IN THE COURT OF SPECIAL JUDGE, SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 44 of 2016 U/S 6 of POCSO Act,2012. (Arising out of Moranhat P.S. Case No. 116/2016)

State of Assam

-Vs-

Sri Ajay Pantanti @ Kundu Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. D. K. Gohain, Advocate

(State Defence Counsel)

Date of framing Charge : 20.01.2017

Dates of Evidence : 16.02.2017, 17.04.2017, 09.05.2017,

08.06.2017, 05.07.2017, 01.08.2017,

Date of S/D : 30.10.2017 Date of Defence Evidence : 13.11.2017

Date of Argument : 10.01.2018 & 02.02.2018

Date of Judgment : 12.02.2018

J U D G M E N T

- 1. Prosecution case, in brief, is that on 19.09.2016, Smt. Taramoni Uzir lodged an FIR with I/C, Sepon Out Post alleging, inter alia, that on 17.09. 2016 (Saturday), accused Kundu Pantanti committed rape on her minor daughter victim 'S' (named withheld), aged about 7 years by enticing and taking the victim inside Dumar Dolong Tea Estate at Section No. 38.
- 2. On receipt of the FIR, Sepon O.P. G.D. Entry No. 380, dated 19.09.16 was made and forwarded the FIR to O/C Moranhat P.S. for registering a

case. Accordingly Moranhat P.S. Case No. 116/2016, U/S 8 of POCSO Act,2012 was registered and investigated. During investigation the I.O. visited the place of occurrence, prepared sketch map and recorded the statement of the witnesses. The victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C. On 27.09.2016 accused was arrested and produced before the court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet U/S 8 of POCSO Act, 2012 against the accused person.

- 3. On receipt of charge sheet, copy was furnished to the accused. Services of State Defence Counsel was provided to accused. Upon hearing both the sides, vide order dated 20.01.2017, charge U/S 6 of POCSO Act, 2012 was framed and explained to the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined nine witnesses including M.O. and I.O.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Defence examined two witnesses in support of his plea of alibi.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D. K. Gohain, learned State defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- 6. (I) What was the age of the victim 'S' on the date of incident?
 - (II) Whether on 17.09.2016, victim S was subjected to aggravated penetrative sexual assault?
 - (II) If So, whether the accused Ajoy Pantanti @ Kundi has committed said aggravated penetrative sexual assault on the victim 'S'?

DECISION AND REASONS THEREOF

7. PW-1 Smt. Taramani Uzir, mother of the victim in her evidence deposed that her daughter victim S was aged about 7 years and a student of

class I. On the day of Biswakarma Puja i.e. 17.09.2016, at about 3 pm, while she returned from work and did not find the daughter S in the residence, she searched her. After some time victim returned home with pain. On inquiry victim S told her that while she was returning home alone after enjoying Puja, the accused took her to show tiger's feet mark in the tea garden and committed misdeed with her by keeping the hands tied. The boy pulled her pant and penetrated his penis (susu) on her vagina. On seeing victim's private parts, she saw that blood is coming out from her vagina. At the time of reporting the matter by victim her husband Baneswar was with her. Immediately the matter was informed to VDP secretary and victim S was taken to Dumor Dalang T E Hospital. Due to absence of doctor, victim S was brought to Sepon Hospital. On this, she lodged the FIR at Sepon OP. Police took the victim S to Sonari Hospital. During inquiry, victim S told the description of the accused and on that basis, they identified the accused and subsequently police apprehended the accused. At police station also, victim S has identified the accused who has committed rape on her. In her cross-examination PW 1 deposed that FIR was written by other. FIR was filed on Monday. Incident took place on Saturday. The accused was identified on Sunday i.e. on the next day of the incident on the basis of shoulder bag used by accused and as per physical description given by Sunki. On informing the matter to VDP, he asked us to find out the culprit and did nothing on the same day. Residence of accused is it some distance but in the same Tea Estate. He was not known to her prior to this incident. Accused used to play football. Several other boys were also play football with him. One other boy was with the accused but he did not commit any offence. She has not seen the accused in committing rape on her daughter. She denied the defence suggestion that they have identified the accused on suspicion only and lodged false case.

8. PW-2 the victim S in her evidence deposed that she can recognised the accused standing on the door of the court chamber. PW 2

further deposed on the day of Biswakarma Puja, after seeing Puja, while she was returning home alone, the said boy (accused) told me that he will show her tiger's feet mark and took her in the tea garden. After taking inside the Bagan, he laid her in garden land, pulled her pant and entered his susu (penis) on his susu (vagina). He did not allow her to cry and kept her hand tied. She got severe pain in her susu (vagina). He kept his susu in her susu for some time. Blood come out from her susu. After leaving her, she somehow managed to come back to home. The incident took place near to her house. She has reported the incident to her mother and father was present in the house. She was taken to secretary and there from, she was taken to Bagan hospital. One nurse has examined her. She asked to take her to big hospital. On the next day she was taken to another hospital. There from she was taken to Police. Police took her to place of occurrence. She has shown them the place. Police also took her to hospital and court. She told about the incident in court. On inquiry, she told her mother that the boy used on shoulder bag and his physical description i.e. dark colour boy. On asked by parent to search the boy, she with her parents searched the boy in Bagan line and able to point out the boy on identifying him after 2 days. Police arrested the boy. She has also identified the boy at police station and today in court. In her cross examination, the victim admitted that accused was not known to her prior to the incident. Her mother has accompanied her to police station and in court on the date of evidence. He mother also accompanied her to Sonari Court. She stoutly denied that she gave her statement and evidence on being tutored by her mother. She admitted beofre police and before court she has not stated that the boy was moving with shoulder bag and about his dark complexion. She denied that she has wrongly identified the accused.

9. P.W. 3 Dr. Pranjal Kumar Gogoi in his evidence deposed that on 21.09.2016, he examined victim S, in connection with Moranhat P.S. Case No. 116/2016, who came to him with brief history of sexual assault on 17.09.2016

at around 3.30 p.m. Upon examination as per Radiological evidences he found that her age is in between 5 to 8 years. That there was violent sexual act was being taken place recently. PW 3 the medical report as Ext. 1 and his signature in the report as Ext. 1 (1). Ext. 1(2) is the signature given by Radiologist Dr. Tapan Borbora. In his cross examination PW 3 deposed that as per the brief history as mentioned in Ext. 1 the occurrence took place on 17.09.2015 (ought to have been 17.09.2016). He stated that he examined the victim on 21.09.2015(ought to have been 21.09.2016), i.e. on 4th day of occurrence. He also stated that during his examination, the victim did not state taking any other treatment prior to coming him.

- 10. PW-4 Sri Baneswar Uzir, father of the victim in his evidence deposed that his daughter victim S was aged about 7 years and studying in class I. He also deposed that on the day of Biswakarma Puja i.e. 17.09.2016, at about 3 pm, while he returned from work and was sitting, he saw that victim returned home by crying with pain. My wife took her inside. Her mother inquired about the incident. His wife told him that accused has committed rape with victim S. On knowing this, he informed the matter to VDP secretary. Thereafter a village meeting was held. His wife lodged the case. He went with his daughter to hospital. Accused was absconding for about 15-20 days. Thereafter police arrested him. He heard that accused has taken victim S to bagan area to show tiger's feet and committed misdeed with her. She also told that accused has threatened her if she disclosed the same to others. In his cross-examination PW 4 admitted that he did not ask his daughter about the incident. He denied the defence suggestion that they have falsely implicated the accused.
- 11. PW-5 Smt. Lakhi Mani Tanti in her evidence deposed that victim S daily comes to her residence for play with her granddaughter. Her daughter is aged about 7 years. On the day of Biswakarma Puja i.e. 17.09.2016, victim S came to her residence and left her house at about 3 pm. While she left her

house, she saw that accused Ajay was following victim S. Subsequently mother of victim S came to her in search of her daughter. After coming of police, mother of victim S told me that accused has committed misbehave with her daughter. Victim S also told me that the accused Ajay took her to inside Bagan jungle area and hold her. In her cross-examination she admitted that she heard about the incident while victim S and her mother telling the incident to police as she was present there. She individually did not ask them about the incident. Ramesh is the elder brother of victim S. On the date of incident, Ramesh did not come to her house for play. She did not play with Ramesh at her residence. PW 4 denied the defence suggestion that she deposed falsely that she had seen the accused in following victim S. She also denied that before police she had stated that she saw three boys going behind victim S and that accused Kundu is a resident of same line. Residence of accused is not in the same line.

- 12. PW-6 Sri Udeswar Tanti, the VDP secretary in his evidence deposed that on the day of Biswakarma Puja i.e. 17.09.2016, Baneswar Uzir, father of victim S came to him with the victim and informed him that her daughter sustained bleeding injury on her vagina for misdeed by somebody. He advised to take her to medical. Lateron, he came to know that rape was committed on her. Subsequently he came to know that accused Ajay Pantanti has committed rape on Sunki. In his cross-examination PW 6 admitted that from police he came to know that accused has committed rape on the victim. Baneswar or victim did not disclose the name of accused before him. He met police on the next day of incident. PW 6 also admitted that while giving statement to police, he did not state that Baneswar and victim S came to him and informed him about the misdeed by somebody.
- 13. PW-7 Smt. Renosing Horo, Nurse at Dumar Dolong Bagan Hospital in her evidence deposed that on the day of Biswakarma Puja i.e. 17.09.2016, at about 8 pm while she was working as duty nurse at Dumar Dolong Bagan Hospital, father of victim S brought her to hospital as she was crying with a

history of sexual assault. She examined her and slight marks on the vagina of the child. At that time child was aged about 7-8 years. Doctor was on leave. On contacting the doctor over phone, he advised her to refer the matter to Govt. Hospital. Accordingly she referred the patient to Govt. Hospital. In her cross-examination she admitted that before and after examining the victim, she did not made any entry at Bagan Hospital register. Baneswar Uzir came to hospital. While giving statement to police, she had stated that Baneswar reported her that 2 boys took his daughter to jungle on the plea of showing of tiger's feet. She denied the defence suggestion that she deposed falsely regarding seen of injury marks on the vagina of the victim girl.

- 14. PW-8 Smt. Anamika Middha in her evidence deposed on the next day of Biswakarma Puja i.e. 18.09.2016, victim S and her mother came to her house and asked one boy namely KUNDU. On informing that there are four KUNDU named boy in our bagan line, after taking tea, they returned back. In her cross-examination PW 8 deposed that she has no personal knowledge about any incidence relating to victim S. While coming to her house, victim S was walking and behaving normally.
- 15. PW-9 Sri Rajib Das I/O of this case, in his evidence deposed that on 19.09.2016, while he posted as I/C Sepon OP, on that day at about 8 PM, he has received one written FIR from Smt. Taramani Uzir and after entering the same in G D Entry vide Sepon G D Entry No. 380 dated 19.09.2016 and sent the FIR to Moranhat OP to register case. Accordingly, Moranhat PS case No. 116/16 u/s 8 of POCSO Act was registered. He proved the said FIR as Exbt. 2. Exbt. 3 is the abstract copy of Sepon OP G D Entry No. 380 dated 19.09.2016. On taking charge of investigation, he examined the informant and victim Sunki Uzir at PS campus. On the next day morning, I went to the place of occurrence i.e. 38 No. section of Dumar Dolong T.E. and as shown by victim, he has drawn a sketch map of the PO. Exbt. 4 is the said sketch map. During investigation, he apprehended the FIR named accused Sri Ajay Pantati @ Kundu. On the next

day, victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. During investigation he has collected the medical report and statement given by victim in court. Exbt. 5 is the statement of the victim given in court u/s 164 Cr.P.C. On completion of investigation, he has submitted charge sheet against the accused u/s 8 of POCSO Act. Exbt. 6 is the charge sheet. In his cross-examination PW 9 stated that in the FIR there was no explanation for the delay in lodging the FIR. He visited the place of occurrence on 20.09.2016 at 6 AM. Accused was apprehended from his house on 27.09.2016 and arrested him on that day. Victim was sent to medical and to court on 21.09.2016. In the CD, there was mention that due to Assam Bandh call, he could not send the victim for medical and to court on 20.09.2016 but this fact not mentioned in witness forwarding report. PW 9 affirmed that victim in her statement given to me did not state that accused was moving with shoulder bag and about his dark complexion. Witness Lakhimani Tanti in her statement given to him stated that she has seen three boys going behind victim S. Witness Renu Singh Horo in her statement given to him stated that Baneswar reported to him that 2 boys took his daughter to jungle on the plea of showing of tiger's feet. He has not investigated regarding presence of other two persons accompanying the accused.

DW-1 Sri Mantu Kumar in his in his evidence deposed that Accused Ajay @ Kundu Pantanti is known to him being neighbour and brother-in-law in relation. He heard that Taramani has filed a case against the accused. The alleged incident happened on the day of Biswakarma puja last year. On previous night, his mother expired and she was taken for burial on the day of Biswakarma Puja. Several peoples including accused Ajoy Pantanti and one Sutu were there at the rituals of Burrial which continued till 2.30 PM. Thereafter, the persons attending the burial left for their home. In his cross-examination by learned PP, DW 1 deposed that on the ritual of burial about 7

persons were present at the time of digging grave. Subsequently several others attend the place. Rana, Sutu, and Ajoy were present there. Residence of Ajay is just opposite to his residence on the other side of the road.

- DW-2 Sri Sutu Tanti in his evidence deposed that he heard that Ajay was arrested by police but cannot say why he was arrested. On the previous day of Biswakarma Puja of previous year, mother of Mantu Kumar expired and she was taken for burial on the day of Biswakarma Puja. He along with accused Ajoy Pantanti and several other boys were there at the rituals of Burial. In his cross-examination by prosecution, DW 2 deposed that he was called by Mantu Kumar for digging burial grave. He cannot recollect who were present with him for digging the grave. Several peoples gathered there at the place of burial.
- 18. Basing on above evidence on record, let me decide the points formulated for just decision of the case.
- 19. Point No. I: So far point No. I is concerned regarding age of the victim, from the evidence of P.W. 1 and P.W. 4, the parents of the victim it appears that victim is aged about 7 years and presently she is studying in Class-I. P.W.5 also stated the age of the victim as 7 years. P.W. 3, the M.O. in his evidence stated that 21.09.2016 he examined the victim 'S' and upon radiological examination he opined the age of the victim between 5 to 8 years. The I.O. did not collect any document on age of the victim. However from the materials on record, it appears that there is no dispute regarding age of the victim that on the date of incident as stated by her parents. Medical officer has also corroborated the same. Thus it can safely be held that on the date of incident the victim 'S' was of the age of 7 years only.
- 20. <u>Point No. II:</u> So far the allegation of penetrative sexual assault on the victim is concerned, from the evidence on record, particularly from the evidence of P.W. 2, the victim it appears that on the date of occurrence she

was taken inside the Tea Garden on the name of showing tiger's feet mark and after laying her on the garden land, her pant was pulled and accused put his penis on her vagina. She got severe pain and blood comes out from her vagina. This part of evidence of the victim was duly corroborated by her mother (P.W.1). In her evidence P.W. 1 stated that she saw the victim in returning home with cry and on asking she told her that she was taken inside the tea garden on the plea of showing tiger's feet mark and after pulling her pant, the boy penetrated his penis on her vagina. On seeing private parts, PW 1 saw blood is coming out from the vagina of the victim. Immediately the victim was taken to Bagan Hospital. P.W. 7 Smt. Renu Singh Horo, Nurse of Dumar Dolong Bagan Hospital in her evidence confirmed that on 17.09.2016, at about 8.00 P.M. as duty nurse at Dumar Dolong Bagan Hospital, the victim was brought to Hospital by her father as the victim was crying with a history of sexual assault. She examined her and found slight marks on the vagina. Doctor was on leave and as per the advice of the Doctor she referred the victim to Government Hospital. From the evidence of P.W. 3, Dr. Pranjal Kumar Gogoi who examined the victim 'S' on 21.09.2016 on police requisition, in his evidence stated that the victim came to him with brief history of sexual assault on 17.09.2016, at about 3.30 P.M. and upon examination he found the hymen ruptured in 6 & 7 O'clock position. In his opinion the M.O. has opined that upon examination of the victim 'S' he is of the opinion that there was recent violent sexual act taken place with the victim. During cross examination the defence failed to dislodge the above evidence on the point of penetrative sexual assault upon the victim. The findings of the M.O. (P.W. 3) regarding rupture of hymen of a seven years old girl with the positive opinion of the medical officer regarding existence of violence mark of sexual assault which remained un-rebutted during crossexamination by defence lead me to unhesitatingly hold that the victim 'S' was subjected to penetrative sexual assault on 17.09.2016. It may be noted here that during cross examination of P.W. 3, the dates were mentioned as 17.09.2015 and 21.09.2015 in place of 17.09.2016 and 21.09.2016 though

correct dates appeared in Exbt.1, the medico legal report and most probably the dates as mentioned during the cross examination is due to inadvertent typo-graphical error at the time of recording evidence.

