

IN THE COURT OF THE SPECIAL JUDGE :::::::

CHIRANG, KAJALGAON.

Special (P) Case No. 05(RKT)/2019

U/S 6 of POCSO Act

State of Assam Vs. Md. Julmot Ali @ JumudAccused

PRESENT:

Shri D.J. Mahanta, Special Judge, Chirang, Kajalgaon

ADVOCATES APPEARED:

For the State

: Shri D. Das, Ld. Public Prosecutor

For the accused

: Md. S. Alam, Ld. Advocate

Date of Evidence

: 09.05.19, 23.05.19,

01.07.19, 31.07.19,

24.09.19

Date of Argument : 03.12.2019

Date of Judgment : 17.12.2019

<u>JUDGMENT</u>

Special Judge Chirang, Kajalgaon The prosecution case as revealed during trial in brief is that on 06.12.2018, an FIR was lodged before the I/C, Bengtol Police Out Post alleging that accused Julmot Ali @ Jumud, seducing minor daughter of the informant Miss 'X' (name is withheld), 15 years, had been committing illicit sexual intercourse with her since 3/4 months back and on 04.12.2018, the accused person gave two tablets to the victim and when the victim consumed the said tablets, bleeding started from her private part and her condition became serious. It was alleged that the accused administered the said tablet to the victim for aborting her pregnancy.

2. After receiving the FIR, the I/C, Bengtol Police Out Post made GDE No. 101, dated 06.11.2018 and forwarded the same to the O/C, Runikhata P.S. for registering a case. Accordingly, the O/C of Runikhata P.S. registered a case being numbered as Runikhata P.S. Case No. 60/18 U/S 376(2)(i) IPC R/W Section 6 of POCSO Act and entrusted SI Lakshman Kr. Das for investigation of the case. Accordingly, the Investigating Officer arrested the accused, visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C and collected the medical report. He also arrested the accused. After completion of investigation, he submitted formal charge-sheet against the accused Julmot Ali @ Jumud U/S 376(2)(i)/313 IPC R/W Section 6 of POCSO Act. After receiving charge sheet, copies of relevant documents were furnished to the accused person. Accused person was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge U/S 6 of POCSO Act was framed against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. During trial, accused person was released on bail as per order of Hon'ble High Court.

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3. In support of the case prosecution side examined as many as 9 (nine) witnesses including the M.O. and I.O. One witness was examined as CW 1.

Following witnesses were examined:-

- (1) Informant as PW 1
- (2) Victim Miss 'X' (name is withheld) as PW 2
- (3) Smt. Malati Ray as PW 3
- (4) Sri Sukumar Ray as PW 4
- (5) Dr. Ranjit Kr. Pradhan (Radiologist) as PW 5
- (6) Sri Barada Prasad Brahma as PW 6
- (7) Sri Upeshor Ray as PW 7
- (8) Dr. Kukumoni Basumatary (M.O.) as PW 8
- (9) S.I. Lakshman Kumar Das (I.O.) as PW 9

(10) Sri Satyendra Nath Sarkar as CW 1

- 4. Statement of the victim recorded U/S 164 Cr.P.C. was exhibited as Ext.1. Radiological Report of the victim was exhibited as Ext.2. Admission Register of Subaijhar High School, for the year 2014/2015/2016/2017/2018 was exhibited as Ext.3. Relevant entry regarding admission of the victim to said school was exhibited as Ext. 3(1). Transfer and leaving certificate of No. 213 Choto Nilibari L.P. School was exhibited as Ext. 4. Medical Report was exhibited as Ext.5. FIR was exhibited as Ext.6. Seizure list was exhibited as Ext.7. Charge-sheet was exhibited as Ext.8. Sketch map was exhibited as Ext.9. Admission Register of No. 213 Choto Nilibari L.P. School was exhibited as Ext. 10 and relevant entry regarding admission of the victim to said school was exhibited as Ext.10(1). Certificate Book No. 1 was exhibited as Ext.11 and counter foil of the certificate issued in the name of the victim was exhibited as Ext.11(1).
- 5. Defence plea is of total denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced no evidence.
- 6. Heard argument from both sides. I have perused the entire evidence on record. I have also considered the statement of the accused recorded u/s 313 Cr.P.C as well as cited case laws.

POINT FOR CONSIDERATION:-

For the offence U/S 6 of POCSO Act

1. Whether prior to filing of FIR on 06.12.2018 for a period of 3/4 months at village Choto Nilibari under Runikhata P.S., the accused committed aggravated penetrative sexual assault upon the victim Miss 'X' (name is withheld)?

DISCUSSION, DECISION AND REASONS THEREFOR:-

8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned point.

9. PW 1 is the informant as well as mother of the victim. She deposed that the age of her daughter was 15 years and she read up to Class-VI and she left school nine months ago. Occurrence took place about 5/6 months ago. Her daughter used to go to the field for grazing cows and the accused used to sail boat in Aie River near the field. One day, she noticed that blood was oozing out from the private part of his daughter. When she asked about the reason, then her daughter reported her that accused had committed sexual intercourse with her for two days as a result of which her menstrual cycle was stopped and when she reported the matter to accused, he supplied some medicines to her and according to advice of the accused she consumed the same for which blood was oozing from her private part. She immediately reported the matter to the villagers and a village meeting was held but as matter was not settled, so she lodged the FIR. During cross-examination, she deposed that her husband took the victim to the L.P. School for admission. Victim has no birth certificate. She stated the age of her daughter on the basis of Polio Card but Polio Card was not produced before this Court or before police. Prior to the incident of bleeding, she had no knowledge about the relationship between the accused and her daughter. It was suggested that her daughter, the victim did not state before her that on the date of bleeding that the accused had committed sexual intercourse with her for two days as a result of which her menstrual cycle was stopped and when she told the fact to the accused he supplied some medicines to her and according to advice of the accused, she consumed the medicine for which blood was oozing from her private part but entire facts were denied by this witness.

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up to Class-VI and she failed in two times. She first attended Choto Nilibari L.P. School. In that school, she read up to Class-V. She further deposed that she used to visit the bank of river to handle cow and goat. Then she used to meet the accused who was riding boat at Aie River. As a result, love affairs developed between her and accused. About 8/9 months ago from her date of deposition, the accused forcefully committed sexual intercourse with her. She further deposed that accused had pressed her during the time of sexual intercourse. He committed sexual intercourse with her for two times. As there was love affair between her and accused, she did not divulge the fact to

anybody else. After 4/5 days from the last sexual intercourse, the accused supplied three numbers of tablets. She consumed one tablet and two tablets were inserted to her vagina. As a result, bleeding took place. At that moment, the matter was known by her family members. She first reported the matter to her aunt who reported the matter to her mother. Then she stated about the incident to her mother. According to her, at that time, her age was 15 years. She heard about her age from her mother.

During cross-examination, she deposed that she developed love affairs with accused 7/8 months ago from the incident. As there was love affair for which she did not inform about their physical relationship to her uncle whose shop was situated near the bank of river. She further deposed that she reported the incident when bleeding was occurred and seen by her family members. Another point revealed from her cross-examination is that she told her date of birth before the L.P. School authority as stated by her mother. She further deposed that she told before the Magistrate that she had failed in Class-III and V. All total, she failed for two times. One omission pointed out by the learned counsel for the accused to this witness is that she did not state before the I.O. that accused person had pressed her which was also confirmed by the I.O Learned defence counsel gave suggestion to this witness during cross-examination that at the time of occurrence, her age was above 18 years but same was denied by this witness. The learned defence counsel totally denied the allegation of sexual intercourse as committed by the accused but said suggestion was also denied by this witness. In reply to a question put by the Court, she deposed that her menstrual cycle first started one year ago. Another point raised by learned defence counsel during crossexamination is that the date of birth was not stated to her by her mother prior to her admission to L.P. School, but same was also denied by this witness.

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After going through the entire evidence of PW 2, it is found that there was love affair between her and accused but her age was below 18 years. Though she stated that date of birth was told to her by her mother, but this fact was not supported by her mother. According to her, at the time of occurrence, age of the victim was below 15 years. Her mother did not mention

specifically about the date of birth of the victim during her deposition before this Court.

- 11. PW 3 deposed that occurrence took place about 5/6 months ago. After hearing the facts that bleeding was occurred from the private part of the victim, she went to their home and saw the bleeding. The victim told the villagers that accused supplied medicine and she consumed the same as a result bleeding was occurred. Victim told them that accused made her pregnant. According to PW 3 victim was born in the year 2003. During cross, she deposed that victim was born in the year 2003 and her date of birth was 20.01.2003. He admitted that the victim did not state anything personally to her but she heard when the victim told the facts before the villagers in general. She denied the suggestion made by defence that she falsely stated that victim was born in the year 2003.
- 12. PW 4 is the uncle of the victim, who deposed that occurrence took place about 6/7 months ago. At that time, he was not in his home. After returning from his duty, he heard from one Pratul Ray that present accused had committed sexual intercourse with his niece. Then he went to the house victim. When the villagers asked his niece about the reason of bleeding, then she told them that accused had committed sexual intercourse with her and she told them that he gave some medicines. After that, his niece took the medicine for which bleeding was occurred. At the time of occurrence, age of the about 14 years. During the I.O. that when the villagers asked his niece about the reason of bleeding, then she told them that accused had committed sexual intercourse with her and after that he gave some medicines and after that, his niece took the medicine for which bleeding was occurred but he denied the same.
 - PW 5 Dr. Ranjit Kr. Pradhan, the Consultant Radiologist, Lower 13. Assam Hospital & Research Centre, Bongaigaon deposed that on 07.12.2018, he was working as Consultant Radiologist, Lower Assam Hospital & Research Centre, Bongaigaon. On that day, on referred by Dr. Kukumoni Basumatary,

he examined Miss 'X' (name is withheld), aged about 15 years. He has done the ossification test of victim. On examination, he found the following:-

X-ray:-

Right wrist – Epiphysis of lower end of radius and ulna are in stage of fusion. Epiphysis (base) of 1st metacarpal is recently fused.

Right elbow – All epiphysis of lower end of humerus are fused. Epiphysis of radial head and proximal ulna are fused.

Pelvis - Epiphysis of femoral head and greater & lesser trochanters are fused.

Epiphysis of ischeal tuberosities are appeared but not fused.

Epiphysis of iliac crest are not fused.

