IN THE COURT OF SPECIAL JUDGE AT BARPETA.

Present :- Sri Vinod Kumar Chandak, M.A., M.Com., LL.B.,AJS, Special Judge, Barpeta.

JUDGMENT IN SPECIAL CASE NO. 17 OF 2017 (G.R. Case 439 of 2016) Sarthebari P.S. Case No 31 of 2016

State of Assam

-versus-

Sri Gajendra Baishya @ Gajen Baishya S/O Late Namala Baishya Resident of Sarukhetri, P.S. Sarthebari, District – Barpeta

..... Accused.

APPEARANCES:

For the State : Sri Lalit Ch. Nath, learned P.P., Barpeta. For the Accused : David Ledger, learned Advocate, Barpeta.

CHARGE FRAMED UNDER SECTION 342, 506 & 376 OF THE INDIAN PENAL CODE READ WITH SECTION 4 & 14 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.

Date of Charge : 23.05.2017,

Date of Prosecution evidence : 01.07.2017, 31.07.2017, 18.11.2017,

18.01.2018, 08.03.2018 & 14.06.2018,

Date of Statement of accused : 13.07.2018, Date of Argument : 07.02.2019, Date of Conviction : 16.02.2019,

Date of Sentence Hearing &

Judgment : 22.02.2019

JUDGMENT

1. The prosecution case, in brief, is that Sarthebari P.S. Case No 31 of

2016 under section 120(B)/342/506 of the Indian Penal Code Read With 4/14 of the Protection of Children From Sexual Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Smti. Rinkumoni Deka, mother of the victim (hereinafter referred to as 'X').

In the aforesaid F.I.R. dated nil **(Exhibit -2)** the informant Smt. Rinkumoni Deka (P.W.1), who is the mother of the victim girl (X), alleged interalia that since 4/5 months prior to 24.01.2016 the accused used to rape her minor daughter occasionally, by putting her in fear, by confining her in his shop house. The accused also threatened her not to disclose the matter to anybody otherwise he would publish her obscene video and she would be killed. Lastly on 23.01.2016 at about 2:30 PM, the accused, with the intention to rape her, confined her in his shop house. However, neighbouring people and some minor boys witnesses the incident and rescued her from the shop of accused. The accused fled away from the place of incident.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Sarthebari P.S., the same was entered in General Diary Register vide G.D.E. No.476, dated 24.01.2016 and subsequently, the same was registered as Sarthebari P.S. Case No 31 of 2016 under section 120(B)/342/506 of the Indian Penal Code Read With 4/14 of the Protection of Children From Sexual Offences Act, 2012.

During the court of investigation, the victim girl was medically examined by the doctor, her statement under station 164 of CrPC was recorded by the learned Magistrate. Police, on completion of investigation, filed charge sheet in the case against the above named accused Sri Gajendra Baishya under section 342/506 IPC R/W section 4/14 of the Protection of Children From Sexual Offences Act, 2012 vide charge sheet No.171/2016.

- **2.** My learned Predecessor-in-office received the case record alongwith the case diary of the case from I.O. of the case. Accused was summoned. On appearance of accused, copy was furnished to him by my learned Predecessor-in-office.
- **3.** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the learned counsel for the

accused and the prosecution in this behalf, charges were framed against the accused u/s 342/376/506 IPC R/W section 4/14 of the Protection of Children From Sexual Offences Act, 2012, which was read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4. During the court of trial, **07(seven)** number of witnesses including the victim, her parent, the Medical Officer and the I/O were examined on behalf of the prosecution to prove the charge u/s 342/376/506 IPC R/W section 4/14 of the Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of the above named accused was recorded u/s 313 of CrPC. The accused denied all the alleged incriminating materials against him. He further stated that the informant Rinkumoni Deka purchased furniture worth Rs.8000/- by paying only Rs.1000/-. The remaining Rs.7000/- was due to him for which he entered into argument with the informant. At last, he stated that the informant had lodged false case against him. He claimed himself to be innocent. He denied to adduce evidence in his defence.

