IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>07 OF 2014</u>

(Under Section 6 of the POCSO Act, arising out of G.R. Case No. 2217 of

2014)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Madhab Chandra Nath,

Son of Late Rameshwar Nath Resident of Besseria (Pukhuria)

Police Station – Tezpur Dist; - Sonitpur, Assam

Date of framing Charge :- 24/02/2015

Date of Recording Evidence :- 11/09/2015, 05/03/2016,

25/04/2016, 30/06/2016 21/03/2017, 23/03/2017 09/11/2017 & 09/01/2018.

Date of examination of accused :- 05/02/2018.

u/s 313 Cr.P.C

Date of Argument :- 09/03/2018

Date of Judgment :- 22/03/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused :- Smti Dulumoni Sinha, Advocate.

JUDGMENT

- **1.** In this case accused Sri Madhab Chandra Nath is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.
- 2. The prosecution case according to the FIR in brief is that on or about 8 a.m. of 06-09-2014 accused took informant's minor daughter Miss X with a lure to give something to the water supply plant in absence of informant's family members and physically assaulted her and also committed rape on her. The accused has also asked the informant's minor daughter not to disclose the matter to anybody. Thereafter, the informant's minor daughter developed a pain in stomach and as a result, she does not wants to go to school. While the informant asking her daughter repeatedly why it was so she disclosed the details about the incident. Thereafter, the informant informed the matter to the local public and on 08-09-2014 she filed the ejahar before the I/C of Kacharigaon police Out Post under Tezpur Police station.
- 3. On receipt of the ejahar, the I/C of Kacharigaon Police Out Post after giving the GD Entry No. 138/14 dated 08-09-2014 forwarded the same to O/C Tezpur PS for registering a case. On receipt the ejahar, the Officer-In-Charge of Tezpur Police Station registered a case being Tezpur P.S. Case No. 1062/14 u/s 376(I) of the IPC read with section 8 of the POCSO Act. After completion of usual investigation, the O/C Tezpur Police Station sent up the case record for trial against the accused Madhab Chandra Nath by filing charge sheet u/s 376(2)(i) of the IPC read with section 8 of the POCSO Act.
- **4.** On being appeared the accused before this Court, after hearing both parties, my learned predecessor, framed charge under section 6 of the POCSO Act, 2012 against the accused Sri Madhab Chandra Nath and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.

- **5.** To substantiate the case prosecution examined as many as nine numbers of witnesses. After completion of prosecution evidence, accused was examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for his explanation where he denied the allegations, evidence and declined to adduce defence evidence.
- **6.** I have also heard argument put forwarded by learned counsels of both the parties.
- **7.** The point for decision in this case is that -

(1) "Whether, on last 06-09-2014 at about 8 a.m. in the morning at his Govt. quarter at Ketekibari under Tezpur Police Station, the accused committed penetrative sexual assault on the victim Miss "X", aged about 7 years and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

Reasons, Decisions and reason for decision.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9.** PW 1, Dr. Ila Rajkhowa, stated that on 08-09-2014 she was posted as Sr. Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day, at about 1.30 p.m. in the emergency outdoor, labour room complex of KCH,Tezpur, she examined Barasha Saikia, 7 years, D/O Sri Girindra Saikia of village Ketekibari, PS- Tezpur, in reference to Kacharigaon OP vide GD E No. nill dated 08-09-2014, on being escorted and identified by UBC 511 Prasanta Gogoi, in presence of GNM Manika Dutta. Consent taken from the victim girl and her quardian. On examination she found the following:

Identification mark – one black mole on left hand.

Height - 114 cm., Weight - 17 Kg, Teeth - 10/11. The girl has not attained puberty.

She is a small built child. She is a school going child. Neat and tidy and well dressed. Her gait is normal. As she does not attain puberty, her secondary sexual character does not developed.

Auxiliary and pubic hair does not develop. Vagina and vulva healthy but not developed. There are no marks of injury in any parts of her body or in her private parts.

Investigation advised:

Vaginal smear examination given and sent to laboratory of Kanaklata Civil Hospital – spermatozoa not seen. Lab No. 97.

Urine for HCG test – negative. Done in Asstha International Diagnostic Centre, Patient ID NO. 049261/70/14 done by Dr. A. Sharma. MD Pathologist.

X-ray for age determination – Age of the person under investigation appears to be below 8 years.

Epiphysis of bones around elbow yet to be fused.

Iliac crest epiphysis yet to appear around puberty.

Pisiform bone yet to appear.

Epiphysis of lower ends of ulna are yet to appear. Appear by 8th years. Done at Scanx Diagnostic Centre, done by Dr. R. Baruah, MD consultant Radiologist.

USG of lower abdomen:

USG features within normal limit.

UB is well distended. No intra luminal abnormality found. UB wall is normal. Uterus: Uterus is normal in size, shape and position.

Measures $-1.8 \times 3.8 \times 1.0$ cm. No myoma seen. Endometrial echo is maintained. Cervix is normal. Both the ovaries are normal in size, shape and echo textures. No solid and cystic mass lesion is seen.

Right Ovary: measures 2 x 2 x 0.9 cm.

Left Ovary: measures 1.9 x 0.8 cm

ADNEXA- No adnexal mass seen, done at Scanx Diagnostic Centre, done by Dr. R. Baruah, MD consultant Radiologist.

Remarks:

- 1. No sign of recent sexual intercourse during the time of examination.
 - 2. Estimated age of the victim girl is below 8 years.
- 3. There is no injury marks on the body or in her private parts.

Ext. 1 is the Medical Report and Ext. 1(1) is his signature. Ext. 2 is the laboratory report of Kanaklata Civil Hospital, Tezpur. Ext. 3 is the report of Urine test. Ext. 4 is advice slip for investigation and Ext. 4(1) is my signature. Ext. 5 is the X-ray report along with three plates. Ext. 6 is the USG report along with plate.

- **10.** PW 2 Smti Bijaya Bordoloi stated that she knows the accused Madhab Nath. She also knows the victim Barsha. The incident occurred on 7th March, 2014. On that day, she went outside to mend her cows in the nearby field. At that time Debajani and Rashmi called her and told her that the accused has done harm to victim.
- 11. PW 3 Smt. Debajani Saikia stated before the court that victim is her daughter. She know the accused Madhab Nath. When they were in a rented house at Ketekibari, they came in contact with him because he was the Operator of Water Supply Department. About 1 year 7 months ago, the occurrence took place. On the day of occurrence, her daughter was 7 years old and she was a student of class -1 of Majdeuri gaon Primary School. One day, she was giving a bath to her daughter before sending her to school and at that time victim told her that she could not go to school because she was suffering from pain on stomach. She also stated before her that "Tanki Mama" was a bad man. Her daughter

called the accused as "Tanki Mama". She told her that on the pretext of giving of guava and other fruits, he used to call her daughter to the room at the Water Supply system. Her daughter also disclosed before her that on multiple occasions by giving fruits to her, the accused used to remove her pant and inserted his penis into her vagina. Her victim daughter also told her that the accused had threatened her that if she had disclosed the matter to others, he will kill her. Thereafter, she went to the Police Station. Before that she had informed her husband about the said facts. Ext. 7 is the ejahar and Ext. 7(1) is his signature. She narrated the entire facts before a person whose name is not known to her. He in turn dictated his wife to write the ejahar. Her daughter was brought to the Court for recording her statement. She was also subjected to the medical examination.

Though PW 3 has been exposed to long cross-examination except giving many suggestions, the evidence as to - one day while she after giving bath to her daughter before sending her to school and at that time victim told her that she could not go to school because she was suffering from pain on stomach, she also stated that "Tanki Mama" was a bad man, she also told that on the pretext of giving of guava and other fruits, he used to call her daughter to the room at the Water Supply system, on multiple occasions by giving fruits to her, the accused used to remove her pant and inserted his penis into her vagina, and her victim daughter also told her that the accused had threatened her that if she had disclosed the matter to others, he will kill her has remained unchallenged.

12. PW 4 Miss X, the victim, who was examined after making enquiry by putting some questions and answers as to her ability to give rational answers stated that the occurrence took place at about 11 a.m. On that day, she felt stomach pain so she could not go to the school. At about 11 a.m. Tanki Mama called her to his house. He works in the Water supply system. She went to his house alone. He showed her bananas and chips. When she reached his house he gave her a potato

chip. Thereafter he removed her panty. The accused wearing a "Gamosa". He touched her vagina with his penis. Thereafter he inserted his penis into her vagina. She was laid on his bed at that time. She shouted for help then he gagged her mouth with his hands. She told him that she was suffering from pain then he removed his penis. When she felt too much pain and when she shouted louder, the accused had wiped her vagina with the gamosa. At that time her younger brother came to the place of occurrence. To see her younger brother the accused left her. Before the day of occurrence, the accused did those things to her on five days. She did not tell those things to her mother because the accused threatened that if she disclosed the said facts to her parents he will beat her. He also told her that on hearing such facts her mother will also beat her. After the aforesaid incident her stomach pain began to grow bigger and then she told her mother about the whole facts. Sometimes another person comes to the room where the accused staying. On the day of occurrence the said person was not present in that room. She was subjected to medical examination. She was produced before a Magistrate in the Court for recording her statement. She told the Magistrate as she has stated before the court. Ext. 8 is my statement recorded u/s 164 Cr.P.C. and Ext. 8(1) to 8(4) are her signatures.

Though she has been exposed to long cross-examination except giving many suggestions the evidence as to on the day of incident she was called by accused Tanki Mama to his working place by showing her bananas and chips, thereafter accused removed her panty, the accused wearing a "Gamosa", he touched her vagina with his penis, thereafter he inserted his penis into her vagina by laid down on his bed, when she shouted for help then the accused gagged her mouth with his hands and she told him that she was suffering from pain then accused removed his penis has remained unchallenged.

13. PW 5 Sri Girindra Saikia stated that he knows the accused Madhab Nath. Victim is her daughter. About one year 8 months ago

the incident took place. At that time, her daughter's age was 6½ years. He has two children. On the day of occurrence he went out for work in the morning and returned on the mid day to have bath. He asked his wife as to why the children were not sent to school on that day. She was crying and told him that the accused Madhab Nath had taken their daughter to the Water supply Pump complex near his house on the pretext of giving some fruits to her and there the accused had touched her vagina with his penis after removing her pants. He asked her daughter about the said fact. His daughter also told him the facts as her mother had disclosed him. Immediately he went to the said water supply pump complex in search of the accused but he could not find him there. He returned home and thereafter went to Mission Chariali police Out Post and lodged ejahar before police.

Though he has been exposed to long cross-examination except giving many suggestions the evidence as to on the day of occurrence returned on the mid day to have bath from his working place, while he asked his wife as to why the children were not sent to school on that day, his wife was crying and told him that the accused Madhab Nath had taken their daughter to the Water supply Pump complex near his house on the pretext of giving some fruits to her and there the accused had touched her vagina with his penis after removing her pants, then he also asked her daughter about the said fact and his daughter also told him the facts as her wife had disclosed him has remained unchallenged.

14. PW 6 Smti Banti Bharali who turned hostile. The unhostile portion of her statement is that – she knows the victim girl. The incident took place about two years ago. One day at morning many people gathered near the water tank situated nearer to her house. She cannot say exactly what was happened but heard that accused committed misdeed to a little girl. She had not made any statement to

police neither she was reported about the incident by the mother of the victim

In cross-examination by defence she admitted that accused is known to her but she has not heard any adverse against the accused. As she was not reported anything by Debajani so she did not made any statement before the police.

- **15.** PW 7 Miss J. Borah, stated that on 09-09-2014 she was working as Judicial Magistrate, 1st class, Tezpur, in reference to Tezpur PS Case No. 1062/14 as per the order of learned Chief Judicial Magistrate, Sonitpur, Tezpur, she has recorded the statement of one minor witness Miss X. Since the witness was minor, so she has put some questions and on her answers she is satisfied that she is able to understand the questions put to her and to give rational answers, accordingly, she recorded her statement. The witness made statement before her voluntarily. After recording her statement she has read over the contents of the writings and on her acceptance she put her signature thereon. The said witness was identified by UBC 511 Prasanta Gogoi and WHG Mamoni Saikia. Ext.9 is the GR Case No. 2217/ 14, Ext.9(1) is the order of the then learned Chief Judicial Magistrate, Sonitpur, Tezpur, Ext. 9(2) is the signature of the then learned Chief Judicial Magistrate, Sonitpur, Ext. 9(3) is her order after receiving the case record of GR Case and Ext. 9(4) is her signature. Ext. 8(5) is her signature in the statement of Miss X.
- 16. PW 8 Sri Keshab Baruah, the I.O. has stated before the court that on 08-09-2014 he was posted at Kacharigaon Police out Post under Tezpur PS as SI of police. On that day he received a written ejahar from Debajani Saikia. On receipt of the ejahar he has given GD Entry No. 138/14 dated 08-09-2014 and the same was forwarded to O/C Tezpur PS for registering a case. Accordingly, O/C Tezpur PS registered a case being Tezpur PS Case No. 1062/14 u/s 376(I) of IPC r/w section 8 of POCSO Act and also registered a GD entry No. 446 dated 09-09-2014 and entrusted him for investigation. Ext. 7 is the

said ejahar and Ext. 7(2) is his signature with note and Ext. 7(3) is the signature of the then O/C Tezpur PS some "Deka". Accordingly, he visited the place of occurrence and prepared a sketch map of the place of occurrence vide Ext. 10 and Ext. 10(1) is his signature. Thereafter, he recorded the statement of the witnesses u/s 161 Cr.P.C., sent the victim for medical examination and collected the report and sent the victim to the learned Magistrate for recording her statement u/s 164 Cr.P.C. On his transfer, he has handed over the case diary to the then O/C Tezpur Police station.

He has recorded the statement of witness Banti Bharali. The said witness stated before him that "on 08-09-2014 after completion of her domestic work she went to market she saw Smti Debajani by standing was talking with somebody. While she goes forward and asked her what happened, she told her that the incident is not such to state loudly so she called her at a little distance. After purchasing some materials while she went with her towards her house, she reported her that accused Nath has sexually tortured her minor daughter by calling to his water supply plant. Then she advised her to inform the matter to police. Ext. 11 is the GR Case No. 2217/14, Ext. 11(1) is the relevant statement of said witness Smti Banti Bhorali recorded u/s 161 Cr.P.C. and Ext. 11 (2) is his signature.

In cross-examination, she admitted that according to FIR date of occurrence was on 06-09-2014, but the ejahar was lodged on 08-09-2014 i.e. after two days of the incident. The FIR does not explain two days delay in lodging the same. He has met and recorded the statement of the victim on 08-09-2014. Due to mistake of pen, he has shown the date in the statement of victim on 08-08-2014 though the incident took place on 06-09-2014 and the ejahar was lodged on 08-09-2014. Actually, it should be on 08-09-2014.

17. PW 9 SI Gopal Singha, stated that on 08-09-2014 he was posted as I/C of Kacharigaon Out Post. On that day, O/C, Tezpur PS endorsed him to investigate the case of Tezpur PS Case No. 1062 of

2014. Accordingly, he received the case diary of Tezpur PS Case No. 1062 of 2014. On being taken the charge of investigation, on perusal of the case diary it appears that the investigation of the case has already been completed. He only collected the medical report of the victim. On perusal of the case diary it appears that victim girl Miss X, aged about 7 years, D/O Girinda Saikia, has been committed rape by the accused Madhab Chandra Nath. Finding sufficient materials against the accused Madhab Chandra Nath he has filed chargesheet vide charge sheet No. 649/14 dated 24-10-2014 u/s 376(2)(1) of the IPC read with section 8 of POCSO Act. Ext. 12 is the chargesheet and Ext. 12(1) is his signature.

- **18.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- **19.** I have heard the arguments put forwarded by learned counsels of both the sides.
- Learned counsel for the accused submitted that the prosecution 20. has failed to prove the case beyond any reasonable doubt. Firstly, had an adult person committed rape on a minor girl she must have sustained injury not only on her private parts but also on her body but according to the doctor the victim sustain no such injury. Secondly, according to the FIR, the alleged incident took place on 06-09-2014 but the FIR was filed by the complainant on 08-09-2014. The FIR was silent as to any explanation for lodging the same in late. Thirdly, other than PW 3, mother of the victim and PW 5, father of the victim and victim none has supported the prosecution case. Fourthly, Smti Banti Bhorali has turned hostile. Her hostile portion of statement cannot be used by prosecution to convict the accused. Fifthly, according to PW 2 Smti Bijaya Bordoloi on the day of incident PW 2's son Gitartha Bordoloi staying in the same rook room together with the accused. Besides, on that day accused helped her to milk her cows after closing his room under lock and key and lastly, though the I.O. has recorded the statement of victim on 08-09-2014 but in fact in the

statement u/s 161 Cr.P.C. the I.O. stated that he has recorded the statement of victim on 08-08-2014 i.e. about one month prior to the date of incident. Under such circumstances, accused is required to be acquitted.

- 21. On the other hand, learned Special Public Prosecutor submitted that the prosecution has ably proved the case beyond any doubt against the accused, firstly, by way of giving evidence by the minor daughter of the informant. This statement was recorded by Hon'ble court after due enquiry by putting many questions as to her intelligence and ability to give rational answers. The victim also stated before her mother after two days at the time of going to school when she had suffered unbearable pain at stomach that was reported to her father on his arrival. There is no any evidence that accused has any enmity with the informant prior to the incident, even if there may be some strange relation between the accused and the informant, it is impossible to think to file a false case against any person by involving their own minor daughter alleging her commission of such a heinous act, therefore, the prosecution has ably proved the case against the accused beyond all reasonable doubt, hence, the accused is required to be convicted under the charged section.
- **22.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case.
- **23.** After going through the evidence of the aforesaid witnesses, it is seen except the victim, there is no eye witness to the incident, but after the incident, the victim informed to her mother (PW 3) and father (PW 5) which are corroborated.

According to PW 3, the mother of the victim stated that at the relevant time her victim daughter was only 7 years old and she was student of class I standard. One day, she was giving a bath to her daughter before sending her to school and at that time victim told her that she could not go to school because she was suffering from pain on

stomach. She also stated before her that "Tanki Mama" was a bad man. Her daughter called the accused as "Tanki Mama". She told her that on the pretext of giving fruits and some things to victim, accused called her daughter to the room at the Water Supply system. Her daughter also disclosed before her that on multiple occasions with a lure to give fruits, the accused called victim where accused used to remove her pant and inserted his penis into her vagina. Her victim/daughter also stated her that the accused had threatened her that if she had disclosed the matter to others, he will kill her. Though she has been exposed to long cross-examination except giving many suggestions, the evidence as to one day while she after giving bath to her daughter before sending her to school and the victim told her that she could not go to school because she was suffering from pain on stomach, she also stated that "Tanki Mama" was a bad man, on the pretext of giving of guava and other fruits, he used to call her to the room at the Water Supply system, on multiple occasions by giving fruits to her, the accused used to remove her pant and inserted his penis into her vagina has remained unchallenged.

