IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

Spl. POCSO Case No. 12 of 2018

U/S - 366 IPC r/w Sec. 4 of POCSO Act, 2012.

State

- Versus -

Saiful Islam

: Accused person.

Present: Sri L.K. Saikia, AJS. Additional Sessions Judge, Bajali, Pathsala.

Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons : Mr. Abdul Kayam. Ld. Advocate.

Dates of recording evidences: 01-10-18, 11-10-18, 08-11-18,

29-11-18, 28-02-19, 25-03-19,

24-06-19

Date of recording statements u/s 313 Cr.P.C. : 30-08-2019.

Date of Argument : 14-10-2019 and 21-11-2019.

Date of Judgment : 30-11-2019.

J U D G M E N T

1. The prosecution case in brief, is that, one Abdul Rezzak lodged an ejahar on 06-04-2018 with the In-Charge, Bhawanipur Police Out Post alleging, *inter-alia*, that on 05-04-18 at about 10 pm his daughter and niece were missing from their respective houses. On their

searched they found both the girls on 06-04-2018 at Rajakhat chowk and while they asked, they came to know that accused persons took away and after giving assurance for marriage, they committed physical relation with them. Hence, this case.

- 2. On receipt of the ejahar, Sarupeta OP registered a GD Entry No. 103 dated 06-04-2018 and forwarded the same to Barpeta Police Station to register a case under proper section of law and accordingly it was registered as Barpeta P. S. Case No. 718/18 u/s 366-A/34 IPC r/w Section 4 of POCSO Act.
- 3. investigation police visited During the place of occurrence, recorded the statements of witnesses including the victim girl, sent them for medical examination, produced both the victims before the Court wherein the Ld. Magistrate recorded their statements u/s 164 Cr.P.C, arrested the accused persons and and forwarded them to to the court and after completion of investigation, having been found prima-facie case, the I/O sent up the accused for trial by filing charge sheet u/s 366-A/34 IPC r/w Sec. 4 of POCSO Act, 2012. During the course of investigation it comes to light that accused Habibul Haque is a juvenile, as such, he was sent to face trial before the Principal Magistrate, Juvenile Justice Board, Barpeta.
- 4. The accused was produced from jail hajot for trial and the copies were furnished to him. After hearing the learned Addl. P. P. appearing for the State and the learned defence counsel and on perusal of materials available on record u/s 173 Cr.P.C., having been found sufficient grounds for presuming that the accused person has committed the offence, framed charge under section 366 IPC and 4 of POCSO Act, 2012 and the accusation of charges were read over and explained to him, to which he pleaded not guilty and claimed to be tried. Hence, the trial.
- The prosecution in order to prove its case examined altogether 9 (nine) PWs including M.O. and I/O. The defence plea is of total denial. The accused person was examined u/s 313 of Cr. P. C.

wherein he denied all such allegations levelled against him by the prosecution witnesses. The defence side took full scope of cross-examination of Pws. The defence side has not adduced any defence evidence to disprove his case.

6. Heard argument of learned Addl. P. P. and the learned defence counsel. Perused the record.

7. POINTS FOR DETERMINATION

- (i) Whether the accused person 05-04-2018 at night about 10 p.m. at Madhya Datirbari village of Bhabanipur Out Post under P.S. and district Barpeta kidnapped a minor girl with intent to marry her against her will and that thereby committed the offence punishable u/s 366 IPC?
- (ii) Whether the accused person on the same, date, time and place, committed penetrative sexual assault upon the minor daughter of the informant and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

Evidence of witnesses

8. PW – 1 victim (herein after referred to as "X") deposed that on 05-04-2018 at night about 10 pm while she was in her house then accused Saiful Islam rang to her over phone and called her to come out from the house to meet him. She came out from the house and met him. She also found "A" (name withheld as she is also a victim) and accused Habibul Hauqe on the road. Thereafter, accused caught her hand and brought her to nearby bush of bamboo which is 100 meters far away from her house. At first he told her that he would marry her and then forcefully did sexual intercourse with her near the bush of the bamboo. In the meantime, "A" again came and told her that

she was raped by Habibul Haque. Thereafter, accused Hbibul brought them to Balapara in an isolated place and left them there. After that she and "A" came to Rajakhat on foot and they met their father there. She explained the entire incident of occurrence on the last night to their fathers. Then he brought them to Bhawanipur OP and lodged the FIR. She also stated that they were brought to FAAMCH, Barpeta for medical examination and accordingly their medical examination had been conducted. She was also produced before the Court wherein the learned Magistrate had recorded her statement. Ext. 1 is the statement and Ext. 1(1) is her signature.

In cross-examination, PW 1 stated that her father had produced her birth certificate to the police. While their statements were recorded by the police, they are in their uniform. She stated before the police that she knew accused Saiful since 1 ½ years back. She had love affair with accused Saiful. She used the mobile handset of her father wherein accused rang to her. She met Phulbhanu at the time of occurrence. PW 1 also stated that her mother, father and younger brother were in the house while the accused Saiful called her over phone. She did not raise any hue and cry while the accused Saiful did sexual intercourse with her. They reached Balapara at about 3.30 am but they do not know the distance between Balapara to bamboo bushes. On the way, they did not make hue and cry or ask anybody to help. While she and "A" went to Balapara then the mobile phone were with them but they did not make any phone call to their parents. PW 1 stated that she stated before the Magistrate that on the way they met Saiful and Habibul and then they dragged them nearby forest. She also stated that she stated before the Magistrate that she called her father over phone from the mobile phone of an unknown boy to take them back home. She stated before the police that the accused Saiful did forceful intercourse on her near their bamboo bush. PW 1 denied the suggestion that the doctor told her that she attained above 18 years at the time of examination. It is also denied by her that accused Saiful did not called her or take her to the bamboo bush and committed sexual

intercourse forcefully with her.

9. PW - 2 Abdul Razzzak deposed that the victim is his daughter. At the time of occurrence the victim was reading in class X and she was 15 years old. He does not know the accused standing in the dock. he also know another victim who is a daughter of Hatem Ali. On 05-04-2018 at about 10/10.30 pm his daughter as well as victim was found missing in the house. Though they searched his daughter but could not trace her where abouts. At the time of searching he came to know that another minor girl who is a daughter of Hatem Ali as well as friend of his daughter, had also been missing. They could not trace out both the girls even on the next date also. On the next day of the occurrence, in the afternoon, he received a phone from an unknown person of Rajakhat informing that they recovered his daughter and the another girl so, asked him to go there to take them back. Immediately he along with Hatem Ali came to Rajakhat and found both the girls there and on being asked, both the girls told them that one Saiful Islam and one boy called them over phone to come out from the house. Further they told him that at the request of Saiful Islam and another body they both of them came out from the house and then and met Saiful Islam and another boy on the road and thereafter, they brought them near the bushes of bamboo and raped by both the boys. Hearing the allegations from both the girls they brought them to Bhabanipur Police Out Post and he lodged the ejahar. Ext. 2 is the ejahar and Ext. 2(i) is his signature. Both the victim girls were brought to FAAMCH, Barpeta wherein they were medically examined and thereafter they were taken to Bajali Court wherein their statements were recorded before the Magistrate. The police had recorded his statement and seized the birth certificate of his daughter and the another victim girl/"A". Ext. 3 is the seizure list and Ext. 3 (i) is his signature. The birth certificate of the victims were given zimma to them and he brought the original birth certificate of his daughter as per direction of Court on the day of recoding his evidence before the Court. Material Ext. 1 (proved in original) is the birth certificate of his

daughter.

In his cross-examination, PW 2 deposed that the ejahar was written by one person at Bhabanipur Out Post as per his version. He has forgotten the name of the scriber of the ejahar. Before writing the ejahar he asked his daughter of the facts of the case. There was male and female police personnel while victim girls were brought there. The In-Charge of the Bhabanipur Out Post took statements of the victim girls, police were in their uniform. The police personnel did not seize the any cloth or article from the victims on that they. He has seven children. The victim was born in his house not in hospital. He has not produced the school certificate of his daughter with the ejahar. The birth certificate of his daughter was issued in the year 2015. He had filed an affidavit to obtain the birth certificate of the victim. He obtained birth certificate of his 3 children. The certificate was issued by the Bhabanipur PHC. PW2 denied to the suggestion that Material Ext. 1 has been obtained on false contention in the affidavit. PW2 denied the suggestion that at the time of occurrence the victim was above 18 years. PW2 denied the suggestion that he intentionally did not produce the school certificate of the victim girl on being she is above 18 years. At the time of occurrence his daughter have mobile handset in her name. He came to know that the daughter of Hatem Ali had also mobile phone. The victims did not rang to them after the occurrence. One Jalal of Rajakhat had informed him over phone about recovery of victim girls. PW2 denied the suggestion that he did not state before the police that they came to Rajakhat after getting phone call form one Jalal. It is also denied by him that he did not state before the police that on the day of occurrence Saiful Islam raped on his daughter and another boy raped the daughter of Hatem Ali. He stated before the police that about the facts of the case on being heard from the victim girls. In the statement before the police he stated that the victim were raped in an unknown place. The place of bushes of bamboo is about less than ½ km away from his house. Jaynal Abedin is residing near the bamboo bushes. He went to the

place of bamboo bushes to see the place of occurrence. The dry leafs the bamboo is lying in the bamboo bushes. He had not seen any clean area near the beneath of the bamboo bushes. PW2 denied the suggestion that he did not state before the police that the accused persons had committed rape on the victim girl near the beneath of the bamboo bushes. Their villagers while goes to Balapara Bajar then they have to across the place of occurrence. His house situated in the western side of Phingua chowck. Rajakhat is 3 km far away from Phingua chowck. He knows Safigul who is the father of accused. He does not know Azahar and Mafidul. PW2 denied the suggestion that about 9 months back from the occurrence his daughter went to the house of Azahar. The police had seized the mobile phones of the victim girl and later on it was returned to them. He heard that there was a guarrel between Afjal and Safikul, the father of the accused Saiful for which a case was registered. PW2 denied the suggestion that for that case, the instant case had been lodged against the accused Saiful with intent to harass his family. PW2 denied the suggestion that the other persons brought the victims girls and as such the accused is not associated with the alleged occurrence. PW2 denied the suggestion that this case has been brought against falsely against the accused. PW2 denied the suggestion that on the day of occurrence his daughter went to the house of her maternal grandmother house.

10. PW 3 Md. Hatem Ali deposed that informant Abdul Rezzak is his co-villager. Victim is the daughter of informant Abdul Rezzak. "A" (another girl of this case) is his daughter. He knows accused Saiful Islam after the occurrence. He also know Habibul Haque. On 05.04.2018 at about 9.30-10 pm his daughter "A" was missing from his house and at the time of occurrence she was a student of class VIII. He along with his family members and neighbourers searched her but could not trace her whereabouts. He came to know that daughter of Abdul Rezzak was also missing on that very night. On the next day morning he along with Abdul Rezzak along with other persons searched them and went to Razzakhat to search them. From

Razzakhat they went to Salbari and while they were at Salbari then an unknown person informed them from Razzakhat that both the girls had been recovered. Then they immediately rushed to Razzakhat and found both their daughters. On being asked his daughter told him that a boy eloped her to marry and on that very night the boy raped on her and at the late night, he boy left her along with her friend who is daughter of informant. On being asked, the daughter of the informant also told that she was also eloped by Saiful Islam and on the way she was raped by him. Later on, Abdul Rezzak lodged the ejahar with the police. The police had seized the birth certificates of both the girls. He put his signature as witness in the seizure list (Ext. 3). At the time of occurrence his daughter was about 16 years.

