IN THE COURT OF THE SESSIONS JUDGE: : KAMRUP: : AMINGAON

District: Kamrup, Amingaon

Present: A.F.A. Bora

Special Judge, Kamrup, Amingaon

Special Sessions (POCSO) Case No. 09/2014

Under section 6 of the POCSO Act, 2012

State of Assam

-Versus-

1) Sri Sanjib Rabha

S/o- Samudra Rabha

Vill- Pachim Manikpur

P.S- Palashbari

Dist- Kamrup, Assam

2) Sri Nilkamal Rabha

S/o-Late Mohan Rabha

Vill- Loharghat Godaiguri

P.S- Palashbari

Dist- Kamrup, Assam -Accused

Appearance:

Smt. P Deka, Public Prosecutor, for the State

Sri Bhupen Mazumdar

Advocate for the accused.

Date of Argument: 03-03-2018

Date of Judgment: 19-03-2018

JUDGMENT

- 1) The brief history of the prosecution case as revealed from the FIR is that on 29.05.2013 one Barun Sangma lodged an FIR at Palashbari P.S. alleging the fact that on 28.05.2014 at around 9 P.M. his daughter (prosecutrix) went to a Bihu function at Loharghat. Till the next morning, the girl was not returning home and the informant went out in search of his daughter. Then he found his daughter in the house of one aunt of her friend. It is alleged that the prosecutrix informed that while she went to meet natural call from the Bihu function, accused Sanjib Rabha and Nilkamal Rabha forcibly committed sexual intercourse upon her near the Bihu function.
- 2) The above FIR was registered as Palashbari P.S. Case No. 221/14 and police investigated into the matter. The prosecutrix was sent for medical examination and her statement before a Magistrate was recorded u/s 164 Cr.P.C.
- 3) On completion of investigation Police submitted charge sheet against the accused Sanjib Rabha and Nilkamal Rabha u/s 376(2) (h) (i) (d) of IPC.
- 4) On submitting charge sheet under above sections of law, the case was committed to the Court of Sessions. On receiving the record this Court after hearing both the sides found prima facie materials u/s 5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (here-in-after called POCSO Act) and accordingly charge was framed under above sections of law against the accused persons to which they pleaded not guilty and this case was registered as special case.

5) **POINT FOR DETERMINATION**

Whether the accused persons committed gang penetrative sexual assault upon the prosecutrix who is below the age of 16 years and thereby committed offence of aggravated penetrative sexual assault punishable u/s 6 of the POCSO Act, 2012?

DISCUSSION AND REASONS THEREOF:

- 6) Perused record. Heard Ld. Counsel of both the sides. In the instant case prosecution examined altogether 8 witnesses whereas defence examined two witnesses. The case of the accused is of denial. The statement of the accused u/s 313 Cr.P.C. was recorded in which both the accused claimed themselves to be innocent.
- 7) Let me now discuss the testimony of the witnesses one by one to testify the veracity of their statements and to arrive at a decision whether any penetrative sexual assault has been committed upon the prosecutrix as alleged or not.
- 8) At the very outset I like to refer the testimony of Medical Officer and her report as available on record. As revealed from the record, P.W. 5 Dr. Anurupa Choudhury is the Medical Officer who examined the prosecutrix on 30.5.2014 i.e. on the very next day of the incident. The Medical Officer narrated the story of the alleged incident which she derived from the prosecutrix. It is stated by P.W. 5 that it was reported to her by the victim that on 28.5.2014 when the prosecutrix went to see a function, at around 10 P.M. she went to pass urine at a nearby place, then two boys namely, Sanjib Rabha and Nilkamal Rabha caught her mouth to prevent shouting and pulled her to a paddy field. It has been reported to her that those boys had committed sexual intercourse several times till 1 A.M. on 29.5.2014. The Medical Officer examined the prosecutrix and recorded her report vide Ext. 3 and testified Ext. 3(1), 3(2) and 3(3) as her signatures. From Ext. 3

the report of the Medical Officer recorded in a prescribed form is of following nature-

Genital organs- developed. Vulva- Labia minora is covered by labia majora in lithotomy position. Abrasion present on the posterior fourchette. Hymen- Recent tears at 5 and 8 O'clock position with oozing of blood from the margins. Tenderness present on and around the hymen. Vagina- as described. Uterus-not palpable per abdominally. Evidence of venereal disease-not detected clinically. Vaginal swabs collected from- posterior and lateral fornix. Injury on body-as described. Evidence of struggle and evidence of strain- not detected.

