IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

Spl. POCSO Case No. 07 of 2017

U/S - Sec. 4 of POCSO Act, 2012.

State

- Versus -

Dulal Roy

: Accused person.

Present: Sri L.K. Saikia, Additional Sessions Judge, Bajali, Pathsala.

Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons :Sri Nabajit Barman. Ld. Advocate.

Dates of recording evidences : 19-12-17, 30-01-18, 08-02-18

14-03-18, 02-06-18, 27-07-18 &

16-03-19.

Date of recording statements u/s 313 Cr.P.C. : 17-05-2018.

Date of Argument : 20-03-2019 and 09-05-2019.

Date of Judgment : 16-05-2019.

<u>J U D G M E N T</u>

1. The prosecution case in brief, is that, one Anup Roy lodged an ejahar on 07-10-17 with the In-Charge Baghmara Police Out Post alleging, *inter-alia*, that on 06-10-17 while his daughter went to

purchase goods to the shop of accused Dulal Roy then the accused sexually assaulted her. Later on his daughter told him about the incident and also told about the tenderness in her private parts. Thereafter he brought her to Pathsala Civil Hospital for treatment. Hence, this case.

- 2. On receipt of the ejahar, Baghmara police registered a GD Entry vide Baghmara OP GDE No. 88 dated 07-10-2017 and forwarded the same to Patacharkuchi Police Station to register a case under proper section of law and accordingly it was registered as Patacharkuchi P. S. Case No. 711/17 u/s 4 of POCSO Act, 2012.
- 3. During investigation police visited the place of occurrence, recorded the statements of witnesses including the victim girl, sent her for medical examination and collected medical examination report, produced her before the Court wherein the Ld. Magistrate recorded the statement of the victim u/s 164 Cr.P.C, arrested the accused person and forwarded him to the court and after completion of investigation, having been found *prima-facie* case, the I/O sent up the accused for trial by filing charge sheet u/s 4 of POCSO Act, 2012.
- 4. In the meantime the accused had enlarged on bail and on appearance, the copies were furnished to him. After hearing both the parties, my predecessor-in-office, framed charge under section 4 of POCSO Act, 2012 and the accusation of charge was read over and explained to him, to which he pleaded not guilty and claimed to be tried. Hence, the trial.
- The prosecution in order to prove its case examined altogether 7 (seven) PWs including M.O. And I.O. The defence plea is of total denial. The accused person was examined u/s 313 of Cr. P. C. wherein he denied all such allegations levelled against him by the prosecution witnesses. The defence side has adduced 4 DWs and 1 (one) CW as evidence.
- **6.** Heard argument of learned Addl. P. P. and the learned defence counsel. Perused the record.

7. **POINTS FOR DETERMINATION**

(i) Whether the accused person on 06-10-17 at about 3 p.m. at village Bandha Sidhani (Maharani) under Patacharkuchi P.S. of district Barpeta, while the victim went to the shop of accused, the accused person committed penetrative sexual assault and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

Evidence of witnesses

- **8.** To arrive at the judicial decision, let me see what the witnesses have stated.
- PW 1, the victim deposed that she knew the accused Dulal Roy as he is their neighbour. She stated that one day she went to the shop of Dulal Roy and in the shop Dulal Roy put off her panty and touched her vagina with his penis. Thereafter he gave her a chocolate and after that she returned to her house. She stated that she told to her father that Dulal Roy put off her panty and touched her vagina with his penis. She felt pain in her vagina. Thereafter she was brought to hospital and later on she made statement before the Miss (Magistrate). She stated that she went to the shop of Dulal Roy to purchase *Chana* after coming from school.

In cross-examination, PW 1 deposed that the police brought her to the hospital and Court. She stated that she called Dulal as *Dokoni* (shopkeeper). Dulal Roy carried her to his Bisana (bed) inside the shop. In the shop Dulal Roy sells *chana*, *chocolate*, *biscuit* etc. and he keeps the said article in the *Almirah* of his shop. At the time of occurrence Dulal Roy was wearing *lungi*. He touched her vagina with his penis for sometime. She stated that she did not raise any hulla. The shop of Dulal situated in his house. There were two other houses adjacent to the house and shop of Dulal. They are Nayan and Sima. She stated that nobody dictated her to depose in the Court or before police. At the time of occurrence Dulal Roy was wearing a red T-shirt. The police did not ask her. No person gathered after the occurrence. They have no relation or discussion with the family of Dulal Roy. They

have no visiting terms with the house of Dulal Roy. She stated that she was brought to hospital in the evening. She also stated that nobody witnessed the occurrence. There was one door in the back side of the shop.