In cross-examination, PW 3 stated that he had also filed ejahar for kidnapping of his daughter. On that case the police had recorded his statement. While the statements of the victims were recorded by the police, they were in their uniform. His daughter and the daughter of Abdul Rezzak were having mobile phone and both of them were called by the accused over phone as he came to know later on. Both the boys brought both the girls about ½ km. away from the house and thereafter they raped on them. They were raped in the jungle beside the "beel". The birth certificate of his daughter was issued by Bhawanipur PHC and he applied for her birth certificate by supporting an affidavit. Their daughters did not inform them over phone though they were possessing mobile handset with them. The police had not seized their clothes which were they were wearing at the time of occurrence. PW3 denied the suggestion that he did not state before the police that they were informed from Razzakhat over phone about recovery of the victim girls as well as their daughters. He stated before the police of the alleged occurrence of raped as stated by their daughters. PW3 denied the suggestion that he stated before the police that in an unknown place their daughters were raped. It is also denied that the accused did not kidnap their daughters rather they went intentionally from their houses.

11. PW 4 "A" (name withheld) deposed that on 05.04.2018 at about 9.30-10 pm while she was studying her books then "X" rang to her and asked to come out from her house. Then she came out from her house without informing to her parents and met "X", Saiful Islam and Habibul Hague on the road. Then Habibul snatched away her mobile phone and caught hold her hand, forcefully brought her to nearby jungle in the back side of the house of Jainal Abedin and under the neath of the "Bamboo Chupa", Habibul raped on her. She knows that accused Saiful also raped on "X". After committing rape accused Saiful and Habibul brought them to Balapara. At Balapara both the accused left them and fled away. Finding no alternative they proceeded to Rajjakhat and came to the house of one unknown person, called him, told him about the entire facts and then he rang to her father and also she told to her father about the occurrence. Immediately her father and Abdul Rezzak, the father of the "X" came to Rajjakhat. They explained the entire occurrence to their fathers. Thereafter their fathers brought them to Bhawanipur OP. The police had recorded their statements. They were brought to FAAMCH, Barpeta and got medically examined and thereafter they were brought before the Magistrate at Bajali and recorded their statements (Ext. 4). After recording their statements they were handed over to their fathers.

In cross-examination, she deposed that due to the forceful rape she felt pain in her private part. She also complained before the Doctor and before the police that she had felt pain in her private parts. From Balapara to Rajakhat is a motorable road and there was a by lane towards their house. They went to Rajakhat rather going to their house. She does not know the name of that person to whom they asked for help at Rajakahat. She raised hue and cry while Habibul forced upon her to do sexual intercourse and "X" also raised commotion. At that time the mobile was with her and after leaving them at Balapara, she did not rang to anybody but "X" rang to Habibul and Saiful to come back. Her brother Asraful rang to "X" while they

were at Balapara but he did not go there. The police personnel recorded their statements while they were in uniform. The police brought them to Bajali Court and they were accompanied by their fathers. While her statement was recorded before the Magistrate then her father was not with her and the police personnel were also outside the room. She knows accused Habibul since last 1 year of the occurrence and they were in love. She stated before the Magistrate in Assamese but she does not know in which language her statement was recorded by the Magistrate. She stated before the Magistrate that Habibul did sexual intercourse with her with promise that he will marry her. PW4 denied the suggestion that she did not state before the police while she was called by "X" then she was studying in her room. PW4 denied to the suggestion that she did not state before the police that Habibul and Saiful left them at Balapara; that she told the entire facts to the unknown person at Balapara and they went voluntarily from the house.

was working at Fakkaruddin Ali Ahmed Medical college & Hospital, Barpeta as Lady Medical Officer in the department of Forensic Medicine. On that day, she examined "X", aged 15 years (approximately) D/o Md. Abdur Razzak, resident of village- Madhya Dalirbari, P.S. Barpeta, Dist- Barpeta with reference to Bhawanipur OP GDE No. 103 dated 06.04.2018. She was escorted and identified by WPC 671 Mala Boro and her father Abdur Razzak. History of the allegation that the victim had love affair with Saiful Islam, 19 years male. Further allegation of assaulted sexually on 05.04.2018 at around 11 pm and recovered by family member at around 02.30 pm on the next day.

On physical examination she found as follows:

Identification marks: One black mole on left thumb of palm's side. Height: 151 cm. Weight: 50 kg. Chest girth as nipple level: 76 cm. Abdominal girth as nipple level: 80 cm. General built and appearance:

Average. Voice: Feminine.

Hair: Axillary/ Body: Present. Breasts: Develop. Puberty (as told by individual): 12 years. Menstruation (as told by individual): Regular. L.M.P (as told by individual): 24.03.2018. Mental Condition: Stable. Gait: Normal. Intelligence: Average.

Wearing- garments & any suspected stains present: No stain detected. Bodily injury: No injury on body.

On genital examination:

Pubic Hairs: Present. Vulva (Labia majora & minora): Normal. Hymen: Tear. Vagina: Admit 2 fingers. Cervix & Uterus: Uterus not palpable per abdominally. Fourchetee & Perineum: Normal. Vaginal swab collected from posterior fornix. Result of vaginal swab smear examination: No spermatozoa is seen on microscopic examination of vaginal swab slides. Result of X-ray investigation (plate no. 61 MLC, dated 10.04.2018). Wrist Joint, Elbow Joint, Shoulder Joint: All epiphyseal Union are completed. Pelvis: epiphyseal Union is not completed. Ultrasonography advised and result: **No UGC report.** PW 5 opined that according to x-ray report her age is above 18(eighteen) years below 20(twenty) years at present, there is no recent sign of sexual intercourse but victim is accustomed to sexual intercourse and there is no injury marks on her private parts. She proved her medical report as Ext. 5.

