#### **DISTRICT- BAKSA**

# IN THE COURT OF SPECIAL JUDGE, BAKSA, MUSHALPUR



## SPL. POCSO CASE NO. 64/18

(u/s 4 of POCSO Act r/w section 506 of IPC)

State of Assam

-versus-

Karnelus Ekka@ Cornelius Ekka ...... Accused

# Present- Smti. M.C. Bordoloi, M.A., L.L.B., (A.J.S.), Judge Special Court, Baksa

## Appearance:

Mr. Ranjit Chetri......Public Prosecutor for the State
Abdul Gaffur.....Advocate for the accused person

Date of charge:

31-10-18

Date of Evidence:

12-12-18, 07-02-19, 06-04-19, 30-05-19,

18-11-19

Statement recorded on:

26-07-19

Date of Argument:

21-01-2020, 13-02-2020

Date of judgment:

18-02-2020

## **JUDGMENT**

Prosecutrix lodged an ejahar with the Kumrikata Outpost on 19.07.2017 alleging inter alia that on 11.07.2017 at about 10 am, her uncle accused Karnelas Ekka proposed to take her to Bhutan for an outing and accordingly took her in a four-wheeler to Sashipur and having kept the vehicle there took her in a motorcycle to Bhutan Gate and in a hotel at Bhutan offered her juice, having mixed the same with some intoxicating substance, drinking which, she became unconscious and



waking up, found herself in the Sumo (four-wheeler) in the next morning without any clothes on her body and also realized that the accused had raped her in her unconscious state .It was also alleged that when she tried to raise a cry of alarm, after having woken up, the accused threatened to end her life. Hence the ejahar.

Upon receipt of the ejahar, entry in the Kumrikata Outpost's General Diary vide No. 281 dated 19.07.2017 was made and thereafter the ejahar was forwarded to O/C Tamulpur P.S for registration of a case under proper section of law. Upon receipt of the ejahar, the then O/C of Tamulpur Police Station registered a case vide Tamulpur P.S Case No. 209/19 u/s 4 of the POCSO Act and caused investigation of the case.

Upon completion of investigation, charge-sheet vide No. 101/17 dated 31.07.2017 was laid before the Ld. CJM Baksa which was put up before the Hon'ble Sessions Judge Baksa who having taken cognizance of the offence issued summons to the accused person. Having secured the attendance of the accused person in the court, Hon'ble Sessions Judge Baksa in compliance of the provisions of Section 207 Cr.PC furnished copies of the case to the accused Karnelas Ekka. Having heard the Ld. Counsels of both sides and finding prima-facie materials against the accused person u/s 4 of the POCSO Act R/W Section 506 IPC, Hon'ble Sessions Judge Baksa vide order dated 31.10.18 framed a charge u/s 4 of the POCSO Act R/W Section 506 IPC against accused Karnelas Ekka and the charge on being read over and explained to the accused, he abjured guilt and claimed trial.

Prosecution in order to prove the charge brought about against the accused person examined as many as 6 numbers of witnesses Person examined a person exami

The defence side cross examined all the prosecution witnesses barring PW-5 and also adduced the evidence of one witness.

The statement of the accused person was recorded u/s 313 Cr.PC. In his statement u/s 313 Cr.PC, the accused pleaded complete innocence and expressed his willingness to adduce evidence. The accused in her statement u/s 313 CrPC averred that the victim girl at first went to Sashipur Don Bosco and therefrom to Bhutan and that his



companion also went with them and that the victim girl on her own consumed beer and thereafter they returned on bike from Bhutan. Accused denied having committed the alleged offence.

It is worthwhile to mention herein that with the designation of the instant Court as Special Court for trial of cases under POCSO Act by the Hon'ble Gauhati High Court , Guwahati vide notification dated 2.1.2020, the case record was transferred to the instant Court by the Hon'ble Sessions Judge ,Baksa for disposal. Accordingly the arguments were heard in this Court.

## **Arguments:**

I have heard the arguments advanced by the Ld. Counsels of both sides.

It needs mention herein that no Special Public Prosecutor has been appointed at Baksa for conduct of cases under POCSO Act as mandated by Section 32 of the Act but in the interest of speedy trial the prosecution was allowed to be conducted by Ld Public Prosecutor Baksa(Ld P.P for short hereinafter).

Ld. P.P Baksa submits that the prosecution has successfully proved the guilt of the accused beyond all reasonable doubt for which the accused is liable to be convicted. Ld. P.P also submits that the offence committed by the accused is a heinous one and the accused deserves to be punished appropriately.

Per contra the Ld. Defence Counsel submits that the prosecution has completely failed to establish the charge brought about against the accused in the instant case. Ld. Counsel takes this court to Section 4 of the POCSO Act and submits that to constitute an offence u/s 4 of the POCSO Act penetration of the penis, or any organ of the perpetrator is required and in the instant case there is no evidence that there was any kind of penetration of either the accused's penis ,or of any object or any of his body part in the victim's body. Hence the charge u/s 4 of the POCSO Act completely fails.

Ld. Counsel also submits that the victim in the instant case is well above the age of minority and is a completely matured girl who can go on her own from one place to another, she having admittedly left her



aunt's place to pick up another girl to provide her some work at Guwahati. Ld counsel submits that the victim was old enough to do things on her own and had enough maturity to concoct a false story against the accused person.

Ld. Counsel also points out that there is a serious lapse in the prosecution case as the vehicle in which the alleged rape had been committed or the clothes of the victim or the accused had not been seized and sent for chemical examination for which the alleged rape cannot be held to have been committed by the accused person. Mere fact of finding herself in a naked position would not be proof of alleged rape.

Ld. Counsel also submits that the victim hails from a society where consuming alcohol is not a taboo and that the victim drank alcohol on her trip to Bhutan and had lost her senses but the accused did not take advantage of the condition of the victim rather helped her and provided her shelter in the house of some person and also asked her to dress herself. Ld. Counsel submits that the story of the victim being one not inspiring confidence, no conviction could be recorded on the basis of her sole testimony.

I have given my anxious consideration to the valued submission of the Ld. Counsels of both sides. I have also perused the entire C/R meticulously. The point for determination that has arisen in the instant case is given herein below:

### **POINT FOR DETERMINATION:**

- 1. Whether on the 11<sup>th</sup> day of July 2017 at about 8 am, the accused Karnelas @ Cornelius Ekka at about 10 am committed penetrative sexual assault upon the victim girl/informant girl at Bogajuli under Tamulpur P.S.?
- 2. Whether on the same day, time and place, the accused committed criminal intimidation by threatening the victim not to raise halla for the alleged sexual assault upon her and thereby committed offence punishable u/s 506 IPC.

My decision on the above points for determination is given herein under.

# **DISCUSSION, DECISION AND REASONS THEREFOR:**

To address the points for determination so framed it will be worthwhile to peruse the evidence available on record and accordingly I proceed to do so.

At the outset, the evidence of the victim informant is perused.

PW-1 the victim informant in her evidence stated that the occurrence took place about one year back from the day of her deposing in Court and that on the fateful day she was returning to Guwahati for her work and she planned to pick up her friend Sushmita from Jamuguri en-route Guwahati and that she met the accused at the Jamuguri bus stand at about 9 am. She also stated that the accused insisted to accompany him to Don Bosco Sashipur Hostel to meet some friends as he would also go to Guwahati the next day and that initially she turned down the accused's proposal but later gave in to his persuasion and accordingly reached Don Bosco Sashipur Hostel and thereafter she expressed her intention to go to Jamuguri to pick up her friend when the accused proposed to go to Bhutan for an outing, assuring to drop her at her destination and accordingly she went with the accused to Bhutan on a bike and at the border gate of Bhutan accused took her inside a hotel and offered her a bottle of cold drink, consuming which she became unconscious and having regained her senses she found herself in a car in properties and the dress up and the accused threatened her and directed her to dress up and the accused threatened her and the dress up and the accused threatened her and the dress up and the accused threatened her to dress up and the accused threatened her accused threatened threatened her accused threatened thre  $\overset{ au}{\sim}$  a naked condition in a  $\,$  vehicle belonging to the Don Bosco Hostel. PW-1 anybody and that the accused thereafter dropped her at the road at Jamuguri. PW-1 also stated that she did not disclose the incident for two days out of fear to anybody and thereafter she went to the house of her aunt and on the next day she went to Guwahati with her friend and after two days she reported the incident to her aunt who having discussed the matter with her husband asked her to file the ejahar and accordingly she filed the ejahar.

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PW-1 identified the ejahar lodged by her as Ext-1 and her signature thereon as Ext-1(1). She also identified her medical examination report as Ext-2 and her signature thereon as Ext-2(1). PW-1 identified her statement recorded u/s 164 Cr.PC as Ext-3 and her signatures thereon as Ext-3(1) and Ext-3(5). She revealed that she was 15 years of age at the time of occurrence and accordingly identified her birth certificate as Mat. Ext-1 and the seizure list vide which the same was siezed as Ext-4 and her signature thereon as Ext-4(1).

In her cross-examination, PW-1 disclosed that she was studying in Class-IX at Montfort High School, Guwahati at the time of the alleged occurrence and that she was brought up at Snehalaya -an orphanage and that she was a drop out after Class-IX. She disclosed that she had friends at Snehalaya and on the fateful day her friends from Snehalaya had come to Don Bosco Sashipur for picnic and that on the fateful day she went to meet her old friends from Snehalaya. She also disclosed that her aunt and her friend Sushmita knew that she would visit their home on the fateful day and that nobody went in her search when she went missing on the fateful day.

PW-1 clarified further that she went with the accused alone but at Bhutan she met another person who was accused's co-villager and that the said person after having met the accused at the hotel left the place early. She disclosed that she was an orphan, born at Singramari and that after the death of her parents the sisters of Snehalaya brought her up. She also disclosed that the house of the accused was adjacent to her house at Jamuguri.

PW-1 denied the defence suggestion that she was 19 years of age at the time of occurrence and that she consumed liquor with the person who accompanied the accused in the hotel, in absence of the accused and that being under the influence of alcohol she took shelter in the house of one Dhaba Ekka. She also denied the defence suggestion that as there was a boundary dispute between her aunt Silbina Ekka and the accused for a long time he filed the false case against the accused.

PW-2 Gobindo Rabha in his examination in chief stated that the occurrence took place in the year 2017 and that on the fateful day



he went to Darangamela to take out money from the ATM and on the relevant time he met the accused who asked him for some money to go to Bhutan since his niece had come from Guwahati to visit Bhutan but her failed to give any money to him whereupon the accused asked him to accompany them to Bhutan. PW-2 further stated that the accused went to Bhutan with his niece on a motorcycle and asked him to go there and accordingly he went to Bhutan and thereafter at Bhutan he and the accused as well as the girl went to a hotel where he consumed beer while the accused gave a cold drink to the girl. PW-2 stated further that accused had mixed some zin with the cold drink before giving the same to the victim girl and that he had paid the bill amounting to Rs. 800/from his pocket and thereafter he left for his home.

In his cross-examination, PW-2 stated that he went to Bhutan Gate on bike and therefrom he went inside Bhutan on foot. He disclosed that himself and the accused consumed two bottles of beer while the girl did not consume beer. He also disclosed that the accused had also ordered zin. He remained steadfast in his evidence that the girl only consumed cold drink with them and that the cold drink was mixed with zin and that before leaving he found the victim girl in a normal condition. Accused did not pressurize the victim girl to have her cold drink mixed with zin.

PW-2 denied the defence suggestion that he omitted to state before the police that the accused called him to Bhutan and asked him to pay their hotel bill at Bhutan. He clarified further that the entry of vehicle to Bhutan is recorded at the check gate but the entry of human is not done so.

PW-3 Sillvina Ekka the aunt of the victim girl deposed that on the fateful day the victim girl went to Jamuguri where she met the accused and on the same day her sister- in- law called her in the evening to report that the victim girl had gone to her home and accordingly she went to her parental home to find the victim girl there and then the victim girl reported to her that the accused took her and committed rape on her person. PW-3 further stated that she sought the advice from Adivaasi Student Union in connection with the alleged offence who



advised her to file the case and accordingly the case was filed. She deposed that the victim girl was 15 years of age at the relevant time.

In her cross-examination PW-3 clarified that the house of the accused was next to her house and that on the fateful day the victim had left her house to go to Guwahati. She also disclosed that the victim was found weeping at her parental home and that even on inquiry she did not disclose anything and only on the next day the victim narrated the incident to her. PW-3 denied the defence suggestion that the case being a false case, the same was filed belatedly and that the victim being her niece she had deposed falsely in her favour. PW-3 subsequently disclosed that the victim had narrated about the alleged occurrence over phone form Guwahati.

PW-4 Teleshpore Kispotha deposed to the fact that the accused met the victim girl at Jamuguri and took her to Sashipur at first and thereafter to Bhutan and having mixed some intoxicating material in a juice, offered the same to the victim girl at Bhutan who having drank the same became unconscious and thereafter the accused took the victim girl in an unconscious state to Bogajuli forest area and committed rape on the victim girl and thereafter dropped the victim at Jamuguri Chowk. PW-4 stated that the victim reported about the occurrence to his wife over phone first who in turn informed him and accordingly he informed the local students union and the gaonburah who sent them to the police station and accordingly FIR was lodged. PW-4 disclosed that at the relevant time victim was 15 years of age and that police seized the birth certificate of the victim vide Ext-4 being the seizure list in his presence. PW-4 identified his signature on the seizure list as Ext-4(2). He also stated that the victim was working as a domestic help in Guwahati at the relevant time.

When put to cross-examination, PW-4 denied the defence suggestion that he omitted to state before the police that the victim narrated the incident to his wife over phone or that the accused dropped the victim at Jamuguri Chowk on the fateful day. He clarified that the victim did not report about the incident to him directly rather his wife informed him about the occurrence and that after medical examination

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the doctor informed him about the presence of drugs in the body of the victim. He also denied the defence suggestion that the case was filed falsely against the accused as there was a boundary dispute between the accused and the parental home of his wife.

PW-5 Dr. Dolly Gogoi deposed that on 20.07.2017 she examined the victim girl on being escorted by WHG Prabita Das in connection with Tamulpur P.S Case No. 209/17 u/s 4 of the POCSO Act and that the victim girl did not give her consent for medical examination. She deposed further that X-ray was advised for age determination of the victim and X-ray report was received and as per radiological evidence the age of the victim is estimated above 19 years. PW-5 identified the medical report as Ext-2 and her signature thereon as Ext-2(2) and Ext-2(3).

PW-6 Munna Pachani- the Investigating Officer of the case deposed that on 19.07.2017 he was posted as the I/C of Kumrikata OP and on that day he received an ejahar lodged by the informant and accordingly entered the receipt of the same in the OP's General Diary vide No. 281 dated 19.07.2017 and forwarded the ejahar to O/C Tamulpur P.S for registration of a case under proper section of law. PW-6 identified the ejahar as Ext-1 and his signature thereon as Ext-1(2), the signature of the then O/C of Tamulpur P.S Upendranath Sarmah as Ext-1(3), affixing the same at the time of endorsing him for investigating the case. PW-6 deposed that during investigation he recorded the statement of the victim and the witnesses, visited the place of occurrence, prepared the sketch map, arrested the accused, seized vehicles being a motorcycle and a four-wheeler Sumo vehicle, seized the victim's birth certificate and having found sufficient materials against the accused, arrested the accused and forwarded him to court, caused the recording of victim's statement u/s 164 Cr.PC, collected the victim's medical report and on completion of investigation submitted charge-sheet against the accused. PW-6 identified the sketch map as Ext-5. His signature thereon as Ext-5(1), the seizure list vide which the motorcycle was seized as Ext-6, his signature thereon as Ext-6(1), the seizure list of the four-wheeler vehicle as Ext-7, his signature thereon as Ext-7(1), the seizure list vide

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which victim's birth certificate was seized as Ext-4 and his signature thereon as Ext-4(3). He also identified the charge-sheet as Ext-8 and his signature thereon as Ext-8(1).

In his cross-examination, PW-6 disclosed that he did not visit Bhutan during the course of investigation nor he examined any students from Pan Bazaar Snehalaya who were at Don Bosco School Sashipur in connection with the investigation of the case. PW-6 disclosed that the Mat. Ext-1 was issued from the register office at Hengrabari, Guwahati and that he did not verify the authenticity of the said exhibit. He disclosed that the birth certificate of the victim was obtained after 13 years of her birth. He disclosed that he did not send the seized vehicles for forensic test.

PW-6 confirmed the fact that PW-3 Silvina Ekka did not state before him that she brought the victim girl to Kumrikata to go to Jamuguri en-route Guwahati to her workplace and that on the same day her sister- in- law called her in the evening informing her that the victim girl had gone to her sister in law's house. PW-6 also confirmed that PW-4 did not state before him that the victim had stated about the incident to his wife. He disclosed that he did not take efforts to track the mobile phone location during investigation.

DW-1 the defence witness in his examination- in- chief stated that on the fateful day at about 3 pm the accused brought the girl to his house and requested him to provide shelter to the girl and that also left his house on foot. He further stated that he found the girl in a normal condition.

In her cross-examination she disclosed that she did not have any knowledge regarding the visit of the accused to Bhutan with the girl and the alleged rape on the person of the victim by the accused. She clarified that she did not know the victim girl in person.

Now having perused the evidence available on record let me first take a cursory glance at the POCSO Act more particularly Section-3 which defines the sexual penetrative assault.

**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 the 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.

Now having gone into what constitutes penetrative sexual assault which is punishable u/s 4 of the POCSO Act, when the evidence on record is perused it is seen that there were no eye-witnesses to the alleged occurrence of rape. The scene of the crime is that of fourwheeler vehicle which had been reportedly seized by the Investigating Officer during investigation vide Ext-7. It is in the evidence of the PW-1 the victim/prosecutrix that the accused took her from Jamuguri Chawk to Sashipur Don Bosco School thereafter from there to Bhutan. The accused is known to the victim girl is abundantly clear from the evidence on record. PW-3 the victim's aunt, PW-4 the victim's uncle disclosed that the accused is the boundary man of the PW-3's parental home and that the accused is known to the victim. It is in the victim's evidence that she had on the fateful day gone to Jamuguri Chawk and therefrom the accused offered to take her to Don Bosco Sashipur and from there to Bhutan. The accused also in his statement u/s 313 Cr.PC admitted having taken the prosecutrix with him to Don Bosco Sashipur and from there to Bhutan for an outing. The fact of the victim girl going with the accused on the fateful day from Jamuguri Chowk to Don Bosco Sashipur is believable for the fact that the victim girl having known the accused and addressing the accused as an uncle there is every

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likelihood that on his insistence the victim accompanied him moreso when she had friends at the Don Bosco Sashipur Hostel, as the said friends reportedly had come over to Don Bosco Sashipur from Guwahati. The unchallenged evidence of the PW-1 and the admission of the accused in his statement u/s 313 Cr.PC proves the fact that the accused had taken the victim girl to Don Bosco Sashipur at first. The defence argument that the story of the prosecutrix is not believable for the fact that she being destined to go to Guwahati would not take a different route and go to Jamuguri instead is not acceptable. The argument that none examination of the victim's friend who was supposed to accompany the victim girl to Guwahati is fatal and strikes at the very root of the prosecution version is also not acceptable in the face of the above overwhelming evidence of the PW1.

Now PW-1 had also stated that form Don Bosco Sashipur the accused offered to take her to Bhutan. PW-3 also testified in respect of the accused taking the victim girl whom he presented as his niece to him, to Bhutan in a motorcycle and that he had also seen the victim girl with the accused at Bhutan and that the three of them had drinks at a hotel in Bhutan. This evidence of PW-3 remained unrebutted. PW-3 remained steadfast in his evidence that the victim had cold drink which was mixed with zin (a kind of alcoholic beverage) at the hotel at Bhutan. Defence could not elicit anything to show that PW-3 was deposing falsely against the accused in respect the presence of the accused and the victim girl at Bhutan. The evidence of PW-1 and the PW-3 along with the revelation of the accused in his statement u/s 313 Cr.PC leads this court to conclude that the accused had taken the victim girl from Don Bosco Sashipur to Bhutan on a bike.

Now it is required to be seen whether the alleged penetrative sexual intercourse had being committed by the accused or not.

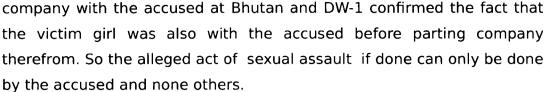
PW-1 in her evidence stated that she found herself in a naked condition inside a vehicle at Bogajuli forest area and after having woken up realized that she was raped by the accused and that the accused threatened to kill her if she raised any cry of alarm or reported about the occurrence to any person.



PW-5 the Medical Officer disclosed the fact that the victim had not permitted her examination in connection with the alleged sexual assault. Therefore the medical evidence is completely silent in respect of any injuries sustained by the victim girl in the alleged sexual attack on her person.

What remains is only the evidence of the prosecutrix in respect of her sexual assault. PW-1 had categorically stated that she found herself in a naked condition inside a vehicle and she realized that she had been raped. PW-1 failed to state what situation led her to conclude and realize that she had been raped by the accused person. Though it may happen that in a state of unconscious if a victim had been ravished by someone, she would not know all the acts of rape committed on her by the perpetrator but after regaining consciousness the victim would be able to tell what led her to conclude that she had been ravished. The failure of the Investigating Officer to send the vehicle for a chemical examination to detect the presence of spermatozoa etc in the alleged vehicle is a dent in the prosecution version apparently. The version of the PW1 that it was her realization that she had been raped has not been clarified by the victim clearly. But that she was found in a naked condition inside the vehicle could not be dislodged by the defence in her cross-examination. The non-allowing of the victim's medical examination can be taken as a victim's conduct u/s 8 of the Evidence Act Leading this court to infer that the alleged rape on her person or that she or that she was found in a paked condition. she was found in a naked condition in the vehicle and that accused was also present at the said place could not be dislodged by the defence. The evidence of DW1 to the effect that accused brought the victim girl to her place also is a link in the chain of evidence that the accused after having met the victim girl at Jamuguri Chowk brought her to Don Bosco Sashipur and thereafter to Bhutan and therefrom to her house that is the house of DW-1. Apparently the victim girl was all along in the company of the accused.

The victim girl was last seen in the company of the accused as per the defence witness as well. PW-3 testified in respect of victim's



Now coming back again to the evidence of PW-1 it is seen that she had in her evidence stated that she went to the house of her aunt and on the next day she went to Guwahati with Sushmita and after two days she reported the incident to her aunt. PW-3 and PW-4 also stated in their respective evidence that the victim girl on the evening of the fateful day went to PW3's sister- in- law's house and that on getting the said information of the arrival of the victim there, PW3 went to Jamuguri to find the victim girl at her parental house and that the victim girl reported about the act of accused taking her and committing rape on her. In her cross-examination she clarified that the victim did not disclose anything to her rather the victim on the next day disclosed the incident to her and after knowing the incident she allowed the victim to go to Guwahati and that she had reached Jamuguri Chawk at about 6 pm on the fateful day. PW-3 clarified later on that the victim had reported about the incident over phone from Guwahati. PW-4 also deposed that he learnt about the alleged occurrence from his wife who was informed by the victim over phone from Guwahati .That the victim girl did not disclose about the occurrence to the PW-3(aunt) on the very day is confirmed by the victim as well as PW-3 for she herself had confirmed in her cross-examination that even on inquiry victim did not disclose the being not in harmony doubt arises. The defence argument that the itself. Ld. Counsel submits that had the occurrence being a true one the victim girl could have reported about the same immediately to her aunt on meeting her. But at this juncture it must be borne in mind that the offence which is under trial herein is the offence relating to the alleged sexual assault of a girl. Various factors come into play, at the time of the victim's disclosure about a incident of the sexual assault on her person. Apparently the victim girl is an orphan. The consideration that she would not be given an ear if she narrated the sexual assault on her person to



her aunt may also be one of the factor which made her withhold the information back from the aunt at first. The mental state of the victim must also be taken into consideration. The feeling which might have not allowed her to make any disclosure at first cannot be loose sight of. The accused is the victim's acquaintance and uncle .The feeling that such a person had done the overt act and the necessity to report about the accused uncle and weighing the twin factors and thereafter deciding which weighed more might have taken time for which the disclosure had been made subsequently and not immediately on meeting the aunt is possible. The defence arguments therefore does not hold water. PW-3 at first stating that she allowed the victim girl to go to Guwahati after knowing the incident and subsequently stating that she learnt about the occurrence from the victim over phone from Guwahati cannot be held to be mutually destructive evidence as it must be remembered that this court is dealing with evidence of witnesses who are not of urban areas rather is one belonging to the tea garden community. At this juncture the case of Shivaji Sahabrao Bobade Vs. State of Maharashtra reported in (1973) 2 SCC 793 can be pressed into service wherein Hon'ble Supreme Court held that 'the too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered'.

Again the case of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat reported in (1983) 3 SCC 217** can be successfully referred to. Herein the Hon'ble Supreme court held as herein under-

"We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for



the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

- (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events. The witness would not have anticipated the occurrence which so often has an element of surprised. The [pic] mental faculties therefore cannot be expected to be attuned to absorb the details.
- (3)The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorded.
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence

witnessed by him- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

Again the witnesses who are belonging to not so modern community over passage of time might forget the chronology of the events of reporting as held by the Hon'ble Supreme Court in the case of Bharwada Bhoginbhai Hirjibhai(supra). The PW3's evidence that she was reported about the occurrence and PW-1 confirming the fact of reporting of the incident of PW-3 are corroborating its other and it can be well concluded that victim had reported the incident to PW-3 and thereafter victim had filed the case with the police.

Defence at this juncture has argued that the accused had been falsely implicated the accused over a grudge in respect of boundary dispute with the PW-3's parental home. This plea though taken, could not be probalized by defence by leading cogent evidence. Rather the act of accompanying of the accused by the victim from the Jamuguri Chowk to Don Bosco Sashipur and therefrom to Bhutan contradicts the defence case that the victim held out grudge against the accused person over the issue of boundary dispute with her aunt. Had there been a grudge over a boundary dispute as projected by defence, the victim girl would not have accompanied the accused at the very first instance rather her accompanying the accused on his insistence discloses that she knew the accused and went in his company, having known him.

Again defence disclosed that the case is false one as the counterplant of the perusal of Ext-1, it is clear that the alleged occurrence took place on 11.07.2017 while the ejahar was lodged belatedly on 19.07.2017. Apparently there is delay of 8 days but as stated earlier this court is in seisin of a trial of an alleged act of sexual assault by the accused person. The victim has to muster much courage to report the alleged assault on her person first to her family and then to the police, especially in the Indian society where much taboo is attached to the victim of a sexual assault. The society instead of feeling the pain of the victim looks down upon the victim and this fact at most times leads the victim to withhold back information to





family or to the police. Therefore in such situation, the delay of reporting cannot be held to be fatal to the prosecution case. The defence arguments cannot be sustained in this count as well.

Now coming to the point of minority of the victim girl it is seen that defence has disputed that the instant case is not triable by the Special Court as the victim is well above the age of majority. Ld. Counsel had taken this court to Ext-2 which is the victim's medical report wherein it has been mentioned that the victim's age from the radiological point of view is above the age of 19 years but though there is a mention in Ext-2 that X-ray for the victim's age determination was advised but the said medical report viz Ext2 is without the X-ray film. PW-5 failed to prove the basis on which the victim's radiological report had been prepared. Now coming to the birth certificate which is the Mat. Ext-1 which is available on record it is seen that the victim as per the birth certificate was born on 22.02.2002 and date of issuance of the same was 27.04.2015. Defence has also disputed the genuineness of Mat. Ext-1 on the ground that same was issued after 13 years of the birth of the victim girl. Though defence had disputed Mat. Ext-1 on the basis of delayed issuance but has failed to show that it was otherwise a forged document. Birth certificate issued by a competent authority is to be considered a genuine one unless, on the face of it found to be a forged document. The victim girl belonging from the tea garden community(Adivaasi) also an orphan has been brought up at "Snehalaya" an orphan house. Defence has not disputed the upbringing of the victim girl at "Snehalaya". Consider the certificate of their wards at the time of their birth. In the instant case the victim being an organization ignored. The said victim though was born at Singramari but her upbringing being done at Snehalaya and the authorities concerned at Snehalaya knowing the importance of possession of a birth certificate for future reference had applied for the victim's birth certificate and accordingly same was issued from the office of the Registrar of Births and Deaths, Hengrabari Assam, the said office being the competent authority to issue certificate in case of the births and deaths within the



jurisdiction of Guwahati. The delay in respect of securing the birth certificate therefore cannot be held to be a ground for rejection of the victim's birth certificate more so when the medical report in respect of victim's age is not proved by cogent evidence. The birth certificate of the victim girl being issued by competent authority under the seal of the office, for the mere fact of securing the same belatedly, court is not required to undertake a roving inquiry for the parties of checking the genuineness of the said documents. Therefore the age of the victim as per the Mat. Ext-1 being under the age of majority at the relevant time, the submission of the Ld. Counsel for the accused with this court is not having the jurisdiction to try the instant case is not acceptable.

Now going back to the evidence of PW-1 again it is seen that the accused according to the victim had committed rape on her person by stripping her naked. It is not in her evidence that she was stripped naked in her inebriated or unconscious state for purposes of pornography or for filming her naked rather it is in her evidence that she realized that she was ravished by the accused. Now, for commission of an offence under POCSO Act Section 29 of the Act comes into play which envisages the presumption against the commission of offence by the accused unless the contrary is proved. Again Section 30 of the Act also provides for presumption of the culpable mental state of the accused for commission of the alleged act. The victim had testified that she was ravished by the accused person. Defence failed to show that enmity existed between the accused and the relatives of the victim or that the victim held out grudge against the accused rather the act of the accused stripping the victim leads this court to the presumption that the victim had a culpable mental state to commit an offence of sexual assault on the victim girl. Had there been no intention on his part, the victim would not had been stripped naked. Even assuming the defence argument that the victim girl had drank liquor ,it could not give license to the accused to strip her naked. The very act of removing the wearing apparels of the victim by the accused leads this court to conclude that the accused had a culpable mental state and that he had no such mental state could not be proved by defence. The presumption u/s 29 having shifted the burden

Judge Mushabi



on the accused to rebut the said presumption, the defence failing to discharge the same it can be concluded that the accused had committed the act of stripping naked the victim/prosecutrix. While stripping naked the prosecutrix/victim sexual assault on the victim girl by the accused has to be committed and thus it can be safely concluded that victim girl was sexually assaulted by the accused only. However the alleged ravishment of the victim/prosecutrix by the accused stands short of being proved. Section 222 of the CrPC provides that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence if the ingredients of minor offence are available. In the present case accused was charged u/s 4 of the POCSO Act but as stated above the ingredients of section 4 of the POCSO Act could not be successfully proved by prosecution but the ingredients of section 7 of the act have been successfully proved by prosecution against the accused. Hence in view of section 222 CrPC the accused can be convicted u/s 7 of the POCSO Act punishable u/s 8 of the Act.

Now coming to the allegation that the accused had criminally intimidated the victim girl, it is seen that PW-1 in her evidence had not stated in clear terms as to how the accused threatened her. Therefore it cannot be safely concluded that accused had criminally intimidated the victim girl.

# The points for determination stands answered accordingly against the accused person.

Prosecution has been able to prove beyond all reasonable doubt that accused had committed the offence of sexual assault on the victim/prosecutrix. Charge u/s 506 IPC against accused fails however.

Accused is accordingly held guilty for commission of offence u/s 7 of the POCSO Act punishable u/s 8 of the POCSO Act.

Heard the accused on the quantum of sentence. Accused submits that he is the sole earning member of his family constituting of his wife, himself and his child. Accused submits that if he goes behind bars his family will face immense hardship. Accused prays that he may be pardoned.



Heard the ld. Counsel for the accused who urged that a lenient view may be taken as accused has a small child and the child would suffer in the absence of the accused.

Ld. P.P. Baksa submits that offence being of a grave nature, a strict view is necessary.

Heard. Perused the case record.

It is trite law that while deciding the quantum of sentence it is required to strike a balance between the aggravating and mitigating circumstances. Hence I proceed to scrutinize the aggravating and the mitigating circumstances in the instant case.

The mitigating factors in the instant case are:

- · Accused is a young man and has a family to support.
- Prosecution has not been able to prove any previous conviction of the accused person.

The aggravating factors in the case are:

- Accused has sexually assaulted a minor victim.
- ◆ The sexual assault on the victim's prosecutrix is not only to the victim's body but would continue to haunt all throughout her life.
- Victim being a orphan her misery is cumulative.
- It is a crime against the society at large.

When the aggravating and the mitigating factors are weighed it is found that the aggravating factors outweighs the mitigating factors. The statute prescribes minimum punishment of 3 years of either description and fine for commission of the offence of sexual assault which is extendable upto 5 years.

In my measured opinion in the facts and circumstances of the case the minimum punishment of 3 years and fine appears justifiable and accordingly I proceed to sentence the accused as below:

### **Order**

Accused Karnelus Ekka is convicted u/s 7 of the POCSO Act.

For his conviction u/s 7 of the POCSO Act accused is sentenced to suffer Rigorous Imprisonment(R.I.) for a period of 3 years and to pay a fine of Rs. 10,000/-(Rs Ten Thousand only) in default to suffer Simple



Imprisonment(S.I.) for a term of 3 months. The period of detention undergone, during investigation shall be set off as against the sentence of imprisonment, in view of provisions of section 428 CrPC. Accused is acquitted of charges u/s 506 IPC however.

As per section 357 A CrPC, and section 33(8) of the POCSO Act victim compensation is permissible. In the facts circumstances of the case, I am of the measured opinion that to mitigate the trauma suffered by the victim an amount of Rs. 25,000/- (Rs. Twenty Five Thousand only)can be paid to the victim prosecutrix as compensation. The Id. Secretary DLSA, Baksa be asked to make payment of compensation as determined to the victim after proper inquiry. Copy of the judgment be sent to DLSA, Baksa for needful action.

Let a free copy of this judgment be furnished to the convictaccused free of cost.

A copy of the judgment also be send to the District Magistrate Baksa in view of the requirement of section 365 CrPC.

Bail bond of the accused stands cancelled and surety discharged. Issue jail commitment warrant.

Given under my hand and seal of this Court on the 18<sup>th</sup> day of February, 2020.

(Smti. M.C. Bordoloi) udge Spi Court
Special Judge, Baksa, Mustalbur Mushalour

Dictated and corrected by me

(Smti. M.C. Bordoloj) udge Spi Coun

Special Judge, Baksa, Baksal Mushalper



## **APPENDIX**

## **Prosecution witnesses:**

PW1 Victim(name withheld) PW2 Gobinda Rabha PW3 Shilvina Ekka PW4 Teleshpore Kisputta PW5 Dr. Dolly Gogoi PW<sub>6</sub> Munna Pasani

# **Documents Exhibited by Prosecution:**

Ext.1 Ejahar Signature of victim Ext. 1(1) Signature of Munna Pasani Ext. 1(2) Ext. 1(3) Signature of Upendra Nath Sarma Victim's medical report Ext. 2 Ext. 2(1) Signature of the victim Ext.2(2) and Ext. 2(3) Signature of Dr. Dolly Gogoi Victim's statement u/s 164 CrPC. Ext. 3 Ext.3(1) to Ext. 3(5) Signatures of victim's Ext. 4 Seizure list Ext. 4(1) Signature of victim's

Ext. 4(2) Signature of Teleshpore Kisputta Ext.5 Sketch map of P.O.

Signature of Munna Pasani Ext. 5(1)

Seizure list vide which motor cycle seized Ext.6

Signature of Munna Pasani Ext. 6(1)

CouldExt.7 Mushahotkt. 7(1) Seizure list vide which Sumo seized

Signature of Munna Pasani

Charge Sheet

Ext.8(1) Signature of Munna Pasani

## **Defence witnesses:**

DW1 Shantira Ekka

Material exhibits:

Mat. Ext.1 Original birth certificate of victim

**Court witnesses:** Nil.

(Smti. M.C. Bordolojidge Spi Court Special Judge, Baksa Mushabur