- I have heard Mr. Lalit Ch. Nath, learned Public Prosecutor of Barpeta for the State as well as Mr. David Ledger, learned Defence Counsel for the accused, who is facing trial for commission of offence u/s 342/376/506 IPC R/W section 4/14 of the Protection of Children From Sexual Offences Act, 2012.
- **6.** Now the points for determination before this court are as follows ---
- (1) Whether on 23.01.2016 at about 2:30 PM at village Byash Kuchi within the jurisdiction of Sarthebari Police Station, the accused wrongfully confined Bijita Deka, aged about 12 years, daughter of the informant Rinkumoni Deka, for one day and thereby committed an offence punishable u/s 342 of the Indian Penal Code?
- (2) Whether the accused committed criminal intimidation by threatening Bijita Deka, aged about 12 years, daughter of the informant Rinkumoni Deka, with injury to her person, reputation or to commit forceful rape on her and thereby liable for committing an offence u/s 506 of the Indian Penal Code?

- (3) Whether the accused committed rape on Bijita Deka, aged about 12 years, daughter of the informant Rinkumoni Deka and thereby liable for committing an offence u/s 376 of the Indian Penal Code?
- (4) Whether the accused committed penetrative sexual assault on the victim, aged about 12 years, at the same time and place and thereby committed an offence punishable u/s 4 of the Protection of Children From Sexual Offences Act, 2012?
- (6) Whether the used the victim girl for pornographic purposes by directly participating in pornographic act and thereby liable for committing an offence 14 of the Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF

7. To decide the above points and sections of law, let us examine, analyze and appreciate the evidence of the witnesses alongwith the relevant documents.

PW-1 (Smt. Rinkumoni Deka) is the informant, who stated in her deposition in court, that she lodged the FIR of this case. Incident took place before 1 1/2 years from the date of her deposition at about 2:30 PM. On the date of incident, the victim went to play cricket. The accused called her and told that he will make a cricket bat for her. She deposed that the accused has timber shop near their house. The victim girl went to the shop of the accused and the accused made her sit on a bench and tied her mouth. The accused then went out from his shop and returned back after some time. The accused showed her one pen and told the victim that if she makes hue and cry, then he will record the incident through that pen. He also threatened to kill her if she discloses the matter to others. Then accused made her lie on a bag and committed rape on her. By that time, the boys, who were playing, came in search of the victim, to the shop of accused. The accused then went out by locking the door of his shop. When the boys and girls asked him as to who was inside his shop, then the accused replied that nobody is there. However, the children could notice the victim inside the shop of accused through hole in the bamboo fencing of the shop of the accused. Then they called one teacher namely Bijay

Barman. By this time, the accused returned back. Then the said teacher asked him to open his shop, but the accused did not open his shop. Then the people after breaking the bamboo fencing, brought out the victim girl from the shop of the accused.

The informant further deposed that she lodged the FIR after hearing the incident from the victim. The victim was medically examined and her statement was recorded by the learned Magistrate. She disclosed the age of the victim as 12 years and she was a student of Class IX at the relevant time. She exhibited the FIR as Ext.1 and Ext.1(1) to be her signature.

During cross examination, she stated that the victim is her third child. She denied that she did not state before the police that the victim went to play after coming from school; she was called by accused who told her that he will make a bat for her; then she went to his shop; accused tied her mouth and went outside the shop and returned back; that he threatened the victim that he will record everything by showing a pen to her; that he will assault her if she discloses the matter to her parents; then he raped her by making her lied on a bag. She also denied that she did not make statement before the police as told by her hereinabove.

PW further stated that she does not remember the date of birth of the victim and police did not seize the wearing apparel of the victim. All the defence suggestions which were put to her during cross examination were denied by the informant i.e. PW1.

PW-2, who is the victim of this case, deposed in the court that she knows the accused. Incident took place at about 2:00/2:30 PM before 1 ½ year from the date of her deposition. She was playing cricket with some boys at the relevant time. Accused called her in a shop and told that he will make one bat for her. The accused gagged her mouth after closing the door of his shop. She was wearing a half pent and top. The accused opened her half pent. She protested, but the accused did not free her. The accused opened his long pent, he inserted his male part into her private part. The accused also told hat he has made video of the incident and he will show the same to the villagers in the village if she does not come, on his call. Afterwards the accused used to call her after 3 /4 days or 5/6 days. When she did not come, then accused told her that he will show the video to

the public. Then out of fear, she used to go to his shop as and when the accused called her. The victim stated that the accused indulged in sexual act with her as he did earlier. The victim deposed that when she attained puberty, the accused used to wear balloon at the time of indulging sexual act with her. The accused did sexual act with her for 4/5 months. She deposed that due to the sexual act committed by the accused, blood came out from her vagina. The accused used to tell her to remain silent whenever she made complaint of getting hurt in the sexual act. The accused did sexual intercourse wit her before 10 days of lodging this case. The accused also called her three days afterwards. The boys, who used to play with her, saw the accused calling her. The boys also called the nearby people. Then the accused put her under a table and covered her with the bag and told her not to go out. The accused did not open the door of his shop even though he was called by one Sir. The accused fled away and many people came. Then one Sailen brought her out from his shop by cutting the bamboo fencing of the shop of the accused.

The victim exhibited her statement made before the Magistrate as Ext.2 and Ext.2(1) to 2(5) are her signatures. The victim also deposed that the accused pushed her though a hole in his shop to go out, but by this time public gathered there. She also claimed that she has stated all this things before the police.

During cross examination, she has stated that she gave her statement before the police after three days of the incident at the police station. She further deposed that the accused called her to his shop by saying that he will make a bat for her while she was playing with Kankan Deka, Ajay Deka, Manas Deka, Gourab Deka, Chinmoy Deka. She told that she went with the accused after telling the boys that they should keep on playing. On the first day of incident, she came out from the shop of the accused after 25/30 minutes without telling anything to those boys. She stated that she did not make hue and cry as the accused threatened her.

She could not state as to whether she told before the police that the accused used to call her after 3/ 4 days or after 5/6 days; that she did not go to accused initially; but when the accused threatened her to show the video while going to school; then she went to his shop out of fear; that on each occasion accused indulge in sexual act with her; that blood came out from her vagina; that she used to complaint to the accused that she got pain, but the accused used to tell to remain silent.

She also told that she never made hue and cry as the accused threatened her to show the video. She denied that she deposed before the Magistrate as tutored by her parents. She also denied that she has deposed against the accused on being tutored by her mother who had to pay Rs.7000/- to the accused for purchasing furniture from the accused.

PW3-Biju Bharali @ Biju Barman deposed that the accused is having a furniture shop opposite to the road. He was called by one Sailen Baishya by stating that some young boys have gathered there. He was also told that the victim is inside the shop which was locked from outside.

On reaching there, he noticed that the lock outside the furniture shop. Then he sent back the boys from that place. After five minutes the accused came and he told him to open the lock. But the accused told him that he will come after some time after having a betel nut (Tamul). Then Sailen Baishya broke the bamboo fencing of the shop of accused and brought out the victim after taking permission from the owner of the furniture shop namely Dhanjit Bharali.

During cross examination, he told that he did not see any incident and police recorded his stated after 2/3 days of the incident.

He denied that he did not state before the police as stated in the court. He, however, admitted that he did not ask the victim about the incident.

PW4- Debajit Bharali deposed that the incident took place on 23.01 and he noticed gathering of people near the shop of accused at about 2:30/3:00 PM.

Defence has declined to cross examine him.

PW5- Sri Dhiren Pathak, who is also having a shop adjacent to the shop of the accused, deposed that the incident took place at about 3:00 PM. He deposed that the shop of accused is not visible from his shop. Later, he came to know that the victim was found inside the shop of the accused which was locked from outside.

During cross examination the witness deposed that he does not know anything about the incident.

PW6- Dr. Bharati Das, who was posted at FAAMCH, Barpeta on 25.01.2016 at Medical & Health Officer. She deposed that she examined the victim and found as follows--

History:- On 23.01.2016 Gajen Baishya had forceful sexual intercourse at around 2:30-3:00 PM. From last 4/5 months he was doing this with her in the Furniture shop he owns. Allegedly he also has video recoding of the sexual acts. He used condoms allegedly during sexual intercourse.