In her cross-examination deposed that at the time of examination the victim told her that she was 15 years old. She determined her age as above 18 years as per ossification test as well as X-ray report.

PW 6 Sri Niranjan Kalita deposed that on 06.04.2018, he was posted at Bhwanipur OP as I/C and on that day he received an FIR from one Abdul Razzak and the same was made as GDE No. 103 dated 06.04.2018 and forwarded the FIR to the O/C, Barpeta PS for register a case. Accordingly, it was registered as Barpeta PS Case No. 718/18 u/s

366A/34 IPC, r/w sec. 4 of POCSO Act and entrusted him to complete the investigation. During the investigation he examined the complainant Abdul Razzak and both the victims. Thereafter he visited the place of occurrence and drew up the sketch map (Ext. 7), seized the birth certificate of the victims produced by Abdul Razzak vide Ext. 3 seizure list. Material Ext. 1 is the birth certificate. He also recorded the statement one witness namely Haten Ali. Though he searched the houses of accused Saiful Islama and Habibul Hoque but could not trace out them. After that case diary was handed over to O/C, Inspector Binoy Kalita and proceeded for new place of posting.

In cross-examination, PW 6 deposed that complainant along with the 2(two) victims appeared before the Out Post and then after interrogation, he recorded their statements u/s 161 CrPC. Thereafter forwarded both the victims for medical examination to FAAMCH, Barpeta. On that day, he has not seized any wearing cloths of the victims even not seized their mobile phones from their hands. In the sketch map he has shown the Bamboo Bush under which victims were raped but he has not found any trace on the ground of committing rape. In the sketch map "B" is the house of Jainal. At a distance of 50 meters the house of "X" and from that at a distance of 50 meters the house of Asraf Ali. If there raise hue and cry then neighbour people will have heard. He has not recorded the statements of Asraf Ali Jainal Abedin. In the 164 CrPC statement the victim "X" stated that on returning from grandmother's house she was raped in a jungle but she has not investigated into that period from which victim was coming i.e. coming from grandmother's house to her house. He has not seized mobile phone of accused persons. He has not collected the call detect register for confirmation of call of victim by which the victim called the accused persons. The birth certificate of both the victim were issued by the Registrar, Bhwanipur PHC that produced by the father of the victim but he has not interrogated the Registrar. The certificates were issued in the year of 2015. He has not seized the school certificates of the victims. It has been clearly mentioned in his

case-diary that at the time of recording the statement of victim he was in civil dress. In his case-diary it has not been mentioned that before recording her statement he did not take her option in which place would be better for her or she want to state at that place. PW 2 Md Abdul Rezzak stated before him that the victim were raped in an unknown place. PW 2 did not state before her him that victims were recovered from Rajakhat. PW 2 did not state before him that they came to Rajakhat after getting phone call form one Jalal. PW 2 stated before him that on the day of occurrence Saiful Islam raped on her daughter and another boy raped the daughter of Hatem Ali.

14. PW 7 Sri Pradip Haloi, in this case deposed that on 08-06-2018 he was working as In-Charge of Bhawanipur Out Post. On that day the O/C of Barpeta police station endorsed him a FIR vide Barpeta PS Case No. 07/18 u/s 366A/34 IPC r/w Sec. 4 of POCSO Act. Having got the endorsement he has read the case-diary and found that investigation almost been completed except arresting the accused persons. On 03-07-2018 arrested the accused Saiful Islam and recorded his statement, medically examined him and thereafter forwarded him to the Court. On 06-07-18 other accused Habibul had surrendered before them, accordingly his statement was recorded, medically examined him and thereafter forwarded him to the Court. On seizing the birth certificate of Habibul it appeared that he is a juvenile as such, his case was forwarded to the JJB, Barpeta through the Magistrate. After completion of investigation, finding the incident being true submitted the charge-sheet against accused Saiful Islam u/s 366(A) IPC r/w Sec. 4 of POCSO, Act 2012. Ext. 8 is the charge-sheet vide No. 541/2018 dated 31-07-2018 and Ext. 8(i) is his signature.

In his cross-examination deposed that before filing charge-sheet they took note of SP as Supervisor of the investigation. He did not go to the Bhawanipur PHC for proving the authenticity of birth certificate of "X". After completion of investigation it is come to light that the accused persons by giving inducement of marriage kept confined the victims and committed sexual intercourse. The victim in

her statement it has been mentioned that the place of occurrence is nearby forest but he has not visited that place of occurrence.

15. Smti. Sonamani Chanda, the then SDJM, (M) Bajali deposed that on 07/04/2018 she was working as SDJM(M), Bajali. On that day she has recorded the statement of "X" of Madhya Datirbari, P.S. & Dist. - Barpeta. Then the victim was a student of class IX and her age was 15 years. In the statement in the name and date column she has wrongly recorded the date as 07 day of April 2017; but it should be 7th day of April 2018. Ext. 1 is the statement of the victim and Ext. 1(iii) and Ext. 1(iiii) are her signatures.

In cross-examination, she deposed that before recording the statement of the victim, she kept the victim in her chamber. She asked the victim about the incident in Assamese but she recorded the statement in English. In the statement of the victim it is written that "on 05/04/2018 at about 10.30 pm (night) she was returning back from her grandmother's house. "A" was with her. Her house is at about 50 meter distance."