- I would like to mention here that as the penetrative sexual assault was done on a child below 12 years of, the act of penetrative sexual assault comes under the definition of aggravated penetrative sexual assault as defined under 5 (m) of POCSO Act 2012 as amended up-to-date.
- 22. Point III:- In view of my positive finding that the victim was subjected to aggravated penetrative sexual assault, now let me decide as to whether accused Ajay Pantanti @ Kundu has committed the offence on the victim S.
- 23. In the course of argument hearing, learned Special P.P. by referring the evidence of P.W. 2 has vehemently argued that the victim has unerringly identified the accused Ajay Pantanti @ Kundu at village, then at Police Station and while adducing evidence in Court. During her cross examination the defence failed to dislodge the evidence of the victim on the point of identity. Learned Special P.P. by referring Section 29 of the POCSO Act has also submitted that though no TIP was held, the identification of the accused by the victim cannot be doubted as defence has failed to rebut the evidence or cast any doubt on the evidence of the victim on the identity of the accused as the perpetrator of the crime. On the other hand, learned State defence counsel Mr. D.K. Gohain by placing reliance on the reported case of Rajesh Govind Jagesha Vs State of Maharashtra [1999 (4) Crimes 331 (SC): (1999) 8 SCC 428] has argued that in the case in hand, it is clear that the accused was not known to the victim prior to the alleged offence and for proper identification, no TIP was held for enabling the witness to identify the person alleged to have committed the offence and as such the entire evidence on identification of the accused for the first time in the court is fatal to prosecution. Learned Advocate for the accused by referring to the evidence of P.W. 8 has

also questioned implication of present accused as four persons in the said Bagan is available in the name of Kundu. Furthermore, learned Advocate for the accused by referring to the evidence of D.Ws submitted that at the time of alleged incident the accused Ajoy Pantanti @ Kundu was present at the Burial of the mother of one Mantu Kumar (D.W.1) and as such, the allegation of his presence and committing crime is not possible. I have considered the submission of both the sides. Before going to discuss the evidence on this point, let me look at the law on this point.

- 24. Hon'ble Supreme Court in the case Rajesh Govind Jagesha (supra) as relied by defence has held as Follows:-
 - "4. **** In cases where a person is alleged to have committed the offence and is not previously known to the witnesses, it is obligatory on the part of the investigating agency to hold identification parade for the purposes of enabling the witnesses to identify the person alleged to have committed the offence. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Such a parade may not be necessary in a case where the accused person is arrested on the spot immediately after the occurrence. The evidence of identifying the accused person at the trial, for the first time, is from its very nature, inherently of a weak character."
- 25. Hon'ble Supreme Court of India in the case S v. Sunil Kumar, [(2015) 8 SCC 478] while deciding a case u/s 376 IPC on the point non-holding TIP and identification of accused for the time in court has laid down the law as follows:-
 - 11. It has consistently been held by this Court that what is substantive evidence is the identification of an accused in court by a witness and that the prior identification in a test identification parade is used only to corroborate the identification in court. Holding of test identification parade is not the rule of law but rule of prudence. Normally identification of the accused in a test identification parade lends assurance so that the subsequent identification in court during trial could be safely relied upon. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the

witness is otherwise trustworthy and reliable. The law on the point is well settled and succinctly laid down in Ashok Debbarma [(2014) 4 SCC 747: (2014) 2 SCC (Cri) 417].

- 12. In the present case the appellant was subjected to sexual intercourse during broad daylight. The fact that she was so subjected at the time and in the manner stated by her, stands proved. Three witnesses had immediately come on the scene of occurrence and found that she was raped. The immediate reporting and the consequential medical examination further support her testimony. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon her mind the identity of the offender."
- 13. In Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] in a similar situation where identification by the prosecutrix for the first time in court was a matter in issue, this Court had observed: (SCC p. 755, para 16)
 - "16. ... She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity."
- "14. Furthermore, the appellant had gone to the extent of stating in her first reporting that she would be in a position to identify the offender and had given particulars regarding his identity. The clothes worn by the offender were identified by her when called upon to do so. In the circumstances there was nothing wrong or exceptional in identification by her of the accused in court. We find her testimony completely trustworthy and reliable. Consequently, we hold that the case against Respondent 1 stands proved. Since the trial court had found the appellant to be 10-13 years of age, we take the age to be on the maximum scale i.e. 13 years. In our considered view, the High Court was not justified in dismissing the revision. No other view was possible and the case therefore warrants interference by this Court."
- 26. Thus from the above the case laws, it becomes abundantly clear that identification of accused for the first time in court cannot be overlooked in

a case of rape where the evidence of victim was found trustworthy. Non holding of TIP will not be fatal to prosecution as argued by defence.

