IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>48 OF 2017</u>

(Under Section 448/354 of IPC r/w section 8 of the POCSO Act, arising out of G.R. Case No. 3297

of 2017)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Md. Nabi Sah

Son of Hafiz Sah,

Resident of No-1, Dolabari, Police Station – Tezpur, Dist:- Sonitpur, Assam

Date of framing Charge :- 21/09/2017

Date of Recording Evidence :- 16/11/2017, 07/02/2018 &

19/02/2018

Date of examination of accused u/s

313 Cr.P.C

19/02/2018

Date of Argument :- 20/02/2018

Date of Judgment :- 22/02/2018.

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. F. Jaman, Ld. Advocate.

JUDGMENT

1. In this case accused Md. Nabi Sah is put for trial for allegation of charge under Section 448/354 of IPC r/w section 8 of the POCSO Act, 2012.

- 2. The prosecution case according to the FIR in brief is that the informant resides along with her family at No-1, Dolabari of Gutlong village under Tezpur PS in the land on one Moina Mahajan. On 20.08.2017 taking advantaged of absence of the informant and the other family members, the accused trespassed into their house, closed the door from inside and attempt to commit rape on the informant's 13 years old minor daughter and while the said daughter raised alarm the accused fled away from there. It has been also stated by the informant that the accused has threatened her while the informant informed the matter to the villagers and therefore, it becomes delay in lodging the FIR. Hence, the prosecution case. The FIR was filed by one Must Jomila Begum before the O/C Tezpur Police Station on 25.08.2017.
- On receipt of the aforementioned FIR, the Officer-In-Charge of Tezpur Police Station registered a case being Tezpur P.S. Case No 1726/17, under section 448/506 of IPC r/w section 4 of the POCSO Act, 2012 and endorsed S.I. Malindra Kumar Borah to investigate the case. After completion of usual investigation, the O/C Tezpur Police Station sent up the accused for trial by filing charge sheet u/s 448/506 of IPC r/w section 4 of the POCSO Act against the accused Md. Nabi Sah.
- **4.** On being appeared the accused before this Court, after hearing both parties, my learned predecessor-in-court framed charge under section 448/354 of IPC r/w section 8 of the POCSO Act, 2012 against the accused and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- To substantiate the case prosecution examined as many as seven numbers of witnesses. 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. To buttress the defence, the accused declined to give defence evidence.
- **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 on or about 6:30 PM of 20.08.2017 at Gotlung under Tezpur PS, committed criminal trespass by entering into the house of the informant Jamila Begum and thereby committed an offence punishable under section 448 of IPC?
 - (2) "Whether the accused on the same date, time and place, assaulted Miss "X", 13 years of age (or used criminal force to a woman, intending to outrage) (or knowing it to be likely that you would thereby outrage the modesty of the said Miss "X") and thereby committed an offence punishable under section 354 of IPC?
 - (3) "Whether the accused on the same date, time and place had committed penetrative sexual assault on the victim Miss "X" (13 years) and thereby committed an offence punishable under section 8 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.
- 9. **PW 1, Must Jamila Begum,** who is the mother of Miss "X" has stated that she knows the accused person and the incident took place about 2 ½ months ago. She stated that at the time of incident, her victim daughter was only about 13 years old. On the date of the alleged incident, leaving her victim daughter in her home, she along with her three daughters went to her parental home to consult a doctor at Balipara. On that day, her husband Unus Ali and her victim daughter Miss "X" was at home. She returned back at the evening time at

about 7 PM and on their arrival at home at 7 PM, her victim daughter told her that while her father went out to market at about 5:30 PM, accused, who is her relative brother-in-law came to their house. During that time her victim daughter Miss "X" was sleeping in bed playing mobile. Thereafter, accused grabbed her breast and attempted to open her pant, then, she resisted him by kicking him and raised alarm and thereafter, accused fled away from there. She also stated that her victim daughter also reported the matter to her father while her father arrived at home. Therefore, they have discussed the matter with their relatives and after 2/3 days, she has filed the ejahar. She has requested one scribe to write the ejahar. According to her dictation, the scribe has written the ejahar. After writing the ejahar, the scribe has read over the ejahar and on acceptance, she put her thumb impression thereon.

