IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, Sivasagar.

Spl. (P) Case No. 2 of 2017 U/S 6 of POCSO Act, 2012. (Arising out of Nazira P.S. Case No. 07/2017)

State of Assam

-Vs-

Sri Latu Das Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. Bikash Dey, Advocate

(Legal Aid Counsel)

Date of framing Charge : 20.02.2017

Dates of Evidence : 22.03.2017, 19.04.2017, 05.05.2017,

15.06.2017, 15.09.2017

Date of S/D : 09.11.2017

Date of Argument : 08.02.2018 & 28.02.2018

Date of Judgment : 13.03.2018

JUDGMENT

Prosecution case, in brief, is that on 14.01.2014, one Sri Parmananda Sharma lodged an FIR with O/C, Nazira Model Police Station alleging, inter alia, that on 13.01.2017, at about 11.30 P.M., while they were enjoying the Bihu feast, accused Latu Das took away the informant's minor daughter victim 'K' (name withheld), aged about seven years to nearby jungle area and committed rape on her. On this matter Sri Babu Das, on hearing hue and cry of his mother, came out of his house on which accused fled away by leaving the victim in half naked condition. The victim was recovered from the said jungle by said Babu Das and Alpana Das.

- On receipt of the FIR, Nazira P.S. Case No. 7/2017 U/S 4 of POCSO Act, 2012 was registered and investigated. It may be noted here that, before filing of the FIR, investigation of this case began on the basis of Nazira PS G D Entry No. 382 dated 13.01.2017 (Exbt. 7). During investigation, I.O. visited the place of occurrence, prepared sketch map and recorded the statement of the witnesses. During investigation, accused was arrested and produced him before the court for judicial custody. The victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet U/S 4 of POCSO Act, 2012 against the accused person.
- 3. On receipt of charge sheet, cognizance of offence was taken and after furnishing copy to the accused and after hearing both the sides, vide order dated 22.02.2017, charge U/S 6 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial.
- 4. During trial, prosecution side has examined as many as eleven witnesses including two M.O. and I.O. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- It may be noted here that accused faced the entire trial as UTP. Initially the accused was defended by his engaged counsel. However, subsequently refusal of the engaged counsel, accused was provided with the services of Legal Aid Counsel Mr. Dhiraj Dutta. However at the last stage of trial, due to appointment of the Legal Aid counsel as PP, Sivasagar, accused was provided with the services of another Legal aid counsel Mr. Bikash Dey, a senior member of Bar and due to waiting for taking Charge by Special PP, there was some delay in disposal of this case.
- 6. I have finally heard argument of learned Special P.P. Mr. Srimanta

Gogoi and Mr. Bikash Dey, learned Legal Aid Counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- (I) What was the age of the victim 'K' on the date of incident?
- (II) Whether on 13.01.2017, at about 11.30 PM victim 'K' was subjected to aggravated penetrative sexual assault by the accused Latu Das?

DECISION AND REASONS THEREOF

- 7. Before going further, let me narrate the evidence of the witnesses for better understanding of fact in issue.
- 8. PW-1 Smt. Baby Sharma, mother of the victim K in her evidence deposed that accused Latu Das is known to her being neighbour. On 13.01.2017, they have organised a feast on occasion of Bihu with neighbours. Latu das was also dancing on the tune of music. On that day, at about 11 pm, she sent her daughter victim K to the residence of neighbour Debojit Gogoi, but her daughter did not return in time. She and other neighbours searched for her daughter. She has noticed that accused Latu Das was also not there. By that time, nearby aunt, Alpana Das went to attend the call of nature on her back yard and heard some noise in the backside jungle. Thinking of coming thief, she called her son and on this her son Babu Das run to the said place of noise. On this they also rushed there. By this time victim cried as "save me, save me". Babu Das went there and recovered the victim in half naked condition and handed over to her. She saw blood coming out from her mouth and genital part. Her panty, three quarter pant, and the long pant and the sandal (slipper) which she was wearing were missing. On getting her daughter in this condition, their landlord's son Debojit Hazarika informed the matter to police. At about 12 midnight police arrived there and visited the place of occurrence, and recovered the pants of her daughter, sandal of daughter, Shoes, purse containing voter card, D/L, ATM card, photo belongs to Latu Das. Police seized those articles. On

the same night, her daughter was taken to Nazira SHC. On the next day morning, her husband Parmananda Sarma lodged the FIR at Nazira PS. On recovery of victim, on being asked, victim told them that Latu Das has taken her by grabbing her mouth and threatened her not to make cry else he will kill her. On her cry, accused slapped her brutally. She also told her that accused by opening her pant, forcibly committed mis-deed. While she tried to restrain by pulling her legs, accused forcefully separated her legs. Scratch marks were seen on her legs. She also told about getting pain on her private parts. During investigation, police took her and the victim to court and they gave statement in court. Exbt. 1 is her statement. Exbt. 1(i) and 1(ii) are her signature. In her cross-examination, she admitted that the night of the incident was dark. Incident took place after 11 pm. She has not seen the accused Latu Das at the place of occurrence. While giving statement in court, she has not stated that victim told me regarding getting pain in her private parts. She followed police while they went to place of occurrence. She has seen police in picking up some articles and then shown to her. In a query by Court, the witness deposed that the date of birth of the victim is 26.08.2007. Police seized the birth certificate of her daughter.

