IN THE COURT OF THE SESSIONS JUDGE :::: NALBARI

<u>Present:</u> Mrs. S. Begum. Sessions Judge, Nalbari.

<u>SPECIAL (P) CASE NO : 7/16</u> u/s- 342/354B IPC r/w 8 of POCSO Act

State of Assam

.....Complainant

-Vs-

Dayaram Barman

.....Accused person

Appearance:

For the prosecution : D. Barman, P.P, Nalbari

For the defence : Md. M. A. Sheikh, Advocate

Date of Argument : 12/10/2018

Date of Judgment : 20/12/2018

J U D G M E N T

1. The prosecution case as it is reflected in the ejahar lodged by Kulen Barman on 09/04/16 is that on 08/04/16 at about 3:00pm his 11 years old daughter Ankita Barman (hereinafter referred as "Miss X") was sexually assaulted by accused Dayaram Barman by calling her to his house. It is contended that the accused taking the advantage of absence of other family members in his house called the victim to his house and after increasing the sound of the TV, removed her clothes and thereafter caused sexual assault on her. While the family members of the victim did not find the victim inside the house then they called her loudly and then the accused sent her away from the house. The victim narrated everything to the family

members of her house. On the strength of the ejahar Tihu PS Case No. 46/16 u/s- 342/354B IPC r/w 8 of POCSO Act. has been registered.

- 2. Police force set in to motion and on completion of the investigation submitted charge sheet against accused Daya Barman u/s- 342/354B IPC r/w section 8 of the POCSO Act. While the accused entered in to his appearance before this special court, getting primafacie materials to charge against the accused u/s- 354B IPC and section 8 and 12 of the POCSO Act, charge is framed accordingly and read over to the accused to which he pleaded not guilty and claimed to be tried. Later on charge is amended and additional charge u/s- 6 of the POCSO Act has been framed against the accused and read over to the accused to which he pleaded not guilty and claimed to be tried.
- 3. The prosecution to bring home the charge against the accused examined as many as 8 witnesses including the M/O and I/O. Plea of the accused is of denial. He submitted that he was falsely implicated as he chased the victim for touching the articles brought for the marriage ceremony of his daughter. The accused adduced 5 defence witnesses. Heard arguments from both the sides.

4. POINTS FOR DETERMINATION

- i) Whether the accused on 08/04/2016 at about 3:00 PM at Bhojkuchi (Ojapara) village under Tihu P.S. committed sexual assault upon Miss X, aged 11 years, and thereby committed an offence punishable u/s- 8 of the POCSO Act.
- ii) Whether the accused on the aforesaid day, time and place committed sexual harassment upon Miss X, aged 11 years, and thereby committed an offence punishable u/s- 12 of the POCSO Act.

- iii) Whether the accused on the aforesaid day, time and place assaulted or used criminal force to Miss X with the intention of disrobing or compelling her to be naked and thereby committed an offence punishable u/s- 354B IPC
- iv) Whether the accused on the aforesaid day, time and place committed aggravated penetrative sexual assault upon Miss X, aged 11 years, and thereby committed an offence punishable u/s- 6 of the POCSO Act.

DECISION AND REASONS THEREOF

- 5. I have heard arguments put forwarded by the learned counsels for both the sides. The learned defence counsel argued on several counts to show the innocence of the accused. It is submitted that in the instant case except the family members of the victim no other independent witness has been examined by the prosecution. It is further submitted that the victim is the lone eye witnesses of the present case and that she being a minor and mentally retarded child there is probability of tutoring by the family members of the victim and only upon her evidenced the accused should not be convicted. It is further submitted that there is material contradiction in the testimony of the witnesses including the informant and other witness of the victim's family with their earlier statement before the I/O and the learned defence counsel urged not to convict the accused on the basis of such doubtful evidences. It is submitted that the evidence of the victim is not inspiring to sustain the conviction of the accused. It is also stated that there is unexplained delay in lodging the ejahar and there is every chance of concoction. It is submitted that as per the information of the victim she informed about the occurrence to her aunt Dulu and Manisha but those two witnesses are not examined as PWs and their non examination creates doubts on the veracity of the prosecution case.
- 6. It is submitted that there is material contradiction between the testimony of the victim with the evidence of the grandmother and

mother of the victim and the learned defence counsel submitted that due to material discrepancies the evidence of the victim should not be relied upon. He also submitted that the DWs examined by the defence side clearly established that no such incident as alleged by the informant had happened and that actually the victim was chased out from the house by the accused on the date of alleged occurrence as she created annoyance in the house of the accused by touching the articles which was collected for the marriage ceremony of the daughter of the accused. It is further submitted that as per the medical report no external injury was found on the body of the victim. It is also submitted that though the victim stated that the finger of the accused was inserted in her anus but medical report does not show any injury at her anus. It is argued that as the medical report does not corroborated the evidence of the victim so the evidence of the victim should be discarded.

- 7. Per contra the learned Special PP argued that the prosecution side, by cogent and reliable evidence of the victim as well as other prosecution witnesses, has been able to bring home the charge against the accused beyond all reasonable doubt and that conviction should be recorded against the accused u/s- 354B IPC and section 8 and 12 of the POCSO Act. It is submitted that though there is some minor contradiction in the testimonies of the victim with her earlier statement before the I/O yet those are minor contradictions and do not go to the root of the case.
- 8. On the backdrop of the forgoing argument now let me discuss and appreciate the testimonies of the witnesses to arrive at a judicious decision. First of let me discuss the evidence of PW-1 Kulen Barman, who is the informant cum father of the victim. He narrated during his evidence that his daughter "Miss X" was aged 11 years at the time of occurrence. On the date of occurrence at about 8:00am he came out from his house for business purpose. His wife Meghali also went to her sister in law's house. His daughter Miss X and his

mother Janaki was in the house. At about 3:00pm his uncle's daughter Manisha Barman over phone called him to come to the house. In the evening at about 6:00 pm while he returned back to the house his wife, who came back from her sister-in-law's house earlier to him, informed him that accused Daya calling the victim to his house touched different parts of her body in side his house by increasing the sound of the TV and closing the door. Thereafter the accused removing the panty of Miss X did bad work with her. His wife also told him that as the victim was not seen anywhere, then his mother Janaki Barman called her loudly and at that time accused Daya sent the victim through the back door of his house. He also disclosed that all the above facts were narrated by the victim to his wife. On the next day he lodged the ejahar. He exhibited Ext-1 as the ejahar. He disclosed that as the police were busy with election duty so police visited his house after 4/5 days of lodging the ejahar. Thereafter police brought the victim to the hospital for medical examination and her statement also got recorded by the police. He also exhibited the birth certificate of the victim which was seized by police vide Ext-2. He exhibited Paper Ext-1 as the said certificate. It is disclosed by him that the statement of the victim got recorded by magistrate u/s- 164 CrPC. The witness was re-examined and during his re-examination he exhibited Paper Ext-2 as the mentally retarded certificate of the victim. This witness was cross examined at length. During cross examination he revealed that he cannot now recollect the exact date of birth of the victim but he reiterated that his daughter was born in the year 2005. he also revealed that his daughter studied in class VI at the time of occurrence. He Further revealed that his wife did not inform him that the accused inserted his finger in to the anus of the victim.

9. PW-2 Meghali Barman, who is the mother of the victim, testified that on the date of occurrence she came to Nalbari town at about 8.30 am and returned at at 5pm. On her arrival the victim grabbed her and informed her that while she went to the house of

the accused to collect pebbles from his house for playing "lash" then the accused invited her to his house to watch TV. While she entered in to the house of the accused then the accused increased the volume of the TV and the speed of the fan was also increased. Thereafter the accused embarrassed her from back side and removed her frock up to her shoulder and pressed her breast. It is stated that while she screamed then the accused turned her facing towards him and removing her panty tried to insert his penis in her private part. She also disclosed that the victim informed her that while the victim raised hue and cry asking for releasing her then initially the accused did not release her but later on he sent her from his house through the back side door of the of the house. It is disclosed that the house of the accused is in front of their house and the victim used to frequently visit the house of the accused. On the date of occurrence the wife of accused along with her daughter went to market for purchasing articles for the marriage of her daughter and wife of the accused informed her (PW-2) about the fact that she would go to the market. It is disclosed by this witness that after her (PW-2) arrival at her house, her husband came back and she informed her husband about the incident. While the wife and daughter of the accused returned back then she informed the wife of the accused about the occurrence. Till the next day they awaited for some reply from the wife of the accused but as she did not reply on the next day also, so her husband lodged the ejahar at Tihu PS. The victim was also taken by her (PW-2) husband with him to the Tihu PS. Police brought the victim before the Tihu PHC for her medical examination and her statement was also got recorded by judicial magistrate. She also disclosed that her daughter is a little mentally retarded. During cross she revealed that the victim though is little bit mentally retarded girl but she herself gave the statement before the magistrate and that she was also present before the magistrate while the statement of the victim was recorded. She during cross examination revealed that the victim did not disclose before her that the accused inserted his finger in her anus. It is revealed that the victim was studying at class VI during that time and that at present she is a student of class VIII.

10. PW-3 is the victim. As she is a minor, aged 12 years, and as she seemed to be a mentally retarded girl to a certain extent so to ascertain her capability of understanding and maturity, few questions were put to her and after recording the answers while it appeared that she has proper understanding and maturity to depose then her evidence was recorded in verbatim. During her evidence the victim disclosed that she went to the house of the accused after returning back to home from her school for bringing pebbles/ stone for playing "lash". The pebbles were at the courtyard of the accused and she met the accused at his courtyard. Seeing her the accused called her to his house and thereafter embraced her. It is further revealed that the accused also increased the speed of the fan and volume of the TV after bringing her to his house. Thereafter the accused removed her wearing frock to her shoulder and thereafter touched her breast. The victim raised hue and cry and thereafter the accused removed her panty and pushed his penis ("suma") in between her legs from the back side and his penis came out to the front side of her legs. However it did not touch her sexual organ. It is further revealed that the accused inserted one of his finger in her anus. Thereafter while she raised hue and cry and also cried, then the accused allowed her to come out from his house through the back door of the house. At the time of occurrence the accused was alone in side his house. It is revealed by her that she informed the matter to her aunt Dulu and Manisha. Her parents were not at her house at that particular time. While her mother returned back, then she informed her mother about the whole incident. Two days subsequent to the incident, she went to the PS along with her parents and she was brought before the doctor, her statement was also got recorded by the magistrate u/s- 164 CrPC. She exhibited Ext-3 as her statement before the magistrate. This witness was cross examined at length. During cross examination she denied that she did not state before the magistrate as well as before the police that the accused inserted one of his finger in her anus. It is admitted by her that she frequently visited the house of the accused for watching TV. It is denied by her that as she annoyed the accused by entering in to his house and as other family members of the accused were not present in the house so the accused asked her to go from his house. It is revealed by her that first accused asked her to go and thereafter asked her to come. It is stated by her that while she came out from the house then the accused was in side his house.

11. PW-4 Janoki Barman who is the grandmother of the victim disclosed during her evidence that on 08/04/16 at about 1:00pm her granddaughter Miss X returned back from her school. At that time she was cooking rice and while the meal was ready then she searched for the victim but found that she was not inside the house. So she came out to the road and called the victim by uttering her name and also went ahead. Then she noticed that the victim was coming out from the backyard of the house of the accused. Noticing her (PW-4) the victim rushed to her house and informed her (PW-4) that the accused touched her breast and then taking her in his lap, touched her private part by his male organ and she also informed her aunt Manisha about the incident. While she (PW-4) inquired the victim why she went to the house of the accused then the victim informed that she went to the courtyard of the accused to bring pebbles and then the accused called her in to his house and committed bad works with her as described above. It is revealed by this witness that at that time mother of the victim was not at house. The mother of the victim went to the house of her sister-in-law. So she (PW-4) informed the mother of the victim about the incident over mobile phone. She (PW-4) also sent information to the father of the victim about the incident. During cross examination this witness disclosed that she called the victim from 15 meters away from the house of the accused. It is revealed that she noticed the victim coming out from the back side of the house of the accused and that the victim informed her that she (victim) was sent out by the accused through the back door of his house. It is disclosed that though the victim is a little bit mentally retarded yet she can express all the things properly in words.

- 12. PW-5 Manisha Barman is the cousin sister of the informant. She during her evidence testified that her house is in the same courtyard to that of the informant and the victim called her as aunt. She revealed that on the date of occurrence i.e. 08/04/16 at about 2:30/ 3:00 pm while she was at her own house at that time the victim also returned back to home from her school. Sometimes later, the victim became traceless from her house. It is revealed that the grandmother of the victim calling the victim loudly came to the road from her house and she (PW-5) also went out from her house to the gate of her house. At that time she noticed the victim coming our from the back side of the house of the accused by pulling her panty. After coming back to her own house the victim in crying condition informed her that the accused inside his house taking her on his lap caught her breast by his hand and entered his sexual organ through her legs. She also disclosed that the victim informed her that at that time the accused locked the door of his house and TV and Fan was running in the house. During cross examination she revealed that while she awaited at the gate of her house the grandmother (PW-4) of the victim ahead and that she noticed the victim coming out from the house of the accused from a distance of 20 meters. She revealed that at that time the back side chain of the wearing frock of the victim was in open condition. It is also disclosed that the victim informed her that the wife of the accused was not present at the house at the time of occurrence.
- 13. PW-6 Karunakanta, who is the grandfather of the victim, disclosed during his evidence that on the day of occurrence while he returned back after cutting bamboo at his own basti land then this wife Janaki informed him that the accused committed sexual assault

upon the victim at his house. It is also disclosed by this witness that his wife Janaki informed him that the accused removed the wearing clothes of the victim and did bad work with her and while Janaki called the victim loudly then she noticed the victim coming out from the back side door of the house of the accused.

- 14. PW-7 Dr. Jonali Deka is the M/O of this case. She disclosed during her evidence that on 09/04/16 at 9:20am she examined the victim "Miss X", aged 11 years, at Tihu FRU. The doctor opined that no sign and symptoms of sexual assault is found at the time of examination of the victim.
- 15. PW-8 Jalilur Rahman, who is the I/O of this case, testified during his evidence that on 09/04/16 on receipt of an ejahar from one Kulen Barman the O/C, Tihu PS registered Tihu PS Case No. 46/16 u/s- 342/354B IPC r/w section 8 of the POCSO Act and entrusted him with the charge of investigation. He took the charge of investigation and on that very day he recorded the statement of informant and victim at Tihu PS. Thereafter he visited the PO and prepared sketch map of the PO. He exhibited Ext-5 as the sketch map of PO. He disclosed that he recorded the statement of the witnesses. He brought he victim for medical examination. He also produced the victim before the magistrate and statement of the victim got recorded by the magistrate at Tihu. He revealed that he seized the birth certificate of the victim vide Ext-6. Thereafter he arrested the accused and produced him before the JMFC, Tihu. It is disclosed that on completion of the investigation, he submitted the charge sheet against the accused Daya Barman u/s- 342/354B IPC r/w section 8 of the POCSO Act. He exhibited Ext-7 as the charge sheet. During cross examination the I/O revealed that the victim was sent for medical examination to Tihu PS on 09/04/16. It is revealed by him that in the CD he did not mention whether there was TV in the house of the accused or not. It is also disclosed that he did not seize the wearing clothes of the victim. It is further revealed by the I/O that in the

sketch map, "A" is the PO, which is the house of the accused and "E" is the house of the victim and informant. He revealed that he did not mention the distance between the house of the accused and the victim in the sketch map. It is denied by the I/O that he prepared the sketch map by not visiting the PO and that he prepared it at the PS.

- 16. DW-1, who is the accused, disclosed during his evidence that Kulen Barman lodged an ejahar against him. He disclosed that the marriage ceremony of his daughter was fixed on 22/4/16 and invitation cards were printed. He exhibited Ext-"ka" as the said invitation card. It is disclosed by him that on the previous day of the alleged occurrence he stored the articles, which was purchased for the marriage, under his bed in his house. He disclosed that on the date of alleged occurrence he was at his own house and his wife Himani Barman, his two sister-in-laws i.e. Kabita Barman and Jayanti Barman as well as Ranju Barman and Manju Barman were also present at his house. He disclosed that on the day of alleged occurrence the victim came to his house and she started to touch the articles which were purchased for the marriage of his daughter and which were kept in side his room. Then he rebuked the victim for touching the said articles and at that time his wife came to his room and asked him what happened. Thereafter he ousted the victim from his house by catching her hand through the back side door of his house. It is also disclosed by him that while he ousted the victim from his house then his sister-in-laws also noticed the same. During cross examination it is stated by the accused that he collected articles of marriage of his daughter since one month prior to the date of marriage.
- 17. DW-2 Himani Barman, who is the wife of the accused, disclosed during her evidence that informant Kulen lodged a false ejahar against her husband. She disclosed that on the date of occurrence she along with Ranju Bamran, Manju Barman and her sister-in-laws i.e. Kabita Barman and Jaymati Bamran were sitting at

their kitchen discussing about the marriage ceremony of her daughter. It is disclosed by her that at about 11-30 am the victim came to their house and entered into the front room of their house. Her husband asked the victim to go out from the house and asked her not to touch the articles which were collected for the marriage. She disclosed that she came to the front room of her house and noticed that her husband ousted the victim from the house. She disclosed that her sister-in-laws also noticed the said fact. During cross examination this witness revealed that the room in which the victim entered is their drawing doom and that the bed room is at the side of the small room which is near the drawing room. She disclosed that her husband pulled the victim from the bed room.

- 18. DW-3 Kabita Barman, who is the sister-in-law of the accused, deposed in the same way to that of the DW-2. During cross examination this witness disclosed that she did not notice the victim while she entered into the house of the accused.
- 19. DW-4 Jaymati Barman, who is the own sister-in-law and adjacent neighbour of the accused also corroborated the evidence of DW-2. During cross examination she revealed that on the date of occurrence while they were at the kitchen of the accused at that time Dayaram was inside his room. The bed room of Dayaram is at a certain distance from the kitchen and there are other rooms in between the kitchen and bed room and the articles of marriage were kept in the bed room of Dayaram. It is disclosed by her that while Dayaram chased the victim then they were inside the kitchen and that the victim was crying while she was chased from the house of accused Dayaram.
- 20. DW-5 Ranju Barman, who is the sister-in-law of the accused, disclosed during her evidence in the same way to that of the evidence of DW-2.

- 21. On the backdrop of the forgoing evidence now let me consider whether the prosecution has been established a case u/s- 354B IPC and u/s- 6/8/12 of the POCSO Act against the accused. While considering the evidence on record it is found that the whole prosecution case rest on the evidence of the lone eye witness who is the victim herself and who is a child witness. The other witnesses are reported witnesses. It is well settled principle of law that testimony of a child witness should not be rejected only on the ground of the witness being of tender age but the evidence of such witness has to be scrutinized with care and caution.
- 22. Section 118 of the Indian Evidence Act dealt with the testimony of a child witness. This section contemplates that all person are competent to testify unless the court considers that by reason of tender year, extreme old age, disease or infirmity they are incapable of understanding the questions put to them and giving rational answers to them.
- 23. Our Hon'ble High Court in (2007) 3 GLR 612 in para 13 held as follows: "A bare perusal of the provisions of law above mentioned would go to manifestly indicate that a person either a minor or lunatic is not incompetent to testify, unless he is prevented by his minority or lunacy as the case may be from understanding the questions put to him and giving rational answers to them."
- 24. On the back drop of above the settled principle of law regarding the competency of child witness now let me scrutinize the testimony of the victim who is examined by the prosecution as PW-3. In the present case to test the competency of the victim who is a slightly mentally retarded child witness and regarding which there is no denial on the part of the defence, various questions were put to ascertain whether she has proper understanding and maturity so as to depose and after such examination while it was found that she gave rational answers and has proper understanding and maturity to

depose, then only evidence of the victim was recorded. She during her evidence vividly described the incident. She testified that on the date of occurrence she went to the house of the accused after returning back to home from her school for bringing pebbles/ stone for playing "lash". The pebbles were at the courtyard of the accused and she met the accused at his courtyard. Seeing her the accused called her to his house and thereafter embraced her. It is further revealed that the accused also increased the speed of the fan and volume of the TV after bringing her to his house. Thereafter the accused removed her wearing frock to her shoulder and thereafter touched her breast. The victim raised hue and cry and thereafter the accused removed her panty and pushed his penis ("suma") in between her legs from the back side and his penis came out to the front side of her legs. However it did not touch her sexual organ. It is Further revealed that the accused inserted one of his finger at her anus. Thereafter while she raised hue and cry and also cried, then the accused allowed her to come out from his house through the back door of the house. At the time of occurrence the accused was alone in side his house. The evidence of this witness on all material point is corroborated by her statement u/s- 164 CrPC which was recorded by Magistrate. Her statement got recorded four days subsequent to the incident and no major contradiction is found between her testimony before the court and her statement u/s- 164 CrPC. There is only one contradiction with her earlier statement u/s-164 CrPC. She in her statement u/s- 164 CrPC did not disclose that the accused inserted his finger in her anus. Except this contradiction there is no other major contradiction. Nothing could be elicited by the defence during the cross-examination of the victim to show that she had stated falsely against the accused regarding committing sexual assault upon her by the accused. Nothing could be shown by the defence why the victim would falsely implicate the accused with such type of shameful occurrence. No motive is found why this child witness would speak falsely about such type of incident implicating the accused. Usually girls of Assamese society are very much shy in nature and they would not speak about such type of incident on imagination. From the very childhood the female child of Assamese society tries to conceal their private parts from others and it is unbelievable that child of such Assamese society would concoct a story involving herself with such a shameful occurrence.

25. The evidence of the victim got credence by the evidence of her grand-mother Janaki Barman (PW-4) and her cousin sister Manisha Barman (PW-5). According to the testimony of PW-4 Janaki Barman the victim on the date of occurrence at about 1:00 pm returned back from her school and while the meal was ready she called the victim but noticed that she was not inside the house. So PW-4 Janaki Barman went towards the road and called her by uttering her name and then went ahead. At that time she noticed that the victim was coming from the house of the accused through the back side door of the house of the accused. PW-5 Manisha Barman who is the aunt of the victim also supported the evidence of the PW-4 who is the grandmother of the victim. She (PW-5) stated that the grandmother of the victim went towards the road uttering the name of the victim at that time she (PW-5) also came out to the gate of her house. She fully supported the evidence of the PW-5 Janaki Barman that they noticed the victim who was coming from the back side of the house of the accused. The evidence of the both these witnesses transpire that in the afternoon they noticed the victim coming from the back side of the house of the accused. PW-5 Manisha narrated during her evidence that after coming back to her own house on inquiry the victim in crying condition disclosed before her that the accused taking her on his lap touching her breast by his hand entered his sexual organ through her legs. She (PW-5) also disclosed that the victim informed her that at that time the accused locked the door of his house and TV and Fan was running in the house.

- 26. PW-4 Janaki Barman also disclosed that the victim narrated before her that the accused at his house touched her breast and then taking her in his lap, touched his penis in her private part and the victim also informed her aunt Manisha about the incident. While she(PW-4) inquired the victim why she went to the house of the accused then the victim informed her that while she went to the courtyard of the accused to bring pebbles then the accused called her in to his house and let her to watch TV and then committed bad works with her as described above.
- 27. Though there is some minor inconsistencies between the testimony of PW-5 Manisha and PW-4 Janaki yet the said inconsistencies are minor inconsistencies and do not go to the root of the case. The evidence of the victim that she went to the house of the accused to bring pebbles for playing "lash" is also supported by her grandmother. The evidence of PW-4 and PW-5 that they both noticed the victim coming out from the backside of the house of the accused brings credence to the testimony of the victim.
- 28. The mother of the victim who is examined as PW-2 and the father of the victim PW-1 were not at their house at the time of occurrence. The father of the victim went out for his work in the morning and the mother of the victim went to the house of her sisterin-law at Nalbari town. The mother of the victim testified that while she returned back from the house of her sister-in-law at about 5.00 pm at that moment the victim told her crying that while she went to the house of the accused to collect pebbles from his house for playing "lash" then the accused invited her to his house to watch TV. While she entered in to the house of the accused then the accused increased the volume of the TV and the speed of the fan was also increased. Thereafter the accused embraced her from back side and removed her frock up to her shoulder and pressed her breast. It is stated that while she screamed then the accused turned her facing towards him and removing her panty tried to insert his penis in her

private part. She also disclosed that the victim informed her that while the victim raised hue and cry asking for releasing her then initially the accused did not release her but later on he sent her from his house through the door of the back side of the house.

- 29. The father of the victim PW-1 revealed during his evidence how his wife disclosed before him that the victim was sexually assaulted by the accused in side his house.
- 30. PW-6 Karuna Kanta Barman the grandfather of the victim disclosed that on the date of occurrence while he returned back to his house after cutting bamboo at his basti then his wife PW-4 informed him about the sexual assault caused upon the victim by the accused at his house.
- 31. Nothing could be elicited by defence why these witnesses would depose falsely against the accused. No material contradiction could be brought out by defence during cross examination of these witnesses. Though there is some minor contradictions, yet it cannot negate their evidences. Nothing could be brought by the defence why the close relatives of the victim who bears no enmity with the accused will implicated the accused falsely. No close relatives of the victim would concoct such a case against an

innocent person. Though the parents of the victim knew that publication of such type of incident will create stigma in the chastity of the victim and will cause problem in the future life of the victim yet they dared to lodge the ejahar against the accused with a hope that the victim would get justice for the heinous act done by the accused upon her. No father would file a false case against a person involving chastity of his own daughter. Though there is some minor contradiction in the evidence of the mother of the victim with that of their earlier statement before the I/O yet the said contradictions cannot dislodge their whole evidence. It is found from the evidence of the victim that she during her evidence disclosed that the accused

inserted his finger in her anus but it was not stated by her during her statement recorded u/s-164 CrPC. For the said contradiction her evidence cannot be thrown away.

- 32. The ejahar which was lodged on the next day of occurrence also fully corroborated the evidence of the victim. Though there is one day delay in lodging the ejahar yet it cannot create any doubt regarding credibility of the evidence of the victim and her relatives. The evidence of the mother of the victim shows that they first informed the wife of the accused while she returned back from market about the occurrence but the wife of the accused saying that she would inquire about the matter at her house later on did not reply on that day. They awaited till next date and thereafter her husband lodged the ejahar. So there is justified ground for the one day delay in lodging the ejahar.
- 33. The accused during his statement u/s- 313 CrPC as well as during his evidence as DW-1 wanted to say that the victim on the date of occurrence coming to his house touched the articles which he purchased for the marriage ceremony of his daughter and which was kept inside his room and for that reason he rebuking the victim ousted her from his house by catching her hand through the back door. He also disclosed that at that time his wife and his sister-in-laws Kabita Barman, Jayanti Barman Himani Barman, Ranju Barman and Manju Barman were also present at his house. However, the mother of the victim during her evidence narrated that on the date of occurrence at the house of the accused except the accused no one was present. It is testified by the mother of the victim that the wife of the accused and daughter of the accused went to the market for purchasing articles for the marriage ceremony of the daughter of the accused on that particular day and at the time of going to the market the wife of the accused meeting her in front of the house told her that they were going to market. This fact was not challenged by the defence during cross examination and hence it

amounts to admission. The victim also disclosed in her evidence that there was no one in the house of the accused at the time of occurrence. Her evidence is found to be cogent and reliable.

- 34. Under the above circumstances the evidence of the accused (DW-1), DW-2, DW-3, DW-4, and DW-5 that on the date of occurrence while the victim came to the house of the accused at that time DW-2 Himani, who is the wife of the accused, and other women were present at his house is absolutely unbelievable. Though the defence side adduced evidences of 5 Nos of DWs to show that the wife of the accused and 4 other relatives of the accused were present at his house at the time of alleged occurrence and no such incident happened as testified by the victim and that actually the victim caused annoyance by touching the articles gathered for marriage in the house of the accused at the time of the alleged occurrence and so the victim was chased from the house of the accused, yet the evidence of the DWs are not worthy of credence as because during cross examination of the victim, by suggesting that the accused asked the victim to leave his house as none was at the house of the accused, the accused admitted that the accused was alone in his house at the time of occurrence. As such the evidence of DWs are totally unreliable and unworthy of credence and cannot be relied upon.
- 35. The father of the victim disclosed during his evidence that age of the victim was 11 years at the time of occurrence. The victim also disclosed her age as 12 years on the date of recording her evidence which implies that her age was 11 years at the time of occurrence. The father of the victim exhibited Paper Ext-1 as the birth certificate of the victim. As per the Paper Ext-1 the date of birth of the victim is 18/05/18. The occurrence happened on 08/04/16. So from the documentary evidence as well as from the evidence of the victim it transpires that the age of the victim was 11 year at the time of

occurrence. It is established by the prosecution that the victim was a minor girl, aged 11 years, at the time of occurrence.

- 36. Marshalling the evidence on record it appears that prosecution, without any shadow of doubt, has established the fact that on 08/04/16 the accused embraced the victim and then touched and pressed the breasts of the victim after removing her frock up to her shoulder. The accused also removed the panty of the victim and entered his male organ through her legs from her backside and the male organ from the back side came out to her front side through her legs. It is established by the prosecution the accused caused sexual assault upon the victim on 08/04/16 at about 3:00pm . It is also established that the accused also caused sexual harassment upon the victim by inserting his male organ thought the legs of the victim. It is also established by the prosecution that the accused by removing the panty and the frock up to her shoulder he tried to disrobe her by using criminal force upon her.
- 37. Prosecution has well established a case u/s- 354B IPC and section 8 and 12 of the POCSO Act, against the accused beyond all reasonable doubt. Prosecution has failed to establish a case against the accused u/s- 6 of the POCSO Act. The accused is convicted u/s- 354B IPC and section 8 and 12 of the POCSO Act.
- 38. Heard the accused on the point of sentence. He submitted that he is the only male person in his family and his wife is dependent upon him and he prayed for showing him leniency. After hearing the accused on the point of sentence, the accused is sentenced to undergo S/I for 5 (five) years and also to pay a fine of Rs.10,000/-i/d, further S/I for another 6 (six) months for committing offence u/s-8 of the POCSO Act. He is also sentenced to to undergo S/I for 2 (two) years and also to pay a fine of Rs. 2,000/- i/d, further S/I for another 2 (two) months for committing offences u/s- 12 of the POCSO Act. He is also sentenced to undergo R/I for 3 (three) years

and also to pay fine of Rs. 10,000/- i/d S/I for another 6 (six) months for committing offence u/s- 354B IPC. All the sentences will run concurrently. The period of detention already undergone by the accused shall be set off against the period of sentence u/s- 428 CrPC. The fine, if realize, be paid to the victim.

- 39. It appears from the record that the victim who is a minor girl and is little bit mentally retarded has suffered from trauma due to the commission of rape upon her by the accused. Considering the mental and physical suffering of the minor victim for the act done by the accused, I feel that compensation should be given to the victim. The matter of compensation is recommenced to the District Legal Service Authority, Nalbari. The District Legal Service Authority, Nalbari will decide the quantum of compensation to be awarded to the victim.
- 39. Seized birth certificate and disability certificate of the victim be returned back to the father of the victim. Other seized articles be destroyed in due course of time.
- 40. Judgment is pronounced at the open court in presence of the accused.
- 41. Furnish a copy of judgment free of cost to the accused. Send a copy of judgment to the District Magistrate, Nalbari and District Legal Service Authority, Nalbari.

 $\mbox{ Judgment is given under my hand and seal of this } \\ \mbox{court on this the 20^{th} day of December, $2018}$

Sessions Judge Nalbari

Dictated & corrected by me

APPENDIX

A. <u>Prosecution witness</u>.

PW-1	Kulen Barman (Informant)
PW-2	Meghali Barman
PW-3	"Miss X" (Victim)
PW-4	Janaki Barman
PW-5	Manisha Barman
PW-6	Karunakanta Barman
PW-7	Dr. Jonali Deka (M/O)
PW-8	Jalilur Rahman (I/O)

B. <u>Defence witness.</u>

DW-1	Dayaram Barman (Accused)
DW-2	Himani Barman
DW-3	Kabita Barman
DW-4	Jaymati Barman
DW-5	Ranju Barman

C. <u>Prosecution Exhibit.</u>

Ext-1 Ejahar

23 of 23

Ext-2	Seizure List
Ext-3	Statement of the Victim u/s- 164 CrPC
Ext-5	Sketch map of PO
Ext-6	Seizure List
Ext-7	Charge sheet
Paper Ext-1	Birth Certificate of the victim
Paper Ext-2	Disability Certificate of the victim

D. <u>Defence Exhibit.</u>

Ext-"Ka" Invitation card of marriage ceremony.

Sessions Judge Nalbari