#### IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>24 OF 2017</u>

(Under Section 4 of the POCSO Act, arising out of G.R. Case No. 3504 of

2016)

Present :- Sri Ashok Kumar Borah, AJS

**Special Judge, Sonitpur** 

**Tezpur** 

Prosecutor :- State of Assam

-vs-

Accused :- Sri Madhab Ghatowal

Son of Late Lalu Ghatowal Resident of Dipatola Police Station – Jamuguri, Dist:- Sonitpur, Assam

Date of framing Charge :- 12/07/2017

Date of Recording Evidence :- 18/08/2017, 29/08/2017,

06/09/2017, 22/09/2017 21/10/2017 & 06/11/2017

Date of examination of accused u/s :- 18/11/2017

313 Cr.P.C

Date of evidence of DW :- 11/12/2017.

Date of Argument :- 08/01/2018

Date of Judgment :- 20/01/2018

Counsel for the Prosecution :- Mr. Munin Ch. Baruah

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. R.K. Kalita &

Mr. Arjun Prasad Kurmi,

Advocates.

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#### **JUDGMENT**

- **1.** In this case accused Sri Madhab Ghatowal is put for trial for allegation of charge under Section 4 of the POCSO Act, 2012.
- 2. The prosecution case according to the FIR in brief is that accused used to visit the house of the informant since the month of May, 2016. On the first day of incident in the evening time taking advantage of absence of other family members of the informant committed sexual intercourse with informant's minor daughter Miss "X", as a result of such act, she became five months pregnant. On enquiry the matter to the girl, she disclosed that the accused has caused her pregnancy. On 13-10-2016, while the ladies of their village along with VDP personnel asked the accused but he refused to confess. Hence, this prosecution case. The ejahar was filed by Smt. Tileswari Kurmi before the O/C of Jamuguri Police Station on 14-10-2016.
- **3.** On receipt of the ejahar, the O/C of Jamuguri Police station registered the case being Jamuguri PS Case No. 144/16 u/s 493 of IPC read with section 6 of POCSO Act by entering GD Entry No. 311 dated 14-10-2016. After completion of usual investigation, the O/C Jamuguri Police Station sent up the accused for trial by filing charge sheet u/s 4 of the POCSO Act against the accused Sri Madhab Ghatowal.
- **4.** On being produced the accused before this Court, after hearing both parties, charge under section 4 of the POCSO Act, 2012 framed against the accused Sri Madhab Ghatowal and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- **5.** To substantiate the case prosecution examined nine numbers of witnesses and also examined one Court Witness. After completion of prosecution evidence, accused was examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the

evidence and allegation against him. To buttress the defence, the accused has also examined one Defence witness.

- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -
  - (1) "Whether the accused prior to 13-10-2016 at Kusumtola, under Jamuguri Police station, committed penetrative sexual assault on the victim Miss X (16 years) and thereby committed an offence punishable under section 4 of the Protection of Child from Sexual Offences Act?

## Reasons, Decisions and reason for decision.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- PW 1, informant Smt. Tileswari Kurmi stated that accused 9. Madhab Ghatowar is her co-villager. Victim Miss "X" is her minor daughter. At present her daughter just crossed 16 years. The incident took place during the time of Durga Puja last year. Usually in the day time she went out to do her daily labour and therefore in the evening after marketing she returned to home. In her absence her victim daughter and other daughter Tulsi were resides. Her husband also went out to do his works. On being seen the large abdomen of her daughter she asked her whether she attained her periodical menstruation or not. But due to shame she falsely stated "yes". But when she took her to doctor of Tezpur, Doctor reported that her daughter was pregnant of five months. Then she asked her victim daughter how she become pregnant, her daughter stated that during their absence accused Madhav Ghatowal came to their house and took her to the kitchen and forcefully raped on her. She was also threatened not to disclose to anybody. By that way, accused 3/4 times committed rape on her daughter. Then she informed this matter to VDP and local Mahila

samity. Then, they called accused but accused fled away. Then she filed the ejahar before the police. The ejahar was written by one Tridip Rai Bhuyan on her dictation. During investigation, Police examined her daughter through the Doctor. Then her statement was also recorded through the learned Magistrate. Thereafter her victim daughter gave birth a female child. Now, her victim daughter and the baby live with them.

In cross-examination, she admitted that victim girl is her first child. She was born after about one and half years from their marriage. Next child namely Bimala was born after about one and half years from the birth of victim girl. Bimala, the second daughter attains puberty about one year ago from today. The distance between her house and the 12<sup>th</sup> Bn is 500 meter. Their village is thickly populated village. Near their house, there are houses of Kalu Kurmi, Bhibishan Kurmi, Sankar Kurmi and gaonburha Sakar etc. In the first room of her house, her husband resides and in the next room she along with her children resides. One can enter into their room only through the first room where her husband resides. One of their daughter Bimala is resides in the house of one Nirmal Baruah who is doing service at Bn. And other daughter Urmila Kurmi is resides in the house of one Naren Borah who is also an employee of Bn. When her victim daughter and Bimala went to school, they locked their house. Sometimes she returned home at about 4/5 p.m. and sometimes she returned at about 6/7 p.m. When she worked in paddy field then she returned home sometimes earlier. There are differences of ten houses in between her house and the house of the accused.

**10. PW 2** Sri Hem Chandra Kurmi, father of the victim girl, stated that accused Madhab Ghatowar is his co-villager. At the time of incident, the age of his victim daughter was 17 years. He came to know about the incident about one year ago. At the relevant time, he has seen her daughter who becomes sickly and thin. Then he asked his wife why his daughter becomes so. Then they took their victim daughter to hospital

where doctor diagnosed that she became pregnant. When he asked his victim daughter how she became pregnant, she told him that she become pregnant from the side of Madhav Ghatowal. Then his wife filed the ejahar. They also informed the matter to VDP secretary and Gaonburah. When their villagers, VDP secretary and Gaonburah searched the accused, he was absconded from his house. As the accused was absconded then they advised them to file case against the accused. Then his wife filed the ejahar. During investigation, Police examined his daughter through the Doctor. Then her statement was also recorded through the learned Magistrate. Thereafter his daughter gave birth a female child. Now, his victim daughter and the baby live with them.

In cross-examination, he admitted that victim girl is his first child. After about one year first baby was born. His victim daughter was admitted at Dipatola LP school when she was 6 years old. She reads there for four years but she failed in one class. When she attained about 12 years they admitted her in Nagsankar Girl's school. She reads upto class X. She could not appear in Matric examination due to the said incident. She failed in one time in High school also.

11. PW 3 Sri Home Nath Chetry stated that he knows the complainant as well as the victim girl. The victim girl is 17 years old at present. At the time of incident victim was 16 years of age. The incident took place in the month of May, 2016. On 13-10-2016 the informant along with her husband complained in writing addressing him stating that their minor daughter Miss "X" was found five months pregnant. While they enquired, the victim stated that she become pregnant from the side of Madhab Ghatowal. Then they went to the house of accused and shown the said complaint. They have also stating him from the side of accused the victim became five months pregnant but he refused to admit and called a meeting but the accused did not come and also stated to file a case. During that time, they advised the complainant to file a case against the accused. On 04-11-2016, the Investigating Officer

has seized the School Certificate of the victim vide seizurelist Ext.1. Ext. 1(1) is his signature. According to the said school certificate the victim at the time of incident only 16 years old as date of birth of the victim is 17-04-2000. At last, the said victim gave birth a female child.

Though he has been exposed to long cross-examination except giving many suggestions, the evidence as to on 13-10-2016 he along with the complainant write a letter addressing him stating that on being seen the five months pregnant of his daughter Miss "X", she told her guardian that she become five months pregnant, on being asked victim stated that she become pregnant from the side of Madhab Ghatowal, then they went to the house of accused and shown the said complainant and also stating that it is alleged in the complaint that from his side victim become pregnant but accused refused, the meeting convened by them accused did not appear rather stating that they can take the help of law, then they advised the complainant to file the case and accordingly during investigation on 04-11-2016 police seized the school certificate of the victim has remained unchallenged.

**12. PW 4** Miss B. Khakhlary, learned Judicial Magistrate, 1<sup>st</sup> class, Tezpur who recorded the statement of the victim stated that on 18-10-2016 in reference to Jamuguri PS Case No. 144/16 u/s 493 of IPC read with section 6 of POCSO Act, she has recorded the statement of the victim Miss "X", aged about 16 years, D/O Sri Hemchandra Kurmi of Kusumtola, PS Jamuguri u/s 164 Cr.P.C as Elaka Magistrate. The victim was escorted and identified by Nayan Jyoti Kalita, PLV No.17. She has given reflection period of three hours to the victim in the court premises and thereafter, she has recorded her statement in the chamber. The victim made statement voluntarily. At the time of recording her statement other than her and the victim none was there. After recording the statement, the whole statement was read over to her and on acceptance she put her signature in the statement in her presence. Ext. 1 is her order dated 18-10-2016 and Ext. 1(1) is her signature. Ext.

2 is the relevant statement of victim recorded by her and Ext. 2(1) is her signature.

**13**. **PW 5** Sri Kalu Kurmi, the grand-father of the victim, stated that the complainant is his elder daughter-in-law. He came to know about the incident nine months ago. Before nine months they noticed apparent physical change of the victim. On being asked the victim, she told that she become pregnant from the side of Madhab Ghatowal, then they informed the matter to local public. They also informed the matter to Lily Bhuyan Baidue of Mahila Samity, Secretary Hom Nath Chetry and Gaonburha Sankar Kurmi. Then local public asked the accused but the accused denied. During that time, his grand-daughter was five months pregnant. When the accused refused to confess, the villagers again came to her and advised them to take the help of law. Then, complainant filed this case. During that time the victim was only 16 years old. At last, the victim grand-daughter gave birth a female child, at present the baby is seven months old and the baby lives with his victim grand-daughter.

Though he has been exposed to long cross-examination, but the evidence as to on being noticed the change of physical appearance of the victim granddaughter while asked her, she disclosed that she become pregnant from the side of accused Maghab Ghatowal, accordingly, they informed the matter to local public including Lilu Bhuyan Baidue of Mahila Samity, Secretary Hom Nath Chetry and Gaonburah Sankar Kurmi, they also asked the accused but the accused refused to admit, during that time the victim was five months pregnant, therefore at the advice of local public, the complainant filed this case and at last the victim gave birth a female child has remained unchallenged.

**14. PW 6** Smt. Lily Bhuyan, President of Nikhil Bharat Ganatantik Mahila Samity, Jamuguri Region, stated that at the time of incident, victim was only 16 years old. On 13-10-2016 the parents of the victim has filed a complaint before her stating that 40/45 years old Madhab Ghatowal raped their daughter as a result, their daughter became

pregnant. On being receipt the complaint, she discussed with the VDP secretary, village headman and local public about the matter. Thereafter, she along with the VDP secretary, village headman and public of three organisations asked the accused and called the accused to the meeting convened by them but the accused did not attend the meeting. Therefore, they advised the complainant to take the help of law and accordingly, the complainant filed this case. When the complainant side informed them about the incident, the victim was five months pregnant. Thereafter, on 25-12-2016 the parents of the victim reported them that the victim gave birth a female child. While they asked the victim Miss "X", she disclosed that she become pregnant form the side of accused, while they asked the victim as to why she did not inform about the incident to them earlier, the victim stated that the accused threatened to kill her, therefore, out of fear she did not disclose it. The baby gave birth by victim is with the victim at present.

Though she has been exposed to long cross-examination but the evidence as to on being receipt of complaint from the parents of the victim that the accused caused pregnancy to their daughter, she informed the matter to VDP Secretary, village headman and the local public, accordingly they went to the house of the accused, asked about the incident, they called a meeting but accused did not come, then they advised them for instituting the case has remained unchallenged.

**15. PW 7** Miss "X" stated that the incident took place on or about 1½ years ago. One day at night her parents are absent and she was alone in her home. She has three sisters, all the three sisters were engaged as maid in some other houses. At the time of incident she was reading in class IX. Her mother went out for works at the relevant time and did not return home. Her father like a mad man, loitering anywhere. Accused at about 7/8 p.m., came to their house, called as "mami", "mami". She was alone in her bed. Accused took her to the kitchen. While she raised alarm accused gagged her mouth with her red coloured "churni". Accused fell her down by opening her churidar, scroll

upon her and committed misdeed to her. He inserted his private parts into her private parts. Thereafter also accused came to their house and committed such type of misdeed for total four days. She was threatened to kill if she disclosed the matter to others, as a result, she became pregnant. While she reported about her pregnancy to accused, accused stated her not to worry. During Puja time local people noticed her swelling abdomen and on being seen that asked her mother, accordingly, her mother asked her, she told whole incident to her mother where her mother has assaulted. She disclosed to her mother that she became pregnant form the side of accused Madhab. Thereafter, her mother informed the matter to village headman, members of Mahila Samioty, VDP and local public. On the advise of local public her mother filed this case. At last she gave a female child which is now resides with her. After instituting the case, she was examined through the doctor, her statement was also recorded through the learned Magistrate. Ext. 2 is the said statement and ext. 2(2) to 2(4) are her signatures. She made statement to the learned Magistrate what she deposed today. Accused has also advised her not to disclose anybody about her closure of menstruation, otherwise threatened her to kill. Therefore, she told others that she was regularly menstruated.

Though she has been exposed to long cross-examination but the evidence as to at the relevant time taking advantage of absence of other family members, accused came to their house, fell her down on the floor, sleep over her, where accused inserted his sexual organ into her private parts, by that way accused committed rape for four days, accused also threatened her not to disclose the matter to others, otherwise she will be killed, thereafter she became pregnant and when she reported the matter to the accused, accused asked her not to worry has remained unchallenged.

**16. PW 8** Dr. Jharna Kakoti, the Medical Officer, stated that on 19-10-2016 she was working as Sub-Divisional Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day in reference to

Jamuguri PS Case No. 144/16 u/s 493 of the IPC read with section 6 of the pOCSO Act dated 18-10-2016, she examined Miss "X", 16 years, D/O Hem Ch. Kurmi of village Kusumtola, PS –Jamuguri, Dist. Sonitpur, on being escorted and identified by Nayan Jyoti Kalita, WGH. The victim was examined on 19-10-2016 at about 1.50 p.m. in the labour room complex of KCH, in presence of GNM Kamala Talukdar of KCH, vide hospital registration No. 45540/16 and on examination found the following:

Idenfication mark - mole on right upper part of chest.

Menstrual history – history of cessation of menstruation for few months

History of sexual intercourse few months back.

Height - 153 cm, Weight - 42 Kg, Teeth - 14/14.

At the time of examination she was well dressed, neat and tidy. Gait normal. Her secondary sexual characters developed. Vulva, vagina healthy, hymen absent. Perabdominal height of uterus just above the umballicus. There was no injury mark or marks of violence on her private parts. Vaginal smear for spermatozoa was taken.

Investigations advised and reports-

- 1. Vaginal smear for spermatozoa- No sperm (done at KCH Lab No. 113/16 dated 19-10-2016)
- 2. Urine for HCG Positive (done at Assam X-ray Clinic & Lab, Tezpur. Reports given by Dr.D. Mahanta, Pathologist. Patient ID BI, 31639 dated 19-10-2016.
  - 3. X-ray of left wrist joint, elbow joint and iliac crest for age determination.

Union of the epiphysis of the lower ends of radius and ulna are complete.

All Epiphysis of the bones around the left elbow joint has fused.

Epiphysis of the iliac crest has appeared but not fused.

Age of the person under investigation is appears to be just over 18 years. Patient ID No. 2764 dated 19-10-2016, done at AXCL, report given by Dr. P.K. Barman, Radiologist.

Ultra Sonography of pelvis – Single live fetus is seen in the uterus with cephalic presentation. Fetal heart rate is normal and regular. Heart rate is 156 BPM. US gestational age is 28 weeks. Estimated fetal weight is 1200 gams. The placenta is normal and is situated in the fundus and of posterior uterine wall. Liquor amount is adequate. Active fetal movements were observed during examination. The cervical segment is normal and measures 32 mms. Normal intra –uterine, 28 weeks gestation with single active fetus, (done at Assam X-ray Clinic & Lab, Patient ID NO. AXC 2764 by Dr. P.K. Barman, Sonologist.)

#### **OPINION:**

- 1. There is no injury marks or violence on her body as well as on her private parts at the time of examination.
- 2. She was pregnant normal, Normal intra-uterine 28 weeks gestation with single active foetus at the time of examination.

Enclosures: Advice slip, police requisition, Vaginal smear report, Urine for HCG report, Ultra sonography report with plates and X-ray reports with plates.

Ext. 3 is the Medical report and Ext. 3(1) and 3(2) are her signatures. Ext. 4 is the advice slip of KCH. Ext. 5 is the Ultra sonography report with X-ray reports along with plates and Ext. 5(1) is the signature of Dr. P.K. Barman, Radiologist which is known to her. Ext. 6 is the vaginal smear report and Ext. 6(1) is the signature of laboratory technician of KCH, Tezpur which is known to her. Ext. 7 is

the Urine for HCG report and Ext. 7(1) is the signature of Dr. D. Mahanta, which is known to her.

In cross-examination, the doctor admitted that since the age of foetus was 28 weeks, which is the result of sexual intercourse took place prior to March, 2016.

**17.** PW 9 Sri Raju Bahadur Chetry, Investigating Officer of this case, stated that on 14-10-2016 he was posted at Jamuguri Police Station as O/C. On that day, an FIR was received from one Smt. Tileswari Kurmi and registered the same as Jamuguri PS Case No. 144/16 u/s 493 of the IPC read with section 6 of the Special POCSO Act by giving GD Entry 311 dated 14-10-2016 and he himself taken the charge of the In the said ejahar the complainant Smt. investigation the case. Tileswari Kurmi put her thumb impression. Ext. 8 is the said ejahar and Ext. 8(1) is his signature. Thereafter, on the said date, at about 10.15 a.m. he left for the place of occurrence, visited the place of occurrence and prepared the sketch map of the place of occurrence. Ext. 9 is the sketch map and Ext. 9(1) is his signature. He has recorded the statement of victim girl and other witnesses u/s 161 Cr.P.C. at the place of occurrence. Thereafter on 04-11-2016 he has seized one school certificate of victim Miss "X", D/O Sri Hem Chandra Kurmi of village Dipatola of Jamuguri Police station bearing No. 495, Admission Register No. 14/524-15 issued by Head Master of Nagsankar Adarsha Girls' High School mentioning the date of birth is 17-04-2000. The original of the said seized certificate given to the zimma of father of the victim girl namely, Hem Chandra Kurmi. Photocopy of the said seized certificate is enclosed with the seizurelist. Ext. 1 is the seizurelist and Ext. 1(2) is his signature. Ext. 10 is the undertaking bond regarding zimma of the victim girl to her guardian and Ext. 10(1) is his signature. On 18-10-2010 he has sent the victim for medical examination and also sent the victim to the learned court for recording her statement u/s 164 Cr.P.C.by forwarding letter vide Ext. 11 and Ext.11 (1) is his signature. After collecting the medical report and other required documents, finding

sufficient materials against the accused person Madhab Ghatowar he has filed charge-sheet against him u/s 4 of the Special POCSO Act. Ext. 12 is the charge-sheet and Ext. 12 (1) is his signature. He has mentioned in the charge-sheet that the victim girl was five months pregnant. During investigation, he searched the accused in his house but he was found absent.

In cross-examination, he admitted that he has not recorded the statement of Kalu Kurmi, Sankar Kurmi, Somnath Chetry and Lily Bhuyan and Bhibhisan Kurmi as they have corroborated the statement of victim and complainant. He has not given any explanation as to why he has not recorded their statements however, he has given a explanatory note.

**18**. Court witness 1, Sri Ratul Bhuyan, Head Master of Nagsankar Adarsha Girls' High School, stated that he has appeared before this court upon the receipt of summons. In the said summons he was asked to produce the original counter foil of the Books of Certificate and Admission Register. On 07-08-2015 he was posted as Head Master of Nagsankar Adarsha Girls' High School. On that day, he has issued a Certificate in the name of Bharati Kurmi, D/O Sri Hem Chandra Kurmi of village Dipatola, PO - Karsontola, PS Jamugurihat as she was a student of class IX of their school. The certificate being No. 495 was issued by him where the date of birth of Bharati Kurmi was mentioned as 17-04-2000 according to their School Admission register where he signed as head Master of the School. The original counter foil of the certificate is kept in their school which he produced before the court. Ext. 1 is the original counter foil Certificate (proved in original) issued to Miss Bharati Kurmi and Ext. 1(1) is my signature as head Master of the School. Ext. 1(2) is the counterfoil of the said certificate. It appears from Ext. 1(2) that father of Miss Bharati Kurmi, Sri Hem Chadra Kurmi has received the same by putting his thumb impression. Ext. 2 is the Admission Register from 2005-2017. Ext. 2(1) is the relevant page of Admission

register and Ext. 2(2) is the relevant entry of Miss Bharati Kurmi, SI NO. 14/524 where her date of birth is on 17-04-2000.

In cross-examination he admitted that victim admitted in their school in Class IX but her date of admission not noted in the admission Register. Usually they issued Transfer/Reading Certificate at the time of leaving the school by the students but so far he recalled these certificates were issued to the student at the time of NRC updating.

- **19.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- 20. To buttress the defence, defence examined one witness i.e. DW 1 Sri Chandra Kanta Mura who stated that he is the member of Pub-Borbhogia Gaon Panchayat consisting of Dipatola and Nizbosti village. Tileswari Kurmi belongs to Dipatola village. He has a plot of land in village Dipatola, accused has also plot of land and Tileswari Kurmi has also a plot of land. The land of Tileswari Kurmi and Madhab Ghatowal are adjacent. His plot is situated at the eastern side of their land. For the land dispute there were many quarrel took place in between Tileswari and Madhab. In the month of June, 2016 at the time of paddy cultivation a quarrel took place between Tileswari and Madhab for distribution of irrigation water. During that time Tileswari warned accused that she will falsely implicated him in a case where they have to sale their landed property. As a gaon Panchayat member, he used to visit their village. During the time of Durga puja, he went to see the construction work of the house allotted under Indira Abas Yojana in the evening time, then Tileswari called him to their house and accordingly, at about 6.00 p.m. he went to the house of Tileswari Kurmi. Then the elder brother of Tileswari Kurmi was called by Tileswari. He has seen her pregnant abdomen. Tileswari Kurmi asked him to ask the said daughter from whose side she becomes pregnant. Then the victim stated that she become pregnant from the side of her father Hem Chandra Kurmi. Then, again she stated that she become pregnant from the side of Munu Kurmi. Then there were Hulasthul took place at that

time. Munu Kurmi used to live in the house of Tileswari Kurmi. Tileswari Kurmi deals in business of local liquor, therefore, many customers came to their house. When the hulasthul took place, then he left the house of Tileswari Kurmi. Then he heard that Tileswari filed a case against Madhab Ghatowal.

In cross-examination, he stated that he has appeared before this court not on summons but on the request of the accused he came to the court to adduce evidence. Even before coming to this court, he has discussed with the accused Madhab Ghatowal. He admitted that he knows that Tileswari Kurmi has filed a case against accused Madhab Ghatowal alleging that Madhab Ghatowal committed rape on Tileswari's elder daughter on several times as a result, she became pregnant. Usually, in the village, if such any incident took place, before informing to police or court, usually they informed the village headman about the occurrence. The victim and complainant belong to village Dipatola and the alleged incident did occur at Dipatola village. The village headman of the village Dipatola is Sankar Kurmi. In the village Dipatola, there is Mohila Samity namely Nikhil Bharat Ganatantrik Mohila Samity. During that time Lily Bhuyan was the president of that Mohila Samity. He knows Hom Nath Chetry and at that time he was the VDP secretary of Dipatola village.

21. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, other than the victim none has supported the prosecution case. Even the statement of the victim, there is no any direct evidence as to the alleged offence. Secondly, the case was filed after five months of incident but FIR does not reveal any explanation. Thirdly, foetus of the victim took place 28 weeks ago i.e. prior to the month of March, 2016 as the doctor clearly stated that pregnancy may be occurred due to sexual intercourse prior to 28 weeks. But, according to FIR, accused after introduction used to visit the house of complainant after the month of May'16 and alleged forceful sexual intercourse took place during that

period. Had that been so fetus of victim of 28 weeks cannot be took place. To be pregnancy and fetus of 28 weeks of the victim, the victim must have been sexual intercourse with a person in the month of March'16. Therefore, the pregnancy of the victim cannot be caused by accused as the accused introduced with complainant and victim only from the month of May'16. **Fourthly,** the doctor opined that the age of the victim is above 18 years so this case cannot be come under POCSO Act. **Fifthly,** there is many contradictions. Besides that the allegation of land dispute is admitted by the prosecution and due to enmity the case is filed by the prosecution. **Lastly,** the Investigating Officer has failed to examine the neighbours.

- **22.** Per contra, learned Public Prosecutor, Sonitpur, Tezpur submittd that the prosecution has ably proved the case beyond any reasonable doubt, as such, accused is required to be convicted under the charged section of law.
- **23.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case as follows.
- 24. A close scanning of the record including the evidence of the aforesaid witness, it is seen that except the victim there is no eye witness to the occurrence. There is an evidence of victim i.e. Miss "X" PW 7 stated that at the time of incident, her parents were absent in their home and she was alone in her home. She has three sisters, all the three sisters were engaged as maid in some other houses. At the time of incident she was reading in class IX. Her mother went out for works at the relevant time and did not return home. Her father like a mad man, loitering anywhere. Accused at about 7/8 p.m., came to their house, called as "mami", "mami". She was alone in her bed. Accused took her to the kitchen. While she raised alarm accused gagged her mouth with her red coloured "churni". Accused fell her down by opening her churidar, scroll upon her and committed misdeed to her. He inserted his private parts into her private parts. Thereafter also accused came to their house and committed such type of misdeed for total four days.

She was threatened to kill if she disclosed the matter to others, as a result, she became pregnant. While she reported about her pregnancy to accused, accused stated her not to worry. During Puja time local people noticed her swelling abdomen and on being seen that asked her mother, accordingly, her mother asked her, she told whole incident to her mother where her mother has assaulted. She disclosed to her mother that she became pregnant form the side of accused Madhab. Thereafter, her mother informed the matter to village headman, members of Mahila Samioty, VDP and local public. On the advice of local public her mother filed this case. At last she gave a female child which is now resides with her. After instituting the case, she was examined through the doctor, her statement was also recorded through the learned Magistrate. Ext. 2 is the said statement and ext. 2(2) to 2(4) are her signatures. She made statement to the learned Magistrate what she deposed today. Accused has also advised her not to disclose anybody about her closure of menstruation, otherwise threatened her to kill. Therefore, she told others that she was regularly menstruated. Though she has been exposed to long cross-examination but the evidence as to at the relevant time taking advantage of absence of other family members, accused came to their house, fell her down on the floor, sleep over her, where accused inserted his sexual organ into her private parts, by that way accused committed rape for four days, accused also threatened her not to disclose the matter to others, otherwise she will be killed, thereafter she became pregnant and when she reported the matter to the accused, accused asked her not to worry has remained unchallenged.

The statement of the victim is also supported by the PW 3, PW 5, PW 6 and PW 7. PW 3 stated that he knows the victim, her age is about 17 years. At the time of incident victim's age was about 16 years. The incident took place in the month of May, 2016. On 13-10-2016 the informant along with her husband complained in writing addressing him stating that their minor daughter Miss "X" was found five months pregnant. While they enquired, the victim stated that she become

pregnant from the side of Madhab Ghatowal. Then they went to the house of accused and shown the said complaint. They have also stating him from the side of accused the victim became five months pregnant but he refused to admit and called a meeting but the accused did not come and also stated to file a case. During that time, they advised the complainant to file a case against the accused. On 04-11-2016, the Investigating Officer has seized the School Certificate of the victim vide seizurelist Ext.1. Ext. 1(1) is his signature. According to the said school certificate the victim at the time of incident only 16 years old as date of birth of the victim is 17-04-2000. At last, the said victim gave birth a female child.

Similarly, PW 5, the grandfather of the victim stated that on being noticed the physical appearance of the victim, they asked the victim how she became so, she told them that she became pregnant from the said of Madhab Ghatowal. Accordingly, they informed the matter to the local villagers. They have also informed to Lily Bhuyan Baidue of Mahila Samity, Secretary Hom Nath Chetry and Gaonburha Sankar Kurmi. Then local public asked the accused but the accused denied. During that time, his grand-daughter was five months pregnant. When the accused refused to confess, the villagers again came to her and advised them to take the help of law. Then, complainant filed this case.

PW 6 Smt. Lily Bhuyan, President of Nikhil Bharat Ganatantik Mahila Samity, Jamuguri, stated that she knows the victim. At the time of incident, victim was only 16 years old. On 13-10-2016 the parents of the victim has filed a complaint before her stating that due to rape committed by one Madhab Ghatowal, 40/45 years of age, their minor daughter became pregnant. On being receipt the complaint, she discussed with the VDP secretary, village headman and local public about the matter. Thereafter, she along with the VDP secretary, village headman and public of three organisations asked the accused and called the accused to the meeting convened by them but the accused

did not attend the meeting. Therefore, they advised the complainant to take the help of law and accordingly, the complainant filed this case. When the complainant side informed them about the incident, the victim was five months pregnant. Thereafter, on 25-12-2016 the parents of the victim reported them that the victim gave birth a female child. By that way, PW 3, PW 5 and PW 6 were supported the evidence of PW 7 i.e. the victim.

Though the aforesaid witnesses PW 3, PW 5 and PW 6 were duly cross-examined by the defence but except giving many suggestions the evidence as to at the relevant time on being filed an application before them by the parents of the victim that their minor daughter became pregnant from the side of accused, they met the accused and asked him but he refused to admit. Even the meeting convened by them on that issue accused did not come rather accused told them to file case before the police has remained unchallenged.

25. In this case, the victim, her mother and the independent witnesses categorically stated about the incident. Their statements are corroborated with each other. During their cross-examination same has not been disputed at all by the defence. The victim has been consistent with the material particular with regards to the incident that on the day of incident while her parents and other family members were absent accused came to their house, forcefully took her to their kitchen and thereafter fell her down, opening her Churidar, forcefully committed rape on her and by that way accused committed sexual intercourse with her for four time as a result, she became pregnant. There is also an evidence that while she became pregnant, she reported the matter to the accused but accused console her not to worry, thereafter, the accused threatened the victim to tell lie by stating that her menstruation is regular, even in fact, her menstruation was irregular. Therefore, she had to state local public that her menstruation was regular out of fear. The statement of the victim is also corroborated with her statement made u/s 164 Cr.P.C. and made before the police u/s 161 Cr.P.C.

- 26. The un-rebuttable evidence of doctor is such that at the time of examination of the victim, the victim was pregnant. Normal intra-uterine 28 weeks gestation with single active fetus at the time of examination. The doctor admitted in cross-examination that pregnancy may be occurred due to sexual intercourse prior to 28 weeks. Since the age of foetus was 28 weeks, which is the result of sexual intercourse took place prior to March, 2016. According to the FIR, the accused was used to visit their house since the month of May, 2016 and the alleged incident took place during that period. Learned counsel for the accused vehemently submitted that if the victim got pregnancy for 28 weeks on 19-10-2016 then sexual intercourse might have been occurred prior to the period of 28 weeks that means prior to the month of march, 2016. Since there is no any evidence that accused has visiting terms to the house of the victim from the month of March, 2016 and accused used to visit the house of the complainant only after the month of May, 2016 so it is impossible to made any alleged sexual intercourse during the month of March, 2016, therefore, the alleged pregnancy is not from the side of the accused. Besides that prosecution has failed to prove the case by way of DNA test that the girl baby was born to victim from the side of the accused Madhab Ghatowal.
- 27. It is a fact that there is no any evidence that from the month of March, 2016 accused has visiting terms in the house of the complainant or he accused had any sexual relation forceful or consensus with the victim from the month of March, 2016. According to the FIR accused used to visit the house of complainant only after the month of Mary, 2016. Therefore, pregnancy of the victim of 28 weeks on 19-10-2016 cannot take place for alleged intercourse after the month of May, 2016 it must have been resultant of intercourse took place from the month of March, 2016. But here in this case there is no such evidence as stated above that there is a relation of the victim with the accused from the month of March, 2016. Secondly, as submitted by learned counsel for the accused that it is a fact that prosecution has failed to examine the DNA test to confirm about the allegation that the girl child was born