According to Radiologist, as per radiological examination, the age of the individual is above 16 years but below 18 years. During cross, it was suggested that according to analysis done by him and according to medical jurisprudence, the age of the victim should be above 18 years but he

- denied the suggestion.
- 14. PW 6 Shri Barada Prasad Brahma, the Head Master of Subaiihar High School deposed that according to Admission Register, on 04.01.2018, victim took admission in Class-VI. Her date of birth was mentioned as 12.11.2007 which was found from the transfer and leaving certificate issued by Headmaster of No. 213 Choto Nilibari L.P. School. The victim was taken by her mother to their school for her admission. He exhibited the relevant entry regarding admission of the victim in their school.
- 15. PW 7 deposed that occurrence took place about 5/6 months ago. After hearing from the villagers regarding bleeding from the private part of the victim, he went to the house of the victim and saw that victim was sleeping in her home. The victim reported him that accused had committed

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sexual intercourse with her. During cross, he deposed that victim did not state about the entire incident.

16. PW 8 is the Medical Officer, who examined the victim. She deposed that on 12.12.18, she was working as Medical & Health Officer-1 at JSB Civil Hospital, Kajalgaon. On that day, she examined the victim in connection with Runikhata P.S. Case No. 60/18 U/S 376(2)(i)/313 IPC R/W Section 6 of POCSO Act identified and brought by WPC/122 Bishmita Boro and mother of the victim.

There was history of sexual assault in village Choto Nilibari since 4 months. History of amenorrhea. History of intake of abortificient followed by bleeding P/V since 04.12.18 (approximately).

On examination, she found the following:-

Physical examination:-

(i) Height - 149 cm. (ii) Weight - 40 kg. (iii) Chest girth (at nipple line) - 81 cm. (iv) Abdomen girth (at umbilicus) - 68 cm. (v) Teeth - 7/, 7/7 (Total - 28 Nos.)

Scalp hairs - Present.

Axillary hairs - Present.

Pubic hairs - Present.

Beards, moustaches and body hairs – Absent.

Breasts - developed.

History of puberty -

Menarche - 2 years back.

Menstrual cycle - regular.

L.P.M. - Sept/Oct (Not confirmed).

Genital examination -

Genital organs – No abnormality detected.

Vulva – No laceration or tear seen. No active bleeding seen.

Hymen - ruptured.

Vagina - No abnormality detected.

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 $\mbox{Cervix - Soft, internal os dilated (1 cm), blood clots not seen.} \label{eq:cervix}$ No active bleeding seen.

Uterus - Not palpable.

Evidence of venereal diseases - absent.

No injury found on her body or private parts.

Vaginal swab test for spermatozoa – not seen.

General mental condition -

- (a) Co-operation and behavior Co-operative, conscious and well oriented.
- (b) Intelligence and memory Intact.
- (c) Gait Normal.

X-ray for age determination:-

Right elbow – All epiphysis of lower end of humerus are fused. Epiphysis of radial head and proximal ulna are fused.

<u>Pelvis</u> – Epiphysis of femoral head and greater & lesser trochanter are fused. Epiphysis of ischeal tuberosities are appeared but not fused. Epiphysis of iliac crest are not fused.

As per radiological examination, the age of the individual is above 16 years and below 18 years.

USG pelvis – Uterus – Bulky in size. Endometrium is thickened. No evidence of focal lesion.

Ovaries - Normal in size.

Pregnancy test - Positive.

Vaginal swab test for spermatozoa – not seen.

According to Medical Officer, the age of the individual is above 16 years and below 18 years. Pregnancy test is positive. No injury marks seen

As per radiological e above 16 years and below 18 years.

USG pelvis – Uterus – No evidence of focal lesion.

on body. Hymen ruptured with bleeding PV chance of sexual intercourse. From the above points, there is chance of sexual assault.

When Doctor was asked how he she found pregnancy test positive ,then she has stated that after abortion, the level of HCG hormone is found to be positive for above two weeks and therefore, pregnancy test was medically considered as positive. After genital examination, she found internal OS as dilated which means there was pregnancy. During cross, it was suggested that the explanation already given to the Court by her was not based on medical science but she denied the same. She further stated that in other grounds also, internal OS can be dilated in case of major woman but it is not applicable in case of minor.

17. PW 9 is the I.O., who deposed that on 06.12.2018, he was serving as I/C of Bengtol Police Out Post under Runikhata P.S. On that day, one Smt. Rani Bala Ray lodged FIR before him. After getting the FIR, he made Bengtol O.P. GDE NO. 101, dated 06.12.2018 and forwarded the same to Runikhata P.S. for registration. On the basis of said GD Entry, he started investigation and recorded the statement of victim. The O.C. Runikhata P.S. registered a case being numbered as Runikhata P.S. Case No. 60/18 U/S 376(2)(ii)/313 IPC R/W Section 6 of POCSO Act and entrusted him for investigation. after taking the charge of investigation, he visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim to JSB Civil Hospital, Kajalgaon on 07.12.2018 for her medical examination, sent her to the Court for recoding her statement U/S 164 CrPC, seized the school certificate of the victim from the Head Master of Subaijhar High School, arrested the accused and collected the medical report. After completion of investigation, he submitted charge-sheet for the offence U/S 376(2)(i)/313 IPC R/W Section 6 of POCSO Act against the accused Julmot Ali @ Jumud. He proved the FIR filed by the informant as Ext.6, seizure list as Ext.7, charge-sheet as Ext.8 and sketch map as Ext.9. During cross, he deposed that in FIR, no specific date was mentioned regarding alleged sexual intercourse by the accused upon the victim and victim did not point out the place where alleged sexual intercourse took place.

