IN THE COURT OF THE SPECIAL JUDGE, SIVASAGAR

Present – Biprajit Roy, AJS. Special Judge, Sivasagar.

Special (P) Case No. 46/2017

Sec. 376(2)(f) & (n)of IPC & sec. 6 of POCSO Act/ Sec. 17/6 of POCSO Act & section 109 r/w sec.376(2)(f) & (n) of IPC

State

-Vs-

Sri Kumud Ch. Borgohain

&Smti. BS (name withheld)

Advocates appeared:

For the State : - Mr. S. Gogoi,

For the accused : - Mr. U. Kakoti& Syed A.R. Rahman,

Date of evidence : - 10.01.2018,07.02.2018,14.06.2018,10.07.2018,

01.09.2019 & 12.11.2018

Date of argument : - 06.11.2019, 25.11.2019,

Date of judgment :- 21.12.2019

JUDGMENT

1. The case of the prosecution is that the informant DS (name withheld) who is also one of the victims of the case lodged an FIR in the in Namti police station on 30.09.2017 stating that the accused Kumud Chandra Borgohain used to visit their house since last ten years and developed illicit relation with her mother BS. The informant alleged that thereafter the accused on pretext of providing her treatment, took her to Jorhat and exploited her sexually. The informant further alleged that the accused took her to Dibrugarh also with same intention on pretext of

treatment and attempted to exploit her sexually at Dibrugarh and also at her home. The informant further alleged that the accused also took her sister JS (name withheld) who is another victim of this case to Guwahati on tour an exploited her sexually. The informant alleged that her mother BS (name withheld) fully co-cooperated the accused in his illegal activities.

- 2. The Officer-in-charge of Namti Police Station received the FIR and registered Namti P.S. case no. 21/2017 u/s 4 of POCSO Act. After completion of investigation charge-sheet was submitted against the accused persons Kumud Ch. Borgohain and BS (name withheld) and read with section 4 of the POCSO Act.
- 3. The case was investigated by SI Robindra Hazarika, O.C. of Namti PS and on completion of investigation the I.O. submitted charge-sheet against the accused persons Kumud Chandra Borgohain and BS (name withheld) u/s 4 of POCSO Act.
- 4. Record reveals that during investigation birth certificate of the victim girls were seized by the I.O. their statements were also recorded in the Court u/s 164 of Cr.P.C. Both the victim girls were examined u/s 313 of Cr.P.C.
- 5. Copy of relevant documents were furnished to the accused persons. After hearing Id. counsel of both sides and taking into consideration the materials available on record, charge u/s 6 of POCSO Act was framed against the accused Kumud Chandra Borgohain vide order dated 13.12.2017 which was read over and explained to which he pleaded not guilty. Charge u/s 17 of IPC read with section 6 of POCSO Act were framed against BS which were read over and explained to the accused to which he pleaded not guilty. Subsequently in the course of trial charges were framed on the basis of the materials available on record vide order dated 18.04,2019 which were read over and explained to the accused persons to which they pleaded not guilty. The subsequently framed charges are under section 6 of POCSO Act for the other victim ' JS ' and

alternate charges u/s 376(2)(f)(n) of IPC against the accused Kumud Chandra Borgohain and alternate charge u/s 109 of IPC read with section 376(2)(f) and (n) of IPC was framed against the accused BS which were read over and explained to the accused persons to which they pleaded not guilty. The alternate charges were framed by exercising of power conferred u/s 42 of POCSO Act.

After framing alternate charges and adding charge u/s 6 of POCSO Act for the victim 'JS' both prosecution and the defence were given the opportunity to examine the witnesses further but both sides submitted that they are not willing to examine the witnesses any further as they have already sufficiently examined and cross-examined them.

- 4. In the course of trial prosecution side examined 10 (ten) witnesses. Two (2) Court witnesses were also examined. The defence plea is of denial.
- 5. The accused persons were examined u/s 313 Cr.P.C. It is also pertinent to mention here that in her examination u/s 313 of Cr.P.C. the accused BS who is the mother of the victim girls stated that she does not remember the date of birth of her daughters. She also stated that the other accused Kumud Chandra Borgohain used to visit their house and her husband sometimes borrowed money from him. She further stated that the accused being an electrician had installed electricity connection in her house by hooking and so the villagers did not like him. The other accused Kumud Chandra Borgohain in his examination u/s 313 of Cr.P.C. denied the allegation levelled against him and stated that the brother of the victims demanded Rs. 7,00,000.00 from him and when he refused, he altercated with him and he was saved by the other accused BS. He used to visit the house of the victims. He also stated that he is innocent and the case is false.
- 7. Heard argument of learned counsel of both sides.
- 8. The points for determination in this case are :

- (i) Whether the victims DS and JS were minor girls at the time of alleged incident?
- (ii) Whether the accused Kumud Chandra Borgohain used to visit the house of the victims?
- (iii) Whether the accused Kumud Chandra Borgohain took the victims to Jorhat, Dibrugarh and Guwahati on various pretexts and raped them?
- (iv) Whether the accused BS abetted/assisted the accused Kumud Chandra Borgohain in commission of the crime?
- (v) Whether the accused persons committed any offence as alleged in the FIR?

Evidence as adduced by the Prosecution side in this case are as follows:

9. The PW-1 DS stated in her evidence stated that accused BS is her mother. Accused Kumud Borgohain is known to her. He used to frequently visit their shop. Presently her age is 18 years and she is reading in class X at Namti Girls High School. Her date of Birth is 17.06.1999.

In the year 2016 accused Kumud Borgohain used to visit their residence and became like a family member. In the year 2016 for her skin problem, Kumud Borgohain offered to take her to Dibrugarh for medical check up to which she declined. But her mother BS forcibly sent her to Dibrugarh with accused Kumud Borgohain. He took her to one hotel at Dibrugarh and committed rape on her in the hotel room. He did not take her to hospital for medical treatment. They stayed at the hotel for one night. In the hotel he introduced her as his daughter by changing her title. From Dibrugarh, accused Kumud Borgohain brought her back to her residence. She did not inform the matter to her mother as she did not listen to them and remained influenced by Kumud Borgohain.

After about one year again accused Kumud Borgohain took her to Jorhat for medical consultation of her skin problem and after consultation with the doctor, he took her to one hotel at Jorhat and kept in the said hotel for the night. Her mother called Kumud Borgohain and he informed her mother that he will stay at the residence of one of his known person. By keeping her in the hotel at Jorhat, accused Kumud Borgohain committed rape on her at night hours. Accused took her to Jorhat thrice and committed rape on all the three occasions. Out of these, twice she was taken for medical check-up and once for visit. All these three times she went alone with accused Kumud Borgohain and she was sent by force by her mother BS in spite of her reluctance.

Accused also used to come to their residence in absence of her father and used to sleep with her mother. In absence of her father her mother used to call Kumud Borgohain and he used to stay at their home for the night. While he came to their residence, Kumud Borgohain used touch her body. Accused took her sister JS to Guwahati twice and also committed misdeed with her. Once JS went to Guwahati with her mother and once alone.

They reported the matter to their aunt Smti. Mira Devi Saikia. Just before filing of the case, at night hours, when Kumud Borgohain came to their house and she and JS did not respond treat him well, he rebuked them. On this her elder brotherBBS asked about the reason and they narrated the incidents of misdeeds and rape committed on them by Kumud Borgohain. On knowing this her brother scolded Kumud Borgohain. But her mother protected the accused Kumud Borgohain. Even their mother asked them to beg apology but they refused. On hearing hue and cry at their house, neighbouring people gathered at our house. Her brother slapped the accused Kumud Borgohain. On this her mother sent back the accused from back side of the house.

On the same night they went to Namti PS and lodged FIR. Ext. 1 is her FIR. Ext. 1(i) is her signature. Police recorded her statement. Police took her and JS to hospital. Police also took them to Court where she gave my statement. Ext. 2 is the statement given in Court. Ext. 2(i), 2(ii) and 2(iii) are my signatures.

The PW-1 was further examined and she stated that she has already adduced evidence in this case. Today she has brought her birth certificate in original. Ext. 4 is the (proved in original copy) Birth Certificate in which her date of birth is mentioned as 17.06.1999.

In her cross-examination the PW-1 stated that she knew that she was born at her residence. Namti Primary health Centre is near to their residence. She cannot say if said hospital issues Birth Certificate. Ext. 4 was issued by Gelakey unit of Registrar of Birth and Death. She denied the suggestion that Ext. 4 is a procured document by her father to show their age less than the actual age. She also denied that her age is higher than what she claimed. She failed once in class VIII. She denied that she failed several times in school. She stated that police perused their birth certificates but did not seize the same.

She admitted that she has not submitted any document showing her skin ailments in 2016. She denied that before police, she did not disclose the name of the doctor who had examined her at Dibrugarh.

During cross-examination the PW-1 denied the suggestion that she did not state before the I.O. as follows:

"...my mother has forcibly sent me with the accused Sri Kumud Ch. Gogoi to Dibrugarh; that in the hotel accused Kumud introduced me as his daughter by changing my title; that I did not inform the matter to my mother as she did not listen to us and remain influenced from Kumud Borgohain; that from Jorhat when my mother called Kumud Borgohain, he informed my mother that he will stay at residence of his known person; that accused took me to Jorhat thrice and committed rape on all the three occasions; that out of this, twice I was taken for medical check-up and once for visit; that in absence of my father my mother used to call Kumud Borgohain and he used to stay at our home for night; that while he come to our residence, Kumud Borgohain used touch my body; that accused

took my sister JS to Guwahati twice and also committed misdeed with him and once JS went to Guwahati with my mother and once alone; that we have reported the matter to our aunt Mira Devi Saikia, that just before filing of the case, at night hours, when Kumud Borgohain came to our house and I and JS did not responded well to treat him, he rebuked us, that on this my elder brother BBS asked about the reason and we narrated the incidents of misbehaves and rape on us by Kumud Borgohain, that on knowing this my brother scolded Kumud Borgohain but my mother protected the accused Kumud Borgohain; that even our mother asked us to beg apology but we refused; that on hearing hue and cry at our house, neighbouring peoples gathered at our house; that my brother also slapped the accused Kumud Borgohain and on this my mother sent back the accused from back side of the house..."

She denied the suggestion that the accused Kumud Ch. Borgohain never took her to any hotel, did not keep her there and never committed any rape on her. She denied the suggestion that on being tutored by others, she has deposed falsely. She denied the suggestion that her mother might reveal the truth, so they have falsely implicated her. She has not submitted any document regarding reading in Namti Girls High School. She denied the suggestion that no incident of rape or misbehaviour took place with her and she has falsely implicated the accused in this case.

10. The PW-2 JS stated in her evidence that the accused BS is her mother. Accused Kumud Borgohain is known to her. He used to frequently visit theirshop and residence. Presently her age is 18 years and she is reading in class X at Namti Girls High School. Her date of birth is 17.06.1999.

Since 2006 accused Kumud Borgohain used to visit their residence while he was electrical contractor and became like a family member.

He also used to visit the shop opened by her mother and came in touch. He helped financially her mother in maintaining the shop and the family. In absence of her father, her mother used to call Kumud Borgohain to their residence and stayed with her mother. While he used to stay in their residence, since last 6/7 years her mother askedKumud Borgohain to sleep with them. At that time she along with her sister DS used to sleep.

While sleeping with themKumud Borgohain used to commit rape on her and DS. Though she informed the matter to her mother, she disbelieved them and remained mum.

In the year 2016 during summer vacation, Kumud Borgohain took her to Guwahati for visit and kept her in a rented house for 2(two) nights. At Guwahati the accused committed rape on her twice. The accused also used to bring drinks and with fruits forced her to consume the drinks. After this the accused tried to take her outside but she boldly refused. The accused took her sister DS to Jorhat and Dibrugarh for medical consultation of her skin problem. DS reported her that the accused Kumud Borgohain has committed rape with her at Dibrugarh and Jorhat. She also told the matter to her best friend Queen Dutta.

Accused Kumud Chandra Borgohain committed rape on DS on several occasions. She informed the matter to NGO secretary Farid Islam Hazarika. Just before filing of the case, a feast was organised at theirresidence. After the dinner, when Kumud Borgohain came to their house, she and DS did not treat him well and on this Kumud Borgohain rebuked them.

On this her elder brother BBSasked about the reason and they narrated the incidents of misbehaviour and rape committed on them by Kumud Borgohain. After knowing this her brother scolded Kumud Borgohain. But her mother protected the accused Kumud Borgohain from public outrage. On hearing hue and cry in their house, neighbouring people gathered at their house. Then her mother sent back the accused from back side of the house.

On the same night they went to Namti PS and lodged FIR. Police recorded her statement. Police took her and DS to hospital. Police also took them to Court where she gave her statement. Ext. 3 is the statement given in Court. Ext. 3(i), 3(ii) and 3(iii) are her signatures.

The PW-2 was further examined and she stated that she has brought her birth certificate in original. Ext. 5 is the (proved in original copy) Birth Certificate in which her date of birth is mentioned as 17.06.1999.

During cross-examination she stated that she knew that she was born at her own residence. Namti Primary health Centre is near their residence. She cannot say if said hospital issues Birth Certificate. Ext. 5 was issued by Gelakey unit of Registrar of Birth and Death. She denied the suggestion that theExt. 5 is a procured document by her father to show their age less than the actual age. She denied the suggestion that her age is higher than what she has claimed. She failed once in class IX. She denied the suggestion that she failed several times in school. Police perused their birth certificates but did not seize the same.

She stated that she has appeared in class X exams from Sri Manta Sankar Dev High School, Meteka.

She denied that she did not state before the I.O. as follows:" Accused Kumud also used to visit the shop opened my mother and came in touch; that in absence of my father, my mother used to call Kumud Borgohain to our residence and stay with mother; that while he used to stay in our residence, since last 6-7 years my mother asked Kumud Borgohain to sleep with us; while sleeping with us Kumud Borgohain used to commit rape on me and DS; though I informed the matter to my mother, she disbelieves us and remained mum; at Guwahati, accused also used to bring drink and with fruits forced us to consume drink; that after this accused tried to take me again outside but I boldly refused; that accused took my sister DS to Jorhat and Dibrugarh for medical consultation for her skin problem, that DS reported to me that accused Kumud Borgohain has committed rape on her at Dibrugarh and Jorhat;

that she also told the matter to her best friend Queen Dutta; that accused Kumud Chandra Borgohain committed rape on DS on several occasions; that i have also informed the matter to NGO secretary Farid Islam Hazarika; that just before filing of the case, a feast was organised at our residence on coming of my uncles, that after the dinner, when Kumud Borgohain came to our house and I and DS did not respond well to treat him and on this Kumud Borgohain rebuked us; that on this my elder brother BBS asked about the reason and we narrated the incidents of misbehaves and rape on us by Kumud Borgohain; that on knowing this my brother scolded Kumud Borgohain but my mother protected the accused Kumud Borgohain from public outrage; that on hearing hue and cry at our house, neighbouring people gathered at our house and on this my mother sent back the accused from back side of the house."

She admitted that shecannot say the name of the land lord of the tenanted house where the accused kept her. She denied the suggestion that the accused Kumud Ch. Borgohain is not an electrical contractor.

She denied the suggestion that the accused Kumud Ch. Borgohain never took her to Guwahati nor kept her there and never committed any rape on her. She denied the suggestion that on being tutored by others, she has deposed falsely. She denied the suggestion that her mother might reveal the truth, so they have falsely implicated her. She denied the suggestion that no incident of rape or misbehaviour took place with her or DS and they have falsely implicated the accused in this case.

11. The PW-3 BBS stated that accused BS is her mother. Accused Kumud Borgohain is known to him. He used to frequently visit their shop. Victim DS and JS are his younger sisters. They are twins. Presently their agesare about 16 years and both are reading in class X at Namti Girls High School.

Since last 10 years accused Kumud Borgohain used to visit their residence and became like a family member. Whenever he came, normally he used to take lunch/dinner etc.

On 30.09.2017 their family members and uncles joined in a get together. After the leaving of the guests, the accused Kumud Borgohain came to their house and asked a glass of water from his sister JS. At that time he was taking his lunch. On asking of water by the accused, JS told that by giving milk they are maintaining a snake. Then he asked JS as to why she uttered those words. She did not give any direct reply. On asking DS, she narrated to him in detail about the incidents. DS told him that accused Kumud Borgohain by taking both of them to various places attempted to commit rape on them. She also told him that accused took them to Jorhat, Guwahati and Dibrugarh. On knowing this he altercated with Kumud Borgohain. Hearing hue and cry in their house, neighbouring people gathered at their house. On arrival of villagers, the accused leaving his scooty in our house, fled away therefrom. On this his mother also tried to set our shop on fire by pouring kerosene oil but failed and she left the place. On the same night they went to Namti PS and his sister lodged FIR. Police came to their house and recorded his statement.

In cross-examination he admitted that he has not seen the accused Kumud Borgohain staying in their house at night.

He denied the suggestion that he did not state before the I.O. as follows: "On 30.09.2017 when our other family members and uncles joined in a get together, after leaving the guest, accused Kumud Borgohain came to our house and asked for a glass of glass of water from my sister JS. At that time I was taking my lunch. On asking water by accused, JS told that by giving milk they are maintaining snake. On this I asked JS why she uttered this word. She did not give me direct reply."

He denied that he did not state before the I.O. as follows: "On knowing this I made altercation with Kumud Borgohain. On hearing hue and cry at our house, neighbouring people gathered at our house. On arrival of villagers, accused by leaving his scooty in our house, flee away there from. On this my mother also by spraying kerosene attempted to set our shop on fire but failed and she left the place."

He admitted that he cannot say the dates on which accused Kumud took his sisters to Guwahati, Jorhat and Dibrugarh. He admitted that he had not not seen his sisters going with the accused Kumud to Guwahati, Jorhat and Dibrugarh.

He also admitted that he had no personal knowledge except hearing the incident from DS. JS did not inform him about any incident of misbehaviour with her by accused. He denied that he has deposed falsely on the matter of hearing the incident from DS. He denied that the accused Kumud has recently retired from his service, so they demanded Rs. 7,00,000/-(seven lakhs) from him and on his refusal, they concocted this case against him falsely. He denied the suggestion that his mother could have told the truth, so they have implicated her falsely in this case.

He denied the suggestion that on the previous day i.e. on 29.09.2017 his father had lodged one FIR against accused Kumud alleging kidnap of his mother BS from their house.

12. The PW-4 F stated in his evidence that the accused BS is his wife. Accused Kumud Borgohain is known to him. He used to frequently visit their shop. Victim DS and JS are his daughters. They are twins. Presently their agesare about 18 years and both are reading in class X at Namti Girls High School.

Since last 07 years accused Kumud Borgohain used to visit his house. In connection with his business, he had to remain away from his house consecutively for 3/4 days in a week. He heard that the accused used to visit his house in during his absence.

On 30.09.2017 at about 8:00 p.m. when he returned home from Sonari, he did not find anybody in his house. His brother Monai Saikia told him that as accused Kumud had misbehaved his daughters, the family members went to Namti PS. At about 9:00 p.m. one neighbouring boy took him to Namti PS by saying that he was called by the officer. At Namti PS, police officer informed him that his wife has fled away with one

man. He saw his son and two daughters at Namti PS. He did not ask them as to why they were at the PS.

Therefrom he went back home. At about 12:00 o'clock at midnight his children returned back home. On the next day at evening hours his wife returned home.

He admitted that he did not state before the I.O. as follows: "On 30.09.2017 at about 8 PM, when I returned home from Sonari, I did not find anybody in my house. My brother Monai Saikia told me that as accused Kumud has misbehaved my daughters and for this all the family members went to Namti PS. At about 9 PM one neighbouring boy took me to Namti PS on the plea that I was called there by the officer. At PS, police officer informed me that my wife and has flew away with one man. I saw my son and two daughters at Namti PS. I did not ask them as to why they are at the PS. Therefrom I went back home. At about 12 midnight my children returned back home. On the next day at evening hours my wife returned home."

He denied the suggestion that as accused Kumud recently retired from his service, they asked for Rs. 7,00,000/- from him and on his refusal, they concocted this false case against him. He also denied the suggestion that as his wife could have told the truth, they implicated her in this case falsely.

13. The PW-5 Meera Devi Saikia stated in her evidence that accused Kumud Borgohain is known to her. She had seen him visiting the residence of BS since last seven years when she came to the village after her marriage. Victim DS and JS are twin daughters of BS.

About 7/8 months back, while she and JS went to field for cultivation, with hesitation JS told her that her mother BS compelled her and DS to establish physical relation with Kumud Chandra Borgohain. She also stated that due to skin problem of DS, her mother sent DS with accused Kumud to Jorhat for medical consultation and he kept DS in a

hotel and established physical relation with DS against her will. JS also stated that accused Kumud had taken her to Guwahati and attempted to establish physical relation with her but failed due her resistance. On knowing this, she asked JS to inform the matter to her brother and father.

After about a month of reporting the matter to her, when accused came to the house of DS and JS, in presence of their brother, JS misbehaved Kumud and there after the twins reported the incidents that happened with them to their brother. While the brother of DS tried to assault Kumud, BS saved Kumud and thereafter they both fled away. The entire incidents were reported to her by JS. On knowing this, on her asking, DS also reported the entire incidents that happened with her in the similar manner as stated by JS. She also stated that while in the hotel, Kumud had disclosed the identity of DS as his daughter by changing her title.

She denied the suggestion that she did not state before the I.O. as follows: "while I and JS went to field for cultivation, with hesitation JS informed me that her mother BS compelled her and DS to establish physical relation with Kumud Chandra Borgohain; that she also stated that due to skin problem of DS, her mother sent DS with accused Kumud to Jorhat for medical consultation; and kept DS in a hotel and established physical relation with DS against her will; that JS also stated that accused Kumud has taken her to Guwahati and attempted to establish physical relation with her but failed due to resistance by JS, that on knowing this, I asked her to inform the matter to her brother and father."

She denied the suggestion that she did not state before the I.O. as follows: "After about a month of reporting the matter to me, when accused came to the house of DS and JS, in presence of their brother, JS misbehaved Kumud and there after the twins reported the incident happened with them to their brother. While brother of DS tried to assault Kumud, BS saved Kumud and thereafter they both flee away. All above

was reported to me by JS. She also stated me that while keeping her in hotel, Kumud has disclosed that DS was his daughter by changing his title."

She denied the suggestion that she deposed falsely in favour of JS and DS.

14. The PW-6 Pranab Dutta stated in his evidence that the accused BS and Kumud Borgohain are known to him. He is the next door neighbour of BS. DS and JS are the twin daughters of BS.

He had seen the accused Kumud Borgohain frequently visiting the residence of BS.

About 7/8 months back, at about 6:00 p.m. while he was in his shop, on hearing hue and cry, he went to the house of accused BS and saw that BBS was scolding Kumud Borgohain. BBS informed him that Kumud Borgohain by taking his sisters JS and DS to Dibrugarh and Jorhat, committed misdeed with them and asked him as to what he should do with accused Kumud. He asked DS and JS about the matter and the accused Kumud fled away with the help of BS. He also heard shouts and cry of BS and then she left the house. Several villagers gathered there. Then he returned to his shop. Matter was informed to police.

Subsequently on asking DS and JS told him and others that Kumud Borgohain took them to various hotels and showed pornography and made physical relation with them.

In hiscross-examination he stated that heknows that accused Kumud worked in ASEB as lineman and came to their village as lineman.

He denied the suggestion that he did not state before the I.O. as follows: "on going to his residence, BBS also by informing me that Kumud Borgohain by taking his sisters JS and DS to Dibrugarh and Jorhat, committed misdeed with them and asked me as to what he should do with accused Kumud; that accused Kumud Flee away with the help of BS; that DS and JS told me and others that Kumud Borgohain by taking them to

hotels after showing them pornography, made physical relation with them."

He denied the suggestion that without knowing anything about the incident, he has deposed falsely.

15. The PW-7 Ashim Dutta stated in his evidence that accused BS and Kumud Borgohain are known to him being resident of neighbouring village. DS and JS are the twin daughters of BS.

He stated that he saw the accused Kumud Borgohain frequently visiting the residence of BS and also heard from villagers that they both maintained illicit relation.

On the date of filling FIR, one of the sisters finding me on the road, complained that Kumud Borgohain by taking her to Dibrugarh, Jorhat etc. in the name of consultation to skin doctor kept her in a hotel, committed rape with her. She also stated that while she informed the matter to her mother, she refused to divulge the same to others. She also stated that her mother forced both the twin sisters to go with Kumud Borgohain and on their reluctance, she used to scold them. He advised them to inform the matter to villagers. A village meeting was held. Several villagers gathered at Perabhari L. P. School and after discussion, resolved to take the matter to police. He was present in the meeting. In the village meeting also, both the twin sisters narrated the incidents.

He stated that a quarrel took place in the house of BS on this matter. He learnt that accused Kumud had fled away leaving behind his scooty.

In cross-examination he stated that he cannot say if, at the time of giving his statement he did not state that he heard from villagers that they both maintained illicit relation.

He denied the suggestion that he did not state before the I.O. as follows: "On the date of filling FIR, one of the sisters on finding me on road, complained that Sri Kumud Chandra Borgohain by taking her to

Dibrugarh or Jorhat in the name of consultation to skin doctor; that her mother forced both the twin sisters to go with Sri Kumud Chandra Borgohain and on their reluctance, she used to scold them; that a meeting was held and several villagers gathered at Perabhari L P School and after discussion, resolved to take the matter to police; that there was a quarrel in the house of BS on this matter; that I learnt that accused Kumud had to flee away by leaving behind his scooty."

He stated that Kumud Borgohain worked as electrical lineman in their village.

16. The PW-8 Dr. Duplay Patir stated in his evidence that on 02-10-2017 he had examined the victim girls DS & JS in connection with Namti P.S. Case No. 21/2017. On examination of DS he found the hymen absent. The rest findings were normal. No spermatozoa was seen in the vaginal smear test. The age of the victim was above 18 years as per the radiological report. She did not have any sign of recent sexual intercourse. She did not have any sign of pregnancy. She did not have any sign of injury on her body and private part at the time of examination. The Ext. 6 is the medical examination report: Ext.6 (1) is his signature.

On the same day he also examined JS, the other victim of this case. On examination of JS he found the hymen absent. The rest findings were normal. No spermatozoa was seen in the vaginal smear test. The age of the victim was above 18 years as per the radiological report. She did not have any sign of recent sexual intercourse. She did not have any sign of pregnancy. She did not have any sign of injury on her body and private part at the time of examination. The Ext. 7 is the medical examination report: Ext.7 (1) is his signature.

In his cross-examination the PW-8 stated that in case of young girls, hymen may get torn due to cycling, running etc. it may also get torn due to use of fingers for irritation arising out of some skin

disease. He denied that in case of multiple sexual intercourse the breast becomes softer and pendulous. He admitted that he had not mentioned the upper age limit of the victim girls. The victim DS did not complain of any skin disease at the time of medical examination.

The PW-9 SI Rabindra Hazarika who is the I.O. of the case stated in 17. his evidence that on 30.09.2017 he was posted as O/C at Namti PS. On that day at about 8:00 p.m. he received one written FIR from DS and registered Namti PS case No. 21/2017 u/s 4 of POCSO Act and took charge to investigate the case. After taking charge of investigation, he examined the informant cum victim DS and another victim JS, their brother BBS and others present at PS campus. Thereafter, on the same night he went to the place of occurrence i.e. residence of informant at Perabhari Gaon and drawn a sketch map of the place of occurrence. Exbt. 10 is the said sketch map; Exbt. 10(i) is his signature. He also examined witnesses found at the place of occurrence. During investigation, he apprehended the FIR named accused BS, mother of the victims from back side of her house. Accused Kumud Borgohain was apprehended from his house and brought both the accused persons to the police station. On the next day, both the victims were sent for medical examination and also sent them to Court for recording their statements u/s 164 Cr.P.C. Both the accused persons were forwarded to the Court. During investigation, he collected birth certificates of the victim girls as produced by the informant. As per the birth certificate collected by him, date of birth of both the victim girls were 17.06.1999. On his transfer, he handed over the CD to his successor.

During cross-examination he stated that he did not seize any article in connection with this case. Except the PW DS, he recorded statement of all other witnesses at the police station on the night of receipt of the FIR. He denied the suggestion that he had recorded statement of DS at police station campus.

He did not examine Pinku Saikia, neighbour of the informant. Except visiting the residence of the informant he had not visited any other place for investigation.

He had not visited Jorhat or Dibrugarh or Guwahati as the victim did not disclose the specific names of the hotels at those places or the names of the doctors.

He stated that the PW DS in her statement before him u/s 161 Cr.P.C did not state as follows:

"my mother has forcibly sent me with the accused Sri Kumud Ch. Borgohain to Dibrugarh; that in the hotel accused Kumud introduced me as his daughter by changing my title; that I did not inform the matter to my mother as she did not listen to us and remain influenced from Sri Kumud Chandra Borgohain; that from Jorhat when my mother called Sri Kumud Chandra Borgohain, he informed my mother that he will stay at residence of his known person; that accused took me to Jorhat thrice and committed rape on all the three occasions; that out of this, twice I was taken for medical check-up and once for visit; that in absence of my father my mother used to call Sri Kumud Chandra Borgohain and he used to stay at our home for night; that while he come to our residence, Sri Kumud Chandra Borgohain used touch my body; that accused took my sister JS to Guwahati twice and also committed misdeed with her and once JS went to Guwahati with my mother and once alone; that we have reported the matter to our aunt Mira Devi Saikia, that just before filing of the case, at night hours, when Sri Kumud Chandra Borgohain came to our house and I and JS did not responded well to treat him, he rebuked us, that on this my elder brother BBS asked about the reason and we narrated the incidents of misbehaves and rape on us by Sri Kumud Chandra Borgohain, that on knowing this my brother scolded Sri Kumud Chandra Borgohain but my mother protected the accused Sri Kumud Chandra Borgohain; that even our mother asked us to beg apology but we refused; that on hearing hue

and cry at our house, neighbouring peoples gathered at our house; that my brother also slapped the accused Sri Kumud Chandra Borgohain and on this my mother sent back the accused from back side of the house."

He stated that the said PW stated about rape committed at Jorhat.

The PW-9 stated that witness JS in her statement before him u/s 161 Cr.P.C did not state as follows:

"Accused Kumud also used to visit the shop opened my mother and came in touch; that in absence of my father, my mother used to call Sri Kumud Chandra Borgohain to our residence and stay with mother; that while he used to stay in our residence, since last 6-7 years my mother asked Sri Kumud Chandra Borgohain to sleep with us; while sleeping with us Sri Kumud Chandra Borgohain used to commit rape on me and DS; though I informed the matter to my mother, she disbelieves us and remained mum; at Guwahati, accused also used to bring drink and with fruits forced us to consume drink; that after this accused tried to take me again outside but I boldly refused; that accused took my sister DS to Jorhat and Dibrugarh for medical consultation for her skin problem, that DS reported to me that accused Sri Kumud Chandra Borgohain has committed rape on her at Dibrugarh and Jorhat; that she also told the matter to her best friend Queen Dutta; that accused Kumud Chandra Borgohain committed rape on DS on several occasions; that I have also informed the matter to NGO secretary Farid Islam Hazarika; that just before filing of the case, a feast was organised at our residence on coming of my uncles, that after the dinner, when Sri Kumud Chandra Borgohain came to our house and I and DS did not respond well to treat him and on this Sri Kumud Chandra Borgohain rebuked us; that on this my elder brother BBS asked about the reason and we narrated the incidents of misbehaves and rape on us by Sri Kumud Chandra Borgohain; that on knowing this my brother scolded Sri Kumud Chandra Borgohain but my mother protected the accused Sri Kumud Chandra Borgohain from public outrage; that on hearing hue and cry at our house, neighbouring peoples gathered at our house and on this my mother sent back the accused from back side of the house."

The PW-9 stated that in her statement JS stated that accused Kumud took her to Guwahati and by keeping her in a rented house for two days, committed rape on her.

The PW-9 stated that witness BS in her statement before him u/s 161 Cr.P.C did not state as follows:

"On 30.09.2017 when our other family members and uncles joined in a get together, after leaving the guest, accused Sri Kumud Chandra Borgohain came to our house and asked for a glass of glass of water from my sister JS. At that time I was taking my launch. On asking water by accused, JS told that by giving milk they are maintaining snake. On this I asked JS why she uttered this word. She did not give me direct reply." This witness also did not state before me that "On knowing this I made altercation with Sri Kumud Chandra Borgohain. On hearing hue and cry at our house, neighbouring peoples gathered at our house. On arrival of villagers, accused by leaving his scooty in our house, flee away there from. On this my mother also by spaying kerosene attempted to set our shop on fire but failed and she left the place."

The PW-9 stated that witness DS in her statement before him u/s 161 Cr.P.C stated that "he lodged an FIR." Said witness DS lodged an FIR at Namti PS on 29.10.2017 alleging that Kumud Borgohain had taken away BS by enticement. On the basis of that FIR, Namti PS case No. 20/2017 was registered. Exbt. A is the certified copy of the FIR lodged by DS.

The PW-9 stated that witness Mira Devi Saikia in her statement before him u/s 161 Cr.P.C did not state as follows:

"while I and JS went to field for cultivation, with hesitation JS informed me that her mother BS compelled her and DS to establish physical relation with Kumud Chandra Borgohain; that she also stated that due to skin problem of DS, her mother sent DS with accused Kumud to

Jorhat for medical consultation; and kept DS in a hotel and established physical relation with DS against her will; that JS also stated that accused Kumud has taken her to Guwahati and attempted to establish physical relation with her but failed due to resistance by JS, that on knowing this, I asked her to inform the matter to her brother and father."

The PW-9 stated that the said witness stated that she came to know from DS about rape on her by accused Kumud.

The PW-9 stated that the said witness also did not state that before him as follows:

"After about a month of reporting the matter to me, when accused came to the house of DS and JS, in presence of their brother, JS misbehaved Kumud and there after the twins reported the incident happened with them to their brother. While brother of DS tried to assault Kumud, BS saved Kumud and thereafter they both flee away. All above was reported to me by JS. She also stated me that while keeping her in hotel, Kumud has disclosed that DS was his daughter by changing his title."

The PW-9 stated that witness Pranab Dutta in his statement before him u/s 161 Cr.P.C did not state as follows:

"on going to his residence, BBS also by informing me that Kumud Saikia by taking his sisters JS and DS to Dibrugarh and Jorhat, committed misdeed with them and asked me as to what he should do with accused Kumud; that accused Kumud Flee away with the help of BS; that DS and JS told me and others that Kumud Borgohain by taking them to hotels after showing them pornography, made physical relation with them."

The PW-9 stated that the witness Ashim Dutta in his statement before him u/s 161 Cr.P.C did not state as follows:

"On the date of filling FIR, one of the sisters on finding me on road, complained that Sri Kumud Chandra Borgohain by taking her to Dibrugarh or Jorhat in the name of consultation to skin doctor; that her mother forced both the twin sisters to go with Sri Kumud Chandra Borgohain and on their reluctance, she used to scold them; that a meeting

was held and several villagers gathered at Perabhari L P School and after discussion, resolved to take the matter to police; that there was a quarrel in the house of BS on this matter; that I learnt that accused Kumud had to flee away by leaving behind his scooty."

The PW-9 stated that he/PW-Ashim Dutta stated that the informant DS informed him that Kumud maintained illicit relation with her mother and that her mother sent her to Jorhat with accused Kumud, where Kumud had committed rape with her by keeping her in a hotel.

The PW-9 denied that he did not investigate the case properly and lawfully.

18. The PW-10 SI Biraj Kumar Das stated in his evidence that on 13.10.2017 hewas posted as O/C at Namti PS. On that day he took charge to complete the investigation of Namti PS case No. 21/2017. On taking charge of investigation, he had gone through the case diary. During investigation, he collected medical report of the victims. On completion of investigation, he submitted charge-sheet against the accused persons namely Kumud Ch. Borgohain and BS u/s 4 of POCSO Act. Exbt. 11 is the charge-sheet; Exbt. 11(i) is his signature.

In his cross-examination the PW-10 admitted that he has submitted final report (FR) in Namti PS case No. 20/2017 by mentioning that it was lodged on a mistake of fact. FIR of Namti PS case No. 20/2017 was lodged by DS. Exbt. B is the certified copy of Final Report.

He denied that he has submitted charge-sheet against accused persons without having any material.

Evidence of the Court Witneses:

- 19. Record reveals that as per order dated 01-09-2018 two court witnesses were examined.
- 20. The CW-1 Smti. Queen Dutta stated in her eevidence that the victim girls DS & JS were her classmates. They studied in Namti Girls' School

upto class IX. She stated that at the time of filing of the FIR, they were reading in class IX. Thereafter she did not meet DS & JS. She stated that she got married two years ago. She forgot her date of birth but stated that her present age may be 21 years.

21. The CW-2 Farid Islam Hazarika stated in his evidence that the victim girls were students and they were involved in a project organized by the NGO Naba-Udit Samaj. He stated that he went to the house of the victim girls after the case but they were not found in the house. He came to know about the arrest of the accused persons in connection with this case. He stated that the victim girls did not inform him about the incidents.

<u>Discussion</u>, reasons for the decision & the decision:

Point no. 1-

- 22. The PW-1 stated in her evidence that her date of birth is 17-06-1999. She exhibited her birth certificate marked as Exhibit-4 (proved in original) in which her date of birth is recorded as 17-06-1999. The PW-2 also stated in her evidence that her date of birth is 17-06-1999. She exhibited her birth certificate marked as Exhibit-5 (proved in original) in which her date of birth is recorded as 17-06-1999. The PW-3 and the PW-4 are the brother and father of the PW-1 & PW-2. They stated that the PW-1 & PW-2 are twins. The accused BS who is the mother of the PW-1 & PW-2 stated during her examination under section 313 Cr.P.C. that she does not remember the date of birth of her daughters. So she tried to evade from disclosing the actual date of birth of both thevictim girls.
- 23. In cross-examination of the PW-1 & PW-2 the defence suggested that the birth certificates were procured by their father by giving false date of births. It is submitted that both the PW's stated that they were born at their own residence but the birth certificates were issued by the

concerned authority at Geleky under Sivasagar district in spite of the fact that there is Namti Primary Health Centre near their residence.

- 24. From perusal of the said exhibited documents it appears that the said birth certificates were issued on 03-04 2000. The date of registration was 15-11-1999. The case was filed in the year 2017. So it cannot be accepted that the father of the victim girls had procured the said birth certificates by giving false date of births.
- 25. Another important aspect of the matter is that while cross-examining the PW-4 who is the father of the victim girls, the defence remained totally silent on the point of the said birth certificates. Again the defence was given sufficient opportunity to adduce evidence but no DW's were adduced. Hence the birth certificates issued by the competent authority cannot be discarded on mere suspicion of the defence that those were procured by giving false date of births of the victim girls. Hence it is established that the date of birth of the victim girls who are twins in 17-06-1999.
- 26. The PW-8 Dr. D. Patir in his evidence stated that on 02-10-2017 he had examined the victim girls and on the basis of the report of the radiologist, he stated that both were above 18 years. It is pertinent to mention here that both the victim girls stated that the incidents took place in the year 2016. As per their date of birth (17-06-1999) in the year 2016 they were 17 years old. So the medical officer in the year 2017 found their ages above 18 years. From that point of view also, at the time of the occurrences the victim girls were below 18 years.
- 27. In the course of argument the ld. defence counsel relied on a case law reported in (2010) 9 SCC 209 in between Madan Mohan Singh & others-vs- Rajni Kant & another (Civil Appeal No. 6466 of 2004 decided on 13-08-2010) and submitted that though the prosecution has exhibited the birth certificates but failed to prove the same and so the same cannot be relied upon.

28. I have gone through the said judgment which was given on different facts and circumstances. In the said judgment the Hon'ble Supreme Court also held in paragraph 17 that for determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents.

- 29. In the instant case the mother of the victim girls, as discussed already, avoided to disclose the date of birth of her own daughters as she herself is an accused in this case as an abettor with the principal accused. The PW-4 who is the father of the victim girls stated that both the victim girls are twins and their age on 07-02-2018 (i.e. the date of adducing evidence on 07-02-2018) was about 18 years. This is supported by the birth certificates exhibited the PW-1 & PW-2. As stated already, the father of the victim girls was not cross-examined on the point of date of birth or age of the victim girls.
- 30. The ld. defence counsel also submitted that the CW-1 Smti. Queen Dutta who was one of the class friends of the victim stated her age as 21 years. It is pertinent to mention here that she stated her age at beginning as 19 years. In cross-examination she stated her age about 21 years but at the same time also admitted that she does not remember her date of birth.
- 31. Firstly, on the basis of the age of class friend, the date of birth or age cannot be ascertained for the simple reason that in one class all the students do not always belong to the same age group. Some fails in the examination, others take admission late. So the said argument cannot be accepted.
- 32. From the discussion made above, it can be safely concluded that the victim girls were below 18 years at the time of the alleged occurrences.

Point no. 2-

33. The next point to be decided in whether the accused used to visit the house of the victim girls. In their examination under 313 Cr.P.C. both the accused BS admitted that the accused Kumud Chandra Borgohain used to visit her house. The accused Kumud Chandra Borgohain also admitted that he used to visit the house of the victims. The accused BS further stated that her husband used to borrow money from Kumud Chandra Borgohain. He had also installed electric connection in their house by hooking. The accused Kumud Chandra Borgohain stated that the brother of the victim girls used to take money from him. The PW-1, PW-2, PW-3 & PW-4 also stated that the accused Kumud Chandra Borgohain used to visit their house and shop. The PW-5, PW-6 & PW-7 who are the neighbours also stated that the accused Kumud Chandra Borgohain used to visit the house of the victim girls frequently. The defence also did not dispute the fact that the accused used to visit the house of the victim girls frequently.

34. So it is established that the accused Kumud Chandra Borgohain was a frequent visitor in the house of the victim girls. From the evidence of the witnesses it also appears that the accused Kumud Chandra Borgohain also used to visit the house of the victim girls in absence of their father and stayed with their mother BS who is the other accused of this case.

Point no. 3, 4 and 5-

- 35. The next point to be decided is whether the accused Kumud Chandra Borgohain took the victim girls to Jorhat, Dibrugarh and Guwahati and committed rape with them. The other point to be decided is whether the mother of the victim girls namely BS abetted the accused Kumud Chandra Borgohain in this act. As both the questions are related, they are taken up together for discussion.
- 36. Before proceeding to decide these two points, it is necessary to look at the contradictions recorded during evidence in this case. From perusal of the evidence of the prosecution witnesses including the evidence of the

I.O. it appears as if the PW-1, PW-2, PW-3 & other witnesses did not state before the I.O. the same facts which they stated before the Court and almost their entire evidence was contradicted during cross-examination.

The Hon'ble Supreme Court in State of U.P. -Vs- Anil Singh reported in AIR 1988 SC 1998 observed as follows:

"It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

On the use of case diary the Hon'ble Patna High Court in a case reported in 2003(3) PLJR 190; MANU/BH/0399/2003 observed as follows:

"Sub-section (2) of Section 172 of the Code of Criminal Procedure provides that the Court not only can call for the case diary but may also use such diaries to aid it in such trial. If the Court only has the power to look into the case diary and whatever it peruses, to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in our opinion, cannot be the intention of legislation. If the Court peruses any such thing and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the Court cannot use any portion of the case diary as evidence".

Keeping in mind the above observations made by the Hon'ble Courts I have perused the Case Diary of this case and gone through the statements of the witnesses recorded under section 161 Cr.P.C. only for

the purpose of clarification as to whether the said prosecution witnesses did not make any such statement before the I.O.

- 37. The PW-1 DS stated in her statement under section 161 Cr.P.C. that the accused Kumud Ch. Borgohain used to visit their house since last 10/12 years and he had developed illicit relation with her mother. The accused Kumud Ch. Borgohain spent money in their household affairs. Last year in 2016 during Durga Puja he took her to Dibrugarh for treatment of her skin problem but instead of providing treatment, the accused kept her in a hotel for the night and forcefully raped her. The accused did not listen to her objections. Again in July 2017 he took her to Jorhat for treatment of her skin problem and consulted the doctor. At night the accused kept her in a hotel and again forcefully raped her. After returning home, she told the incidents to her sister DS. Again in the same month i.e. July the accused again took her to Jorhat for treatment and raped her. She did not inform the incidents to her father. At that time she was below 18 years. She stated that her mother used to send her forcefully with the accused.
- 38. The PW-2 JS stated in her statement under section 161 Cr.P.C. that the accused Kumud Ch. Borgohain used to visit their house since last 10/12 years and he had developed illicit relation with her mother. The accused Kumud Ch. Borgohain spent money in their household affairs. About two years ago he took her to Guwahati with her mother. Then the accused once took her to Guwahati alone and kept her in a rented house for two days and forcefully raped her. She did not inform the incidents to her parents. At that time she was below 18 years. She stated that her mother used to send her forcefully with the accused.

So from the statements of the PW-1 & PW-2 made before the I.O. it is clear that the basic version of their statements remained same. Of course there are some omissions and exaggerations in their evidence but that cannot be a ground to disbelieve their entire evidence.

The Hon'ble Supreme Court of India in AIR1983SC753-Bharwada Bhoginbhai Hirjibhai-Vs-State of Gujarat while dealing with the point of appreciation of evidence in a rape case held as follows:

- "(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person,
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of

the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

- (8) Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.
- (9) It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences. This Court, in Rameshwar v. The State of Rajasthan MANU/SC/0036/1951: 1952CriLJ547 has declared that corroboration is not the sine qua-non for a conviction in a rape case. The utterance of the Court in Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the Court-

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge.

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

- (10) And whilst the sands were running out in the time-glass, the crime graph of offences against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logos' and 'ethos', has been necessitated.
- (11) In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual

molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to translate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different."

TheHon'ble Supreme Court in Dola-vs-The State of Odisha reported in AIR 2018 SC 4020 while dealing with the appreciation of evidence in a rape case observed as follows:

"5. It is well settled law that if the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness and is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. When a grown up and married woman gives evidence on oath in Court that she was raped, it is not the proper judicial approach to disbelieve her outright.

6. In this regard it would be useful to quote certain observations of this Court in the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, [MANU/SC/0090/1983: (1983) 3 SCC 217] wherein it is observed that:

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married

woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

39. Keeping in mind the above principles of law, if the evidence of the PW-1 & PW-2 are critically analysed, it becomes clear that they uttered the truth. The difference that occurred in the statements under section 161 Cr.P.C. and the depositions made before the Court was mainly because of the different environment and different mode of recording adopted by the Court and the police which is known to all of us. Those cannot be said to be major contradictions which may lead to the extent of disbelieving the said two victims. The victim girls have by uttering the truth on the one hand have put their mother in danger and on the other hand have taken upon themselves the stigma of being raped. They are the real victims of the criminal acts of the accused persons and also victims of circumstances and they are the losers from both end. So I do not find any reason to disbelieve them.

The Hon'ble Supreme Court in The state of Rajasthan vs N.K. Accused reported in (2000) SCC (Crl.) 898 observed as follows:

"...It is true that the golden thread which runs throughout the cob-web of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal

by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy preys, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In Bharwada Bhoginbhai Hirijibhai Vs. State of Gujarat 1983 Crl.L.J. 1096 this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this court has said through one of us (Dr. A.S. Anand, J. as His Lordship then was) in State of Punjab Vs. Gurmeet Singh & Ors., 1996 (2) SCC 384.

..A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

The questions arising for consideration before us are: Whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the F.I.R.?

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, some of which are Rameshwar 1952 SCR 377, Sidheshwar Ganguly AIR 1958 SC 143, Madhoram & Anr. (1973) 1 SCC 533, State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550, Madam Gopal Kaddad (1992) 3 SCC 204 Shri Narayan AIR 1992 (3) SCC 615, Karnel Singh 1995 (5) SCC 518, Bodhisattwa Gautam 1996 (1) SCC 490 & Gurmit Singh (supra). We may quote from the last of the above said decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words:-

If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If

for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations..."

40. From the discussion made above it becomes abundantly clear that the accused Kumud Ch. Borgohaincommitted rape of the minor victim girls by taking them to various places from their house at Sivasagar with premeditated mind with the help of the other accused who is unfortunately the mother of the said victim girls. The accused Kumud Ch. Borgohain committed rape repeatedly on the victim girls by taking them to Dibrugarh and Jorhat and Guwahati.

Section 17 of the POCSO Act says that a person abets an offence	who:
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First	 				
Secondly	 				

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that offence.

41. In the instant case if we carefully examine the evidence on record and the statements made by the accused persons during their examination under section 313 Cr. P.C. it becomes clear that the accused Kumud Ch. Borgohain made his entry into the house of the victims through his acts of helping the family by illegally providing electric connection by hooking and also by providing financial help. The father of the victim girls used to remain out of his house because of his business. The brother of the victim girls is a driver by profession and so naturally he also used to remain outside in connection with his job. The accused took this opportunity and initially developed an illicit relation with the mother of the victim girls. Then his eyes fell on the minor victim girls. By the time the mother of the victim girls was totally under his dominion. The accused took the opportunity and materialized his vicious design and the mother of

the victim girls knowingly and intentionally aided the accused in fulfilling his lust by sending her minor daughters with him to various places in spite of their reluctance. So the mother of the victim girls abetted the accused Kumud Ch. Borgohain in commission of the crime.

42. Hence the accused Kumud Ch. Borgohain is held guilty under section 6 of POCSO Act and also under section 376 (2) (n) of IPC and accordingly convicted.

The accused BS is held guilty under section 17, read with section 6 of POCSO Act and also under section 109 read with section 376 (2) (n) of IPC and accordingly convicted.

- 43. I have considered the applicability of section 3 & 4 of the Probation of Offenders Act in this case. The punishment provided for the offences under is rigorous imprisonment which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. The nature of the offence, the manner of commission and the punishment provided under the law makes it clear that it is not a fit case to give benefit under the said provision of law.
- 44. Heard the accused persons on the point of sentence. Their statements are recorded in separate sheets. I have also heard the ld. advocate of both sides.

The Hon'ble Supreme Court on the point of sentencing in a rape case observed as follows in Shyam Narain-vs-State(NCT of Delhi) reported in (2013)7 SCC 77:

"18. In State of Andhra Pradesh v. Bodem Sundra Rao[6], this Court noticed that crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general. After so observing, the learned Judges had to say

this: -"The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment."

19. In State of Punjab v. Gurmit Singh and others[7], this Court stated with anguish that crime against women in general and rape in particular is on the increase. The learned Judges proceeded further to state that it is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection of the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. Thereafter, the Court observed the effect of rape on a victim with anguish: -

"We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault – it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

20. In State of Karnataka v. Krishnappa[8], a three-Judge Bench opined that the courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. It was further observed that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

21. In Jugendra Singh v. State of Uttar Pradesh[9], while dwelling upon the gravity of the crime of rape, this Court had expressed thus: -

"Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

22. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended up to life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in

cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mind-set that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court."

- 45. Keeping in view the facts and circumstances of the case, the manner of commission of the offence and the nature of the offence, I am of the opinion that the accused persons do not deserve leniency.
- 46. Section 42 of the POCSO Act provides for alternate punishment in such a situation and the offender, if found guilty of such offence shall be liable to punishment under this Act or under the IPC which is greater in degree. In the instant case the punishment provided for the offence under section 6 of POCSO Act and section 376 (2) (n) of IPC are same. Hence the accused person Kumud Ch. Borgohain is sentenced under section 6 of POCSO Act to undergo rigorous imprisonment (RI) for life and also to pay a fine of Rs. 5,000/- (five thousand) only, in default, to undergo simple imprisonment for of 6(six) months.

The accused BS is sentenced under section 17 read with section 6 of POCSO Act to undergo rigorous imprisonment (RI) for life and also to pay a fine of Rs. 5,000/- (five thousand) only, in default, to undergo simple imprisonment for of 6(six) months.

47. The amount of fine if realised, be given, to the victim girls as compensation under section 357 Cr.P.C.

Date: 21-12-2019

48. Considering the fact of imposing lesser amount of fine, I am of the opinion that it is a fit case for referring the matter to DLSA for granting compensation under section 357A Cr.P.C. to the victim girls in addition to the compensation granted under section 357 Cr.P.C.

- 49. The convicts are entitled for the benefit of section 428 Cr.P.C. for the period already undergone during investigation and trial, if any.
- 50. Let a free of cost copy of the judgment be given to the convicts immediately as per the provisions of Section 363(1) Cr.P.C.
- 51. Convicts are informed about their right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 52. Send a copy of the judgment to District Magistrate, Sivasagar under section 365 Cr.P.C.

Given under my hand and seal of this Court on this 21st day of December, 2019.

Special Judge, Sivasagar

<u>Appendix</u>

Prosecution Witnesses-

PW1- DS

PW2-JS

PW3-BBS

PW4-F

PW5- Smti. Meera Devi Saikia

PW6- Sri Pranab Dutta

PW7- Sri Ashim Dutta

PW8- Dr. Duplay Patir

PW9- S.I. Sri Rabindra Hazarika

PW10- S.I Sri Biraj Kumar Das.

Court Witnesses:-

CW1- Smti. Queen Dutta

CW2- Farid Islam Hazarika

<u>Defense Witnesses:-</u>

None

Exhibits:-

Fxhibit 1- FIR

Exhibit 2- Statement of DS

Exhibit 3- Statement of JS

Exhibit 4- Birth Certificate of DS

Exhibit 5- Birth Certificate of JS

Exhibit 6- Medical examination report of DS

Exhibit 7- Medical examination report of JS

Exhibit 8- Sketch Map

Exhibit 9- Charge-sheet

Special (POCSO) 46 of 2017 Date: 21-12-2019

Exhibit A- Certified copy of Ejahar of GR case no. 482/2017

Exhibit B- Certified copy of Final Report of Case no. 10/2017

Special Judge, Sivasagar