Physical Examination:-

Identification marks: - A mole in front of neck.

Height: - 155 CM. Weight: - 55 Kg.

Chest girth at nipple level: - 88 Cm. Abdominal girth at navel level: - 78 Cm.

General built & appearance: Average,

Voice: Female type

Teeth: 28

Permanent: 28

Breast: Developing

Puberty(as told by the individual): Approximately 5 months ago.

LMP(as told by the individual): Approx 1 month ago.

Mental Condition: - Sound

Gait:- Normal

Intelligence: Average

Bodily injuries: - Bite mark on both the cheeks

Pubic hairs: Growing

Vulva(Labia majora & minora):-Healthy looking

Hymen:- Tear present.

Vagina:- Admits 1 finger. Fresh tear present from post comisure to upward on post vaginal wall (approx 1cm)

Cervix and Uterus: Not palpable per abdominally,: Healthy

Vaginal swab collected.

Result of vaginal swab smear examination:-Spermatozoa not seen in the vaginal swab after microscopic examination.

Result of X-Investigation: Plate No. R-12 MLC Dated-27-1-2016

Wrist Joint: Epiphyseal union around wrist is not completed.

Elbow Joint:-Epiphyseal union around elbow completed

Shoulder Joint :- Epiphyseal union around shoulder not completed

Pelvis:-Epiphyseal union around iliac crest and around ischial tuberosity not completed.

Opinion:-

- (1) No sign of recent sexual intercourse.
- (2) Injury on genital area present as described above.
- (3) Age is above 14(fourteen) years and below 16 (sixteen) years.

PW6 exhibited her report vide Ext.3 wherein Ex.3(1) is her signature and Ext.3(2) is the signature of Prof. & Head of the Deptt. of Forensic Medicine, FAAMCH, Barpeta.

During cross examination she stated that her medical report with regard to age of the victim is based on the report of the Radiologist. The report of the Radiologist has not been enclosed with her report. The hymen can be torn or ruptured if the victim is a sports person and drives bicycle or participates in any other sports activities.

PW7-Braja Haloi, the I/O of the case who divulged in his testimony that on 23.01.2016 he was working s S.I. of Sarthebari Police Station and he was entrusted with the investigation of the case. During investigation he visited the place of incident where he found the victim and many persons. He examined the witnesses there. He also drew sketch map of the place of occurrence, which he exhibited as Ext.4 wherein Ext.4(1) is his signature. He produced the victim before the doctor for medical checkup. The victim was also produced before the learned Magistrate for recording her statement u/s 164 CrPC. He also examined the other witnesses who were acquainted with the facts and circumstances of the case. On completion of the investigation he submitted the charge sheet against the accused persons under section 120(b)/342/506/ IPC R/W section 4/14 of POCSO Act. Ext.5 is the charge sheet and Ext.5(1) is his signature.

During cross examination he stated that he examined the witness Dhanjit Bharali u/s 161 CrPC. He admitted that he did not seize the wearing apparel of the victim.

He denied that witness Sri Rinkumoni Deka(PW1) stated before him that the victim went to play after coming from school; that she was called by the accused who told her that he will make a bat for her; that then she went to his shop; that the accused tied her mouth and went outside the shop and returned back; that he threatened the victim that he will record everything by showing a pen to her; that he will assault her if she discloses the matter to her parents; that then he raped her by making her lied on a bag.

The I/O also deposed that witness Biju Bharali(PW3) did not state

before him that he was called by Sailen Baishya that the victim was inside the shop of the accused; that he saw Gajendra coming to his shop; that he told him to open the door, but he went to market to have a betel-nut; that the boys again assembled there; that, later on, he heard that the accused had raped the victim.

8. From the close perusal of the evidence on record, it is seen that the victim (PW2) and Sri Biju Bharali @ Biju Barman are the star witnesses of the case.