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- 18. The Head Master of No. 213 Choto Nilibari L.P. School was examined as CW 1. He deposed that in the year 2012, he was transferred from Monglagaon K.C. Ray L.P. School to No. 213 Choto Nilibari L.P. School as Assistant Teacher. He brought the Admission Register w.e.f. 05.02.2004 to 10.01.2019 and Counter Foil of Certificate Book w.e.f. 31.12.2016 to 28.12.2018. The victim got admitted on 03.02.2012 in Class-I in their school. According to Admission Register, her date of birth is 12.11.2007. On the basis of Admission Register, on 22.12.2017, the then Headmaster of their L.P. School, Sri Pradip Kr. Kujur issued Transfer/Leaving Certificate vide Sl. No. 30 of Book No. 1 (Ext.4). In said certificate, date of birth was written as 12.11.2007. He exhibited the Admission Register as Ext.10 and the relevant entry regarding admission of the victim as Ext. 10(1). He proved the Book No. 1 as Ext.11 and the Counter Foil Certificate issued in the name of victim as Ext. 11(1).
- 19. The defence version is that accused did not commit any sexual intercourse and there was love affair between the accused and victim. The further point taken by defence is that at the time of occurrence, age of the victim was above 18 years but during examination U/S 313 Cr.P.C, accused admitted that age of the victim was below 18 years.
- 20. On the other hand, learned P.P. has submitted that the accused committed sexual intercourse upon the victim and made her pregnant as stated by PW 2, the victim. Medical evidence also corroborated the pregnancy. So, according to Ld. P.P. sexual intercourse by accused and pregnancy was proved during trial. It was also proved from evidence on record that at the time of occurrence, victim was minor. The Head Master of No. 213 Choto Nilibari L.P. School, who was examined as CW 1 clearly stated that according to Admission Register, the date of birth of victim was 12.11.2007. Hence, at the time of occurrence i.e. 3/4 months prior to filing of FIR on 06.12.2018 the victim was minor and accused had committed sexual intercourse on her and made her pregnant as advanced by ld. P.P.
- 21. After going through the entire evidence on record as well as rival submission from both sides, I have found that in this case, the victim

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developed love affair with the accused and due to their love affair, the accused started physical relationship with the victim on the bank of Aie River. According to victim, accused had committed sexual intercourse with her for two alternate days. Though victim did not mention in her later deposition that her menstrual cycle was stopped, but it was stated by her before the Magistrate under Section 164 Cr.P.C that her menstrual cycle was stopped. According to her earlier statement before the Magistrate, accused supplied medicine because her menstrual cycle was stopped. The victim in her later deposition did not specifically mention that her menstrual cycle was stopped but she stated that accused supplied three tablets. She consumed one tablet and inserted two tablets through her private part.

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22. Learned defence counsel pointed out that above specific facts were first time uttered by the victim before this Court. According to learned defence counsel, in her earlier statement before the police as well as Magistrate, she only stated that two tablets were supplied. In my view, this discrepancy is minor in nature but it is admitted fact that due to taking of tablet, blood was oozing and then matter was divulged by the victim to her aunt first and after that, her aunt reported the incidence to the mother of the victim. Other persons noticed that blood was oozing from her private part. The I.O. also drew sketch map of the house of the victim because miscarriage was held in her own home after consuming tablet. In this regard, the I.O. did not collect any type of strip of medicine. Name of the medicine was also not ascertained by the I.O but matter was revealed from the said incident only. During her cross-examination, victim categorically stated that if miscarriage was not happened, she would not have told the matter to anybody else. Learned defence counsel pointed out that the subsequent conduct of the victim established that there was love affair and due to consent of the victim, she did not state about the alleged sexual intercourse by the accused to anybody else. Learned defence counsel though took such defence but they totally denied the allegation of sexual intercourse committed by accused. Learned Public Prosecutor also stated that after considering the entire evidence of the victim, it is revealed that to some extent, she had consent but she specifically mentioned that at the time of committing sexual intercourse by the accused, she had no consent. As she had no consent, Court shall presume

that sexual intercourse took place without her consent. In this regard, learned P.P. submits that Section '114 A' of Evidence Act has stated that in rape case under Section 376(2) IPC if sexual intercourse was proved and victim stated that she had no consent, then Court shall presume that there was no consent on the part of the victim. According to learned P.P., in present case at hand, victim stated that at the time of sexual intercourse, she had no consent. On the other hand, learned defence counsel pointed out that she did not state anything about the alleged sexual intercourse to anybody else. After that she again met the accused and both of them entered into sexual intercourse as alleged by her. She further deposed during her cross-examination that if blood was not oozing from her private part then she would not state the fact to her mother or any family members. This version of victim proved that she was consenting party at the time of alleged sexual intercourse. After going through the entire evidence of the victim, I have found that the conduct of the victim established that due to love affair, she met the accused and accused committed sexual intercourse. Now, question is whether victim was a consenting party or not. In this regard, her age will play a major role. If she was minor then her consent has no value. In this regard, prosecution exhibited the certificate of Choto Nilibari L.P. School which was proved by the issuing authority, the Headmaster. It was also compared with the Admission Register of the school which was exhibited as Ext.10. The relevant entry was also exhibited as Ext.10 (1). In this regard, learned defence counsel pointed out that Ext.10 was not signed by authorized person. No any signature of the Headmaster of the school was found in Ext.10. Moreover, the Ext. 10(1) the relevant entry was also made after using whitener. The name of mother was initially written as one Bharati Ray but said name was cut by using ink. The name of the mother of the victim is not Bharati Ray. Use of whitener in Ext.10 (1) creates doubt about the genuineness of the relevant entry Ext.10 (1). The Headmaster (CW 1) also failed to state the name of the person who inserted the relevant entry and who erased the name of earlier person and after erasing wrote the name of the victim. It is found from the evidence of the I.O. that he seized the certificate of the victim from the Headmaster of Subaijhar High School. Said Headmaster came to this Court along with certificate issued by the Headmaster of No. 213 Choto Nilibari L.P. School. The I.O. clearly