16. PW – 9 Dr. Sarbananda Kalita deposed that Material Ext. 1 is the birth certificate of "x" which was issued by him on 23/07/2015 on the basis of an order of the Executive Magistrate dated 03/07/2015 communicated vide memo No. BJAD/2705 dated 03/07/2015. Material Ext. 1(i) is his signature.

In his cross-examination, deposed that the said "A" was not born in their Hospital. On the basis of an order passed by the Executive Magistrate vide memo No. BJAD/2705 dated 03/07/2015 he had issued the birth certificate. He issued the birth certificate in the year of 2015 during the continuation of NRC process.

DISCUSSION. DECISION AND REASON THEREOF:

- **17.** To establish the case u/s 366 IPC prosecution is to prove the following.
 - (1) that the accused kidnapped or abducted:

- (2) that the person kidnapped or abducted was a woman-
- (a) that such woman would be compelled to marry any person against her will; or
- (b) that she would be forced or seduced to illicit intercourse.

Or the following points should be proved-

- (1) that the accused induced a woman;
- (2) to go from any place-
- (a) by means of compulsion,
- (b) criminal intimidation, or
- (c) abuse of authority.
- (3) that he then intended or knew that it was likely:
- (4) that such woman would be forced or seduced or to illicit intercourse.
- **18.** Section 361 IPC provides kidnapping from lawful guardianship- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

- 19. FIR reveals that on 05-04-18 at about 10 pm daughter of the informant and his niece were missing from their respective houses. On searched they found them at Rajakhat chowk on 06-04-2018 and after asking to them they told that the accused person kidnapped them forcefully after giving assurance that they would marry them.
- **20.** PW 2 the informant deposed that on the next day of the

occurrence in the afternoon he received a phone from an unknown person of Rajakhat that they had recovered his daughter with an another girl and asked him to go there to take them back. Hearing this, he along with Hatem Ali rushed to Rajakhat and found both the girls there and on being asked, they told him that one Saiful Islam and another boy called them over phone to come out from the house. Having got the phone call they came out from their house and met Saiful Islam and another boy on the road.

- 21. In support that that PW 1 the victim also deposed that on 05-04-2018 accused Saiful Islam called her over phone to meet him and accordingly she came out from the house and met him on the road. Thereafter he took her to nearby bamboo bushes. Like that PW 4 the another victim deposed that on 05.04.2018 at about 9.30-10 pm while she was studying then "X" rang to her and asked her to come out from her house. Accordingly she came out from her house without informing to her parents and met "X", Saiful Islam and Habibul Haque on the road. Then Habibul snatched away her mobile phone and caught hold her hand and forcefully brought her to nearby jungle in the back side of the house of Jainal Abedin. PW 3 deposed that on the day of occurrence, while they were searching her daughter then an unknown person informed him from Razzakhat that both the girls had been recovered and asked him to come there. Hearing it he immediately rushed to Razzakhat and found her daughter along with the another victim. On being asked his daughter told him that a boy eloped her to marry. The testimony of PW 7 reveals that he had recorded the statements of informant and the victim girls and after that visited the place of occurrence, drew sketch map. During investigation he found that both the victims were under the age of 18 vears.
- **22.** On precises analysis of the evidence of the vital material witnesses, it appears that on the date of occurrence, the accused persons called the victim girls and accordingly without informing their parents and any other guardian of their house, they came out from

their respective houses. So, from the above, it is reveal that there was no any inducement even any force for taking away the victims i.e. the PW 1 and PW 4. Rather the evidence of victims reveals that they went out voluntarily. As such, the ingredients of section 366 IPC is seemingly missing.

- 23. Now come to the point No. II. Whether the accused committed forceful penetrative sexual assault on the victim?
- 24. Section 4 of the Protection of Child from Sexual Offences Act, 2012 consent is an immaterial Spl. POCSO Case consideration as consent is not an ingredient of offence as defined in Section 3 of the Protection of Child from Sexual Offences Act, 2012. For the sake of convenience, Section 3 of the Protection of Child from Sexual Offences Act, 2012 is quoted herein below:-
- "3. Penetrative sexual assault. A person is said to commit "penetrative sexual assault" if -
 - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
 - (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
 - (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to

do so to such person or any other person.

25. From above, it appears that mere penetration is enough to constitute of an offence of penetrative sexual assault against a child and consent is immaterial for commission of the said offence.

Punishment for penetrative sexual assault.-

commits Whoever penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven but which may extend years to imprisonment for life, and shall also be liable to fine.

26. PW 1 "X" the victim girl stated that on the day of occurrence accused Saiful Islam called her over phone and then she came out from her house. She met him on the road and after that he caught hold her hand and took away her to nearby bush of bamboo which is 100 meters away from her house. At first he told her that he would marry her and then he did forceful sexual intercourse with her. In the meantime, her friend "A" (name withheld) came and told her that she was raped by Habibul Hague. Thereafter, accused Saiful Islam and Habibul brought them (both the girls) to Balapara in an isolated place and left there. She further stated that she had love affair with the accused Saiful Islam about 1½ years prior to the occurrence. She used the mobile handset and in that phone, accused rang to her. It is also stated that by her that she did not raise hue and cry while accused Saiful did sexual intercourse with her even on the way to Balapara. She also not asked to help anyone on the way to Balapara. Though at that time, she has mobile with her but she did not rang to her parents. She stated before the Magistrate that she was dragged to a nearby forest but before the police stated that accused Saiful did forceful intercourse near their bamboo bush. PW 1 denied the suggestion that doctor told her that she attained above 18 years at the time of examination and accused did not commit sexual intercourse with her.