- 27. Keeping the above in mind, let me discuss the evidence on the role of the accused. Admittedly, in the case in hand no TIP was held. The victim (PW 2) in her evidence has categorically stated that she recognised the accused standing on the door of the court chamber. PW 2 further deposed on the day of Biswakarma Puja, after seeing Puja, while she was returning home alone, the said boy (accused) told her that he will show her tiger's feet mark and took her in the tea garden. PW further deposed that on asking by her parents to search the boy, she with her parents searched the boy in Bagan line and able to point out the boy on identifying him after two days. She also stated that after apprehension of the boy, she was able to identify the boy at the Police Station and on the date of evidence she identified the boy in court. In her crossexamination, she though stated that accused was not known to her prior to the identity, but the fact that the victim able to identify the boy at the Bagan line, at the Police Station and at in the court remained unshaken in her cross examination.
- 28. P.W. 1, the mother of the victim on the point of identity clearly stated that during inquiry victim told the description of the accused and on that basis they have identified the accused and subsequently police apprehended him. She also confirmed that the victim has identified the accused at Police Station. In her cross examination she stated that the incident took place on Saturday and they could identify the accused on Sunday, i.e. on the next day of the incident on the basis of shoulder bag used by accused and as per physical description. PW-5 Smt. Lakhi Mani Tanti in her evidence deposed that after playing while the victim left her house at about 3 pm, she saw that accused Ajay was following victim S with. Though there is evidence that another boy accompanied the accused, but according to P.W. 2 did not made any complaint about other boy.

- The evidence of P.W. 4, the father of the victim is a hearsay witness so far identification of the boy is concerned. P.W. 6 is a VDP Secretary to whom the matter was informed on the same day. So far involvement of the accused is concerned; P.W. 6 appears to be a hearsay witness without disclosing the source. P.W. 8 in her evidence stated that on 18.09.2016, i.e. on the next day of the incident the victim and her mother came to her house and asked one boy namely Kundu and on informing that there are four Kundu named boy in their Bagan line, she left her house.
- 30. From the above evidence it appears that before going to the house of P.W.8, the victim and her mother (P.W.1) able to point the finger towards the accused. Even though there are four Kundu named boy as stated by P.W. 8, yet said P.W. 8 did not dislodge the identification of the accused by the victim. From the evidence of the I.O. (P.W. 9) it appears that he apprehended the accused from his house on 27.09.2016. The evidence of PW 8 shows that PW 1 and the victim could pin point that the incident was committed by one Kundu.
- Thus from the above, I am of the considered opinion that though a question mark was raised on the identity, but to my mind prosecution has been successfully and beyond doubt proved the fact that it is none but accused Ajoy Pantanti @ Kundu has taken the victim inside the tea garden on the plea of showing tiger's feet mark and committed penetrative sexual assault on the victim. By remaining with accused for a long time by way of talking to him, going with him and then seeing him in committing penetrative sexual assault on her certainly the face of the accused made an permanent imprint on her mind and hence there cannot be any reason of mis-identification by the victim. There is nothing on record to show that the victim or her parents have any previous enmity with the accused or his family for false implication. I have no hesitation in my mind that though no TIP was held, yet there is no scope of doubt on the identification of the accused by the victim. So far identification of the accused is

concerned, the evidence of the victim is found wholly reliable and trustworthy.