10. PW 2 Sri Anup Roy deposed that victim is his daughter. He stated that the occurrence took place about 3 months back. On the day of occurrence in the afternoon about 3 pm while he was having meal then his daughter came to him and told him that her palm smells badly. Then he told her to wash hand and immediately he asked her what she had touched then she told him that she went to the shop of accused Dulal Roy to purchase chana (mixture) and then accused Dulal Roy compelled her to touch his penis and accused put off her panty and touched her private part with his penis. She also complained that she felt pain in her private part. Then he told the victim to intimate her mother as stated to me and asked her to call the wife of accused. Thereafter, he told the facts to the wife of accused Dulal Roy while she came to their house. Then he brought his daughter to Pathsala hospital and treated her and thereafter he brought back to the house. Thereafter the sons and wife of accused abused their family with filthy language. He asked them to settle the matter at the village mel then they refused to call any mel and hence on the next day morning he lodged the ejahar (Ext. 1) with the police.

In cross-examination PW 2 deposed that there are one houses situated between his house and the house of accused. There are 4/5 other families near their house. It could be heard if anybody raised hulla in the shop of accused Dulal Roy. PW 2 stated that he had not seen occurrence by his own eye. The ejahar was written by another person as per his version. On the next day of the occurrence, he lodged the ejahar. He did not go to the place of occurrence after knowing the occurrence. There was no any examination of the smell. Nothing has been seized by the police. He stated that he does not know the contents of the ejahar even the name of ejahar writer. He further stated that on the very day of occurrence he did not inform to the police. There was no any enmity with the accused earlier to the

occurrence. PW 2 denied the suggestion that he did not bring the victim to Pathsala Civil Hospital for treatment. He had not filed any criminal case and any application before the Gaonbura against the accused persons for abusing them on the day of occurrence. On the next day of occurrence the police brought the victim to FAAMCH, Barpeta for medical examination. PW 2 stated that police went to the place of occurrence in their absence while he went to FAAMCH, Barpeta for medial examination of the victim. He stated that he did not know who shown the place of occurrence.

11. PW 3 Smti Junti Roy @ Jinti has deposed that victim is her daughter. The occurrence took place about 3 months back. On the day of occurrence in the afternoon about 3 pm while she was in her house and her husband was having meal then her daughter/PW 1 came and told to her husband that her palm smells badly. Then her husband told her to wash hand and immediately he asked her what she had touched then she/PW 1 told to her husband that she went to the shop of accused Dulal Roy to purchase chana and then accused compelled her to touch his penis and also she told that accused put off her panty and touched her private part with his penis. She also complained that she felt pain in her private part. Then she wash her private part and her body. PW 3 further stated that after sometime she complained that she felt uneasy to urinal and suffers pain. Then her mother-in-law called the wife of accused and explained to her of the occurrence and then she told them to bring the victim to hospital for treatment and also requested them not to disclose the matter to any other persons. Then after sometime the sons and the wife of accused abused her with filthy language. After treatment of her daughter her husband brought back to the house and asked them to settle the matter in the village mel but the accused and his family did not pay any interest. On the next day her husband lodged the ejahar with the police.

In cross-examination, PW 3 stated that they had good relation with the accused before the occurrence. She stated that she had not seen the occurrence from her own eye. She had not stated before the police about the smell and the talk of the wife which she

assured them to provide expenditure of victim. She also stated that she had not stated before the police calling of a mel in the village. She stated that nothing had been seized by the police from them. On the next day of occurrence the police came to the place of occurrence. She did not accompany the victim while she was brought to FAAMCH, Barpeta and to the Ld. Magistrate. PW 3 stated that the house of accused is situated in-front of her house and his shop is adjacent to his house.

12. PW 4 Smti Monamati Roy had deposed that on the day of occurrence in the afternoon about 3 pm while she was sleeping then the victim after coming from the school went to the shop of accused to purchase chana. After sometime she returned from the shop of accused. Thereafter her daughter in law Junti told her that victim told her that accused compelled to touch his penis and he put off her panty and touched her private parts with his penis. She also complaint that she felt pain in her private part. Then on being asked, the victim told the same fact that Dulal, the dukani burha compel her to touch his penis and he put off her panty and touched her private parts with his penis. Thereafter the accused gave her channa and chocolate and sent her to the house. At the time of occurrence she was 6 years old. Then she called the wife of accused and explained to her about the occurrence as complained by the victim. Then the wife of accused requested her not to disclose the matter to anybody. After sometime, her daughter-in-law told her that the victim complained that she felt uneasy and pain while she attempted to urine. Then the victim was brought to Pathsala Civil Hospital wherein she was provided treatment. On the next day her son lodged the FIR with the police.

In cross-examination, PW 4 stated that she had not seen the occurrence from her own eye rather she had heard from the victim as well as from the son and daughter-in-law. The police had visited the place of occurrence and brought the victim to the police station and to the medical i.e. FAAMCH, Barpeta. At that time the police personnel were in uniform. PW 4 stated that she had not stated that since the family of accused used high sound of music sometimes in that regard,

altercation took place since it disturbed her niece who was a student of LLB.

- 13. PW 5 Si Manab Pathak has deposed that he heard from the villagers that accused Dulal Roy committed rape on the victim. In cross-examination PW 5 stated that he heard that due to the earlier enmity, the informant filed the instant case against the accused and also he heard that there was no any occurrence took place as alleged in the case. He also stated that had no any personal knowledge of the occurrence.
- 14. PW 6 Dr. Mamata Devi has deposed that on 07-01-2017 she was posted at FAKHRUDDIN Ali Ahmed Medical College and Hospital, Barpeta as demonstrator in the department of Forensic Medicine. On that day she examined the victim at about 12.20 pm in reference to the Baghmara OP GDE No. 88/17 dated 07/08/2017. She was escorted and identified by Bhupali Boro. After examination she opined that the age of victim is above 7 years and below 9 years, evidence of recent sexual intercourse is not detected, however, genital findings are suggestive of recent penetration, and no injury or violence mark is detected on her person at the time of examination. She proved the medical examination report as Ext. 2 and Ext. 2(i) is her signature.

In cross-examination, PW 5 stated that the penetration is not possible minor aged about 6-9 years but due to pressure of genital organ, the vulva usually became red and swollen and there also tenderness present. She has not mentioned the duration as well as size whereupon she had seen the red colour. She find the adult organ was used but she had not mentioned in her report that the adult organ. She also stated tat it may be redish (red) if it is pressurized by natural or artificial thing. She stated that she had not found any injury in other parts of the body of the victim **except in the private part of the minor.**

15. PW 7 Sri Pradip Haloi, I/O of this case has deposed that on 07-10-17 she was discharging as In-charge of Baghmara police out

post. On that day he had receipt an ejahar from one Anup Roy which was entered in the GD Entry as Baghmara OP GDE No. 88 dated 07-10-17 and forwarded the same to the Officer-In-Charge of Patacharkuchi PS to register a case and accordingly a case was registered as Patacharkuchi PS Case No. 711/17 u/s 4 of POSO Act, 2012. During investigation he visited the place of occurrence, drew sketch map (Ext. 3) of the place of occurrence, recorded the statements of the witnesses, sent the victim for medical examination and also recorded the statement before the Magistrate u/s 164 Cr.P.C. and after completion of the investigation he submitted the charge-sheet (Ext. 4) against the accused u/s 4 of POSO Act, 2012.

In cross-examination, PW 7 stated that in the note of the case diary against Ext. 3 (sketch map) it has been noted that the place of occurrence is a "dokan". In Ext 4 (charge-sheet) he had mentioned as Indian Penal Code section 4 of POCSO Act, 2012, but in the charge-sheet it ought to have been u/s 4 of POCSO Act and the dokan ought to have been pan-dokan. The occurrence took place on 07-10-2017. The informant had shown the place of occurrence. At the time of recording statement of victim he was in uniform as on duty. He stated that he had not noted in the case diary who were present while she was recording the statement of the victim and the informant. The victim was accompanied by WPC Smti Bhupali Boro to FAAMCH, Barpet for her medical examination.

16. DW 1 Sri Dulal Roy has deposed that the case had been filed against him with intent to harass him. The police arrested him on that false case without any cogent reason. Earlier to this case there was an quarrel between his son Gopesh Roy and Anup Roy for which this case has been lodged. He stated that he had not done any offence to the daughter of Anup Roy. Once Dilip Roy made quarrel with them while they asked him to stop the high volume music play in his house. Due to that high volume music their children had been disturbed in reading their books. Due to their objection Dilip Roy frequently used to stay quarrel with them.

In cross-examination, DW 1 stated that no criminal case

has been filed against Dilip Roy in relating to the earlier quarrel. DW 1 denied the suggestion that he did sexual assault to the victim as well as the daughter of the informant. Prosecution has also put some suggestions to DW 1 which he answered in negative.

17. DW 2 Sri Karuna Roy deposed that informant and the accused are his co-villagers. Accused Dulal Roy is a aged person having 6 sons and at this stage he never do such type of offence as alleged against him. The case has been brought against him on false and concocted story and due to the earlier enmity. Frequently quarrel took place between the family of accused with Dilip Roy since he used high volume music which causes disturb to the school going children of accused family. DW 2 stated that accused did not sit in his shop regularly. He had not heard any mel held against Akhsay Roy the son of accused on the allegation of any outraged of modesty to a girl of the village.

In cross-examination, DW 2 stated that he came to the court to adduce evidence at the request of accused. His house is about 2 ½ farlong far away from the shop of accused. DW 2 denied the suggestion that accused did sexual assault to the victim inside his shop on the day of occurrence. Prosecution has also put some suggestions to DW 2 which he answered in negative.

18. DW 3 Sri Jitendra Nath Kalita has deposed that this case has been brought against the accused on false and concocted story and due to the earlier enmity. Frequent quarrel took place between the accused family with Dilip Roy since he used high volume music which causes disturb to the school going children of the accused family. He stated that he had not heard any mel held against Akhasy Roy the son of accused on the allegation of any outraged of modesty to a girl of the village. Accused never to such type of offence as alleged against him.

In cross-examination, DW 3 stated that on the alleged day of occurrence he was performing ojapali at Barama. He had not seen the occurrence. DW 3 denied the suggestion that accused did sexual assault on the victim. Prosecution has also put some suggestions to

DW 3 which he answered in negative.

- 19. DW 4 Sri Mridul Roy had deposed that he knew that the informant had brought this case falsely. There is no such offence took place as alleged against the accused. The accused is a aged person and it is impossible to do such offence as alleged against him. In cross-examination, DW 4 stated that there was whispering in their village about the alleged occurrence.
- 20. CW 1 Sri Arpan Boro has deposed that on 09-10-2017 he was working as Bench Assistant attached to SDJM(M), Bajali, Pathsala. On that day, in respect of Patacharkuchi PS Case No. 711/17 a victim girl was produced before the Court for recording her statement u/s 164 Cr.P.C. The victim girl had put some thumb impression in the statement u/s 164 Cr.P.C. and he had taken the thumb impression.

Discussions, Decision, and Reasons thereof

- **21.** Perused the case record and also gone through the provision of law.
- 22. Section 4 of the Protection of Child from Sexual Offences Act, 2012 consent is an immaterial Spl POCSO Case consideration as consent is not an ingredient of offence as defined in Section 3 of the Protection of Child from Sexual Offences Act, 2012. For the sake of convenience, Section 3 of the Protection of Child from Sexual Offences Act, 2012 is quoted herein below:-
- "3. Penetrative sexual assault. A person is said to commit "penetrative sexual assault" if -
 - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina,

the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- **23.** From above, it appears that mere penetration is enough to constitute of an offence of penetrative sexual assault against a child and consent is immaterial for commission of the said offence.

Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

PW 1 in her evidence specifically stated that the accused person put off her panty and touched her vagina with his penis. She stated that she told to her father that Dulal Roy put off her panty and touched her vagina with his penis. She felt pain in her vagina.

The accused during cross-examination of PW 1 affirmed that accused person put off her panty and touched her vagina with his penis rather rebut.

Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any

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

- **25.** So as per section 29 and the evidence of PW 1 it can be presumed that the accused person had committed the offence unless contrary is proved.
- The evidence of other PWs i.e. PW 2, PW 3 and PW 4 are 26. not direct. They have heard the incident from the victim i.e. PW 1 and they have explained the incident as told to them by the victim that PW 2 deposed that on the day of incident his daughter came to him and told him that and accused put off her panty and touched her private part with his penis. PW 3 deposed that while the victim/PW 1 went to the shop of accused Dulal Roy to purchase chana, then he compelled her to touch his penis and put off her panty and touched her private part with his penis. PW 4 deposed that while the victim went to the shop of accused Dulal Roy, then Dulal, the dukani burha compelled her to touch his penis and he put off her panty and touched her private parts with his penis. PW 5 deposed that ASI Sri Kumud Roy called him and with him he went to the house of accused person and heard that the villagers have discussed that Dulal Roy committed rape on the victim. Corroborating to the fact, the M.O PW 6 deposed that while she examined the victim she opined that evidence of recent sexual intercourse is not detected, however, genital findings are suggestive of recent penetration.
- 27. In spite of that the incident is also proved by the I/O by stating that after completion of the investigation, finding the incident being true submitted the charge-sheet (Ext. 4) against the accused u/s 4 of POSO Act. 2012.
- **28.** PW 1 also in her statement u/s 164 Cr.P.C. (C. Ext. 1) before the Magistrate during investigation stated that on the day of incident she went to the shop of accused for purchasing chance and

after giving *channa* he asked her to sit on the bed and thereafter he touched her private parts with his penis. During the cross-examination the accused side affirmed incident rather rebut by asking that to the victim that Dulal Roy carried her to his Bisana (bed) inside the shop and he touched her vagina with his penis for sometime.

29. So to disprove the case DW 1 deposed that earlier to this case there was an quarrel between his son Gopesh Roy and informant Anup Roy for which this case has been lodged. But during cross-examination of PW 2 and PW 3, the accused side did not put any question or any suggestion that is there any enmity in between them rather it was affirmed that "there was no any enmity with the accused earlier to the occurrence". It is also stated by him that he had not done any offence to the daughter of Anup Roy. Once Dilip Roy was playing music with high volume then the accused person asked him to stop the music and then a quarrel took place. DW 2 Sri Karuna Roy deposed that frequently quarrel took place between the family of accused with Dilip Roy since he used to play high volume music which causes disturb to the school going children of accused family. DW 3 Sri Jitendra Nath Kalita also deposed that frequent quarrel took place between the accused family with Dilip Roy since used he to play used high volume music which causes disturb to the school going children of the accused family. But this facts had also not been stated by PW 2 and PW 3 in their cross-examination even the accused person did not put any suggestion to them to that effect. It was for the first time this question was raised by the accused in his defence evidence that the playing of high volume music by Dilip Roy there were frequent quarrel between them and due to that grudge the informant had filed this case. Since the defence side did not put any suggestion about that fact in the evidence of Pws as such, at this juncture it need not to be proved by the defence. DW 4 Sri Mridul Roy deposed that he knew that the informant had brought this case falsely. There is no such offence took place as alleged against the accused. The accused is a aged person and it is impossible to do such offence as alleged against him.

30. All the accused's side witnesses i.e. DW 1, DW 2, DW 3

and DW 4 deposed that they have not seen the occurrence and their presence in the place of occurrence is also doubtful as none of the witnesses have deposed that they were present at the time of happening the incident at the shop of accused Dulal Roy which shows they have no personal knowledge about the incident just heard about the incident or deposed before the Court as tutored by the accused.

- In the instant case, the presumption under Section 29 of the POCSO was not rebutted either by bringing out any favourable reply from the evidence of the prosecution witnesses or by examining any witness or producing documentary evidence on the side of the defence. On the other hand, in this case, the evidence of P.W.1, who was minor and aged about 6 years at the time of occurrence, is crystal clear without giving any room of doubt to test the veracity of the crime committed by the accused.
- 32. The offence u/s 4 of the Protection of Child From Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that mater other offences also under this Act can be committed only on a child. The definition of child u/s 2(d) of the POCSO Act is as follows:

"Child" means any person below age of 18 years.

Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years.

- 33. In the instant case the victim stated that her age is about 6 years and as per the medical examination report, the doctor opined her age is above 7 and below 9 years. Whatever may be the 7 or 9 years at the time of incident in no case it is not more than minor.
- **34.** In the case of **Pancchi Vs State of U.P., AIR 1998 SC 2726**, it was further held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be

swayed by what others tell them and this a child witness is easy prey to tutoring.

- 35. The ratio of above cases is that the testimony of child witnesses is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent. In the present case, the victim has been consistent on the material particulars with regard to the incident when the accused committed penetrative sexual assault upon her. Apart from that, there is no meaningful cross-examination to the witnesses regarding the incident, except denial.
- **36.** In the case of POCSO Act, two provisions are there regarding presumption i.e. 29 and 30 of POCSO Act.
- 37. In the case in hand, the accused has been prosecuted for committing penetrative sexual assault, as defined in Section 3 of the Act. Thus, in terms of Section 29 of the Act, this Court is bound to draw a presumption in favour of the victim that the accused had committed the offence, unless contrary is proved by the accused. In other words, the onus is upon the accused to establish that he had not committed penetrative sexual assault towards the victim. Admittedly, in the instant case, the accused has not rebutted the said presumption in any manner. Thus, this Court has no reason to draw the presumption in favour of the victim.
- **38.** Similarly, u/s.30 of POCSO Act, Special Court has to draw presumption in favour of the prosecution where culpable mental state is required on the part of the accused. Section 30 reads as under:
 - "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of prosecution."
- 39. Bare perusal of Section 30 of the Act reveals that whenever a question of culpable mental state on the part of the accused is required to prove the guilt of the accused, Court shall presume the existence of said mental state. Though accused can take the defence to prove the fact that he had no such mental state with respect to his act but accused has to prove the said fact beyond reasonable doubt and not by showing its existence by establishing preponderance of probability. Thus, u/s.30 of the Act, liberty is given to the accused to take a defence that he had no such mental state of his act but he has to prove the said fact beyond reasonable doubt.
- 1. But in the instant case, the accused has neither taken any such defence nor the witnesses adduced proved that fact but they had stated another story not related to this case since they have not seen the incident as they were not present at the shop of the accused at the time of the happening of the incident. Thus, this Court is bound to draw a presumption that the accused had culpable mental state of his act.
- 40. Culpable mental state" is defined in the explanation to Section 30 of the Act which includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. To bring home the guilt of the accused u/s.30 of the Act, prosecution has to establish sexual intention on the part of the accused but in terms of Section 30 of the Act, Special Court is bound to draw a presumption in favour of the prosecution that accused had such intention unless presumption is rebutted by the accused beyond reasonable doubt.
- 34. The Ld. Defence counsel during the argument contended that none of the witnesses have seen the occurrence and hence their evidence cannot be taken as believable and trustworthy as there is a chance of tutored to the victim and the evidence of victim is also doubtful. So the accused cannot be held guilty on the basis of sole

testimony of the victim as she was tutored by her parents due to previous enmity.

- 41. Now coming to the question as to whether conviction can be recorded on the sole testimony of a child witness or not? This issue was dealt by the Hon"ble Apex Court in *Virendra Vs State of U.P., (2008) 16 SCC 582.* The same are reproduced as under: "The Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that:
 - 118. Who may testify All persons shall be competent to testify unless the Court consider that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."
- A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per-se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
- 43. In the case of **Ratansinh Dalsukhbahai Nayak Vs - State of Gujarat, (2004) 1 SCC 64,** it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. In the instant case there is no other element in the evidence of victim except believing her fact as stated by her as true.
- 44. In another case **Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341,** it was held as follows: "A child witness if found competent to depose to the facts and reliable one such

evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s. 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

- 45. In the present case, the deposition of the victim stands well corroborated with the statement recorded u/s 164 Cr.P.C of the victim and other witnesses. The medical officer has also corroborated the fact as stated by the victim that **genital findings are suggestive** of recent penetration. Though the witnesses were cross-examined in full length, but nothing has come on record, which could suggest that the prosecution case is false in any aspect or that the prosecution witnesses are not deposing the truth. I find the deposition of the victim and her parents and other witnesses to be cogent, convincing and reliable. Irrespective of any support from Section 29 and 30 of POCSO Act, 2012 the prosecution case in fact stands well proved from the deposition of the victim.
- 46. In the considered view of this Court, the prosecution has clearly established in proving beyond shadow of all reasonable doubt that accused Dulal Roy had committed penetrative sexual assault on the victim child. The act of the accused thus falls u/s 4 of POCSO Act. Accordingly, the accused is found guilty and therefore, he is convicted there under.

HEARING ON THE POINT OF SENTENCE

47. The accused is heard on the point of sentence. He has submitted before the Court that he is a old aged person above 75 years. He has to look after his old aged ailing wife who is also 70 years. He stated that he has been suffering from different ailments and

without support of other family members even he cannot walk. Further he stated that he has already undergone in jail hajot during the investigation of this case and hence prayed for leniency.

- that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances. The aggravating circumstances relate to the crime and the mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body, but also to the mind of not only the victim, but that of the entire family members. The stigma, which she is going to carry for ever is not erasable. Thus, the aggravating circumstances are so grave in nature.
- 49. Turning to the mitigating circumstances, the accused is above 75 years of age at the time of the incident. It is not brought to the notice of the court that he was involved in any other crime, prior to the incident. The statute under Section 4 of POCSO Act prescribes a minimum punishment for a term of 7 (seven) years with fine. When the intention of legislature is to impose stringent punishment for not less than 7 (seven) years, this Court has got no option except to impose minimum punishment for seven years.

ORDER

50. I convict the accused Dulal Roy u/s 4 of POCSO Act and sentence him to R.I. for 7 (Seven) years and also to pay a fine of Rs.1,000/- (Rupees One Thousand), in default, R.I. for six months. The period which he detained in custody, shall be set off from the period of imprisonment imposed on him.

- **51**. Now, coming to the aspect of compensation to the victim, who is a minor child, the Hon'ble Apex Court has time and again observed that subordinate Courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victim being an offence against the basic human right and violative of Article 21 of the Constitution of India. In a case titled as Bodhisattwa Gautam - Vs -Subhra Chakraborty, AIR 1996 SC 922, it has been held by the Hon"ble Supreme Court that the jurisdiction to pay compensation (interim and final) has to be treated as a part of the over all jurisdiction of the Courts trying the offences of rape, which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and Life. Even otherwise, the concept of welfare and well being of children is basic for any civilized society and this has a direct bearing on the state of health and well being of the entire community, its growth and development. It has been time and again emphasized in various legislations, international declarations as well as the judicial pronouncements that the children are a supremely important national asset and the future well being of the nation depends on how its children grow and develop, which has been observed in the case of Laxmi Kant Pandey - Vs - Union of India, (1984) 2 SCC 244. Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the Secretary, DLSA, Barpeta to grant compensation to the tune of Rs. 50,000/- (Rupees Fifty Thousand) to the victim. The amount shall be used for the welfare and rehabilitation of the victim under the supervision of District Social Welfare Officer, Barpeta.
- **52.** A copy of the order be sent to the Secretary, DLSA, Barpeta for necessary action.
- **53.** A copy of this judgment be given to the accused free of cost and a copy thereof be sent to the District Magistrate, Barpeta.
- **54.** The Sessions Case is disposed of accordingly.

55. Judgment is pronounced and delivered in the open Court in presence of both the parties and I put my hand and seal of this Court on this 16th day of April, 2019.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

APPENDIX:-

Oral evidences:-

PW-1 Victim.

PW-2 Sri Anup Roy

PW-3 Smti Junti Roy

PW-4 Smti Monamati Roy

PW-5 Sri Manab Pathak

PW-6 Dr. Mamata Devi

PW-7 SI Pardip Haloi.

Documentary evidence:-

Ext. -C 1. Statement of victim

Ext.-1 Ejahar

Ext. - Medical examination report.

Ext. 4 - Charge-sheet.

Defence evidence.

DW 1- Dulal Roy.

DW 2- Karuna Roy

DW 3 Jitendra Nath Kalita

DW 4- Mridul Roy.

Court witnesses:

CW 1- Sri Arpan Boro.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.