- 27. PW 4 "A" (friend of the present victim) deposed that on 05.04.2018 at about 9.30-10 pm "X" rang to her and asked her to come out from her house. Then she came out and met "X", Saiful Islam and Habibul Haque on the road. After that Habibul snatched away her mobile phone, caught hold her hand and forcefully brought her to nearby jungle in the back side of the house of Jainal Abedin. Under the neath of the "Bamboo Chupa", Habibul raped on her. She knew that accused Saiful also raped on "X". After committing rape accused Saiful and Habibul brought them to Balapara and left there. Finding no alternative they came to the house of one unknown person and told him about the entire facts and then he rang to her father, she talked with him and told about the occurrence. Immediately her father and Abdul Rezzak, the father of the "X" came to Rajjakhat and on being arrived, they explained the entire occurrence to them. Her father brought them to Bhawanipur OP. She further stated that due to the forceful rape she felt pain in her private part. She also complained before the doctor and before the police that she had felt pain in her private parts. She does not know the name of that person to whom they asked for help at Rajakahat. She raised hue and cry while Habibul forced upon her to do sexual intercourse and "X" also raised hue and cry. Though she has mobile phone with her but did not rang to anybody. "X" rang to Habibul and Saiful to come back. She knows accused Habibul since last 1 year of the occurrence and they were in love. She stated before the Magistrate that Habibul did sexual intercourse with her with a promise that he would marry her.
- 28. PW 2 is the informant of this case and PW 3 is the father of PW 4. PW 2 deposed that on 05-04-2018 his daughter was missing from his house. On the next day of the occurrence, he received a phone from an unknown person of Rajakhat who told that they recovered his daughter and the another girl and asked him to go there and to take back. Hearing it, he along with Hatem Ali went to Rajakhat

wherein he found his daughter and PW 4 and on being asked, both the girls told them that Saiful Islam and another boy brought them near the bushes of bamboo and raped. Thereafter, he lodged the ejahar (Ext. 2). The police had seized the birth certificate of his daughter and the another victim girl vide seizure list Ext. 3. Material Ext. 1 (proved in original) is the birth certificate of his daughter. PW 2 further deposed that the police personnel did not seize the any cloth or article from the victims on that day. The birth certificate of his daughter was issued in the year 2015 and it was issued by the Bhabanipur PHC. PW2 denied the suggestion that Material Ext. 1 has been obtained on false contention in the affidavit. It is also denied that at the time of occurrence the victim was above 18 years. The victims did not rang to them after the occurrence. He stated before the police that about the facts of this case, on being heard from the victim girls. The police had seized the mobile phones of the victim girl and later on it was returned to them. PW 3 Hatem Ali deposed that on 05.04.2018 his daughter "A" was found missing from his house. On the next day, an unknown person informed them from Razzakhat that both the girls had been recovered and then they rushed there and found both their daughter along with "X". On being asked his daughter told him that a boy eloped her to marry and after committing rape, left her. He further deposed that while the statements of the victims were recorded by the police they were in uniform. The birth certificate of his daughter was issued by Bhawanipur PHC and he applied for her birth certificate by supporting an affidavit. Their daughters did not inform them over phone though they were possessing mobile handset with them. PW3 denied to the suggestion that the accused persons did not commit raped on their daughters as such, he could not say the place of alleged occurrence.

29. The evidence of PW 2 and PW 3 are hearsay. They have not seen the occurrence but heard from the victim girls. Yet as per section 6 of the Evidence Act their evidence that on the day of occurrence accused Saiful Islam took away the victim "X" to nearby

bamboo bushes and forcefully committed sexual intercourse with her, cannot be thrown out.

30. In the case of State of Punjab Vs. Gurmit Singh & Ors. AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :- "The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm.The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case......Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to

injury......Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

31. In the case Vijay @ Chinee -vs- State of Madhya **Pradesh** of the Hon'ble Supreme Court held that "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

32. Ld. Counsel for the accused has strenuously argued that the medical examination of the victim was conducted but the doctor

did not find any sign of recent sexual intercourse or injury on her private part but opined that she is accustomed to sexual intercourse. She also opined that the victim was above 18 years of age according to x-ray report. As such, opinion of the doctor has not corroborated the offence of rape that alleged to have been committed by the accused.

- **33.** Now let us see whether the evidence of victim needs to be corroborated by the evidence of medical officer in the eye of law.
- 34. The Hon'ble Supreme Court in the case of *Ranjit* Hazarika vs State of Assam (1998)8 SCC 635 held that "the opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, opinion of the doctor appears to be based"The courts must. while evaluating evidence, remain alive to the fact that in a case of rape, no selfrespecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more

reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

- officer did not find any sing of recent sexual intercourse but she is accustomed to sexual intercourse. She also found hymen of the victim was tear. If victim was accustomed to sexual intercourse there should be old rupture of hymen. From the above discussions and findings of the Hon'ble Supreme Court, it can safely held that there is no need for corroboration of medical evidence, if the evidence of prosecutrix found to be reliable. So, in the instant case the Court is of the considered opinion that there is no need for corroboration of the medical evidence of the victim.
- **36.** Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and

specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. In our case, the victim also stated that the accused forcefully raped on her.

- 37. Ld. counsel for the accused submitted the according to the opinion of doctor, the victim was above 18 years and below 20 years. The doctor opined the age on the basis of x-ray examination report. Hence, at the time of alleged commission of rape, she was a major one and she knew the about the circumstances of her conduct. Moreover, the victim herself stated that she did not raise any hue and cry while the accused committed sexual intercourse with her. As such, being an adult woman, she herself given consent.
- **38.** PW 6 Sri Niranjan Kalita, I/O of this case deposed that he conducted the the investigation of Barpeta PS Case No. 718/18 u/s 366A/34 r/w Sec. 4 of POCSO Act, 2012 and during investigation he seized the birth certificate of the victim vide seizure list Ext. 3. Material Ext. 1 is the said seizure list. PW 9 Dr. Sarbananda Kalita deposed that Material Ext. 1 the birth certificate of "X" was issued by him on 23-07-2015 on the basis of an order passed by Executive Magistrate dated 03-07-15 communicated vide Memo No. BJAD/2705 dated 03-07-2015.
- **39.** Material Ext. 1 is the said seized birth certificate of "X" wherein her date of birth is recorded as 01-01-2003. As per the FIR as well as the evidence of the PWs the incident of sexual intercourse had taken place on 05-04-2018. As such, the victim was 15 years 3 months 4 days old at the time of occurrence.
- 40. In the instant case, though PW 5 doctor, who examined the victim has opined that the age of the victim at the time of her examination was above 18 years, however learned Addl. PP has argued that in light of the categorical statement of the victim and on the basis of Material Ext. 1, she was below 18 years of age at the time of

incident, the opinion of the doctor can be ignored by this Court as there is a probability of percentage of error in assessment of the age of the victim by radiological examination. Ld. Addl. PP has also cited a ruling of Hon'ble Supreme Court of India in "Java Mala vs-Home Secretary, Government of Jammu and Kashmir & Ors." reported in (1982) 2 SCC 538 wherein Hon'ble Supreme Court of India dealing with a case were question of determination of the age was involved observed that :- "one can take judicial notice that the margin of error in age ascertained by radiological examination is 2 years on either side." In our case in view of the aforesaid ruling of Hon'ble Supreme Court of India and also in view of the categorical testimony of the victim and PW 9 and on the basis of Material Ext. 1 the birth certificate of "X", it can be inferred that the age ascertained by Doctor in the instant case is not the conclusive determination of age of the victim but it is to be accepted that an error of 2(two) years in determining the age, through medical examination, is possible. Thus, for the said reasons, this Court holds that the victim was below the age of 18 years when the incident occurred.

- **41.** Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under <u>Sections 3</u>, <u>5</u>, <u>7</u> and <u>9</u> of the 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.
- **42.** So as per section 29 of the act the evidence of PW 3 can be presumed that the accused person had committed the offence unless contrary is proved.
- **43**. PW 1 the victim has categorically stated that on the day of occurrence while she came out from the house the accused person caught hold her hand and took away to the nearby bamboo bushes and committed forcibly sexual intercourse with her. During cross-examination, the defence side has failed to demolish the credibility of

the evidence of victim PW 1.

- 44. The Learned counsel for the accused has argued on the point that the investigating officer has not complied with the provision of the section 24 of the POCSO Act, 2012 and also the provision of Section 102 Cr.P.C. while conducting investigation. It is also argued that while the victim was examined the police personnel were in uniform.
- **45.** Per contra the Ld. Addl. PP. submits that defective investigation is not a reason for disbelieving that fact and circumstance of the case also the evidence of the victim in the circumstances of rape case corroboration of the fact is not so much necessary if the evidence of victim is found reliable and trustworthy. There may be some lacuna on the part of the investigating officer but which means it is not that the fact is not true.
- 46. At this juncture, this Court has follow the case of *C. Muniappan and Others vs. State of Tamil Nadu, (2010) 9 SCC 567,* explained the law on this point in the following manner: "There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused.
- 47. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded.
- **48.** The presumption under Section 29 of the POCSO Act was not rebutted either by bringing out any favourable reply from the evidence of the prosecution witnesses or producing documentary evidence on the side of the defence. On the other hand, in this case, the evidence of P.W. 1, who was minor and aged about 15/16 years at the time of occurrence, is crystal clear without giving any room of

doubt to test the veracity of the crime committed by the accused.

49. The offence u/s 4 of the Protection of Child From Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that mater other offences also under this Act can be committed only on a child. The definition of child u/s 2(d) of the POCSO Act is as follows:

"Child" means any person below age of 18 years.

- **50**. Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years. In the instant case, the victim is also below the age of 18 years.
- 51. In the case of *Pancchi Vs State of U.P., AIR 1998*SC 2726, it was held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this a child witness is easy prey to tutoring.
- The ratio of above cases is that the testimony of child witnesses is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent. In the present case, the victim has been consistent on the material particulars with regard to the incident when the accused committed penetrative sexual assault upon her. Apart from that, there is no meaningful cross-examination to the witnesses regarding the incident, except denial.
- **53.** In the case of POCSO Act, two provisions are there regarding presumption i.e. 29 and 30 of POCSO Act.
- **54.** In the case in hand, the accused has been prosecuted for committing penetrative sexual assault, as defined in Section 3 of the Act. Thus, in terms of Section 29 of the Act, this Court is bound to draw

a presumption in favour of the victim that the accused had committed the offence, unless contrary is proved by the accused. In other words, the onus is upon the accused to establish that he had not committed penetrative sexual assault towards the victim. Admittedly, in the instant case, the accused has not rebutted the said presumption in any manner just putting the argument. Thus, this Court has no reason to draw the presumption in favour of the accused.

- **55.** Similarly, u/s.30 of POCSO Act, Special Court has to draw presumption in favour of the prosecution where culpable mental state is required on the part of the accused. Section 30 reads as under:
 - "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume 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 the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of prosecution."
- Bare perusal of Section 30 of the Act reveals that whenever a question of culpable mental state on the part of the accused is required to prove the guilt of the accused, Court shall presume the existence of said mental state. Though accused can take the defence to prove the fact that he had no such mental state with respect to his act but accused has to prove the said fact beyond reasonable doubt and not by showing its existence by establishing preponderance of probability. Thus, u/s.30 of the Act, liberty is given to the accused to take a defence that he had no such mental state of his

act but he has to prove the said fact beyond reasonable doubt.