- 10. In her cross examination, she admitted that she cannot re-call the exact date of occurrence. On the date of the incident at morning, she went to her parental home and in the evening time at about 7 PM she reached at her home. She stated that there is a small road in between her house and accused's house. They have visiting terms. She has quite often taken some money from accused being her brother-in-law.
- 11. PW 2, Md. Unus Ali, father of the victim has stated in his evidence-inchief that accused is his cousin. The incident took place about 2 ½ months ago. On the date of the alleged incident, his wife went to Balipara to a consult doctor by taking other three daughters leaving the victim girl alone in the house. He stated that at about 4:30 PM, he went out to Centre for marketing and returned at about 6:30 to 7 PM. Thereafter, his victim daughter reported him that accused came to their house while she was playing mobile in the bed. Accused dragged by holding her hand and lying on the bed and attempted to open her clothes. His victim daughter narrated the whole story to her mother in detail. While she raised alarm, accused fled away from there. He stated that at the relevant time, his daughter was about 13 years old and studied at Class-VII. Accused being his relative, so, they called him and thereafter, his wife filed the case lately.

- 12. Though, he has been exposed to long cross-examination except giving many suggestions, the evidence as to on the date of the alleged incident on the date of the alleged incident, his wife went to Balipara to consult a doctor by taking other three daughters leaving the victim girl alone in the house. At about 6:30 to 7 PM, he returned from the centre and came to know from his daughter that accused came to their house while she was playing mobile in the bed. Accused dragged by holding her hand and lying on the bed and attempted to open her clothes. His victim daughter narrated the whole story to her mother in detail. While she raised alarm, accused fled away has remained unchallenged.
- **13. PW 3, Md. Nurul Amin** stated before this court that the accused is his next door neighbour. He knows the complainant of this case. He belongs to his sane village. The incident took place about 2 ½ months ago. Father of the victim, as neighbour, went to his house and reported him that accused entered into their home while the victim was alone and forcefully dragged her.
- 14. Though, he has been exposed to long cross-examination except giving many suggestions, the evidence as to he admitted that father of the victim, as neighbour, reported him that accused entered into their house while the victim was alone and forcefully dragged her has remained unchallenged.
- 15. PW 4, Miss "X" victim of this case stated before this court that accused is her related uncle. They did not have any quarrelled with the accused. The incident took place about 2 ½ months back at about 6 PM on Sunday. She stated that on the previous day of the incident her mother, two younger sisters and one elder sister went to Balipara to their matrimonial uncle's house. Therefore, at the relevant time her mother was not there. Though, her father was at home, he went to market. During that time while she was sleeping playing with mobile, accused came to her home and asked for some tobacco. Then she replied to accused that there is no tobacco available in their house. Thereafter, accused sitted at the side of her and also watching mobile with her. During that time she woke up from her bed then accused grabbed her breast. Though, she tried to woke up but the accused forcefully dragged her to the bed and attempted to open her cloths, out of fear she raised alarm and kicked him, thereafter, accused fled away from there. She stated that accused came to

commit misdeeds to her. On arrival of her mother she reported the same to her mother. After 2/3 days of the institutions of this instant case she made statement before the Ld. Magistrate. Ext 1 is her statement u/s 164 CrPC made before the Ld. Magistrate and Ext 1 (1-2) is signatures therein.

- Though, she has been exposed to long cross-examination except giving many suggestions, the evidence as to at the relevant time while her parents were not there at home, she was watching mobile then the accused came to her home and wants some tobacco. Thereafter, she stated there were no tobaccos available in their house then the accused sitted in the bed where she was watching mobile. The accused also see the mobile and when she was got up from the bed accused touched her breast and forcefully took her to the bed and tried to put off her clothes, out of fear she raised alarm and kicked the accused has remained unchallenged.
- 17. PW 5, Must Amina Khatoon, who turned hostile stated before this court that she knows the accused standing in the dock, his house is situated at a difference of 2-3 houses of her house. She also knows the informant of this case and her house is around 200 meter away from her house. She stated that the mother of the victim informed her that accused had taken money from her. She knows nothing about the incident. Police recorded her statement. Thereafter, she was turned hostile.
- **18. PW 6**, **SI Molindra Kumar Borah**, who is the I/O of this case has stated that on 25.08.2017 he was posted at Mahabhoirab OP as In-charge of Mahabhoirab OP and on that day one Jamila Begum filed an ejahar before the Tezpur PS, which was registered as Tezpur PS Case No. 1726/17 u/s 448/506 r/w section 4 of POCSO Act and accordingly, O/C Tezpur PS Mr. Ranjit Saikia endorsed him for investigation. In the FIR lodged by the complainant, the complainant put thumb impression thereon. Ext 2 is the ejahar and Ext 2 (1) is the note with signature of O/C, Tezpur PS. On being taken the charge of investigation, he has visited the place f occurrence and prepared sketch map. Ext 3 is the sketch map wherein he put his signature as Ext 3 (1). He stated that he has also examined the victim and sent her for medical examination and then also sent to the Court for recording her statement under section 164 CrPC. He also

recorded the statement of the other witnesses. Thereafter, he arrested the accused and forwarded him to the Court. After completion of usual investigation, finding sufficient materials, he has filed charge sheet against the accused person under section 448/506 of IPC r/w section 4 of POCSO Act. Ext 4 is the charge sheet and Ext 4 (1) is his signature. Though, he has sent the victim for medical examination, but, the victim did not consent and allow doctor for examination. Ext 5 is the prayer for medical examination and Ext 5 (1) is his signature.

He has recorded the statement of Amina Khatoon, who stated before him that "Unus Ali resides near their house. On or about 6:30 PM of 20.08.2017 she was at home and on that day, wife of the said Unus Ali namely Jamila Begum was absent in their house since morning. In the evening time her husband was also went to the market and during that time their 13 years old minor daughter was only there. Taking advantage of the absence of the other family members, accused trespassed into their house and committed misdeeds to the said minor girl by threatening her to open the clothes. When the girl raised alarm the accused returned from there. The accused is a stupid person. He was involved in such incident in earlier also. Ext 6 is the case diary of Tezpur PS Case No. 1726/17 (GR Case No. 3297/17) and Ext 6 (1) is the relevant portion of the statement of Amina Khatoon and Ext 6 (2) is his signature.

- 19. In his cross examination, he admitted that at the relevant time there was no woman SI posted in Tezpur PS. In Ext 3 the sketch map which he prepared he has mentioned the house of Innas Ali, Samir Das, Firoj Ali and Babul Ali near the place of occurrence. He has recorded the statement of the victim at the police station. He has also recorded the other witnesses at the place of occurrence.
- **20. PW 7, Smt. Achma Rahman** is the Addl. Chief Judicial Magistrate, Tezpur stated that on 26.08.2017 she was posted as a SDJM(S), Tezpur. On that day, in reference to Tezpur PS Case No. 1726 of 2017 u/s 448/506 of IPC r/w 4 of POCSO Act, she has recorded the statement of one Nazima Begum, daughter of Md. Unus Ali of village Gotlung under Tezpur PS in her chamber. At the time of recording of the statement, other than she and the said witness, none was present there. The witness made statement voluntarily. After recording her

statement, she has read over the contents of the statement and on acceptance, the said victim put her signature thereon. The victim was escorted and identified by one Home Guard Purnima Boro. Ext 1 is the statement of the victim u/s 164 of CrPC and Ext 1 (3) is the signature of PW 7. Ext 7 is the relevant order dated 26.08.2017 for recording the statement u/s 164 CrPC passed by herself and Ext 7 (1) is her signature. Her cross examination was declined by the defence side.

