him that the prosecution witness number 4 had come rushing to his residence and had informed that 3 men were committing rape on the victim whereafter all of them had immediately rushed to the place of occurrence which is in a nearby jungle. He has stated that he had found the victim lying on the side of the road and jungle in an extremely exhausted and weak condition. He has stated that the victim was trying to speak but her speech was not intelligible. He has stated

that he and victim's father had lifted the victim and had brought her back to the residence and had given massage to her body whereafter she had felt better and on being asked, she had stated that the accused Basir Uddin and two other persons, whose names she did not know, had committed rape on her. He has stated that the police were informed, and the victim was hospitalized and that during investigation, the victim had identified the accused Ramjul as one of the offenders and that this is how he knows that Ramjul Hussain is involved in the incident. In his cross-examination, he has admitted that the accused Ramjul Hussain lives in the adjacent village and that his father has a grocery shop. He has also stated that this accused used to frequent his area and that this is how he knows him. The accused Ramjul Hussain has taken the stand that he was not involved in the incident. The witness has stated further that the police had seized a sandal from the place of occurrence. During cross-examination on behalf of the accused Basir Uddin, he has stated that the playground in which he was playing football is at a distance of around 5-7 minutes' walk from the place of occurrence but he had not heard anyone's scream. He has stated that at the place of occurrence he had found some slipper but had not found anything else there. He has confirmed that the victim had told him that this accused had committed rape on her.

28. Prosecution witness number 7 has stated that at the time of the incident, finding that the informant, the prosecution witness number 4 and several others were running towards the place of occurrence, he had also followed them but was not able to run as quickly because of his nerve problem and that after a while, he had seen the informant coming back with the victim on his back. He has stated that the victim was looking as if she was dead and that the informant had told him that the victim had been raped. He has stated that thereafter the informant had gone to his house and he had followed him and

that after regaining senseless, the victim had told that the accused Basir, along with 2 others, had committed rape on her. According to him, the victim had also stated that she would be able to identify the other 2 accused if she saw them. He has also stated that when the informant was carrying the victim back to his residence, he had seen that the victim's pant et cetera had been removed and her upper garments were torn. He has stated that he had seen blood coming out of her breasts and that it appeared as if the miscreants had bitten or scratched her breasts. According to him, the informant had gone to Kallibari outpost and had informed the police and that he had accompanied him to the police station. During his cross-examination, the accused Ramjul Hussain has taken the stand that this witness had detained a cow belonging to the said accused in his slaughterhouse whereafter, a quarrel had ensued between him and the said accused's cousin Monir Uddin. The witness denied all these allegations. However, the accused did not adduce any evidence to prove the same. Clearly, this does not carry any evidential weight. The witness confirmed that the incident had taken place in a tea garden. He has denied that his statement in his examination in chief that the police had recovered and seized victim's pant and 3 sandals from the place of occurrence is false. The accused was, however, successful in getting confirmed by the investigating officer that this witness had not stated to him that he had seen the informant, the prosecution witness number 4 and others rushing towards the place of occurrence; that the informant had told him that the victim had been raped; and that due to his nerve problem, he was not able to run as quickly as the informant. During cross-examination on behalf of the accused Basir Uddin, this witness has stated that the prosecution witness number 4 had not told him that the victim had been raped. He has denied the suggestion that he had not seen any bleeding injuries on the breasts of the victim. This accused has taken

the stand that on the day of the incident victim had brought the cow belonging to his father to his slaughterhouse because of which, they had a quarrel and that because of the said quarrel, he has deposed falsely against the accused. It is obvious that in absence of any positive evidence led by this accused to substantiate these allegations, these suggestions do not carry any evidential weight and therefore, it cannot be said that this accused has succeeded in discrediting the testimony of this witness.