- **57.** But in the instant case, the accused has neither taken any such defence nor adduced any defene witnesses. Thus, this Court is bound to draw a presumption that the accused had culpable mental state of his act.
- **58**. Culpable mental state" is defined in the explanation to Section 30 of the Act which includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. To bring home the guilt of the accused u/s.30 of the Act, prosecution has to establish sexual intention on the part of the accused but in terms of Section 30 of the Act, Special Court is bound to draw a presumption in favour of the prosecution that accused had such intention unless presumption is rebutted by the accused beyond reasonable doubt.
- **59.** The accused person while examined u/s 313 Cr.P.C. did not take any plea except total denial.
- 60. In the case of *Ratansinh Dalsukhbahai Nayak Vs -*State of Gujarat, (2004) 1 SCC 64, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. In the instant case there is no other element in the evidence of victim except believing her fact as stated by her as true.
- 61. In another case *Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341,* it was held as follows: "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s. 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof.

The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

- Magistrate. Though the witnesses were cross-examined in full length, but nothing has come on record, which could suggest that the prosecution case is false in any aspect or that the prosecution witnesses are not deposing the truth. PW 1 in her evidence also the statement u/s 164 Cr.P.C. stated that the accused person restrained her on the way, dragged her to a nearby forest and did sexual intercourse with her. Irrespective of any support from Section 29 and 30 of POCSO Act, 2012 the prosecution case in fact stands well proved from the deposition of the victim.
- 63. In the considered view of this Court, the prosecution has clearly established in proving beyond shadow of all reasonable doubt that accused Saiful Islam had committed penetrative sexual assault on the victim. The act of the accused thus falls u/s 4 of POCSO Act. Accordingly, the accused is found guilty and therefore, he is convicted there under.

HEARING ON THE POINT OF SENTENCE

- **64.** The accused is heard on the point of sentence. He has submitted before the Court that he has old aged ailing parents in the house. He is the only earning member of his family and hence prays for leniency.
- **65.** Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances

and the mitigating circumstances. The aggravating circumstances relate to the crime and the mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body, but also to the mind of not only the victim, but that of the entire family members. The stigma, which she is going to carry for ever is not erasable. Thus, the aggravating circumstances are so grave in nature.

Turning to the mitigating circumstances, the accused was not involved in any other crime, prior to the incident. The statute under Section 4 of POCSO Act prescribes a minimum punishment for a term of 7 (seven) years with fine. When the intention of legislature is to impose stringent punishment for not less than seven years, this Court has got no option except to impose minimum punishment for 7 (seven) years.

O R D E R

- 67. I convict the accused Saiful Islam u/s 4 of POCSO Act and sentence him to R.I. for 7 (Seven) years and also to pay a fine of Rs. 10,000/- (Rupees Ten Thousand only), in default of payment of fine, shall undergo, R.I. for another 6 (six) months. The fine amount of Rs. 10,000/- if recover be deposited into the account of Taluk Legal Service Authotiy, Bajali. The period of detention during investigation and trial be set off from the period of imprisonment imposed on him. The prosecution side failed to establish the charge u/s 366 IPC against the accused and he is acquitted of the said charge.
- Now, coming to the aspect of compensation to the victim, who is a minor child, the Hon"ble Apex Court has time and again observed that subordinate Courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victim being an offence against the basic human right and violative of Article 21 of the Constitution of India. In a case titled as **Bodhisattwa Gautam Vs -**

Subhra Chakraborty, AIR 1996 SC 922, it has been held by the Hon"ble Supreme Court that the jurisdiction to pay compensation (interim and final) has to be treated as a part of the over all jurisdiction of the Courts trying the offences of rape, which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. Even otherwise, the concept of welfare and well being of children is basic for any civilized society and this has a direct bearing on the state of health and well being of the entire community, its growth and development. It has been time and again emphasized in various legislations, international declarations as well as the judicial pronouncements that the children are a supremely important national asset and the future well being of the nation depends on how its children grow and develop, which has been observed in the case of Laxmi Kant Pandey - Vs - Union of India, (1984) 2 SCC 244. Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the Secretary, DLSA, Barpeta to grant compensation to the tune of Rs. 15,000/- (Rupees Fifteen Thousand) to the victim. The amount shall be used for the welfare and rehabilitation of the victim under the supervision of District Social Welfare Officer, Barpeta.

- **69.** A copy of the order be sent to the Secretary, DLSA, Barpeta for necessary action.
- **70.** A copy of this judgment be given to the accused free of cost and a copy thereof be sent to the District Magistrate, Barpeta.
- **71.** The accused/convict has been informed about his right to appeal against this judgment before the Hon'ble Gauhati High Court.
- **72.** The seized article be disposed of after appellate period. A copy of this order be given to PSI, Bajali.
- **73.** The Spl. POCSO Case is disposed of accordingly.
- **74.** Judgment is pronounced and delivered in the open Court

in presence of both the parties and I put my hand and seal of this Court on this 30th day of November, 2019.

> (L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

APPENDIX:-

Oral evidences:-

- PW-1 Victim.
- PW-2 Md. Abdul Rezzak,
- PW-3 Md Hatem Ali.
- PW-4 "A" (Name withheld)
- PW-5 Dr. Anima Boro
- PW-6 Sri Niranjan Kalita
- PW-7 Sri Pradip Kalita
- PW-8 Smti Sonamani Chanda
- PW-9 Dr. Sarbanand Kalita.

Documentary evidence:-

- Ext.-1 Statement of victim "X"
- Ext.-2 Ejahar
- Ext.-3 Seizure list
- Ext.-4 Statement of "A"
- Ext.-5 Medical Examination Report of "X"
- Ext.-6 Medical Examination Report of "A"
- Ext.-7 Sketch Map
- Ext.-8 Charge-sheet.

Material Exhibits:

Ext. 1 Birth Certificate of "X"

Defence evidence.

Nil.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.