The victim (PW2) during her statement stated that Incident took place at about 2:00/2:30 PM before 1 ½ year from the date of her deposition. She was playing cricket with some boys at the relevant time. Accused called her in a shop and told that he will make one bat for her. The accused gagged her mouth after closing the door of his shop. She was wearing a half pent and top. The accused opened her half pent. She protested, but the accused did not free her. The accused opened his long pent, he inserted his male part into her private part. The accused also told hat he has made video of the incident and he will show the same to the villagers in the village if she does not come on his call. Afterwards the accused used to call her after 3 /4 days or 5/6 days. When she did not come, then accused told her that he will show the video to the public. Then out of fear, she used to go to his shop as and when the accused called her. The victim stated that the accused indulged in sexual act with her as he did earlier. The victim deposed that when she attained puberty, the accused used to wear balloon at the time of indulging sexual act with her. The accused did sexual act with her for 4/5 months. She deposed that due to the sexual act committed by the accused, blood came out from her vagina. The accused used to tell her to remain silent when she made complaint of getting hurt in the sexual act. The accused did sexual intercourse wit her before 10 days of lodging this case. The accused also called her three days afterwards. The boys, who used to play with her, saw the accused calling her. The boys also called the nearby people. Then the accused put her under a table and covered her with the bag and told her not to go out. The accused did not open the door of his shop even though he was called by one Sir. The accused fled away and many people came. Then one Sailen brought her out from his shop by cutting the bamboo fencing of the shop of the accused.

The victim exhibited her statement made before the Magistrate as

Ext.2 and Ext.2(1) to 2(5) are her signatures. She also claimed that she has stated all this things before the police.

But the I/O (PW7) during his cross-examination disclosed that the victim did not state before him that she was playing with five nos. of boys; that accused to call her 3-4 or 5-6 days of the incident; that she did not go to accused initially; but when the accused threatened her to show the video while going to school; then she went to his shop out of fear; that on each occasion accused indulge in sexual act with her; that blood came out from her vagina; that she used to complaint to the accused that she got pain, but the accused used to tell to remain silent.

9. Learned counsel for the accused has argued that the mother of the victim i.e. informant(PW1) of the case had enmity with the accused as she is to pay Rs.7000/- to the accused for purchase of furniture from the accused.

The accused in his statement u/s 313 CrPC also stated that he is to get Rs.7000/- from the informant on account of purchase of furniture by informant (PW1). He further stated that for this reason he also entered into altercation with the informant(PW1). The accused, at last, stated in his statement u/s 313 CrPC that for this reason only the informant, who is mother of the victim has lodged this false case against him.

However, the plea of defence does not hold water as accused has not adduced any evidence or any materials to prove that he owed Rs.7000/- from the informant to accept or even consider his plea that the informant has lodged false case against him.

Moreover, the evidence of independent witness Biju Bharali @ Biju Barman (PW3), who is a teacher by profession, wholly belies the plea taken by the defence side.

PW3 in his evidence categorically deposed that on the date of incident he came to the furniture shop of accused on being informed that the victim is inside the shop of the accused and the door is locked from outside. He further deposed that he asked the accused to open the door, but the accused did not unlock the door of his shop rather he told that he will go to market to have 'tamul' (betel-nut). Later on, the victim was recovered from inside the shop of the accused after breaking the

bamboo wall of the shop of the accused.

Though defence side argued that this witness did not exactly stated as to what he deposed before the police in his statement u/s 161 CrPC. It was further argued that even the I/O (PW7) confirmed thatPW3 did not state before him that PW3 was called by one Sailen Baishya who told that the victim is inside the shop of the accused, then he asked the accused to open the lock of his shop, but he went to market to have 'tamul'(betel-nut).

However, upon perusal of his(PW3) statement u/s 161 CrPC it is seen that he PW3 clearly deposed before the I/O that on the relevant day he came to the shop of accused on being informed by villagers and could see the victim from the hole in the bamboo wall of the shop of accused. He categorically stated that the victim was recovered by breaking the bamboo wall of the shop of accused with the help of villagers. The victim also stated that the accused raped her inside his shop with a promise that he will make a wooden cricket bat for her.