- 9) With the above medical report and testimony of P.W. 5 it is conclusive in nature that the victim was below 16 years of age and the cross examination of P.W. 5 reveals no such inconsistency to hold a view that medical report is not admissible and as a Demonstrator P.W. 5 cannot examine the victim without presence of superior Medical Officer which has been suggested by the defence during cross examination.
- 10) With the above medical evidence on record let me testify the evidence of the prosecutrix who is examined as P.W. 2. She stated that her father lodged FIR against accused Sanjib Rabha and Nilkamal Rabha. She stated clearly that she does not know the accused, but she could identify them if see them. She has narrated the whole story as revealed in the FIR and she stated that two boys caught hold of her while she went out for urinate and took her to the paddy field to a distance of ½ km. According to her both the accused had sex with her and they used with her everything. P.W. 2 has narrated the happenings that both the accused undressed her and thereafter they also removed their clothes and laid her down on the ground and committed sex one by one. The prosecutrix further narrated that the accused had penetrated (in the Garo language 'ispil") the sex organs on the

lower part of her body. The proscutrix has further narrated that after the incident she was abandoned there and when she collected her clothes she found all the clothes dirty for that she could not return back to the function again and proceeded towards the road.

- 11) P.W. 2 deposed that on her way back she met her friend Balita and her aunt and asked them for help. They took her to their house, but she had not disclosed anything to them as she was scared of. She spent the night there in the house of the aforesaid aunt and thereafter on the same night she took bath requesting her friend and put on the garments of her friend. According to her on the following day she went to her friend's relative house at around 9 A.M. after having breakfast in the house of her friend. The father of the prosecutrix came there and he inquired her as to why she did not return home on the previous night. Then the proscutrix told her father about the incident which took place on the previous night. Prosecutrix further stated that at the time of the incident she did not know the name of the accused persons, but she saw them behind in the function. They were standing behind them and her friend Balita was also present at that time. After narrating the incident to the father of the prosecutrix and to Balita, her friend Balita could identify the accused as Sanjib Rabha and Nilkamal Rabha. Thereafter, the prosecutrix along with her father went to the Palashbari Police station and lodged FIR. She also stated that she was taken to GMCH, Guwahati where she disclosed the incident to the doctor who examined her. P.W. 2 further testified Ext. 2 as her previous statement made before the Magistrate and Ext. 2(1) as her signature.
- 12) She was cross examined by the defence on to different aspects of the matter. In cross she admitted that she attained puberty at the age of 13 years and at the time of deposition she was a student and had not given up her study. She admitted that after

three days of the incident police had produced her before a Magistrate for recording her statement and she stated before the Magistrate that she could not identify the boys. She further admitted that after two days of the incident doctor examined her at GMCH. She also admitted that she went to watch Bihu function at 7 P.M. with her friends and after the incident she first met her friend Balita. She did not tell her immediately about the incident as she was getting scared and thereafter she met the aunt of Balita and she did not tell anything to aunt of Balita also about the incident. She admitted that when she met them her dress was not normal and in the house of Balita's aunt house she met the husband of Balita's aunt and she did not disclose about the incident to him. She admitted that accused Sanjib Rava had never visited her house prior to the incident and police recorded her statement one day after the incident. The defence put suggestion that she stated before the police that she knew Sanjib Rava from earlier which is denied by P.W. 2. The defence also put suggestion that she told before police that Sanjib sometimes visited their house which is denied by her. She did not state before the Magistrate or Police that Balita, after hearing her description of the accused persons, when she narrated the incident to her father, Balita disclosed the name of two accused persons as Nilkamal and Sanjib. She admitted that police did not ask her these and so she did not tell police about it.

13) P.W. 2 during cross admitted that she did not take any food at night in the house of Balita's aunt. She admitted that she did not state either before Police or Magistrate that she narrated the incident to her father in presence of her friend and her relatives. The defence put suggestion that she had a mind to marry Sanjib Rava which is denied by P.W.2. The defence also put suggestion that her parents and herself gave proposal that if after marriage Sanjib resides at their house, she would marry him which is denied by her. The defence put suggestion that Sanjib refused to

- marry on that condition which is denied by her. She admitted that she disclosed the names of Sanjib and Nilkamal on grudge instead of real assaillants/miscreants who are involved in the incident. The defence put suggestion that Sanjib and Nilkamal are not involved in the incident which is denied by her.
- 14) P.W. 1 Sri Barun Sangma is the complainant of this case and father of the prosecutrix. He stated that he filed the ejahar against accused Sanjib Rabha and Nilkamal Rabha who are known to him. The ejahar was written as per his instruction and he put his signature on it. He stated that the incident took place on 28/05/2014. His daughter, the prosecutrix went to watch Bihu function held at Loharghat and she left the house around 5 P.M. in the evening and at that time he was at home and she was accompanied by her uncle Sri Samudra Das. He stated that when her daughter did not return at night till 9 P.M. he searched her and went to Loharghat, but did not find her. He could not trace her out on that night and on the next day i.e. on 29-05-2014 again he went out to search her at Loharghat and he found his daughter at the residence of one Niati Rava, her Mahi at Loharghat. He stated that on being inquired, his daughter told him that on the previous night she went to attend nature's call and two youths gagged her mouth and took her to a paddy field at a little distance and committed sexual intercourse with her forcibly and she told before him the name of the youths as Sanjib Rabha and Nilkamal Rabha. Then he went to police station along with his daughter and lodged the ejahar. He stated that his daughter was aged 14 years at the time of occurrence.
- 15) In cross he admitted that he is not well educated and he does not know how to read and write except putting his signature. The defence put suggestion that the contents of the ejahar are not written as per his instruction which he denied. He further admitted that he knew one of the accused from earlier and the

other from few months. The defence put suggestion that he did not state before the police that his daughter on the date of incident went to watch Bihu function at Loharghat which is denied by him. The defence put suggestion that he did not mention in the ejahar that at around 5 P.M. he was at home which is denied by him. The defence put suggestion that he did not state in the ejahar nor stated before the police that his daughter went out to watch function with her uncle Samudra Das which is denied by P.W. 1. The defence further put suggestion that he has not mentioned in the ejahar that till 9 P.M. his daughter did not return home and he went to search her nor stated this fact before police which is denied by P.W. 1. The defence put suggestion that he has not mentioned in the ejahar that he found out his daughter at the house of her Mahi Niati Rabha, nor has he stated it before police when he was examined which is denied by P.W. 1. The defence put suggestion that on the following day of the function his daughter in quite normal condition came back to the house with her two friends and narrated that two unknown youth's committed sexual intercourse on her on the previous night which is denied by P.W.1.

16) He admitted that after filing the ejahar police recorded his statement and thereafter his daughter was taken to GMCH and on the same day his daughter was brought to Court. He admitted that his daughter was taken to Court about 3 days after the incident and prior to that she was kept in Jalukbari State Home. When his daughter was taken to Court he also came to the Court and his daughter read up to class IX never dropping in any class. The defence put suggestion that his daughter had dropped in classes many times before she was promoted to class IX and at the time of incident her age was above 20 years which is denied by P.W.1. He admitted that accused Sanjib Rabha had no visiting terms with him and he does not know that his daughter was in love with the accused Sanjib. The defence put suggestion that

- they were intending to marry off his daughter to accused Sanjib Rabha but he refused to marry and for that he lodged the case which is denied by P.W.1.
- 17) P.W. 3 is Niati Rava. She stated that she does not know the accused, as well as the informant and will be able to identify them if she sees them. She stated that she does not know the proscutrix. She heard from Balita that two youths raped the proscutrix and one day in the morning at around 9 A.M. prosecutrix came to her house and after coming of the father of prosecutrix. She disclosed the incident to her father and then she came to know about the incident. P.W. 3 has not supported the cse and also about the incident of the accused.
- 18) In cross she admitted that prosecutrix took her meal at her house in the morning. She admitted that the proscutrix did not disclose any incident to her and one Nripen Rava was also present. She did not hear anything what the prosecutrix narrated before her father. She admitted that she asked the prosecutrix to have meal and she did not state before the police that she knows the prosecutrix. Nobody stated before her about the incident and she does not know anything about the case.
- 19) P.W. 4 is Sri Nripen Rabha. He stated that he did not know the informant but he knew the accused. According to him In 28th 2014 Bihu function was going on and on that day his sister in law Smti. Bolita Rabha while returning from function along with his wife, found the prosecutrix and brought her home. On that night the prosecutrix stayed in their home and on the next morning and she went to the house of Neoti Rabha and later the father of the prosecutrix brought her from the house of Neoti Rabha. He stated that subsequently he knew about the incident from the father of the prosecutrix. He stated that the girl would be aged about 16-17 years

- 20) In cross he admitted that he came back from the function to his house at 12 to 12-30 at night and again he was in function and came back at 3-30 A.M. and at that time he found the prosecutrix in his house. He admitted that he stated before the police that when Bihu function was going on at 11-30 P.M. his sister in law and the prosecutrix due to lack of company stayed at his house. He did not state before the police that his sister in law and his wife after meeting the girl brought her home. He did not state before the Police that that the father of the prosecutrix told him that accused had raped her. He admitted that when he came back home on that day at around 3-30 A.M. he found the girl in a normal condition and at that time the clothes of the girl were not wet or torn. The girl did not state anything to him and he does not know the exact age of the girl. He did not know about any marriage proposal given by the father of the prosecutrix to accused Sanjib Rabha.
- 21) P.W. 6 is Sri Samudra Rabha. He stated that accused Sanjib Rabha is his son and other accused Nilkamal Rabha is known to him. He stated that one day police came to his house and arrested his son Sanjib Rabha and took him away and he does not know anything about the incident.
- 22) This witness was declared hostile by the prosecution and in cross examination by the prosecution he stated that on 28.05.2014 his son Sanjib Rabha went to watch Bihu function at Loharghat. The prosecution put suggestion that in the morning he was telephoned from Loharghat that his son had taken away a small girl and committed bad act in the dark and police might come to ask about it and so after knowing this, in the morning he kept his son at home for giving to police which is denied by P.W.6. He admitted that when the police came he handed over the boy to police. The prosecution put suggestion that he stated

- before the police that upon asking the boy, the boy admitted that he had committed bad act which is denied by him.
- 23) In cross he admitted that one Barun had given a proposal for marriage to the prosecutrix with his son Sanjib and that upon such marriage, his son would be taken to the girls home and kept as as a Ghar-jowai and he suspects that due to the refusal for such proposal the instant case has been falsely lodged upon his son. He admitted that accused Nilkamal is the friend of his son and he has been implicated in the instant case due to being friend of his son. The defence put suggestion that his son Sanjib had gone to Loharghat to see the function which is denied by P.W.6. He admitted that his son Sanjib was at home.
- 24) P.W. 7 is Sri Rana Dutta and he stated that on 30-05-2014 he was working as JMFC, Kamrup, Amingaon. On that day the prosecutrix was produced before him by police for recording her statement u/s 164 Cr.P.C. in connection with Palashbari P.S. Case No. 221/2014. He stated that as the victim was a minor he sent her to State Home for two days fixing 02-06-2014 for next appearance and on 02-06-2014 he recorded her statement u/s 164 Cr.P.C. He testified Ext. 2 as the statement of the prosecutrix u/s 164 Cr.P.C. and Ext. 2(2) as his signature.
- 25) In cross he admitted that in Ext. 2 he has not mentioned the police case number in connection with which he has recorded the statement of the prosecutrix. He has not mentioned in Ext. 2 as to who has identified the victim before him at the time of recording the statement. He admitted that in the statement the prosecutrix stated that she does not know the two boys and she will recognize the boys if she sees them. She also stated in her statement that Chitra Rabha and her three friends were with her. He admitted that in orders dated 30-05-2014 and 02-06-2014 he has not mentioned the police case number in connection with which he has recorded the statement of the prosecutrix.

- 26) P.W. 8 is Jagat Chutia. He deposed that after taking charge of investigation he examined the informant and the prosecutrix. He stated that he went to the place of occurrence, prepared the sketch map vide Ext.4. The place of occurrence is paddy field and there was no house near the place of occurrence and he went to the adjacent residence and examined some of the witnesses. On the next day he sent the prosecutrix for medical examination. He testified Ext. 6 the forwarding for medical examination and Ext. 6(1) ishis signature. He stated that the victim was also sent for recording her statement u/s 164 Cr.P.C. before a Magistrate and during investigation he arrested both the accused persons. After completion of investigation he submitted charge sheet against the accused persons u/s 376(2) (h) (i) (d) IPC. He testified Ext. 7 as the charge sheet and Ext. 7(1) as his signature. He stated that he examined (P.W.6) Smudra Rabha as a witness and this witness stated before him that in the morning he received a telephone from Loharghat that his son had taken away a minor girl and committed bad act in the dark. This witness also stated that it was informed that police might come to ask about it and so after knowing this, in the morning, he kept his son at home for giving to police. This witness also stated before him that upon asking the boy, the boy stated that he had committed bad act. He testified Ext. 8 as the statement of Samudra Rabha recorded u/s 161 Cr.P.C. and Ext. 8(1) as his signature.
- 27) In cross he admitted that the original FIR of the case was not sent to the Court by him and it was sent by the O/C of Palashbari P.S. He collected the medical report of the victim and he has not inquired about the friends to whom the incident was reported by the victim and stated before the Medical officer. He admitted that he has not examined one Chitra Rabha whose name has been disclosed by the victim during her statement recorded u/s 164 Cr.P.C. No test identification parade was conducted during investigation as there is a statement of the victim girl that she will

be able to identify the accused if produced. He admitted that he has not seized the wearing garments of the victim during investigation. His case diary is not paginated and as such he could not say on which page the statement of the victim was recorded. He admitted that in the statement recorded u/s 161 Cr.P.C. of the victim girl no name of Bolita Rabha was disclosed by the victim. He has not examined any witness by name Samudra Das during investigation.

- 28) During cross P.W. 8 (I/O) admitted that the victim girl when examined by him u/s 161 Cr.P.C. she made a statement that she knows accused Sanjib Rabha who introduced Nilkamal Rabha who sometimes used to visit her house. He admitted that he examined the prosecutrix on 30.05.2014, medical examination was done on 30.05.2014 and statement of the victim girl was got recorded u/s 164 Cr.P.C. on 02.06.2014. He admitted that P.W. 1 the informant of this case has not stated before him that prosecutrix was accompanied by her own uncle Samudra Das. While he examined the informant he made statement that when he went out in search of his daughter and found her in her aunt house and she reported that on the previous night two boys, namely, Sanjib Rabha and Nilkamal Rabha took her to a nearby paddy field and committed sexual intercourse. The defence put suggestion that the informant made a statement before him that two unknown youth committed sexual intercourse upon her which has been made before the Court by the witness which is denied by P.W.8. He admitted that the victim girl in her statement u/s 161 Cr.P.C. has not stated that the incident was narrated by Bolita Rabha to the father of the prosecutrix in which she disclosed the name of Nilkamal Rabha and Sanjib Rabha.
- 29. With the above evidence adduced by prosecution, the defence took a different plea for implicating them falsely by the prosecutrix for the reason of some inimical relationship with the

father of the victim girl. To substantiate the plea, the defence examined two witnesses. DW.1- Sri Sanjib Rabha , according to him, he had love affairs with the prosecutrix and prior to this incident he was called to the house of the informant and gave him proposal to marry the prosecutrix and staying in his house as his son-in-law which the accused did not agree. According to him, after that incident, the prosecutrix and her father jointly conspired against him and his friend Nilkamal. DW.2 Subudh Rabha, a co-villagers who know both the parties. According to him, accused Sanjib Rabha had love affairs with the prosecutirx and one day accused took him to the house of the informant, and there was a discussion regarding marriage of the accused with the prosecutrix. DW.2 further claimed that accused was with him till 12.00 mid-night on the day of incident discussing about extraction of sand from the river.

- 30. The above evidence of the defence appears to be not believable having regard to the fact that at no point of time during trial any of the witnesses admitted the above fact. Surprisingly, there is a question of identity of the accused as urged by the defence. But, if they had an earlier affairs between the prosecutirx and one of the accused, then the identification of the accused by the prosecutrix or by her friend is not improbabable and unbelievable. Probability of such relationship cannot be ruled out, but it cannot be a ground for implicating the accused by the prosecutrix at the cost of her own dignity and chastity.
- 31. Here, we can take reference of a reported case law **Rajendra**@ **Raju Vs. State of Himachal Pradesh.** In the aforesaid case law, it has been observed in Para -14 of the judgment which is quoted as below :-
 - " In Sadashiv Ramrao Hadbe, this Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of prosecutrix if it is capable of inspiring the

confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated:

It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by ay medical evidence or the whole surrounding circumstances are highly improbable and believable the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

In the aforesaid case the Hon'ble Apex Court at para 18 of the Judgment referring a case of Radhu where the evidence of the prosecutrix was found full of discrepancies and not worthy of credence. The medical evidence also did not corroborate the case of sexual intercourse or rape. In Radhu the Hon'ble court reiterated the legal position which read as under:

"6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that

absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent."

- 32. From the discussion made above, it becomes established principle of law that sole testimony of the victim may be sufficient for convicting an accused without corroboration. But, that too considering the fact that entire case is not improbable and unlikely to happen.
- 33. In the aforesaid case law, the Hon'ble Apex Court made a remark that in the context of Indian culture, a woman victim of sexual aggression would rather suffer silently then to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime she could not blame anyone but the real culprit. It has been further narrated in para 21 of the aforesaid Judgment that while appreciating the evidence of the prosecutrix the Court's must always keeping mind that no self- respecting woman put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix.
 - 34. Now, the present case in hand is under POCSO Act and offence is for aggressive penetrative sexual assault committed by a gang of two persons on a child in furtherance of their common intention which is an offence U/s 5 (g) of the POCSO Act. So far the question of age of the victim is concerned, her statement along with the statement of P.W. 1 is found believable and corroborated by the evidence of Medical Officer, P.W. 5 who has

distinctly opined that age of the victim is in between 14 to 16 years regarding the age of the prosecutrix the defence could not rebut the prosecution evidence and it is proved by prosecution that victim is below 16 years and case is falling under the present Act.

- 35. Here the testimony of the prosecutirx is found very much distinct and clear about the fact that two boys whom shesawtermedas accused committed penetrative sexual assault upon her after undressing her cloth on a paddy field, dragging her when she came out for urinate from the Bihu function. It is true that a child below the age of 16 years when suffered from a traumatic situation may give some confusing statement stating that she will be able to identify the accused if she sees them. This part of evidence is not fully explained whether she was examined in presence of the accused or not and there is no explanation sought by the defence during her cross-examination that she subsequently, made her statement that the accused persons committed the act of sexual assault upon her.
- 36. The defence further by cross examining the investigating officer tried to establish the fact that he had not done TIP and the name of the accused was not disclosed by the victim in her previous statement recorded by police and Magistrate. Here, I have taken notice of the previous statement of the victim which is termed as Ext. 2 which also reveals that the same fact that initially prosecutrix could not identify the accused persons who committed such act upon her. But, the FIR was lodged by the father of the victim where the name of the accused persons were disclosed and on Ext. 3 the Medical Officer had also recorded the name of the accused persons in the medical report.
- 37. I have taken a curious look into the testimony of PW. 2 who has categorically made a statement that she came to know the names of the accused persons from her friend Balita when

she narrated the incident to her father. The name of the two accused persons was disclosed and according to her she had not disclosed this fact to police as police did not ask her the same. It may be probable fact that in most of the time, the witnesses without knowing the complexity of legal proceedings made some statements with little contradiction from the earlier statement for which the whole testimony of the witness cannot be discarded. The investigation was initiated on the basis of an FIR disclosing the names of the accused persons, but if there is any confusion or doubt as to the identity of the accused, the police might have done the investigation to that line. But, the clear statement made by the informant and the subsequent statement made by the victim in the Court requires some more discussions.

- 38. At the same time, plea of having earlier relationship taken by the accused is denied by prosecution witnesses and is not found conclusive for the reasons that such relationship will not lead a woman to expose herself in the society.
- 39. The defence while arguing the case cited the following case laws-
 - (i) 1996-Crl.L.J. 1019 (Orissa High Court)
 Shyamlal Pradhan –vs- State of Orissa
 - (ii) 196 (Vol.1) GLT-295 (Gauhati High Court)

Dulal Sonowal -vs-State of Assam

(iii) 1997 –AIR (SC) 1127 –(The Supreme Court of India)

Kanan-vs-State of Karela.

(iv) 1995 (III) GLT-109 (Gauhati High Court)

Man Singh Praja-vs- State of Assam

(v) 196(3) GLT-473 (Gauhati High Court)

Yazid Ali and another-vs-State of Tripura.

(vi) 196(3) GLT-440 (Gauhati High Court)

Dilwar Islam Laskar & others-vs-State of Assam.

(vii) (2009)3 Gauhati Law Reports -13 (Gauhati High Court)

Rambabu Sarma & others-vs-State of Assam.

- 40. The aforesaid case laws cited by the defence are considered wherefrom it reveals that case law cited 1996 Crl. L.J. 1019 of Orissa High Court is relating to an offence in case of robbery where the question of TIP was a ground as to the question of identity of the accused persons.
- 41. The case law cited 1996 (i) GLT 295 Dulal Sonowal –vs- State of Assam and the proposition of law is that identification of the accused at the time of trial cannot be accepted as a Court identification and on the basis of such identification it will not be safe to convict a person.
- 42. The proposition of law established in the above case is the admitted position of law, but however, it was in respect of accused who is not known to the witness and the witness identified him first time in the Court. In our present case in hand fact is something different from the cited case law. In our case in hand the accused persons were present at the function, prior to the incident but failed to identify them during trial without specific word as to identity.
- 43. The case law cirted by the defence 1995(iii) GLT 109 Man Singh Praja –vs- State of Assam which established the fact that there is contradiction in the evidence of eye witness and it is not safe to base conviction on such evidence.
- 44. Lastly, defence took reported case law Rambabu Sarma and others –vs- State of Assam stating the fact that evidence of defence witnesses entitled for equal treatment.
- 45. Now the whole prosecution case is based on the sole version of the prosecutrix supported by circumstantial evidence. When she was examined in the Court, she made a statement which is very

much specific that at the time of incident she did not know the name of the accused persons, but she saw them behind in the function. She categorically stated that they were standing behind them and her friend Balita was also present at that time. This part of the evidence of the prosecutrix is in continuation of her statement during trial when she was examined by the Court when she made a statement that she does not know the accused, but she could identify them, if she sees them. Here, if we take the totality of the version of the prosecutrix including her statement made on oath that afternarrating the incident to her father and to her friend Balita, her friend Balita could identify the accused as Sanjib Rabha and Nilkamal Rabha and thereafter the prosecutrix along with her father went to Palashbari Police Station and lodged FIR disclosing the names of the accused. If this fact is considered for the purpose of identification, then it again appears from the evidence of P.W. 1 that the names of the accused were disclosed by the prosecutrix to him before lodging the FIR which corroborates the prosecution case.

46. The father of the prosecutrix (P.W.1) lodged the FIR immediately on the very next day of the incident and named the accused in his FIR. Moreover, the medical report which is termed as Ext. 3 discloses the name of the accused persons who examined the prosecutrix on the following day of the incident i.e. 30.05.2014. The Medical Officer narrated the incident as derived from the prosecutrix. If the name of the accused persons was not disclosed with the alleged act of sexual assault, it is not probable that Medical Officer will falsely include the name of the accused persons in her report not being disclosed by the victim. The defence again took a plea suggesting the fact to the Investigating Officer that informant has made a statement before him that two unknown youth committed sexual intercourse upon the prosecutrix as stated before the Court which is denied by the witness. While the Investigating Officer is cross examined, he

- admitted that the prosecutrix made a statement which is recorded by him and as such I like to quote from his testimony which reads as below-
- "The victim girl when examined by meu/s 161 Cr.P.C. she made a statement that she knows the accused Sanjib Rabha who introduced Nilkamal Rabha who sometimes used to visit her house."
- 47. But throughout the prolonged cross examination of the Investigating Officer defence has not agitated the point suggesting her statement about the identity of the accused persons. Again during cross examination of P.W. 2 the defence has not raised any issue about the identity of the accused persons which she had made in her examination in chief, but at certain point of time P.W. 2, prosecutrix admitted that she did not state either before Police or a Magistrate that she narrated the incident to her father in presence of her friend and her relatives. She admitted that Police did not ask this question and so she did not tell Police about it. As such taking a plea that victim has stated in her examination in chief that she will be able to identify the accused, if shown to her cannot be taken in negative sense for the reason of not putting any specific question by the prosecution to the above witness. If the identity of the accused is a question, then cross examination as already mentioned, the defence could have rebutted the same by putting specific questions on the point of identification. But in her cross examination the defence instead of putting direct question denying the identity of the accused put the suggestion that prosecutrix knew the accused from earlier which is further denied by P.W.2 and defence further put the suggestion that accused Sanjib Rabha sometimes used to visit their house which too is denied by the victim. So far the identity of the accused is concerned, it is clear statement made by the victim for not

- disclosing the name of the accused to police because police did not ask her this question as replied during cross examination.
- 48. A minor girl while experiencing an incident of sexual assault must be in a traumatic condition and it is not expected to get the Video graphic description of the happenings and description of the name, identity etc. little contradiction and omission on certain aspect is natural. But so far the identity of the accused is concerned, the totality of the evidence of the victim is to be taken for determining the issue of identity. Here I have taken notice on Ext. 2, the statement recorded by a Judicial Magistrate. The statement recorded by the Magistrate is very concise and not elaborative.
- 49. On very careful perusal of the record it appears that Medical Officer (PW 5) disclosed the name of the accused on her report on being reported to her by the victim on 30.05.2014. But the Ld. Magistrate who recorded the statement of the victim on 02.06.2014 which reveals that proscutrix has not disclosed the name of the accused stating that she will be able to identify them if she sees them. The defence put suggestion by cross examining P.W. 7 stating that the Police case number and the person who has identified the victim have not been mentioned on Ext. 2 which is admitted by the Magistrate who recorded the statement of the victim u/s 164 of the Cr.P.C. On perusal of Ext. 2 it also appears to me that there is no such specific question to the identity of the accused, but it has been indicated in the statement of the prosecutrix that she will be able to identify them, if she sees them.
- 50. Here it becomes very confusing and doubtful happenings that the same victim who was examined by the Medical Officer on 30.05.2014 made a statement disclosing the name of the accused and same were recorded by P.W. 5 on Ext. 3. After producing her before a Magistrate on 30.05.2014 her statement was recorded

- not on same day, but on 02.06.2014 bringing her back from the State Home where she had not made any disclosure about the name of the accused. This discrepancy appeared in the previous statement of the victim cannot be considered an omission on material point as major contradiction.
- 51. Now in the given circumstances, it appears that the present case is in respect of an offence under POCSO Act and the most of the citations relied upon by the defence are of different cases including the case of murder etc.as already discussed. The prosecution further took reliance on a reported case law Sheo Shankar Singh –vs-State of Jharkhand and another which has been passed in Criminal Appeal No. 791 and 792 of 2005 along with Criminal Appeal No. 793 and 794 of 2005 Umesh Singh –vs-State of Jharkhand and another passed by the Apex Court on 15.04.2011. In the aforesaid judgment Hon'ble Apex Court at para 37 stated as follows-
- " It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provide corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification prade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight

attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate case the Court may accept the evidence of identification in the Court even without insisting on corroboration. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh and Ors –vs-State of M.P. (2003) 5 SCC 746."

" It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See Kanta Prashad –vs-Delhi Admn. AIR 1958 SC 350, Vaikuntam Chandrappa –vs-State of A.P. AIR 1960 SC 1340, Budhsen-vs- State of U.P. (1970) 2 SCC 128 and Rameshwar Singh –vs- State of J&K (1971) 2 SCC.

- 52. With the backdrop of the evidence as already discussed and proposition of law referred by the parties, I would like to place the sequence of happenings and the circumstances that have prevailed in the present case which are as follows-
 - (i) The prosecutrix was watching Bihu function along with her friends at the first hour of the night. Some boys including the accused were also watching the said function behind the prosecutrix and her friends.
 - (ii) During the time of watching the function prosecutrix came alone to urinate and while she was alone she was dragged by two unknown boys and they committed rape upon her one by one in a paddy field at a distance of $\frac{1}{2}$ km. from the pendal of the function.
 - (iii) She was abandoned in the paddy field and after sometime the prosecutrix went out from there and on the way she met her friend Balita and her aunt.
- (iv) She took shelter at their house for the night, and she changed her clothes there without informing anything to her friend Balita at that time.
 - (v) On the following day morning at 9 A.M. she came to the house of one Niati Rabha, relative of Balita where she took breakfast, and on arrival of her father she disclosed the entire incident to him in presence of her friend Balita.

- (vi) Thereafter, the father of the prosecutrix went to the police station along with the prosecutrix and lodged FIR disclosing the name of the accused persons in the FIR.
 - (vii) After lodging of FIR, the victim was examined by a Medical Officer to whom the names of the accused persons were disclosed and the Medical Officer had also mentioned the name of accused persons in his medical report.
 - (viii) Subsequent to that the prosecutrix was examined by a Magistrate where she stated that she will be able to identify the accused if she sees them.
 - (ix) During investigation, the accused persons were arrested by police and forwarded them to Court. After completion of investigation police submitted charge sheet against the accused.
- 53. In the backdrop of the discussion made above, it is established by the prosecution that a girl below the age of 16 years had suffered from aggravated sexual assault committed by two boys of their locality taking advantage of her loneliness outside the Bihu function when she went out for urinate. As such the present case is brought against the accused u/s 6 for committing the offence u/s 5 of the POCSO Act. And in such a case the special provisions laid down under POCSO Act,2012 may be considered for taking resort of Section 29 of the Act which is a clause of presumption and it provides for presumption as to certain offences which reads as under-
 - "29. Presumption as to certain offences- Where a person is prosecuted for committing or abetting or attempting to commit any offence under section 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."

- 54. In a case Dhanwantrai Desai –vs-State of Maharastra the Hon'ble Supreme Court laid down that –Presumptions are rules of evidence and do not conflict with presumption of innocence of the accused for the burden, on the prosecution to prove its case beyond all reasonable doubt, still remains intact. Again in Narayan Govind Gavate Etc.- vs- State of Maharastra it was held that administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence.
- 55. From the above reference it can be laid here that true presumption, whether of law or fact are always rebuttable. In other words, the party against whom the presumption may operate can and must lead evidence to show why the presumption should not be given effect to.
- 56. In our present case in hand, the defence took the plea that accused No. 1 had a conflict of opinion with the father of the prosecutrix as he wanted to give his daughter in marriage with the accused with condition that he should stay within their house as Gharjowai. The plea for another accused is as he is the close friend of the accused No. 1 and they both were falsely implicated in the present case. It is true as referred by the Ld. Defence counsel in his argument that the defence evidence should also be given equal weightage and entitled for equal treatment referring a case law Rambabu –vs-State of Assam.
- 57. The principle laid down in the aforesaid case is undoubtedly admitted principle of law, but by giving equal treatment in this case too, the story narrated by the defence is not found conclusive and it cannot take place as a strong circumstance for rebutting the prosecution case. Not to speak of the law of presumption that requires to be rebutted by the accused as the plea taken by the accused, even if accepted in that case also it is not believable that a lady at the cost of her chastity and social

- status will initiate a proceeding against two of the boys whom she knows from earlier. As such the gap of evidence may be filled up by taking resort of section 29 of the POCSO Act.
- 58. From the entire evidence as already discussed it is found established by prosecution through P.W. 1 and P.W. 2 that it is none but the accused who had committed the alleged offence of aggravated sexual assault in furtherance of common intention of the both. The opinion of Medical Officer found un-rebutted as already discussed and it proves that the age of the victim is below 16 years. The Medical Officer detected recent forceful attempted vaginal penetration and hymen having recent tears at 5 O'clock and 8 O' clock position with oozing of blood from the margins. The offence is committed by two persons for which it becomes an offence u/s 5(g) of the POCSO Act, 2012.
- 59. In the result it is held that prosecution succeeded in proving a case u/s 6 of the POCSO Act, 2012 which has been proved against the accused beyond all reasonable doubt and accordingly, the accused persons are convicted for the offence u/s 6 of the POCSO Act.
- 60. Before awarding sentences, the accused persons are heard on the quantum of sentences. They claim that they are innocent. The age, antecedent of the offenders are considered before awarding sentences. The act of the accused does not deserve leniency, but however, instead of imposing maximum award, considering the age of the offenders, they have been awarded with minimum punishment prescribed by law u/s 6 of the Protection of Children from Sexual Offences Act, 2012. Hence accused persons are convicted and sentenced to undergo RI for 10 (ten) years each with fine of Rs. 5000/- each I/D RI for 2 (two) months each u/s 6 of the Protection of Children from Sexual Offences Act, 2012. The period of imprisonment, if any be set of from the sentences awarded.

61. The seized articles, if any be destroyed in due course of time.

62. It is further recommended as per section 7 of the Protection of Children from Sexual Offences Rule, 2012 R/W sub-section 2 & 3 of section 357(A) of Cr.P.C. that the matter be referred to the Member Secretary, State Legal Service Authority, Assam as District Legal Service Authority is not constituted at Kamrup, Amingaon, by sending a copy of this order along with the address of the prosecutrix in a separate envelop for the purpose of determination of compensation under Victim Compensation Scheme as per provisions of section 357A(5) of Cr.P.C.

A free copy of judgment shall be given to the convict. Another copy of this order and judgment shall be sent to the District Magistrate, Kamrup, Amingaon in compliance with section 365 Cr.P.C.

Given under my hand and seal of this Court on this 19^{th} day of March, 2018.

Special Judge Kamrup, Amingaon

Dictated and corrected by me

Special Judge, Kamrup, Amingaon

Typed by Shri B. Bhattacharjya Stenographer

Appendix

Prosecution witnesses

- P.W.1 -Sri Barun Sangma
- P.W.2 Miss Krishma G. Sangma
- P.W.3 Smti. Niati Rava
- P.W.4 Sri Nripen Rabha
- P.W.5 Dr. Anurupa Choudhury
- P.W.6 Sri Samudra Rabha
- P.W.7 Sri Rana Dutta
- P.W. 8 Jagat Chutia

PROSECUTION EXHIBITS

- Ext. 1 FIR
- Ext. 2 Section 164 statement of the victim
- Ext.3 Medical report
- Ext. 5 Printed form of FIR
- Ext. 6- Forwarding for medical examination.
- Ext. 7 Charge sheet

Special Judge Kamrup Amingaon