- 32. So far incident of penetrative sexual assault is concerned, as discussed earlier of having ample evidence of penetrative sexual assault, the case is proved against the accused on its own merit, even without taking the help of Section 29 of the POCSO Act.
- 33. It may be noted here that the accused by examining two witnesses in his defence tried to take plea that accused Ajoy Pantanti @ Kundu was with them at the rituals of burial of the mother of Mantu Kumar, but from the evidence of D.W. 1 it is clear that said burial was continued till 2.30 P.M. However from the answer given by the accused in his 313 Cr.P.C about his say, he never taken the plea that he was at burial of mother of DW 1. Rather the accused stated that on the date of incident he was at his home. No such defence plea was taken during cross-examination of PWs. The plea as put forwarded through DW 1 and 2 is nothing but an afterthought.
- 34. Even assuming for a minute that the accused was at the place of burial till 2.30 PM, yet as per the victim (P.W. 2) and her mother (P.W. 1), the victim was found missing at about 3.00 P.M. So it might happened that after coming from burial place, the accused allured the victim to go with him on the plea of showing tiger's feet mark inside the tea garden. Considering the age of the victim it is quite possible that a seven years old girl can easily be enticed on the plea of showing tiger's feet mark inside the Bagan area where admittedly tiger frequently appeared and killed cows as stated by the victim in her statement u/s 164 Cr.P.C. The defence witnesses as examined by the accused side failed to prove the plea of alibi regarding presence of the accused at the relevant time of the occurrence in the Bagan area. The evidence of D.W.1 and D.W.2 found to be of no help to the defence in dislodging the prosecution case which is otherwise found proved beyond doubt.
- 35. To sum up the discussion, I hold that prosecution has been able to

prove the guilt of the accused Ajoy Pantanti @ Kundu in committing the offence of aggravated penetrative sexual assault on the victim as defined u/s 3(a) r/w section 5(m) of the Pocso Act and as such accused is liable for punishment U/S 6 of POCSO Act, 2012.

- 36. Considering all above, I hold the accused guilty for the offence punishable U/S 6 of Pocso Act, 2012 and accordingly accused Ajoy Pantanti @ Kundu is convicted for the offence punishable U/S 6 of Pocso Act, 2012.
- 37. I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. Considering the nature of the offence proved by the prosecution and also considering the age of the victim, I am of the opinion that it is not at all a fit case to extend the benefit of Section 3 and 4 of Probation of Offenders Act to the accused.
- 38. Heard the accused on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. Learned State defence counsel has prayed for leniency in sentence by narrating the facts and circumstances of the case to which learned P.P. has strongly objected.
- 39. Section 6 of Pocso Act provides for Punishment of rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.
- 40. Considering the nature of the offence proved by the prosecution, I am of the opinion that the minimum punishment provided for the offence will meet the ends of justice. Accordingly Convict Ajay Pantanti @ Kundu is sentenced to undergo Rigorous Imprisonment for 10 (ten) years and to pay a fine of Rs. 2000/- (two thousand) i/d further SI for 2 months for the offence punishable U/S 6 of Pocso Act, 2012.
- 41. Convict is remanded to District Jail, Sivasagar to serve out the sentence.

- 42. Convict is entitled to the benefit of Section 428 Cr.P.C for the period already undergone during investigation and trial.
- Considering the fact of imposition of meager amount of fine, no order for payment of compensation to victim U/S 357 Cr.P.C. is made from the fine amount.
- Considering the nature of the case, I am of the opinion that it is a fit case for referring the matter to DLSA for exploring the possibility of granting compensation U/S 357-A Cr.P.C. to the victim for her rehabilitation, education and treatment though her mother.
- 45. A free copy of the Judgment be furnished to the convict immediately.
- 46. Send a copy of the judgment to learned District Magistrate, Charaideo at Sonari U/S 365 Cr.P.C.
- 47. Learned. State defence counsel is entitled for his professional fess form State of Assam as per rules.
- 48. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 12th day of February 2017 at Sivasagar.

Special Judge, Sivasagar:

<u>APPENDIX</u>

1. Prosecution witnesses -

- P.W.1 Smt. Taramoni Uzir (Informant)
- P.W.2 Victim
- P.W.3 Dr. Pranjal Kumar Gogoi (M.O.)
- P.W.4 Sri Baneswar Uzir
- P.W.5 Smt. Lakhi Moni Tanti
- P.W.6 Sri Udeswar Tanti
- P.W.7 Smt. Renu Singh Horo
- P.W.8 Smt. Anamika Mirdha
- P.W.9 Sri Rajib Das (I.O.)

2. <u>Defence witnesses</u>:

- D.W.1 Sri Mantu Kumar
- D.W.2 Sri Sutu Tanti

3. <u>Court witnesses</u> : None

4. Exhibits by prosecution -

- Exbt.1 Medical examination report
- Exbt.2 FIR
- Exbt.3 Abstract copy of Sepon OP GD Entry No. 380, dtd 19.9.16
- Exbt.4 Sketch map
- Exbt.5 Statement of the victim recorded U/S 164 Cr.P.C.
- Exbt.6 Charge-Sheet

Special Judge Sivasagar