

IN THE COURT OF THE SPECIAL JUDGE

CHIRANG, KAJALGAON.

Special(P) Case No. 04(Basu)/2018

U/S 6 of POCSO Act

State of Assam V5. Md. Jahirul Islam

:::::::

.....Accused

PRESENT:

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

ADVOCATES APPEARED:

For the State

: Shri D. Das, Ld. Public Prosecutor

For the accused

: Md. N.I. Siddique, Ld. Advocate

Date of Evidence

: 20.03.18, 03.04.18, 05.05.18, 01.06.18, 12.10.18, 18.07.19,

26.08.19, 23.09.19

Date of Argument : 28.11.19 & 07.12.19

Date of Judgment : 21.12.2019

JUDGMENT

- The prosecution case as revealed during trial in brief is that on 1. 25.10.2017, the informant lodged an FIR before the I/C, Bidyapur Out Post alleging that on that day at about 2.00 P.M., the accused Jahirul Ali while taking his niece Miss 'X' (name is withheld), 9 years from her school, he forcefully committed sexual assault upon her in the jungle near railway line and threatened to kill her if she would divulge the incident to anybody else.
- 2. After receiving the FIR, the I/C, Bidyapur Out Post made GDE No. 394 dated 25.10.2017 and forwarded the same to the O/C, Bongaigaon

P.S. for registering a case. Accordingly, the O/C of Bongaigaon P.S. registered a case being numbered as Bongaigaon P.S. Case No.789/17 U/S 4 of POCSO Act and entrusted SI A.K. Saha for investigation of the case. Accordingly, the Investigating Officer arrested the accused, visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C and collected the medical report. Later on, case was transferred to Basugaon P.S. as the place of occurrence falls within the jurisdiction under Basugaon P.S. Accordingly, the O/C of Basugaon P.S. registered a case being numbered as Basugaon P.S. Case No. 99/2017 U/S 4 of POCSO Act and entrusted S.I. Nobin Boro for further investigation of the case After completion of investigation, S.I. Nobin Boro submitted charge-sheet before this court against the accused Jahirul Islam U/S 6 of POCSO Act. After receiving charge sheet, copies of relevant documents were furnished to the accused person. Accused person was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge U/S 6 of POCSO Act was framed against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. Later on, accused person was released on bail during trial.

3. In support of the case prosecution side examined as many as 11 (eleven) witnesses including the M.O., I.O. and Scientific Officer.

Special Judge Chirang, Kajalgaon

Following witnesses were examined:-

- (1) Victim Miss 'X' (name is withheld) as PW 1
- (2) Mustt. Ful Bibi as PW 2
- (3) Md. Jinnat Ali as PW 3
- (4) Informant as PW 4
- (5) Md. Akbar Ali as PW 5
- (6) Md. Sabed Ali as PW 6
- (7) Md. Abu Sama Ali as PW 7
- (8) S.I. Nobin Boro (I.O.) as PW 8
- (9) Dr. Ranjeeta Das (M.O.) as PW 9
- (10) S.I. Ajay Kr. Saha (I.O.) as PW 10

(11) Shri Sankar Ch. Rabha (Scientific Officer, FSL) as PW 11

- 4. Statement of the victim recorded U/S 164 Cr.P.C. was exhibited as Ext.1. Seizure list was exhibited as Ext.2. FIR was exhibited as Ext.3. Charge-sheet was exhibited as Ext.4. Medical Report was exhibited as Ext.5. Sketch map was exhibited as Ext.6, extract copy of Bidyapur O.P. GD Entry No. 394 dated 25.10.2017 was exhibited as Ext.7 and FSL Report was exhibited as Ext.8. Wearing apparel of victim was exhibited as Material Ext.1. Birth certificate of the victim was exhibited as Material Ext.2.
- 5. Defence plea is of partly denial. Statement of accused was recorded u/s 313 Cr.P.C. The accused during his examination under Section 313 Cr.P.C admitted the fact that he took the victim from the school and he dropped her in front of her home. Moreover, he also admitted that he used to take the victim from her school prior to the incidence. In reply to a particular question, he stated that he had confessed before villagers due to fear. Defence adduced evidence of one Md. Sobahan Ali as DW 1.
- 6. Heard argument from both sides. I have perused the entire evidence on record. I have considered the statement of the accused recorded u/s 313 Cr.P.C. I have also perused the case laws supplied by learned defence counsel.

Special Judge Chirang, Kajalgaon

7. POINTS FOR CONSIDERATION:-

For the offence U/S 6 of POCSO Act

1. Whether on 25.10.2017, at about 10.30 P.M., at village Ghilaguri under Basugaon P.S., the accused committed aggravated penetrative sexual assault upon Miss 'X' (name is withheld), niece of the informant?

DISCUSSION, DECISION AND REASONS THEREFOR:

8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned point.

as PW 1. As she stated her age as 10 years for which some questions were

put to her to examine her understanding capacity. It was found that she understood the value of oath. As her age was above 7 years but below 12

The victim is the star witness of this case, who was examined

years and it was found that she had sufficient understanding capacity and she knew the value of oath, for which oath was administered. According to PW 1, at the time of giving evidence, she was reading in Class-IV in No. 248 Basugaon Town J.B. School. At the time of occurrence, she was reading in Class-III. Occurrence took place about 5/6 months ago from the date of her deposition. Initially she was in her school. After closing of class, she came out and found accused Jahirul Islam, who was standing in front of the gate of the school along with a bicycle. She knew him and called as brother. The accused stated her that he was asked by her mother to take her to home. Prior to this incident, he took her from school in three times. She got up on his bicycle and after crossing few distance, the accused stopped his bicycle and entered into jungle area. The victim told him that she would report the matter to her mother because accused had committed sexual intercourse in previous occasion. Then accused threatened her and after that he put off her panty and his long pant. She was lying on the ground and accused committed sexual intercourse. According to PW 1, accused gagged her. He inserted his penis to her vagina. Prior to this incident, he had committed sexual intercourse in three times but she did not state about those incidences to her mother as accused had threatened her. She stated that there was quarrel prior to the incident. After committing the offence, the accused again took her on his bicycle and she was dropped near a shop from where she was going to her home on foot by weeping. She reported the matter to her mother. Her uncle lodged the FIR because her father was absent. She stated that she had told all these facts before the Investigating Officer as well as Magistrate during the time of investigation. She further deposed that her uniform was seized by police and she was examined by doctor. She clearly stated that she did not fail in any class and she was not tutored by anyone to depose like that way. During

cross-examination, she deposed that after closing of her classes when she

came out, there were several persons on gate. She stated that there were several persons on road when she was taken by accused on bicycle. Learned

Special Judge Chirang, Kajalgaon 9.

defence counsel pointed out to this witness that before I.O. she did not state that prior to this incident, accused had committed sexual intercourse with her for three times but she denied. It is admitted by this witness that a shop belonged to their family is situated in front of their house and there is another shop belonged to accused on the other side of the road. The learned defence counsel further suggested that her family tried to grab the land belonged to the accused and for which they threatened him time to time but this suggestion was also denied by this witness. it was suggested by the learned defence counsel that accused was sent to the school by grandmother of the victim and accordingly, accused took her from school and dropped her in her home but said suggestion was also denied by this witness. The learned defence counsel suggested that accused did not commit any sexual act but this suggestion was denied by this witness. It was suggested by the learned defence counsel that victim was tutored by her family members for which she stated the alleged incident before the police, Magistrate as well as Court but she denied. All other suggestions were also denied by this witness.

It is found from the record that statement of victim u/s 164 Cr.P.C was exhibited as Ext.1 in which she stated all these facts before the Magistrate. Her statement corroborated her later deposition.

Special Judge Chirang, Kajalgaon

10. PW 2 is the mother of the victim. She deposed that occurrence took place on 25.10.2017 and at that time, the victim was aged about 9 years and she was reading in Class-III at Basugaon Town J.B. School. At the time of occurrence, she was in her home. On the date of occurrence, in the morning, she brought her daughter to her school and keeping her thereon, she returned to home. The grandmother of the victim went to the school to take her back but school authority told her that one person had taken the victim prior to her arrival. Then the grandmother of the victim came to their home and reported the matter to her. Then they searched victim in different places and found her on the way near their house. She was weeping and when she asked her about the reason of weeping, the victim replied that accused Jahirul Islam took her on his bicycle from the school and went to Garu Bazaar area and entered into the jungle, put off her panty and committed sexual intercourse with her. Then her brother-in-law lodged the FIR. The victim was taken to the hospital for

examination and she noticed that her wearing apparel was stained with semen like substance and it was dirty. Police seized the wearing apparel of the victim by preparing seizure list and she put her signature upon the seizure list. She exhibited the seizure list as Ext.2 and her signature therein as Ext.2 (1). She further proved the wearing apparel of the victim as Material Ext.1. Her daughter further stated that accused had threatened her by saying that if the matter would be disclosed to anybody, then he would kill her. Prior to this incident, accused took her daughter from the school three times. During cross, she deposed that she noticed that blood was oozing from her private parts.

- 11. PW 3 is the father of the victim. According to this witness, on the date of occurrence, he was at Guwahati. His wife informed him through mobile phone that his daughter was missing from the school. Then he returned to his home and went to Bidyapur Police Out Post and found his daughter along with his elder brother. On being asked, his daughter told him that on the date of occurrence accused took her from her school on his bicycle and on the way he entered nearby jungle and committed sexual intercourse with her. During investigation, his daughter was medically examined and the I.O. seized the birth certificate and wearing apparel of the victim and he put his signature upon the seizure list. He exhibited the birth certificate of the victim as Material Ext.2. During cross, he deposed that he got information at 2 p.m. and he reached the police station at 7.30 p.m. It was suggested that he did not ask anything to his daughter and latter also did not reply anything but this witness denied the same.
- 12. PW 4 is the uncle of the victim as well as informant of this case. He deposed that occurrence took place on 25.10.2017 and on that day, he was returning from his business at about 2.30 p.m. Then he knew from the mother of the victim that she was bought by accused from her school on bicycle and on the way, he put off her dress and committed sexual intercourse with her. At that time, victim was reading in Class-III in Basugaon J.B. School. When he reached his home, he noticed that victim was weeping. After knowing the incident, he lodged the FIR before Bidyapur Police Out Post. He proved the FIR as Ext.3. During cross, he deposed that he brought the victim to the police station. It was suggested that he did not state before the police

that he heard about the incident from the mother of the victim and he noticed that victim was weeping but he denied the same. When he saw the victim, she was under trauma.

PW 5 Akbar Ali deposed that on the date of occurrence while 13. he was working at Bengtol Chariali, one Mohor Ali informed him through mobile phone that accused Jahirul took his granddaughter, the victim from her school and on the way, within Basugaon police station area near the railway track he committed sexual intercourse with the victim after taking her to nearby jungle. Then he returned to his home and saw that villagers cordoned the accused Jahirul and he confessed that he had committed sexual intercourse with the victim and pleaded mercy. He heard the confession made by the accused before the villagers. After that, villagers advised them to file a case. Accordingly, FIR was lodged before Bidyapur Police Out Post. He noticed blood stain on the wearing apparels of the victim. The victim reported him that she was taken by accused forcefully and he committed sexual intercourse. During cross, he deposed that he noticed the body of his granddaughter was covered with mud. It was suggested that he did not state before the police that he had noticed blood stained wearing apparels of the victim and same were seized by the police and victim reported him that accused had committed sexual intercourse with her on her way from school but he denied the same. He denied the fact that he did not state before the police that occurrence took place near railway track within jungle under Basugaon P.S.

Special Judge Chirang, Kajalgaon

14. PW 6 Saheb Ali deposed that occurrence took place on 25.10.2017. On that day, he went to Dhontola market and at about 3.30 PM, his father Akbar Ali informed him through mobile phone that accused committed sexual intercourse with the victim. He immediately returned to his home and found that villagers cordoned the accused in his home and he confessed his guilt before the villagers. The accused admitted that he had committed sexual intercourse with the victim when she was taken from the school. The accused stated that the occurrence was held at Gohat under Basugaon P.S. He heard the confession made by the accused and at that time, no one beat the accused. Police was also absent at that time. He noticed the

victim who was weeping. During cross, it was suggested that he did not state before the police that after returning home, he saw that accused confessed his guilt before the villagers and he admitted the fact that he had committed sexual intercourse with the victim when she was taken from the school and he further stated that occurrence was held at Gohat within Basugaon P.S., he heard the confessions made by the accused and at that time no one beat the accused and police was absent at that time and he noticed the victim who was weeping but same were denied by this witness.

- PW 7 deposed that on the date of occurrence, at about 3 p.m., 15. when he was returning from Guwahati on train and reached Rangia station, the mother of the victim informed him through mobile phone that accused had committed sexual intercourse with the victim when she was taken from her school. He reached his home at 5 p.m. and saw that the villagers gathered in the house of the accused and accused was sitting and he was cordoned by the villagers. When he entered the house compound of the accused, the villagers told him that the accused had already confessed his guilt. Thereafter, he went to the house of the victim and found that she was weeping. He noticed blood stain and other stain on the school uniform of the victim. On interrogation, victim reported him that accused took her after the school hours and did not come to her house instead he took her to nearby jungle through another way and committed sexual intercourse with her. During cross, it was suggested that he did not state before the police that victim reported him that she was taken by accused from her school after school hours and instead of coming to their house, he took her to nearby jungle in another way and committed sexual intercourse with her but he denied the same.
- 16. PW 8 is the I.O., who deposed that on 02.12.2017, he was working as SI of Police at Basugaon P.S. On that day, concerned O/C handed over the case diary of Basugaon P.S. Case No. 99/17 U/S 4 of POCSO Act for further investigation. After taking the charge of investigation, he visited the place of occurrence, which is a narrow path within a jungle eastern side of the Basugaon Railway Station. He collected medical report of the victim, sent the wearing apparels of the victim to FSL, collected the report from the FSL, recorded the statement of remaining witnesses, re-examined the victim and

after completion of investigation, he submitted charge-sheet U/S 6 of POCSO Act against the accused. During the cross-examination, PW 8 confirmed that PW 7 did not state before him that when he noticed the victim she was weeping and there was blood stained and other stain on her school uniform. He further confirmed that PW 7 did not state before him that victim reported him that she was taken by the accused from her school after school hours and instead of coming to their house, he took her to nearby jungle in another way and committed sexual intercourse with her.

17. PW 9 is the Medical Officer, who examined the victim. She deposed that on 26.10.17, she was working as Medical & Health Officer under NHM at Bongaigaon Civil Hospital, Bongaigaon. On that day, she examined the victim in connection with Bongaigaon P.S. Case No. 789/17 U/S 4 of POCSO Act identified by mother of the victim and escorted by WPC Pramila Kar and UBC/133 Paresh Ch. Ray. On examination, she found the following:-

She was conscious well oriented.

Teeth - 6/6, 5/6

Secondary sexual character:-

Breast - Enlarged. Nipple and areola are not developed.

Axillary hair and pubic hair – Not developed. She has not attained puberty.

Local examination:-

Tenderness in the genital area.

Mucous present in and around the introitus.

Hymen – Intact.

Per vagina – Admits tip of one finger.

No external injury seen.

Investigation:-

- (1) X-ray for age determination As per radiological examination, the age is above 9 years and below 13 years.
 - (2) Vaginal smear No spermatozoa seen.
 - (3) Pregnancy test Negative.

According to Medical Officer, from the history and findings, it could not be said if she was raped or not.

During cross, she deposed that she examined the victim within 24 hours from the alleged incident. When she touched the private part, the victim felt pain for which she mentioned it as tenderness in her report.

18. PW 10 is another I.O. who initially investigated the case. He deposed that on 25.10.2017, he was serving as I/C at Bidyapur O.P. under Bongaigaon P.S. On that day, at about 9.20 PM, informant Ennus Ali lodged an FIR before him alleging that his minor niece was taken by the accused from her school at Basugaon and on the way he took her to a different road and committed sexual assault. After getting the FIR, he made Bidyapur O.P. GDE No. 394 dtd. 25.10.17 and forwarded the FIR to Bongaigaon P.S. He started investigation and recorded the statement of the complainant. According to complainant, place of occurrence was fallen under Basugaon P.S. He recorded the statement of the victim, sent her to Bongaigaon Civil Hospital for her medical examination and to the Court for recording her statement U/S 164 CrPC, visited the place of occurrence and drew the sketch map of the P.O. After that he found that the P.O. was fallen under Basugaon P.S. for which he transferred the FIR and other documents to Basugaon P.S. He seized the uniform and birth certificate of the victim and arrested the accused. During cross, he admitted that at the time of examination of the victim, he was wearing his uniform and the victim stated the fact by weeping. Her parents were present at the time of recording the statement of the victim.

- 19. PW 11 is the Scientific Officer, Serology Division at Directorate of Forensic Science, Kahilipara, Guwahati-19. He deposed that on 14.12.2017, he was working as Scientific Officer, Serology Division at Directorate of Forensic Science, Kahilipara, Guwahati-19. On that day, he received a parcel through Director of FSL in connection with Basugaon P.S. Case No. 99/17 u/s 4 of POCSO Act. The parcel sealed cloth covered one carton box consisted of one exhibit. After opening the parcel, he found one green coloured skirt contains stain of suspected semen marked as "A" M.R. No. 110/17. His examination No. Sero-3900/A. After examination, he found that Ext.Sero-3900/A gave positive test for human semen and negative test for blood. The question of DNA analysis for comparison is not possible without control sample. He proved his report as Ext.8 and his signature as Ext.8(1). During cross, he deposed that no any sample was sent along with Ext.Sero-3900/A or later on for which he could not compare the exhibit along with sample.
- 20. DW 1 Sobahan Ali deposed that occurrence took place on 25.10.2017. On that day, while he was in his home, then one Darbesh Ali informed him over mobile phone that there was quarrel between the accused and informant and he asked him to reach the place immediately. After half an hour, another person came to his home and called him to the place of occurrence. He heard from the villagers gathered at the P.O. that accused had committed rape upon the victim. Then he proceeded to the house of accused and found that some persons cordoned him within his compound. He told them that accused would not be beaten and matter would be placed according to law. But he does not know whether allegation was true or false. When he asked the victim, she told him that accused committed rape upon her but he found her in well state of health. He informed the matter to police. Prior to this incident, both families used to make quarrel regarding the two shops belonged to the informant and accused. Police seized the school uniform of the victim and he put his signature upon the seizure list on next day. During cross, he admitted that at that time, the age of the victim was about 7/8 years.

Special Judge Chirang, Kajalgaon

21. After going through the entire evidence on record, I have found that in this case, victim stated that accused had taken her from school on the

date of incident and on the way he committed sexual intercourse within the jungle. This fact was stated by her before the police as well as Magistrate. Accused also admitted the fact that he took her on the date of incident and dropped her in front of her house. According to victim, after committing the offence, accused dropped her near a shop from where she was walking to her home by weeping. The mother of the victim stated that she found the victim on the way when latter was coming by weeping. Then she asked her the reason of weeping, the victim told that accused had committed sexual intercourse with her on the way. According to mother of the victim (PW 2), the grandmother of the victim went to the school to take her but school authority told her that one person had taken the victim from school. After that they searched but did not find. After sometime, victim was found on the road when she was coming to her home but she was weeping. Then matter was revealed. The mother and father deposed that at the time of incident, age of the victim was 9 years. This fact was also admitted by accused during his examination under Section 313 CrPC. Birth Certificate of the victim was exhibited by PW 3, the father of the victim. According to the said Certificate, date of birth of the victim is 01.07.2007 i.e. her age was 10 years 3 months 24 days. The Birth Certificate was issued on 16.06.2009 which was exhibited as Material Ext.2. Though Material Exhibit was not proved by examining the issuing authority, but the age stated by both the parents of the victim as well as the age mentioned in the Birth Certificate is below 12 years and same was admitted by the accused. No any question was raised by learned defence counsel regarding the age. Learned P.P. submitted that age was admitted by the accused and defence. In this regard, no question was put to the witnesses by the defence. To ascertain the age of the victim, the most relevant document is the Matriculation Certificate or the Certificate of the school in which victim first attended and if this two documents are not found, then only Birth Certificate is to be considered. In present case, victim was reading in a school. According to her, she was reading in Basugaon Town J.B. School. The prosecution did not call any document from the school authority. According to learned P.P., as Birth Certificate was exhibited for which prosecution did not call the school authority to prove the age of the victim. It is found from the entire evidence on record that the age of victim was admitted by the accused

as 9 years. Accused clearly admitted that at the time of occurrence, age of the victim was 9 years and she was reading in Class-III. Same fact was stated by the victim as well as her parents. It is settled law that for determining the age of a person, the best evidence is of his or her parents if it is supported by any document. In this case, both parents stated that at the time of occurrence, age of the victim was 9 years and Material Ext.2 also supported that her age was below 12 years. Accused also admitted the age as 9 years. Admitted fact need not be proved. So, it is proved from entire evidence on record that at the time of incidence, age of the victim was below 12 years. Medical evidence also opined that that her age is above 9 years but below 13 years. Considering the documentary evidence as well as the evidence from parents, it is crystal clear that at that time, age of the victim was below 12 years.

22. The learned defence counsel during argument has submitted that the medical evidence did not corroborate the ocular evidence and version of the victim. No any injury was found on her private part by the doctor who examined her. Hymen was also intact. No any external injury was also found. As medical evidence does not support the ocular evidence, therefore, according to learned defence counsel, prosecution story is not believable. To attract penetrative sexual assault insertion of penis to any extent is sufficient The Medical Officer deposed that during the time of examination, she found the tenderness on private part of the victim. During cross-examination, Medical Officer Stated that when she touched her private part the victim felt pain for which she mentioned it as tenderness in her report. She did not find any bruise, redness or swelling on her private part. According to doctor, in case of forceful penetration, there should be some redness, bruise or swelling on private part. In case of more than one time penetration, hymen could not be intact. In case of penetration, hymen can be remained intact. Considering the medical evidence, I have found that hymen was found intact but it does not mean that there was no penetration. In this regard evidence given by independent witnesses PW 5, PW 6 and PW 7 are very much essential. PW 5 and PW 6 clearly stated that when they reached the compound of the accused then he was cordoned by villagers and he confessed his guilt before them. Both PW 5 and 6 heard that accused confessed that he had committed sexual intercourse with the victim. The PW 7 also supported this fact. According to

PW 6, at that time, no one beat the accused and police was absent and he saw the victim who was weeping. According to PW4 victim was in trauma. These facts were put before the accused during his examination under Section 313 CrPC. The accused admitted that he had confessed before the villagers as because the villagers threatened him by showing 'dao'. According to him, due to fear he confessed his guilt. On the other hand, PW 5, 6 and 7 has not stated that anyone showed dao or any other weapon to the accused and threatened him. The I.O. on the date of occurrence seized the uniform which contained some stains. According to Forensic Science Laboratory report the stain is of human semen. Unfortunately, sample semen or blood was not collected from the accused by the I.O. for which DNA test could not be performed by Scientific Officer, FSL but it is proved that uniform of the victim contained stain of semen. According to learned defence counsel, what was stated by the victim is not believable because she did not state before the I.O. that accused had committed sexual intercourse for three times prior to the incident. Except this, no any omission was put forward by the defence during the cross-examination of the victim. Learned defence counsel though suggested during cross-examination of PW 6 that he did not state before the I.O. that accused had confessed his guilt but said fact was not confirmed through the I.O. DW 1 also corroborated the prosecution version. According to him, after knowing the fact that there was quarrel between the accused and family of the victim, he proceeded to the house of accused and saw that accused was cordoned by villagers. He heard that accused had committed rape upon the victim. Then he informed the matter to police. So, it is revealed from the evidence of the DW 1 that prior to the arrival of police accused was cordoned by villagers and in front of the villagers, accused confessed his guilt that he had committed sexual intercourse with the victim. The accused admitted the fact that he took the victim from the school and he used to take her from school in several times. It is also revealed that he was well known to the victim. Learned defence counsel though suggested that there was enmity between both the families and family of victim tried to grab the land belonged to the accused, but these facts were not proved. No any witness admitted this fact. Victim deposed that there was quarrel but it does not mean that accused was tried to evict by the family members of the victim. If there was any such

enmity, then accused was not allowed to bring the victim from her school. A reasonable person does not believe the fact that one allows his enemy to take his or her minor girl from her school. In present case at hand, it is revealed that accused took the victim at the relevant time from the school and he also stated that he confessed his guilt. He has shown the reason of his confession that villagers threatened him but no such type of threat is proved from entire evidence on record.

23. Regarding enmity and discrepancies/contradictions, learned defence counsel has submitted the following case laws:-

(1) (2019) 1 G LT 17 (Sri Abhijit Dutta v. State of Assam and Others)

24. In said case, our Hon'ble High Court held as follows:-

"Evidently, in her statement u/s 164 she stated about one incident but no indication of sexual intercourse as stated in course of trial. She developed her case in course of trial when she stated that she was subjected to sexual intercourse for several days, which is totally inconsistent with her earlier statement. Here is the difficulty to accept the testimony of the victim."

25. In said case, our Hon'ble High Court further held as follows:-

"18. In 2008 (10) SCC 69, Lalli Ram v. State of M.P., it is held as follows:

"It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As observed by this court in **Pratap Mishra and others vs. State of Orissa (1977 3 SCC 41),** where the allegation of rape by many persons and several times but no injury is noticed that certainly is an important factor. If the prosecutrix version is credible, no

corroboration is necessary. But if the prosecutrix version is not credible then there would be need for corroboration."

19. As discussed above, the evidence of the victim does not find support from the medical evidence and it is inconsistent on material aspects and hence unreliable.

a victim of sexual assault, particularly when she is a minor cannot be discarded because such minor child has no such hostility of her own towards an accused for false implication, but the same is equally true that such minor child also can be tutored by their guardian for their own purpose. In the given case where there is a background of quarrel between the informant and the landlady where the informant and the accused stayed and the informant was asked to vacate the tenanted premises, vested interest on the part of informant for false implication cannot be denied.

Special Judge Chirang, Kajalgaon

which is not sustainable."

- I have gone through it. In the said case, victim was mum for a long period and she did not state some facts before the Magistrate as well as police. Material witness was also not examined. In present case at hand; victim immediately reported the incidence to her also admitted the prosecution story to some extent. Defence witness also admitted the prosecution story to some extent. Age stated by the parents of the victim was also admitted by the accused. Accused admitted that he had confessed his guilt before villagers due to fear. Therefore, in my view, cited case is not similar with that of the present case at hand.
- 27. Learned defence counsel has further submitted that the presumption mentioned under Section 29 and 30 of POCSO Act is not absolute presumption. This is rebuttable presumption. In this regard, he submitted the following case law:-

(1) Criminal Appeal No. 579/2017 (Ramprasad v. State of Maharashtra)

28. In the said case, Hon'ble Bombay High Court held as follows:

"18. Once such a conclusion is arrived at, the presumption under Section 29 of the POCSO Act comes into operation and it has to be presumed that the acts alleged against the appellant (accused) were indeed committed by him until the contrary stood proved. Therefore, the burden becomes heavier on the defence in such cases. It is required to be examined whether the evidence on record indicated that the appellant (accused) was able to rebut the presumption to demonstrate that the prosecution case was not made out. The presumption can be rebutted by showing that on preponderance of probabilities the defence raised by the accused was made out.

19. Section 29 of POCSO Act reads as follows:-

"29. Presumption as to certain offences — Where a person is prosecuted for committing or abetting or attempting to commit

any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

The above quoted provision mandates that unless the accused proves to the contrary, it would be presumed that he has committed offences under the POCSO Act for which he is prosecuted. But, there can be no doubt about the proposition that no presumption is absolute and that every presumption is rebuttable. A statutory presumption of this nature can be rebutted by the accused on the touchstone of preponderance of probabilities. In the case of Babu Versus State of Kerala [(2010) 9 SCC 189], the Hon'ble Supreme Court, while examining as to in what manner presumption under a statute could operate against the accused has held as follows:-

20. In a recent judgment also, in the face of presumption under Section 29 of the POCSO Act, this Court in Amol Dudhram Barsagade Versus State of Maharashtra, [Criminal Appeal No. 600/2017 Decided on 23.04.2018] (Nagpur Bench), held as follows:-

......

The

Special Judge Chirang, Kajalgaon

submission that the statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proved the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious

doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable."

- 29. I have gone through it.
- 30. The Sections 29 and 30 POCSO Act runs as follows:-
 - "29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.
 - 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 metal state with respect to the act charged as an offence in that prosecution.
 - (2) For the purposes 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 probability."

Special Judge Chirang, Kajalgaon

31. After going through both the Sections, I have found that Section 29 discuses the presumption regarding commission of offence and Section 30 relates to presumption of culpable mental state. Both presumptions are rebuttable presumptions but this rebuttable fact must be proved by the defence through cogent evidence. In present case at hand, evidence given by defence side is not sufficient to prove the rebuttal fact that there was enmity between the families and for which this false case was filed. The prosecution evidence also did not support any rebuttal evidence pointed out by learned

defence counsel during the time of cross-examination of prosecution witnesses. Regarding Section 30, accused has not proved the fact that he had no such mental state with respect of the act charged as an offence. Subsection 2 of Section 30 clearly states that for the purposes 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 probability. So, the existence of criminal mental state can be rebutted by some facts which should be proved beyond all reasonable doubt. By giving evidence in the standard of preponderance of probabilities, is not sufficient to rebut the presumption given under Section 30 of POCSO Act. In present case at hand, accused admitted the fact narrated by victim regarding her age as well as part of incidence. In this case, the independent witnesses also supported the fact stated by victim. Accused also admitted that he had confessed before the villagers. According to him, confession was made due to fear but said fact was not proved by the defence through cogent evidence. So, 'fear for giving confession' was not proved beyond all reasonable doubt. DW 1 also failed to rebut the prosecution version through his evidence. As a result, the prosecution story is established against the accused beyond all reasonable doubt. It is proved from the entire evidence on record that at the time of occurrence, age of the victim was below 12 years. It is further proved that at relevant point of time, accused had committed penetrative sexual assault upon the victim. So, the ingredient of Section 5(m) of POCSO Act is proved. So, case is established under Section 6 of POCSO Act. The point is proved against the accused beyond all reasonable doubt. Accused is found guilty under Section 6 of POCSO Act.

Special Judge Chirang, Kajalgaon

ORDER

- 32. Prosecution proved the case U/S 6 of POCSO Act against accused Md. Jahirul Islam beyond all reasonable doubt. Accused is convicted under Section 6 of POCSO Act.
- 33. Sentence will be pronounced on next date after hearing the accused and his engaged counsel on point of sentence.

34. Given under my sign and seal of this Court on this the 21st day of December, 2019, at Kajalgaon, Chirang.

Dibyayyob Mahaula (D.J. Mahanta) 21/12/19 Special Judge Chirang, Rajalgaon

Dictated and corrected by me,

(D.J. Mahanta)
Special Judge

Chirang, Kajalgaon

APPENDIX

Prosecution witness:

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

PW 2 – Mustt. Ful Bibi

PW 3 - Md. Jinnat Ali

PW 4 - Informant Md. Ennus Ali

PW 5 - Md. Akbar Ali

PW 6 – Md. Sabed Ali

PW 7 - Md. Abu Sama Ali

PW 8 - S.I. Nobin Boro (I.O.)

PW 9 – Dr. Ranjeeta Das (M.O.)

PW 10 - S.I. Ajay Kr. Saha (I.O.)

PW 11 - Shri Sankar Ch. Rabha (Scientific Officer, F\$L)

Exhibit (Prosecution):

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

Ext-2 Seizure list

Ext-3 FIR

Ext-4 Charge-sheet

Ext-5 Medical report

Ext-6 Sketch map

Ext-7 Extract copy of Bidyapur O.P. GD Entry No. 394 dated 25.10.2017

Ext-8 FSL Report

Material Exhibit (Prosecution):

Material Ext.1 Wearing apparel of victim Material Ext.2 Birth certificate of the victim

Defence Witness:

DW 1 - Md. Sobahan Ali

Defence Exhibit:

Nil

(D.J. Mahanta)

Special Judge
Chirang
Chirang, Kajalgaon