PW-2 the victim in her evidence while recognising the accused Latu Das as neighbour deposed that on the occasion of Bihu at night hours, her mother sent her to the residence of Debojit uncle to give meat. At that time accused Latu was dancing alone on the tune of deck. Others went for taking meal. While she was returning after giving the meat bowl, accused Latu Das grabbed her mouth and took her to jungle, opened her pants and committed mis-deed. He also told her that he will give her money purse, ATM Card, mobile etc. which she threw away. At that time, she wore one panty, one half pant and one long pant. After grabbing her mouth, accused told her that if she make cry, he will kill her and flee away. He laid her on ground. He also slapped her and gave scratch marks on her cheek, thigh. She got pain in her susu (vagina), on

her hands when he committed misdeed. He also pinched her mouth and blood come out. She cried but he gagged her mouth. By this time, mother of Babu das made cry as thief, thief. On this Latu Das flee away by leaving her in the jungle. She was picked up by neighbouring uncle. They brought her to her house. She told the incident to her mother. After some time, police arrived there. She was taken to hospital and also in court. She gave statement in court. Exbt. 2 is her statement. Exbt. 2(i) and 2(ii) are her signature. In her cross-examination, the victim deposed that on the day of incident, Magh Bihu feast was arranged. It was dark on that night. Accused took her to jungle. She recognised him as Latu Das. Initially she could not know the name of accused. Her mother told her his name as Latu Das. She denied the defence suggestions that, accused is not the same person who took her to jungle and committed mis-deed. She also denied that on being tutored by her mother, she deposed implicating the accused Latu Das.

- 10. PW 3 Dr. Amiya Saikia in his evidence deposed that on 14.01.2017 at about 7.15 p.m., on police requisition, he examined Sri Latu Das, (accused) in connection with Nazira P. S. Case No. 7/2017 and upon examination he found 4 (four) Linear abrasions present on left side of face, size 3 cm. X 1mn. Reddish in colour. The injury marks were recent. He is of the opinion that the injury is simple and caused by blunt object. He proved the report as Ext.3 The scratch mark present on the face of the persons are straight. These Scratch marks apparently caused by finger nails. In his cross-examination he admitted that the scratch mark can be done by other objects.
- 11. PW-4 Sri Debojit Hazarika, in his evidence deposed that accused and victim are known to him. Victim was aged about 7 years. They are tenant in his house. Their house is at a distance of about 150 meters from his residence. On 13.01.2017, at about 11–11.30 PM, while he was in his residence, on hearing a hue and cry in the BARI area, he went there and met the mother of the victim. She told him that accused has committed rape on her

daughter. He saw bleeding injury on the victim's private parts. Police arrived there and took the victim to Medical. Police also went to the place of occurrence in the nearby jungle area. He accompanied police. Police seized several articles viz. one pair sports shoe, one hawai chapple, one yellow underpant, 3 quarter half pant, green colour sleeks, money bag, voter ID card in the name of Latu Das, One D/L in the name of Latu Das, ATM card, etc. from the said place. Exbt. 4 is the seizure list. Exbt. 4(i) is his signature. PW 4 recognised the seized articles as Material Exhibit (M. Ex.) 1 to 8. He also inquired about the incident from the victim. In his cross-examination, PW 4 admitted that Police has shown him the seized articles from some distance. He has not seen the names written in the seized ID card, D/L etc. at the time of seizure. He heard about the incident from the mother of the victim only.

12. P.W. 5, Dr. Mukut ch. Deka, the medical officer who had examined the victim, in his evidence deposed that on 14.01.2017 at about 1.30 p.m., on police requisition, he examined the victim in connection with Nazira P. S. Case No. 7/2017 U/S 4 of POCSO Act and found as follows:

General History: Menarche – not attained.

General behaviour and mental state - normal.

Mark of violence on the body -

- 1. 2-3 scratch injury marks (superficial) and fresh seen in medial aspects of right thigh.
- 2. Abrasion injury seen just above the upper lip and blood clot in upper lip seen.
- 3. Superficial lacerated injury lateral aspects of right labia muscle of vagina seen. No bleeding seen.
- 4. Tear in fourchette of vagina seen.
- 5. Tear of hymen seen with redness of vagina, oozing of blood seen.

Examination of genitalia -

Pubic hair – absent. Clitoris – normal.

Labia, majora and minora - poorly developed.

Fourchette – tear seen. Hymen – tear.

Vagina – redness and oozing of blood seen. Injury – nil

Discharge and stains – blood stain.

<u>Laboratory investigation</u>: (done on 16.01.2017)

Vaginal smear test - spermatozoa not seen.

Pregnancy Test (HCG in urine) – report reveals – negative.

Radiological examination:

X-ray left elbow & wrist joint reveals incomplete fusion of epiphysis of both bone).

- 13. PW 5 also deposed that in his opinion (i) there is external evidence of forceful attempt of sexual act is seen, (ii) there is multiple marks of violence on her body seen and, (iii) according to her dentition report and X-ray report and by appearance her age is about seven years old. He proved the medical report as Ext. 5. Ext.5(1) is his signature. Exbt.5(2) is the radiological report of Nazira SDCH. In his cross-examination, PW 5 deposed that tear of hymen might be caused due to cycling and jumping. In case of hymen is torn, blood may ooze out. Only by tear of hymen it cannot be said that there is penetration, but if coupled with the injuries, it may be suspected case of penetration. He denied the defence suggestions that without examining the victim's private parts, he prepared the report on the statement of the victim only.
- 14. PW-6 Sri Debojit Gogoi a tenant near to the house of accused, in his evidence deposed that victim is known to her and might be aged about 6½ years. On 13.01.2017, celebration of Magh Bihu Uruka was going on. They were enjoying by playing music. By that time accused arrived there and was dancing. On calling by his wife, he went to his room and asked the mother of the victim for some meat prepared in her house. She sent the meat bowl with her daughter (victim K). After 15-20 minutes, mother of victim came there and searched for the victim but did not find her. Latu Das was also found absent. After searching for 15-20 minutes, he came to know that victim was found. On looking at her he saw her cloths torn. Victim was not in a position to talk. Police

also went to the back side of the residence of Kalpana Das and recovered some articles from the said place. Police came to his residential area and shown him some articles viz one pair sports shoe, one hawai chapple, voter ID card in the name of Latu Das, One D/L in the name of Latu Das, Pan Card, Mobile Phone etc. Exbt. 4 is the seizure list. Exbt. 4(ii) is his signature. He also recognised the articles vice M. Ex. 1 to M. Ex. 8 is the D/L in the name of Latu Das. In his cross examination, PW 6 deposed that he started residing in the said rented premises prior to one month of the incident. From his room, residence of Latu Das is at a distance of about 100 meters. He saw the victim while she came to his house with meal bowl and thereafter only with police. Initially he has seen the girl with her mother in naked condition and subsequently due cold wave, her mother put shawl on her body. It was about 10.30 pm-11 pm. There was electric light in the area. He did not go with the police while police recovered the seized articles.

15. PW-7 Smt. Alpana Das @ Majoni, while recognising accused and victim as neighbours, in her evidence deposed that victim might be aged about 7 years. On 13.01.2017 at about 10-11 pm on getting from sleep, she went on the back side of her residence for urination. Suddenly, she saw one man running out from the area and she chased him. Her son Babu Das also followed her. They both jumped on the down area. There she heard a cry "bachao bachao". There from the victim was recovered by her son Babu Das. She saw that the victim was naked from waist part. She also saw bleeding injury on her face, ear, injury on eye etc. By that time girl became senseless. She was taken to her residence. After some time police arrived there. She shown the place wherefrom the victim was recovered to Police. Police brought several articles from the said place viz one pair sports shoe, one hawai chapple, money bag, cloths etc. of the victim. The I-Card etc. were of Latu Das. Police took the victim for medical examination. In the area, there was sufficient light in which she has seen that one person in running away. She cannot recognise the man

who ran away. After taking treatment about one month, the victim recovered. In her cross-examination, she admitted she did not went with police to the place of occurrence. She cannot say from the seized documents that those belonged to Latu Das.

- 16. PW-8 Sri Babu Das in his evidence deposed that on 13.01.2017, at about 11-11.30 pm, while he was about to sleep, on hearing cry of his mother (CHOR-CHOR) who went to the back side of their residence for urination, he followed her. On the back side of his house, he heard a cry "bachao –bachao". He went to the area and recognised the victim. He recovered her from the said place and saw her in naked condition. He saw bleeding injury on her nose, ear etc. After recovery he handed over the victim to her mother. Their landlord Debojit informed the matter to police. After some time, police arrived there. He presumed that the victim was raped. He heard that accused Latu Das has committed the rape. In his cross-examination, he deposed that while he picked the girl, she was completely naked. He cannot say what articles were recovered by police. There was complete dark on their back side.
- 17. PW-9 Sri Parmananda Sharma, father of the victim in his evidence deposed that at the time of incident victim was a student of Class III and aged about 7 years. On 13.01.2017, after returning from work, while he was sleeping, on hearing hue and cry, he got up and learnt that his daughter was missing. By that time police arrived there and seized some articles findings on nearby jungle area. He also learnt that rape was committed with the victim. Police seized several articles viz. one pair sports shoe, one hawai chapple, one yellow underpant, 3 quarter half pant, green colour sleeks, money bag, voter ID card in the name of Latu Das, One D/L in the name of Latu Das, ATM card, etc. from the said place. On this incident he lodged the FIR. Exbt. 6 is the FIR. Exbt. 6(i) is his signature. FIR was written by other on his dictation. He saw injury marks on various parts of his daughter. In his cross-examination, he deposed that Latu Das was his neighbour. Feast was going on for Bihu. He denied that

he has not seen police in recovery of the seized articles from the jungle area. He also denied that while Latu Das was dancing in Bihu feast area, his purse with ATM D/L etc. was fallen and some body has handed over it to police.

- 18. PW-10 Sri Krishna Bora in his evidence deposed that victim is known to him being next door neighbour as tenant. On 13.01.2017, they have organised a feast on occasion of Bihu with neighbours. Latu das was also dancing on the tune of music. At about 11 – 11.30 pm he went to his residence for dinner. On hearing a hue and cry, he heard that victim K is missing from the place and during search, he heard cry of one elderly lady as "chor chor" and saw that son of the said lady picked up victim K in necked with injuries. After some time police arrived there. Police was taken to the place of recovery of victim K. He went there. On search, he saw that police has found one purse from the place. Police also recovered and seized one pair sports shoe, one hawai chapple, one yellow underpant, 3 quarter half pant, green colour sleeks, money bag, voter ID card in the name of Latu Das, One D/L in the name of Latu Das, ATM card, etc. from the said place. Exbt. 4 is the seizure list. Exbt. 4(iii) is his signature. He also recognised the seized articles as M. Ex. 1 to M. Ex. 8. In his cross-examination, PW 10 deposed he along with 15-20 persons went with Police at the place of recovery. Money bag (purse) was found there by some one of them from the jungle at the spot. Police has shown him recovered articles. He cannot say who found the purse. It is not a fact that the purse with ATM D/L etc. was found at different place by somebody and handed over it to police.
- 19. PW-11 Sri Nurtaz Ali in his evidence deposed that on 13.01.2017 at about 11.30 PM the then O/C has received one information over phone from Debojit Hazarika of Amolapatty Nazira regarding rape on a 7 year old girl by Latu Das and that the said Latu Das fled away from the place of occurrence. On getting this information, same was entered in G D Entry book vide G D Entry No. 382 dated 13.01.2017 and entrusted him to proceed to the place of

occurrence and to investigate the matter. Exbt. 7 is the abstract certified copy of Nazira Model PS G D Entry No. 382 dated 13.01.2017. Exbt. 7(i) is the signature of the then O/C Apurba Kumar Bora. Accordingly at 11.45 pm, he arrived at Amolapatty area and went to the residence of Debojit Hazarika and saw that one minor girl was in the lap of her mother and from the local gathering, he came to know that the said girl was raped by Latu Das and they have recovered the victim from nearby jungle. On this he went to the residence of mother of the victim which is a tenanted premise of Debojit Hazarika. He drew a sketch map of the said place of occurrence of first incident. Exbt. 8 is the sketch Map. Thereafter as shown and led by witness Babu Das, he went to the place of second place of occurrence and a small jungle area beside a pond where the alleged occurrence of rape took place. He drew a sketch map of the said place of occurrence of second incident. Exbt. 9 is the sketch Map. During inspection of the second place of occurrence, he found one pair sports shoe, one hawai chapple, one yellow underpant, one 3 quarter half pant, one green colour sleeks, one money bag containing voter ID card in the name of Latu Das, One D/L in the name of Latu Das, ATM card, etc. from the said place. Exbt. 4 is the seizure list. Exbt. 4(iv) is his signature. He recognised the seized articles as M. Ex. 1 to M. Ex. 8. He recorded statement of witnesses and sent the victim for medical examination at Naziara CHC. On 14.01.2017, at about 1 PM father of the victim Paramananda Sarma has lodged a formal FIR on which Nazira PS case No. 7/16 u/s 4 of POCSO Act was registered and he was entrusted to do the further investigation of the case. On 14.01.2017 the victim was sent to Ligiripukhuri Civil Hospital for detail medical check up. Some more examinations were done on 16.01.2017. During investigation, on 14.01.2017, he apprehended the FIR named accused Sri Latu Das from his residence. Upon noticing scratch mark on his left side cheek and over eyes, he sent the accused for detail medical examination to Nazira SHC. He has photographed the face of the accused showing injury marks. Exbt. 10(i) to 10(iii) are the said photographs. Latu Das was sent to Court for remand. On 14.01.2017 the victim

and her mother were sent to Court for recording their statement u/s 164 Cr.P.C. During investigation he has collected birth certificate of the victim. Exbt. 11 is the seizure list. As per the birth certificate the date of Birth of the victim is 26.08.2007. After seizure, he handed over the original certificate in zimma of the mother of the victim and kept xerox copy in CD. On completion of investigation, he submitted charge sheet against the accused Latu Das u/s 4 of POCSO Act. Exbt. 12 is the charge sheet.

20. In his cross-examination, PW 11 admitted that he started the investigation on the basis of G D Entry No. 382 dated 13.01.2017. The information leading to G D Entry was specific against the accused Latu Das. On his arrival, on seeing the victim, though he wanted to send the victim for medical examination first, but as desired by local gathering, he went to the place of occurrence. While he went to the second place of occurrence, about 6-7 persons went with him to said place. He has not drawn any sketch map where the feast was organised. In the notes in the CD, he has mentioned that the distance from the first place of occurrence i.e. courtyard of rented premises, to the second place of occurrence i.e. the place of alleged rape was about 50 meters. The above distance or the way by which path victim was taken to second place was not mentioned in the sketch map. Place of alleged rape in an open jungle and easily accessible from three side. He has not sent the seized articles for determination of their ownership or for expert opinion. At the place of second occurrence, the seized articles were found scattered and the persons went with him to the said PO, has helped him in collecting the same and accordingly, he seized the same. He cannot say, if any person threw any of the seized article there and then shown him the item. While he went to the PO, 4 other police staffs were with him. They all have actively searched the second Place of occurrence. At the said second place of occurrence there was no sufficiency of light. Witness Alapna Das in her statement before him did not state that while she chased the accused, her son Babu Das also followed her.

- 21. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 22. Point No. I: So far age of the victim is concerned P.W. 4, P.W. 6 and P.W. 7, the neighbours of the victim and P.W. 9, father of the victim in their evidence stated that at the time of incident the victim 'K' was aged about 7 years and she was a student of Class-III. P.W. 5, the M.O. who has examined the victim has deposed that as per his opinion based on radiological report and dentition report and by appearance the age of the victim is seven years. P.W. 11, the I.O. in his evidence stated that during investigation, he has collected the birth certificate of the victim and proved the same vide Exbt. 11.He further deposed that as per the birth certificate the date of birth of the victim 'K' is 26.08.2007. The incident of this case took place on 13.01.2017. So as per the birth certificate, the victim was about 9 years 41/2 months on the date of occurrence. The victim in her evidence also claimed her age as 9 years. This part of evidence on age of the victim remained unchallenged by the defence. As such, it can safely be held that on the date of incident the victim 'K' was below the age of 10 years.
- 23. <u>Point No. II</u>: So far allegation of aggravated penetrative sexual assault is concerned, from the evidence of P.W. 1, mother of the victim, it appears that after recovery of the victim in half naked condition she saw blood coming out from her mouth and genital part. P.W. 2, the victim also stated that after laying her on the ground, when misdeed was committed she got pain on her vagina. P.W. 5 Dr. Mukut Ch. Deka, who examined the victim 'K' on the next day of the incident found the following marks of violence on her body (i) 2-3 scratch injury marks (superficial) and fresh seen in medial aspects of right thigh; (ii) Abrasion injury seen just above the upper lip and blood clot in upper lip seen; (iii) Superficial lacerated injury lateral aspects of right labia muscle of vagina seen. No bleeding seen; (iv) Tear in forchette of vagina seen. The M.O. also

opined that upon examination of victim 'K', he is of the opinion that there is external evidence of forceful attempt of sexual act and multiple marks of violence seen on her body. In his cross-examination, the M.O. stated that tear of hymen might be caused due to cycling and jumping. In case of hymen is tear, blood may ooze out. Medical Officer has also opined that only by tear of hymen, it cannot be said that there is penetration, but if coupled with the injuries, it may be suspected case of penetration. P.W. 10 in his evidence deposed that after recovery of the victim he saw injury on face, body, leg and private parts of the victim at the veranda in electric light.

- Basing on the evidence of medical officer as narrated above, in the case in hand, it is apparent that the victim was subjected to penetrated sexual assault. The defence argument that the evidence is insufficient to hold penetrative sexual assault and at the best it may be treated as attempt of penetrated sexual assault cannot be accepted. The medical evidence is loud and clear that not only hymen was found torn but oozing of blood from vagina and the peripheral injury on private parts of the victim indicates of penetrative sexual assault on her.
- 25. As at the time of occurrence, the victim was below 12 years of age, as per Section 5 (m) of POCSO Act,2012 the offence of penetrative sexual assault becomes aggravated penetrative sexual assault and liable for punishment u/s 6 of Pocso Act, 2012.
- 26. Now the prime question falls for determination is whether the accused is the perpetrator of the crime of aggravated penetrative sexual assault on the victim K.
- 27. In the course of argument hearing, learned Special P.P. Mr. Srimanta Gogoi has vehemently argued that apart from the evidence of the victim identifying the accused in taking away her while she was returning after giving meat bowl to her neighbour, the identity of the accused is no way

doubtful in this case and accused in his examination U/S 313 Cr.P.C. failed to explain the circumstances under which the purse containing his D/L, voter identity card, ATM card were found at the place of occurrence as seized by police. Learned Special P.P. further argued that just before the incident accused Latu Das suddenly disappeared from the place of dancing and as such after recovery of the victim, a presumption is attributed against him and accordingly same might have been informed to police and got his name in the G D Entry. On the other hand, learned Legal Aid Counsel Mr. Bikash Dey has submitted that in this case there is no eye witness of the occurrence except the victim and none has seen the accused in taking away the girl or committing the alleged offence or fleeing away of the accused from the jungle. The only circumstance which appears against the accused is recovery of the purse containing voter card, ATM card, Driving License issued in the name of the accused which were allegedly recovered upon search conducted in presence of police officer. It is further argued that while informing the matter to police over phone, though the name of the accused was specifically mentioned, but by that time nobody knew that accused Latu Das has taken away the victim. It is also argued that the victim was found in unconscious state and as such, she was not in a position to take the name of the accused Latu Das, which is evident from her deposition. So involvement of the accused Latu Das with the alleged crime appears to be doubtful. It is further argued that though one pair of sports shoe were recovered, but the ownership was not established. Under these circumstances, learned legal aid counsel has prayed for extending the benefit of doubt to the accused. I have considered the submission of learned Advocate for both the sides.

28. There is an admitted fact that on 13.01.2017 at night hours, a feast was going on the occasion of Magh Bihu near the house of the informant and neighbouring people took part in the said feast. It is also admitted that accused Latu Das came there and was dancing with neighbours on the tune of

music playing at that place. It is evident in the evidence of P.W. 1, mother of the victim that at about 11.00 P.M. she sent her daughter victim 'K' to the residence of neighbour Debojit Gogoi, but her daughter did not return in time and by that time she also noticed that accused Latu Das was also not there. Sending of the victim to the house of Debojit Gogoi was confirmed by said Debojit Gogoi (P.W. 6). He deposed that when he asked the mother of the victim for some meat prepared in their house, she sent the meat-bowl with her daughter victim 'K' and after 15-20 minutes peoples searched for the victim but did not find her and accused Latu was also found absent. Thus it is proved that while victim has returned from the house of PW 6, she got missing.

29. From the evidence of P.W. 7 it appears that on 13.01.2017, at about 10-11 P.M. on getting up from sleep, she went to the back side of her house for urination and then suddenly saw one man running out from the area. On this, she chased the boy and her son Babu also followed her. They both jumped on the down area and there she heard a cry "Bachao, Bachao" and there from her son Babu Das recovered the victim 'K' in half naked condition. This part of evidence was duly corroborated by P.W. 8 Babu Das (son of P.W. 7). From the evidence of PW 7, it appears that on 13.01.2017, at about 11-11-30 PM, while he was about to sleep, on hearing cry of his mother 'Chor, Chor' he went on the backside of their house and followed his mother where he also heard a cry 'Bachao, Bachao". He went to the area and recognized the victim and recovered her from the said place in naked condition. The victim was brought and handed over to her mother. This part of evidence, i.e. recovery of the victim and handing over to her mother was duly corroborated by P.W. 1, mother of the victim and P.W. 2, the victim herself. P.W. 6 has confirmed the evidence of P.W. 7 and P.W. 8. This part of evidence that victim was found in naked condition on the backside of the residence of the P.W. 7 and P.W. 8 and that she was recovered there from by P.W. 8 and handing over to her mother's lap remained unrebutted and unshaken during their cross examination.

- 30. Now so far the identity of the accused is concerned, the victim while deposing as PW 2 has vividly the described the incident. She clearly stated that accused Latu Das is known to her being neighbour. While she was returning after giving the meat bowl, accused Latu Das grabbed her mouth and took her to jungle. By taking there, Latu das has opened her pants and committed mis-deed. He also told her that he will give her money purse, ATM Card, mobile etc. which she thrown away. After grabbing her mouth he told her that if she makes cry he will kill her and flew away. He laid her on ground. He also slapped her and gave scratch marks on her cheek, thigh. She got pain in her susu (vagina), when he committed misdeed. He also pinched her mouth and blood come out. She has cried but he hold her mouth. By this time, Mother of Babu das made cry as thief, thief. On this Latu Das flew away by leaving her in the jungle. She was picked up by neighbouring uncle. She gave statement in court. Exbt. 2 is her statement. In her cross-examination, accused took her to jungle. She recognised him as Latu Das. She denied the defence suggestion that the accused is not the same person who took her to jungle and committed mis-deed. Thus from above, it is clear that being neighbour, accused is known to her may not be by name but by face. In her evidence, without any doubt, she recognised the accused as the person who took her to jungle, laid her on ground, opened her cloths and committed misdeed and then upon coming of PW 7, fled away from the place.
- 31. On the point of admissibility of evidence of rape victim, Hon'ble Supreme Court of India in the case of State of H.P. v. Asha Ram, (2005) 13 SCC 766 has held as follows:-
 - "5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-

settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

32. Apart from the evidence of victim, which alone is found wholly reliable and trust worthy on the fact that it the accused Latu Das and none but him who has committed aggravated penetrative sexual assault on the victim (PW 2), to get further corroboration on the point of identity of the accused; from the evidence of P.W. 1, P.W.4, P.W.6, P.W.7, P.W.8 and P.W.10 it appears that after recovery of the victim, the matter was informed to police over phone. From the evidence of P.W. 11, the I.O. it appears that on 13.01.2017, at about 11.30 P.M. one Debojit Hazarika (P.W. 4) has informed over phone to Nazira P.S. regarding commission of rape on a seven years old girl by Latu Das and that the said Latu Das flew away from the area. PW 11 also deposed that on getting this information, a GD Entry was made vide Nazira P.S. GD Entry No. 382, dated 13.01.2017 (Exbt. 7) and accordingly at 11.45 P.M. he arrived at the place of occurrence and saw the victim in the lap of her mother. From the evidence of P.W.11 it also appears that as shown and lead by Babu Das (P.W. 8) he went to the second place of occurrence, i.e. a small jungle area beside a pond where the alleged occurrence of rape took place. During inspection of the said place, he found one pair of sports shoe, one pair of Hawai Chapple, one yellow under-pant, one 3 quarter half-pant, one green colour sleeks, one money bag containing voter ID card, one Driving License, one ATM card, all

issued in the name of accused Latu Das (material Exbt. 1 to Mat Exbt. 8) and he seized those articles vide Exbt. 4. This part of evidence regarding finding of the above articles was duly confirmed and corroborated by P.W.4, P.W.6 and P.W.10, the seizure witnesses. In their cross examination P.W. 10 stated that he along with 15-20 peoples went to the place of recovery and some one of them picked up the said purse from the jungle and handed over to police. This part of the evidence was confirmed by the I.O. P.W.11, I.O. in his cross examination stated that while he went to the second place of occurrence, about 6-7 persons went there and the seized articles were found scattered and the persons went with him to the said place has helped him in collecting the same and accordingly he seized those articles. He further stated that four other police staff went to the second place of occurrence with him and they actively searched the said place of occurrence. The I.O. in his cross examination also stated that the second place of occurrence is at a distance of 50 meters from the court-yard of the residence of victim. Even the victim in her evidence stated that while accused gave his money bag to her, she threw the same and this reinforces the fact as to how the same was found lying in the jungle and improbablise the defence argument that it might have fallen at dance place and handed over to police.

33. From the above evidence, so far search and seizure is made, it appears that prosecution has been able to prove beyond doubt that the articles found at the second place of occurrence of rape which includes the money bag of the accused having voter ID card, one Driving License, one ATM card, all issued in the name of accused Latu Das. The defence argument that those might have fallen at the place of dancing those were handed over to police is nothing but mere hypothesis in view of unshaken evidence of seizure witnesses. From the evidence available on record it is crystal clear that the money bag was found at the place of commission of rape and not at the place of dancing. All these matters have been specifically put to the accused Latu Das during 313

- Cr.P.C. examination, but he could not give any satisfactory explanation as to how these articles were recovered from the said jungle area where the victim 'K' was found lying in naked condition. The accused never denied the existence of his purse or the voter ID card, D/L or ATM card in his named. On a specific question vide Question No. 66 during 313 Cr.P.C. examination, the accused simply stated that he cannot say how his money bag has fallen.
- 34. From the recovery of the above articles from the said jungle area where the victim 'K' was found, clearly shows that it is none but the accused Latu Das who has committed the offence of aggravated penetrative sexual assault on the victim 'K'. The argument that informing the police by specifying the name of Latu Das just after the incident could not shatter on the abundance of evidence available against the accused, both circumstantial and direct evidence as led by prosecution through P.W. 1 to P.W. 11.
- 35. Apart from above unimpeachable circumstance, prosecution has brought another strong circumstance evidence against the accused showing his involvement with the alleged crime. By examining PW 3 prosecution has brought that on 14.01.2017 at about 7.15 p.m., on police requisition, accused Latu Das examined at Nazira Subsidiary Health Centre, Nazira and upon examination the medical officer has found 4 (four) Linear abrasions present on left side of face, size 3 cm. X 1mn. Reddish in colour. The medical officer has also opined that the scratch mark present on the face of the victim is straight. These Scratch marks apparently caused by finger nails. I/O has proved the photographs of the face of the accused as Exbt. 10 (i) to 10 (iii), which clearly shows presence of 4 (four) strait linear abrasions present on left side of face of accused. It shows the possibility of nail marks of the victim during attempt of penetrative sexual assault on her. Accused failed to explain as to how those marks come on his face. This also raises a strong presumption against the accused for showing his involvement in the alleged offence of rape.
- 36. To sum up the discussion, I am of the considered opinion that

there is no scope of doubt that on 13.01.2017, at about 11.00 P.M. while the victim went to the residence of P.W. 6 for giving a meat-bowl and was returning home, accused Latu Das took her to jungle on the backside of the house of P.W. 7 and P.W. 8 and after opening her pant (as deposed by victim) committed penetrative sexual assault on the victim and during that process while P.W. 7 came to the backside of her house for urination, on sensing her presence accused Latu Das flew away leaving behind the victim and during that process one pair of shoe and failed to collect his purse containing voter ID card, one Driving License, one ATM card, all issued in the name of accused Latu Das as thrown by the victim at that place, and that subsequently the victim was recovered by PW 8.

- Considering all above, I have no hesitation to hold that accused Latu Das has committed the offence of aggravated penetrative sexual assault upon the victim 'K', a girl of about 9 years old and make himself liable for punishment as provided U/S 6 of POCSO Act, 2012.
- 38. In view of above, I hold the accused guilty for the offence punishable U/S 6 of POCSO Act, 2012 and accordingly accused Latu Das is convicted for the offence punishable U/S 6 of POCSO Act, 2012.
- 39. 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 punishment provided for the offence, I am not inclined to extend the benefit of the benevolent provisions of law to the accused.
- 40. 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 Special PP has prayed for awarding maximum punishment for the accused. Learned Legal Aid counsel has prayed for leniency in sentence by narrating the family background of the accused.

- Considering the way of committing the offence on a 9 year old girl child, who might have not yet understood about sex and is of the age of running after butterflies, I am of the considered opinion that it is a fit case for imposing some exemplary punishment on the accused for committing aggravated penetrative sexual assault on 9 years old girl, i.e. victim 'K'. I find no reason for leniency in sentence by awarding the minimum punishment prescribed by law as submitted by learned legal aid counsel.
- 42. Hon'ble Supreme Court of India in the case of State of Punjab v. Gurmit Singh [(1996) 2 SCC 384] has expressed its anguish on the of the increasing rate of crime against women, has held as follows:
 - "21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.
- On the point of awarding just sentence in a case of rape, Hon'ble Supreme Court of India has observed that Shyam Narain v. State (NCT of Delhi), [(2013) 7 SCC 77] has laid down the law in following words:
 - "14. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying

out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim."

- In the above referred case of Shyam Narain (supra), Hon'ble Supreme Court of India while dealing with the matter of imposition of life imprisonment to the convict for the offence of 376(2)(f) for committing rape on a 8 year old girl child after discussing various judgment of Hon'ble Supreme Court of India has held as follows:
 - 25. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors.
 - 26. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers.
 - 27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilised norm i.e. "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should

be paramount in everyone's mind that, on the one hand, society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some perverted members of the same society dehumanise the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court.

28. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court."

- Keeping the law laid down by Hon'ble Supreme Court of India so far awarding of sentence is concerned, though learned legal aid counsel appearing for the accused has prayed for mercy by referring the family back ground and children of the accused, I am of the considered opinion considering the nature of the brutality in committing the offence of aggravated penetrative sexual assault on a 9 year old girl as proved by the prosecution, I am of the considered opinion that accused does not deserve any leniency in sentence. The maximum sentence provided by law i.e. imprisonment for life with some amount of fine is the only just sentence in this case.
- Accordingly, convict Latu Das is sentenced to undergo rigorous imprisonment (RI) for life for committing the offence punishable U/S 6 of Pocso Act, 2012 and also to pay a fine of Rs. 2,000/- (two thousand) only i/d further SI of two month.

- 47. Convict Latu Das is remanded to District Jail, Sivasagar to serve out the remaining part of sentence.
- 48. Convict Latu Das is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 49. Seized articles be returned to its owners in due course of time.
- 50. Considering the fact of imposing meager amount of fine due to poor financial back ground of the convict, no order is passed for payment of compensation to victims U/S 357 Cr.P.C.
- 51. Considering the fact and circumstances of the case, the matter is referred to DLSA Sivasagar for exploring the possibility of compensation U/S 357A Cr.P.C. Send a copy of the judgment to Secretary DLSA Sivasagar for needful action.
- Let a free of cost copy of the judgment be given to the convict Latu Das immediately as per the provisions of Section 363(1) Cr.P.C.
- 53. Convict Latu Das is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 54. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 55. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 13th day of March, 2018 at Sivasagar.

Special Judge, Sivasagar

<u>APPENDIX</u>

1. Prosecution witnesses -

- P.W.1 Smt. Baby Sharma
- P.W.2 (Victim)
- P.W.3 Dr. Amiya Saikia (M.O.)
- P.W.4 Sri Debojit Hazarika
- P.W.5 Dr. Mukut Ch. Deka (M.O.)
- P.W.6 Sri Debojit Gogoi
- P.W.7 Smt. Alpana Das @ Majoni
- P.W.8 Sri Babu Das
- P.W.9 Sri Parmananda Sharma (Informant)
- P.W.10 Sri Krishna Bora
- P.W.11 Sri Nurtaz Ali (I.O.)

2. <u>Defence witnesses</u>: None

3. Court witnesses : None

4. Exhibits by prosecution -

- Exbt.1 164 Cr.P.C. statement of the witness Baby Sharma.
- Exbt.2 164 Cr.P.C. statement of the victim.
- Exbt.3 Medical examination report of Latu Das.
- Exbt.4 Seizure list
- Exbt.5 Medical examination report of victim 'K'
- Exbt.6 FIR
- Exbt.7 Abstract certified copy of Nazira Model P.S. GD Entry No.382, dated 13.01.2017.
- Exbt.8 Sketch map
- Exbt.9 Sketch map
- Exbt.10 (I) to 10 (iii) Photographs of accused Latu Das
- Exbt.11 Seizure list
- Exbt.12 Charge-Sheet
- M.Exbt.1 One pair sports shoe
- M.EXbt.2 One pair of Hawai Chapple
- M.EXbt.3 One yellow underpant
- M.EXbt.4 3 quarter half-pant
- M.Exbt.5 Green colour sleeks
- M.Exbt,6 Money Bag
- M.Exbt.7 Voter ID Card in the name of Latu Das
- M.Exbt.8 D/L in the name of Latu Das

Special Judge, Sivasagar: