IN THE COURT OF SESSIONS JUDGE cum SPECIAL JUDGE :: **SIVASAGAR**

Present :- Sri S. K. Poddar, Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 2 of 2015 U/S 6 of POCSO Act.

(Arising out of Sonari P.S. Case No. 281/14)

State of Assam

-Vs-

Sri Baisaku Goala..... Accused

APPEARANCE:

Date of argument

For the prosecution Mr. Srimanta Gogoi, Special P.P.

For the accused Sri D.K. Gohain, Advocate

(State defence counsel)

Date of framing charge 26.06.15

Dates of evidence 07.08.15, 28.09.15, 04.02.16,

30.03.16, 15.06.16, 03.08.16, 01.06.16, 29.09.16, 03.12.16, 24.01.17, 07.02.17, 01.04.17, 31.08.17, 21.02.18, 20.06.18

13.07.18. 24.07.18 & 07.08.18

31.10.17, 07.03.18, 29.06.18

Date of S/D :

Date of Judgment 16.08.2018

J U D G M E N T

1. Prosecution case, in brief, is that on 21.12.2014, one Sri D. Bhumij lodged an FIR with O/C, Sonari P. S. alleging, inter alia, that on that day, at about 1 p.m. while his minor daughter victim 'D' (name withheld) was playing in her court-yard, suddenly she went missing. During search, at about 3 p.m. she could be traced out in the Jungle of Sonari Tea Estate and apparently she was raped.

Immediately she was taken to Naphuk Tea Estate Hospital and there from she was referred to AMCH, Dibrugarh.

- 2. On receipt of the FIR, Sonari P.S. Case No. 281/2014, U/S 3 of POCSO Act was registered and investigated into the case. During investigation, victim was medically examined and her statement was recorded in the court U/S 164 Cr.P.C. Several articles were seized and sent to FSL, Assam for DNA fingerprinting and also for serological examination. Accused Baisaku Goala was produced before this court for trial as the case is exclusively triable by the court of Special Judge. On completion of investigation, I/O submitted Charge-Sheet against the above named accused U/S 6 of POCSO Act, 2012.
- 3. On receipt of charge sheet, copy of relevant documents were furnished to the accused. Services of state defence Counsel was provided to the accused. After hearing both the sides, vide order dated 26.06.2015, the then learned presiding officer has framed charge U/S 6 of POCSO Act, 2012 against the accused and on read over and explaining them to him, the accused pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined twenty-two witnesses including three Medical Officers, 2 officers form FSL Kahilipara Assam, and I.O. Dr. Kripanath Morang was examined as C.W.1. Defence cross-examined the said P.Ws but adduced no evidence.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case was of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- 5. I have heard argument of learned Spl. P.P. Mr. Srimanta Gogoi and Mr. D. K. Gohain, learned State defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

6. **POINTS FOR DETERMINATION ARE**

- (I) What was the age of the victim on 21.12.2014?
- (II) Whether on 21.12.2014 the victim 'D' was subjected to penetrative sexual assault?
- (III) If so, whether accused has committed offence of penetrative sexual assault?

DECISION AND REASONS THEREOF

- 7. Before going further, let me discuss the evidence available on record for better understanding of fact in issue.
- 8. P.W. 1 Dr. Pranjal Kr. Chutia in his evidence deposed that on 24.12.2014 while he was on emergency duty at Sonari Hospital, victim 'D' was brought for medical examination and at that time the victim was aged about 4 (four) years. Upon examination of the said victim, on ascertaining sexual harassment or biting by some infectious insects in Jungle, he informed the matter to police. He collected vaginal smear and crust of semen from the thigh area of the victim and handed over these articles to police. Police seized the same vide Exbt. 1, the seizure list. He saw injury mark near her vagina. In his cross examination, P.W. 1 submitted that on the next day he handed over those articles to police. He gave preliminary treatment to the victim. He did not give any written document to police regarding collection of the seized articles from him. He denied the defence suggestion that he has not taken any samples.
- 9. P.W. 2 victim 'D' in her evidence deposed that she is studying in Anganwadi School. Accused Baisaku kicked on her abdomen and she suffered pain. He did nothing with her. In her cross, she stated that accused Baisaku is her maternal uncle.
- 10. P.W. 3 Mrs. Jyoti Gogoi, Staff Nurse of Rajapukhuri SDCH at Sonari in her evidence deposed that on duty Doctor collected vaginal smear and crust of semen from thigh area of victim. Police seized those articles vide Exbt. 1. Exbt. 1(1) is her signature. In her cross she

admitted that on the date of seizure she was on duty. She did not have personal knowledge of the incident.

- 11. P.W. 4 (wrongly marked as P.W.3) Sri Dipak Bhumij in his evidence deposed that victim 'D' is his niece and she is aged about 6 to 7 years. About 8/9 months back (deposing on 28.09.2015), victim told him that accused had committed rape on her. He saw the family members of victim were searching her and he also joined them. Subsequently Subash Bhumij found the victim in the nearby Jungle in unconscious condition and informed them. She was brought to her home. Her pant was removed and blood oozing out from her urinary tract. She was taken to Bagan Hospital where from she was taken to Rajapukhuri Hospital at Sonari. Police seized one blood stain frock and one panty of the victim vide Exbt. 2, seizure list. He identified the seized frock as M. Exbt.1 and the panty as M. Exbt. 2. Police also seized one light blue colour undergarment used by man with marks of blood and semen vide Exbt. 3. He also recognized the said undergarment as M. Exbt. 3. In his cross examination, he deposed that he cannot say where from these articles were seized. He denied the defence suggestion that while giving statement to police, he did state that victim has informed him of committing rape by accused.
- 12. P.W. 5 Sri D. Bhumij, the informant of this case in his evidence deposed that on knowing that his five years old daughter victim 'D' was missing from the house, he and others searched for her and could locate her in the jungle in senseless condition. Therefrom she was brought to the residence of Kartik Bhumij and at that time, she was completely naked. Victim was taken to Hospital wherefrom she was referred to AMCH, Dibrugarh where she stayed for 26 days. On asking the victim, she told that accused after taking her physically assaulted her. Victim got injury on her neck and bleeding injury per vagina. Police seized the blood stain cloths of the victim. Thereafter he lodged the FIR. In his cross examination, he stated that he cannot

say as to what was written in the FIR. FIR was written by police. After 10-15 days of the incident, police recorded his statement. He was informed by police that after two days of the incident, accused was arrested. Victim was initially taken to Naphuk Hospital and therefrom she was taken to AMCH, Dibrugarh and in between, she was not taken to any other place. At the time of incident while searching the victim, the accused was at Forest Gate Tini-Ali and on asking he stated his ignorance about the victim.

- 13. P.W. 6 Dr. Nibedita Shyam in her evidence deposed that on 22.12.2014 she was on duty as Medical Officer at AMCH, Dibrugarh, on that day, she examined victim 'D' on being referred by Surgical Unit-II, Hospital No. ML-15038, AMCH, Dibrugarh dated 22.12.2014. The victim was accompanied by her mother. There was no police escort and consent was taken from the mother of the victim girl and on examination she found as follows:
 - 1. Date & time of examination 22.12.2014, at about 9.15 a.m. at Department of Casualty, AMCH, Dibrugarh as referred by SU-II, AMCH, Dibrugarh.
 - 2. Re-examined on 27.12.2014, at about 12.30 PM at Department of Paediatric Surgery, AMCH, Dibrugarh.

Brief history of the case - As per the mother of the victim girl, on 21.12.2014, at around 2 p.m. the girl went missing from the house and at around 4.30 p.m. some people went to the nearby jungle and found the girl lying on the ground. On being asked, the victim informed her mother that a man named Baisaku Gowalla of same village took her to the jungle side, gave her money and allegedly had sexual intercourse with her. After the act, the man left the girl and went away. Thereafter the parents took the girl to nearby hospital, but she was referred to AMCH Dibrugarh.

Mental condition - No abnormality detected at the time of examination.

Injuries over the body (examined on 22.12.2014) - are as follows 1. Linear abrasion of size 7 cm X 0.5 cm present over front of neck, 4 cm

below the chin, reddish in colour.

2. Linear abrasion of size 4 cm X 0.5 cm present over front of neck, 5 cm below the body of mandible on left side, reddish in colour.

Genital injuries (examined on 22.12.2014) – Injuries found over the

genital organs are as follows -

- 1. Multiple abrasion over vulva, reddish in colour. Vulva swollen.
- 2. Hymenateac seen at 5, 6 and 9 O'clock position with swollen margins, tender, reddish in colour and bleeds on touch.
- 3. Vagina tear present in posterior for-nix and forchette, tender, reddish in colour and bleeds on touch.

The victim girl was re-examined as per requisition from department of Pediatric Surgery on 27.12.2014.

Injuries over her body (examined on 27.12.2014) -

Injuries No.1 & 2 found over the body of the victim on 22.12.2014 were partially healed abrasions covered by black scald.

Genital injuries are same as found on 22.12.2014 except vulva oedema diminished and the said injuries did not bleed on touching.

<u>Laboratory investigation:</u>

Vaginal smear examination – report did not reveal any spermatozoa.

Opinion: On the basis of physical examination and laboratory investigation done on victim 'D' PW 6 has opined that evidence of recent sexual intercourse not detected on her person. However findings are suggestive of forceful vaginal penetration. Age of the injuries as on 22.12.2014 were approximately 12 hours to 24 hours and injury nos. 1 & 2 were caused by blunt force impact. Her age was 5 to 6 years. Ext. 4 is medical examination report. In her cross examination, PW 6 stated that at the time of examination victim, was in conscious state of mind and found no abnormality. During interrogation to Phuleswari Bhumij, the mother of the victim did not

state before her the victim becoming unconscious.

- 14. P.W. 7 Sri Kartik Bhumij, uncle of the victim in his evidence deposed that on the date of incident, after returning from work he saw that mother of the victim came to his house in search of his daughter and on this, he also joined them. By this time, his brother Subhash could trace out victim in the Jungle and brought her to his residence. At that time victim was in unconscious state. Therefrom she was taken to Naphuk Hospital. He saw bleeding injury per vagina. Thereafter victim was taken to Rajapukhuri Hospital at Sonari and then to AMCH, Dibrugarh. After about two months, victim returned home. On asking her, victim told that accused took her to nearby Jungle and committed rape with her. Police also seized one blood stain Jungia in his presence vide Exbt. 3, seizure list. He recognized the said seized Jungia as M.Exbt. 3. In his cross examination, he admitted that while giving statement to police, he did not state that Subhash could trace out the victim and that victim was taken to Naphuk Hospital and thereafter AMCH, Dibrugarh. He could not say where he had put his signature on Exbt. 3. He could not say the contents of the seizure list. He also admitted that before police, he did not state that after returning from Hospital victim had informed him about commission of rape by the accused.
- 15. P.W. 8 Sri Tankeswar Dutta in his evidence deposed that after returning from market, from his wife he heard that somebody had taken away the victim and subsequently the victim was recovered and taken to Hospital. From public he came to know that accused committed misdeed with the victim.
- 16. P.W. 9 Mrs. Jharna Saikia, JMFC, Sivasagar in her evidence deposed that on 26.02.2015, while she was working as Judicial Magistrate, First Class at Sivasagar, on that day, victim 'D' was produced before her in connection with Sonari P.S. Case No. 281/2014 U/S 6 of POCSO Act, and accordingly, she recorded her statement U/S