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stated that he did not visit No. 213 Choto Nilibari L.P. School. It is found from the evidence of PW 6, the Headmaster of Subaijhar High School that Transfer Certificate from No. 213 Choto Nilibari L.P. School was kept in their school. On the basis of said School Certificate, the victim was admitted in their school i.e. Subaijhar High School. According to No. 213 Choto Nilibari L.P. School Leaving Certificate, the date of birth of the victim is 12.11.2007. On the basis of said School Certificate, the Headmaster of Subaijhar High School inserted the date of birth in their Admission Register. CW 1 is the Headmaster of No. 213 Choto Nilibari L.P. School, who exhibited the School Certificate Book and Admission Register. The Certificate issued by Headmaster of No. 213 Choto Nilibari L.P. School was exhibited as Ext.4. Learned defence counsel submitted that the date of birth inserted in Ext. 10 as well as Ext.4 is not believable because the entry was doubtful because eraser/whitener was used in relevant entry i.e. Ext.10(1). As Ext.10 was not reliable and on the basis of such entry Ext.4 was issued and accordingly, her date of birth was inserted in the Admission Register of the Subaijhar High School is not believable as true date of birth of the victim.

- 23. In this regard, learned defence counsel has submitted the following case laws:
 - 1988 AIR (SC) 1796
 (Birad Mal Singhvi v. Anand Purohit)
 - Criminal Appeal No. 502 of 2019
 (Amol v. State of Maharashtra)
 - Criminal Appeal No. 68 of 2018
 (Sujoy @ Sanjay Laltu Chakravarty v. State of Maharashtra)
 - 4. Criminal Appeal No. 35 of 2017 (Anish Rai v. State of Sikkim)
- 24. In the case of **Birad Mal Singhvi v. Anand Purohit, 1988 AIR (SC) 1796**, the Hon'ble Supreme Court held that –

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"12.

...... After making the aforesaid observations the High Court held that these documents were public documents within the meaning of Section 74 of the Evidence Act and therefore there was a presumption about the correctness of the date of birth mentioned therein. The High Court was conscious of the fact that in the absence of the evidence of the person who may have given information regarding the date of birth, the entries contained in the scholar's register or certificate had no probative value as would be clear from the following observations: "It is true that it would have been better if the person who gave the information regarding the date of birth would have been examined but failure to examine such a person would not in any way affect the genuineness of the entries and also their probative value unless in comparison to these entries, any other weighty evidence having greater probative value is produced (Emphasis supplied). The entry in the scholar register may be contradicted by the birth entry or entry in the vaccination register or reliable horoscope or any other reliable or weighty oral or documentary evidence but in the absence of such contradicting weighty evidence, the entries in the scholar register and other records of the educational institution would, in my opinion, certainly enjoy such probative value".

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13.

The High Court proceeded on the assumption that if these witnesses had been examined they would not have supported the respondent. After drawing adverse inference against the appellant and placing reliance on the aforesaid documentary evidence the High Court held that Hukmi Chand and Suraj Prakash Joshi both were qualified to contest the election as they had competed 25 years of age on 1-1-1984 and the returning officer had improperly rejected their nomination papers which materially affected the result of the election. The High Court in our opinion committed serious error of law in appreciating the evidentiary value of the documentary evidence

produced by the respondents as a result of which its findings are not sustainable."

25. In said case, Hon'ble Supreme Court further held that –

"15.The High Court held that in view of the entries contained in the Exs.8, 9, 10, 11 and 12 proved by Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5, the date of birth of Hukmichand and Suraj Prakash Joshi was proved and on the assumption it held that the two candidates had attained more than 25 years of age on the date of their nomination. In our opinion the High Court committed serious error. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded."

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After going through the above case law, I have found that this case is related to an election petition under Representation of the Peoples Act, 1951 where only document was submitted to ascertain the age. No any ocular evidence or any other kind of circumstantial evidence was recorded to determine the age of the candidate. Therefore, in my view, this case is not relevant to the present case.

27. In the case of **Amol v. State of Maharashtra, Criminal Appeal No. 502 of 2019**, the Hon'ble Bombay High Court held that –

"13. Insofar as documentary evidence is concerned, the prosecution is relying on Exh.34. This document is proved by PW 6 Akash Kalamkar, a Gram Sewak. He is not the author of this document. Perusal of Exh.34 would show that the name of newly born child is corrected. Even that aspect is admitted by PW 6. Though it was expected from the prosecuting agency to offer explanation as to under what circumstances there took correction in the name, no such explanation is offered during the evidence of this prosecution witness. Further, though Exh.34 is having column of signature of a person who gave intimation about the birth, the said column is also found to be blank. In view of this, I am of the opinion that it will be hazardous to rely on this document as the last word in respect of date of birth of the victim.

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16. Evidence of the victim would show that she was a consenting party and with her consent only the sexual relations between the appellant and the victim took place resulting into delivery of male child. Since, the prosecution has not proved its case beyond reasonable doubt about the date of birth of the victim to show that the victim was below the age of extending consent, in my view, the appellant is entitled to be acquitted by quashing the judgment and order of conviction. Consequently, I pass the following order:"

......

- 28. In this case, date of birth or specific age was not stated by victim or her guardian and certificate was also not proved by issuing authority. So, fact of this case is not similar with present case at hand.
- 29. In the case of **Sujoy** @ **Sanjay Laltu Chakravarty v. State of Maharashtra, Criminal Appeal No. 68 of 2018**, Hon'ble Bombay High Court held as follows:-

"33. What would be the evidentiary value of the admission register or the transfer certificate is no more in res integra. In Birad Mal Singhvi vs. Anand Purohit, reported in AIR 1988 SC 1796, in this authoritative pronouncement of the Hon'ble Apex Court held that to render a document admissible under Section 35 of the Evidence Act, three conditions must be satisfied. Firstly, the entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating the fact in issue or relevant fact and thirdly, it must be made by a public servant in 21 APPEAL68.18.odt discharge of his official duty or any other person in performance of a duty specially enjoined by the law. An entry relating to the date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded.

Similarly, in Sushil Kumar vs. Rakesh Kumar, reported in AIR 2004 SC 230, the Hon'ble Apex Court in paragraphs 33 and 34 has stated as under and are reproduced hereinunder:

33. Under Section 35 of the Indian Evidence Act, a register maintained in terms of a statute or by a statutory authority in regular course of business would be a relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.

34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person."

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observed in preceding paragraph, is having 15 vertical columns and column no. 7 shows that the date of birth of the victim girl was initially recorded in Zilla Parishad Primary School, Wadegaon. In my view, this particular document would have been a primary document and an attempt ought to have been made by the prosecution to produce this particular document on record. Not only that, it was further obligatory on the part of the prosecution to prove that on whose statement, the date of birth of the victim was recorded as 21.5.1999 even in Zilla Parishad Primary School. The parents of the victim are blissfully silent in their evidence that while taking admission of their ward namely the victim they disclosed to the school authorities that date of birth of the victim as 21.5.1999, in absence of this material piece of evidence on record insofar as date of birth of the victim as 21.5.1999, in my view is mere a quess work.

30. In this case, Admission Register was actually exhibited. No certificate was exhibited but in our case certificate from the school first attended was exhibited and it was proved by the Headmaster of the said school. Therefore, the fact of this case is also not similar with our case.

31. In the case of **Anish Rai v. State of Sikkim, Criminal Appeal No. 35 of 2017**, Hon'ble Sikkim High Court held as follows:-

"11. Without further ado, we may also refer to the Judgment of **Birad Mal Singhvi vs. Anand Purohit**, wherein the Hon'ble Supreme Court while discussing Exhibits 8, 9, 10 and 11, entries in the scholar's register, counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of Secondary School Examination of 1977 respectively, observed as follows:

' <i>14.</i>	

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As already stated neither of the parents of the two candidates
nor any other person having special knowledge about their date
of birth was examined by the respondent to prove the date of
birth as mentioned in the aforesaid documents. Parents or near
relatives having special knowledge are the best person to
depose about the date of birth of a person. If entry regarding
date of birth in the scholars register is made on the information
given by parents or someone having special knowledge of the
fact, the same would have probative value
The date of birth mentioned in the scholar's register has no
evidentiary value unless the person who made the entry or who
gave the date of birth is examined.
Merely because the documents Exs.8, 9, 10, 11 and 12 were
proved, it does not mean that the contents of documents were
also proved. Mere proof of the documents Exs.8, 9, 10, 11 and
12 would not tantamount to proof of all the contents or the
correctness of date of birth stated in the documents.
13. 7. 44. 4
12. In Madan Mohan Singh and Others vs. Rajni Kant and
Another, the Hon'ble Supreme Court while distinguishing between
admissibility of a document and its probative value observed as follows:
"18. Therefore, a document may be admissible, but as
to whether the entry contained therein has any probative value
may still be required to be examined in the facts and
circumstances of a particular case.
19

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20. So far as the entries made in the official record by an official or person authorized in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

- 21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents.
- 22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein.

13. A careful reading of the extracts supra would clarify that a given document may be admissible under from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. In fact, the ratio supra emphasizes that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case."

In this case also, only document was considered. I also agree with the principle of admissibility as well as proving of document discussed in this case but in our case ocular evidence from competent

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person was adduced by prosecution in addition to documentary evidence. Therefore, facts are not similar with the present case.

- 32. It is further submitted by the learned defence counsel that in case of rape or any other sexual offence, age of the victim shall be determined according to Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules.
- 33. In this regard, he has submitted that according to said rule at firs court must consider the matriculation certificate of the victim. If there is no matriculation certificate court must have to consider the school certificate in which victim first attended and if no such certificate then court will have to consider her birth certificate. If prosecution failed prove any document mentioned above then only court will consider medical evidence. According to learned defence counsel in present case at hand, prosecution failed to prove the age of the victim through any one of the documents or certificates mentioned above. On the other hand, in this case medical evidence opined that age of the victim was above 16 years but below 18 years. It is settled law that in case of medical age it would vary 2 years in either side. So, considering the medical evidence it can be safely concluded that at the time of occurrence age of the victim was above 18 years.