from the side of the accused. In absence of such evidence, it remains dark as to whose side the said child was born.

28. Besides the above discussion, PW3 stated that on 13-10-2016, the parents of the victim girl given in writing that the victim was found five months pregnant. According to PW5, the grandfather of the victim he came to know about the abnormal formation of abdomen of victim in nine months ago, whereas, PW5 given evidence on 06-09-2017. Therefore, PW 5 came to know about the apparent large abdomen of victim in the month of Dec'16 or Jan'17. During that period, the victim was five months pregnant. So, sexual intercourse might have been took place in the month of June'16 or July'16. According to PW6 when they both have been informed by the parent of the victim, the victim was five months pregnant. According to her, parent of the victim informed them on 13-10-2016. During that time, the victim was five months pregnant. Had that been so, the victim must have been indulged in sexual intercourse prior to five months i.e. within the month of May'16. But, as stated above, according to doctor who examined the victim on 19-10-2016 found normal pregnancy of the victim with 28 weeks fetus at the time of examination. The doctor admitted that pregnancy may be occurred due to sexual intercourse prior to 28 weeks. Since the age of fetus is 28 weeks which is the result of sexual intercourse took place prior to March'16. But, the present case is instituted upon the FIR. The FIR clearly reveals that accused was introduced to complainant and victim only in the month of May'16 and thereafter, accused used to visit their house. FIR does not reveals any of the incident of March'16 neither evidence of any of the witnesses stated about the any event of March'16. 2ndly, the prosecution has failed to DNA test of the child born to the victim. Had prosecution properly test DNA of the child, then it would be clear about the paternity of the child.

**29.** Under such circumstances, I have come to a conclusion that prosecution has failed to prove the aforesaid alleged penetrative sexual assault to the victim by the accused, as a result, the child was born to

victim. Hence, I have not hesitation to hold that accused is entitled to get the benefit of doubt. As such acquit him and set at liberty forthwith.

- **18.** The liability of the bailor is hereby discharged.
- **19.** Send back the LCR.

Given under my Hand and Seal of this Court on this the 20<sup>th</sup> day of January,2017.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. P. Das, Steno

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# **APPENDIX**

### **Prosecution Witness**

PW 1	:-	Smti Tileswari Kurmi(complainant).
PW 2	:-	Sri Hem Ch Kurmi.
PW 3	:-	Sri Home Nath Chetry.
PW 4	:-	Miss B Khaklary.
PW 5	:-	Sri Kalu Kurmi
PW 6	:-	Smti Lily Bhuyan,
PW 7	:-	Miss "X"(victim).
PW 8	:-	Dr Jharna Kakoti(MO).
PW 9	:-	Sri Raju Bahadur Chetry(IO).
CW 1	:-	Sri Ratul Bhuyan.

# **DOCUMENTS EXHIBITED BY PROSECUTION:**

Exhibit 1	:-	Order dated 18-10-2016.
Exhibit 2	:- /	Statement of victim recorded under
		Section 164 of CrPC.
Exhibit 3	*	Medical report
Exhibit 4	:-\	Advice slip of KCH
Exhibit 5		USG report along with X-ray
		reports with plates.
Exhibit 6	:-	Vaginal smear report.
Exhibit 7	:-	Urine for HCG report.
Exhibit 8	:-	Ejahar .
Exhibit 9	:-	Sketch map.
Exhibit 10	:-	Undertaking bond regarding zimma
<b>* \</b>		of victim girl to her guardian.
Exhibit 11	:-	Forwarding letter.

**Exhibit OF Court witness.** 

Chargesheet

1. Exhibit 1 : Original Counter foil certificate.

2. Exhibit 2 : Admission Register.

Exhibit 12

(Ashok Kumar Borah) SPECIAL JUDGE SONITPUR: TEZPUR