164 Cr.P.C. Exbt. 5 is the statement.

- 17. P.W. 10 Sri Dasarath Pandav in his evidence deposed that being VDP Secretary and on being asked by I/C of the Out Post, he came to the residence of the accused and one underwear of the accused was seized vide Exbt. 3. He put his signature as Exbt. 3(1). He recognized the said seized underwear as M.Exbt. 3 and knew that it was seized in connection with a rape case. In his cross examination, he admitted that he had no personal knowledge of any incident.
- 18. P.W. 11 Smt. Hiramoni Bhumij in her evidence deposed that victim is her grand-daughter and she went missing while playing. At about 4.00 PM Subash could trace her out in the Jungle in senseless condition and brought her to his residence. There from victim 'D' was taken to Naphuk Hospital and then to Rajapukhuri Hospital at Sonari and therefrom she was taken to AMCH, Dibrugarh where she stayed for about a months. On asking the victim, she told her that accused had called her. At that time, victim was aged about 6(six) years. In her cross, she deposed that she had not seen the victim lying in Jungle. While giving statement to police she stated that some unknown person had committed rape on the victim and that she did not see any person coming to her house on the date of incident.
- 19. P.W. 12 Smt. Protima Bhumij in her evidence deposed that at the time of incident victim was aged about 4½ years. On knowing that victim was missing, she also searched her and at about 4 PM, Subhash could trace her out in the Jungle in senseless condition and brought her to his house. She also saw that pant of victim was removed and blood was oozing out from her vagina. After three days, victim regained her sense and on asking, the victim told her that accused took her towards Tea Garden area for keeping her to the residence of her grand-mother. In her cross examination, she stated that she did not see the incident on her own. She denied the defence suggestion that while giving statement to police she did not state

regarding regaining sense after three days and that victim told her that accused has taken her towards garden. She also denied that before police she stated that she did not suspect anybody.

- 20. P.W. 13 Sri Montu Bhumij in his evidence deposed that on hearing hue and cry near the residence of victim, he came there and learnt that victim 'D' went missing from her house. Subsequently, victim was recovered from Jungle of Sonari Tea Estate and brought back to her house. He saw bleeding injury on her vagina and thereafter she was taken to hospital. On asking, the victim told him that accused Baisaku took her with him. Police seized the blood stain frock and panty of the victim vide Exbt. 2. He also recognized the said seized articles as M.Exbt. 2. In his cross examination, he admitted that before police, he did not state regarding finding of the victim in Jungle by Dipak and that he saw bleeding injury on the vagina of victim. Victim 'D' is his niece. He denied defence suggestion that while giving statement to police, he did not state that on asking the victim she told him that accused Baisaku took her. He admitted that while giving statement to police he stated that some unknown person had committed rape on her. The seized frock and panty were handed over to police by Dipak Bhumij.
- 21. P.W. 14 Smt. Phuleswari Bhumij, mother of the victim, in her evidence deposed that on the day of incident, at about 10.30 AM she left the house for collecting fire wood and at about 1.30 PM, on return, her in-laws informed her that victim 'D' was missing from her house. By that time her husband also arrived there and made search of the victim. Subsequently her brother-in-law Subhash Bhumij could trace out the victim in Jungle. She went there and saw her daughter lying in senseless condition. Blood was oozing out from the vagina of the victim. Therefrom the victim was brought and taken to hospital. At AMCH, Dibrugarh some operation was also performed. From Dibrugarh, victim was taken to Guwahati for further treatment. The

victim regained her sense at AMCH, Dibrugarh. On asking by her uncle, the victim told him that accused Baisaku took her to the jungle and after assaulting her committed misdeed with her. Victim was treated at Guwahati for about forty days. In her cross examination, she denied the defence suggestion that she did not see her daughter in the jungle with bleeding injuries on her vagina. She also denied defence suggestion that no treatment was provided at Guwahati and no such medical document was given to police regarding taking treatment at Guwahati.

- 22. P.W. 15 Smt. Rajashree Dutta, the Staff Nurse of AMCH, Dibrugarh simply stated that on 05.01.2015 while she was on duty, police recorded the statement of victim 'D' in her presence.
- 23. P.W. 16 Smt. Seema Das Rajbanshi, P.W. 17 Smt. Dimpal Kour, P.W. 18 Smt. Kamala Newar and P.W. 19 Smt. Sangita Baishya, all members of Local Mahila Samittee, in their evidence deposed that on the matter of rape near Naphuk Forest Gate area, on behalf of their organization, they demonstrated a protest. P.W. 16 and 17 also deposed that after returning from AMCH, Dibrugarh, while the victim was brought to Naphuk Hospital again, they along with other lady members met the victim, who told them that accused took her on the pretext of giving 'Morton' and committed rape on her. Victim had to take treatment at Dibrugarh and Guwahati. In their cross, PW 16 and 17 admitted that after 15-20 days they met the victim at Bagan Hospital. Both of them denied the defence suggestion that, while giving statement to police, they did not state that accused has taken the victim on the pretext of giving 'Morton' and committed rape with her.
- 24. PW- 20 Sri Prabin Kalita, i/o of this case in his evidence deposed that on 21.12.2014, the written FIR of Dinesh Bhumiz, Sonari PS case No. 281/14 u/s 3 Pocso Act was registered. Exbt. 6 is the FIR. During investigation, he went to the place of occurrence i.e. Dipu Line under

Naphuk T.E and drawn a sketch map of the PO. Exbt. 7 is the said sketch map. He seized the frock and underwear of the victim having bloodstain. Exbt. 2 is the seizure list. M. Exbt. 1 is the seized frock containing blood stain. M.Exbt. 2 is the blue pant (underwear) of the victim. On the next day, he arrested the accused and seized his underwear containing semen and blood stain. Exbt. 3 is the seizure list. M.Exbt 3 is the light blue colour (underwear) of the accused having blood and semen marks. On 23.12.2014, accused was forwarded to court. During investigation, victim D was initially sent for medical examination to Sonari wherefrom she was referred to Assam Medical College & Hospital, (AMCH) Dibrugarh. Victim was sent to court for recording her statement u/s 164 Cr.P.C. He also seized the vaginal smear and semen particles collected by Doctor of Sonari from the inner thigh of the victim in glass slide and sent to FSL, Kahilipara Guwahati. Exbt. 1 is the seizure list of glass slide. Blood sample of accused was also collected through Jail Doctor S. Shyam and sent to FSL Guwahati. On 27.12.2014, he went to AMCH Dibrugarh and recorded the statement of the victim and her parents. He also collected FSL report from FSL Guwahati. Exbt. 9 is the FSL report signed by R. Bora Handique, scientific officer, Serology Department, Director of Forensic science. Exbt. 10 is the DNA report received from Director of Forensic science. DNA report was signed by Monalisa Choudhury, scientific officer, serology division, DNA typing unit of FSL. On completion of investigation, he submitted charge sheet against the accused u/s 6 of POCSO Act. Exbt. 11 is the charge sheet. At the time occurrence the victim was aged about 4½ years. He collected the photocopy of birth certificate of the victim which showed date of birth of the victim as 21.06.2009. In his cross-examination, the I/O has deposed that the victim was sent to court for recording her statement on 26.02.2015 due to late release from medical college. As per his investigation, after release from AMCH, victim was again admitted at Naphuk Hospital. He did not collect the discharge certificate of the

victim form AMCH or her admission or discharge at Naphuk Hospital. While forwarding the victim to court for recording her statement u/s 164 Cr.P.C, in the forwarding report, he did not mention the reasons for the delay in sending her to court but a note was available in CD. He mentioned the names of 10 members of Mahila Samity as witnesses but did not examine them individually. Witness Dipak Bhumij did not state before him that the victim told him that accused had committed rape on her. Witness Mantu Bhumij did not state before him that the victim told him that accused had taken her. Witness Mantu Bhumij did not state before him that he saw the victim in jungle and also saw bleeding injury from her urinary tract. He did not record the individual statement of Dimple Kour. She did not state before him that victim told her that accused took her to jungle on the pretext of giving morton and committed rape on her.

- 25. P.W. 21 Smt. Renu Bora Handique, Scientific Officer, Serology Division, FSL Guwahati, on 30.01.2015, she had received one parcel from Director, FSL in connection with Sonari P.S. Case No. 281/2014. The parcel was in sealed condition and was sent by SDPO, Charideo, Sonari containing following articles:
 - 1. One old and dirty check multi cloured frock contains stain of suspected blood and semen, marked as 'A'. Sero 3441/A.
 - 2. One green coloured old and dirty torn panty contains stain of suspected blood and semen, marked as 'B'. Sero -3441/B.
 - 3. One vaginal smear glass slide marked as 'B' (sent by DNA Div.). MR No.87/14. Sero 3441/C.
 - 4. One air tight glass vial contains crusts of semen taken from inner aspect of thigh of the victim. MR No.86/14. Sero 3441/D.
 - 5. One light blue and white & cheek underwear (Jangia) contains semen and blood, marked as 'E'. Sero 3441/E.

Result of Examination:

1. Exh. No. Sero - 3441/A, Sero - 3441/E gave positive test for human semen.

- 2. Exh. No. Sero 3441/B, Sero 3441/D gave negative test for human semen.
- 3. Exh. No. Sero 3441/C done by DNA unit in this laboratory, report will be sent separately.

PW 21 proved her report as Exbt. 21. In her cross-examination, PW 21 deposed that during examination, no blood stain was found in the above mentioned Exhibits. She has not compared the semen found in Exhibits i.e. Sero-3441/A & Sero -3441/E as she has no such facility. This comparison can be done only by DNA unit.

26. CW 1 Dr. Kripanath Morang, who was called to clarify the date of examination of victim, as cropped up during examination of PW 1 and date of taking the victim for treatment as stated by other witnesses, in his evidence deposed that, in pursuant to the summons issued to Superintendent, Sub Divisional Civil Hospital, Sonari, on being authorised, he has appeared with medico-legal register of the hospital (book No. 4) containing examination of patient from 17.04.2014 till 06.03.2015. As per above register, on 21.12.2014 at about 7 PM victim D aged about 5 years D/O Dinesh Bhumiz of Forest Gate, Naphuk was brought to above hospital with a history of rape by miscreants in forest at evening hours. The patient examined by Dr. Pranjal Kumar Chutiya.

Following finding were recorded in the register:

General behaviour:- Patient in subconscious state.

Marks of violence in the Body:- (i) Nail marks over chest and neck, (ii) Cut mark over centre of lower lip, (iii) Fourchette torn, (iv) Vaginal tear seen, (v) Bleeding per vagina seen (vii) Hymen torn, (viii) Vagina - abrasion with tear vaginal introitus (ix) dry semen seen over inner aspect of thigh.

CW 1 has proved the following documents - Exbt. 11 is the

authority letter given to him. Exbt. 12 is the medico legal register. (proved in original). Exbt. 13 is the relevant entries as above in the medico legal register. (under Objection). The above entries were made at page No. 186 and its over leaf. As police did not come to collect the report, the attending doctor did not put his signatures in the register. In his cross-examination, CW 1 deposed that in the first line of the report, the column with heading 'examining the victim' was blank. From the name of the individual, it can be said that victim D was examined on that day. He denied the defence suggestion that Exbt. 13 is not related to victim D. In Exbt. 13, there is no mention of the name and signature of attending doctor.

27. P.W. 22, Dr. Manalisha Choudhury, Scientific Officer, DNA Typing Unit of Serology Division, Directorate of Forensic Science, Assam, Kahilipara, in her evidence deposed that on 30.01.2015, while she was working at DNA Typing Unit of Serology Division, at Directorate of Forensic Science, Assam, Kahilipara, vide Memo No. SDPO/CRD/SNR/15/61-63 dated 29.01.2015 she received 2 (two) parcel per messenger. The parcel 1 consisted of two (2) exhibits packed in a cartoon box and parcel 2 consisted of one(1) exhibits in Thermos Flask containing ice which was sealed with the impression seal corresponding with the seal impression forwarded.

1	One glass slide.	Marked as Exhibit No. DNA 1157/15
2	One check colored frock and a undergarment of the victim.	Marked as Exhibit No. DNA 1158/15
3	One sealed EDTA vial contains 2ml(approx.) liquid blood of Sri Bikash Gowala collected by doctors of District Jail, Sivasagar with blood donar authentication card.	No. DNA 1159/15

PW 22 also deposed that DNA from the sources of the above exhibits were isolated by organic extraction method and subjected to multiplex PCR reaction using AmpFLSTR Y filer Kit. The amplified

products along with control was run on Automated DNA Sequencer and analysis was carried out using Genemapper ID v3.7software with respect to standard ladder.

- 1. The amplified loci of Exhibit no. DNA 1158/15 matches with the amplified loci of the Exhibit no. DNA 1159/15.
- Exhibit No. DNA 1157/15 gave negative result for presence of spermatozoa. Therefore its comparison with exhibit no. DNA 1159/15 does not arise.

PW 22 proved her report as Ext. 10 and her signature as Ext. 10(1). Ext. 10(2) is the forwarding letter of her report. In her cross-examination, PW 22 admitted that in the forwarding letter send to her, the name of the accused was mentioned as Bikash Goala. She has not received any requisition regarding accused Baisaku Goala. In a pointed query by this Court, the witness answered that DNA test is reliable up to the extent of 99.9%.

28.

Basing on the above evidence on record, let me decide the points formulated for just decision of the case.

Point No. I: So far age of the victim is concerned, from the evidence of P.W. 2, the victim, it appears that she read in Anganwadi school. From the evidence of P.W. 4, uncle of the victim it appears that victim was aged about 5 to 6 years on the date of incident. From the evidence of P.W. 9 Mrs. Jharna Saikia, JMFC Sivasagar it appears that on 26.02.2015 she recorded the statement of the victim aged about 4½ years. P.W. 12 also deposed that on the date of incident victim was aged about 4½ years. C.W. 1 Dr. Kripanath Morang who came with the medico-legal register of Sonari Sub-Divisional Civil Hospital in his evidence stated that as per the record on 21.12.2014, the victim 'D', aged about 5 years was brought to the said Hospital for medical check-up. From the evidence of P.W. 6 Dr.

Nibedita Shyam, who examined the victim on 22.12.2014 and re-examined the victim on 27.12.2014 stated that her age is 5 to 6 years. The I/O (PW 20) in his evidence stated that during investigation he has collected the photocopy of birth certificate of the victim which show date of birth of the victim as 21.06.2009. While examining the accused U/S 313 Cr.P.C., accused also did not challenge the above referred evidences on age of the victim when put to him. This part of evidence on age of the victim remains unrebutted by the defence. So from the above evidence from the date of Birth as mentioned by the I/O it appears that on the date of alleged incident i.e. on 21.12.2014 it can safely be held that victim 'D' was aged about $5\frac{1}{2}$ years.

30. So far allegation of penetrative sexual Point No. II: assault on the victim 'D' is concerned, from the evidence of P.W. 1 Dr. Pranjal Kr. Chutia, the M.O. who has attended the victim at the first instance, shows that upon examination he found symptom of sexual assault, Crust of semen was collected from the thigh area of the victim. P.W. 3 Mrs. Jyoti Gogoi, Staff Nurse of Sonari SDCH has confirmed that crust of semen was collected from the thigh area of the victim and glass slide was seized by police. C.W. 1 Dr. Kripanath Morang who appeared with the medico-legal register of Sonari SDCH in his evidence deposed that on 21.12.2014, at about 7 P.M. the victim was brought to above Hospital with a history of rape and was examined by Dr. Pranjal Kr. Chutia (P.W.1) and following findings were recorded - (i) Nail marks over chest and neck, (ii) cut mark over center of lower lip, (iii) Fourchettee torn, (iv) vagina tear seen, (v) bleeding per vagina seen, (vi) Hymen torn, (vii) vagina – abrasion with tear vaginal introitus, (viii) dry semen seen over inner aspect of thigh. He proved the said medico-legal register as Exbt.11. Exbt. 13 is the relevant entry. P.W. 6 Dr. Nibedita Shyam, M.O. from AMCH Dibrugarh who has attended the victim at AMCH Dibrugarh has deposed that on 22.12.2014, at about 9.15 a.m. victim was brought to Casualty where from she was referred to Surgical Unit-II. Again the victim was examined on 27.12.2014 in the Department of Pediatric Surgery with brief history of sexual molestation and upon examination on 22.12.2014 she opined that the findings are suggestive of forceful vaginal penetration and the injuries as found on 22.12.2014 on the body and private parts of the victim are approximately 12 hours to 24 hours. The above evidence of P.W. 6 who has attended the victim on 22.12.2014 duly corroborated the evidence of C.W. 1 and the findings recorded in Exbt. 12 & Exbt. 13. P.W. 7, P.W. 11 and P.W. 14 in their evidence also stated regarding finding of bleeding injuries on the private parts of the victim soon after her recovery from jungle.

31.

So all these witnesses have corroborated to the fact that on 21.12.2014 the victim, went missing from her house and later on she was recovered from the jungle area where she was found in naked condition and the persons who recovered her found injuries on her private parts and subsequently on the same day victim was taken to Sonari SDCH where P.W. 1 Dr. Pranjal Kr. Chutia has examined the victim and recorded his opinion in Exbt. 12 medico-legal register. However due to non-arrival of police for collecting the said medicolegal report; the same was not signed by the P.W. 1. However through C.W. 1 Dr. Kripanath Morang said medico-legal register was brought to court and proved the relevant entries. This part of findings recorded in Exbt.13 was duly corroborated by P.W. 6, the M.O. who has attended the victim at AMCH Dibrugarh who was taken there on the next day of the incident. P.W. 6, the M.O. basing upon the injuries found on the person of the victim, has categorically opined that victim was subjected to forcible penetration. Findings of several injuries on the private parts of a 5½ years old girl leaves no scope of doubt that on 21.12.2014 the victim 'D' was subjected to penetrative sexual assault. In view of the fact that on the relevant, date, the victim was aged about 5½ years, under section 5(m) of Pocso Act, it becomes aggravated penetrative sexual assault.

32. **Point No. III:** So far role of the accused in causing alleged aggravated penetrative sexual assault on victim is concerned, in the course of argument hearing, learned Special P.P. has submitted that though victim did not speak about the incident of penetrative sexual assault on her by the accused except stating that accused has kicked her on her abdomen for which she got pain, yet the other evidence on record including oral, medical and scientific evidence is loud and clear to hold that on 21.12.2014 it was none but accused, who did the heinous crim. Learned Special P.P. has further pointed out that at the time of incident, the victim was roughly aged about 5 years only and as such, it may be difficult for her to express the term of rape/penetrative sexual assault as it is quite natural that she even did not attain the age of understanding meaning of sex. Learned Special P.P. has submitted that court should look at the circumstantial evidence including scientific evidence (PW 22) to determine the role of the accused by ignoring the statement of the victim.

33.

On the other hand, learned State defence counsel Mr. D.K.Gohain by putting much emphasis on the evidence of P.W. 2, the victim and the exaggerations made by witnesses during their evidence so far implicating the accused with the alleged crime, has submitted that once the victim has clearly admitted that the accused did nothing with her except kicking on her abdomen, court should not ignore her evidence and the other evidence as available on record are mere hearsay witnesses only. As such they cannot take the place of primary evidence of the victim. Learned advocate of defence has also challenged that the DNA report relating to one Bikash Goala and was not connected with the accused Baisaku Goala. I have considered the submission of both the sides.

34. From the evidence of P.W. 2, the victim it is seen that victim in her evidence as narrated herein before, has simply stated

that accused is known to her. On being kicked by the accused, she got pain on her abdomen and except this, nothing was done with her. In her cross she admitted that accused is her maternal uncle. From Exbt. 5, it appears that in her statement u/s 164 Cr.P.C, given before PW 9, the victim has stated that she was kicked by the accused on her abdomen and she was taken by him towards the jungle and assaulted her. She got severe pain. She further stated she was taken by the accused towards jungle for going to the house of her grand-mother. In spite of the above statement of victim, same cannot be used in favour of the accused to hold him not guilty, mainly on the ground that prosecution has been able to prove that on 21.12.2014 she was subjected to penetrative sexual assault by the accused beyond doubt. I found force on the submission of learned Special P.P. that from a girl of $5\frac{1}{2}$ years, it cannot be expected that she may be in position to know about sex, its implications and to divulge the same in Court due to its ambience. Considering above aspect, the entire fact and circumstances have to be taken into consideration.

- 35. To find out the implication of accused in committing the crime of rape on the victim, on careful perusal of the evidence on record, it appears that none of the witnesses has seen the accused taking the victim towards the jungle or committing rape with her or any proximity between the accused and the victim near the jungle. The entire case is based on scientific evidence collected by the I.O. of this case and the disclosure of the victim made to the other witnesses after her recovery.
- Now coming to the circumstance of the recovery of the victim from jungle, it appears that on the date of incident while the victim was found missing, search was made. This aspect was supported by P.W. 3, P.W. 5, P.W. 7, P.W. 11, P.W. 12, P.W. 13 and P.W. 14. From the evidence of P.W. 14, mother of the victim, it appears that on the date of incident, at about 1.30 p.m., while she returned after

collecting fire wood, her mother-in-law informed her that the victim was missing. By that time, her husband arrived there and they started searching the victim. Defence during cross-examination did not challenge this aspect.

- 37. As stated earlier, P.W. 4 P.W. 5, P.W. 11, P.W. 12, P.W. 13, P.W. 14, P.W. 16 and P.W. 17 in their evidence have categorically stated that after recovery of the victim or during her treatment, on asking, the victim has stated that accused by taking her in the jungle, committed rape on her. However, the victim was silent regarding reporting of the matter of penetrative sexual assault on her by the accused to her parents or others. Apart from above, except PW 14, mother of the victim, the witnesses by themselves or the I/O has confirmed that they did not disclose the fact that the victim has told them that accused has committed rape with her. Thus the evidence of other witness except PW 14, appears to be exaggerated and cannot be relied upon.
- 38. Now Coming on scientific evidence, as pointed by learned Special P.P., from the evidence of P.W. 22, the expert from FSL who has conducted the DNA finger printing on the blood samples of the accused collected through due process by the Jail Doctor of Sivasagar and was sent to FSL, Assam, Kahilipara, Guwahati for comparison with the blood samples available in the wearing apparels of the victim clearly indicates that the blood of the accused was matching with the blood found in the frock of the victim. In a specific question by the court, the expert has opined that the findings of DNA finger printing are more or less 100% reliable. The above findings of the P.W. 22 was put to accused during his examination u/s 313 Cr.P.C, but he simply denied about his knowledge and failed to give any satisfactory reply as to how the blood samples of the accused are matching with the blood samples found on the wearing apparels (frock and panty) of the victim. This DNA test matching of the blood on the wearing apparels

of the victim with the blood samples of the accused gives a strong circumstance against the accused, that it is none but the accused Baisaku Goala has taken the victim to jungle and during the process of committing rape, he also sustained some bleeding injuries on his penis, which is apparently possible due to tender age of the victim, and blood of accused has fallen on the wearing apparels of the victim (frock and undergarment of the victim). Apart from above, finding of human semen on the wearing apparels of the victim and also finding of blood and sign of semen on the underwear (Jangia) of the accused gives another strong presumption against the accused. The defence argument that the blood samples sent to FSL was in the name of Bikash Goala and not of Baisaku Goala cannot be accepted to create doubt on the report of the P.W. 22 because the blood samples was collected from the accused Baisaku Goala by the Jail Doctor through due process while the accused is was jail. The mistake in writing the name of the accused deserves to be ignored, which I do accordingly.

- 39. Under these facts and circumstances, i.e. matching of the DNA of the blood samples, it appears to me that soon after the incident, the victim disclosed to her mother (PW 14) about the accused and under that context, the evidence given by the mother of the victim that victim has told her that accused took her to jungle and committed misdeed is relevant and admisible.
- 40. At this juncture, I would like to mention here that the alleged incident took place on 21.12.2014 and the victim was brought to court for recording her statement u/s 164 Cr.P.C. on 22.02.2015 and for evidence during trial on 28.09.2015. While appreciating the evidence on record, I am alive to the fact that the victim being a girl of tender age and have no proper education and hails from a rural rustic family background and as such, it may not be in her mind to disclose in great detail as to whom she has reported the matter or about the incident of sexual assault with her in the jungle on

- 21.12.2014. There is every possibility that, she might have forgotten the trauma she had suffered on 21.12.2014 and thereafter due to injuries on her private parts. Under this context, if I relook at her statement as given u/s 164 Cr.P.C, it clearly discloses that, she was taken to jungle by the accused on some false pretext of taking to house of grandmother and she was physically assaulted. She specifically averred that accused is a very bad man. If this part of evidence along with the medical finding which was done within a very short time i.e. within three hours of the alleged incident are taken together, there is no other possibility that anybody else except accused has committed the penetrative sexual assault on the victim. Thus, I intend to rely on the evidence of PW 14, mother of the victim so far her disclosure that after the incident, victim has reported the matter to her.
- 41. The defence has failed to bring anything from the witnesses to show that there is any possibility of false implication by the informant side. There is nothing on record to show that there was any previous enmity between the accused and the informant. It is in the evidence that accused was arrested on the next day of the incident and police seized his underwear (Jangia) and found suspected marks of semen and blood. Definitely this part was done due to disclosure made by the victim to the family members and then this information passed over to villagers only.
- 42. Under the above circumstances, I am of the opinion that the overall evidence of PW 14 is found reliable and trustworthy so far pointing finger towards the accused Baisaku Goala.
- Considering all above by placing reliance on the evidence of PW 14 and PW 22 (DNA expert), I have no hesitation to hold that accused Baisaku Goala has committed the offence of aggravated penetrative sexual assault upon the victim 'D', a girl of about 5½ years old and make himself liable for punishment as provided U/S 6 of

POCSO Act, 2012.