Father of the victim (PW 5) Sri Girindra Saikia also stated that one day when he returned on the mid day to have bath from his working place, he asked his wife as to why the children were not sent to school on that day, his wife was crying and told him that the accused Madhab Nath had taken their daughter to the Water supply Pump complex near their house on the pretext of giving some fruits to her and there the accused had touched her vagina with his penis after removing her pants, while he asked her daughter (victim), his victim daughter disclosed about the fact. Though he has been exposed to long cross-examination except giving many suggestions, the evidence as to one day while he returned to home for bath, he asked his wife as to why his children were not sent to school, his wife was crying and told him that accused had taken their daughter to the Water supply Pump complex near his house on the pretext of giving some fruits to her and there the accused had touched her vagina with his penis after removing her

pants, while he asked her daughter (victim) about the fact, his daughter told him about the said fact has remained unchallenged.

24. Learned counsel for the accused submitted that the FIR filed by the informant did not disclose any reasons for filing the same in 2 days late.

In **state Vs. Gurmit Sing,** the Hon'ble Apex Court , stated that

"The court cannot over looked the fact that in sexual offence, delay in lodging the FIR can be due to variety of reasons particularly the reluctant of the prosecutrix or her family members to go to the police and complained about the incident which concern the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual assault is generally lodged."

In the instant case, the complainant, the mother of the victim filed the ejahar on 08-09-2014 on being came to know about the incident from her victim daughter, though the incident took place on 06-09-2014. Here in the present case, the informant lodged the ejahar on the very day when she came to know about the incident. Therefore, there is nothing delay in lodging the FIR. Under such circumstances, though the FIR was filed on 08-09-2014 where the incident took place on 06-09-2014 cannot be stated to be filed in late.

- **25.** Learned counsel for the accused argued that the victim is a minor girl and changed her version in different times, before the police, before the Magistrate and even in the Court as such, her statement cannot be considered to convict the accused.
- **26.** Here in the present case, as details discussed herein before, the victim stated that the accused called her to his house i.e. the Water Supply system. She went to the house of the accused alone. He showed her bananas and chips. When she reached the house of the accused, he gave her a potato chip. Thereafter the accused removed her panty. The accused wearing a "Gamosa". He touched her vagina with his penis.

Thereafter he inserted his penis into her vagina. She was laid on his bed at that time. While, she shouted for help, accused gagged her mouth with his hands, she told the accused that she was suffering from pain then he removed his penis. When she felt too much pain and when she shouted louder, the accused had wiped her vagina with the gamosa. At that time, her younger brother came to the place of occurrence. To see her younger brother, the accused left her, after two days while her mother get her ready for school after bathing her she (victim) disclosed about the incident. On arrival of her father (PW 5) her mother narrated the whole incident and her father while asked the matter to the victim/ daughter, the victim/daughter reported to him in details. In her statement u/s 164 Cr.P.C. she stated that just prior to the incident accused called her through the window. Accordingly, she went there and her younger brother was watching TV and slept. Accused used to give her fruits. Thereafter, accused opened her panty and inserted his sexual organ into her private parts. She feels pain and she shouted. By this way accused doing such act in several times. Accused also threatened her to kill if she disclosed the matter to others. While she was suffering from stomach pain on being asked by her mother she narrated about the whole story.

27. The learned Magistrate who recorded the statement of the victim u/s 164 Cr.P.C. confirmed in the court that in considering the age of the victim she recorded the statement of the victim after proper enquiry by putting many questions to test her intelligence and ability to give rational answers thereafter the learned Magistrate recorded the statement of the victim where the victim made statement voluntarily. No doubt, the statement of Prosecution witnesses, some minor contradiction appears.

In Boya Ganganna Vs. State of Andhra Pradesh reported in AIR 1976 SC 1541 wherein it is held —

"Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and

educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence."

As stated above as raised by learned counsel for the accused, these are some slight minor contradictions. Even if admitted the said contradictions, the prosecution case would not change.

- 28. Learned counsel for the accused again submitted that there is no any birth certificate or age certificate or any certificate issued by the School authority where the victim first or last attended or any certificate issued by local authority. According to the PW 1, the doctor who examined the victim stated the age of the victim is below 8 years. According to the mother of the victim (PW 3), victim was 7 years old. On the other hand, victim was examined on 21-03-2017 and on that day she was 9 years old. The incident took place on 06-09-2014, therefore, according to victim her age at the relevant time was about 6 years. However, that has not been challenged by the defence at any point of time. Therefore, it can be safely held that the victim was a minor.
- 29. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD)**No.98 of 2015, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is disputed by the adverse party

alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

In this case, the victim and her parents categorically stated the age of the victim as 7 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs in respect of age of the victim remains unchallenged.

30. A careful perusal of the whole case record, it appears that the statement of the victim made before the court is corroborated by her earlier statement u/s 161 Cr.P.C. and 164 Cr.P.C. Though she has been exposed to long cross-examination the evidence as to at the relevant time accused with a lure of giving her banana and chips called her to his water supply system Unit where the accused removed her pant, laid her down on the bed, inserted his sexual organ into her private parts has remained unchallenged. Besides, according to the prosecution story, after about two days when the victim's mother get her ready for school, she expressed her pain in stomach and that is why she did not like to go to school, when the victim was asked by her mother, the victim vividly disposed that accused called her to his house in many times with a lure of giving chips and fruits and there he opened her panty and inserted his sexual organ into her private parts in many occasions and while PW 5, father of the victim came to have his launch, on being seen his daughter in house asked his wife why their daughter did not go to school, then she narrated the whole incident to him, while he enquired the matter to his daughter, his daughter narrated the incident to him. Besides, the learned Magistrate who recorded the statement of the victim u/s 164 Cr.P.C. stated that the victim made statement voluntarily.

31. In the case in hand, the victim has been consistent on the material particulars with regard to the incident that during the time of incident, she was called by accused with a lure of giving chips and

fruits, accused took her to his house i.e. on the Water supply system unit where after removing her pant accused inserted his sexual organ into her private parts in several times as a result of which she suffers from pain in stomach. When her mother came to know about the incident from the victim she narrated the whole story to her husband, her husband also confirmed after enquiry to his victim daughter. Though the victim and other witnesses including the parents were exposed to long cross-examination but their evidence remained unchallenged. The evidence of the victim is cogent and reliable. There cannot be any doubt to disbelieve the evidence of the victim.

- **32.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **33.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.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.
- **34.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence

for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- **35.** The use of expression "shall presume" has been defined in Section 4 of the Indian Evidence Act. As contrasted from the expression "if presume", the expression "shall presume" whenever used connotes "legal presumption" or "compulsory presumption" as contrasted from "factual presumption" or "discretionary presumption" emanating from the expression "may presume". "Legal presumptions" or "compulsory presumption" as are signified by the use of expression "shall presume" are inferences or proposition established by law, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. The presumptions of law are in reality rules of law, and part of the law itself and the court may draw inference whenever the requisite facts are developed in pleadings.
- **36.** Similarly whenever any law prescribes that the Court shall presume the existence of culpable mandatory state or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. Certainly, it does not discharge the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume". Thus, as per Section 29, if a person is prosecuted for committing or abating or attempting to commit any offence u/s.3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abated or attempted to commit the said offence as the case may be unless the contrary is proved. However, in the present case, the accused has completely failed in discharging his burden

even by preponderance of probabilities much less beyond reasonable doubt.

37. Coming now to the fact as to whether conviction can be recorded on the sole testimony of a child witness or not? This issue was dealt by the Hon'ble Apex Court in **Virendra – Vs – State of U.P., (2008) 16 SCC**, which are reproduced as under:

"The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that who may testify – all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

- **38.** A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- **39. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341**, it was held that a child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s.118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answer thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

- **40.** Subsequently, in **Ratansingh Dalsukhbahai Nayak Vs State of Gujarat, (2004) 1 SCC 64**, it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.
- **41.** Coming to the present case, it appears that according to prosecution story, after two days of the incident when the victim suffered pain in her stomach in the course of time she disclosed the whole story to her mother and on arrival of the father of the victim, while victim's father enquired why the victim/daughter did not go to school, then the victim's mother narrated the whole incident to him and then she filed the ejahar. While the accused's statement was recorded u/s 313 Cr.P.C. he stated nothing but denied about the incident. There is no any evidence that complainant had any quarrel or enmity to falsely implicate the accused in such a heinous crime. Even if some enmity with the accused it is absurd to think that the complainant filed this false case against the accused by involving her own minor daughter in such a heinous crime.
- **42.** On appreciation of evidence given by the victim, her parents and other witnesses, I find that the victim was sexually assaulted by the accused person. It appears that medical evidence no way supported the materials of penetrative sexual assault, as the doctor stated that no injury found in the private parts of the victim and also in the body. Here in the present case, the victim is below 8 years at the time of occurrence according to the doctor. The prosecution has failed to collect the Birth Certificate or Age certificate of victim from the school authority or any local authority. Therefore, when the prosecution has failed to prove the exact age of the victim at the time of occurrence, I think the offence committed by accused is "sexual assault". Therefore, accused is acquitted from the charge u/s 6 of the POCSO Act. Hence, I have come to the conclusion that accused Sri

Madhab Chandra Nath has committed an offence punishable u/s 8 of the POCSO Act. Accordingly, accused Sri Madhab Chandra Nath is convicted u/s 8 of the POCSO Act.

- **43.** The accused is heard on the point of sentence where he praying for leniency stating that he is doing service at Public Health Department and he is the only bread earner of his family. Besides he has been in custody for many days. Hence praying for leniency.
- **44.** I have heard learned counsel for the accused as well as learned Special Public Prosecutor, Sonitpur.
- 45. Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body but also to the mind of not only to the victim but that of entire family members, but considering the mitigating circumstances, the accused was hardly 55 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. There is likelihood of his reformation, but the statute u/s.8 of POCSO Act prescribes minimum punishment for a term of three years with fine. When the intention of the legislator is to impose stringent punishment for not less than three years, this court has no option but to impose minimum punishment of three years.

ORDER

46. I convict the accused Sri Madhab Chandra Nath u/s. 8 of POCSO Act and sentence him to Rigorous Imprisonment for 3 (three) years and also to pay a fine of Rs.500/- (Rupees Five Hundred only), in default, Rigorous Imprisonment for one month. The period, which he detained in custody, during the period of investigation, trial etc. shall be set off u/s 428 of Cr.P.C.

47. As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs.30,000/- (Rupees Thirty thousand) only is awarded as compensation. The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the father of the victim after proper enquiry.

Let a copy of the Judgment be sent to the Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur for her necessary action.

- **48.** A copy of this judgment be furnished to the accused free of cost immediately.
- **49.** Let another copy of Judgment be sent to learned District Magistrate, Sonitpur, Tezpur, u/s 365 of Cr.P.C.

Given under my Hand and Seal of this Court on this the 22nd day of March, 2018.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

APPENDIX Prosecution Witness

Prosecution Witness No.1 :- Dr. Ila Rajkhowa, M.O.
 Prosecution Witness No.2 :- Smti Bijaya Bordoloi

3. Prosecution Witness No.3 :- Smti Debajani Saikia, complainant

4. Prosecution Witness No.4 :- victim

5. Prosecution Witness No.5 :- Sri Girindra Saikia 6. Prosecution Witness No.6 :- Smt. Banti Bhorali

7. Prosecution Witness No.7 :- Miss J. Borah, Judicial Magistrate

8. Prosecution Witness No.8 :- Sri Keshab Baruah, I.O.

9. Prosecution Witness No.9 :- SI Gopal Singha.

EXHIBITS.

Exhibit 1 : Medical report

Exhibit 2, : Laboratory report,

Exhibit 3 : report of urine test

Exhibit 4 : Advice slip

Exhibit 5 : X-ray report.

Exhibit 6 : USG report

Exhibit 9 : Ejahar

Exhibit 8 : 164 Cr.P.C. statement of the victim

Exhibit 9 : GR Case NO. 2217/14

Exhibit 10 : Sketch map

Exhibit 11 : GR Case NO. 2217/14

Exhibit 12 : Chargesheet

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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