- 29. Prosecution witness number 1 is the scribe of the 1st information and has stated that on 09.03.2015, the prosecution witness number 5 had come to him with several villagers and had requested him to write a 1st information whereafter, he had scribed the Exhibit 1 1st information. During cross-examination, nothing damaging could be brought out from him. The point highlighted by the 2 accused is that in Exhibit 1, he had made the endorsement that the said exhibit was a written in accordance with the narration given by the informant and not that the Exhibit 1 is a reproduction of the statement made by the informant. However, this is a mere technicality and does not go to the root of the 1st information making it invalid in law or suspect.
- 30. Testimony of the prosecution witness number 2 is not of much help to the prosecution inasmuch as he has claimed to be the owner of the ration shop from which the victim and prosecution witness number 4 had purchased rice whereas the 1st information mentions name of some other person as the owner of the ration shop. Learned Counsel for the accused Basir Uddin has argued that this shows that the story of the prosecution is a pure concoction. However, in view of the evidence led by other witnesses which could not be impeached by the accused, the argument does not hold water.
- 31. Prosecution witness number 10 was posted at Kallibari police outpost and the

in charge of the said outpost had made general diary entry number 115 dated 09.03.2015 of the said outpost after receiving the Exhibit 1 written 1st information from the informant and had forwarded the same to the Officer in charge of Ram Krishna Nagar police station and thereafter, had instructed this witness to take the steps for investigation whereafter, he had taken the victim to Kallibari Stated Dispensary from there, the victim was sent to civil hospital at Hailakandi. He has stated that he had given a written requisition for her medical examination vide Exhibit 11. He has stated that the informant had brought the victim to the said outpost along with several others and they had produced one pair of male Hawai slippers, one pair of leather sandal and one piece of female slipper made of nylon and he had seized the same vide Exhibit 3. He has identified the said the items as material exhibits 3, 4 and 5. While the accused Basir Uddin chose not to cross examine this witness, the accused Ramjul Hussain suggested that he was not entrusted with taking of preliminary steps of investigation which he has denied. Clearly, his testimony is of a formal character. Of course, it corroborates the testimony of prosecution witness number 7 as to the seizure of the aforesaid materials after being produced by the informant.

32. The investigating officer of this case was examined as prosecution witness number 11. He has stated that after receiving the telephonic information from the prosecution witness number 10 that 3 persons had committed rape on a Khasi girl of Sonaicherra Khasia Punji (habitat), he had made general diary entry number 207 dated 09.03.2015 of the Ram Krishna Nagar police station and had taken the prosecution witness number 12 with him to the outpost. He has stated that he had reached the Kallibari outpost at 10:20 PM to learn that on the same day, at 5:30 PM, the victim was raped by the accused Abdul Basit, S/o Ala Uddin and 2 others and that the victim had been forwarded to Kallibari

Primary Health Centre from where she had been referred to Hailakandi Civil Hospital. He has stated that on the same night, at 1 AM, he had visited the house of the owner of the ration shop and had recorded his statement and then had recorded the statements of prosecution witness numbers 4, 6, 7 and 2 others and then had conducted a raid in the house of the accused Basir Uddin and had found him absent from his house. He has stated that thereafter, he had gone to the place of occurrence at 4:30 AM in the following day but as it was still dark, he had actually inspected the place of occurrence at 5 AM and had prepared Exhibit 16 sketch map. He has stated that the place of occurrence was shown to him by the informant. He has also stated that he had recovered one piece of slipper from the place of occurrence and had seized the same vide Exhibit 17. He has identified the said slipper as material Exhibit 6. He has stated that on receiving information that the victim had been discharged from Hailakandi Civil Hospital on 10.03.2015, he had gone to her house with the prosecution witness number 12 and had instructed her to record the statement of the victim which the said woman police Constable did and then handed over the record of the statement to him. He has stated that he had seized the wearing apparels of the victim, which she was wearing at the time of the alleged incident corroborating the statement, as such, of the victim. He has also stated that on his prayer, test identification parade of the apprehended accused persons was held, and the victim had identified 4 accused including the 2 accused under trial in this case. During his cross-examination, it has come out that the place of occurrence is at the foothills of a hillock but cannot be seen from the top of the hillock. He has denied the stand of the accused Ramjul Hussain that he deliberately did not examine anyone inhabiting the said place on the ground that the place of occurrence is not inhabited. This accused was also taken the stand that not sending the seized slippers et cetera and the wearing apparels of the victim to the FSL for chemical examination or serological examination is fatal to the case of the prosecution. However, ocular testimony of the victim, sufficiently corroborated by other witnesses, establishes that this accused was also involved in gang penetrative sexual assault on the victim and therefore, this plea is only of an academic value and not substantial.

- 33. Prosecution witness but 12 is the woman constable who had recorded the statement of the victim. She has exhibited the record of the said statement as Exhibit 20. Learned advocate for the accused Ramjul Hussain has taken the plea that Exhibit 20 mentions that 3 persons had committed rape on the victim and as the other accused, namely, Basir Uddin is facing trial in this case and 2 children in conflict with law are facing enquiry before the Juvenile Justice board in respect of the same incident, this accused cannot be said to be involved in the alleged offence. However, this reasoning has already been met by this Court. It is held that in view of clear identification by the victim that this accused was also involved in committing penetrative sexual assault on her, such a plea cannot be taken to be of any merit. It is to be noted that the statement of the victim was recorded almost immediately after she was discharged from hospital and it cannot be said that she was in such a frame of mind that she could have given every bit of detail about the incident. It has been already observed that the 4th miscreant have not indulged in penetrative sexual assault and was thought to be an innocent person and therefore, the victim did not mention about him.
- 34. The above goes on to show that not only that the prosecution has succeeded in proving the basic facts constituting an offence under section 6 of the Protection of Children from Sexual Offences Act, 2012 but has been able to

prove the charges against the 2 accused beyond reasonable doubts. Clearly, this brings the presumptions under section 29 and 30 of The Protection of Children from Sexual Offences Act, 2012 into play against the 2 accused. The 2 accused did not adduce any evidence to substantiate the defence nor have they succeeded in rebutting the evidence led by the prosecution by way of an effective cross examination. During examination under section 313 of the Code of Criminal Procedure, 1973, while the accused Ramjul Hussain took the stand that the prosecution witness number 7 had detained his cow and calf through the children of the locality by paying them ₹ 30/- and then had taken ₹ 100/from him for releasing the cow but as he had not agreed to pay the same amount for release of the calf, his refusal had led to a dispute between his family and the said prosecution witness and had also led to a minor scuffle and that the instant case has been instituted at the instigation of the prosecution witness number 7 as he is the head man of the habitat which the victim and his family belong; the accused Basir Uddin has taken the stand that as his cattle used to graze the vegetable garden belonging to the victim and her family, the same had led to a quarrel between the 2 sides and then to the instant case. However, none of them has led any evidence to substantiate the same.

- 35. In view of the above, the question numbers (iii) and (iv) posed above are answered in the affirmative and against the 2 accused.
- 36. In the result, the accused Ramjul Hussain and Basir Uddin are convicted of having committed offences under section 376D of the Indian Penal Code and under section 6 of the Protection of Children from Sexual Offences Act, 2012. As these provisions provide for imprisonment for more than 3 years, the 2 convicts are taken into custody and are committed to prison. There bail bonds and sureties stand cancelled with immediate effect.

- 37. Seized articles be confiscated to the state and destroyed/disposed of in due course in accordance with the provisions of the Code of Criminal Procedure, 1973.
- 38. This judgement has been pronounced in the open court by reading the operative part of it in presence of the learned Public Prosecutor, learned Counsel for the informant, the 2 accused and their respective learned Counsels. Given under my hand and seal of this court on this the 9th day of December 2019.

Sessions Judge Karimganj at Karimganj.

- 39. Section 6 of the Protection of Children from Sexual Offences Act, 2012 stipulates that whoever commits the offence of aggravated penetrative sexual assault which is a genus of gang penetrative sexual assault, shall be punished with rigourous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine. On the other hand, section 376D of the Indian Penal Code lays down that where a woman is raped by one or more persons constituting a group or acting in furtherance of the common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigourous imprisonment for a term which shall not be less than 20 years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine............
- 40. This makes it clear that section 376D of the Indian Penal Code provides for a

punishment of greater degree than section 6 of the Protection of Children from Sexual Offences Act, 2012 provides for. Section 42 of the Protection of Children from Sexual Offences Act, 2012 lays down that where an act or omission constitutes an offence punishable under the said act and also under, inter alia, section 376D of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this act or under the Indian Penal Code as provides for a punishment which is greater in degree.

- 41. Clearly, in the instant case, the convicted accused have to be sentenced under section 376D of the Indian Penal Code. The said provision provides for a minimum sentence of rigourous imprisonment for not less than 20 years which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine. In view of the above, the two convicts have been heard on point of sentence.
- 42. The accused Ramjul Hussain has stated that he is the eldest son of his parents who are old; that he is continuing his formal studies and is also looking after his two parents and, therefore, he be given the minimum punishment prescribed under the law. The accused Basir Uddin has taken the plea that his two parents are ailing and that he has 2 kids: one is 2 years and the other is only 15 days old. He has further stated that he is the only person earning a livelihood in his family and that if he is put in jail, his parents and other family members will die of hunger. On the said ground, he has prayed for the minimum punishment prescribed under the law.
- 43. The respective learned counsels for the 2 convicts have submitted that in view of young age of the 2 convicts and absence of any past criminal records, they be given the minimum punishment.

- 44. This Court has also heard the victim and the Public Prosecutor assisted by the learned Counsel appointed by the informant. They have submitted that the victim was a girl of less than 13 years of age when she was subjected to gang rape by the two convicts in association with two more. It has been submitted that given the fact that these incidents are on the rise in the country and has attained an alarming proportion and also in view of the fact that perhaps for the entire life, the victim shall have to live with stigma, the case in hand does not call for any leniency to be shown to the convicts. He has stated that the victim had to discontinue her studies because of the incident. It has come out in the evidence that at the time of the incident she was studying in class VII.
- 45. Materials on record show that two children in conflict with law are facing enquiry before the Juvenile Justice Board at Karimganj in respect of the same incident. These two convicts were found to be major at the time of the incident. It is seen that not only that they committed such a heinous offence as gang rape on a little girl of less than 13 years of age, they also misguided two children to get associated with them in committing gang rape. The tender age of the victim in this case cannot be lost sight of in showing lenience to the two convicts. Treating the two convicts with any lenience or showing any mercy to them will give a wrong message to the society. As such, this Court holds the view that the two convicts deserve the maximum punishment provided under section 376D of the Indian Penal Code. As such, each of the 2 convicts, namely, Ramjul Hussain and Basir Uddin are sentenced to undergo rigourous imprisonment for the remainder of their lives and also to pay a fine of ₹ 50,000/- each to the victim. In default of payment of the fine, they shall undergo further rigourous imprisonment for one year. The fines, if realized, shall be paid to the victim.

- 46. The aforesaid convicts shall not get the benefit of the provisions of section 428 of the Code of Criminal Procedure, 1973.
- 47. Let a warrant of commitment of the two convicts to jail for serving the sentence imposed hereby be issued to the Superintendent, District Jail at Karimganj.
- 48. As the prosecutrix is a victim of gang penetrative sexual assault/gang rape as defined in the Protection of Children from Sexual Offences Act, 2012/Indian Penal Code, it is clear that she falls within the definition of the expression "victim" appearing in section 2(wa) of the Code of Criminal Procedure, 1973, and is, therefore, by virtue of the provisions of section 357A of the said Code, entitled to receive compensation under the Victim Compensation Scheme of the State of Assam and also requires rehabilitation. As such, the Secretary, District Legal Services Authority, Karimganj is directed to take adequate steps for paying compensation to the victim and for her rehabilitation including appropriate counselling by trained psychiatrist/psychologist/mental health expert. Send a copy of the medicolegal injury report of the victim, the 1st information report, the charge sheet, and her deposition recorded in this case to the Secretary, District Legal Services Authority, Karimganj for doing the needful.
- 49. Send a copy of this judgement to the learned District Magistrate, Karimganj and also to the Superintendent of Police Karimganj.

