### IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>31 OF 2016</u>

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

2613 of 2016)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Ganga Das

Son of Late Babulal Das, Resident of Chengalimara, Police Station – Jamuguri, Dist:- Sonitpur, Assam

Date of framing Charge : 23/11/2017

Date of Recording Evidence :- 13/02/2018, 05/05/2018, 14/05/2018,

21/05/2018 & 18/06/2018

Date of examination of accused u/s :- 12/07/2018

313 Cr.P.C

Date of Argument :- 24/07/2018

Date of Judgment :- 07/08/2018.

Date of Sentence Hearing :- 08/08/2018

Date of Final Judgment :- 08/08/2018

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. A. K. Saikia, Ld. Advocate.

#### **JUDGMENT**

- **1.** In this case accused Sri Ganga Das 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 14.08.2016 at about 5:30 PM, the accused who is the father of 10 years old granddaughter of the informant enticed her and took her to his house. On the same night, at about 9 PM when the victim was sleeping with the accused, accused attempted to rape the victim by opening her panty and asked her do not disclose about the same to anybody. When the victim wanted to attend nature's call, her parents opened the door and then she fled away from their house and informed the matter to Srimanta Das, Junti Das and the village headman Prabhat Das on the said night about the incident. Hence, the prosecution case. The FIR was filed by one Sri Puren Das before the O/C of Jamuguri Police Station on 15.08.2016.
- 3. On receipt of the aforementioned FIR, the Officer-In-Charge of Jamuguri Police Station registered a case being Jamuguri P.S. Case No 117/16, under section 6 of the POCSO Act, 2012 vide GDE No. 388 dated 15.08.2016. After completion of the usual investigation, the O/C of Jamuguri Police Station sent up the accused for trial by filing charge sheet u/s 4 of the POCSO Act against the accused Sri Ganga Das.
- **4.** The accused on appearing before this Court, after hearing both parties, charge framed under section 6 of the POCSO Act, 2012 against the accused and particulars of the charge was read over, explained to the accused to which he pleaded not guilty and claimed to be tried.
- To substantiate the case prosecution examined as many as eleven numbers of witnesses and besides the aforementioned PWs, the prosecution side also examined, Smt. Saruai Das and Sri Thitharaj Das as CW 1 and CW 2. After completion of the prosecution evidence, the accused was examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence which appear against the accused were put before him for explanation where he denied the evidence. To buttress the defence, the accused declined to give defence evidence.

- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -

(1) "Whether the accused on or about 5:30 PM of 14.08.2016 at Chengelimara under Jamugurihat PS, committed penetrative sexual assault on the victim Miss "X" (10 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.
- PW 1, Sri Puren Das, who is the grandfather of Miss "X" has stated 9. that the incident took place in the year 2016 in the evening. Victim Miss "X" was living in his house, as her mother had died. At the time of the incident, her age was 10 years. When he returned back from his work, he did not find his granddaughter, so, he asked his wife Ghanakanti the whereabouts of his granddaughter. She told him that her father called her as her father has brought one large fish. Therefore, she was invited by her father to have dinner. He was waiting for his granddaughter to come, but, she did not come until 9 PM. Thereafter, he came to know from his sister Saruai Das that his granddaughter went to the house of village headman from her father's house. Then he rushed to the house of village headman Prabhat Das. But, he did not find his granddaughter there. In the next morning, his village headman told him that the accused committed misdeed to his granddaughter and also asked him to go the police station. Accordingly, he went to the police station and meet his granddaughter there. On being asked, his granddaughter told him that her father committed misdeed to her, therefore, she went to the house of village headman Prabhat Das and informed him about the incident and accordingly, Prabhat Das informed the matter to the police station. Then he lodged the ejahar before the police station. The ejahar was written by one scribe. After writing the ejahar, the

scribe read over the ejahar to him and on his satisfaction he put his signature thereon. Ext.1 is the ejahar and Ext. 1(1) is his signature. Thereafter, police registered the case and sent the victim for medical examination and also sent her to the Court for recording her statement under Section 164 CrPC. Thereafter, the victim was given custody to him. Now, the victim is studying in Class-V.

- 10. Though, he has been exposed to long cross-examination except giving many suggestions, the evidence as to his granddaughter who is the victim in the instant case resides with him since the death of her mother, she was called by the accused to have dinner. Till 9 PM when the victim did not return, he came to know from his sister Smt. Saruai Das that the victim went to the house of village headman from the house of her father/accused. Accordingly, he rushed to the house of village headman. In the next morning, the village headman told him that accused committed misdeed to his granddaughter and also asked him to go the police station. On being aware about the incident from his granddaughter that her father has committed misdeed to her, then he lodged the ejahar before the police station has remained unchallenged.
- 11. PW 2, Sri Prabhat Chandra Das, who is the village headman has stated in his evidence-in-chief that he knows the complainant, the accused and the victim of this case because they are all belongs to his "lat". The incident took place in the year 2017. At the relevant time i.e. about 7 PM, he went to Jamuguri Centre. At about 8.00 PM, victim Miss "X" came to their house informed his wife Kobita Das that "she was called by accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of accused, she was locked in a room and committed misdeed by the accused". After his arrival his wife reported him about the incident. He saw the victim who was sitting in the veranda and her father i.e. the accused was found in his courtyard tide him by the villager in a bamboo post with a rope. The victim told them in crying that she did not like to see the face of her father. She also told them that accused committed misdeed by opening her panty. Immediately, he informed the matter to the police station. He took the victim and the accused to the police station in his own car. At the relevant time, victim has crossed 11 years. During that time probably she was studying in Class-IV. Police recorded his statement.

- 12. Though, he had been exposed to long cross-examination without giving any suggestions, the evidence as to on the date of the incident at about 8 PM, victim Miss "X" came to their house, informed his wife Kobita Das that "she was called by the accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of the accused, she was locked in a room and was behaved inappropriately by the accused". After his arrival his wife reported him about the incident. He saw the victim girl who was sitting in the veranda and the accused was found in his courtyard tied by a villager in a bamboo post with a rope. The victim told them sobbing that she did not want to see the face of her father. She also told them that the accused committed misdeed by opening her panty which has remained unchallenged.
- 13. PW 3, Smt. Kobita Das stated that she knew the complainant, the accused and the victim of this case because they all belonged to their village. The incident took place in the year 2017. At the relevant time i.e. about 7 PM her husband went to Jamuguri Centre. At about 8.00 PM, victim Miss "X" came to their house informed her that "she was called by accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of the accused, the accused opened her panty and committed rape on her and as such she was suffering from severe pain. In the meantime, villagers came to their house and attempted to assault the accused and held and tied him in a bamboo post. After sometime, her husband arrived and reported him about the incident. The victim also reported the incident to her and to some of the villagers. Thereafter, her husband being gaonburha along with some of the villagers took the victim and the accused to the police station. Police recorded her statement at her house in the said night.
- 14. Though, she had been exposed to long cross-examination without giving any or minor suggestions, the evidence, at the relevant time her husband going towards Jamuguri Centre. At about 8.00 PM, victim Miss "X" came to their house and informed her that "she was called by the accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of the accused, the accused opened her panty and committed rape on her and as such she was suffering from severe pain which has remained unchallenged.

- **15**. PW 4, Miss "X" who is the victim of this case was examined after making due enquiry to know about her intelligence and rationality stated that the incident took place about 1 year ago. As her father severely assaulted her mother, she left their house. Her brother Bitu also lived at her uncle's house and her younger brother lived at her aunty's (Jethai) house at Biswanath Chariali and she lived with her grandfather. She stated that on the day of the incident at about 7 PM, she was called by her father to have dinner as he brought meat. She was invited at about 3:30 PM and thereafter, at about 4 PM she went to the house of her father (accused) but her father did not provide her rice. Her father after closing the door committed misdeed to her by opening her panty. She stated that her father touched her private parts through his private organ. She become suffocated. At last by opening the door, she ran away to the house of village headman Prabhat uncle. As her uncle was not there, she reported the matter to his wife Kobita aunty. On arrival of her Gaon Burah uncle, she reported the incident in details to him. Her father after doing misdeed told her that he had committed misdeed to her so she should not disclose the same to anybody. If she disclosed, the police would arrest him. In the same day, she was taken to the police station and her grandfather filed this case. Thereafter, she was medically examined and her statement was also recorded through the Ld. Magistrate. Ext 2 is her statement u/s 164 CrPC made before the Ld. Magistrate and Ext 1 (1-3) are signatures therein. She stated that at the relevant time she was wearing a black coloured panty and also put white skirt with yellow sporting.
- 16. Though, she had been exposed to long cross-examination without giving any or minor suggestions, the evidence as to on the day of incident she was invited by her father/accused to have dinner. Accordingly, she went there at about 4 PM. In the home, her father did not provide her meal instead the accused father after closing the door committed misdeed to her by touching her private parts through his private organ and then she become suffocated. At last she ran away by opening the door and went to the house of village headman Prabhat uncle. But the village headman uncle was absent so she reported the matter to Kobita aunty in details. On arrival of her Gaon Burah uncle, she narrated the whole incident to him. It is also stated that after committing

misdeed, the accused warned her not to disclose the matter to anybody, otherwise police will arrest her father which has remained unchallenged.

- **17.** PW 5, Sri Dilip Kumar Das, stated that he knows the accused Ganga Das as well as the complainant of this case. He also knows the victim Miss "X", who is a student of his School namely Basudev LP School, Sengelimari where he was the Headmaster. He stated that on 14-08-2016, he was posted as a Headmaster of Basudev LP School, Sengelimari. He has brought the School Admission Register of their School namely Basudev LP School, Sengelimari before the Court containing record from 1992 till date for inspection. The prosecution side exhibited the said School Admission Register as Ext.3 and Ext. 3(1) is the proved in original copy of the cover page of Ext.3. Ext. 3(2) is the relevant page bearing page No 63 & 64 which contained the relevant admission entry of victim Miss "X". Ext. 3(3) is the proved in original copy of Ext. 3(2). Ext. 3(4) is the Admission SL NO 237/D12 dated 28-01-2012 of Miss "X", D/o Sri Ganga Da of village Sengelimari. Ext. 3(5) is the proved in original copy of Ext. 3(4). As per the said Admission Register, the date of birth of Miss "X" is mentioned as 11-04-2006. He has also brought the certificate book of their school namely Basudev LP School, Sengelimari before the court. Ext.4 is the original school certificate book bearing No 26 dated 19-08-2016 and Ext. 4(1) is his signature as a Headmaster of the said school. Ext. 4(2) is the proved in original copy of Ext.4. As per said School certificate book; on 19-08-2016, age of Miss "X", D/o Sri Ganga Das of village Sengelimari is 10 years 11 months 8 days.
- **18. In his cross examination,** he admitted that Ext. 3 bears no signature of School Inspector. There is some mark of whitener in the Serial Nos in Ext. 3(2). In Ext. 3(4), the date of birth of Miss "X" is written as 11-04-2006 in Assamese and there in overwritten in the column of month of the said date. It is not mentioned in Ext. 3(4) that on what basis the date of birth of victim Miss "X" was written as on 11-04-2006.
- **19. PW 6, Sri Srimanta Das,** stated before this court that he knew accused Ganga Das as well as the victim Miss "X", the daughter of accused. He also knew the complainant Puren Das. The incident took place about 2 ½ years ago. The place of occurrence was opposite to his house. He is the Secretary of

the village Sabha. He stated that at the relevant time, he along with his mother after having dinner was sitting in the veranda of their house as there was no electricity. During that time, victim Miss "X" came to him and reporting him that her father committed misdeed to her, then he advised her to inform the matter to village headman Prabhat Chandra Das. Accordingly, she went there and informed the matter to the said village headman along with some other villagers. Thereafter, he went to the house of village headman along with some villagers to talk about the matter. The accused was caught and was taken to the house of village headman by the villagers. At the time of incident, the said victim girl was about 10/11 years old.

- In his cross examination, he admitted that the house of Miss "X" was at a distance of 100 metres from the house of accused. The victim girl usually lived in the house of her maternal grandfather Puren Das. He stated that he did not know when the victim came to the house of the accused. He told the age of victim to be 10/11 years as a guess. He also did not know whether the victim did study at a School or not. Police did not record his statement under Section 161 CrPC. What he had stated before the Court is deposed only for the first time.
- **21. PW 7, Dr. Jharna Kakoti,** who is the medical officer of this case has stated that on 15.08.2016, she was posted at as S.D.M & HO at Kanaklata Civil Hospital, Tezpur. On that day, in reference to Jamuguri PS Case No. 117/16 under section 6 of POCSO Act, she examined one patient Miss "X", 10 years, female, daughter of Sri Ganga Das, residence of Chengelimara under Jamuguri PS on being escorted and identified by WPC Dipti Chetry. She examined the victim on 15.08.2016 at 4:20 PM in the emergency and labour room of the complex of the Kanaklata Civil Hospital, Tezpur in presence of GNM Anna Tirki vide hospital registration No. 42976/16 and found the following:

**Menstrual History:** Menarche not attained.

**<u>Identification Mark:</u>** Mole on right upper part of chest.

According to the victim, history of attempted sexual assault on 14.08.2016 at about 7:30 PM by her father Ganga Das. The victim girl came alone without guardian.

**O/E:-** Height- 117 CM, Weight-17 cm, Teeth-6/6-6/6.

At the time of examination, she was well dressed, neat and tidy. Built average. Gait normal. Secondary sexual characters were not developed. Vulva, vagina healthy. Hymen present. No injury marks on her body as well as on her private parts.

<u>Investigations advised and report:</u> Vaginal smear for spermatozoa-no sperm seen. Done at KCH Laboratory, Lab No. 5/16 on 15.08.2016.

## **OPINION:**

- (i) There is no mark of injury on her body as well as on her private parts at the time of examination.
- (I) There is no sign and symptoms of recent sexual intercourse at the time of examination.

Ext 5 is the medical report and Ext 5(1) is her signature. Ext 6 is the advice slip of KCH, Tezpur and Ext 6(1) is her signature. Ext 7 is the police requisition and Ext 7(1) is her signature. Ext 8 is the vaginal smear report of KCH, Tezpur and Ext 8 (1) is the signature of Laboratory Technician of KCH, Tezpur which she knows on official communication. In her opinion in the medical report, the "recent" means within 48 hours.

- **PW 8, Sri Diku Das,** who was hostile has stated before this court that he knew the accused Ganga Das as well as the victim Miss "X", who is the daughter of the accused aged about 8/9 years. The incident took place about 1 ½ years ago. Victim was his niece. He heard that victim Miss "X" was raped by her father i.e. the accused. Police did not record his statement. Then he turned hostile.
- 23. In cross examination by the prosecution, he denied the suggestion that he had stated to police that "Miss "X" reported to him that while she was sleeping at her father's house, her father Ganga Das(accused) raped her by opening her clothe. Then, she went out pretended to listen to nature's call to the house of village headman Prabhat Das and there she reported the matter to Smti Kobita Das wife of Prabhat Das and the matter was disseminated in the village.

On being aware about the incident, local public apprehended the accused and handed over to the police station. During that time, at about 10/11 PM"." He denied the fact he had deposed falsely to save the accused who is his own younger brother and that he has suppressing the material fact.

- 24. In cross examination by the defence, he admitted that he had not stated before the police what the learned Special Public Prosecutor stated in the Court. He admitted that he has stated whatever he heard from the villagers. He had given statement to I/O. He admitted that he did not have any personal knowledge about the incident. Accused Ganga Das belongs to BPL category and has one house with single room. His house is adjacent to the house of the accused Ganga Das. Other than the victim, accused Ganga Das has two sons namely Bitu Das, aged about 7 years and another one is Paramananda aged about 2 ½ years old. At the relevant day, Bitu Das, son of accused was with his father. On the day of occurrence, he has not seen Miss "X" coming to the house of Ganga Das. He did not suspect that the accused has involved in such type of offence. The wife of accused Bhaluki not reside with the accused and her father Puren Das fled from the house of the accused.
- **25. PW 9, Sri Junti Das,** stated that he knew the accused Ganga Das as well as the victim. The incident took place about 2 years ago. On the day of incident, at about 8/8.30 p.m., he heard some boisterous noise on the roadside and he rushed to the house of Gaonburah Prabhat Chandra Nath where the accused Ganga Das was apprehended and was being interrogated by the local public. Victim stated that the accused had committed misdeed by opening her panty in his house. Goanburah handed over the accused to police station at about 9.30/10 p.m.
- **26. PW 10, SI Raju Kumar Chetry,** who is the Investigating Officer of this case has stated before this court that on 15.08.2016 he was posted as O/C of Jamuguri PS. On that day, he received an ejahar filed by one Puren Das. On receipt of the ejahar, he made GD Entry vide GDE No. 388 dated 15.08.2016 and he took up the charge of the investigation of the case. Thereafter, he has registered a case being Jamuguri PS Case No. 117/16 under section 6 of POCSO Act. Ext 1 is the ejahar and Ext 1 (2) is his signature. Thereafter, he visited the

place of occurrence and prepared a sketch map of the place of occurrence. Ext 9 is the sketch map and Ext 9(1) is his signature. He had also recorded the statement of the witnesses, namely, complainant, victim, Diku Das, Prabhat Das, Srimanta Das, Junti Das, Kabita Das, Tirtharaj Das and Smt. Saruai Das u/s 161 of CrPC. On the same day, he sent the victim for medical examination to KCH, Tezpur. He also arrested the accused Ganga Das and forwarded him to the court in connection with the Jamuguri PS Case No. 117/16. Next day, i.e. on 16.08.2016 he sent the victim girl to the court for recording her statement u/s 164 of CrPC. He also seized one birth certificate of the victim Miss "X" to ascertain the exact age of the victim. He also recorded the statement of the Head Master of Basudev LP School. Then he gave in zimma the school certificate to the complainant as per request. As the date of birth of the victim was 11.04.2006 therefore, on the day of occurrence i.e. on 15.08.2016 her age was 10 years 4 months 3 days. He collected the medical report from KCH, Tezpur, after obtaining approval letter from concerning S.P. and after completion of usual investigation finding sufficient materials against the accused Ganga Das, he filed charge sheet u/s 4 of POCSO Act vide charge sheet No. 78/16 dated 31.08.2016 against him. Ext 10 is the charge sheet and Ext 10(1) is his signature.

He admitted that he has recorded the statement of witness Diku Das who stated before him that "Miss "X" reported him that while she was *sleeping* at her father's house, her father Ganga Das(accused) raped her by opening her clothe. Then, she went out pretended to listen to nature's call to the house of village headman Prabhat Das and there she reported the matter to Smti Kobita Das, wife of Prabhat Das and the matter was disseminated in the village. On being aware about the incident, local public apprehended the accused and handed him over to the police station. During that time, at about 10/11 PM"." Ext 11 is the case diary of Jamuguri PS Case No. 117/16, Ext 11(1) is the relevant statement of the said witness Diku Das and Ext 11(2) is his signature.

**27. In his cross examination,** he admitted that the witness Prabhat Ch. Das informed him about the incident over telephone immediately after the occurrence. He made GD Entry. He stated that the witness Prabhat Ch. Das has not stated before him that "At about 8.00 PM, victim Miss "X" came to their

house, informed his wife Kobita Das that she was called by accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of accused, she was locked in a room and committed misdeed by the accused". After his arrival, his wife reported him about the incident. He saw the victim girl who was sitting in the veranda and her father i.e. the accused was found in his courtyard tied by the villagers in a bamboo post. The victim told them crying that she did not like to see the face of her father. She also told them that accused committed misdeed by opening her panty. Immediately, he informed the matter to the police station. He took the victim, the accused and two villagers to the police station in his own private car. At the relevant time, victim had crossed 11 years. During that time, probably she studied at Class-IV."

He stated that witness Kobita Das had not stated before him that "At about 8.00 PM, victim Miss "X" came to their house informed her that "she was called by the accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of the accused, the accused opened her panty and committed rape on her and as such she was suffering from severe pain. In the meantime, villagers came to their house and attempted to assault him and tied him and tide him in a bamboo post." He stated that witness Miss "X" had not stated before him that " as my father assaulted her mother severely so her mother left the house, Bitu resides at the house of uncle (Bordeuta) and Paramananda Aunty (Jethai) and her father called her to have rice and mutton at about 7 PM."

He stated that witness Miss "X" had not stated before him that " her father did not provide her food, her father by locking the door committed misdeed on her, she went to the house of Prabhat Gaonburah but she did not meet him, she informed about the incident to Saruai, at the time of occurrence, she wore a black coloured skirt and white coloured sporting." He stated that he did not seize any wearing apparels of the victim. In the place of occurrence i.e. in the house of the accused there is only one room but he did not mention in the sketch map that how many doors and windows there are in the house.

**28. PW 11, Miss. Bijaya Khakhlary** is the Judicial Magistrate First Class, Tezpur stated that on 16.08.2016 she was posted as Judicial Magistrate First

Class, Tezpur and on that day, in reference to Jamuguri PS Case No. 117 of 2016 u/s 6 of POCSO Act, she had recorded the statement of one Miss Gayatri Das, daughter of Sri Ganga Das of village Panpur Chengalimara under Jamuguri PS u/s 164 of CrPC in her court chamber. The said victim was a student of Class VI standard. The victim was escorted and identified by one Nayanjyoti Kalita, PLV M. No. 17. The witness made statement voluntarily. She put some questions to the victim. It appeared that the victim was able to answer the questions put to her and also able to give rational answers to the questions. After recording her statement, she read over the contents of the statement recorded u/s 164 CrPC to the victim and on acceptance, the said victim put her signature thereon. Ext 2 is the statement of the victim u/s 164 of CrPC and Ext 2 (4) is her signature. Vide Ext 12, order dated 16.08.2016, Ld. Special Judge, Sonitpur, Tezpur directed her to record the statement of the victim. Ext 12(2) is her order dated 16.08.2016 and Ext 12(3) is her signature. Her cross examination was declined by the defence.

- **29. CW 1, Smt. Saruai Das,** stated that she knew accused Ganga Das who was her co-villagers. She also knew the complainant and victim Miss "X". The incident took place about 1 ½ years ago. On the night of the incident, a commotion took place in the house of Gaonburha. On hearing commotion, she came to the place of occurrence. There she saw many people gathered there and the accused was tied with a rope by the local public. She did not see the victim there. She heard that the father of the victim committed rape to the victim.
- **30. In her cross examination,** she admitted that she deposed for the first time in the Court. She could not say whether the local public stated correctly or wrongly whether the accused has committed rape to his own daughter.
- **Gangaram** Das and the victim Miss "X". He could not recall exactly when the incident took place. Their village headman resided behind their house. On hearing commotion in the house of village headman, he went there and saw a gathering there. His cross examination was declined by the defence.

- **32.** 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.
- 33. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, the victim is her own daughter so it is impossible to commit such type of penetrative sexual assault to his own daughter. **Secondly**, if a matured person forcefully committed rape or cause penetrative sexual assault to a young girl of 10 years she must have sustained injury not only on her private parts but also on her body but according to the doctor's report in this case shows that the victim sustained no mark of any injury. Even doctor did not find any sign or symptoms and recent sexual intercourse at the time of examination. Thirdly, there is only one eye witness i.e. the victim who is a minor. There is ample evidence that her father, the accused assaulted her mother and caused her atrocities, as a result of which her mother left her own home. Even the younger brother of the victim also left her father's house so out of grudge she might have made such a false and concocted story which is absurd to believe. Fourthly, there are many contradictions among the statement of the witnesses under such circumstances, the prosecution has failed to prove the case beyond any reasonable doubt.
- **34.** On the other hand, Learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt. Hence, the accused person was required to be convicted under the said charged sections of law. Ld. Special Public Prosecutor also submitted that in fact there is no any quarrel, no enmity between the accused and the complainant to file this false case. Even if there is any short of strangulation between the accused and the complainant, it would not be believable to think that the grandfather may file this false case against the accused person by involving in her own minor granddaughter is such a heinous allegation.
- **35.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **36.** I have thoroughly perused the case laws cited by the learned Senior Counsel for the accused.

- **37.** The defence plea is total denial while the statement of the accused was recorded u/s 313 of CrPC.
- **38.** As stated herein above, to substantiate the case prosecution has examined as many as eleven numbers of witnesses. Out of eleven numbers of witnesses four numbers of witnesses are official witnesses. They are PW 5, Sri Dilip Kr Das teacher, who submitted the School Admission Register as well as Certificate. PW 7, Dr. Jharna Kakoti, who examined the victim, PW 10, SI Raju Kumar Chetry, the investigating officer and PW 11, the Ld. Magistrate, who recorded the statement of the victim u/s 164 of CrPC. Therefore, there remains only seven numbers of non-official witnesses. It may be mentioned that two numbers of court witnesses were also examined in this case. Out of seven numbers of non-official witnesses one i.e PW 8, who turned hostile. Then there remains only six numbers of non-official witnesses.
- Let us discuss the evidence of these witnesses. PW 1, the complainant 39. undoubtedly is an eye witness to the occurrence. He stated that his granddaughter used to live with him since her mother had died. At the time of incident, her age was 10 years. When he returned back from his work, he did not find his granddaughter, so, he asked his wife Ghanakanti whereabouts of his granddaughter. She told him that her father called her as her father has brought one large fish. Therefore, the father accused took her to his house to have dinner. Though he is waiting for his granddaughter to come, but, she did not come till 9 PM. Thereafter, he came to know from his sister Saruai Das that his victim granddaughter went to the house of village headman from her father's house. Then he rushed to the house of village headman Prabhat Das. But, he did not find his granddaughter there. In the next morning, his village headman told him that accused committed misdeed to his granddaughter and also asked him to go the police station. Accordingly, he went to the police station and meet his granddaughter there. On being asked his granddaughter, she told him that her father committed misdeed to her, therefore, she went to the house of village headman Prabhat Das and informed him about the incident and accordingly, Prabhat Das informed the matter to the police station. Then he lodged the ejahar before the police station.

- 40. The undisputable evidence of the victim is that on the day of incident at about 3:30 PM she was invited by her father accused to have dinner as he brings meat for her. Accordingly, she went there at about 4 PM but her accused father did not provide her meal instead the accused after closing the door misdeed to her by opening her panty and touches her private parts through his private organ. She started suffocating. She ran away by opening the door to the house of village headman and as the village headman was not there so she informed the matter to the wife of the village headman. On arrival of her Gaon Burah uncle, she reported in details to him about the incident. Her father after doing misdeed told her that he committed misdeed to her so she should not disclose the same to anybody. If she discloses, the police will arrest him. Then, she was taken to the police station by her Gaonburah uncle. After instituting the case by her grandfather her statement was recorded by the police. She was also medically examined and thereafter, she was taken before the Ld. Magistrate to record her statement u/s 164 of CrPC where she narrated the whole story.
- **CW 1** also stated that on the night of the incident there was a meeting took place in the house of Gaonburha and while she went there she saw many people gathered there and the accused was tied with a rope by the local public. But she did not see the victim there. She heard that father of victim committed rape to the victim. No doubt she made such a statement for the first time only before the court.
- **41.** It is seen that except the victim, there was no any eye witness to the occurrence but in the instant case, the victim came to the house of the Gaonburah and reported the matter to the wife of the Gaonburah and on arrival of Gaonburah the victim narrated the whole incident to him and then the Gaonburah took the victim to police station. In the meantime, on caming to know about the incident the local public apprehended the accused and took him to the house of the Gaonburah and tied him with a rope which is corroborated by them.
- **PW 3,** wife of village headman to whom the victim informed about the incident stated that at about 8.00 PM, victim Miss "X" came to their house informed her that "she was called by the accused from the house of her grandfather to have dinner, accordingly, she went there and in the house of the

accused, the accused opened her panty and committed rape on her and as such she was suffering from severe pain. In the meantime, villagers came to their house and attempt to assault him and held him and tied him in a bamboo post. After sometime, on arrival of her husband, she reported about the incident to him. The victim also reported about the incident to her husband and to some of the villagers. Thereafter, her husband being gaonburha along with some of the villagers, took the victim and the accused to the police station.

43. The Ld. Magistrate who recorded the statement of the victim u/s 164 of CrPC confirmed in a court that she has recorded the statement of the victim on 16.08.2016 where the victim made the statement voluntarily. The Ld. Counsel for the accused submitted that the statement of the prosecution witnesses, some contradictions are appears. As such the said statement was not reliable.

# 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 providing evidence. Even in case of trained and educated persons, memory sometimes play false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by 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, there are some slight minor contradictions appears in the statement of the witnesses. Even if admitted the said contradictions, the prosecution case would not change.

44. Learned Counsel for the accused again submitted that Ext 5 the medical report did not state the age of the victim. Besides that the victim stated in her statement that on the date of recording her statement i.e. on 13.02.2018 she was 11 years. PW 1, the complainant as well as the grandfather of the victim stated that at the time of incident the victim was about 10 years old. It appears that during the investigation the Investigating Officer collected one school

certificate issued by the head master of Basudev LP School, Sengelimari where it was seen that the date of birth of the victim was 11.04.2006. PW 5, Sri Dilip Kr Das, who was the head master of Basudev LP School, Sengelimari, who has issued the Ext 3(2). He also brought the School Admission Register vide Ext 3 and Ext 3(1) is the proved in original copy of the cover page of Ext.3. Ext. 3(2) is the relevant page bearing page No. 63 & 64 which contains the relevant admission entry of victim Miss "X", which he proved in original copy. Since the alleged incident took place on 14.08.2016 so on the date of the incident the victim was 10 years, 4 months and 3 days. 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 of below 12 years.

- 45. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD)**, 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.
- **46.** In this case, the victim and her parents categorically stated the age of the victim was 10 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.
- 47. In the case in hand, the victim has been consistent on the material particulars with regard to the incident that on the day of incident, the victim was called by her father accused to have dinner as he brings meat. Accordingly, at about 4 PM she went to the house of her father accused but her father did not provide her any meal instead the accused after closing the door by opening her pant, touched her private parts through his private sexual organ. Thereafter, she started suffocating. She ran away by opening the door to the house of village

headman and as the village headman was not there so she informed the matter to the wife of the village headman. On arrival of the village headman, she narrated the whole story in details to him. Then, she was taken to the police station. It appears that her statement is supported by PW 1, the complainant as well as the grandfather of the victim, PW 2, the village headman, PW 3, the wife of the village headman. Their statements are corroborated to each other. Though the victim and the other witnesses including the grandfather of the victim, PW 2 and PW 3 are exposed to long cross examination but their evidence remain unchallenged. The evidence of victim is found to be cogent, straightforward and reliable. There cannot be any doubt to disbelieve the evidence of the victim.

- **48.** 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.
- **49.** 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.
- 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.
- 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.
- **52.** 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.
- **53.** 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."

- **54.** 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.
- **55.** 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.
- 56. 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.

- **57**. Coming to the present case, as discussed herein above at the time of examination of the victim, some questions were put to her and she replied the same without any hesitation and this Court hold that the victim was able to give rational answers and thereafter her statement was recorded on oath. Apart from that, PW 1, PW 2 and PW 3 clearly supported the evidence of PW 4 (victim) and the victim's statement are also corroborated with her statement made before the I/O u/s 161 CrPC and also made before the Ld. Magistrate u/s 164 of CrPC. While the statement of the accused was recorded u/s 313 CrPC he has stated nothing but denied about the incident. There is no any evidence that complainant had any guarrel 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 granddaughter in such a heinous crime. The prosecution has ably submitted the School Certificate to confirm about the age of the victim. The Head Master who issued the certificate has proved the certificate. Therefore, we must hold that at the time of the incident, the victim was only 10 years old.
- 58. On appreciation of the evidence given by the victim, her grandfather, the village headman and the wife of the village headman and other independent witnesses, I find that the accused attempted to sexual assault on the victim. 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 12 years at the time of occurrence. According to Section 9 (m) aggravated sexual assault whoever commits sexual assault on a child below twelve years. Section 10 of POCSO Act prescribes the punishment for the offence defined u/s.9 for a term which shall not be less than five years but which may extend to seven years and shall also be liable to a fine. Hence, I convict the accused Sri Ganga Das U/s 10 of the POCSO Act. Accused is acquitted from the charge u/s 6 of POCSO Act.

- **59.** The accused is heard on the point of sentence where he prayed for leniency stating that he is the only bread earner of his family. He has been in jail hajot for about two years, hence praying for leniency.
- **60.** I have heard learned Counsel for the accused as well as Learned Special Public Prosecutor, Sonitpur.
- 61. Turning to the guestion 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 38 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.10 of POCSO Act prescribes minimum punishment for a term of five years with fine. When the intention of the legislator is to impose stringent punishment for not less than five years, this court has no option but to impose minimum punishment of five years and a fine.

#### ORDER

- **62.** I convict the accused Sri Ganga Das u/s. 10 of POCSO Act and sentence him to Rigorous Imprisonment for 5 (Five) 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, shall be set off from the period of imprisonment, imposed on him.
- **63.** 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.

- **64.** The Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur be asked to give the compensation to the grandfather of the victim after proper enquiry.
- **65.** Let a copy of the Judgment be sent to the Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur for necessary action.
- **66.** A copy of this judgment be furnished to the accused free of cost immediately.
- **67.** Let another copy of Judgment be sent to Learned District Magistrate, Sonitpur, Tezpur, u/s 365 of Cr.P.C.
- **68.** Let the G.R Case No. 2613/2016 be sent to Ld. committal Court along with a copy of Judgment.

Given under my Hand and Seal of this Court on this the 8<sup>th</sup> day of August, 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:

Sri Janmoni Deka, Steno

#### A-N-N-E-X-U-R-E

#### 1. PRESECUTION WITNESSES

PW 1 :- Sri Puren Das, the Informant
PW 2 :- Sri Prabhat Chandra Das, Village Head Man

PW 3 :- Smt. Kobita Das
PW 4 :- Miss "X", Victim

PW 5 :- Sri Dilip Kumar Das,

PW 6 :- Sri Srimanta Das

PW 7 :- Dr. Jharna Kakoti, Medical Officer

PW 8 :- Sri Diku Das PW 9 :- Sri Junti Das

PW 10 :- SI Raju Kumar Chetry, the Investigating Officer
PW 11 :- Miss. Bijaya Khakhlary, J.M.F.C. Sonitpur, Tezpur

## 2. WITNESSES FOR DEFENCE: NIL

## 3. PROSECUTION EXHIBITS:

Exhibit 1 :- FIR

Exhibit 2 :- Statement of the victim Miss "X" u/s 164 CrPC

Exhibit 3 :- School Admission Register

Exhibit 3(1) :- Original copy of the cover page of Ext.3.

Exhibit 3(2) :- Relevant page bearing page No 63 & 64 which contains

the relevant admission entry of victim Miss "X".

Exhibit 3(3) :- Original Copy of Ext. 3(2)

Exhibit 3(4) :- Admission SL NO 237/D12 dated 28-01-2012 of Miss

"X".

Exhibit 3(5) :- Original Copy of Ext. 3(4)

Exhibit 4 :- Original School Certificate Book bearing No 26 dated

19-08-2016

Exhibit 4(1) :- Signature of PW 5 as Head Master

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Exhibit 4(2) :- Original Copy of Ext.4

Exhibit 5 :- Medical Report

Exhibit 6 :- Advice Slip

Exhibit 7 :- Police Requisition

Exhibit 8 :- Vaginal Smear Report of KCH, Tezpur

Exhibit 9 :- Sketch Map

Exhibit 10 :- Charge Sheet

Exhibit 11 :- Case diary of Jamuguri PS Case No. 117/16

Exhibit 11(1) :- Relevant statement of witness Diku Das

Exhibit 12 :- Order dated 16.08.2016, Ld. Special Judge, Sonitpur,

Tezpur

Exhibit 12(2) :- Order dated 16.08.2016 passed by PW 11

Exhibit 12(3) :- Signature of PW 11

## 4. **COURT WITNESSES:**

CW 1 :- Smt. Saruai Das

CW 2 :- Sri Thitharaj Das

## 5. **DEFENCE EXHIBITS:** NIL

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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