- **21.** 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.
- 22. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. *Firstly,* the sole evidence of the victim cannot be relied on as her statement made before the court is not tallied with the statement recorded u/s 164 Cr.P.C, particularly as to allegation of touching her breast. *Secondly,* there are many contradictions in the statements of the witnesses. *Thirdly,* there is a wide difference of her statement made before the Court under section 164 CrPC and her statement made under section 161 CrPC.

To fortify his argument learned counsel for the accused submitted the following case laws: "Atul Baishya -vs- State of Assam & Anr reported in 2017 (2) GLT 844".

23. On the other hand, Learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt. Hence, the accused person is required to be convicted under the charged sections of law. Ld. Special Public Prosecutor also submitted that in fact there is no any quarrel, no any enmity between the accused and the complainant. Even if there is any short of strangulation between the accused and the complainant, it would not be extracted from the complainant involved in her own minor daughter is such a hat rate cases. Ld. Special Public Prosecutor again submitted that PW 1 and PW 2 are the mother and the father of the victim, therefore, question may arise as to their interestedness to succeed the case. To rely the interested witnesses in convicting the accused, Ld. Special Public Prosecutor submitted the case of Gali Venkataiah Vs. State of Andhra Pradesh reported in 2008

- **Crl.L.J. 690.** In regard to minor discrepancies, Learned Special PP also submitted the case law of **State of UP V. Krishna Master & ors** reported in **2010 Crl.L.J.3889.**
- **24.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **25.** I have thoroughly perused the case laws cited by the learned Senior Counsel for the accused.
- **26.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is no eye witness to the incident, but after the incident, the victim informed about the incident to her mother and later on her mother informed the matter to her father which are corroborated.

According to PW 1, the mother of the victim, she knows the accused. At the time of incident, her victim daughter was 13 years of age. She left her victim daughter in her house. She along with her three daughters went to her parental house to consult a doctor at Balipara. On that day, her husband Unus Ali and her victim daughter Miss "X" was at home. She returned back at the evening time at about 7 PM and on their arrival at home at 7 PM, her victim daughter told her that while her father went out to market at about 5:30 PM, accused, who is her relative brother-in-law came to their house, while the victim was sleeping in bed playing mobile. Thereafter, accused grabbed her breast and attempted to open her pant, then, she resisted him by kicking him and raised alarm and thereafter, accused fled away from there. Thereafter, they had discussed the matter with her relatives and after 2/3 days, she has requested one scribe to write the ejahar. According to her dictation, the scribe has written the ejahar. After writing the ejahar, the scribe has read over the ejahar and on acceptance, she put her thumb impression thereon.

PW 2, the father of the victim also stated the same. He stated that on the date of the alleged incident, his wife went to Balipara to a consult doctor by taking other three daughters leaving the victim girl alone in the house. At about 4:30 PM, he went out to Centre for marketing and returned at about 6:30 to 7 PM. Thereafter, his victim daughter reported him that accused came to their house

while she was playing mobile in the bed. Accused dragged by holding her hand and lying on the bed and attempted to open her clothes. His victim daughter narrated the whole story to her mother in detail. While she raised alarm, accused fled away from there. He stated that at the relevant time, his daughter was playing with mobile and her accused uncle came and asked for tobacco, while she replied to him that there is no tobacco available in their house then the accused sitted in the bed and also watching the mobile. During that time she woke up from her bed then accused grabbed her breast. Though, she tried to woke up but the accused forcefully dragged her to the bed and attempted to open her cloths, out of fear she raised alarm and kicked him, thereafter, accused fled away from there. She stated that accused came to commit misdeeds to her.