Special Judge goon

I have also found that Hon'ble Supreme Court in the case of *Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr.*, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining —

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, he Court of the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence of whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

35. The Hon'ble Supreme Court further held in paragraph 12 of **Mahadeo S/O Kerba Maske** (supra) as under:

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."

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36. The Hon'ble Supreme Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In paragraph 13, the Hon'ble Supreme Court observed:

> "In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her V standard and in the school leaving certificate issued by the school under Exhibit 54, the date of birth has been clearly noted as 20.05.1990 and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.05.1990. the reliance placed upon the said evidence by the Courts below arrive at the stage of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of occurrence was perfectly justified and we do not find any grounds to interfere with the same."

Learned defence counsel further pointed out that the victim

In present case, mother failed to state the date of birth of the victim. On the other hand, another witness PW 3 stated that the victim was born on

20.01.2003. Therefore, the date of birth mentioned in Ext.4 is not believable.

Moreover, the person who told the date of birth of the victim to the school

authority was not examined. Mother failed to give the date of birth to the

stated that she was taken to the L.P. School by her father. Her mother did not state that she stated the Headmaster of No. 213 Choto Nilibari L.P. School that her date of birth is 12.11.2007. So, who told the date of birth of the victim to the school authority is not ascertained during the time of evidence of the prosecution. Moreover, concerned Headmaster (CW 1) also did not know who actually told the date of birth of the victim to him. On the other hand, learned P.P. stated that the victim during her evidence stated that as per version of her mother, she told her date of birth to the school authority. This fact was not stated by her mother during her evidence before this Court. Learned defence counsel, therefore, has submitted that the person who is responsible to divulge the date of birth of a minor is nothing but her parents.

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37.

school authority. So, according to learned defence counsel, the date of birth shown in the Ext.4 is false and is not believable. On the other hand, PW 3 stated another date of birth which is also not believable. According to learned defence counsel, age of the victim was above 18 years at the time of incidence and due to love affairs she gave consent. So, she was a consenting party as revealed from her evidence. If a major girl gives consent, then it cannot be treated as an offence under IPC. So, minority of the victim was not proved by the prosecution through cogent evidence. Therefore, according to learned defence counsel, prosecution failed to establish the case under Section 6 of POCSO Act before this Court.

According to learned P.P., prosecution proved the birth certificate by examining the school authority and Ext.10 was prepared several years prior to the incident and Ext.4 was issued several years prior to the incident which was kept in Subaijhar High School. Therefore, there was no doubt about the use of whitener on Ext. 10(1) the relevant entry of the victim in its School Admission Register. According to learned P.P., forgery of relevant entry cannot be presumed merely on the basis of some whiter used by the authority. Though it was stated by the CW 1 that in no other places whitener was used but after careful scrutiny of the Ext.10, I have found that school authority used whitener in different places and in different entries, particularly in Serial No. and in some cases, name was written after using whitener. Therefore, it was their negligence regarding maintenance of record. This negligence will not affect the case at hand.

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39. In **Criminal Appeal No.(s)** 2229/2011 delivered on 29.08.2018 in case of *State of Madhya Pradesh vs. Preetam*, the Hon'ble Supreme Court held that non-examination of the person who took the victim for admission to the school first attended itself, is not fatal to the prosecution story. In our present case at hand, mother stated that age of the victim was about 15 years at the time of occurrence. According to victim also, she was reading in Class-VI immediately prior to the incident. She further stated that accused committed sexual intercourse in two times. As a result, her menstrual cycle was stopped for which she told the matter to the accused who supplied medicine. I have found the victim as reliable witness. In this

regard, Medical Officer clearly stated that pregnancy test was found positive. She also explained how she found the pregnancy test positive. According to her, after abortion, the level of HCG hormone is found to be positive for above two weeks and therefore, pregnancy test was medically considered as positive. After genital examination, she found internal OS as dilated which means there was pregnancy. Learned defence counsel has suggested to this witness that in other grounds also, internal OS can be dilated but this witness has stated that in case of major woman internal OS could be dilated for other reasons but it is not applicable in case of minor. According to radiological test, age of the victim was found above 16 years but below 18 years. So, after considering both tests, I have found that victim was minor and her age was below 18 years. She stated that accused committed sexual offence more than one time. Moreover, the witnesses saw that blood was oozing and medical evidence also supported this fact. Therefore, because of sexual intercourse committed by the accused victim became pregnant. After that pregnancy was aborted. According to her, she consumed tablets and inserted tablets to her private parts. When blood was oozing then only she reported the earlier incidence of sexual intercourse to her aunt and from aunt the informant, the mother of the victim knew about the incidence of sexual intercourse. So, medical evidence supported the ocular version of PW 2, the victim as well as PW 1, the informant. The mother is the best witness to tell the age of her children. In this case, PW 1 is a rustic village woman for which she could not state the actual date of birth of the victim. She clearly stated that at the time of occurrence, age of her daughter was about 15 years. PW 3 also stated that in the year 2003, victim was born. Then also age of the victim was below 18 years. So, considering the evidence of the victim and PW 3 along with the medical evidence as well as School Certificate issued by Head Master No. 213 Choto Nilibari L.P. School, the CW 1, I have found that age was ascertained by the prosecution and it was below 18 years on the date of occurrence. As victim was minor at the time of occurrence, alleged consent of the victim plays no role. Whether she was consenting party or not is irrelevant if she is found to be minor. Therefore, her consent has no value to escape the accused from legal punishment.