Given under my hand and seal of this Court on this the 9th day of December 2019.

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APPENDIX

Prosecution Witnesses: --

P. W. 1	: Shri Noor Uddin
P. W. 2	: Shri Samar Das
P. W. 3	: Victim (name not disclosed)
P. W. 4	: Shrimati June Sutnga
P. W. 5	: Shri Philmon Surang
P. W. 6	: Shri Mathius Sutnga
P. W. 7	: Shri Gabriel Namba
P. W. 8	: Shri Tarun Dey, AJS
P. W. 9	: Dr. Ranobijoy Malakar
P. W. 10	: Shri Mihir Malakar, A. S. I.
P. W. 11	: Shri Dilip Kumar Chanda (I. O.)
P. W. 12	: Shrimati Anjana Rani Dey (Woman Police Constable)

Prosecution Exhibits: -

: First Information.
: Seizure list.
: Seizure list.
: Statement of the victim under section 164 of the Code of Criminal Procedure, 1973.
: Reports of Test Identification Parade of suspects.
: Birth Certificate of the victim.
: Order dated 07.04.2015 passed by the learned Chief Judicial Magistrate, Karimganj, for conducting Test Identification Parade, passed in Ram Krishna Nagar Police Station case no. 33 o 2015 corresponding to the instant case.
: Order dated 07.04.2015 passed by the P. W. 8, for conducting Test Identification Parade, passed in Ram Krishna Nagar Police Station case no. 33 o 2015 corresponding to the instant case.
: Order dated 07.04.2015 passed by the P. W. 8, after conducting Test
Identification Parade, passed in Ram Krishna Nagar Police Station case no. 33 o 2015 corresponding to the instant case.
 : Medico legal injury report of the victim. : Police requisition for medico legal examination of the victim. : Vaginal swab report of the victim.

Exhibit 13 : X-ray report for determination of ae of the victim.

Exhibit 14 : Three X-ray plates via skiagram no. 1671.

Exhibit 15 : Certified copy of general diary entry no. 207 dated 09.03.2015 of

Kalibari Out Post.

Exhibit 16 : Sketch map of the place of occurrence.

Exhibit 17 : Seizure list.

Exhibit 18 : printed form of the first information report.

Exhibit 18A : Requisition for recording statement of the victim under section 164

of the Code of Criminal Procedure, 1973.

Exhibit 19 : Charge-sheet.

Exhibit 20 : Statement of the victim recorder under section 161 of the Code of

Criminal Procedure. 1973.

Material Exhibits: -

Material Exhibit 1 : Frock seized vide Ext. 2. Material Exhibit 2 : Short seized vide Ext. 2.

Material Exhibit 3 : One pair of male hawai sandal seized vide Ext. 3. Material Exhibit 4 : One pair of male leather sandal seized vide Ext. 3.

Material Exhibit 5 : One piece of female slipper made of nylon seized vide Ext.

3.

Material Exhibit 6 : One piece of slipper of a female seized vide Ext. 17.

Defence Witness: - NIL

Defence Exhibit:- NIL.

Court Witness: - NIL.

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CERTIFICATE

It is hereby certified that the victim has been informed and explained the judgement in vernacular and it is made sure that she has understood the same.

It is further certified that the victim has been explained that she has a right to appeal/revision before the High Court within the period of 90 days.

The convicts have also been informed that they are eligible and entitled to free legal aid by virtue of being in custody and that free and competent legal services are available from DLSA/SLSA/HCLSC in the Court as well as inside the jail.

Convicts have been supplied 3 sets of attested copies of judgement and order of sentence along with the warrants to be used as under:

- i. one copy for the family of the convict;
- ii. one copy for the official jail records to be enclosed with the custody warrant;
- iii. one copy for the convict who shall be allowed to retain it at all times with himself/herself.

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