- 44. Accused Baisaku Goala is held guilty for the offence punishable U/S 6 of POCSO Act, 2012 and is convicted for the offence punishable U/S 6 of POCSO Act, 2012.
- 45. I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. Considering the nature of the offence proved by the prosecution and also considering the punishment provided for the offence, I am not inclined to extend the benefit of the benevolent provisions of law to the accused.
- Heard the accused on the point of sentence. His statement is recorded in separate sheet. I have also heard learned Advocate for both the sides. Learned Special PP has prayed for awarding maximum punishment for the accused. Learned State defence counsel has prayed for leniency in sentence by narrating the family background of the accused and the fact that since last about 3 ½ years accused is in jail and face the trial with the help of legal aid counsel.
- 47. Considering the way of committing the offence on a 5½ years old girl child, who did not even have the understanding about sex and was of the age of running after butterflies, I am of the considered opinion that it is a fit case for imposing some exemplary punishment on the accused for committing aggravated penetrative sexual assault. I find no reason for leniency in sentence by awarding the minimum punishment prescribed by law as submitted by learned State defence counsel.
- 48. Hon'ble Supreme Court of India in the case of *State of Punjab* v. *Gurmit Singh* [(1996) 2 SCC 384] has expressed its anguish on the of the increasing rate of crime against women, has held as follows:
 - "21. Of late, crime against women in general and rape in

particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.

- On the point of awarding just sentence in a case of rape, Hon'ble Supreme Court of India has observed that *Shyam Narain v. State (NCT of Delhi)*, **[(2013) 7 SCC 77]** has laid down the law in following words:
 - "14. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim."
- 50. In the above referred case of Shyam Narain (supra), Hon'ble Supreme Court of India while dealing with the matter of

imposition of life imprisonment to the convict for the offence of 376(2) (f) for committing rape on a 8 year old girl child after discussing various judgment of Hon'ble Supreme Court of India has held as follows:

- **25.** Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors.
- **26.** It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.
- 27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The

youthful excitement has no place. It should be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

- **28.** The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court."
- 51. Keeping the law laid down by Hon'ble Supreme Court of India so far awarding of sentence is concerned, though learned State defence counsel appearing for the accused has prayed for mercy by referring the family back ground of the accused, I am of the considered opinion that considering the nature of the brutality in committing the offence of aggravated penetrative sexual assault on a 5½ years old girl as proved by the prosecution, I am of the considered opinion that accused does not deserve any leniency in sentence. The maximum sentence provided by law i.e. imprisonment for life with some amount of fine is the only just sentence in this case.

- Accordingly, convict Baisaku Goala is sentenced to undergo rigorous imprisonment (RI) for life for committing the offence punishable U/S 6 of POCSO Act, 2012 and also to pay a fine of Rs. 2,000/- (two thousand) only i/d further SI of two month.
- 53. Convict Baisaku Goala is remanded to District Jail, Sivasagar to serve out the remaining part of sentence.
- 54. Convict Baisaku Goala is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 55. Seized articles, if any, be destroyed in due course of time.
- Considering the fact of imposing meager amount of fine due to poor financial back ground of the convict, no order is passed for payment of compensation to victims U/S 357 Cr.P.C.
- 57. Considering the fact and circumstances of the case, the matter is referred to DLSA Sivasagar for exploring the possibility of compensation U/S 357A Cr.P.C. Send a copy of the judgment to Secretary DLSA Sivasagar for needful action.
- 58. Let a free of cost copy of the judgment be given to the convict Baisaku Goala immediately as per the provisions of Section 363 (1) Cr.P.C.
- 59. Convict Baisaku Goala is informed about his right of appeal against the judgment and order of conviction and sentence before Hon'ble Gauhati High Court either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 60. Send a copy of the judgment to learned District Magistrate, Charaideo U/S 365 Cr.P.C.
- 61. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 16^{th} day of August, 2018 at Sivasagar.

Special Judge, <u>Sivasagar</u>

APPENDIX

1. <u>Prosecution witnesses :</u> P.W.1 - Dr. Pranjal Kr. Chutia (M.O.)

- P.W.2 Victim 'D'
- P.W.3 Mrs. Jyoti Gogoi
- P.W.4 Sri Dipak Bhumij
- P.W.5 Sri Dinesh Bhumij (Informant)
- P.W.6 Dr. Nibedita Shyam (M.O.)
- P.W.7 Sri Kartik Bhumij
- P.W.8 Sri Tonkeswar Dutta
- P.W.9 Mrs. Jharna Saikia (JMFC)
- P.W.10 Sri Dasarath Pandav
- P.W.11 Smt. Hiramoni Bhumij
- P.W.12 Smt. Protima Bhumij
- P.W.13 Sri Montu Bhumij
- P.W.14 Smt. Phuleswari Bhumij
- P.W.15 Smt. Rajashree Dutta
- P.W.16 Smt. Dimpal Kour
- P.W.17 Smt. Seema Das Rajbanshi
- P.W.18 Smt. Kamala Newar
- P.W.19 Smt. Sangita Baishya
- P.W.20 Sri Prabin Kalita (I.O.)
- P.W.21 Smt. Renu Bora Handique (Scientific Officer, FSL)
- P.W.22 Dr. Manalisha Choudhury, Scientific Officer, FSL.
- 2. Defence witnesses None
- 3. <u>Court witnesses</u> C.W.1 Dr. Kripanath Morang
- 4. Exhibits by prosecution -
 - Exbt.1 Seizure list.
 - Exbt.2 Seizure list.
 - Exbt.3 Seizure list.
 - Exbt.4 Medical examination report.
 - Exbt.5 164 Cr.P.C. statement of the victim.
 - Exbt.6 FIR
 - Exbt.7 Sketch map
 - Exbt.8 -
 - Exbt.9 FSL report
 - Exbt.10 DNA report of FSL.
 - Exbt.11 Charge-Sheet
 - Exbt.12 Medico-Legal Register
 - Exbt.13 Relevant entries in Exbt.12.
 - M.Exbt.1 seized frock of the victim.
 - M.Exbt.2 seized blue pant (underwear) of the victim.
 - M.Exbt.3 seized light blue colour underwear of the accused.

Special Judge, Sivasagar