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- 40. Another point raised by learned defence counsel is that no any injury over private part was found by the doctor. In this regard, I want to reproduce the Section 3 of POCSO Act which reads as follows:
 - **"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 the 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."

After going through the definition of penetrative sexual assault, it is found that a person is said to commit the offence if he penetrates his penis, to any extent. So, non-finding of any injury mark upon the private part of the victim itself is not sufficient to disbelieve the evidence given by the victim. In present case at hand, as it is established from evidence on record that victim became pregnant as a result of sexual intercourse committed by the accused and miscarriage took place due to consuming of tablet. Therefore, the accused has committed the offence under Section 5(j) (ii) and Section 5(l) of POCSO Act. According to these two sub sections of section 5, accused has committed aggravated penetrative sexual assault upon the victim. So, he is liable to bear punishment under Section 6 of POCSO Act.

Special Judge chirang, Kajalgaon

The point mentioned above is proved against the accused beyond all reasonable doubt. Accused is found guilty under Section 6 of POCSO Act.

ORDER

- 42. Prosecution proved the case U/S 6 of POCSO Act against accused Md. Julmot Ali @ Jumud beyond all reasonable doubt. Accused is convicted under Section 6 of POCSO Act.
- 43. It is found from the record that offence was committed by the accused prior to amendment of POCSO Act. Prior to amendment, the punishment u/s 6 POCSO Act was "rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and fine".
- 44. Heard the accused /convict and his engaged counsel on point of sentence. The hearing is recorded in separate sheet and kept with the case record.
- 45. Accused has pleaded mercy of the court considering his tender age as well as his poor economic condition. He has also stated that this was his first offence.
- 46. I have considered all the mitigating circumstances as mentioned by the accused and his engaged counsel. I have also found that this was the first offence committed by the accused because no previous conviction was proved by the prosecution during trial
- 47. Considering all aspects, accused is sentenced to undergo Rigorous Imprisonment for a period of 10 (ten) years and to pay fine of Rs. 10,000/- (Rupees Ten Thousand), in default, 6 (six) months simple imprisonment. Fine amount shall be paid to the victim as compensation.
- 48. The period of imprisonment already undergone by the accused during investigation and trial shall be set off from the sentenced period as per provision of Section 428 Cr.P.C. Accused is committed to the prison forthwith.

Special Judge con

- Seized material if any shall be disposed of according to law.
- This is a fit case to give compensation to the victim. Therefore, I have recommended the case to District Legal Service Authority, Chirang to pay compensation to the victim u/s 33(8) of POCSO Act R/W Section 357A(2) Cr.P.C. Quantum of compensation will be decided by DLSA under Victim Compensation Scheme after summoning the family members of the victim and conducting thorough inquiry in this regard.
- A copy of this Judgment shall be furnished to the accused on free of cost. Another copy of this Judgment shall be given to the District Magistrate, Chirang and Secretary, D.L.S.A., Chirang for information and necessary action.

Given under my sign and seal of this Court on this the $17^{\rm th}$ day of December, 2019, at Kajalgaon, Chirang.

(D.J. Mahanta) 7/12/19 Special Judge, Chirang.

Special Judge Chirang, Kajalgaon

Dictated and corrected by me,

(D.J. Mahanta)
Special Judge,

Special Judge Chirang, Kajalgaon

APPENDIX

Prosecution witness:

- PW 1 Informant
- PW 2 Victim Miss 'X' (name is withheld)
- PW 3 Smt. Malati Ray
- PW 4 Sri Sukumar Ray
- PW 5 Dr. Ranjit Kr. Pradhan (Radiologist)
- PW 6 Sri Barada Prasad Brahma
- PW 7 Sri Upeshor Ray
- PW 8 Dr. Kukumoni Basumatary (M.O.)
- PW 9 S.I. Lakshman Kumar Das (I.O.)
- CW 1 Sri Satyendra Nath Sarkar

Exhibit (Prosecution):

- Ext-1 Statement of the victim U/S 164 Cr.P.C.
- Ext-2 Radiological Report
- Ext-3 Admission Register for the year 2014/2015/2016/2017/2018
- Ext-3(1) relevant entry regarding admission of the victim to Subaijhar High
- Ext-4 Transfer and leaving certificate of No. 213 Choto Nilibari L.P. School
- Ext-5 Medical report
- Ext-6 FIR
- Ext-7 Seizure list
- Ext-8 Charge-sheet
- Ext-9 Sketch map
- Ext-10 Admission Register of No. 213 Choto Nilibari L.P. School
- Ext-10(1) relevant entry regarding admission of the victim to No. 213 Choto Nilibari L.P. School
- Ext-11 Book No. 1
- Ext-11(1) Counter foil certificate issued in the name of the victim

Material Exhibit (Prosecution):

Nil

Defence Witness:

Nil

Defence Exhibit:

Nil

(D.J. Mahanta)
Special Train Special Judge, Chirang.

Special Judge Chirang, Kajalgaon