

IN THE COURT OF THE SPECIAL JUDGE, NAGAON.

PRESENT : Smti. Rita Kar,
Special Judge,
Nagaon

SPECIAL(POCSO) CASE NO.23(N) OF 2018

State of Assam **Complainant**

-Versus -

1. Zakir Hussain
2. Jubeda Khatun
3. Abdul Rezak
4. Muklesur Rahman
5. Fakaruddin and
6. Abdul Rashid

Accused Persons

4-9-18
Special Judge,
Nagaon :: Assam

A P P E A R A N C E

For the Complainant : Sri M.J.Neog,
Special Public Prosecutor.

For accused Zakir Hussain : Sri M.C.Das, Advocate.
(In custody) Legal Aid Counsel
Accused Abdul Rezak and
Jubeda Khatun has also engaged : Sri M.C.Das, Advocate as
Private Defence counsel.

For the accused Muklesur Rahman,
Fakaruddin and Abdul Rashid : Sri Rafique Ullah,
Advocate.

Date of evidences :
**14-05-2018, 15-05-2018, 16-05-2018,
17-05-2018, 18-05-2018, 19-05-2018,
21-05-2018, 22-05-2018, 23-05-2018,
24-05-2018, 25-05-2018, 28-05-2018,
29-05-2018, 31-05-2018, 01-06-2018,
02-06-2018, 04-06-2018, 05-06-2018,
06-06-2018, 07-06-2018, 08-06-2018,
11-06-2018, 12-06-2018, 13-06-2018,
14-06-2018, 18-06-2018, 25-06-2018,**

26-06-2018, 27-06-2018, 28-06-2018.

Date of defence evidences : 27-07-2018 and 09-08-2018.

**Date of Arguments : 23-08-2018, 24-08-2018, 27-08-2018,
28-08-2018 and 29-08-2018.**

Date of Judgment : 04-09-2018

JUDGMENT

F-9-18
Special Judge,
Nagaon :: Assam

1. The prosecution case in nutshell is that on 23-03-2018 informant, Md. Sharfat Ali lodged an FIR with the Officer-in-charge of Batadraba Police Station alleging that on 23-03-2018 at 1.30 p.m. taking the advantage of absence of their family members in the house, accused Zakir Hussain and **his two associates (who are child in conflict-with-law) hereinafter will be referred as CCL or CCLs**, trespassed into their house and at first committed rape on his 12 years minor daughter, namely 'X' by gagging her mouth with cloth and handkerchief and then set fire on her body by pouring kerosene oil which was brought by him to pump out water from the pond. Subsequently, they came to their house and found her daughter in grave condition and as such shifted her to Nagaon Civil hospital for treatment and on asking her daughter, she stated that the above named three accused persons forcefully committed rape and then set fire on her body. Although his daughter was shifted to Nagaon Civil Hospital but for her better treatment doctor referred her to G.M.C.H., subsequently she died at G.M.C.H which was informed to him by his son. Hence, the F.I.R.

2. On receiving the F.I.R., the Officer-in-charge of Batadraba Police Station accordingly entered the GDE No.447 dated 23-03-2018 and registered the Batadraba P.S. Case No. 64/2018 U/s. 448/376(D)/201/302 IPC R/W 4 of POCSO Act against accused Zakir Hussain and two C.C.Ls and started usual investigation thereon. Upon

completion of the investigation police laid charge sheet in the case U/s. 448/376(D)/201/302 IPC R/W Section 6 of POCSO Act against accused Zakir Hussain and two CCLs while charge u/s 120(B)/212/201 IPC is framed against accused Abdul Razzeck, Jubeda Khatun, Abdul Rashid, Muklesur Rahman and Fakaruddin.

3. Accordingly, accused persons, namely, Zakir Hussain, Jubeda Khatun, Abdul Rezzak, Muklesur Rahman, Fakaruddin and Abdul Rashid were furnished with all the necessary copies as required U/s. 207 of Cr.P.C by the court.

4. After hearing both sides and perusal of papers u/s 173 of Cr.P.C, charge u/s 448/302/201 IPC Read with Section 6 of the POCSO Act is framed against accused Zakir Hussain. Charge u/s 120(B)/212 IPC is slapped against accused Jubeda Khatun, Muklesur Rahman, Abdul Rashid, Abdul Rezzak. Charge against accused Fakaruddin is framed u/s 202 IPC. The charges were read over and explained to all the accused persons and they pleaded not guilty and claimed to be tried.

*4/9/18
Special Judge,
Naqaon :: Assam*

5. During trial of the case the prosecution side examined altogether 46 PWs. Accused persons were examined u/s 313 Cr.P.C. The defence side examined 3(three) witnesses in their support. Defense plea is of total denial of the prosecution case.

6. Points for decision in respect of accused Zakir Hussain :-

(a)(i) Whether Zakir Hussain on or about the 23-03-2018 at about 1.30 p.m., committed criminal trespassed into the house of Sarfat Ali alongwith two other C.C.L with intent to commit offence and thereby committed an offence punishable U/s. 448 of IPC ?

ii) Whether on or about the same day, time and place accused Zakir Hussain along with two C.C.L committed gang penetrative sexual assault on 'X' a girl of 9 years and

thereby committed an offence punishable u/s 6 of POCSO Act ?

- iii) Whether on or about the same day, time and place accused Zakir Hussain along with two CCL committed murder by causing the death of 'X' and thereby committed an offence punishable under section 302 IPC ?
- (iv) Whether on or about the same day, time and place Zakir put fire on 'X' so to cause disappearance of evidence of committing penetrative sexual assault on her and thereby committed an offence punishable u/s 201 of IPC ?

Points for determination in respect of accused Abdul Rezzak, Jubeda Khatun, Muklesur Rahman and Abdul Rashid .

- Ram
4-9-18
Special Judge,
Nagaon :: Assam*
- (b)(i)** Whether on or about the 23-03-2018 the accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid agreed to screen the offender Zakir Hussain from punishment and in pursuance of the said agreement caused Zakir to escape and thereby committed an offence punishable U/s. 120-B of IPC ?
 - ii) Whether on or about the 23-03-2018 accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid harboured or concealed the offender Zakir Hussain so to screen him from punishment and thereby committed an offence punishable u/s 212 IPC ?

Points for determination in respect of accused Fakaruddin :-

- (c)(i)** Whether knowing or having reason to believe that on or about 23-03-2018 accused Zakir and other committed rape and murder of the daughter of informant at Lalung gaon and accused Fakaruddin intentionally ommitted to give information of its commission, which he was legally bound to give information and thereby committed an offence punishable U/s. 202 of IPC ?

7. Gist of prosecution evidence.

Now, let us consider what are the evidence adduced by these PWs.

P.W. 1, Sarfat Ali has deposed that incident took place on 23-03-2018 at about 1.30 p.m. At the time of incident he was working in his field along with his wife and one daughter. Then he heard hue and cry and saw smoke coming out from his house. He came running to his house and found her daughter namely, 'X' lying on the ground and her body was burnt. Then he queried his daughter what had happened to her. His daughter then told him that Zakir and two C.C.Ls committed rape on her by gagging her mouth and thereafter tore her urinated organ with a knife. He further stated that his daughter also told him that Zakir directed one of the CCLs to bring oil and pour on her body. Thereafter one of the specified CCLs poured oil on her body and Zakir set fire on her body. PW 1 further deposed that thereafter ambulance were called on and somebody informed the police. After the ambulance came, the girl was shifted to Nagaon Civil Hospital. He also accompanied with his daughter. After sometime, the doctor of Civil Hospital referred his daughter to G.M.C.H. At Guwahati Hospital, doctor declared his daughter dead. On the next day, the dead-body of his daughter was shown to him. He further stated that after performing post-mortem examination, dead-body of his daughter was handed over to them. Thereafter they came back along with the dead-body. PW 1 further deposed that on the day of incident at about 11 p.m. he lodged the Ejahar. Police recorded his statement. Police also produced him before Magistrate and caused his statement recorded.

PW 2, Murshida Begum has deposed that the occurrence took place on the last part of this March, on a day, at 1.30 p.m. At that time she was sleeping along with her one month infant. She further stated that then she heard hue and cry from the house of her father-in-

*For
4-9-18
Special Judge,
Nagaon :: Assam*

law. On hearing hue and cry she came out from her house and saw accused Zakir Hussain and the two C.C.Ls going away from her father-in-law's house. She further stated that on noticing smoke coming out from her father-in-law's house, she went inside and saw fire on the body of 'X'. She further stated that on her alarming, neighbouring people came there and doused fire on the body of the 'X'. Thereafter, her father-in-law, mother-in-law and her elder sister-in-law came there on hearing noise of the people. She further deposed that then her father-in-law asked to her sister-in-law (deceased) that how it happened. Then 'X' told him that Zakir and the two C.C.Ls committed rape on her and tore her private part with a knife. PW 2 further told that 'X' had also told her father-in-law that accused gagged her mouth, tied her hands and legs and then Zakir Hussain asked one of the specified C.C.Ls to bring oil from the adjacent room and to pour oil on her body and thereafter one of the C.C.Ls poured oil and Zakir lit the fire on her body with a match stick. Thereafter, attending people called 108 ambulance and shifted 'X' to Nagaon Civil Hospital and from Nagaon, 'X' was shifted to Guwahati and subsequently she died at Guwahati. She also deposed that her father-in-law lodged a case and police during investigation recorded her statement. From their house, police seized one kerosene oil gallon, a bed, a mat made up of bamboo (locally called dhari), 'X''s part-burnt head hair, cloth with which mouth was gagged, left out burnt part of 'X' clothes. She also stated that after 4 days of incident police seized some soil from the place of occurrence. Ext.1 is the seizure list, Ext.1(1) is her signature, Ext.2 is another seizure list and Ext.2(1) is her signature. PW 2 further deposed that in the court except the bed, she could see all other seized items. Material Ext.A is the kerosene gallon, Material Ext.B is the part burnt piece of clothes of 'X', Ext.C is the 'dhari' (mats made up of bamboo), Material Ext.D is the seized land. Police produced her before a Magistrate and caused recorded her statement. Ext.3 is the her statement recorded by Magistrate and Ext.3(1) and Ext.3(2) is her signatures.

JH 9-18
Special Judge,
Nagaon :: Assam

PW 3, Nur Mohammad Faruki has deposed that incident was of 23-03-2018 and he heard that the incident took place at around 1/1.30 p.m. and at that time he was on his N.R.C duty. He deposed that in the evening at around 3.30 p.m. while he was returning from his N.R.C. duty, he heard from the village people that there occurred a serious incident in the house of Sarafat Ali. Getting the information, he went to the house of Sarafat Ali and found about 200 to 300 people congregated there and police were also present. This witness further stated that he could know from the daughter-in-law of Sarafat, namely Murshida that while 'X' was sleeping after she came from school, then accused Zakir and the two C.C.Ls committed rape on her and thereafter lit fire on her body. Police seized gallon, bed, mat, half burnt hair, half burnt clothes from the place of occurrence and he put his signature in the seizure list Ext.1 vide Ext.1(2) . He deposed that seized materials are seen in the court and police recorded his statement.

Ran
4-9-18
Special Judge,
Nagaon :: Assam

PW 4, Safiqul Islam has deposed that occurrence took place on 23-03-2018 and on the day of incident at about 3.30 p.m. he was in his house. At that time he heard noises of people in the house of Sarafat Ali, so he rushed there. He further deposed that at the place of occurrence, he heard from the other people that Zakir Hussain and the two C.C.Ls after committing bad work (intercourse) set fire on her body. He also deposed that the daughter-in-law of Sarafat, namely, Murshida told them that Zakir Hussain and the two C.C.Ls after committing rape (bad work) left the spot from the back-door. He also deposed that he had seen police at the place of occurrence and police seized a bed, a mat, a gallon, gagging cloth and half burnt hair from the room of the occurrence and obtained his signature in Ext.1, seizure list vide Ext.1(3). He deposed that he has seen the seized items in the court. PW 4 further deposed that when he reached at the place of occurrence, the 'X' was just shifted to Nagaon Civil Hospital. After about 3/4 days of the incident, police went to the school of Zakir Hussain, the two C.C.Ls and 'X' and seized some documents. At the time of seizure, he was present and he put his signature in the seizure list. Ext.4 is the seizure list and Ext.4(1) is his signature. PW 4 deposed that on the next date

when police visited the school, they could know that Zakir Hussain was brought to the Nagaon Sadar Police Station. Thereafter he along with five other people went to the Police Station. He further deposed that when police interrogated Zakir, he admitted the incident and also told police that he would show the place of occurrence. Thereafter, police took Zakir Hussain to the house of Sarfat Ali and then Isfakur, father of Sofiqul Islam namely, Abdul Barek and he accompanied them. After reaching the place of occurrence, Zakir elaborately narrated how he had committed the incident. PW 4 further deposed that thereafter police took Zakir to his house and he (accused) showed a lungi spreading on a bicycle which the accused was wearing at the time of committing the offence. Police seized the said lungi and he put his signature on the seizure list. Ext.5 is the seizure list and Ext.5(1) is his signature. He further deposed that the seized lungi is seen in the court and Mat. Ext.E is the said seized lungi. Police recorded his statement.

*Ran
Special Judge,
Nagaon :: Assam*

PW 5, Nazimul Hoque has deposed that on last 24-03-2018 he went to Batadraba Police Station for some business and at that time it was about 2/2.30 p.m. At the police station he met the two C.C.Ls . Police seized the wearing Army uniform half pant of one of the C.C.Ls and wearing jeans pant of another C.C.Ls. Ext.6 is the said seizure list and Ext.6(1) is his signature. Ext.7 is the another seizure list and Ext.7(1) is his signature.

PW 6, Sofiqul Islam, S/O Abdul Barik Ahmed has deposed that occurrence took place in the current year of March. On the relevant day he heard about the incident at about 2 p.m. of the day but he did not visit the place of occurrence. On the day of incident at about 11/11.30 p.m. of the night while he was guarding a N.R.C Centre near the Batadraba Police Station as Secretary of V.D.P., at that time Sofiqul Islam, S/O late Hajarat Ali and Sarfat Ali came to the Police Station and Sarfat Ali asked him to write an ejahar. He further deposed that on asking about the incident, Sarfat stated him that on that day at about 1/1.30 p.m. while they were not in the house, then Zakir Hussain and the two C.C.Ls came to their house and committed rape on his

daughter and thereafter poured kerosene oil and set fire on her body. His daughter was brought to the Nagaon Civil Hospital but finding her condition critical she was referred to Guwahati but at Guwahati she succumbed to her injuries. He further deposed that as per version of Sarafat Ali he wrote the ejahar. Ext.8 is the ejahar and Ext.8(1) is his signature as writer of the ejahar. In the ejahar Sarafat put his thumb impression. PW 6 further deposed that on the next day he again visited the Police Station and at that time it was about 1/1.30 p.m. and he could see police interrogating the two C.C.Ls . Police seized wearing shorts (half pant) of one of the C.C.Ls and wearing jeans long pant (trousers) and his signature was obtained in the seizure list. Ext.6 and Ext.7 are the seizure list while Ext.6(2) and 7(2) are his signatures. PW 6 heard that on 28-03-2018 accused Zakir was arrested by police as such he along with another Sofiqul Islam, Isfaqur Rahman came to Nagaon Sadar P.S. and saw police interrogating Zakir. PW 6 further deposed that then Zakir admitted before police that he along with the two C.C.Ls committed the offence and also told that he could show the place and also could tell how he did the incident and further told that he could show the lungi which he was wearing at the time of incident. Then police took Zakir along with two Magistrates and video photographer to the house of Sarafat Ali and they were also with them. He further deposed that then Zakir elaborately told them how they entered into the house, through which side they went out, wherefrom they had brought the kerosene oil. Zakir also told them that while they were leaving the house from the backside, then Murshida saw them. Thereafter Zakir led the police to his own house and showed a lungi kept in a room on a bicycle. Police accordingly seized the lungi and obtained his signature in the seizure list. Ext.5 is the seizure list and Ext.5(1) is his signature. He could see the seized lungi in the court. During investigation police recorded his statement.

PW 7, Safiqul Islam, S/O late Zafar Ali has deposed that on 27-03-2018 police visited to their Lalung Gaon L.P. school and sought him Admission Register in respect of 'X', the two C.C.Ls and Zakir Hussain and accordingly he placed the Admission Register of 2003 and

*Ram
U-9-18*
Special Judge,
Nagaon :: Assam

Class IV and V Attendance Registers to Police. He also deposed that on examining their admission register he issued one School Certificate in the name of Zakir. Police accordingly seized the said Admission register, Attendance Register and School Certificate and obtained his signature in the seizure list. Ext.9 is the said seizure list and Ext.9(1) is his signature. The police vide another seizure list seized remaining three school certificates and Ext.4 is the said seizure list, Ext.4(2) is his signature and seized items are seen in the court. Mat.Ext.F is the certificate issued in the name of 'X', Mat. Ext.G is the certificate issued in the name of one of the C.C.Ls, Mat. Ext.H is the certificate issued in the name of another C.C.L, Mat. Ext.I is the certificate issued in the name of Zakir Hussain, Mat. Ext.J is the attendance Register of 2018 of class IV (four), Mat. Ext.K is the Attendance Register of 2018 of class V (five), Mat. Ext.L is the Admission register of 2003. Police recorded his statement.

*Special Judge,
Nagaon :: Assam*

PW 8, Habibur Rahman has deposed that for the incident that took place on 23-03-2018 in connection with Batadraba P.S. Case No.64/18, the Supdt. of Police formed a team to apprehend the miscreants. Accordingly he engaged a source and on 25-03-2018, in the evening around 4 p.m. his source informed him that accused Zakir Hussain is at Laogaon and he asked the source to confirm his exact location and thereafter he reported the matter to the Supdt. of Police who in turn asked him to keep the information secretly. Later on at about 6 p.m., Addl. S.P. after confirming the mobile location, directed them to go to that place. Thereafter they kept watch on both the roads leading from Laugaon to Nagaon. At that time SI Dhiren Kakati, in-charge, Traffic and other three police staff were with him and they were in a private vehicle. He further deposed that while they were waiting at Gousala at about 7 p.m., his source informed over phone that Zakir Hussain, his mother along with few others were leaving Laugaon to Nagaon by a field route. Thereafter they left Gousala road and moved to the road that leads Teliapati to Laugaon. In the Teliapati to Laugaon road after crossing a bridge and proceeding a little distance, they could see Zakir climbing on embankment wearing black shirt followed by a

lady. When he addressed Zakir with his name, he stopped and then they apprehended Zakir, then the mother of Zakir urged them to take her also along with them. Thereafter they boarded them in their vehicle to Nagaon Sadar Police Station. Apprehended persons were interrogated at the police station and they informed them that after reaching Chaparmukh they have planned to go to Kerela by Kerela going train. On their further interrogation, they came to know that Zakir was taking shelter at Laugaon in the house of Abdul Malek and Zakir's brother-in-law, mother, brother and father arranged money to deport him to Kerela. Investigating Officer recorded his statement.

Rehena
*Special Judge,
 Nagaon :: Assam*

PW 9, Wahida Khatun has deposed that 'X', Rehena, Maina, one of the C.C.Ls and she read in the same class and are friends. She deposed that while police recorded her statement at their school at that time their teacher Smti. Trishna Priya Buragohain was present. She further deposed that she has stated before the police that 'X' told her that one of the CCLs loved her and she also loved the C.C.L. PW 9 further deposed that before one month of police visit in their school, 'X' told all these things to her. She deposed that 'X' also told her that she had been loving one of the CCLs since one year and she made this statement before police. She also deposed that she has stated before police that they sit near to each other in the class, wink and chat with each other. She also deposed that she has stated before the police that sometimes another CCL came to their class when their sir and madam were not in class and quarrelled with 'X' and sometimes beat her also then 'X' used to cry. She deposed that one of the CCLs is the son of 'X' 's elder uncle. PW 9 deposed that she did not know the reason of their quarrel.

PW 10, Trishnapriya Buragohain(teacher) has deposed that after 4/5 days of death of 'X' police came to their school and in presence of her and another teacher Kabita Biswas, statements of Wahida Khatun, Maina Sultana and Rehena Begam were recorded.

PW 11, Smti. Bipasha Kalita has deposed that on 28-03-2018 she was working in the office of D.C.Office, Nagaon as Assistant Commissioner and on that day at about 12.30 a.m., Deputy Commissioner, Nagaon has ordered her to go to the place of occurrence in respect of Batadraba P.S. Case No.64/18. Accordingly, she and her colleague, Assistant Commissioner Rinku Boro, Police, one Camera-man, taking Zakir along with them went to the place of occurrence. At the place of occurrence Zakir narrated how he did the incident. Thereafter Zakir led them to his house which is situated at a little distance from the place of occurrence and showed a lungi kept on a bicycle and told them that on the day of incident he was wearing the said lungi. Police seized the said lungi in front of her and obtained her signature in the seizure list. Ext.5 is the seizure list and Ext.5(3) is her signature. Seized lungi is seen in the court. Police recorded her statement.

*For
4-9-18
Special Judge,
Nagaon :: Assam*

P.W.12, Kabita Biswas has deposed that she is a teacher of Lalung-gaon New L.P. School. On 27-03-2018 police came to their school in connection with the incident of 'X', who was a student of class V(five) of their school and recorded the statement of 'X' 's classmates Wahida Khatun, Maina, Rehena and four of the teachers.

PW 13, Md. Ataur Rahman has deposed that he is a teacher of Lalung-gaon New L.P. School. On 27-03-2018 he was at school and on that day at about 10.30 a.m. police came to their school in connection with a case registered for the incident of their student namely, 'X'. Police enquired him in connection with student of their school namely, 'X', two of the C.C.Ls and Zakir Hussain and from their school police seized Attendance Registers of class IV (four) and class V(five) and also 2003, Admission Register vide Ext.9 and Ext.9(2) is his signature. Vide Ext.9, police seized the school certificate of accused Zakir Hussain. Police also seized the school certificates of 'X', and two of the C.C.Ls Ext.4 is the said seizure list and Ext.4(3) is his signature. He deposed that said seized items is seen in the court. Police recorded his statement.

PW 14, Halima Khatun has deposed that incident was occurred more than a two months ago, on a day time at about 1.30/2.00 p.m and at that time she was in her house. She deposed that hearing hue and cry towards their western side, she rushed to the house of Sarafat and found 'X' lying on the ground in burn condition. Fire was extinguished and after 10/15 minutes, 'X' started to breathe. Thereafter she and Murshida lifted 'X' on a bed and at that time Sarafat came from field and asked 'X' what had happened to her. Then 'X' told them that Zakir Hussain and the two of the C.C.Ls committed rape on her and torn her urinated organ and thereafter set fire on her body. Thereafter 108 ambulance was called and shifted 'X' to Nagaon Civil Hospital and then again shifted her to Guwahati but she died at Guwahati . Police recorded her statement and also caused recorded her statement before a Magistrate. Ext.10 is her statement before Magistrate and Ext.10(1) and Ext.10(2) are her signatures.

Ran
Special Judge,
Nagaon :: Assam
9-18

PW 15, Mokshed Ali has deposed that incident took place prior to 2 months ago. The incident occurred in day time at about 1/1.30 p.m. and at that time he was in his house. At that time he heard hue and cry that fire was caught in the house of Sarafat and as such he went to the house of Sarafat with a bucket and saw fire on the body of Sarafat Ali's daughter and he doused fire by splashing water. He deposed that out of fear he came back to his house but after sometime he came again and heard from the mother, father and other persons that Zakir and two of the CCLs committed rape on her. (At this stage PW 15 is declared hostile by the prosecution).

PW 16, Wahida Begum has deposed that incident occurred two months ago in a day time at about 1/1.30 p.m. and at that time she was sleeping in her house after taking lunch. She deposed that at that time she heard that fire was caught in the house of Sarafat and as such she carried bucket of water from a pond and went to the house of Sarafat and saw fire on the body of 'X'. She deposed that she poured water on the body of 'X' and out of panic she came back to her house.

She deposed that she again went to the house of Sarafat Ali's house and learnt that 'X' was shifted to Nagaon Civil Hospital and further heard that Zakir and the two C.C.Ls committed rape on 'X' and set fire after pouring kerosene oil. Police recorded his statement and also got recorded her statement before Magistrate.

PW 17, Rinku Boro has deposed that on 28-03-2018 she was serving as Assisstant Commissioner in the office of the Deputy Commissioner, Nagaon and on that day, the Deputy Commissioner and Addl. District Magistrate instructed her and her colleague Bipasha Kalita that in connection with Batadraba incident, the accused will be taken to the place of occurrence at Lalung gaon and they have also to go with them. As per direction, she and Bipasha Kalita, accompanied by police escort went to Lalung gaon. At first they visited the place of occurrence where the accused narrated elaborately how he did the incident. Accused told them that after the girl came to her house he(Zakir) along with two others entered into her house and fastened the mouth of the girl and committed rape on her and thereafter collected a kerosene gallon from other side of the partitioned room and poured it and set fire on her body. Thereafter they (accused persons) fled away from the backside door of the house. Police drew sketch map of the place of occurrence and the accompanied photographer did the videography. Ext.11 is the sketch map, Ext.11(1) is her signature. From the place of occurrence, the accused (Zakir) took them to his house and showed a lungi unfurled on a bicycle and told them that at the time of committing the offence he was wearing the lungi. Police seized the said lungi and also recorded her statement.

PW 18, Md. Ispakur Rahman has deposed that incident occurred in the month of March of this year. He heard that accused Zakir and the two C.C.Ls committed rape on 'X' and set fire on her body. After 4/5 days of the incident, he came to Batadraba and know that police has arrested accused Zakir, so he along with 4/5 inhabitants of Lalung gaon came to Nagaon Sadar Police Station. He further deposed that at the police station, a police of traffic branch

Ranu
Special Judge,
Nagaon :: Assam
q-18

interrogated accused Zakir in front of them where Zakir admitted that he along with accused the two C.C.Ls committed the offence. Police asked Zakir to show the place of occurrence, then Zakir told them that he could show the place of occurrence and further added that he could also show the lungi which he was wearing at the time of committing the offence. Thereafter, Magistrate, one photographer, DSP and police staff along with them went to the house of 'X'. Zakir described the police how he did the offence. Zakir told that he along with the two C.C.Ls together committed rape on 'X' and thinking that if 'X' remains alive there would be danger, so, they think better to kill her, and as such from the adjacent room they brought a kerosene gallon, then one of the CCLs poured kerosene on 'X' and Zakir lit fire on her body and thereafter from the back-door they skipped off but at that time the sister-in-law of 'X', namely, Murshida saw them. Police drew sketch map and video recorded the place of occurrence. When police asked Zakir about his lungi, Zakir took the police and Magistrate to his house and showed a lungi in a room spread over a bicycle which the police seized it. Police recorded his statement.

R
4-9-18
Special Judge,
Nagaon :: Assam

PW 19, Ali Hussain has deposed that occurrence took place 2 months ago, on a day at about 12.00/1.00 O'Clock. At that time he cross-over Raha by driving his vehicle and was at Bhurburi. At about 2/2.30 p.m. of the day, he was informed over phone from his house that his sister was raped and set fire on her body. After reaching home, at around 4 p.m. he came to Nagaon Civil Hospital and had seen the body of 'X' burnt with fire. He further deposed that he met his father, mother and one another sister at the hospital and 'X' was speaking at that time. PW 19 further deposed that on asking, 'X' told that accused Zakir Hussain and the two C.C.Ls committed rape on her and thereafter they splashed kerosene oil and set fire on her and further torn her urinating organ with a knife. At around 7.30/8.00 p.m. his sister was referred to Gauhati Medical College Hospital from Nagaon Hospital. After his sister was shifted to Gauhati Medical College Hospital, the doctor declared her dead and during that night they stayed at Guwahati. On the next day at about 12 O'Clock his father

visited Guwahati and they identified the dead-body and at that time Magistrate was present. He further deposed that at the time of identification he put his thumb impression in a paper. Police also recorded his evidence during investigation.

PW 20, Amir Hamja has deposed that on 24-03-2018 he was serving as ASI at Doomdumia P.P., then Batadraba P.S. directed him in regards of the incident occurred at Batadraba on 23-03-2018, the deceased is at Gauhati Medical College Hospital and inquest and post-mortem would be held on the dead-body, so he has to go there. As per the direction, he along with H/C Jiten Bordoloi went to the G.M.C.H and then the police of Bhangagarh P.S. conducted Inquest over the dead body by a Magistrate and at the time of inquest he was present there. He further deposed that the photographer who accompanied with them did the videography and the doctor of GMCH conducted the post-mortem examination over the dead-body and at that time he was present there. After the post-mortem was over, he along with the family members of the deceased brought escorted the dead body to Batadraba and handed over to the family members of the deceased. Police recorded his statement.

*4/9/18
Special Judge,
Nagaon :: Assam*

PW 21, Jiten Bordoloi has deposed that on 24-03-2018 he was serving at Batadraba P.S. and on that day the Officer-in-charge of the P.S. directed him to go to Guwahati along with ASI Amir Hamja and further directed them that in connection with the incident of Batadraba P.S. at Lalung gaon, they would have to bring the dead body of deceased after the inquest and post-mortem is over at G.M.C.H to Batradaba. As per the direction he along with A.S.I Amir Hamja went to G.M.C.H and there Inquest over the dead-body was caused by a Magistrate and he was present at that time. After the post-mortem examination on the dead body was over then he along with A.S.I Amir Hamja, family members of the deceased brought escorted the dead body to Batadraba. Police recorded his statement.

PW 22, Srabana Sonowal has deposed that on 24-03-2018 she was posted at Guwahati as Asstt. Commissioner in the office of the Deputy Commissioner, Kamrup (M) and on that day, A.D.C (Magistracy) directed her to conduct inquest over a dead body at G.M.C.H. Accordingly she went to Bhangagarh P.S. and thereafter to the Morgue of G.M.C.H which is nearer to Bhangagarh police Station. In the morgue, she conducted inquest over the dead-body of deceased, age 12 years, D/O complainant of village Dhanibheti, P.S. Batadraba. The deceased was identified by Md. Sarfat Ali and Ali Hussain. She found burn injury on the dead body. The body was completely burn. To ascertain the cause of death, she suggested for P.M. examination. After performing inquest she prepared the inquest report. Ext.12 is the inquest report. Ext.12(1), 12(2), 12(3), 12(4), 12(5) and 12(6) are her signatures.

*Ran
4-9-18
Special Judge,
Nagaon :: Assam*

PW 23, Dr. Kapil Pator has deposed that on 24-03-2018 he was posted at Batadraba M.P.H.C, Nagaon as Medical and Health Officer and on that day at about 3.10 p.m. he examined one of the CCLs village Lalung gaon, P.S. Batadraba produced by SI Maheswar Saikia before him and was registered in their P.H.C vide M/L 1454 and found the following :-

An abrasion seen on glans pennis at the time of examination. Nature of injury- simple. Ext.13 is his report and Ext.13(1) is his signature.

PW 24, Zakir Hussain, S/O Md. Abdul Rashid has deposed that incident occurred prior to two months ago. At that time he was in his house and at around 3/3.30 p.m. when he awoke up from his sleep, he saw many people passing by their road. On asking the people, they told him that they were going to Sarfat Ali's house and further told that Sarfat daughter was burnt with fire. Thereafter he also went to the house of Sarfat and saw many people gather there and also police vehicle and people were narrating that Zakir Hussain and his elder uncle's son and one another boy committed bad work to the daughter

of Sarfat and thereafter set ablazed. Police seized bed(paleng), mat(dhari), clothes and one gallon from the house of Sarfat Ali. Ext.1 is the seizure list, Ext.1(4) is his signature. Seized materials are seen in the court. Police recorded his statement.

PW 25, Raiman Nessa has deposed that incident took place more than a two months ago. The incident took place at about 1/1.30 p.m. At the time of incident she along with her husband and daughter were working at their field. At that time, in front of their house many people gather and were making hue and cry. On hearing hue and cry her husband and daughter rushed there and she also followed them. At the house, she saw that her daughter (since deceased) body was set ablazed and she was lying in bed. Then her husband asked her daughter (since deceased), " what happened to you, tell me." Then deceased told that Zakir Hussain, the two C.C.Ls committed rape on her and fastened her hands and legs and thereafter poured kerosene oil and alight fire. Deceased also stated that one of the CCLs with a knife inserted in her private part and tore up her internal parts. Deceased further added that if she is allowed to stay alive, then it would be dangerous for them, therefore, it would be good for them to kill her. Subsequently, they shifted the deceased to Nagaon Civil Hospital in a vehicle. PW 25 further deposed that she, father of the deceased, her elder daughter and one woman accompanied with the deceased. She further deposed that when doctor asked her about the relationship of her with the deceased, then she told that deceased is her daughter. She further deposed that then the doctor asked her to go from there and they treated the deceased. She further deposed that she could not say the kind of treatment provided to her and on the same day at about 6/6.30 p.m. her daughter was shifted to Guwahati. She and her elder daughter accompanied the victim (since deceased) to Guwahati and at Guwahati Hospital doctor declared her daughter dead. On the next day, they brought the dead-body of deceased to their home. Police recorded her statement in connection with the incident and caused her statement recorded before Magistrate and she put her thumb impression.

RJ
4-9-18
Special Judge,
Nagaon :: Assam

PW 26, Sanjita Khatun has deposed that occurrence took place about 2 months ago, on a day at about 1/1.30 p.m. At that time she was at the field along with her father, then they heard hue and cry that fire was caught in their house. Her father proceeded ahead of them and then she and her mother followed him to their house. At the house they found that body of deceased was set ablazed and people lifted her on a bed. Her father asked deceased what had happened to her and then her sister (X) told that Zakir the two C.C.Ls committed raped by tying her hands, legs and mouth and tore her private part with a knife and subsequently, Zakir told that if she lived alife, it would be dangerous to them and Zakir instructed one of the CCLs to bring a kerosene gallon. One CCL brought kerosene gallon already in their house and splash on the body of 'X' and Zakir set fire on her. Thereafter an ambulance was called and 'X' was shifted to Nagaon Civil Hospital and she, her father, mother and one woman also went to Nagaon Hospital. After a little treatment at Nagaon Hospital, her sister was asked to shift to Guwahati Hospital. Thereafter she, her father, her mother and brother proceeded to Guwahati but her father came back from half way to Guwahati. After reaching Guwahati Hospital, doctor declared her daughter dead and on the next day they brought the dead body to their house. Police recorded her statement. Police seized about 1 kg of soil from the place of occurrence where in Ext.2 is the said seizure list and Ext.2(2) is her signature. Police also caused her statement recorded before a Magistrate. Ext.14 is her statement before Magistrate and Ext.14(1) and 14(2) are her signatures.

PW 27, Dr. Pallabi Hazarika has deposed that 23-03-2018 she was performing indoor duty from 1.30 p.m. to 5 p.m. at B.P.Civil Hospital, Nagaon. At around 4.30 p.m. Dr. Bhaswati Sharma, who was performing casualty duty informed her over phone that police has submitted a requisition to record a dying declaration of one patient of burn unit. On getting the requisition, she went to burn unit and saw a girl with full body burn and at that time two nurses were attending the girl. Two or three female persons were also there. She deposed that

*Ran
4-9-18*
Special Judge,
Nagaon :: Assam

while she asked about the guardian of the said girl, then a woman identified herself as mother of the said girl. The girl was in conscious condition and the girl told them that she is feeling hot and further asked to make her cold. For recording the treatment of the girl, she sent out other persons to go outside the room. PW 27 further deposed that she was along with the two nurses in the room and then she asked the girl of her name and the name of her father. Thereafter, she recorded her dying declaration. Ext.15 is the carbon copy of requisition of police for recording dying declaration, Ext.15(1) is the signature of Dr. Bhaswati Sharma and her signature is acquainted to her. (Ext.15 is exhibited under objection), Ext.16 is the dying declaration recorded by her, Ext.16(1) is her signature. The dying declaration was subsequently seized by police. Ext.17 is the seizure of dying declaration and Ext.17(1) is her signature. Police recorded her statement.

*To
Special Judge,
Nagaon :: Assam*

PW 28, Dr. Netramoni Kakoti has deposed that on 24-03-2018 he was posted at Gauhati Medical College Hospital, Guwahati as Asstt. Professor and on that day, at about 2.45 p.m. he did the post-mortem examination on the dead-body of 'X', of village Dhaniabheti, P.S. Batadraba, District Nagaon, Assam brought from mosque at G.M.C.H., Bed. No.8 with reference to Bhangagarh P.S. GDE No.500 dated 24-03-2018 which was identified by H/G Sidheswar Kalita and Sarfat Ali. Inquest report and dead body challan were also furnished by police.

On examination he found the followings:-

External Appearance.

One female dead body of average build, swarthy complexion, covered by white cloth, eyes were closed, mouth partly open, body cold on touch, rigormortis - present all over the body. Anus, vagina, brows, eyes laches, axillary hairs, pubic hairs are burnt and singed.

Injuries : - Epidermal as well as dermoepidermal burn face, all sides of the neck, both axilla, all sides of both arms, all sides of both forearms, all sides of both palms front and back of the chest, front and back of the abdomen, perineum, both buttocks, all sides of both thighs, all sides of right leg, all sides of left leg except lateral aspect of left leg. The floor of the burn arms are highly congested, hyperemic, separated from healthy tissues by a red line and covered 96% of total body surface area approximately.

Mark of ligature on neck dissection etc. :- burn injury as described.

Cranium and Spinal Canal.

Scalp- As described, Skull, Vertebrae - Healthy,
Membrane - congested.

Brain - Congested, Spinal Cord- not examined.

Thorax

*R. 4-9-18
Special Judge,
Region :: Assam*

Walis - As described, Ribs & Cartilage- Healthy, Pleuraw - congested, Laryax and trachere - Healthy, Right lung - congested, left lung - congested, Pericardium - congested.

Heart - congested, chambers are full with dark coloured liquid and clotted blood, Vessels - Healthy.

Abdomen.

Walls - As described, Peritonum - congested, Mouth, pharynx, oesophagus - All are healthy, Stomach and its contents- Healthy, contains about 150 gms of partly digested rice mixed with vegetables. Small intestine and its contents - - Healthy, contains digested food particles.

Large intestine and its contents - Healthy, contains fecal matter and gases.

Liver- congested, Spleen - Healthy, Kidneys- congested, Bladder - Healthy and Empty,

Organs of generation:- External - As described, Internal -Uterus- Healthy. Cavity - empty.

Muscles, Bones and Joints.

Injury - As described, Disease or deformity - not detected, Fiacture - Nil, Dislocation - nil.

N.B:- (1) Two glass slides taken from posterior fornix and around the convix, on microscopic examination no spermatozoa seen.

(2) Video Recording was done at the time of P.M examination but C.D not available at the time writing the report. Video recording was done by one Basudev Roy.

The doctor further opined that the death was due to shock , assaulting from burn injury as described, which were ante-mortem and covered 96% of total body surface are approximately.

Time since death - 12 hours to 24 hours (Approximately).

Ext.18 is the post-mortem report and Ext.18(1) is my signature.

R
q-18
Special Judge,
Assam

PW 29, Anjumoni Deka has deposed that on 23-03-2018 she was performing her duty as Staff Nurse at B.P.Civil Hospital and on that day she had her duty from noon 2 p.m. to 8 p.m. of the night. On that day at about 4 p.m. while she was performing duty at burn unit, a burn case was admitted and the patient was of 12 years old female. She started the treatment of the patient. Along with her a student of Red-Cross nurse, Smti. Bhabani Das was also there and immediately they informed the indoor doctor and then indoor Dr. Pallabi Hazarika came there. When Dr. Pallabi Hazarika asked for the guardian, then the mother of the girl gave her presence. Thereafter the doctor sent out the women from the room and asked the girl what had happened to her. Then the girl(patient) narrated that after she came to her house from her school, three boys of their village committed rape on her and poured kerosene oil and set fire on her body. The girl also told the name of the boy as Zakir and the two CCLs. After the version of the girl was reduced to writing by Dr. Pallabi Hazarika, she was asked to put her signature. In Ext.16, Ext.16(2) is her signature. Police recorded her statement.

PW 30, Bhabani Das has deposed that on 23-03-2018 she was discharging duty at B.P.Civil Hospital and on that day she had her

duty from the noon of 2 p.m. to the evening of 8 p.m. On that day at about 4 p.m. one burn injury case of a girl was admitted in their burn unit. Along with her Anjumoni Deka was also performing her duty. They started treatment and informed Dr. Pallabi Hazarika. Dr. Pallabi Hazarika came to their unit and asked the girl whether she can speak or not, then the girl replied that she can speak. When doctor asked the girl how the incident took place, then the girl told that while she was alone in the house after she came from her school, then Zakir and the two CCLs came there and committed rape and poured kerosene oil and set fire on her body. The doctor reduced the version of the girl in writing and obtained her signature. In Ext.16, Ext.16(3) is her signature. Police recorded her statement.

Ranu
u-9-18
Special Judge,
Court :: Assam

PW 31, Dr. Bhaswati Sharma has deposed that on 23-03-2018 she was performing outdoor Emergency duty at B.P.Civil Hospital and on that day in the evening at 3/3.30 p.m. one burn injury girl was brought in the hospital and she arranged the treatment of the girl and admitted her in the burn unit and thereafter she informed the police of B.P.Civil Hospital O.P. After sometime police issued a requisition to record the dying declaration of the girl. Then she informed over phone to Dr. Pallabi Hazarika to record the dying declaration of the girl and police requisition was sent to her through a ward boy. Ext.15 (under objection) is the requisition and Ext.15(1) is her signature.

PW 32, Minakshi Talukdar has deposed that on 03-04-2018 she was performing duty as staff Nurse in surgical ward at B.P.Civil Hospital. She had been discharging her duty from 2 p.m., and around 3.30 p.m. police came to their surgical ward and seized the burn register in connection with Batadraba incident and her signature was obtained. Ext.19 is the said seizure list and Ext.19(2) is her signature. Subsequently police gave zimma of the said burn register to her. She deposed that she has brought the said burn register. Ext.20 is the burn register and Ext.20(1) in page 91 is the relevant entry wherein it was written as "X", Age 12, Sex - female, Religion-Muslim. Police recorded her statement.

PW 33, Ananta Bordoloi has deposed that on 23-03-2018 he was in his duty at B.P.Civil Hospital Out post. On that day, in the evening at about 3.30 p.m. a burn case requisition was issued from the hospital. Thereafter he and ASI Biswajit Nath went to the Emergency Room and noticed a girl with burn injury. Requisition was issued to record the dying declaration which they handed over and the said girl was shifted to burn unit and they also went there. The doctor started treatment and they came back. Subsequently after recording the dying declaration of the girl by the doctor, ASI Biswajit Nath seized the dying declaration. As he was along with the ASI Biswajit, so he also put his signature in the seizure list. Ext.17 is the seizure list and Ext.17(2) is his signature. Police recorded his statement.

*Ran
4-9-18
Special Judge,
Nagaon :: Assam*

PW 34, Minakshi Talukdar has deposed that on 02-04-2018 while she was working as Junior Scientific Officer in the Chemistry Division, Directorate of Forensic Science, Assam, she received a parcel through their director which was sent by Addl. Superintendent of Police, Nagaon in connection with Batadraba P.S. Case No. 64/18 u/s 448/376(D)/201/302 IPC R/W Sec.4 of POCSO Act vide Memo No.IV/167/18/1776 dated 27-03-2018 for chemical examination. She further deposed that the parcel consisted of 4(four) exhibits enclosed in a sealed carton box with cloth cover. The facsimile of the seal was found to be SUPDT. OF POLICE NAGAON. On opening the cloth cover she found as follows:-

- (a) One white coloured 20 litres gallon containing 350 ml blue coloured liquid. Marked as Es -'A' MR No.16/18 ----- Marked again as C-20/18(a)
- (b) One close envelope. Marked as Es-'B' containing few assorted half burnt piece of clothes ----- Marked again as C-20/18(b).

(c) One close envelope containing a polythene packet having a bunch of hair. Marked as Ex. 'C' Marked again as C-20/18(c).

(d) One close polythene packet containing 1 kg soil like material . Marked as Ext.'D' Marked again as C-20/18(d).

She further deposed that the exhibits C-20/18(a), C-20/18(b) and C-20/18(d) indicated the presence of Kerosene oil. She further deposed that according to the report of Biology Division.

"1 Physical and histological examination reveals that the hair sample under exhibit No.C-20/18(c) is partially burnt hair of human being." Ext.21 is her report and Ext.21(1) is her signature.

*Ran
Spatial Judge,
Nagaon :: Assam*

PW 34 further deposed that on 11-04-2018 she also received a parcel through their director which was sent by Superintendent of Police, Nagaon in connection with Batadraba P.S. Case No. 64/18 u/s 448/376(D)/201/302 IPC R/W Sec. 4 of POCSO Act vide Memo No.IV/167/18/1816 dated 29-03-2018 for chemical examination. The parcel consisted of 4(four) exhibits enclosed in a sealed carton box with cloth cover. The facsimile of the seal was found to be SUPDT. OF POLICE NAGAON. She further deposed that on opening the sealed carton box cloth cover it contained :-

(a) One white polythene packet containing a sky coloured Lungi having white colour stripe. Marked as Ex-'A'. ---- Marked again as C-21/18(a)

(b) One pink coloured polythene packet containing one Jeans long pant blue in colour. Marked as Es- 'B' ---- Marked again as C-21/18(b).

(c) One white polythene packet containing a multi coloured (Camoufoge colour) half pant Marked as Ex- 'C'
Marked again as C-21/18(c).

She further deposed that the Exhibits C-21/18(a), C-21/18(b) and C-21/18(c) gave negative tests for kerosene oil.

According to the report of Serology Division - "1. The exhibits C-21/18(c) gave positive test for human semen and exhibits C-21/18(a) and C-21/18(b) gave negative test for semen".

Ext.22 is my report and Ext.22(1) is my signature in the report.

R
4-9-18
Special Judge,
Nagaon :: Assam

PW 35, Fazal Hoque has deposed that incident took place little more than a two months ago. The incident occurred about 1.30 p.m. of the day and at that time he was sleeping in his house. At that time victim's father came to his house and told him that his daughter was set on fire. On enquiring him about the assailant, Sarfat told him that Zakir and the two C.C.Ls set her fire. Victim's father also told him that his daughter is narrating the incident(statement) and he can also asked her. Then he went to the Sarafat Ali's house and found the girl laying on a bed. On enquiring, the girl told him that Zakir and the two C.C.Ls after committing bad work with her set her on fire by pouring kerosene oil. PW 35 further deposed that then he intimated about the incident to the Officer-in-charge of Batadraba P.S. Then the Officer-in-charge, asked him to call an ambulance and to arrange for the treatment of the girl. In the meantime he came to know that some other ambulance has been arranged and the ambulance has reached there. The said ambulance shifted the girl for treatment and was

accompanied by the mother and father of the girl along with two other female members of the village. Subsequently at night, he came to know that the girl was dead. During investigation police recorded his statement.

PW 36, Abdul Jalil has deposed that incident took place about 3 months ago, one day at about 1.30/2.00 p.m. of the day and at that time he was in his house. At that time he noticed people rushing outside and heard from the people that fire was caught to the daughter of Sarafat. After hearing the incident, he went to the house of Sarafat and found many people there and he did not go near the girl. From the people he came to know that the girl was severely burnt and thereafter he called for an ambulance. After about half-an-hour or 40 minutes the ambulance has arrived. The said girl was narrating to the people that Zakir and two C.C.Ls committed bad work on her and set fire by pouring kerosene oil. After the ambulance reached, the girl was shifted to Civil Hospital for treatment. Later at night he came to know that the girl was expired. Police recorded his statement.

*Ran
Special Judge,
Nagaon :: Assam*

PW 37, Basudev Roy has deposed that on 24-03-2018 in connection with the incident of Batadraba, the Supdt. of Police, Nagaon deputed him to G.M.C.H along with two police officers to do the videography of post-mortem of the dead girl. Accordingly he did the videography of the whole post-mortem. After videography was done the dead body was brought to Nagaon with escort and he deposited the video camera to their unit in-charge Joydev Roy. Again on 28-03-2018, Supdt. of Police called him to the Police Station and directed him to go the place of occurrence and to do videography of the explanation given by the accused in respect of the incident. Along with them police

and two Magistrates, one of them is a lady Magistrate also went there. On going with them he visted the place of occurrence i.e, Lalung gaon and then to the house of the accused and he did the videography. Police drew the sketch map of the place of occurrence and obtained his signature. Ext.11 is the sketch map, Ext.11(2) is his signature. Police seized a lungi from the house of accused and obtained his signature. Ext.5 is the seizure list and Ext.5(4) is his signature. Seized lungi is seen in the court. After the videography he handed over his video camera to their Photography unit incharge. After two/three days police seized two video CDs from their photography unit and obtained his signature in the seizure list. Ext.23 is the seizure list and Ext.23(1) is his signature. The seized CD is seen in the court.

*Ran
4/4/18
Special Judge,
Nagaon :: Assam*

PW 38, Joydev Roy has deposed that on 04-04-2018 he was discharing duty at their photography Unit. On that day in connection with Batadraba incident, the Post-mortem videography and the scene of crime creation videography from the memory he prepared CD and the police seized both the CDs from him and took his signature in the seizure list. Ext.23 is the seizure list and Ext.23(2) is his signature. He has seen the seized CD in the court.

PW 39, Mafidul Islam has deposed that incident took place 2/2 ½ months ago. At the time of incident he was out of house for his business and in the evening at 3.30 p.m. when he returned home he heard that Zakir Hussain the two C.C.Ls committed rape on 'X' and caused her death by setting fire on her body. Thereafter he visited to the place of occurrence and on enquiring about the matter from the sister-in-law of 'X', she also told the same fact. Subsequently he came to his house and found that all the family members of Zakir ran way from their house. He further deposed that his house and house of Zakir have same boundary. After two days, he heard that when Zakir and his mother were fleeing away, then police caught them on their path.

PW 40, Abdul Hussain has deposed that on 01-04-2018 police came to his house and took away his Tata Sumo vehicle and the

driver i.e, his son Fakaruddin to the Police Station. Police told him that a case has been instituted and in connection with the case his vehicle and son were taking by them. Subsequently, he went to the police station and the police seized the vehicle and obtained his signature in the seizure list. Ext.24 is the seizure list and Ext.24(1) is his signature. After a week thereafter he went to the Police station with the relevant documents of the vehicle and police seized the documents. Ext.25 is the seizure list and Ext.25(1) is his signature.

PW 41, Ashan Ullah has deposed that on 01-04-2018 he went to Batadraba P.S. to meet accused Fakaruddin and at that time police asked him to put his signature in a paper and accordingly he put his signature and left the police station. Ext.24 is the said paper and Ext.24(2) is his signature.

*R
4-9-18
Special Judge,
Nagaon :: Assam*

PW 42, Biswajit Nath has deposed that on 23-03-2018 he was serving at B.P.Civil Hospital P.P. as in-charge. On that day at about 3.45 p.m. Bhaswati Sharma informed him that one female child about 12/13 years of burn injury had brought to the Emergency and called them to see her. Accordingly he entered the B.P.Civil Hospital P.P. GD. Entry No.312 dated 23-03-2018 and went to the Emergency Ward with constable Ananta Bordoloi and found a girl with burn injury and she was screaming. The name of the girl was 'X' and her accompanied attendance viz. her mother, father and other family members told them that the girl was raped and thereafter set fire on her body. The girl was in unrest condition and screamingly telling that she was raped and thereafter set fire on her body. Accordingly he transmitted the information to the Officer-in-Charge of Nagaon(Sadar) Police Station and the Addl. Supdt. Of Police (HQ) who in turn directed him to issue requisition for recording the dying declaration of the girl and accordingly he issued the requisition for recording the dying declaration to Dr. Bhaswati Sharma and same is received by the doctor. In the meantime the girl was admitted in Surgical III burn unit. Subsequently, the Supdt. of Police assessed the situation at the hospital. The dying declaration of the girl was recorded by the indoor

doctor, Pallabi Hazarika and at 6.30 p.m. he seized the dying declaration and also recorded the statement of seizure witnesses. Subsequently on 03-04-2018 he seized the burn data registry chart from the burn unit but the register was given in zimma of duty nurse Smti. Minakshi Talukdar. He also recorded the statement of seizure witnesses. Ext.26 is the General Diary of B.P.Civil Hospital P.P. from 23-03-2018 to 17-05-2018. Ext.26(1) is the relevant entry of GD.Entry No.312 dated 23-03-2018. Ext.15 (under objection) is the carbon copy of requisition for recording the dying declaration. Ext.17 is the dying declaration seized list and Ext.17(3) is his signature. Ext.19 is seizure list of the burn data Registry Chart and Ext.19(3) is his signature.

*Ram
Special Judge,
Nagaon :: Assam*

PW 43, Sri Naren Ch. Das has deposed that on 24-03-2018 he was serving as attached officer at Bhangagarh Police Station and on that day at 7 a.m. they received a written information from the G.M.C.H. that a girl namely, 'X' was brought dead in connection with the Batadraba P.S., Nagaon and as such inquest is required to perform over the dead body. Accordingly he entered the Bhangagarh P.S. GD.Entry No.500/18 dated 24-03-2018 and the Officer-in-charge directed him to conduct inquest over the dead body by a Magistrate. As per direction of the Officer-in-charge, he arranged for the inquest and informed Executive Magistrate. After getting the information, the Magistrate went to the morgue of G.M.C.H and inquest was done with a photo-recording by a photographer from the Nagaon. He recorded the evidence of witnesses who were present at the time of conducting inquest and thereafter doctor performed post-mortem examination on the dead body. The dead-body was handed over to the family members of the deceased after post-mortem examination was done. On 29-03-2018, he collected the post-mortem report and on the same day the post-mortem report, Inquest and SCD were handed over to the Nagaon Police. Ext.27 is the extract copy of Bhangagarh P.S. GD. Entry No.500/18 dated 24-03-2018.

PW 44, Majibur Rahman has deposed that he knows the accused Fakaruddin who is his brother-in-law. After 10/15 days of the

incident of Batadraba, one day police called him to the police station and at the police station he found Fakaruddin and the vehicle of Fakaruddin. He came to know from the police that Fakaruddin in his vehicle sneaked Zakir and Zakir's family to some places and as such police brought the vehicle of Fakaruddin to the Police Station and seized the same. Police also arrested accused Fakaruddin.

PW 45, Maheswar Saikia has deposed that on 23-03-2018 he was serving as 2nd Officer at Batadraba P.S. On that day in the evening at about 3 p.m. the Officer-in-charge told him that at Lalung Gaon, a minor girl was raped and set fire on her body and directed him to get ready for going there. Then the Officer-in-charge, he and other police staff moved for the place of occurrence. The house address of the Lalung gaon was intimated to the O/C by one Fazal Hoque over telephone. After getting the information, the Officer-in-charge entered the Batadraba P.S. GD Entry No.432 dated 23-03-2018 and departed to the place of occurrence. At the place of occurrence, they noticed gathering of about 400/500 of people and prevailed noisy situation there. At the place of occurrence, they came to know that the girl was shifted to B.P.Civil Hospital in a 108 Ambulance by her mother, father and two local women. They inspected the place of occurrence which is the house of Sarfat Ali. The house has two rooms, tin roof, wall of bamboo covered with mud layer and floor is of kacha (soil). In the first room there was a bed, and a dhari (mat) was laid on the bed. The bed and dhari(mat) have burn marks and in the floor there was stained with kerosene. By the side of the bed there was a plastic gallon and a little half burnt hair and clothes were also found. To the North of the place of occurrence there lies Lalung gaon's katcha road, towards the south lies fishery, towards the east there lies fishery and towards the west there lies the house of brother of the victim, Ali Hussain. Behind the house of Ali Hussain there lies a fishery. The place of occurrence was photographed and the sketch map was also drawn. From the place of occurrence the I.O. has seized one 20 litres capacity plastic gallon smell with kerosene, a piece of kerosene-smell half burnt cloth, some hair, one wooden bed of 6 ½ ft. length and 5 ft breadth and one

R
Special Judge,
Gaon :: Assam

bamboo mat (dhari) of size 6 ft. length and 4 ft breadth were seized by preparing a seizure list and signature of witnesses were taken. Ext.1 is the seizure list and Ext.1(5) is his signature. He further deposed that except the bed the other seized items have seen in the court. He has also recorded the statement of seizure witnesses. He also recorded the statement of Mursida Begum besides recording the evidence of seizure witnesses. PW 45 further deposed that after examining the witnesses, he came to know that accused Zakir Hussain, S/O Abdul Rajak the two C.C.Ls committed rape on 'X' inside the house and thereafter poured kerosene oil and set fire on her body and left the place of occurrence. After committing the offence, while the accused persons sneaked away behind the house, Murshida noticed them. Thereafter he went to the house of Zakir Hussain in search of him but Zakir Hussain and his family members were not found and in the meantime, Addl. S.P., C.I. and D.S.P spotted there and led them. Then they went to the house of the two C.C.Ls in search of them and being found them they were brought along with their guardians to the police station and kept them in V.D.P room located by the side of the P.S and they were interrogated and their statements were recorded. During interrogation they admitted the occurrence of incident. They were kept under security at Open Shelter Home Gram Bikas Parishad. At 11.30 p.m. of the night, Md. Sarfat Ali lodged ejahar and accordingly Batadraba P.S. GD. Entry No.447 dated 23-03-2018 was entered and registered a Batadraba P.S. Case No.64/2018 u/s 448/376(D)/201/302 IPC R/W Sec. 4 of POCSO Act. After registering the case the Investigating Officer entrusted him to investigate the case. Ext.8 is the ejahar and Ext.8(2) is the signature of Officer-in-charge, Sri Rajib Barua's and he is acquainted with his signature. He recorded the statement of informant Sarafat Ali.

On 24-03-2018 the two C.C.Ls were brought to the Batadraba P.S. from the Gram Bikas Parishad and on interrogation, they admitted that the pants which they were wearing were the same pants that they wore on the date of incident as such their pants were seized. Ext.6 is the seizure list, Ext.6(3) is his signature, Ext.7 is the another seizure list and Ext.7(1) is his signature. The seized two pants were seen in the court. He also recorded the statements of the seizure

R
Special Judge,
Nagaon :: Assam

witnesses and thereafter the two C.C.Ls were brought to Batadraba M.P.H.C for medical examination and after medical examination they were produced before the Juvenile Justice Board. On 24-03-2018 at about 8.30 p.m., he got information that Zakir Hussain have been taking shelter in his brother-in-law's house, Abdul Rashid at Dhaniabheti. After getting such information they went to the house of Abdul Rasid and met him and Abdul Rashid was brought to the Police Station for interrogation. After interrogation Abdul Rashid was arrested.

*Kon
Special Judge
Nagaon :: Assam
9-18*

On 25-03-2018 they took Abdul Rashid and visited the houses of his relatives and enquiry presence of Zakir but Zakir could not be traced out. Abdul Rashid was forwarded to the Court. On the same day, in the evening at 5 p.m. by a telephonic call from the Sadar Police Station informed that Zakir was arrested by traffic police and brought to the Sadar Police Station. On receipt of information, he along with the Officer-in-charge and other staff came to Sadar Police Station and at the Police station he recorded the statement of the traffic police personnel who have apprehended Zakir. Thereafter the traffic police interrogated the accused Zakir and Zakir's mother. The mother of Zakir, Jubeda Khatun was arrested for allegation of helping Zakir to flee away. After arrest Zakir and Zakir's mother were kept at Nagaon Sadar Police Station.

On 26-03-2018, Zakir and his mother were produced at Nagaon Court and Zakir was taken 5 days police custody.

On 27-03-2018, at 9 a.m. Addl. S.P.(HQ), D.S.P, S.I. Pankaj Mahanta, WPC visited the Lalung gaon and from Lalung gaon L.P. School, they collected the school certificate of 'X', and the two C.C.Ls and were seized. Ext.4 is the seizure list, Ext.4(4) is his signature. He also recorded the statements of seizure witnesses. On the same day, from the school he seized class IV and Class V attendance register, Admission Register, Zakir Hussain's School certificate. Ext.9 is the said seizure list. Ext.9(3) is his signature and seized items were seen in the court. On the same day, he recorded the statement of three girl

student of the said school in front of the two teacher. From the school they visited the place of occurrence and seized about 1 kg of soil from the place of occurrence. Ext.2 is the seizure list and Ext.2(3) is his signature.

On 28-03-2018 at the place of occurrence, he recorded the statements of Helima Begum, Mukshed Ali, Wahida Begum, Mursida Begum, Sarfat Ali, Raimon Nessa, Sanjita Khatun and they were forwarded before the Court for recording their evidences u/s 164 Cr.P.C. On the same day, photographer, Basudev Roy was called from the Nagaon Sadar Police Station, Supdt. of police office and videography was done while recording the statement of Zakir Hussain. On that day, Zakir divulged that he would narrate how he did the incident and also show the lungi which he was wearing at the time of incident, as such they proceeded to the place of occurrence along with Zakir and they were accompanied by two Magistrates and a photographer. At the place of occurrence, Zakir elaborately narrated how he did the offence and his videography was done. He drew the sketch map. Ext.11 is the sketch map, Ext.11(3) is his signature. From the place of occurrence as shown by Zakir they went to the house of Zakir and as pointed by Zakir a lungi was seized which was spread over a cycle. Ext.5 is the seizure list, Ext.5(5) is his signature.

On 28-03-2018, the brother of Zakir, Muklesur Rahman appeared before the Addl. Suptd. of Police but the Addl. Supdt. of Police directed to take Muklesur Rahman to the Sadar Police Station for interrogation. After recording his statement, Muklesur was arrested for the allegation of extending support to flee away Zakir.

On 27-03-2018, he sent one gallon of 20 Its. Capacity, some kerosene-smell half burn cloths, some hair, 1 kg. Soil to FSL for examination.

On 29-03-2018, he sent one lungi, one long pant, one half-pant to FSL for examination.

Ran
4-9-18
Special Judge,
Nagaon :: Assam

On 29-03-2018, the father of Zakir, Abdul Rejak was interrogated at Nagaon Police Station and was found involved with the incident and as such he was arrested.

On 30-03-2018 he received pin report of Bhangagarh P.S. GD.Entry No.500 dated 24-03-2018 along with SCD and same was appended with the original case diary.

On 01-04-2018 he seized the Tata Sumo bearing No.AS-02C-4363 by which Zakir was helped to ran away and on finding materials that Fakaruddin was involved with the incident he was interrogated. Ext.24 is the seizure list. Ext.24(3) is his signature.

*R
Special Judge,
Nagaon :: Assam
9-18*

On 02-04-2018 the said seized vehicle Tata Sumo was seen at the Nagaon Court.

On 03-04-2018, the Supdt. of Police released him from the investigation and re-endorsed the remaining part of investigation to Traffic-in-Charge, S.I. Dhiren Kakati and as such he handed over the Case diary to the Officer-in-charge.

Ext.28 is the Batadraba P.S. General Diary book. Ext.28(1) is the GD Entry No.432 dated 23-03-2018, Ext.28(2) GD Entry No.447 dated 23-03-2018, Ext.28(3) GD Entry No.67 dated 04-04-2018 of the relevant entry.

Ext.29, is the sketch map of the place of occurrence which he drew on 23-03-2018 and Ext.29(1) is his signature.

PW 46, Dhiren Kakati has deposed that on 25-03-2018 he was serving as in-charge of Nagaon Sadar Traffic Branch. On that day, in the evening at about 6 p.m., ASI Habibur Rahman informed him that the prime accused of Batadraba P.S. Case No.64/18 Zakir Hussain is trying to flee away and has been taking shelter in the house of Abdul Malek of Laugaon and also let him know that he had information that

accused would come through the previous Gausala road. At once, he along with ASI Habibur Rahman and other staff went to Gausala and waited there to apprehend Zakir. At that moment, ASI Habibur Rahman got information in his mobile phone that accused has been proceeding through the road from Laugaon to Teliagaon. Immediately, they turn their vehicle through the road of Teliapatty and have been proceeding by the road of Teliagaon. While they were proceeding through the road of Teliagaon they found a concrete bridge and at that time from the field side one boy in black shirt was climbing up to the elevated side along with a woman. Watching the boy, Habibur Rahman addressed Zakir in miya language and he stopped. Then Habibur Rahman caught hold of Zakir. The woman prevented them to bring Zakir but they forcefully lifted the Zakir in the vehicle and the woman was also lifted in the vehicle and both of them were brought to the Nagaon Police Station. On interrogated, Zakir admitted they he had pre-planed to run away to Kerela and his father and brother were at Chaparmukh Railway station and they made all arrangement to send him to Kerela. At night the Investigating Officer recorded his statement and the statement of Habibur Rahman at the Police Station.

On 31-03-2018, the Supdt. of Police entrusted him to investigate the Batadraba P.S. Case No.64/18. On 03-04-2018, he went to the Batadraba P.S. for taking charge of the case. The Officer-in-charge of the P.S. vide GD. Entry No.67/18 dated 04-04-2018 handed over the case diary to him.

After taking charge of investigation, he has gone through the case diary and came to know that the post-mortem of video Disc and displaying of crime scene by accused Zakir Hussain had been videographed and as such he went to the Supdt. of Police Office and from the police photographer both the CDs were seized and recorded their statements. Ext.23 is the seizure list. Ext.23(3) is his signature. He has seen the Dying Declaration, Burn register, Seizure list, Zimmanama, Seizure list of two video Disc before the Court and made a prayer for adding Section 6 of the POCSO Act. After allowing the

*Pa
4-9-18
Special Judge,
Nagaon :: Assam*

permission by the Court on 06-04-2018 he again spotted Batadraba P.S. and met Dr. Kapil Pator at Batadraba M.P.H.C and collected medical report of juvenile of the CCL and recorded the statement of the doctor. He came back to the P.S and recorded the statement of victim's mother. He also recorded the statement of Fazal Hoque.

On 12-04-2018 he recorded the statement of the ejahar writer Sri Safiqul Islam S/O Barik Ahmed at the Nagaon Sadar Police Station. He also recorded the statements of Abdul Jalil and Mofijul Islam.

On 13-04-2018, he recorded the statement of Mojibur Rahman and on the same day, he received two FSL report through the officer-in-charge of Batadraba P.S.

*Re
Special Judge,
Nagaon :: Assam
19/4/18*

On 19-04-2018 he submitted a prayer before the J.J.B, Principal Magistrate, Nagaon for conducting potency test of the two C.C.Ls. On 20-04-2018 their potency test were conducted at Nagaon Civil Hospital.

On 23-03-2018 he seized the documents of Tata Sumo from Abdul Hussain and recorded the statements of Ataur Rahman and Abdul Hussain as seizure witnesses. Ext.25 is the seizure list and Ext.25(2) is his signature.

On 27-03-2018 he collected the potency test report. After completion of investigation, he submitted charge-sheet against accused Zakir Hussain and two of the CCLs u/s 448/376(D)/201/302 IPC R/W Sec.6 of POCSO Act and against accused Abdul Rajek, Jubeda Khatun, Abdul Rashid, Muklesur Rahman and Fakaruddin u/s 120-B/212/201 IPC. Ext.30 is the charge-sheet and Ext.30(1) is his signature.

8. Gist of Defence Evidence.

DW 1 (Rahena Khatun) and DW 2 (Mainara Khatun) were the listed prosecution witnesses whom the prosecution has not

examined and in their evidences they have reproduced their statement before the I.O. u/s 161 Cr.P.C.

DW 1 Rahena Khatun, deposed that she stated before police that she is the student of Lalung Gaon L.P. School of V(fifth) standard. 'X' had read with them. She is dead now. One day police visited to their school and put some questions to her. Then she stated to police that 'X' told her that one CCL love her(X) and she also love the CCL. The matter was of one year old. In the classroom both of them sit near to each other and chat themselves. In the path also they chat themselves. Another CCL reads in their school in class IV(four). While Sir and Madam were not in the classroom, the another CCL came there and quarrelled with 'X' and sometimes beat her also. Another CCL is the son of 'X' father's elder brother. Sometimes, while taking meal at school, another CCL put salt in the meal plate of 'X'. DW 1 further deposed that she does not know why they quarrel.

*R.P. 9-18
Special Judge,
Nagaon :: Assam*

DW 2, Mainara Khatun has deposed that she stated before police that she reads at Lalung gaon L.P. School in class V(five). 'X' was her friend and read with her in the same class. 'X' passed away. After the death of 'X', police visited in their school and put her some questions. She told police that about a year ago, 'X' divulged her that one CCL love 'X' and 'X' also love the CCL. In the classroom both of them sit near to each other and chat themselves. Another CCL is the son of 'X' 's uncle (Bordeuta) who read in their school in class IV(four). Sometimes another CCL came to their classroom and quarrelled with 'X' and sometimes even assaulted her also for which 'X' used to cry. She further deposed that she does not know why they quarrelled. Sometimes, another CCL put salt in the plate of 'X' at the time of taking meal in the school. One CCL and 'X' sometimes chat on road.

DW 3, Abdul Rezzak has deposed that prior to two days of the occurrence he had been staying at Barpeta under the Rupahihat Police Station. Then people told him that in the Television a big incident of his house was shown. Subsequently his elder son informed him over

phone about the said incident and also told him that in the said incident Zakir was made guilty. Thereafter his elder son by engaging his fellow men negotiated with the police to hand over Zakir. Subsequently he and his wife, Jubeda accompanied his son Zakir and handed over Zakir to the police near a bridge. Police lifted Zakir in a vehicle and when police tried to lift the mother of the Zakir in the vehicle he objected but police forcefully lifted her and took away the mother of Zakir along with Zakir. Thereafter he again came back to Barpeta. Police apprehended his elder son Muklesur and brought to Sadar Police Station and when he came to the Police Station for getting information about his son, police arrested him also. Subsequently, when he was bailed out, he came to know from the witnesses Mokshed Ali, Wahida Begum and the village people that the witnesses at first looking fire on the body of the girl doused fire by pouring water and the girl was not in a condition to speak. The girl was taken to a doctor and subsequently she died. He further deposed that he has cultivable land at Lalung gaon under Batadraba Mouza bearing patta No.82. In the said patta land of Fazal Hoque, Mofidul Islam and Rafiqul Islam are also there. They have land dispute in respect of said patta with the above three persons and as such they have propagated rumour that Zakir did the said incident. Ext.E is the Jamabandi of patta No. 82.(under objection).

9. Discussion of evidence, decision thereon and reason for decision:

First, let us appreciate evidence in respect of charges against accused Zakir Hussain. From the evidence of Pws it appears that Murshida Begum (PW 2) was present in her house adjacent to the place of occurrence when the occurrence took place. According to this PW, she was sleeping in her house with her baby, then hearing scream from the house of her father-in-law she came out from her house and saw that accused Zakir Hussain and the two C.C.Ls were coming out from the house of her father-in-law. Entering into the house she saw that fire has caught on the body of 'X' (the deceased). She raised hue

and cry then the neighbouring people came and put out the fire. Thereafter her father-in-law, mother-in-law and sister-in-law came and when her father-in-law asked 'X' what happened then she told that accused Zakir Hussain and two of the CCLs raped her and thereafter Zakir asked one CCL to bring kerosene from the next room and then one CCL brought and poured kerosene and Zakir put fire on her and Zakir has cut her private part by a knife.

PW 1, PW 25 , PW 26 are the father-in-law, mother-in-law and sister-in-law of PW 2 (Murshida Begum) and father, mother and sister of the deceased. All these Pws have stated the same fact as told by PW 2. According to PW 14 (Halima Khatun) at the time of occurrence she was in her house then hearing hue and cry from the western side of her house she went to the house of Sarfat and saw 'X' lying on the ground and her body was been burnt and fire has been extinguished. She and Murshida (PW 2) shifted her to the bed.

In order to prove charge against the accused Zakir Hussain prosecution has relied on the dying declaration of the deceased coupled with evidence of PW 2 (Murshida Begum) and other corroborative evidence.

Now from the evidence of PW 15 (Mokshed Ali) and PW 16 (Wahida Begum) it appears that hearing hue and cry from the house of Sarfat Ali they went there and extinguished the fire which caught on the body of 'X'. It further appears that according to PW 15 and PW 16 after extinguishing the fire they went away. It is evident that PW 14 (Halima Khatun) arrived at the place of occurrence after extinguishing of fire by PW 15 and PW 16. PW 1, PW 25 and PW 26 arrived at the place of occurrence after extinguishing of fire.

It is evident from the evidence of above mentioned Pws that the 'X' sustained burn injury in her whole body and she was immediately broguht to B.P. Civil Hospital, Nagaon by an ambulance.

Ran
4-9-18
Special Judge,
Nagaon :: Assam

PW 31 Dr. Bhaswati Sharma is the Medical & Health Officer-I of B. P. Civil Hospital Nagaon. According to her on 23-03-2018 at about 3.30 p.m. one girl sustaining burn injury was brought to the hospital and she after making arrangement of the treatment, admitted her to the burn unit and inform police of B.P.Civil Hospital patrol post. After sometime police sent one requisition for recording the dying declaration of the victim and she informed Dr. Pallabi Hazarika who was on indoor duty to record the statement.

Re 4-9-18
Special Judge,
Nagaon :: Assam

PW 27 Dr. Pallabi Hazarika recorded the dying declaration of 'X' (the deceased). According to her after receiving information from Dr. Bhaswati Sharma (PW 31) and also receiving police requisiton she went to the burn unit and found that whole body of the girl was burn. Two nurses were attending her. Two/three women were there and when she enquired about the guardian of the girl then PW 25 identified the girl as her daughter. Then she (PW 27) asked all other persons to go away from the room and thereafter she recorded the dying declaration of the victim in presence of two staff nurse. According to PW 27 the girl was conscious. On being asked, the girl told her name and name of her father. Thereafter she recorded her dying declaration. Ext.16 is the dying declaration.

PW 29 (Anjumoni Deka) and PW 30 (Bhabani Das) are the staff nurse. According to these Pws Dr. Pallabi Hazarika recorded the dying declaration of the girl in their presence. Ext.16(2) and Ext.16(3) are their signatures respectively in Ext.16.

PW 42 (Biswajit Nath) is the in-charge of B.P.Civil Hospital P.P., Nagaon. According to him on 23-03-2018 at about 3.45 p.m. Bhaswati Sharma who was on emergency duty inform him that one girl who sustained burn injury has been admitted in the hospital. Accordingly he immediately after making GD Entry No.312 dated 23-03-2018 proceeded to emergency ward and saw one girl with burn injury and she was screaming. Her mother, father and members of his family told that she has been raped and was set ablaze. Then he

intimated O/C Nagaon P.S. and Addl. S.P. (HQ) about the incident who advised him to issue requisition for recording dying declaration, accordingly he issued requisition to Dr. Bhaswati Sharma. Dr. Pallavi Hazarika recorded the dying declaration and he seized the dying declaration at 6.30 p.m. According to this PW on 03-04-2018 he seized the burn data register chart from the burn unit. Ext.26 is the General diary of B.P.Civil Hospital P.P. from 23-03-2018 to 17-05-2018 and Ext.26(1) is the relevant entry in respect of GD. Entry No.312 dated 23-03-2018.

*R
Special Judge,
Nagaon :: Assam
9-18*

PW 33 constable Ananta Bordoloi of B.P. Civil Hospital P.P. deposed in the tune of PW 42. PW 33 is also the seizure witness of burn data register. PW 32 (Minakshi Talukdar) is the staff nurse of B.P.Civil Hospital. According to her on 03-04-2018 police seized burn data register from the surgical ward and obtained her signature in the seizure list. From her evidence it is evident that the girl was referred to Gauhati Medical College Hospital where she was declared dead.

10. Learned Special P.P. has submitted that the dying declaration (Ext.16) as recorded by PW 27 (Dr. Pallabi Hazarika) can be relied into as the doctor has certified that the victim can speak and mentally sound. Pointing towards some aspects as brought out by defence in course of cross-examination of PW 27 like recording of dying declaration in question answer form, requirement of presence of Magistrate at the time of recording dying declaration, learned Special P.P. has submitted that these aspects are not at all vital for doubting the dying declaration (Ext.16) in this case. In support of his contention, he has placed reliance on these citations :- **(1) Ramawati Devi Vs. State of Bihar (1983 Cri.L.J.221), (2) State of M.P. Vs. Dal Singh & ors (Criminal Appeal No.2303/09) decided by Supreme Court on 21-05-2013, (3) Mafabhai Nagarbhai Raval Vs. State of Gujarat (AIR 1992 SC 2186) (4) Vijay Paul Vs. State (GNCT) of Delhi (2015 Crl. L.J.2041), (5) Suresh Purushottam Vs. State of Chattisgarh (2017 Cri.L.J. 91), (6) State of Karnataka - Vs. - Shariff (Supreme Court decided on 27-01-2003), (7) Ram Bihari**

Yadav - Vs.- State of Bihar and ors. (Supreme Court decided on 21-04-98).

11. Learned defence counsel refuting the contentions of prosecution side has argued that the Ext.16 (Dying declaration) cannot be relied into and attacked the dying declaration on the these points :-
(1). The victim sustained 96% burn injury and she was under shock and pain as such it will not be possible on her part to make such declaration. **(2).** PW 27 (Dr. Pallabi Hazarika) has recorded the dying declaration in Assamese language whereas PW 25 in her cross-examination has stated that she and her daughter (deceased) can neither speak Assamese language nor they understand Assamese language, **(3).** the dying declaration was not recorded in presence of any Magistrate **(4).** Dying declaration does not bear any signature or thumb impression of the deceased and note of the doctor in Ext.16 that her finger-print could not be taken as the finger was distorted due to burn is not believable as the said fact has not been proved, **(5).** No question was put by PW 27 to the victim so to ascertain her memory or to satisfy herself (PW 27) regarding the mental fitness of the victim, **(6)** In the police requisition seriousness of the victim was not mentioned. In addition to above points learned defence counsel has also submitted that the dying declaration was recorded on 23-03-2018 on police requisition and PW 42 (Biswajit Nath) seized the Ext.16 on 23-03-2018 but PW 46(S.I. Dhiren Kakoti), the I.O. of the case, forwarded the same to the court for seen on 04-04-2018. While seizure list dated 27-03-2018 was sent to court on the same day, seizure list dated 28-03-2018 and 29-03-2018 was sent to court on 29-03-2018. Again seizure list dated 01-04-2018 and 02-04-2018 was sent to court on 04-04-2018. Thus failure on the part of the I.O. to explain the delay in sending the seizure list dated 23-03-2018 cast doubt regarding recording of Ext.16 (Dying declaration) on 23-03-2018. Again Ext.1 vide seizure list dated 23-03-2018 has been numbered as MR. No.16/2018. Ext.16 vide seizure list dated 23-03-2018 has been numbered as MR 28/2018 and burn data register (Ext.20) seized vide seizure list dated 03-04-2018 has been marked as MR 29/18. Learned defence counsel has submitted

4-9-18
Special Judge,
Nagaland :: Assam

that these aspects are sufficient to prove that dying declaration (Ext.16) was not recorded on 23-03-2018 rather it was subsequently manufactured by the investigating agency with the conspiracy of medical staff.

*R
4-9-18
Special Judge,
Guwahati :: Assam*

Learned counsel has further argued that recording of dying declaration was not entered in the burn data register. It is also the argument of defence counsel that there is no entry in the GD Entry book that higher authority has advised PW 42 to send requisition for recording dying declaration. It is argued that in GD. Entry No.438 dated 23-03-2018 of Batadrava P.S. last few lines were subsequently inserted to cover up the story of recording dying declaration. It is also the argument of defence counsel that there is doubt regarding GD. Entry No.312 dated 23-03-2018 as it is started from 23-03-2018. Learned Counsel also argued that as per PW 33 Ananta Bordoloi, constable of B.P.Civil Hospital P.P, the condition of the victim was bad and she was not in a position to speak and as such it is impossible to record her statement in such condition and this statement of this PW cast doubt about Ext.16 (Dying Declaration).

Learned counsel argued that there is nothing to show that the victim was under expectation of death so to nececiate recording of her dying declaration.

Learned defence counsel relied on these citations on the point of dying declaration :- **(1). Smt. Laxmi, Appellant v. Om Prakash and others, Respondents, (2001 CRI. L.J. 3302) Supreme Court, (2) Ramilaben Hasmukhbhai Khristi and another, Appellants v. State of Gujarat, Respondent with Suleman Yakubhai Khristi Parmar and another, Appellants v. State of Gujarat, Respondent with Dahyabhai Ashabhai Khristi Parmar and others, Appellants v. State of Gujarat, Respondent (AIR 2002 Supreme Court 2996), (3) Rasheed Beg and others - Appellants Vs. State of Madhya Pradesh - Respondents ((1974) 4 Supreme Court Cases 264, (4) Mohar Singh and**

others etc., Appellants vs. State of Punjab, Respondent (1981 CRI.L.J.998), (5) Kake Singh @ Surendra Singh, Appellant v. State of Madhya Pradesh, Respondent (1982 CRI. L.J.986) and (6) Darshan Singh and others, Appellants v. State of Punjab, Respondent and Joga Singh and others, Appellants v. State of Punjab, Respondent (1983 CRI.L.J.985 = Air 1983 Supreme Court 554).

12. I have gone thorough the citations so referred by both parties.

Now, let us scrutinize the dying declaration (Ext.16) carefully so to ascertain whether it can be relied upon or not. From Ext.16, it is evident that the doctor (PW 27) who recorded it, gave certificate that the victim is capable of speaking and mentally sound. PW 27 in Ext.16 has noted that the victim was more than 90% burn, her finger print could not be taken as it was distorted due to burn. PW 29 (Anjumoni Deka) and PW 30 (Bhabani Das), these two attending nurses were present at the time of recording of dying declaration (Ext.16) and they put their signature therein as Ext.16(2) and Ext.16(3). Now defence has cross-examined these PW 27, PW 29, PW 30 and apart from putting certain suggestions which these Pws have denied, could not extract anything from their mouth so to establish the fact that the Ext.16 was not recorded on 23-03-2018. Nothing has been brought on record to show why these three Pws who are independent witness will tell a lie. Defence in course of cross-examination of material witnesses who saw the victim at the place of occurrence could not establish the fact that the victim was unconscious. It is the argument of defence side that PW 27 in her cross-examination has stated that at the time of recording of dying declaration she did not check the pulse, pressure of the victim and she has also stated that the victim was then under shock and pain. Now when the doctor has certified that the victim was mentally sound as such only for non-checking of pulse and pressure, dying declaration cannot be discarded. In this regard prosecution has rightly relied on the decision of Hon'ble

*R
Special Judge
Nagaon :: Assam*

Supreme Court in - State of M.P. - Vs- Dal Singh & ors and in the case of Mufabhai Nagarbhai Raval - Vs- State of Gujarat (AIR 1992 SC 2186).

In the case of **Suresh - Vs. State of M.P. (AIR 1987 SC 860)** also wherein the victim sustained cent percent burn injuries, the doctor's testimony that the deceased was in a fit state of health, was accepted by Hon'ble Supreme Court.

*A
4-9-18
Special Judge.
Pension :: Assent*

In the case of **State of Haryana - Vs.- Harpal Singh and ors. (AIR 1978 SC 1530)** in para 18, Hon'ble Supreme Court observed as follows : "18. The High Court was of the view that a person in the state of health as depicted in the Bed Head Ticket could not have possibly made a coherent and detailed statement as contained in Ex.P.L. We are unable to share the view of the High Court. The doctor was fully aware of the condition and certified that the patient was in a fit condition to give a dying declaration and has deposed that she was conscious and was in a fit condition to give the dying declaration. The fact that the pulse was not palpable and blood pressure un-recordable and the patient was in a gasping condition would not necessarily show that the patient's condition was such that no dying declaration could be recorded. We see no reason for rejecting the testimony of the doctor".

13. Now argument of defence side that statement of PW 33 (Ananta Bordoloi) cast doubt about Ext.16 (Dying declaration) is not acceptable because PW 27 (Dr. Pallabi Hazarika) has examined the victim and as such she is the competent person to ascertain her mental fitness and not the constable. Thus his statement that victim was unable to speak is not at all significant to discard the evidence of PW 27 and Ext.16 (Dying declaration).

So far as language of dying declaration is concerned, the defence has not put any question to PW 12 (Kabita Biswas) and PW 13 (Md. Ataur Rahman) who are the teachers of the Lalung gaon New L.P. School so to ascertain whether the deceased was able to speak and understand Assamese. PW 10 (Trishnapriya Buragohain) who is also one of the teacher of the said Lalung Gaon New L.P. School stated in her cross-examination that since she is new in the said school, she does not understand the language of the students but this PW nowhere in her evidence has stated that the deceased did not understand Assamese. Defence has failed to elucidate from these Pws about the medium of school. It is natural that deceased may had communicated with her family members in their own language at their house but it does not prove that the deceased did not know the Assamese. The defence through the PW 25, (Raiman Nessa) tried to extract that the deceased did not know the Assamese but failed to show that she completely did not understand the Assamese. PW 27 (Dr. Pallavi Hazarika) has clearly stated that she put the questions in Assamese language while the deceased replied the same in broken Assamese language and she recorded the Ext.16 (dying declaration) as per her version in Assamese language. In my opinion communication is the main thing as such although the declarant has narrated the incident in broken Assamese as stated by PW 27 and she has recorded the same in fine Assamese language, this aspect will not affect the probative value of Ext.16. In this regard, I would like to refer the case of **Bakshish Singh - Vs- State of Punjab (1957 AIR 904 equivalent citation 1958 SCR 409)** wherein the deceased spoke in Punjabi language and the statement was recorded in Urdu language but its authenticity was accepted by Hon'ble Supreme Court. Thus, contention as raised by learned defence counsel is not tenable.

Now let us come to the point of tutoring. Defence failed to show that the relatives of the deceased were aware of the fact that dying declaration is going to be recorded at hospital. From the evidence of related Pws of the deceased, it appears that after the unexpected incident of occurrence they shifted the deceased

[Signature]
Special Judge,
Nagaon :: Assam
14-1-18

immediately to hospital with the intention of providing treatment and in such situation they were not aware of legal procedural aspect so to tutor the victim. Moreover nothing can be elucidated from PW 42 (S.I. Biswajit Nath) during cross-examination which can establish the fact that he told the Pws who were present at B.P.Civil Hospital that dying decaration is going to be recorded, so advised them to tutor the victim. Now, mere writing of "Accompanied by police" in Ext.16 by PW 27 is not the conclusive proof that PW 42 was present in burn unit at the time of recording the statement so to tutor the victim. Moreover, from the evidence of PW 27 (Dr. Pallabi Hazarika), it appears that at the burn unit before recording the Ext.16 she sent out all the persons from the burn unit including PW 25, the mother of the victim who identified the girl and thereafter in presence of two nurses, she recorded the dying declaration. Now defence has extensively cross-examined PW 27, PW 29 and PW 30 but except putting suggestions to them that Ext.16 was not recorded on 23-03-2018, defence could not extract anything from their mouth which can create suspicion regarding recording of dying declaration. Some trivial discrepancies in the statements of PW 29 and PW 30 are not sufficient to cause dent in their testimony.

Defence has tried to put the Ext.16 under cloud of suspicion on other aspects like -

(1) Dying declaration which was recorded on 23-03-2018 and was seized by PW 42 (SI Biswajit Nath) of B.P.Civil Hospital O.P. on the same day but the I.O. of the case PW 45 (SI Maheswar Saikia) did not send the said seizure list to the court without delay rather the second I.O. PW 46 (SI Dhiren Kakoty) sent the same to the court on 04-04-2018. Now from the evidence of PW 45 and PW 46 it is evident that PW 45 was the first I.O. up to 03-04-2018 and on 04-04-2018 the second I.O. (PW 45) was entrusted with the task of investigation. PW 45 has stated that S.I. Biswajit Nath (PW 42) has handed over the SCD along with Dying declaration, seizure list and burn register to Officer-in-charge Batadrava P.S. on 03-04-2018. PW 45 has stated that he has not taken step for obtaining the dying declaration from S.I. Biswajit Nath and he cannot furnish any explanation. Now it is evident from the

*R. J. - 18
Special Judge,
Nagaon :: Assam*

evidence of PW 46 (SI Dhiren Kakoty), the second I.O. of this case that on 04-04-2018 he received the dying declaration, seizure list of burn data register and dying declaration, zimanama from Officer-in-charge of Batadraba P.S. and sent the same to court for seen. Now there is no doubt laches on the part of the first I.O. (PW 45) in collecting the dying declaration alongwith its seizure list from PW 42 and to send the same to the court within reasonable time but due to such laches on the part of the first I.O. (PW 45) neither the evidence of PW 27 can be discredited nor the prosecution case can be thrown away on that ground when the defence has failed to shatter the evidence of PW 27.

(2) - Other doubt of defence side regarding Ext.16 is that GD. Entry No.438 dated 23-03-2018 of Batadraba P.S. was made at 6 p.m. and in the last few lines of that entry there is no gap and certain lines written in separate ink seems to be inserted later on.

(3) -There is another doubt as expressed by learned defence counsel is in respect of GD. Entry No.312 dated 23-03-2018 of B.P.Civil Hospital P.P. (Ext.26). It is contended that said GD. Entry book is started from 23-03-2018. It is argued by learned defence counsel that in order to cover the story of recording dying declaration, this GD. Entry book has been started from 23-03-2018 by damaging last pages of earlier GD. Entry book and one GD. Entry is made just before GD. Entry No.312 dated 23-03-2018 to give it a natural look

Now it is already stated hereinabove that defence has failed to shatter the evidence of PW 27, PW 29 and PW 30 as such the grounds of doubt as contended by learned defence counsel is based on conjecture and surmise and in view of this evidence of PW 27, PW 29 and PW 30 can neither be disbelieved nor Ext.16 can be discarded.

Now, so far as question of recording of dying declaration before the Magistrate is concerned, Section 32 of the Indian Evidence Act, 1872 nowhere states that it must be recorded in presence of a Magistrate. In this regard observation of Hon'ble Supreme Court in the case of **Kulwant Singh -Vs- State of Punjab (AIR 2004 SC 2874)** is quoted below:-

"Section 32 of the Indian Evidence Act, 1872 nowhere states that the dying declaration must be recorded in the presence of a Magistrate or in other words no statement which has not been recorded before the Magistrate cannot be treated to be a dying declaration. The fact that the investigating officer from the beginning intended to take the statement of Partap Singh is not in dispute. The endorsement made by the doctor in Ext.PQ/1 and Ext.PR/1 would clearly show that he had not been found fit to make such statement. Only on the fifth day i.e. 18-06-1987, the statement of Partap Singh could be recorded".

Section 32 of the Indian Evidence also does not state that the dying declaration should be made only in expectation of death. Explanation (1) appended to Section 32 makes it clear. In the 2nd para of Explanation (I) it is clearly written as follows:-

"Such statement are relevant whether the person who made them **was or was not**, at the time when they were made **under expectation of death**, and whatever may be nature of the proceeding in which the cause of his death comes into question."

In view of above provision of law contention as raised by learned defence counsel is not tenable.

Argument of learned defence counsel is that PW 27 (Dr. Pallabi Hazarika) did not put any question to the victim to satisfy herself about her mental fitness before recording the dying declaration. Now there is no specified form or format for recording dying declaration. Doctor is the competent person to assess the mental fitness of the victim. PW 27 in her deposition has stated that the victim was conscious and she then asked the girl to tell her name and her father's, accordingly the girl stated so and thereafter she recorded her

Fu-9-18
Special Judge,
Nagaon :: Assam

statement. In view of this evidence, I do not find any reason to discard the evidence of PW 27 and also Ext.16.

In the instant case, there is no evidence on record to establish that the victim was unconscious and she was unable to give her statement. There is also no evidence that the victim was tutored before recording her statement. Considering all aspect I have arrived at the conclusion that the dying declaration (Ext.16) is made by the victim voluntarily and truthfully and free from tutoring and prompting and as such reliance can be place upon it safely.

Ext.16 reveals that it relates to the death of the deceased-declarant and the circumstances resulted in her death. The declarant has also brought allegation of rape with her against Zakir Hussain and two C.C.Ls. In this context, I would like to refer the **illustrations (a) appended to Section 32 of the Evidence Act below:-**

"(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts".

Thus as per illustration (a) to Section 32 of the Indian Evidence Act, the statement made by the deceased in Ext.16 in the instant case is relevant fact and can be relied into.

Signature of relatives in dying declaration.

4-9-18
Special Judge,
Nagaon :: Assam

From the evidence of PW 27 (Dr. Pallabi Hazarika) it appears that she after taking the identity of the guardian of the deceased, turned out all the relatives including the PW 25 (Raimannessa) from the burn unit of the hospital and then PW 27 recorded the dying declaration of the victim in presence of PW 29 (Anjumoni Deka) and PW 30 (Bhabani Das), who were the nurses on duty at that time. PW 29 and PW 30 also stated that they were in the burn unit at the time when the PW 27 recorded the dying declaration (Ext.16). PW 29 and PW 30 testified their signatures in Ext.16 as Ext.16(2) and 16(3) respectively. PW 29 and PW 30 do not know the victim personally nor had witnessed the incident. Thus it appears that the two official witnesses present at the time of recording the dying declaration were the independent witnesses and their quality of evidence cannot be doubted at all as the victim was opportunistically admitted at that time when PW 29 and PW 30 were discharging their duty. That apart there is no prescribed law that the presence of relative is required at the time of recording the dying declaration of deceased.

Y-9-18
Special Judge,
Nagaon :: Assam

Signature or thumb impression of the deceased.

PW 27 (Dr. Pallabi Hazarika) has recorded the dying declaration of the deceased. In the dying declaration (Ext.16) the PW 27 at the last part, above her signature has clearly written that the victim was more than 90% burn, her finger print could not be taken as it was distorted due to burn. PW 28 (Dr. Netramoni Kakoti) did the post-mortem(Ext.18) examination of the deceased at the Gauhati Medical College Hospital. In his report under the heading **injuries** he observed as follows:-

Injuries : - Epidermal as well as dermoepidermal burn face, all sides of the neck, both axilla, all sides of both arms, **all sides of both forearms, all sides of both palms**, front and back of the chest, front and back of the abdomen, perineum, both buttocks, all sides of both thighs, all sides of right leg, all sides of left leg except

lateral aspect of left leg. The floor of the burn arms are highly congested, hyperemic, separated from healthy tissues by a red line and covered 96% of total body surface area approximately.

From the evidence of PW 27 and PW 28 it is clear that the thumb of the deceased was not in a normal condition so to obtain her thumb impression in the dying declaration (Ext.16) recorded by PW 27.

14. Now apart from the dying declaration prosecution relied on the evidence of PW 2 (Murshida Khatun) who saw the accused Zakir Hussain and the two C.C.Ls coming out from the house of her father-in-law. She is the only witness who saw the accused persons. After hearing her scream other Pws arrived at the place of occurrence. Now learned defence counsel has argued that her evidence is not at all reliable as she has made improvement in her evidence before the court from her earlier statement on material point. It is contended that the said PW in her evidence has exaggerated the fact that the accused Zakir after raping her has cut down her private part which has not been substantiated by medical evidence. It is also contended that there is lots of contradictions in her evidence with other Pws who came to the place of occurrence. It is also contended that her house is situated in front of the house of her father-in-law (PW 1) and as per evidence of PW 45 (I.O.) accused persons went away through the back door of that house as such it will not be possible on her part to see the accused persons. Moreover the I.O. (PW 45) in his sketch map has not shown the back door of the house of the informant (PW 1) in his sketch map (Ext.29) as such this aspect falsified the evidence of PW 2.

Now, let us scrutinize her evidence carefully as she is the vital witness of this case.

In her evidence she has stated that the victim told her (PW 2), father-in-law that Zakir and the two C.C.Ls after raping her cut her private part by a knife. Defence in course of her cross-examination has brought out this contradiction and proved the exaggeration

49-18
Special Judge,
Nagaon :: Assam

through PW 45 (S.I. Maheswar Saikia). Thus on the point of cutting the private parts it is found that improvement has been made and as such this piece of evidence can be discarded but her whole testimony cannot be discarded since her evidence is intact on material point. Now, PW 2 has clearly stated that hearing scream she went out from her house and saw Zakir and the two C.C.Ls were coming out from the house of her father-in-law. In her cross-examination also she has stated that from her door she saw Zakir and the two C.C.Ls were coming out from the house of her father-in-law. Hearing her scream they fled away. Now this is a very vital piece of evidence and defence except putting suggestion to PW 2 in this regard could not shatter this evidence so to impeach her credibility. Now, PW 2 in her cross-examination has stated that in her statement before the Magistrate she has stated that she saw accused persons went out through the back door of the house of Sarfat Ali. In the sketch map (Ext.29), I.O. (PW 45) has drawn the place of occurrence, which is the House of Sarfat Ali and also drawn the house of Ali Hussain (PW 19), who is the son of Sarfat Ali and husband of Murshida Begum. In course of cross-examination of PW 45 he stated that in the sketch map (Ext.29) he has not described the direction, width, door, window etc. of house of Ali Hussain and the place of occurrence (House of Sarfat Ali). Now I.O.(PW 45) seems to be not good in drawing but in Ext.29, he has clearly noted that House of Ali Hussain is adjacent. Murshida Begum saw three miscreants, Zakir Hussain and the two C.C.Ls fleeing away through the back door. It is also noted that boundary and courtyard of Ali Hussain and Sarfat Ali is common. Back door of Sarfat Ali and front door of Ali Hussain is face to face. PW 1 (informant) in his cross-examination has stated that his house and house of his son Ali Hussain is face to face. In course of cross-examination of PW 1, PW 2, PW 19 and PW 45 defence has not challenged that back door of PW 1 and front door of PW 19 are not face to face. Now sketch map is for understanding the location of the place of occurrence. Thus considering the evidence of I.O. PW 45 and Ext.29, I am of the opinion that contention as raised by learned counsel that it is not possible for Murshida Begum (PW 2) to see the accused persons

R
Special Judge,
Nagpur :: Assam
q-18

feeling away is not at all sustainable. Since the defence has failed to shake the evidence of PW 2 as such I found her evidence trustworthy.

16. Now, learned defence counsel has contended that there is contradiction in the statement of PWs as to the fact of time of oral declaration as made by the deceased to her family members as stated by PWs with the statement made in the FIR. It is contended that as per PW 1, PW 2, PW 25, PW 26, the deceased narrated the incident to them at the house but as per FIR the victim narrated the incident while she was being taken to B.P.Civil Hospital.

17. Learned Special P.P. has submitted that FIR need not include minutest details and in support of his contention he referred the following citations :-

*R
H 9-18
Special Judge,
Nagaon :: Assam*

**Kirendra Sarkar & ors. Vs. State of Assam (Crl.
Appeal No.845/09 Supreme Court. Decided on 27-04-2009.**

18. Now FIR was written by PW 6 (Safiqul Islam). PW 6 has stated that as Sarfat Ali told him to write the ejahar, he wrote the same. PW 1 also stated in his evidence that he told one person to write the ejahar. Now the main fact as to the incident has been narrated in the FIR as told by the victim. Moreover, before receiving the FIR, GD Entry being No.432 dated 23-03-2018 of Batadraba P.S. case was made in respect of receiving the information about the incident. Thus had the victim not told the incident then it would not have been possible to know exactly what happened. In this case, mere due to some error in writing the FIR on a point is not sufficient to doubt the prosecution case when the material fact is narrated properly. Except the exaggerated part in respect of cutting of private parts of the victim after rape, PW 1, PW 2, PW 14, PW 25, PW 26 has stated before the I.O. (PW 45) about the main incident. Now having regard to the grave and tense situation prevailed at the time of incident and also considering the mental agony of the parents of the victim and her

relatives some inconsistency in respect of sense of time is bound to occur and this is not unnatural. In such a tense situation, it cannot be expected that everyone who were present at the place of occurrence will look into the watch and will note down each and every aspect.

19. Now, according to defence FIR (Ext.8) is doubtful as the date in the FIR has not been written below the signature of the FIR written rather the date has been written in the above right hand corner with different ink. Now in the FIR there is endorsement of the O/C Batadrava P.S. with reference to the GD.Entry No.447 dated 23-03-2018 regarding the receipt of the ejahar and its registration. Moreover, the said ejahar was sent to the court on 24-03-2018 and the C.J.M. Nagaon has seen it. As such, I do not find any reason to doubt the FIR on such silly ground.

*4-9-18
Special Judge,
Nagaon :: Ass.*

In support of his overall argument learned defence counsel has relied on the following citations :-

- (1) **Bhugdomal Gangaram and others etc.**
Appellants. v. The State of Gujarat, Respondent (1983 CRI. L.J. 1276 SC).
- (2) **Deoraj Goal & Anr. V. The State of Assam.**
(2011 CRI.L.J.817) Gauhati High Court.
- (3) **Yazid Ali and another- Accused-appellants. Vs. State of Tripura- Respondent ((1996) 2 Gauhati Law Reportsw 99). kshish Singh - Vs- State of Punjab (1957 AIR 904 equivalent citation 1958 SCR 409)**
- (4) **Ram Kumar Pande, Appellant v. The State of Madhya Pradesh, Respondent (1975 CRI.L.J.870 = AIR 1975 SUPREME COURT 1026).**
- (5) **Sarman v. State of Madhya Pradesh (2006 CRI.L.J.(NOC) 570 (M.P).**

It is the argument of learned defence counsel that according to PW 28 (Dr. Netromoni Kakoti) who performed the Post-

mortem examination on the deceased after microscopic examination of two slides taken from posterior fornix and around the convix did not find any spermatozoa. It is also the argument of defence side that the police seized the lungi of Zakir vide Ext.5 and sent the same to FSL for examination and FSL Report (Ext.22) gave negative test for kerosene and semen which proves the innocence of Zakir in commission of offence. It is also the argument of learned defence counsel that there is no medical report to suggest that Zakir sustained injury in his male organ which is bound to occur in case of forced sexual act with a girl of 10/11 years. Learned defence counsel in this regard referred citation **reported in CRI.L.J.1972. 1260 (Supreme Court)**.

*To
4/9/18
Special Judge,
Nagaon :: Assam*

20. Now, the two C.C.Ls are facing enquiry in the J.J.B. Nagaon yet some vital document like medical report and FSL report, seizure list in respect of them has become necessary to peruse so to ascertain involvement of accused Zakir in commission of alleged offence as this is a case of gang penetrative sexual assault as defined u/s 5(g) of the POCSO Act, 2012. It is evident from record that vide Ext.7 one torn half pant - camouflage colour was seized from one of the CCL on 24-03-2018 and the seizure list was seen by C.J.M., Nagaon and it was sent to FSL Guwahati for examination. As per FSL Report (Ext.22) said half-pant was marked as C-21/18(c) which gave positive test for human semen as deposed by PW 34 (Minakshi Talukdar, Jr. Scientific Officer). Dr. Kapil Pator (PW 23) examined one CCL on 24-03-2018 at 3.10 p.m. and found an abrasion on glans pennis at the time of examination. Ext.13 is the medical report. These aspect establishes allegation against him along with Zakir and other CCLs and also their presence in the house of the informant because PW 2 (Murshida Begum) saw them coming out from the house of the informant.

In this case deceased girl sustained 96% burn injury as per PW 28 (Dr. Netromoni Kakoti). No question was put to him by defence to ascertain whether in such case presence of semen will be available. Now evidence of PW 2 (Murshida Begum) and evidence of PW 27 (Dr. Pallabi Hazarika) and the Dying Declaration Ext.16 is found

trustworthy which clearly establishes the fact that on 23-03-2018 accused Zakir Hussain and two CCLs entered inside the house of the informant (PW 1) was involved in commission of offence of penetrative sexual assault.

Now Section 5 of the POCSO Act, defines **aggravated penetrative sexual assault**. Explantion appended to Sec. 5(g) of the Act reads as follows:-

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.- When a child is subject to sexual assault by one or more persons of a group in furtherance of their common intention, **each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or**

RA 9-18
Special Judge,
Nagaon :: Assam

Thus by virtue of deeming provision of this explanation a person is deemed to have committed gang penetrative sexual assault even if he has not committed actual penetrative sexual assault but one of the groups has committed such act.

21. Plea of defence as taken by accused Zakir Hussain in his statement u/s 313 Cr.P.C. has neither been substantiated by adducing independent evidence nor in course of cross-examination. It is argued that as per evidence of DW 3 (Abdul Rezak) his son Zakir was born on the day of Bohag Bihu (15th April) in the year 2001 and Mat. Ext.1 (school certificate of Zakir Hussain) is doubtful.

Now defence has neither claimed juvenility of Zakir Hussain during trial nor they could rebut Mat. Ext.1 (School Certificate) by producing any other authentic doucment in support of their claim at the time of adducing evidence and as such contention as raised by learned defence counsel is not tenable. As per Mat. Ext.1, the admission register, the date of birth of Zakir Hussain is 08-05-1999.

22. It is the argument of defence side that the school of the deceased starts from 9 a.m. and ends at 2.30 p.m. as such this aspect falsifies the fact that incident took place at 1/1.30 p.m. Now PW 1 has stated in his cross-examination that he could not say at what time his daughter came to the house. PW 25 and PW 26 were at paddy field. Murshida (PW 2) was inside her house and hearing scream at 01.30 p.m. she came out and thereafter she found the victim in her house. Mere timings of school from 9 a.m to 2.30 p.m. and the attendance register does not prove the fact that the victim was at school on the day of occurrence till 2.30 p.m. when defence has failed to extract the same from the mouth of PW 9 (Class-mate of the victim), PW 10 (Teacher), PW 12(Teacher), PW 13 (Teacher).

4-9-18
Special Judge
15-9-2018 :: Assc

Ext. F is the school certificate issued by the Headmaster, Lalung gaon L.P. School in respect of the deceased. It reveals that she was reading in class-V and her date of birth according to Admission Register was 08-05-2008. Thus it is evident that at the time of occurrence she did not complete 10 years.

From the evidence it is established that there were three boys and as such it will not be difficult to imagine that the victim of such tender age was unable to put resistance against them. As per evidence of PW 1, victim told that Zakir and the two C.C.Ls gagged her mouth and then raped her.

23. Appreciation of defence evidence.

Defence side has adduced evidence of three Pws. Two of them are listed prosecution witnesses and the classmates of the deceased whom prosecution did not examine. One DW is accused Abdul Razzak. It is the plea of accused Zakir as taken in his statement u/s 313 Cr.P.C. that there was love affair between the victim and one of the CCL and another CCL used to restrain the victim from loving one CCL and for this reason he (Zakir) believes that the victim might have

committed suicide by setting her into fire. It is also the plea of the accused that after the incident he went to the place of occurrence and many people of the village gathered at the place of occurrence. He saw the victim and her whole body was burnt and she was not able to speak. Her parents took her to hospital. After that one Fazal Hoque spread the rumour that he (Zakir Hussain) set fire on her as Fazal has long pending land dispute with them.

DW 1 (Rahena Khatun) and DW 2 (Mainara Khatun) are the prosecution witnesses whom prosecution did not examine. Defence has reproduced the statement of these witnesses u/s 161 of Cr.P.C. in their evidence and tried to establish that there was love affairs between the deceased and one of the CCLs. But nothing could be proved.

*R
4-9-18
Special Judge,
Nagaon :: Assam*

24. Now, so far as plea of land dispute between PW-35 (Fazal Hoque) and accused Abdul Rezzak is concerned neither this plea was taken in course of cross-examination of PW 1 (Sarfat Ali) and PW 35 (Fazal Hoque) nor this plea could be proved by defence. Mere certified copy of Jamabandi (Ext.E) cannot be treated as proof of land dispute. Defence evidence is found not convincing to combat the strong prosecution evidence of PW 2 (Murshida Begum), PW 27 (Dr. Pallabi Hazarika) and Ext.16 (Dying declaration) and to rebut presumption u/s 29 of the POCSO Act, 2012.

I have gone through all the citations so referred by the learned counsel for the defence. I am of the opinion that these citations will not help them.

25. After appreciation of evidence, I have found the evidence of PW 2 (Murshida Begum) and PW 27 are trustworthy and the Ext.16 free from tutoring, prompting as such reliance can be placed upon them.

Now from the evidence of PW 2 (Murshida Begum), PW 28 (Dr. Netromoni Kakoti) and from Ext.16 (Dying declaration) and Ext.18 (Post-mortem report) following facts are established :

- (1) Accused Zakir Hussain alongwith two CCLs went to the house of the informant on 23-03-2018 to commit offence.
- (2) Accused Zakir Hussain committed penetrative sexual assault on the 'X' (deceased) along with two CCLs.
- (3) Accused Zakir Hussain in order to cause disappearance of evidence of committing penetrative sexual assault set the victim ablazed.
- (4) Due to burn injury death was caused to the victim.

[Signature]
Special Judge,
Nagaon :: Assam

26. In view of discussion of evidence made above and placing reliance on the evidence of PW 2 and Ext.16 (Dying declaration) I have arrived at the conclusion that -

- (1) Accused Zakir Hussain is found guilty of committing offence u/s 448 IPC.
- (2) In view of explanation appended to Section 5(g) of the POCSO Act, 2012 accused Zakir Hussain is found guilty of committing aggravated penetrative sexual assault u/s 5(g) of the said Act.
- (3) Accused Zakir Hussain is also found guilty of committing offence u/s 302 IPC for causing the death of 'X' .
- (4) Accused Zakir Hussain is also found guilty of committing offence u/s 201 IPC.

27. Now let's appreciate evidence to decide charges against accused Abdul Rezzak, Jubeda Begum, Muklesur Rahman, Abdul Rashid and Fakar Uddin.

Now against accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid charge has been framed u/s 120-B/212 IPC.

Against accused Fakar Uddin charge has been framed u/s 202 IPC.

28. First lets decide the charges against accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid.

Now in the instant case PW 8 (ASI Habibur Rahman) and PW 46 (SI Dhiren Kakati) have brought allegation against these persons for scre3ening the offender Zakir Hussain. According to these Pws on secret information they proceeded to apprehend Zakir Hussain and found accused Zakir Hussain and his mother accused Jubeda on the road of Laugaon and after apprehending them brought to the police station where they confesses that they made plan to go to Kerala and Accused Abdul Rezzak, father of Zakir, accused Muklisur Rahman, elder brother of Zakir and accused Abdul Rashid brother-in-law of Zakir has calloected money and made arangement for their escaping away to Kerela.

Now, as per PW 45 (SI Maheswar Saikia) who is the first I.O. of the case, on 24-03-2018 he went to the house of Abdul Rashid and finding him in his house brought him to Police Station and arrested him. Thereafter, on 25-03-2018 alongwith Abdul Rashid made search of accused Zakir Hussain in the house of their relatives but did not find him. According to him on 28-03-2018 accused Muklisur Rahman appeared before the office of the Addl. Superintendent of Police and he was then taken to the Sadar police station for interrogation and thereafter he was arrested on the allegation of helping Zakir Hussain in his escape. On 29-03-2018 he arrested accused Abdul Rezzak.

PW 39 (Mafidul Islam) in his cross-examination has stated that Abdul Rezzak, father of accused Zakir Hussain was not in his house prior to 3/4 days of the incident and he cannot say where he has gone.

Special Judge,
Laugaon :: Assam
4/9/18

Now in this case, I.O has failed to collect cogent materials to establish in whose house Zakir Hussain and his family member were taking shelter. PW 45 in his cross-examination has stated that after arresting and forwarding accused Fakar Uddin, who is the driver of vehicle No.AS-02-C-4363, he did not make any attempt to identify the house where Fakaruddin has dropped Zakir Hussain and his mother.

Now conspiracy does not always take place inside the four corners of the wall but in this case I.O. has failed to collect cogent materials of criminal conspiracy. It is true that after the incident accused Zakir was absconding but this fact is not sufficient to held accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid guilty of charge of criminal conspiracy. Now, any statement made during police custody or in presence of police cannot be used against accused as per Section 25 and 26 of the evidence as the same is inadmissible. As such evidence of PW 8 and PW 45 with regard to confession of accused Zakir Hussain and Jubeda Begum cannot be relied into.

*JF
4-9-18
Special Judge
Nagaon :: Assam*

29. In this case evidence is found insufficient against accused Abdul Rezzak, Jubeda Begum, Muklisur Rahman and Abdul Rashid guilty u/s 120-B/212 IPC.

30. Now, so far as charge against accused Fakar Uddin u/s 202 IPC is concerned let us appreciate evidence.

From the evidence of PW 45 (SI Maheswar Saikia) it is evident that on 01-04-2018 he seized the vehicle No.AS-02-C-4363 vide Ext.24 and also interrogated Fakar Uddin the driver of the vehicle. Seizure of vehicle has been duly proved by PW 40, Abdul Hussain, the father of accused Fakar Uddin.

According to PW 44 (Majibur Rahman) who is the brother-in-law of accused Fakar Uddin, after 10/15 days of the incident of Batadraba, one day, police called him to the police station and

accordingly he went there and found Fakar Uddin and his vehicle there and came to know from police that police has seized the vehicle by which Fakar carried Zakir and his family member.

Now, there is no evidence on the record to establish that accused Fakar Uddin while carrying accused Zakir and his mother Jubeda by his vehicle had knowledge that Zakir has committed crime and he intentionally did not give information to police.

31. In view of discussion of evidence made above, I have arrived at the finding that prosecution has failed to establish the guilt of accused Fakar Uddin u/s 202 IPC with cogent evidence.

[Signature]
Special Judge,
Nagaon :: Assam

32. In view of discussion of evidence made so far I have arrived at the conclusion that accused Zakir Hussain is found guilty of committing offence u/s 448/201/302 IPC Read with Section 6 of the POCSO Act.

Accused Abdul Rezzak, Jubeda Khatun, Muklesur Rahman, Abdul Rashid are not found guilty for committing offence u/s 120-B/212 IPC and accused Fakar Uddin is not found guilty for committing offence u/s 202 IPC.

33. **Finding** :- I have heard submission of both sides and gone through the evidence and materials on record and I have arrived at the finding that prosecution has succeeded to bring home the charge against accused Zakir Hussain u/s 448/302/201 IPC Read with Section 6 of the POCSO Act beyond all reasonable doubt accordingly he is convicted under these sections of law.

Accused Abdul Rezzak, Jubeda Khatun, Muklesur Rahman, Abdul Rashid are acquitted from the the charge u/s 120-B/212 IPC and accused Fakar Uddin is acquitted from the charge u/s 202 IPC. They are set at liberty.

The judgment is pronounced in the open court.

Order on sentence will be passed after hearing the convict and the learned counsels of both sides on the point of sentence.

Given under my hand and seal of this court, I have signed and delivered the judgment on this 4th day of September, 2018 at Nagaon.

Dictated & Corrected by me

4-9-18
Special Judge,
Special Judge,
Nagaon, Assam

Nagaon, Assam

4-9-18
(Smti.R.Kar)
Special Judge,
Special Judge,
Nagaon, Assam

Nagaon, Assam.

Dictation taken & typed by

Nipen Rajkhowa
(Nipen Rajkhowa)
Stenographer

Special (POCSO) Case No.23(N)/2018**Date of argument on sentence : 04-09-2018****Date of order : 07-09-2018.****ORDER ON SENTENCE**

I have heard arguments of Sri M.J.Neog, learned Special Public Prosecutor as well as Sri M.C. Das, the learned Legal Aid Counsel for the convict Zakir Hussain.

Learned Special P.P. considering the nature of the crime has prayed for maximum punishment for all the offences. He has argued in favour of capital punishment for the offence u/s 302 IPC and relied on the following citations:-

- 5 q-18
Special Judge,
Nagaon :: Assam*
- i). **Bachan Singh Vs. State of Punjab, (1980 Cri.L.J. (SC) 636).**
 - ii). **Machhi Singh & ors. Vs. State of Punjab, (1983 Cri.L.J. (SC)1457).**
 - iii). **State of U.P. Vs. Satish, (2005 (SC)).**
 - iv). **Dhananjay Chaterjee Vs. State of West Bengal, (1994, SC.)**
 - v). **Laxman Naik Vs. State of Orissa, (1995 AIR (SC), 1387) and**
 - vi).**Lochan Shriwas Vs. State of Chatisgarh, (Chattisgarh HC.2017).**

Learned Legal Aid Counsel on the other hand has opposed the imposition of capital punishment on the following grounds:-

1. The case is based upon circumstantial evidence and the circumstances are not fully established.
2. The case is based on dying declaration which is doubtful

3. The accused is a minor boy who has not completed the age of 18 years.
4. No probability of commission of crime by accused person in future to constitute continued threat.
5. No evidence with regard to criminal antecedent of the accused.
6. Case does not involve extreme brutality.

Learned Legal Aid Counsel relied on these citations in support of his contentions:-

- (i) **2017 Cri.L.J. 4228 (State of Orissa Vs. Mata Munda & ors)**
- (ii) **2014 Cri.LO.J. 1739 (SC) (Mahesh Dhanji Shinde vs. State of Maharashtra)**
- (iii) **AIR 2017 SC 2363 (State of Maharashtra Vs. Nisar Ramzan Sayyed) and**
- (iv) **AIR 2014 SC 1911 (Setram Vs. State).**

I have gone through the citations so referred by both parties.

In the case of sentencing in respect of offence u/s 302 IPC, Life Imprisonment is the rule and death sentence is the exception which is to be awarded in rarest of rare case with special reasons to be recorded. It is also the principle of law that the court has to weigh the aggravating circumstances against the mitigating circumstances.

It is well known that principle and guidelines in imposing death penalty has been developed in the case of **Bachan Singh Vs. State of Punjab (AIR 1980 SC 898)** and **Machhi Singh and others. Vs. - State of Punjab (1983 AIR 957)**.

In **Machhi Singh and others. Vs. - State of Punjab (1983 AIR 957)** Hon'ble Supreme Court observed that ;

" When the **community feels** that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its **collective conscience** is so shocked that it will expect the holders of the judicial power centre to inflict death penalty **irrespective** of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance :

- (i) **manner** of commission of Murder i.e., when the murder is committed in an extremely **brutal, grotesque, diabolical, revolting** or **dastardly** manner so as to arouse intense and extreme indignation of the community;
- (ii) whether the victim is subjected to **inhuman acts of torture** of cruelty in order to bring about his or her death.

Now so far as point No.1 and 2 of argument of learned defence counsel is concerned, this is not a case of sole circumstantial evidence. Reason has been shown in the judgment for accepting Dying declaration (Ext.16).

Let us draw balance sheet in respect of aggravating and mitigating circumstances in this case.

Aggravating circumstances in this case are :-

1. Age of the deceased/victim was below 10 years. As per her school certificate (Ext.F) her date of birth is 08-05-2008.
2. She was the victim of gang penetrative sexual assault at such tender age.

3. After gang penetrative sexual assault she was set ablazed by the accused Zakir Hussain and two CCLs and she died due to 96% burn injury.

Mitigating circumstance as per submission of learned Legal Aid counsel:-

1. Young age of the accused.
2. No criminal antecedent.

Now let us weigh both the circumstances in this case.

Here mitigating circumstances appeared against the accused is his young age. As per learned Legal Aid Counsel convict Zakir Hussain has not completed 18 years of age. It is already held in the judgment that defence side in course of trial has neither taken the plea of Juvenility nor they could rebut the school certificate exhibited by prosecution by producing any other cogent evidence. As per Mat. Ext.I, date of birth of Zakir Hussain is 08-05-1999.

Now in number of cases, Hon'ble Supreme Court has not considered the young age and lack of criminal antecedents as mitigating circumstances. In the case of **Mukesh and another-Vs.- State for NCT of Delhi & Ors. ((2017) 6 SCC 1)**, young age of the convict/appellant was not considered as mitigating circumstance and death sentence was confirmed.

Some observation of **Hon'ble Justice R.Bhanumathi in the case of Mukesh and ano. Vs.- State for NCT of Delhi & ors. ((2017) 6 SCC 1)**, para 116,126 & 127 are quoted below:-

"116. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges.

9-18
Special Judge
Nagaon :: Ass.

Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large."

*TR
9-9-18
Special Judge,
Nagaon :: Assam*

"126. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be made to **Holiram Bordoloi v. State of Assam** (2005) 3 SCC 793 (Para 15-17), **Ankush Maruti Shinde and Ors. v. State of Maharashtra (2009)** 6 SCC 667 (para 31-34), **Kamata Tiwari v. State of Madhya Pradesh** (1996) 6 SCC 250 (para 7-8), **State of U.P. v. Satish** (2005) 3 SCC 114 (para 24-31), **Sundar alias Sundarajan v. State by Inspector of Police and Anr.** (2013) 3 SCC 215 (para 36-38, 42-42.7, 43), **Sevaka Perumal and Anr. v. State of Tamil Nadu** (1991) 3 SCC 471 (para 8-10, 12) Mohfil Khan and Anr. v. State of Jharkhand (2015) 1 SCC 67 (para 63-65)."

"127. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of **Bhagwan Swarup v. State of U.P.** (1971) 3 SCC 759 (para 5). **Deepak Rai v. State of Bihar** (2013) 10 SCC 421 (para 91-100) and **Shabnam v. State of Uttar Pradesh** (2015) 6 SCC 632 (para 36)".

In **Purashottam Dasrath Borate and anr. Vs. State of Maharashtra ((2015) 6 SCC 652)** Hon'ble Supreme Court has observed as follows:-

" It is true that any case of rape and murder would cause a shock to the society but all such offences may not cause revulsion in society. Certain offences shock the collective conscience of the court and community. The heinous offence of gang rape of an innocent and helpless young woman by those in whom she had reposed trust, followed a cold-blooded murder and calculated attempt of cover up is one such instance of a crime which shocks and repulses the collective conscience of the community and the court. There in the light of aforesaid settled principle, this court has no hesitation in holding that the case falls within the 'rarest of the rare category,' which merits death penalty and none else. The collective conscience of the community is so shocked by this crime that imposing alternate sentence, i.e, a sentence of life imprisonment on the accused would not meet the ends of justice. Rather, it would tempt other potential offenders to commit such crime and get away with the lesser/lighter punishment of life imprisonment ".

In the instant case from the evidence of PW 2 and Ext.16 it is established that convict Zakir Hussain and his two accomplices committed penetrative sexual assault on a girl of about 10 years old and thereafter they did not hesitate to let the girl of such tender age ablazed. Now rape itself as a deprave act that too in respect of a girl of tender age and the convict in diabolic manner has caused her death by setting her ablazed.

Now-a-days sexual assault on child is rapidly increasing in horrifying manner and the parents are feeling insecured in respect of their children. Heinous crime committed in the instant case upon of girl of tender age shocks the collective conscience of the community. Age

To
9-18
Special Judge,
Nagaon :: Assam

of the convict cannot be treated as mitigating against the gruesome act committed in respect of a girl little less than 10 years.

Considering the facts and circumstances of the instance case and keeping in view the well settled principles laid down by Hon'ble Supreme Court in the case of **Bachan Singh Vs. State of Punjab, (1980 Cri.L.J.(SC) 636)** and **Machhi Singh & ors. Vs. State of Punjab, (1983 Cri.L.J. (SC)1457)** and also considering the observation of Hon'ble Supreme Court in the case of **Puroshottam Dashrath Borate Vs. State of Maharashtra ((2015) 6 SCC 652)** and landmark Judgment of recent time in the case of **Mukesh and another-Vs.- State for NCT of Delhi & Ors. ((2017) 6 SCC 1** as referred above, I am of the opinion that this case falls within the rarest of the rare category so to award death penalty in respect of offence u/s 302 IPC.

*TG 9-18
Special Judge,
Nagaon :: Assam*

In view of discussion so far made, I award the following punishment to the convict Zakir Hussain.

(i) The Convict Zakir Hussain is sentenced to 1 (one) year Rigorous Imprisonment for the offence punishable under Section 448 IPC .

(ii) The Convict Zakir Hussain is sentenced to **3 (three) years Rigorous Imprisonment** for the offence punishable under Section **201 IPC** and a fine of Rs.5,000/- (Rupees Five thousand only) in default Simple Imprisonment for another three months.

(iii) The Convict Zakir Hussain is sentenced to **Life Imprisonment** for the offence punishable **under Section 6 of the POCSO Act** and a fine of Rs.10,000/- (Rupees Ten thousand only) in default Simple Imprisonment for another six months.

(iv) The Convict Zakir Hussain is sentenced to death for the offence **under Section 302 of the IPC**. Accordingly, the convict be hanged by neck till he is dead.He will also pay fine of Rs.10,000/-

(Rupes Ten thousand) only in default Simple Imprisonment for another 6 (six) months.

The sentences under Sections 448/201 IPC read with Section 6 of the POCSO Act to run concurrently. Benefit under section 428 Cr.P.C. to be given wherever applicable.

The convict is also informed that he can file an appeal against the judgment and order on sentence within a period of **30** days as per Article **115** of the Limitation Act, 1963.

Case record of this proceeding be submitted to Hon'ble Gauhati High Court for the confirmation of the death sentence u/s 366 Cr.P.C. The file be prepared and be sent to Hon'ble High Court as per rules.

*Ranjan
Special Judge,
Nagaon :: Assam*

The sentence of death imposed on the convict shall not be executed unless it is confirmed by the Hon'ble Gauhati High Court.

The convict Zakir Hussain be committed to jail custody under warrant.

The exhibits be preserved till the confirmation of death penalty by the Hon'ble High Court.

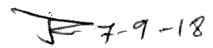
Let certified copy of the judgment and order on sentence be furnished to the accused free of costs forthwith.

Send a copy of the judgment and order on sentence to learned District Magistrate of Nagaon u/s 365 Cr.P.C.

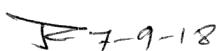
The DLSA, Nagaon will make necessary enquiry to provide compensation to the next of the kins of deceased 'X' under the victim compensation scheme as envisage u/s 357-A of Cr.P.C. Copy of the judgment & order on sentence be sent to the DLSA, Nagaon, accordingly.

Order on sentence is pronounced in open court.

Given under my hand and seal of this court, I have signed and delivered the sentence on this 7th day of September, 2018 at Nagaon.

 7-9-18
(R.Kar)
 Special Judge,
Special Judge
 Nagaon, Assam
Nagaon.

Dictated & corrected by me.

 7-9-18
(R.Kar)
 Special Judge,
Special Judge
 Nagaon, Assam
Nagaon.

Dictation taken & transcribed by

Nipen Rajkhowa
(Nipen Rajkhowa)
 Stenographer.

Contd.....

ANNEXURE**Prosecution Witness :**

1. P.W.1 Sarafat Ali
2. P.W.2 Murshida Begum
3. P.W.3 Nur Mohammd Faruki
4. P.W.4 Safiqul Islam, S/O late Hazarat Ali
5. P.W.5 Nazimul Hoque
6. P.W.6 Safiqul Islam, S/O Md. Abdul Barik Ahmed
7. P.W.7 Safiqul Islam, S/O late Zafar Ali
8. P.W.8 Habibur Rahman
9. P.W.9 Wahida Khatun
10. P.W.10 Trishnapriy Buragohain.
11. P.W.11 Bipasha Kalita
12. P.W.12 Kabita Biswas
13. P.W.13 Md. Ataur Rahman
14. P.W.14 Halima Khatun
15. P.W.15 Mokshed Ali
16. P.W.16 Wahid Begum
17. P.W.17 Rinku Boro
18. P.W.18 Md. Ispakur Rahman
19. P.W.19 Ali Hussain
20. P.W.20 Amir Hamja
21. P.W.21 Jiten Bordoloi
22. P.W.22 Srabana Sonowal
23. P.W.23 Dr. Kapil Pator
24. P.W.24 Zakir Hussain, S/O Md. Abdul Rashid
25. P.W.25 Raiman Nessa
26. P.W.26 Sanjita Khatun
27. P.W.27 Dr. Pallabi Hazarika
28. P.W.28 Dr. Netromoni Kakoti
29. P.W.29 Anjumoni Deka
30. P.W.30 Bhabani Das
31. P.W.31 Dr. Bhaswati Sharma
32. P.W.32 Minakshi Talukdar
33. P.W.33 Ananta Bordoloi
34. P.W.34 Minakshi Talukdar
35. P.W.35 Fazal Hoque
36. P.W.36 Abdul Jalil
37. P.W.37 Basudev Roy
38. P.W.38 Joydev Roy
39. P.W.39 Mofidul Islam
40. P.W.40 Abdul Hussain
41. P.W.41 Ashanullah
42. P.W.42 Biswajit Nath
43. P.W.43 Naren Ch. Das
44. P.W.44 Majibur Rahman
45. P.W.45 Maheswari Saikia
46. P.W.46 Dhiren Kakati.

J
F. 9/218
Special Judge,
Nagaon :: Assam

Prosecution Exhibit :

1. Ext.1 Seizure list
2. Ext.2 Seizure list
3. Ext.3 Statement u/s 164 Cr.P.C.
4. Ext.4 Seizure list
5. Ext.5 Seizure list
6. Ext.6 Seizure list
7. Ext.7 Seizure list
8. Ext.8 Ejahar
9. Ext.9 Seizure list
10. Ext.10 Statement u/s 164 Cr.P.C.
11. Ext.11 Sketch map
12. Ext.12 Inquest Report
13. Ext.13 Injury Report
14. Ext.14 Statement recorded u/s 164 Cr.P.C.
15. Ext.15 Requisition of Dying declaration
16. Ext.16 Dying Declaration.
17. Ext.17 Seizure of dying declaration.
18. Ext.18 Post-mortem Report.
19. Ext.19 Seizure list
20. Ext.20 Burn register (to be verified)
21. Ext.21 FSL Report
22. Ext.22 FSL Report.
23. Ext.23 Seizure list.
24. Ext.24 Seizure list.
25. Ext.25 Seizure list.
26. Ext.26 GD. Of BPCH P.P. Nagaon.
27. Ext.27 Extract copy of Bhangagarh P.S.GDE No.500
28. Ext. 28 Batadraba P.S. GD book
29. Ext.28(1) GD. Entry No.432
30. Ext.28(2) GD Entry No.447
31. Ext.28(3) GD. Entry No.67
32. Ext.29 Sketch map
33. Ext.30 Charge-sheet.

R
Special Judge,
Nagaon :: Assam
9-18

Mat. Exhibit of Prosecution

1. Mat.Ext. A Kerosene Gallon
2. Mat.Ext.B Piece of half-burn cloth and hair.
3. Mat.Ext.C Mat (locally called dhari woven by bamboo)
4. Mat.Ext.D Seized soil
5. Mat.Ext.E lungi
6. Mat.Ext.F School Certificate issued in the name of deceased.
7. Mat.Ext.G School Certificate issued in the name of CCL.
8. Mat.Ext.H School Certificate issued in the name of CCL.
9. Mat.Ext.I School Certificate issued of Zakir Hussain
10. Mat.Ext.J School Attendance Register of class IV of 2018
11. Mat.Ext.K School Attendance Register of class V of 2018
12. Mat.Ext.L Admission Register of 2003.

Defence Witness :

1. DW 1 Rahena Khatun
2. DW 2 Mainara Khatun
3. DW 3 Abdul Rezzak.

Defence Exhibit :

1. Ext. A..... is the signature in Ext.8.
2. Ext.B Thumb impression of the complainant in Ext.8.
3. Ext.C Nil
4. Ext. D..... is the Sketch map.
5. Ext. E..... is the Jamabandi

TC 7-9-18
(Rita Kar)
Special Judge,
~~Special Judge~~
Nagaon, Assam.
Nagaon :: Assam