Thus, this independent witness (PW3) has supported the evidence of the victim in all material particular. Mere marginal variations in the statement of a witness cannot be dubbed as improvement or contradiction.

10. In a case reported in 2018 CRI.L.J. 4731, a single Judge of the Hon'ble Patna High Court, has held that ---

31. In relation to discrepancies in the evidence of witnesses, the Hon'ble Supreme Court in State of U.P. v. Naresh, reported as (2011) 4SCC 324: (2011 AIR SVCW 1877, observed as follows: "30. In all criminal case, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely errors of memory due to lapse of time or due to mental dispositions such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirely. The court has

to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to rest credibility of th prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility (Ed. As observed in Bihari Nath Goswami v. Shiv Kumar Singh (2004) 9SCC 186. p. 192. para 9.).

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. (vide) (Emphasis supplied)

- 32. The Hon'ble Supreme Court in Lal Bahadur v. State (NCT of Delhi), reported as (2013) 4 SCC 557: (2013 AIR SCW 2161), reiterated the principle laid down in Bharwada Bhoginbhai Hirjibhai V. State of Gujrat, reported as (1983) 3 SCC 217: (AIR 1983 SC 753), in relation to minor discrepancies in evidence of eye-witnesses, as follows---
- "(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events, the witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot e expected to be attuned to absorb the details.
- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part

of another.

- (4) By and large people cannot accurately recall a conservation and reproduce the very words used by them or heard by the. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (5) In regard to exact time of an incident or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."
- **11.** Moreover, the victim and independent witness (PW3) have also been supported by another independent witness namely Sri Debajit Bharali, who deposed that on the date of incident at 2:30/3:00 PM he noticed gathering of people, near the shop of accused. Though he did not depose further, but he supported the

versions of PW3 that many people gathered near the shop of accused on the date of incident.

Similarly, Sri Dhiren Pathak (PW5), who has got a shop near the shop of accused, deposed in his evidence that he heard on the date of incident victim was found inside the shop of accused and the door of the shop was locked from outside.

- 12. Learned counsel for accused in his argument submitted that prosecution side has failed to examine one Sailen Das, who reportedly rescued the victim after breaking the bamboo fencing of the shop of accused. Moreover, the male children, who used to play with the victim and who called other witnesses to the shop of accused, have not been examined. So accused is entitled to acquittal at last on benefit of doubt.
- 13. In the case of *Bipin Kumar Mondal -versus- State of West Bengal, 2010 (12) SCC 91*, the Hon'ble Apex Court reiterated the principle stating that it is not the quantity but the quality that is material. The honored principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is congest, credible, trustworthy and reliable.
- **14.** From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon
- **15.** However, from the evidence of PW3 , PW4 & PW5 it is clear that non-examination of Sailen Das and other male children of this case is not going to hamper the credibility of the prosecution case as the independent witnesses have fully corroborated the version of the victim with regard to material facts and particular of the case in hand.
- **16.** It is an admitted fact that the I/O of the instant case has not seized any birth certificate or school certificate of the victim from her parents to prove that the victim is a child/minor less that 18(eighteen) years as on the date of commission

of offence. In the case of *Jarnail Singh -versus-State of Haryana, Criminal appeal No.1209/2010 decided on 01/07/2013*, the Hon'ble Apex Court held that Rule12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 would be applicable determining age even for a child, who is victim of the crime. The said rule is as follows:

"12. Procedure to be followed in determination of age.

