IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 20 of 2017 U/S 6 of POCSO Act, 2012. (Arising out of Gelakey P.S. Case No. 32/2017)

State of Assam

-Vs-

Sri Tulsi Karmakar Accused

<u>APPEARANCE:</u>

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

For the accused : Mr. D. K. Gohain, Advocate

(Legal Aid Counsel)

Date of framing Charge : 06.09.2017

Dates of Evidence : 21.11.2017, 19.02.2018, 19.03.2018,

02.04.2018, 25.04.2018, 22.05.2018,

18.06.2018, 07.07.2018

Date of S/D : 20.07.2018

Date of Argument : 20.09.2018 & 01.10.2018

Date of Judgment : 11.10.2018

JUDGMENT

- 1. Prosecution case in brief is that on 03.05.2017, one Sri Manga Bhengra lodged an FIR with O/C, Gelakey P.S. alleging, inter alia, that on that day, at about 12 noon, finding his daughter victim 'K' (name withheld) alone in her house, the accused Tulsi Karmakar took the victim to his house and after gagging her mouth, committed rape on her. On returning home, victim informed him about the incident.
- 2. On receipt of the FIR, Gelakey P.S. Case No. 32/2017 U/S 4 of POCSO Act, 2012 was registered and investigated. During investigation, I.O.

visited the place of occurrence, prepared sketch map, apprehended the accused Tulsi Karmakar. 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.

- On receipt of charge sheet, cognizance of offence u/s 6 of POCSO Act was taken. After furnishing copies of relevant papers u/s 173 Cr.P.C to the accused and upon hearing both the sides, vide order dated 06.09.2017, 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. During trial, prosecution has examined nine witnesses including M.O. and I.O. ASI Paresh Buragohain was examined as CW 1 to prove the G D Entry, basing on which initial investigation was started.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Accused declined to adduce evidence when he was called upon to enter into defence. Defence case is of total denial and false implication.
- 5. It may be noted here that accused faced the entire trial as UTP and he was provided with the services of Legal Aid Counsel Mr. D.K. Gohain to defend him. It may further be noted here that simultaneously to this trial, accused has also faced the trial of murder of his mother and causing injury to his father.
- 6. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. D. K. Gohain, learned Legal Aid Counsel and gone through the evidence on record. I have considered the submission of both the sides.
- 7. In the course of argument hearing, learned P.P. has submitted that except some minor ignorable discrepancies prosecution has been able to prove that on 03.05.2017, at about 12 noon the victim was taken to the house of the accused for giving lemon while she was vomiting and this part was admitted by the accused in his 313 Cr.P.C. examination. So far the allegation of

rape is concerned i.e. allegation of oral sex and putting his finger in the vagina of the victim, the evidence of the victim is fully reliable and trustworthy and also this is a fit case for drawing presumption of truth on the allegation in view of the provision of Section 29 of POCSO Act 2012 as accused failed to rebut the presumption. It is also argued that, as there was no allegation of any penetration of penis into the vagina of the minor victim, non finding of injury by medical officer in the private parts of the victim is quite natural. On the other hand, learned Legal Aid Counsel Mr. D.K. Gohain by referring the evidence on record in great length has argued that each and every witness has given different version of the incident so far allegation of penetrative sexual assault is concerned. It is also argued that the victim was medically examined on the next day of the incident, but during examination of the victim, PW 7 the M.O. did not find any injury on her body or private part or even any sign of recent sexual intercourse. It is also argued that, had there been any penetrative sexual assault on a nine years old girl, there must have some injury marks on her person and thus it is clear that this a false case. Learned counsel has also argued that just before few days of this incident, accused was released on bail from the other case for allegedly committing murder of his mother and on being offended due to such release of the accused on bail, the villagers had concocted this story and again put the accused behind the bar and thus he is languishing in jail in both the cases. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE:

- 8. (i) What was the age of the victim 'K' on the date of incident?
 - (ii) Whether on 03.05.2017, at about 12 noon, victim 'K' was subjected to aggravated penetrative sexual assault by the accused?

DECISION AND REASONS THEREOF:

9. Before deciding the point as framed above, let me briefly narrate the salient part of the evidence on record for better understanding of the facts of the case.

- 10. PW-1 Sri Manga Bhengra, the father of the victim in his evidence deposed that his daughter is a student of class II and she was aged about 10 years. On 03.05.2017, on returning home from work place, his daughter (victim) told him that accused has committed rape on her. She also told him that accused Tulsi Karmakar took her to his house for giving lemon like article and rapped her. She got injury on her vagina. On the same day, he informed the matter to Geleky PS by filing an FIR. Police took his daughter to Hospital. His daughter was also brought to Court where she gave her statement. Police also seized her wearing apparels. In his cross examination, PW-1 deposed that he has not seen the incident on his own. On the date of incident, his daughter did not go to school as it was holiday. She was ailing and vomited in the courtyard. Residence of Tulsi is near to his house. Accused took his daughter to his house for giving lemon like article to suppress the vomiting. After return from the house of accused, his daughter did not vomit again. He saw bleeding injury on her vagina and panty of his daughter. Doctor has noticed the bleeding injury. PW-1 denied that his daughter did not sustain any bleeding injury on her vagina. He also denied that accused did not commit any rape on his daughter. VDP Secretary has written the FIR at Bagan line. He cannot say about the contents of the FIR. He is illiterate. He has not submitted any school documents to police.
- 11. PW-2 Sri Bishnu Tanti in his evidence deposed that on 03.05.2017 at about 5.30 PM, while he was at his residence, Mangra Vengra called him to Bagan Office and on arrival, he saw that residents of Line No. 7, came there with Mangra. They also brought accused Tulsi Karmakar under apprehension. Mangra informed him that accused Tulsi raped on the victim and they have apprehended Tulsi by chasing him. On knowing this, he informed the matter to Geleky PS. After some time police arrived there and took custody of the accused and investigated the matter. In his cross examination, PW-2 deposed that along with Mangra and villagers, bagan chowkidar Dilip Boraik came to him

and informed him about commission of rape by accused on the daughter of the Mangra Bhengra. He did not ask the victim about the incident.

- 12. PW-3 the victim of this Case in her evidence deposed that presently she is a student of class II. On the date of incident, while she was at the residence of her sister, while she vomited outside the house, accused called her to his house for giving lemon. On taking lemon in the outside room of his house, accused closed the door. Thereafter he put his finger on her fudi (vagina) by saying that, if water comes out in fudi (vagina), her abdominal pain will vanish. Accused also opened her skirt. Thereafter accused Tulsi put his susu (penis) on her mouth. On this, on having vomiting tendency, accused opened the door. On her coming out, her brother Nirdosh Vengra saw her and she reported to him that accused committed misdeed with her. On her returning home, she informed the incident to her parents and went to take bath. Thereafter, she was brought to VDP Secretary. Police came there and took her to police station. Police took her for medical check up and also to Sivasagar Court. On that day, she deposed in similar lines. Police asked her about the incident. In her cross examination, PW-3 deposed that on that day, after coming from school, she went to the house of Dipak and vomited there. While she vomited, Taramani, Maya and Tutu Mani were also present there. Accused called her to his house. She went to his house alone for taking lemon. Taramani, Maya and Tutu Mani have seen the accused in calling her. PW-3 denied that while giving statement in court, she has falsely stated that blood came out from her fudi (vagina). She knows that accused killed his mother. For this, her father and other villagers dislike the accused. After 2 days of going out of jail, accused has committed misbehave with her. PW-3 denied that accused did not commit any misdeed with her. She also denied that she deposed falsely on being tutored by her parents and villagers.
- 14. PW-4 Sri Anil Patnayak in his evidence deposed that on 03.05.2017 at about 3 PM, while returning home, on seeing the door of the house of accused open, with an intention to take SADA (Tambaku) from

accused, he entered in his house. While he just entered his house, he saw the victim in coming out of the house of accused. On asking about Sada, Tulsi denied to have Sada with him. On going out of the house of accused, on seeing relatives of the victim on road, he asked them as there was no women in the house of accused, why Victim went there. While he was talking to them, he noticed that Victim has vomited near the house of accused. After some time father of the victim came there. Victim ran away towards bagan. Accused was apprehended and handed over to bagan chowkidar Dilip Boraik, who take him to VDP. In his cross examination, PW 4 deposed that he has not seen the incident on his own. While entering the house of accused, he saw that victim came out of the house in naked condition. He cannot say the name of the 2 women whom he met near the house of accused. He did not ask the victim about the incident. He came to know about the misdeed from said 2 women. who are the relatives of the victim. Police interrogated him on the date of occurrence. He has no knowledge about killing of his mother by the accused. Accused is original resident of Bihubar Santak. Most probably T.E. Company brought him to labour line. PW 4 denied that he deposed falsely on being tutored.

15. PW 5 Smt. Jitumani Goala in her evidence deposed that on 03.05.2017 at about 3 PM, while returning home from work, she entered into the house of Tulsi and saw that Victim and Tulsi were sleeping in the house of Tulsi. On seeing this, she raised alarm and locals gathered there and after assaulting Tulsi, kept him apprehended and handed over to bagan chowkidar. After some time, police came there and took away accused Tulsi. In her cross examination, PW 5 denied the suggestion made by defence that while giving statement to police, she did not state that "On 03.05.2017 at about 3 PM, while returning home from work, she entered into the house of Tulsi and saw that Victim and Tulsi were sleeping at the house of Tulsi." PW-5 also denied that she deposed falsely.

- 16. PW-6 Smt. Prameela Bawri in her evidence deposed that on the date of incident, at about 1 PM, from her residence, she saw that accused Tulsi took Victim inside his house. Due to non return of Victim for some time, she went to the house of accused and from outside through the door of the house of accused, she saw that Victim was lying inside the house with school dress, skirt was on her belly. Victim came out from the house and vomited on the court yard. She did not ask the victim anything. Victim left the house of Tulsi by running towards Bagan. In her cross examination, PW 6 deposed that there are two houses i.e. house of Anil Patnayak and one vacant guarter in between her house and house of Tulsi Karmakar. From her house, court yard of Tulsi is visible. She denied that before police she did not state that "at about 1 PM from her residence, she saw that accused Tulsi took Victim inside his house. Due to non return of Victim for some time, she went to the house of accused and from outside open the door of the house of accused, she saw that Victim was lying inside the house with school dress, skirt was on her belly." She admitted that before police she has stated that at about 3 PM, she saw Victim in vomiting at the outside court yard of accused Tulsi and on asking her, Victim ran away towards bagan. Except this, she has no knowledge of any incidence with Victim.
- 17. PW-7 (wrongly numbered as PW 6) Dr. Sundar Changmai, the MO of this Case in his evidence deposed that on 04.05.2017, at about 11 A.M. on police requisition, he examined victim K in connection with Gelakey P. S. Case No. 32/2017 and on examination, he was of the opinion that— (i) The age of the victim is between 5 -11 years, From school certificate her date of birth was seen as 06.11.2008 (so age is around 9 years) (ii) no evidence of recent sexual intercourse, (iii) No injury on her body & private parts. Ext.1 is the medical report and Ext. 1(1) is his signature. In his cross examination, PW-6 admitted that during clinical examination, he did not find any bleeding injury in person of the victim including her private parts.
- 18. PW-8 Sri Amir Bhumiz in his evidence deposed that on the date of incident, on noticing a huge gathering and hue and cry infront of the house of

accused, he went there and learnt that accused has committed rape on Victim. After some time, police arrived there and took custody of the accused. During investigation, police seized one sky blue colour uniform skirt and one navy blue colour frock (school uniform) and one green colour panty from the victim. Exbt. 2 is the seizure list. Exbt. 2(i) is his signature. M.Exbt. 1 is the seized sky blue colour uniform skirt. M.Exbt. 2 is the seized navy blue colour frock. M.Exbt. 3 is the seized panty. During signing the seizure list, Rahul Bawri, Bishnu Tanti and victim were there and signed the seizure list with him. In his cross examination, PW-8 deposed that at the time of alleged incident, he was at his place of duty. He has forgotten the day on which the incident took place. He heard about the incident, when the gathering was talking to each other. He did not ask the victim about the incident. He put the signature at their village. He cannot say as to the user of the seized dresses. He also cannot say whether on the date of incident, victim wore those dresses.

19. PW-9 SI Uttam Tamang, the I/O of this Case in his evidence deposed that on 03.05.2017, at about 5.20 PM, he received one information over phone from unknown person regarding apprehension of one person by the villager on the allegation of misbehaviour to a girl at Lakhimijan Bagan. On getting this information, same was entered in Gelakey PS G D Entry book vide G D Entry No. 49 dated 03.05.2017 and took charge to investigate the matter and proceeded to the Lakhimijan Bagan to investigate the matter. Accordingly at 6 pm, he arrived the place of occurrence i.e. residence of Sri Bishnu Tanti, VDP Secretary of Lakhimijan Bagan line No. 5 and came to know that the victim and accused were kept there. He took custody of the boy namely Tulsi Karmakar and the victim. He recorded statement of witnesses found there. As shown by victim, he went to the house of accused, i.e. place of occurrence at Line No. 7 of Lakhimijan bagan and drawn a rough sketch map. Exbt. 3 is the sketch map. As shown by the victim, he seized the school uniform of the victim from the house of victim. Exbt. 2 is the seizure list. M.Exbt. 1 is the seized sky blue colour uniform skirt. M.Exbt. 2 is the seized navy blue colour frock. M.Exbt.

3 is the seized panty. He also examined witnesses found at the P/O. On the same day at about 9 PM, Manja Vengra lodged an FIR at Gelakey PS. On that FIR, he has registered Gelakey PS Case No. 32/17 and took charge to complete the investigation. Exbt. 4 is the FIR. During investigation, he arrested the FIR named accused Sri Tulsi Karmakar. On the next day, victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. Accused was forwarded to Court for custody. During investigation, he has collected school certificate of the victim from Lakhimijan T.E. LP School. As per school record, date of birth of the victim is 06.11.2008. During investigation, he has also collected the medical report and statement given by the victim in court. Exbt. 5 is the statement of the victim given u/s 164 Cr.P.C. On completion of investigation, he has submitted charge sheet against the accused u/s 4 of POCSO Act. Exbt. 6 is the charge sheet. In his cross examination, PW-9 deposed that at the time of incident, there was no lady SI or ASI at Gelakey PS. PW-9 denied that no woman constable went with him. He has not mentioned name of the woman staff. On his arrival, he found that accused was kept inside the locked room and the victim was outside the room with her parents. He did not find the accused and victim at Bagan Office. Bagan Office is at a distance of about 50 meter from the house of VDP secretary. He has orally interrogated the victim at her residence. Victim accompanied the complainant to police station. He has recorded their statement at police station. He cannot say whether on the date of occurrence, there was govt. holiday. He has not annexed the certificate of age with the charge sheet. PW-9 denied that he has not collected any school certificate as claimed. PW 9 affirmed that witness Jitumani Goala (PW 5) in her statement before him did not state that "On 03.05.2017 at about 3 PM while returning home from work, he entered into the house of Tulsi and saw that Victim and Tulsi were sleeping at the house of Tulsi." PW-9 also denied that he has not investigated the case properly and submitted the charge sheet falsely.

- 20. CW-1 ASI Paresh Buragohain in his evidence deposed that as directed by this court, he has appeared with G D Entry book of Gelakey PS containing G D Entry No. 49 dated 03.05.2017. Exbt. 7 is the G D Entry Book. Exbt. 7(i) is the Gelakey PS G D Entry No. 49 dated 03.05.2017. Exbt. 7(ii) is the true certified copy Gelakey PS G D Entry No. 49 dated 03.05.2017. CW 1 also deposed that Exbt. 7(i) Gelakey PS G D Entry No. 49 dated 03.05.2017 contains regarding apprehension of one person by the villager on the allegation of misbehaviour to a girl at Lakhimijan Bagan. This G D Entry also contains that after making the entry, O/C along with other police staff went to the p/o. Cross examination of CW-1 was declined by defence.
- 21. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 22. <u>Point No. I:</u> So far age of the victim is concerned, the informant in his evidence as PW 1 has stated that his daughter victim 'K' was aged about 10 years and a student of Class-II. While adducing her evidence as PW 3 (deposing on 19.02.2018) victim has also claimed her age as 10 years and a student of Class-II. PW 6 the M.O. in his evidence deposed that during examination of the victim the dentist has estimated her age as 8 to 9 years and after ossification test, her age was found between 8 to 11 years. The M.O. has also stated that as per the school certificate produced before him, her date of birth is 06.11.2008. PW 9, the I.O. in his evidence deposed that during investigation, he has collected the school certificate of the victim from Lakhimijan Tea Estate LP School and as per the school record the date of birth of the victim is 06.11.2008. During cross examination of the above witnesses, this fact remains unrebutted. Thus from the materials on record, it appears that at the relevant time the victim was aged about 9 to 10 years only.
- 23. <u>Point No. II:</u> Now coming to the role of the accused on the allegation of rape/penetrative sexual assault, from the evidence of PW 3, the victim, it appears that while she was vomiting outside her house, accused called her to his house for giving lemon. Her presence at the house of the accused was also

seen by PW 4 who saw the victim coming out from the house of the accused. This part of evidence that on seeing the victim vomiting, accused took her to his house for giving lemon has been admitted by the accused in his 313 Cr.P.C. examination. As such the fact that victim was taken to the house of accused stand proved.

- 24. It is the version of the prosecution that for giving lemon to the victim when she was taken, accused put his penis on her mouth and also put his finger on her vagina. Admittedly there is no eye witness to this allegation. The victim in her evidence stated that after taking lemon in the outside room of his house, accused closed the door and put his finger on her vagina by saying that if water comes out in vagina, her abdominal pain will vanish. Victim also stated that accused opened her skirt. She further stated that accused put his penis on her mouth and on feeling vomiting accused left her and she came out. This part of evidence of the victim remains unshaken by defence except denial of false implication due to release of the accused on bail in the murder case. From the medical report Exbt.1 it appears that on 04.05.2017 the victim was taken to Nazira Sub-Divisional Civil Hospital at Ligiripukhuri and before Doctor she has given the history of sexual assault by the neighbouring boy on 03.05.2017 at 12 noon. I have also gone through 164 Cr.P.C. statement of the victim wherein also victim has stated in similar line regarding putting finger in her vagina and putting penis in her mouth. While giving statement u/s 164 Cr.P.C. though victim stated about some bleeding, but nothing has been stated in her evidence in court. This omission on the part of the victim does not make her evidence unbelievable because the other facts regarding putting finger in her vagina and putting penis in her mouth remains unshaken and this act has been covered under the definition of Penetrative sexual assault u/s 3 of Pocso Act and section 375 of IPC.
- 25. At this stage I would like to refer Section 3 of POCSO Act 2012 for ready reference.
 - "3. Penetrative sexual assault.- A person is said to commit

"penetrative sexual assault" if-

- a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- 26. From the above definition, it appears that putting finger in the vagina and putting penis in the mouth of the child is made an offence under section 3 of Pocso Act. Before proceeding further, it may be mentioned here that the trial of a case under POCSO Act stands on a different footing than of other criminal trial by virtue of Section 29 of POCSO Act.
 - "29. Presumption as to certain offences.- Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."
- Thus close look of Section 29 of POCSO Act 2012 mandates for drawing a Legal presumption and Court shall presume regarding of commission of alleged offence unless contrary is proved. The burden of rebuttal is on the accused.
- On applicability of Section 29 of Pocso Act, recently Hon'ble Calcutta High Court in the case of Sahid Hossain Biswas vs State of WB [2017 SCC OnLine Cal 5023] has observed as follows:
 - "22. The law, therefore, provides for a reverse burden upon the accused in a prosecution under sections 3, 5, 7 and 9 of the aforesaid Act. The statutory presumption creates an exception to the ordinary rule of presumption of innocence available to an accused in a criminal

trial and puts the onus on the accused to rebut such presumption and establish his innocence. Presumption of innocence is a basic human right which is a vital facet of fair trial rights enshrined in various international covenants like the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights (to which India is a signatory) but is not a fundamental right under Part III of the Constitution. [See Noor Aga v. State of Punjab, (2008) 16 SCC 417]. The concept of presumption of innocence has, in recent times, been reversed in many situations by creating statutory presumptions like under sections 113A, 113B or 114A of the Evidence Act shifting the burden on the accused to prove his innocence. Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions "shall presume" and "unless contrary is proved" in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the prosecution to prove his guilt beyond reasonable doubt. How is the accused to discharge such burden? Sections 3 and 4 of the Evidence Act define the words 'proved', 'shall presume' and 'disproved' as follows:-

Section 3:— "Proved" - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved"- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Section 4:—"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory

presumption is triggered in to shift the onus on the accused to prove the contrary.

24. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eq. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."

29. In the reported case of Manik Lodh -vs- State of Assam 2007 (3) GLT 207 in respect of "presumption of fact" and "presumption of Law" and "its rebuttal" Hon'ble Gauhati High Court in a case under the provisions of section 139 N I Act, which is otherwise found relevant in the case in hand has held that ---

"(14) When read carefully, it becomes transparent that this section (Section 139) makes it mandatory for the Court, unless the contrary is proved, to presume that the holder of the cheque holds the cheque for the discharge, in whole or in part, of the debt or other liability of the drawer. This, in turn, means that if a person holds the cheque for a particular sum of money, it shall be presumed by the Court that the drawer of the cheque had the liability to pay, at least, the sum of money for which the cheque has been drawn. There is, indeed, a difference between the expressions "may presume", on the one hand, and "shall presume" or "it shall be presumed", on the other. When the legislature uses the expression "may presume", such presumption is called a natural presumption or presumption of fact, which a Court is entitled to raise if

the facts of a given case so require. However, when the statute uses the expression "shall presume" or "it shall be presumed", such a presumption is a presumption of law as distinguished from the presumption of fact. In a given case, when the facts established make it a case for raising a presumption of law, it becomes obligatory for the Court to raise such a presumption.

(20) To sum up, when a person holds a cheque, Section 139 makes it, as already indicted above, obligatory for the Court to presume that the holder of the cheque has received the cheque for discharge, in whole or in part, of a debt or other liability. Once such presumption is raised, the burden shifts to the accused to prove that the drawee did not hold the cheque in discharge of debt or liability of the drawer. When a presumption of fact is raised, the liability of the accused is treated to have been discharged if the explanation offered by the accused is reasonable or probable. But in the case of presumption of law, the accused has the onus of showing not only that his explanation is reasonable and probable, but also that his explanation is a true one. The expression "unless the contrary is proved", which occur in Section 139, makes it clear that the presumption has to be rebutted by proof and not by a mere explanation, howsoever plausible such an explanation may be. A fact is said to be proved, I may recall, when its existence is directly established, or when, based on the materials placed before it, the Court finds its existence to be so probable that a reasonable man ought to act on the supposition that it exists."

30. By keeping the above law in mind, when we look at the other evidence on record as narrated herein before, so far corroboration or contradiction to the evidence of victim is concerned, as argued by learned defence counsel, from the record it appears that except the victim, the other witnesses are more or less hearsay witnesses so far allegation of penetrative sexual assault is concerned. PW 1, the father of the victim has stated that on returning home victim informed him about commission of rape on her by the accused. Though PW 1 stated about seeing of bleeding injury per vagina, but during examination of the victim nothing was found by PW 7, the M.O. PW 2, the VDP Secretary has deposed regarding apprehension of the accused only. PW 4 in his cross examination admitted that he did not ask the victim about the incident and he deposed only coming out of the victim from the house of the accused. PW 5, who has entered into the house of the accused and also stated victim and the accused at the residence of the accused and also stated

regarding apprehension of the accused on her alarm. Though in her examination-in-chief PW 5 stated that she saw the victim and the accused were sleeping in the house of the accused, but that fact was admittedly not stated before police and found exaggerated from her earlier statement given before police. PW 6 though in her evidence stated that she saw the victim inside the house of the accused with school dress skirt, which was over her belly, but admittedly that part of material evidence was not stated before police. PW 8 is a seizure witness who came to the house of the informant after apprehension of the accused and saw police in making seizure of the wearing apparels of the victim vide Exbt.2. PW 9 is the I.O. who did the routine investigation and supported the fact of seizure. As the seized articles were not sent for FSL examination, their seizure only is of no help to prosecution. From the evidence of I/O, it appears that before receipt of the formal FIR, on receipt of an information over phone regarding apprehension of the accused, he made a GD Entry vide Exbt.7 (I) which was proved through CW 1 and went to the place of occurrence, took the custody of the accused and started investigation including seizure of the wearing apparels of the victim and drawing of sketch map. CW 1 has proved the contents of the GD Entry by bringing the GD Entry Book of Gelakey P.S. of the relevant date.

- 31. It may be noted here that during argument hearing, learned defence counsel has pointed out that the evidence of the victim is found not reliable because as per her version, after returning from school she started vomiting, but her father PW 1 has stated that on that day school was closed. Thus it appears that though there are some discrepancies as to whether school was open or closed on that date, I am of the opinion that considering the admitted fact that victim was taken to the house of accused, this discrepancy is totally immaterial. This is a minor discrepancy which has no relevancy with the main incident and deserves to be ignored.
- 32. The next limb of defence argument evidence of victim should not be relied upon for non-finding of any injury mark on the private parts of the

victim has also no force on the admitted fact that the allegation is only of putting finger in her vagina and putting penis on her mouth and as such non-getting of any injury on the private parts of the victim is quite natural.

- 33. The other limb of defence argument that on getting bail in the murder case, villagers hatched conspiracy and framed the accused, it is apparent that in this case, except admission by witnesses that local peoples did not liked the matter of getting bail, defence did not bring any document on record to show that when the accused was released on bail and there is any relation between the deceased mother of the accused and the victim or the informant. Learned Spl PP has pointed out that the said murder case was of Bihubar PS (Bihubar PS case No. 60/2015 : Sessions Case No. 83/2017) for alleged murder of his mother by the accused at his Santak T.E. residence and after releasing on bail accused started living at Lakhimijan Bagan at the area of his wife's paternal house under Gelakey PS. Defence though argued on this aspect, but failed to establish any remote connection between the victim of this case and the deceased of the said murder case.
- 34. Hon'ble Supreme Court of India in the case of State of Punjab v. Gurmit Singh [(1996) 2 SCC 384] while taking note of the existing rate of crime against women, on the point of reliability of evidence of a victim 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. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are

not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

- 35. From the above discussions, it may be mentioned here that taking of the victim is house by the accused being an admitted fact and for the rest part, as discussed earlier defence failed to rebut the evidence of the victim either by adducing defence evidence or bring any material in cross-examination of PWs. There is absolutely nothing to show patent absurdities or inherent infirmities in the version of victim and/or other PWs. It is proved by the PWs that soon after the occurrence, the matter was informed to father of the victim and in turn he informed the matter to local villagers and then to police. Investigation was started within 3-5 hours of the incident. The evidence of victim is found reliable and trustworthy.
- 36. Considering all above, I hold that prosecution has been able to prove the commission of offence as defined u/s 3 of POCSO Act 2012 by the accused Tulsi Karmakar. In view of the fact that the victim is a girl of 9-10 years of age, under the definition of 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.
- 37. To sum up the discussion, I hold the accused Tulsi Karmakar guilty for the offence punishable u/s 6 of Pocso Act, 2012 and accordingly he is convicted for the offence punishable u/s 6 of POCSO Act, 2012.
- 38. 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.

- 39. 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 and the nature of the offence.
- 40. Considering the nature of the offence i.e. putting finger on her vagina and putting his penis in her mouth, I am of the considered opinion that the minimum punishment provided by section 6 of Pocso Act will meet the ends of justice. It may be noted here the offence as proved by prosecution is also an offence u/s 3762(i) IPC and for that offence the minimum punishment provided is equal to that of section 6 of Pocso Act. Section 42 of Pocso Act is taken care of while imposing sentence on the accused.
- Accordingly, convict Tulsi Karmakar is sentenced to undergo rigorous imprisonment (RI) for 10 (ten) years and also to pay a fine of Rs. 2,000/- (two thousand) only i/d further SI of two (2) month for committing the offence punishable section 6 of Pocso Act.
- The period of detention undergone by the accused during investigation and trial, be set off U/S-428 Cr.P.C.
- Considering the fact and circumstances of the case, I am of the opinion that it is a fit case for referring the matter to DLSA for exploring the possibility of granting compensation U/S 357 A Cr.P.C. to the victim who is now living with her parents.
- Considering the fact of imposing minimum 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.
- Let a copy of the judgment be given, free of cost, to the convict Sri Tulsi Karmakar as per the provisions of Section 363(1) Cr.P.C.
- 46. Send a copy of the judgment and order to Secretary DLSA, Sivasagar for needful action.

- 47. Convict is informed about her right of appeal against the judgment and order of conviction and sentence before Hon'ble Gauhati High Court either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 48. Convict Sri Tulsi Karmakar is remanded to District Jail, Sivasagar to serve out the sentence.
- 49. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 50. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 11th day of October, 2018 at Sivasagar.

Special Judge, Sivasagar

<u>APPENDIX</u>

1. Prosecution witnesses -

- PW 1 Sri Manga Bhengra (Informant)
- PW 2 Sri Bishnu Tanti, VDP Secretary
- PW 3 Victim 'K'
- PW 4 Sri Anil Patnayak
- PW 5 Smt. Jitumani Goala
- PW 6 Dr. Sundar Changmai (M.O.)
- PW 6 Smt. Prameela Bawri (Number should have been as PW 7)
- PW 8 Sri Amir Bhumiz
- PW 9 SI Uttam Tamang (I.O.)
- 2. <u>Defence witnesses</u>: None
- 3. Court witnesses : CW 1 ASI Paresh Buragohain

4. Exhibits by prosecution -

- Exbt.1 Medical examination report
- Exbt.2 Seizure list
- Exbt.3 Sketch map
- Exbt.4 FIR
- Exbt.5 Statement of the victim given u/s 164 Cr.P.C.
- Exbt.6 Charge-Sheet
- Exbt.7 Gelakey PS GD Entry Book
- Exbt.7(i) Gelakey PS GD Entry No. 49 dated 03.05.17
- Exbt.7(ii)- True certified copy of Gelakey PS GD Entry No. 49
- M.Exbt.1 Seized sky blue colour uniform skirt
- M.Exbt.2 Seized navy blue colour frock
- M.Exbt.3 Seized panty

Special Judge, Sivasagar: