

IN THE COURT OF THE SPECIAL JUDGE

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CHIRANG, KAJALGAON.

Special(P) Case No. 40(D)/2018 U/S 376 IPC R/W Section 6 of POCSO Act.

State of Assam Vs. Sri Shiv Nath Barman

.....Accused

PRESENT:

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Md. N.I. Siddique,

Mrs. P. Chutia, Ld. Advocates

Date of Evidence

: 25.06.18, 14.08.18, 16.08.18

Date of Argument : 31.10.2018

Date of Judgment : 14.11.2018

JUDGMENT

- Special Judge. Chirang, Kajalgaon
- 1. The prosecution case in brief is that on 23.04.2018, the informant Rina Ray lodged an FIR before Dhaligaon P.S. alleging that the accused Shiv Nath Barman, with a promise to marry her first daughter Miss 'X' (name is withheld), 17 years old, committed sexual intercourse upon her as a result of which she became pregnant and on 19.04.2018, she gave birth of a male child at Swagat Hospital Bongaigaon. It was alleged that after delivery of the child, the accused denied to marry the victim and further denied the paternity of the child.
- 2. After receiving the FIR, the O/C of Dhaligaon P.S. registered a case being numbered as Dhaligaon P.S. Case No. 66/18 U/S 376 IPC R/W

Section 6 of POCSO Act and entrusted SI Chandradhar Uzir to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C, collected the medical report and arrested the accused. After completion of investigation, the investigating Officer submitted charge-sheet against the accused Shiv Nath Barman U/S 376 IPC R/W 6 of POCSO Act before this court as offence under POCSO Act is triable by Special Court. Accused was produced before this court after his first remand. Therefore receiving charge sheet, this court furnished the copies of relevant documents to the accused person when he was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge U/S 376(1) IPC read with Section 6 of POCSO Act was framed against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. Later on, accused person was released on bail after framing charge.

 In support of the case prosecution side examined as many as 7 (seven) witnesses.

Following witnesses were examined:-

- (1) Victim Miss 'X' (name is withheld) as PW 1
- (2) Smt. Rina Ray as PW 2
- (3) Sri Phanidhar Owary as PW 3
- (4) Sri Prahlad Ray as PW 4
- (5) Sri Uttam Ray as PW 5
- (6) SI Chandradhar Uzir (I.O.) as PW 6
- (7) Dr. Meena Hazarika (M.O.) as PW 7
- 4. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext.1. Seizure list was exhibited as Ext.2. FIR was exhibited as Ext.3. Sketch map was exhibited as Ext.4, charge-sheet was exhibited as Ext.5 and medical report was exhibited as Ext.6. School certificate of the victim was exhibited as Material Ext.1 and declaration of birth report was exhibited as Material Ext.2.

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- Defence plea is of total denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced no evidence.
- 6. Heard argument from both sides. I have perused the entire evidence on record. I have also considered the statement of the accused recorded u/s 313 Cr.P.C. I have also perused the case laws supplied by learned Defence Counsel.

7. **POINTS FOR CONSIDERATION**:-

For the offence U/S 376(1) of IPC

1. Whether during the year 2017 prior to 19.04.2018, at village Hashraobari under Dhaligaon P.S., the accused committed rape upon Miss 'X' (name is withheld), daughter of the informant?

For the offence U/S 6 of POCSO Act

2. Whether on same date, time and place, the accused committed aggravated penetrative sexual assault upon Miss 'X' (name is withheld), daughter of the informant?

DISCUSSION, DECISION AND REASONS THEREFOR:

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- 8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned both points simultaneously for the sake of convenience.
- 9. In this case, allegation was made against the accused that he often visited the house of the victim and committed sexual intercourse with her. As a result, victim became pregnant and gave birth of a male child. According to informant and victim, they knew about the pregnancy immediately prior to delivery only.
- 10. PW 1 is the victim Miss 'X' (name is withheld). She deposed that she was reading up to Class-VIII and she left the school about two years ago. She did not fail in any class. Accused often visited their home. As a

result, love affairs developed between her and accused. Taking the chance of loneliness, accused committed sexual intercourse with her. Accused was a contractor under whom her mother was working. There was an agreement between the accused and victim that accused would marry the victim and after that they would live separately in a rented house. As there was promise of marriage from the accused for which she offered her body. On several dates, accused committed sexual intercourse. The victim failed to state any specific date regarding their sexual intercourse. She also stated that due to sexual intercourse, her menstruation stopped but after that she did not know when she became pregnant. She knew about the pregnancy when it developed up to 5 to 6 months. Then matter was informed to the accused and her mother. After that she was taken to nearby hospital. She was accompanied by the accused and her mother. According to PW 1, at that time, she carried 7 months pregnancy. She gave birth of a male child at hospital. After the birth of the child, they were preparing to live in a separate rented house and immediately they handed over the child to the maternal uncle of the victim. After that delivery was known by the paternal uncle of the victim. They caught the victim along with the accused when they were going to stay in a rented house at Bengtol Gate and after that mother of the victim lodged the FIR. She deposed that accused was a married person but she had no knowledge. She further deposed that her mother, PW 2 knew the entire incident. They arranged a rented house to stay along with the accused. During cross examination, this witness stated that there were six brothers and sisters in her family and she was second child of her parents. Her elder brother was reading in Class XII and he failed in H.S. 1st year. She had no any birth certificate. She submitted school certificate to the police. She failed to mention any particular date of their physical relationship. She clearly stated that according to her own consent, accused committed sexual intercourse with her. It is also revealed from the evidence of the PW 1 that she went to school along with her younger brother. She further deposed that as they were caught by villagers for which case was lodged. Otherwise they would stay at rented house.

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11. PW 2 is the mother of the victim, namely, Rina Ray. She also deposed that she knew about the pregnancy of victim on 17.04.18. After

knowing the fact, on next day, victim gave birth of a boy. According to PW 2, accused promised to marry her daughter but he did not fulfill his promise for which she lodged the FIR. This witness stated that at the time of occurrence, age of the victim was about 17 years. During her examination-in-chief, PW 2 stated that victim was born on 10.06.2000. She deposed the date of birth of the victim from her memory. She also knew that accused used to visit their house for a period of one year prior to the incident and there was love affection between the accused and victim. This witness clearly stated that her first son was born in January, 1997. According to PW 2, her second child was a daughter and she died but PW 1 clearly stated that she was the second child of her mother. Learned Defence Counsel pointed out that this witness had specific knowledge about the relationship between the accused and victim but same fact was denied by the witness. This witness also admitted the suggestion given by learned Defence Counsel that PW 1 went to L.P. School along with her younger brother in the same year. At first, victim was reading in Hashraobari L.P. School. She failed to state the year in which victim was first admitted in L.P. School.

- 12. PW 3 Phanidhar Wary is the maternal uncle of the victim. He deposed that after birth of the child, he met the accused on the road along with his elder sister, PW 2. Accused told him to keep the new born baby in his house but he declined. On the next day, both accused and his elder sister (PW2) came and kept the baby in his custody. He kept the child in his home for two days. From his elder sister, PW 2, he knew that victim gave birth of the child and accused was the father of the baby. After two days, he handed over the child to PW 2. He did not know about the incident prior to the birth of the child and he failed to state the date of birth of the victim.
- 13. PW 4 is the paternal uncle of the victim. He also did not know about the actual incident prior to the birth of the child. After birth of the child, he knew about the incident. As reported by the victim, he knew that accused committed sexual intercourse with a promise to marry her for which she became pregnant and gave birth of a male child.

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- PW 5 Shri Uttam Ray is the elder brother of the victim. He also 14. knew about the incident after the birth of the child as stated by him. He stated that he appeared HSLC examination in the year 2015. His younger sister, the victim left the school after passing Class VIII examination two years ago. During cross-examination, PW 5 categorically stated that after admission in L.P. School, he could not attend the class for a period of two years. He also failed to mention the year in which he was admitted in L.P. School. According to PW 5, he was born in the year 1997. He also failed to state the date of birth of the victim.
- PW 6 is the I.O. and PW 7 is the Medical Officer. The Medical 15. Officer did not perform radiological test of the victim. She deposed as follows:

On 25.04.18, she was working as Medical & Health Officer at JSB Civil Hospital, Kajalgaon under NRHM. On that day, she examined Miss 'X' (name is withheld) in connection with Dhaligaon P.S. Case No. 66/18 U/S 376 IPC R/W Section 6 of POCSO Act escorted by Woman Home Guard Ranjita Khaklary and indentified by Rina Ray, mother of the victim.

There was history of sexual assault since last year. She gave birth of a normal male healthy baby.

On examination, she found the following:-

No. of teeth - 7/7, 7/7. Auxiliary hair - Present. Pubic hair -Present. Breast - Developed, lactating. Engorged with milk. Menarche - Five years back. Menstrual cycle - Regular. LMP - Not known. Genital organs - No injury marks. Hymen - Absent. Vagina - Normal. Cervix - Cervical opening slit (sign of delivery). Uterus – Bulky. Evidence of injury on her private parts – Absent. General mental condition - Good. Co-operation - Good. Intelligence and memory - Good. Radiological investigation - Not done.

In her opinion, doctor stated that at the time of medical examination, the age of the victim was about 18 years.

PW 6 is the I.O. He investigated the matter but he did not collect the certificate issued from L.P. School in which victim first attended. He seized a certificate issued by Head Master of Hashraobari M.E. School. Said certificate was exhibited as Material Ext.1. In Material Ext.1, date of birth was not mentioned. It is mentioned in the M.Ext.1 that victim left the said school on 31.12.15 and at that time, her age was 15 years 6 moths 21 days. This fact was also reiterated by the Medical Officer in her certificate. So, from the school certificate issued by Headmaster of Hashraobari M.E. School, it is not clear on which date actually victim was born. According to Medical Officer's opinion, at the time of examination, age of the victim was about 18 years. The I.O. during his cross-examination clearly stated that he did not visit the L.P. School and collect any certificate regarding the age of the victim. Though PW 2 stated that victim was born on 10.06.2000, but in support of this, no any document was produced. This date only tallies the age mentioned in M. Ext.1.

PW 1 and PW 2 that accused often visited their house for a period of one year. It was also known from both of them that there was love affection between the accused and victim. It is also found from the evidence of PW 2 that accused was married and it was revealed that accused married the girl belonged to the same village of the victim. It is also revealed from the evidence of the PW 1 that PW 2 was working as labourer under the accused who was a contractor. Victim clearly stated that according to her own will, accused committed sexual intercourse and both of them planned to stay in a rented house after their marriage. She stated that after stoppage of menstruation period, she could not know about the pregnancy which is not believable. The mother also stated the same facts which also not believable. The mother, PW 2 stated different years regarding the birth of her six children but she failed to state the year in which victim was first admitted in L.P. School. The Headmaster, who issued the school certificate, was not examined

but it is found that a certificate was issued from a Middle English school not

from the school first attended by the victim.

that both PW 1 and PW 2 are not reliable witnesses. It is clearly mentioned by

After going through the entire evidence on record, I have found

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- 17. Learned Defence Counsel, during the time of argument, pointed out that in this case from the evidence of PW 1 and PW 2, it was crystal clear that there was love affection between the accused and victim and same was known by PW 2. Therefore, she took initiative regarding delivery of the baby and keeping of the same in the house of her younger brother (PW3). He further pointed out that to prove an offence under POCSO Act or any sexual offence against a person, prosecution must have to prove the age of the victim.
- 18. In POCSO Act, "child" is defined as follows:
 - "(d) "Child" means any person below the age of eighteen years."
- 19. So, learned defence counsel vehemently argued that prosecution must have to prove the specific age of the victim on the date of alleged occurrence. Unfortunately, in present case at hand, neither the date of occurrence was specifically mentioned in the FIR nor stated by material witnesses in their evidence. It is found from the evidence that victim gave birth of a male child in a hospital but the hospital authority was not examined to prove the fact. Therefore, it was under darkness about the gestation period of the fetus which was delivered by the victim. According to victim, when she knew about the pregnancy, it was about 5/6 months. She further deposed that when it reached 7 months, then she delivered a baby. So, it was not proved on which date accused committed sexual intercourse and as a result of which baby was delivered by the victim.

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20. In this regard, learned defence counsel cited following case

laws: (i) Criminal Appeal No. 269 of 2016
(Subramaniam -vs- The State)

(ii) Criminal Appeal No. 2308 of 2009 (Sunil versus State of Haryana)

21. I have gone through it. In the case of **Sunil versus State of Haryana (Criminal Appeal No. 2308/2009)**, the Hon'ble Supreme Court

held that in a criminal case the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date.

23. Regarding age determination of the victim under POCSO Act, Hon'ble Madras High Court, in the case of *Subramaniam -vs- Tamil Nadu*, (Supra) held as follows:

"18. The Protection of Children from Sexual Offences Act, 2012, does not contain any specific procedure to be followed by the Court to ascertain the age of a child victim. Section 34 of the said Act deals with the procedure in case of commission of offence by child and determination of age of Special Court. Sub-section 2 of the said provision stated "if any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court, after specifying itself about the age of such person and it shall record in writing its reasons for such determination." Except stating so, generally, there is no other guideline in the said provision as to how to determine the age of a child. Section 42-A of the said Act states "the provisions of this Act shall be in addition to an not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of inconsistency." From this provision, since it is clear that for determining the age of a child there is no procedure prescribed in the Act, the Court can very well follow the procedure as contemplated in the Juvenile Justice (Care and Protection of Children) Rules, 2007, wherein Rule 12 reads as follows:

"12. Procedure to be followed in determination of Age:-

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- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
- (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
- (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board, as the case may be, the Committee by seeking evidence by obtaining
- (a)(i) the matriculation or equivalent certificates, if available, and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended, and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, if considered necessary, give benefit to the child or juvenile by

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considering his/her age on lower side within the margin of one year.

And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

By citing the above mentioned case laws, learned Defence Counsel argued that in present case at hand, specific date of birth was not proved from the specific documents as required u/s 12 of JJ Act.

I have found that prosecution failed to ascertain the exact age of the victim on the date of occurrence which was also not established from the evidence on record. Age was not proved as settled by the Apex Court. Hon'ble Supreme Court in the case of *Mahadeo S/o Kerba Maske Vs.*State of *Maharashtra and Anr.*, (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

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"Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining —

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
 - (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, he Court of the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence of whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

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25. The Hon'ble Supreme Court further held in paragraph 12 of Mahadeo S/O Kerba Maske (supra) as under:

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."

Moreover, in present case at hand ,Medical Officer gave opinion that at the time of examination, age of the victim was about 18 years. Regarding medical evidence, it was settled that minimum two years should be added to the given age as decided by Hon'ble Supreme Court in Jaya Mala v.

Home Secretary, Govt. of Jammu and Kashmir & Others reported in [(1982) 2 SCC 538]. So, two years variance in both sides must be there on the age determined through Medical examination.

- 27. So, considering all aspects, I have accepted the view submitted by learned Defence Counsel that at the time of occurrence, victim might be major and she had consent and due to love affair both of them engaged themselves in sexual relationship as a result of which she became pregnant and gave birth of a child. So, in this juncture, accused cannot be booked for the offence mentioned above.
- After going through the above discussions of prosecution 28. evidence as well as cited different case laws by learned Defence Counsel, I have found that witnesses, particularly PW 1 and PW 2 are not wholly reliable. When a witness is found to be partly reliable and partly unreliable, then corroboration, either documentary or oral, is very much necessary. In present case at hand, PW 1 deposed that she was second child. On the other hand, PW 2 stated that her second child died. This fact was not corroborated by PW 1. PW 5 is the eldest son of the PW 2, who deposed that he was born in the year 1997. On the other hand, six children were born from PW 2 within the period started from 1997 to 2010 as stated by PW 2 during her crossexamination. According to her, out of these, one daughter died. This fact was uttered neither by the victim nor by eldest son of the PW 2. Though PW 2 stated that victim was born on 10.06.2000, but in support of this, no any document was produced. Further, she and other witnesses particularly PW 3, PW 4 and PW 5 failed to state the year of birth of the victim. The school certificate of L.P. School in which victim first attended was not seized or collected by the Investigating Officer and during trial, prosecution also failed to bring the Headmaster of the said school in spite of repeated steps. In this regard it was submitted that learned P.P. took several steps to collect the date of birth of the victim but it was not found. Learned P.P. verbally submitted before this Court, during the time of argument that actual date of birth was not found in school record for which he could not bring the certificate or the concerned Headmaster of the L.P. School. It is an admitted fact that there is no birth certificate of victim. She read up to Class VIII. Therefore, there is no

Special Judge, Chirang Kalaigaon question regarding matriculation certificate. So, all the documents prescribed U/S 12 of J.J. Act are lacking in respect of the age of the victim. According to said section, if these documents are absent, then last option is nothing but ossification test. Unfortunately, no radiological test was conducted to ascertain the age of the victim during the time of investigation by the Investigating Officer. On the other hand, Medical Officer from clinical test opined that at the time of examination i.e. after the birth of the child in the month of April, 2018, the age of the victim was about 18 years. So, if I consider the medical age, then two years difference must be occurred. So, she might be above 18 years. So, it was settled by Hon'ble Supreme Court that conviction of a person cannot be based on an approximate date. It is unsafe to convict a person on approximate date. In present case at hand, both PW 1 and PW 2 miserably failed to state the date of birth specifically. The date of birth stated by PW 2 is not believable as true because in support of that no any evidence is found. It only tallies the age given in Material Ext.1 of the Headmaster of Hashraobari M.E. School. According to Section 12, this document is not admissible to prove the age of the victim, particularly the Headmaster who issued the certificate was also not examined. It is doubtful from the evidence of PW 1 that second daughter of PW 2 died. According to PW 1, she is the second child of PW 2. The first child PW 5 stated that he was born in the year 1997. According to PW 2 he had born in the month of January 1997. So, victim might be born prior to 2000. There is reasonable doubt in this respect. So, after going through the entire evidence, I have found that prosecution failed to establish the point that victim was minor on the particular date of incident because date of birth of the victim was not proved as well as date of the sexual intercourse was also not proved. Gestation period was also not proved. No any medical staff of the hospital in which PW 1 gave birth the child was examined. No any document from the said hospital was exhibited to prove the fact that PW 1 gave birth to a male child at such and such weeks of pregnancy. On the other hand, from the evidence it is quite clear that victim was consenting party because she loved the accused and both of them were planning to stay in a rented house. Her paternal uncle and villagers caught them for which PW 2; mother of the victim was bound to lodge an FIR. So, accused cannot be booked either for the offence U/S 376(1) IPC or Section 6 of POCSO Act. In

Special Judge, Chirang, Kajalgaon my view, prosecution must have to prove the case beyond all reasonable doubt. Though there is a provision U/S 29 of POCSO Act regarding presumption, but prior to presume the offence prosecution must have to establish their case through sufficient evidence. In present case at hand, prosecution failed to establish their case by adducing sufficient reliable evidence. The evidence given by PW 1 and PW 2 and PW 5 creates doubt about the actual date of birth of the victim. This doubt will benefit the accused. As a result, both points mentioned above are not proved beyond all reasonable doubt. Accused cannot be booked for offences mentioned above.

ORDER

- 29. Prosecution failed to prove the case U/S 376(1) IPC R/W Section 6 of POCSO Act against accused Shiv Nath Barman beyond all reasonable doubt. Accused is acquitted on benefit of doubt and set at liberty. He is directed to furnish bail bond of Rs. 10,000/- with one suitable surety of the like amount for a period of six months as required U/S 437(A) Cr.P.C. Till then, he is allowed to remain in previous bail.
- 30. A copy of the Judgment shall be given to the District Magistrate, Chirang for information.
- 31. Given under my sign and seal of this Court on this the 14th day of November, 2018, at Kajalgaon, Chirang.

(D.J. Mahanta)

Special Judge,

Dictated and corrected by me,

(D.J. Mahanta) Special Judge,

APPENDIX

Prosecution witness:

PW 1 - Victim Miss 'X' (name is withheld)

PW 2 - Smt. Rina Ray

PW 3 - Sri Phanidhar Wary

PW 4 - Sri Prahlad Ray

PW 5 – Sri Uttam Ray

PW 6 - SI Chandradhar Uzir (I.O.)

PW 7 - Dr. Meena Hazarika (M.O.)

Exhibit (Prosecution):

Ext-1 Statement of the victim U/S 164 Cr.P.C.

Ext-2 Seizure list

Ext-3 FIR

Ext-4 Sketch map

Ext-5 Charge-sheet

Ext-6 Medical report

Material Exhibit (Prosecution):

Material Ext-1 School certificate of the victim Material Ext-2 Declaration of birth report

Defence Witness:

Nil.

Defence Exhibit:

Nil.

(D.J. Mahanta)
Special Judge,
Special Judge,
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