- I.
- ii.
- iii. In every case concerning a child or juvenile in conflict with law, the age of 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 date of birth certificate from the school (other than a play school) first attended; and in the absence whereon;
 - (ii) the birth certificate given by a Corporation or a Municipal Authority or a Panchayat;
 - (iii) the Matriculation or equivalent certificates, if available;
- b) And only in the absence of either (i), (ii) r (iii) of clause (a) above, the medical opinion will be sought from a duly constitution of Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or 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 juvenile, or the medical opinion, as the case may be, record a finding in respect of his/her age and either or the evidence specified in any of the clauses (a) (I), (ii), (iii) or in the absence whereof clause (b) shall be conclusive proof of the age as regard such child or the juvenile in conflict with law.
- 17. In the present case, since document as prescribed under Rule 12(3) (a) are not available, the prosecution has relied upon Exhibit-3, the report of doctor Dr. Bharati Das (PW6), according to which, the age of the victim was above 14 years and below 16 years. There is nothing placed on record to create a doubt about the bone/medical age of the victim child as determined by the Medical Officer. From the

cross-examination of the doctor it is nowhere seen that the opinion regarding age of the victim was not a conclusive report. So, as per section 2(d) of The Protection of Children from Sexual Offences Act, 2012, the victim is found below 18(eighteen) years of age at the time of incident.

It is pertinent to mention here that the version of the victim that the accused had raped her find full support from the Medical report of the Medical Officer (PW6) who stated in her report that---

Vagina:- Admits 1 finger. Fresh tear present from post comisure to upward on post vaginal wall (approx 1cm). The Medical Officer also found Bite mark on both the cheeks of the victim as per her report (Ext.3). The finding of fresh tear on the vagina of the victim supported the testimony of minor victim beyond reasonable doubt about the alleged offence committed upon her.

18. It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of Datttu Rarao Sakhare-versus-State of Maharastra, report in (1997)5 SCC 341, the Hon'ble Apex Court has 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 ca be considered under section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the could should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

19. In another case, i.e. Pancchi-versus- State of uttar Pradesh, AIR 1998 SC 2726, the Hon'ble Apex Court has held that --- "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it is found

reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this child witness is easy prey to tutoring".

- 20. The ratio as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent. In the present case, the victim (PW2) has been consistent on the material particulars with regard to the incident. Further, there is full corroboration by other witnesses.
- Though it was argued on behalf of the accused that he has been falsely implicated in the instant case by the informant of the case due to enmity. However, in the light of the evidence of the victim (PW2) as well as the other witnesses i.e. PW1, PW3, PW4, PW5, PW6, this court can presume under section 29 of the Protection of Children From Sexual Offences Act, 2012 that it was the accused, who had committed sexual assault upon the victim and sexual intent required as per section 7 of POCSO Act, 2012 can also be presumed in the light of section 30 of the Act. It was for the accused to rebut that neither he had any sexual intent nor he had committed the offence by proving to the contrary. No evidence was led by the accused in his defence to prove his innocence. On the contrary, the defence put forwarded by the accused in this case is not consistent and therefore, same is required to be disbelieved.
- 22. The accused Gajendra Baishya @ Gajen Baishya was charged u/s 342/376/506 IPC R/W section 4/14 of the Protection of Children From Sexual Offences Act, 2012. However, from the evidence tendered by the victim (PW2) it can safely be presumed that the offences committed by the accused falls u/s 4 of the Act.

I do not find sufficient evidence against the accused for committing offence u/s 14 of the Protection of Children From Sexual Offences Act, 2012. Hence, the accused is acquitted from the said charge.

Section 4 of the Protection of Children From Sexual Offences Act,

2012 provides punishment for penetrative sexual assault. The section 4 of the Protection of Children From Sexual Offences Act, 2012 reads as follows---

otection of children from Sexual Offences Act, 2012 reads as follows

Whoever commits penetrative sexual assault shall be

punished with imprisonment of either description for a term which shall

not be less than seven years but which may extend to imprisonment for

life, and shall also be liable to fine.

23. In view of my aforesaid discussions in the forgoing paragraphs, I am

of the opinion that prosecution has been able to prove the case against the accused

Gajendra Baishya @ Gejen Baishya under section 342/506 IPC R/W section 4 of the

Protection of Children From Sexual Offences Act, 2012.

As the accused is being punished for committing offence u/s 4 of the

Protection of Children From Sexual Offences Act, 2012, so, I am not going to punish

him u/s 376 IPC in terms of the provisions of section 42 of the Protection of Children

From Sexual Offences Act, 2012.

However, I find the accused guilty for committing offence u/s 342/506

IPC.

Sd/-

Special Judge, Barpeta.

Date: 16.02.2019

SENTENCE HEARING TAKEN ON 22.02.2019

24. Accused Gajendra Baishya @ Gajen Baishya is heard on the point of

sentence. The accused has submitted that he is a married person having wife and

two minor children. There is none to look after them in his absence. He is the sole

earning member of his family. Moreover, he is an ill person. Further, he was never

prosecuted in any other criminal case, prior to the case in hand. Hence the

accused prayed for leniency.

25. I have heard learned Defence Counsel for the accused as well as Sri

Lalit Ch. Nath, learned Public Prosecutor, Barpeta.

Accused Gajendra Baishya @ Gajen Baishya is sentenced to undergo RIGOROUS IMPRISONMENT for 7(seven) years and also to pay a find of Rs.10,000/-(Rupees ten thousand), in default of payment of fine, to suffer RIGOROUS IMPRISONMENT for 3(three) months for the offence under section 4 of the Protection of Children From Sexual Offences Act, 2012.

I also sentence the accused to undergo imprisonment for 1(one) year each for commission of the offence under section 342/506 IPC. I am of considered opinion that considering the nature of offence, this sentence shall do justice.

All the punishment shall run concurrently.

The period of detention already undergone by the accused during investigation and trial shall be set off from the period of imprisonment imposed on him under section 428 of CrPC.

Now, coming to the aspect of compensation to the victim, who is a minor girl, the Hon'ble Apex Court has time to time observed that subordinate courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victims being an offence against the basic human right and violation of Article 21 of the Indian Constitution.

In the case of **Bodhisattwa Gautam -versus- Subhra Chakraborty, AIR 1996 SC 922**, it has been held by the Hon'ble Apex Court that the jurisdiction to pay compensation has to be treated to be a part of overall jurisdiction of the courts trying the offences of rape, which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty & Life.

27. The concept of welfare and well being of children is basic for any civilize society and this has a direct bearing on the state of health and well being of the entire community, its growth and development. It has been time and again emphasized in various legislation, international declarations as well as the judicial pronouncements that the Children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop.

Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the Secretary, District Legal Services Authority, Barpeta to grant adequate compensation to the victim(PW2). The said amount shall be for the welfare of the victim.

28. Free copy of the judgment be furnished to the accused immediately.

29. Send copy of this Judgment to the District Magistrate, Barpeta under section 365 Cr.P.C.

Another copy of this judgment be sent to the Secretary. D.L.S.A., Barpeta for information.

30. Given under my hand and seal of this Court on this 22nd day of February, 2019.

Dictated & corrected by me.

Sd/-Special Judge, Barpeta Sd/-Special Judge, Barpeta.

Typed by me

(Kavery Das, Stenographer)

<u>APPENDIX</u>

(A) Prosecution witnesses:

P.W.1 = Rinkumoni Deka, the informant,

P.W.2 = Bijita Deka, the victim,

P.W.3 = Biju Bharali @ Biju Barman,

P.W.4 = Debojit Bharali, P.W.5 = Dhiren Pathak,

P.W.6 = Dr. Bharati Das, the M.O.,

P.W.7 = Bhaja Haloi, the I.O.,

(B) **Prosecution Exhibits**:

Ext.1 = Ejahar,

Ext.1(1) = Signature of the Rinkumoni Deka,

Ext.2 = Statement of the victim u/s 164 CrPC,

Ext.2(1) to 2(5) = Signature of victim,

Ext.3 = Medical Report.

Ext.3(1) = Signature of Dr. Bharati Das,

Ext.3(2) = Signature of Prof. & HOD of Forensic Medicine,

FAAMCH, Barpeta.

Ext.4 = Sketch Map,

Ext.4(1) = Signature of I.O., Ext.5 = Charge Sheet,

Ext.5(1) = Signature of I.O.

(C) **<u>Defence witnesses</u>**:Nil.

(D) **Defence Exhibits**: Nil.

- (E) **Court witnesses**:Nil
- (F) **Court Exhibits**: Nil.

Sd/-

Special Judge, Barpeta.