Though all the aforesaid witnesses PW 1 and 2 were exposed to long cross-examination but the evidence as to the victim on the day of incident she was watching mobile then the accused came to their house and asked for tobacco and she told him that there is no available of tobacco the accused sitted at the side of the victim at the bed and also watching the mobile. While she woke up from her bed then accused grabbed her breast, forcefully dragged her to the bed and attempted to open her cloths has remained unchallenged.

- **27.** The Learned counsel for the accused submitted that the prosecution has failed to prove the age of the victim as they have not been seized any school certificate or date of Birth certificate of victim to ascertain the age. Therefore, the case cannot be stated to be fallen under POCSO Act.
- **28.** It is true that in the present case there is no document like Birth certificate or age certificate or any certificate issued by the School authority where the victim first studied or any certificate issued by local Panchayat etc. to prove the victim that she was 13 years at the time of incident. But she has not been medically examined neither done the ossification test. That has not been challenged by the defence at any point of time in any of the cross examination of any of the witnesses. Therefore, it can safely be held that the victim was a minor.
- 29. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD)**, it was held that it is true that

primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

- **30.** In this case, the victim and her parents categorically stated the age of the victim as 13 years from the very beginning of the case, at the time of commission of offence, besides during cross examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs 1, 2 and 4 in respect of age of the victim remains unchallenged.
- 31. In this case, the victim has been consistent on the material particulars with regard to the incident that on the day of incident, while she was alone in her house playing mobile, accused trespassed into their house asking for tobacco and while the victim stated that there is no available of any tobacco accused sitted at the side of the victim in the bed and also watching the mobile with her. While she woke up from her bed then accused grabbed her breast, forcefully dragged her to the bed and attempted to open her cloths. The victim also made such statement before the learned Magistrate u/s 164 Cr.P.C. which was confirmed by learned Magistrate (PW 7). She has also made such statement before the I.O. while her statement was recorded u/s 161 Cr.P.C. Though the victim has been vigorously cross-examined by the learned counsel for the accused but the evidence as to while she was watching mobile in absence of her parents accused trespassed into their house asking for a tobacco then she replied to accused that there is no available for tobacco then the accused sitted in the bed and tried to fell down in the said bed, and attempted to open her cloths and also tried to commit misdeeds to her has remained unchallenged. There is nothing in the evidence of the PWs that the accused had any enmity or quarrel with the complainant to file the case falsely against the accused. Therefore, defence of false allegation is not made out.

- 32. The Hon'ble Supreme Court in **State of Rajasthan Vs. Babu Muna** (2013) 4 SCC 206, has observed as under :-
 - **"9.** We do not have any slightest hesitation in accepting the broad submission of Mr. Jain that the conviction be based on the sole testimony of the prosecutrix, it found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be clarified into three categories, namely, (i) wholly reliable, (ii) whole unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of single witness, the conviction can be found without corroboration. This principle applies with greater in terms in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of single witness but the court has no option to acquit the accused."
- **33.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **34.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
 - "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.
- **35.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:

- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- **36.** According Similarly whenever any law prescribes that the Court shall presume the existence of culpable mandatory state or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. Certainly, it does not discharge the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume". Thus, as per Section 29, if a person is prosecuted for committing or abating or attempting to commit any offence u/s.3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abated or attempted to commit the said offence as the case may be unless the contrary is proved. However, in the present case, the accused has completely failed in discharging his burden even by preponderance of probabilities much less beyond reasonable doubt.
- Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? Such issue was dealt by the Hon'ble Apex Court in **Virendra Vs State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that who may testify – all persons shall be competent to testify unless the Court considers that they are prevented

from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

- **38.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- **39. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341,** it was held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.
- **40.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.
- **41**. In the present case, at the time of examination of the victim, some questions were put to her and she replied the same without any hesitation and this Court hold that the victim was able to give rational answers and thereafter her statement was recorded on oath. Apart from that, other witnesses including

the parents of the victim i.e. PW 1 and 2 also supported the evidence of PW 4 (victim). As submitted by the Ld. Counsel for the accused that it is a fact that in the statement of the victim recorded u/s 164 CrPC, she did not state that accused at the relevant time grabbed her breast but other than that the statement of accused dragged the victim to the bed and tried to open her clothes has remained unchallenged. Therefore, the aforesaid statements are nothing but a minor contradiction even after ignoring that contradiction but the other statement attracted the ingredients of under section 18 of the POCSO Act.

- **42.** On appreciation of the evidence given by the victim, her parents and other independent witnesses, I find that the accused attempted to sexual assault on the victim. As it appears from the statement of the victim and other witnesses that accused at the relevant time entered into the house of the complainant, dragged the victim to the bed while the victim woke up the accused attempted to open her clothes with intent to attempts sexual assault. So, the offence of sexual assault is not completed but the accused attempted to cause sexual assault.
- **43**. In regard to the age of the victim, it appears that though all the witnesses stated that the victim was 13 (Thirteen) years. Therefore, committing any sexual offence against that girl of 13 years is well within the come under the offence of POCSO Act.
- **44.** Considering that aspect, the offence of the accused cannot be stated to be attempted to commit aggravated sexual assault but attempt to commit sexual assault. Therefore, accused Md. Nabi Sah is convicted u/s 18 of the POCSO Act.
- **45.** The accused is heard on the point of sentence where he praying for leniency stating that he is the only bread earner of his family consisted of his mother.
- **46.** I have heard learned counsel for the accused as well as learned Public Prosecutor, Sonitpur.
- **47.** Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The

aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 26 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.18 of POCSO Act a punishment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

ORDER

- 48. I convict the accused Md. Nabi Sah u/s. 18 of POCSO Act and sentence him to Simple Imprisonment for Fifteen days and to pay a fine of Rs. 5,000/-(Rupees Five thousand only) in default Simple Imprisonment for another 30 days. It appears from the record that the accused has been in custody from 26.08.2017 to 21.09.2017. Therefore, the period in which the accused detained in custody shall be set off from the period imprisonment imposed upon him.
- **49.** As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs. 10,000/-(Rupees Ten thousand) only is awarded as compensation.
- **50.** The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the mother of the victim after proper enquiry.
- **51.** Let a copy of the Judgment be sent to the Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur for necessary action.
- **52.** A copy of this judgment be furnished to the accused free of cost immediately.

- **53.** Let another copy of Judgment be sent to learned District Magistrate, Sonitpur, Tezpur, u/s 365 of Cr.P.C.
- **54.** Let the G.R Case No. 3297/2017 be sent to Ld. committal Court along with a copy of Judgment.

Given under my Hand and Seal of this Court on this the 22nd day of February, 2018.

(Ashok Kumar Borah)

SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictated and corrected by me

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

Dictation taken and transcribed by me:

Sri Janmoni Deka, Steno

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APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Must Jamila Begum, Informant

2. Prosecution Witness No.2 Md. Unus Ali :-Md. Nurul Amin 3. Prosecution Witness No.3 :-4. Prosecution Witness No.4 Miss "X", Victim :-5. **Prosecution Witness No.5** Must Amina Khatoon :-

6. Prosecution Witness No.6 :- SI Molindra Kumar Borah, I/O

7. Prosecution Witness No.7 :- Smt. Achma Rahman, Addl. C.J.M,

Tezpur

EXHIBITS.

Exhibit 1 :- Statement of the victim Miss "X" U/s 164 CrPC

Exhibit 2 :- FIR

Exhibit 3 :- Sketch Map

Exhibit 4 :- Charge Sheet

Exhibit 5 :- Prayer for Medical Examination

Exhibit 6 :- Case Diary of Tezpur PS Case No. 1726/17

(GR Case No. 3297/17)

Exhibit 6(1) :- Statement of witness Amina Khatoon

Exhibit 7 :- Order of Ld. Magistrate Smt. Achma Rahman,

Material Exhibit.

1. NIL

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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