IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- 49 OF 2018

(Under Section 4/17 of the POCSO Act arising out of G.R. Case No. 3325 of

2017)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- 1.Md. Mofijul Karim @ Rahul @

Babul

Son of Md. Jainal Abdin Resident of Poromarighuli, Police Station – Tezpur Dist:- Sonitpur, Assam and **2. Smti Karmila Munda,** W/O Sri Jowel Munda, Resident of Borson Ghagra,

Police Station – Tezpur Dist:- Sonitpur, Assam.

Date of framing Charge :- 10/01/2018 and 26/07/2018.

Date of Recording Evidence :- 23/02/2018, 21/04/2018,

14/05/2018 & 11/07/2018,

Date of examination of accused

u/s 313 Cr.P.C

20/08/2018.

Date of Argument :- 20/08/2018

Date of Judgment :- 04/09/2017

Counsel for the Prosecution :- Mr. M.Ch. Baruah,

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. Hemendra Borah, Advocate.

JUDGMENT

- 1. In this case accused Md. Mafijul Karim @ Rahul @ Babul is put for trial for allegation of charge under Section 4 of the POCSO Act, 2012 and accused Smti Karmila Munda is put for trial for allegation of charge u/s 109 of IPC read with section 4 of POCSO Act.
- 2. The factual matrix according to the FIR, in brief, is that on or about 10.30 a.m. of 25-08-2017 taking advantage of absence of any of the family members, the informant's 14 years old minor daughter enticing by accused persons and took her to Ghogra. At Ghogra accused hand over informant's daughter to one Babul of Parua. The said Babul kept confined for three days at a house somewhere in Paruwa and all the three days he committed rape on her. On 27-08-2017 accused dropped down informant's daughter at Na-ali. Her daughter informed the informant that accused committed rape on several times. Hence, this prosecution case.
- The informant Monoj Baghowar (Bhonda) filed this ejahar before the I/C of Bebejia Police Out Post on 28-08-2017. On being receipt the ejahar, I/C of Bebejia Police Out Post by giving GD Entry No. 612 dated 28-08-2017 at 3 p.m. started investigation of the case by sending the original ejahar to O/C Tezpur Police station. On receipt the ejahar, the O.C Tezpur P.S. registered the case vide Tezpur P.S. Case No. 1751/17 under Section 366(A)/343 of IPC read with section 8 of POCSO Act. After completion of usual investigation, the O/C of Tezpur PS sent up the case for trial against the accused Smti Karmila Munda and Md. Mafijul Karim @ Rahul and Babul by filing charge sheet under Section 366(A)/343 of the IPC read with section 4 of the POCSO Act.
- **4.** On being appeared the accused persons before this Court, after hearing both parties, charged under section 4 of POCSO Act, 2012 against the accused. Mafijul Karim @ Rahul @ Babul and against accused Smti Karmila Munda u/s 4 of POCSO Ac read with section 511 of the IPC. Thereafter, the charge was modified to against accused Smti Karmila Munda u/s 109 of the IPC read with section 4 of POCSO Act and thereafter, again the charge was modified u/s 17 of the POCSO Act.

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Details of the charge was read over to accused Karmila Munda, to which she pleads not guilty and claimed to be tried. The particulars of the charge against the accused accused Mofijul Karim @ Rahul @ Babul was read over, explained to him, to which he pleaded not guilty and claimed to be tried.

- **5.** To substantiate the case prosecution examined as many as 8 (eight) numbers of witnesses.
- **6.** After completion of prosecution evidence accused persons are examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before them for explanation where they denied the evidence and allegation and declined to give defence evidence.
- **7.** I have heard the argument put forward by the learned counsels of both sides.

8. The points for decision in this case are that:

- 1. Whether the accused Md. Mofijul Karim @ Rahul @ Babul on 25-08-2017 at about 3 p.m. and thereafter for about 3 days at Poruwa, under Tezpur Police station, committed penetrative sexual assault on Miss X (aged about 14 years.)? and
- 2. Whether the accused Md. Mofijul Karim @ Rahul @ Babul on 25-08-2017 at about 3 p.m. and thereafter for about 3 days at Poruwa, under Tezpur Police station, committed penetrative sexual assault on Miss X (aged about 14 years.) and that accused Smti Karmila Munda at the same place abetted the said accused Mofijul Karim @ Rahul @ Babul, in the commission of the said offence of penetrative sexual assault to the victim which was committed in connection with abetment and that you there committed the offence punishable u/s 17 of POCSO Act?

Reasons, Decisions and reason for decision.

9. To arrive at the judicial decision, let me appreciate the evidence on record.

10. PW- 1 Sri Monoj Baghowar stated that he knew the accused Karmila Munda and Babul and the incident took place in the month of August, 2017 at about 10.00 AM. At that time he along with his wife went to work. Victim Miss X is his daughter and her age is 14 years at the time of occurrence. At the relevant time she was alone in the house. The accused Karmila Munda took his victim daughter to Ghagra taking advantage of his absence. The accused Karmila Munda handed over his victim daughter to the accused Babul and Babul took his daughter in a bike to Parowa and forcefully confined her in his rented house for three days. They searched their daughter vigorously for three days, but, could not find her and after three days the accused Babul dropped her at Naali. Then she returned back to their house. On being asked by her mother, she reported that on long three days of confinement at the rented house of Babul, she was being raped by the accused Babul. Lateron, the victim also informed him about the incident. Then, he filed an ejahar before Bebezia Out Post. Ext.1 is the ejahar and Ext. 1(1) is his signature. Thereafter, police took his daughter for medical examination and also sent her before the Court for recording her statement under Section 164 CrPC.

In cross-examination, he admitted that victim studied at LP School for about seven years which includes three years where she failed. She was admitted at School while she was 6½ years old. She studied in Bahbari LP School which School is still existed. Thereafter she was admitted at Omiyadas High School, Bandarmari. The said School is still existed. At present, she studied at Class-VII Standard. She was admitted in said School in Class –VI and completed two years in that school. In LP School she has passed five classes. Ext.1 was written by a police constable in the police station. The police constable was of the Bebezia Police Out Post. The scribe writes the ejahar according to his dictation. He himself and the victim went to Bebezia OP and thereafter along with police he accompanied his victim daughter to the Court for recording her statement under Section 164 CrPC. He never instructed

victim daughter what to state before the learned Magistrate. However, from house, he has accompanied his daughter to the Police Station.

11. PW-2 Sri Dhiraj Baghowar, has stated that he knew accused Karmila Munda who belongs to their village. But, he knew the accused Babul only after the incident. The incident took place about three months ago. Victim is his sister. At the time of incident, her age was 14 years. She was studied in Class-VI at the time of occurrence. At first his victim sister was taken by Karmila to Ghogra and Karmila handing over his sister to other accused standing in the dock. He came to know about the occurrence from his father when he reached home i.e. the next day of recovery of his sister. The victim was recovered after three days of her missing. After recovery, his victim sister informed him that she was brought by accused Babul to his rented house at Parowa.

In cross-examination, he admitted that his victim sister did not state anything about the occurrence to him. He reached Guwahati from Bengalore on flight at about 7.00 AM on 28th day of the month, he did not know the name of the month and thereafter he reached Tezpur at about 8.30 AM on the said 28th day and the FIR was lodged after arrival his home at Tezpur. There are about 25 houses near their house who are neighbours and they are still alive.

- PW-3 Sri Bandhana Orang who turned hostile. The unhostile portion of evidence is such that he knew the victim who is her villager. Accused Karmila Munda is also known to him, who is standing on the dock. He did not know the other accused. He did not know anything about the incident. He only heard that around 3 months back, the victim was missing for about three days. He also heard that somebody has dropped her at Na-ali after three days. Police did not record his statement.
- **13.** PW-4 Sri Lohit Rajwar stated that he knew the woman accused Karmila Munda who belongs to Bahbari. He did not know the other accused. He knew the victim girl. She was the daughter of Manoj

Bagwar. Manoj Bagwar informed him that his daughter was taken by some person.

14. PW- 5 victim Miss X stated that she knows both the accused. Karmila Munda belongs to their village. The incident took place around four months back. At about 10 a.m. Karmila Munda came to their house and took her to Ghogra. At Ghogra, Karmila Munda handed over to Babul who took her in a bike to Paruwa. Prior to the incident, she did not know Babul. He kept her in a rented house at Paruwa. In the said rented house, other than accused Babul and her, none was there. In the said rented house Babul raped her in all three days. He opened her pant and thereafter committed rape. In all the three days, during nights, in such ways accused committed rape. In the day time, he confined her inside the room by locking the door from outside. Thereafter, after about few days, while accused went to take bath by keeping the mobile phone in the room, she informed the matter to her brother Dhiraj Bagwar about the whole incident. Then her brother Dhiraj called back and scolded the accused stating that he will lodge a case against him for this incident, then accused hired one auto asking the autowala to drop her at Na-ali. Accordingly, she came to Na-ali and from Na-ali her brother Dhiraj Bagwar took her to home. Then, her father had lodged this case. Police examined her through the doctor and sent her for recording her statement u/s 164 Cr.P.C. At the time of incident, she was 14 years old and reading in class VII. Ext. 2 is the statement before the Magistrate and Ext. 2(1) and 2(2) are her signatures.

Though, she has been exposed to long cross-examination except giving many suggestion, but the evidence as to at about 10 a.m. Karmila Munda came to their house and took her to Ghogra, at Ghogra, Karmila Munda handed over to Babul who took her in a bike to Paruwa, prior to the incident, she did not know Babul, accused kept her in a rented house at Paruwa, in the said rented house, other than accused Babul and her, none was there, there Babul raped her in all three days, accused opened her pant and thereafter committed rape and during

nights also in such ways accused committed rape on her has remained unshaken.

- 15. PW-6 Sri Bipul Orang who turned hostile. The unhostile portion of his evidence is that he knew both the accused present in the dock. Woman accused is Kamila Munda and he did not know the name of other accused. The victim girl is his niece. She was about 14 years at the time of incident. The incident took place about 8 months ago. He came to know that the victim is missing. Then their family members vigorously searched her. Then he came to know that one Babul has dropped the victim at Na-ali from his bike. While he enquired the matter the victim told that accused Kamila Munda has kidnapped her. Thereafter, one Babul has took her to somewhere.
- **16.** PW- 7 Dr. Ila Rajkhowa, stated that she was posted as Sr Medical and Health Officer at Kanaklata Civil Hospital, Tezpur. On that day, in reference to Bebzia out post GD Entry No. 612 dated 28-08-2017 under section 366 -A of IPC, she had examined one patient (victim) namely Miss X, 14 years, female D/O Sri Manoj Baghowar of vill- Niz-Bahbari, PS- Tezpur on being escorted and identified by WHG Alaka Deka. She had examined the victim on 28-08-2017 at 1.30 PM in the emergency and labour room of the complex of the Kanaklata Civil Hospital in presence of GNM Kamala Talukdar and found the following:

Consent for examination was taken from the victim girl as well as her quardian.

Menstrual History:

Can not tell accurately the date of LMP. History given that she has LMP on first week of August, 2017.

Identification Mark:

One big mole on lower region of lower lip.

On Examination:

Height: 140 cm, Weight: 35 kgs, Teeth: 5/5-6/7.

At the time of examination victim is average built, well dressed, neat and tidy. Secondary sexual character are developed. Breast, areola are developed. Axilary hair, pubic hairs are developed. Vulva, vagina are

developed. There were no sign of any injury or violence in any part of the body or in private parts. Vaginal smear was taken for spermatozoa.

Investigation advised and reports:

- 1. Vaginal smear for spermatozoa not done by the party.
- 2. X-ray of left hand, wrist joint, elbow joint and iliac crest for determination of age union of the epiphysis of the lower ends of radius and ulna are not yet completed. All epiphysis of the bones around the elbow joint have fused. Epiphysis of the iliac crest has appeared but, not fused.

Impression: Age of the person under investigation appears to be below 18 years. (Done at Assam X-ray Clinic and Laboratory. Patients ID No- AXC-216. Report given by Dr. PK Barman, Radiologist).

3. U/S for pelvis: Normal pelvic organs with non-gravid uterus. The uterus is ante-verted and is of normal in size and outlines. Measures $6.0 \times 2.7 \times 2.6 \text{ cm}$ in length breadth and thickness. Myometrium is normal without any focal lesion. The endometrium is of normal thickness. There is no gestational sac or product of conception is seen in the uterus. Both overies are normal in size, and echoanatomy. Right ovary measures $20 \times 19 \times 18 \text{ mm}$. Left ovary measure $16 \times 15 \times 11 \text{ mm}$. No evidence of nay cystic or solid lesion is seen in the ovaries. No mass lesion is seen in the pelvic/ parametrium. No abnormal fluid collections seen the peritonial cavity and in the POD.

Impression: Normal pelvic organs with no gravid uterus. (Done at Assam X-ray Clinic and Laboratory on 14-11-2016, Patients ID- AXC – 3084.

Report given by Dr. PK Barman, Radiologist and Ultrasonologist).

4. Urine for HCG – Negative (Done at Assam X-ray Clinic and Laboratory. Patients ID No – 33157. Report given by Dr. D Mahanta, Pathologist).

OPINION:

- 1. There is no sign of recent sexual intercourse at the time of examination.
- 2. Age of the person under investigations appears to be below 18 years.

3. There is no any sign of injury or violence on her body as well as on her private parts at the time of examination.

Ext. 3 was the medical report and Ext. 3(1) to Ext. 3(5) were signatures. Ext. 4 was the urine for HCG report and Ext. 4(1) was the signature of Pathologist Dr. D Mahanta. Ext. 5 was the U/S and X-ray report with film and plates of Assam X-ray Clinic and Laboratory and Ext. 5(1) was the signature of Dr. PK Barman, Radiologist.

17. PW 8 SI Lakhi Prasad Kachary, the Investigating Officer of this case, stated that on 28-8-2017 he was posted as Incharge at Bebejia Police Out Post under Tezpur PS. On that day, he received an ejahar from one Monoj Baghowar (Dhunda) and he made GD Entry being No. 612 dated 28-08-2017 and forwarded to O/C Tezpur PS for registering a case. He has already taken up the investigation of the case. Ext. 1(2) is his signature on Ext.1, ejahar. He has recorded the statement of the complainant and victim Miss X, 14 years, D/O Monoj Bagowar at the police Out Post. Thereafter, he has sent the victim to KCH, Tezpur for medical examination. He has visited the place of occurrence i.e. Nij Bahbari, prepared the sketch map and recorded the statement of witnesses. Ext. 6 is the sketch map and Ext. 6(1) is his signature. He has arrested the accused person Karmila Munda and brought her to the out post. On 29-08-2017 he has sent the victim girl to the learned Magistrate for recording her 164 Cr.P.C. statement. Thereafter, he has also arrested the accused Babul @ Mafijul. He has forwarded the accused Karmila Munda and Babul @ Mafijul to the court. After collecting medical report and on completion of usual investigation, finding sufficient materials, he has submitted chargesheet against both the accused persons u/s 366 A /343 of IPC read with section 4 of POCSO Act. Ext. 7 is the chargesheet and Ext. 7(1) is his signature.

He confirmed the statement of witness Bipul Orang who stated before him that "on being enquired the victim girl, she told me that initially Kamila Munda kidnapped her, then Babul took her to somewhere where Babul raped her for 3 days." Ext. 8 is the case diary of Tezpur

PS Case No. 1751/17, Ext. 8(1) is the relevant portion of statement of witness Bipul Orang and Ext. 8(2) is his signature.

In cross-examination he admitted that he has visited the place of occurrence as shown by the complainant. Except Ext. 6, no place of occurrence was shown to him by the complainant or victim. He has also not trace out the exact place of occurrence as the victim did not exactly specify him about the place of occurrence.

- **18.** These much is the evidence of the prosecution case. Defence plea is of total denial while their statements are recorded u/s 313 Cr.P.C.
- **19.** I have heard the arguments put forwarded by learned counsel for both the parties.
- 20. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, there are discrepancies in between the statement of victim and other witnesses. There are many contradictions in between the ejahar, statement of the victim made u/s 164 Cr.P.C. and the statement made by victim before the court. **Secondly,** there is only one eye witness i.e. the victim but her statement is not such to convict the accused relying only on the evidence of victim. Thirdly, the place of occurrence as stated in the ejahar is quite different from the place of occurrence as stated by victim in the Court. Fourthly, though the doctor stated that the victim was below 18 years but that is nothing but an opinion. Therefore she may be more than 18 years. In the POCSO Act, the case is depends upon the age of the victim as because the victim must below 18 years of age so there should be concrete proof the age of the victim but here in this case prosecution has failed to prove except the age of the victim. Under such circumstances, the accused is entitled to get acquittal.
- **21.** On the other hand, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt, as such accused persons are required to be

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convicted under the charged section of law. Firstly, the victim vividly described the whole story not only before the court but also the statement made before the learned Magistrate as well as statement made before the Investigating Officer u/s 161 Cr.P.C. as such, her evidence is cogent, reliable, corroborative and convincing. Besides, the statement of other witnesses including PW 1 and 2 all were supported the evidence of victim. Secondly, though the doctor found no any sign of sexual intercourse on 28-08-2017 but the incident took place on 25-08-2017, therefore, she was examined after 3 days which is not possible to remain any sign of sexual intercourse. Besides, there is no question of reveal any spermatozoa when she was examined after 3 days of the incident. Thirdly, under section 29 of the POCSO Act, there is a provision of mandatory presumption where the person is prosecuted for committing, abetting or attempt to commit any offence u/s 3, 5 and 7. Over and above, the prosecution has ably proved the case beyond any reasonable doubt against both the accused as to their respective charge so may be required to convict.

- **22.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **23.** A close scrutiny of the record, it appears that to substantiate the case, the prosecution examined as many as 8 numbers of witnesses. Out of 8 numbers of witnesses, two i.e. PW 7 the doctor and PW 8 the Investigating Officer are official witnesses and therefore there remained 6 numbers of non official witnesses. Among the 6 numbers of non official witnesses, 2 numbers of witnesses are declared hostile. The Investigaging Officer has confirmed the hostile portion of statement of witness Bipul Orang.

Here in the present case as details discussed herein before, the victim PW 5 stated that at about 10 a.m. accused Karmila Munda came to their house and took her to Ghogra. At Ghogra, Karmila Munda handed over to Babul who took her in a bike to Paruwa. Prior to the

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incident, she did not know Babul. He kept her in a rented house at Paruwa. In the said rented house, other than accused Babul and her, none was there. In the said rented house Babul raped her in all three days. He opened her pant and thereafter committed rape. In all the three days, during nights, in such ways accused committed rape. In the day time, he confined her inside the room by locking the door from outside. Thereafter, after about few days, while accused went to take bath by keeping the mobile phone in the room, she informed the matter to her brother Dhiraj Bagwar about the whole incident. Then her brother Dhiraj called back and scolded the accused stating that he will lodge a case against him for this incident, then accused hired one auto asking the autowala to drop her at Na-ali. Accordingly, she came to Na-ali and from Na-ali her brother Dhiraj Bagwar took her to home. Then, her father had lodged this case. Though she has been exposed to long cross-examination, the evidence as to made in examination-in-chief could not be shaken by any means except giving suggestions.

The statements made by victim before the Investigating Officer as well as before the learned Magistrate are also corroborated. No doubt, there is a minor discrepancy in between the statement made by victim before the court and statement made before the learned Magistrate. As it appears that the statement made by the victim before this court that "accused confined her in his rented house at Paruwa for about 3 days." But in her statement made before the learned magistrate, she stated that "accused raped her on the said two nights." Other than that the whole statements are corroborated to each other. This is the statement which is slightly minor contradictions.

In Boya Ganganna Vs. State of Andhra Pradesh reported in AIR 1976 SC 1541 wherein it is held —

"Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be

remembered that the evidence given a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence."

As stated above as raised by learned counsel for the accused, there is minor contradictions. Even if admitted the said slightly contradictions, the prosecution case would not change.

- 24. Learned counsel for the accused again submitted that there is no any birth certificate or age certificate or any certificate issued by the School authority where the victim first or last attended or any certificate issued by local authority. Here in the present case as stated herein before, according to the FIR, the victim at the relevant time was 14 years of age. PW 1, the informant, stated in the court that the victim was 14 years at the time of occurrence. Similarly, the brother of the victim, PW 2 also stated that at the relevant time the age of the victim was 14 years. On the date of recording the statement of victim, she stated that she was 14 years of age. Similarly, on the day of recording her statement u/s 164 Cr.P.C. she stated before the learned Magistrate that she was 14 years of age. The doctor PW 7 also stated that the age of the person under investigation appears to be below 18 years, therefore, over and above, it can be safely held that the victim was a minor at the time of occurrence. Except submitting at the time of argument, defence has not challenged at any point of time about the age of the victim.
- 25. In the case of **K. Muthu Mariappan Vs State**, represented by the Inspector of Police, **Criminal Appeal (MD) No.98 of 2015**, it was held that it is true that primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in absence of birth certificate, the date of birth cannot be proved. When the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact or any fact relevant to the issue, which is

disputed by the adverse party alone, needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

In this case, the victim and her father and brother categorically stated the age of the victim as 14 years from the very beginning of the case, at the time of commission of offence, besides during cross-examination, the same has not been disputed at all by the accused side. Thus, the evidence of PWs in respect of age of the victim remains unchallenged.

26. A careful perusal of the whole case record, it appears that the statement of the victim made before the court is corroborated by her earlier statement u/s 161 Cr.P.C. and 164 Cr.P.C. Though she has been exposed to long cross-examination the evidence as to on the day of incident at about 10 a.m. accused Karmila Munda came to their house, took her to Ghogra, at Ghogra she was handed over to one Babul, said Babul kept her in a rented house at Parua for three days and all the days accused Babul raped her by opening her pant, even in all the nights during her confinement, accused committed rape has remained unshaken. Besides, according to her statement one day during her confinement at Parua accused went to take bath by keeping the mobile in the room, she informed the matter to her brother Dhiraj Bagwar about the whole incident. Then her brother Dhiraj called back and scolded the accused stating that he will lodge a case against him for this incident, then accused hired one auto asking the autowala to drop her at Na-ali and from Na-ali she was taken back by her brother Dhiraj Bagwar. In court PW 2 Dhiraj Bagwar stated about the whole incident in toto. Thereafter, the PW1, the father of the victim stated that on being came to know about the incident, filed ejahar before the police station. The other independent witness PW 4 also supported the prosecution case.

27. It has already stated that out of 6 numbers of non official witnesses, 2 of them i.e. PW 3 and PW 6 are turned hostile. The I.O. has confirmed the hostile portion of statement of PW 6 that at the time of recording the statement of Bipul Orang he stated before him that "on

being enquired the victim girl, she told him that initially Karmila Munda kidnapped her, then Babul took her to somewhere, then Babul raped her for 3 days." Besides that, that hostile portion of statement are corroborated the statement of victim, PW 1, informant and PW 2, the brother of the victim.

28. In the case in hand, the victim has been consistent on the material particulars with regard to the incident that on the day of incident at about 10 a.m. Karmila Munda came to the house of the victim, took the victim to Ghogra, at Ghogra handed over the victim to accused Babul and accused took the victim to a rented house of Parua where accused confined her (victim) for about 3 days and all the 3 days accused committed rape on her. Besides that there is no any evidence that accused persons have some enmity or quarrel with the victim or with the father or any family members of the victim to implicate the accused persons falsely. Though at the time of recording the statement of the accused persons, they stated that the complainant has filed this false case as they have a marked named "Mina bazaar" where Karmila and mother of the victim doing works. Accused Mafijul is the owner of the said "Mina bazaar". The mother of the victim asked Mofijul Rs. 20,000/-. During that time Karmila Munda told her that why Mofijul give her money. For this reason a quarrel took place and complainant has filed this false case against the accused persons. But this is a new plea taken by accused persons only at the time of recording their statements u/s 313 Cr.P.C. It appears that none of the prosecution witnesses has been cross-examined nor even any suggestion has been made to any of the prosecution witnesses that the accused Mofijul Karim is the owner of "Mina Bazaar" where other accused Karmila and mother of victim were doing works and the mother of the victim asked him to give Rs. 20,000/- and during that time Karmila Munda told her that why Mofijul give her money and for this reason a quarrel took place between Karmila and complainant for which the complainant filed this false case against them. Accused Mofijul Karim @ Babul @ Rahul has also failed to adduce any defence evidence to substantiate his claim. Under such

circumstances, his statement cannot be relied on. Therefore, the evidence of victim is cogent and reliable and there cannot be any doubt to disbelieve the evidence of the victim.

- **29.** Undoubtedly in a criminal trial any such lapse on the part of accused is not leading any defence evidence would not have mattered much as prosecution is supposed to prove its case beyond shadows of all reasonable doubts. However, in a case under POCSO Act, the situation is not so. In this regard, it will be worthwhile to refer to the provisions of Section 29 and 30 of POCSO Act.
- **30.** U/s. 29 of POCSO Act, a mandatory presumption for certain offence is to be drawn against the accused in a prosecution for certain offences and same reads as under:
- "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence u/s.3, 5, 7 and

Section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

- **31.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused 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 that 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 probabilities.

- 32. The use of expression "shall presume" has been defined in Section 4 of the Indian Evidence Act. As contrasted from the expression "if presume", the expression "shall presume" whenever used connotes "legal presumption" or "compulsory presumption" as contrasted from "factual presumption" or "discretionary presumption" emanating from the expression "may presume". "Legal presumptions" or "compulsory presumption" as are signified by the use of expression "shall presume" are inferences or proposition established by law, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. The presumptions of law are in reality rules of law, and part of the law itself and the court may draw inference whenever the requisite facts are developed in pleadings.
- 33. Similarly whenever any law prescribes that the Court shall presume the existence of culpable mandatory state or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. Certainly, it does not discharge the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume". Thus, as per Section 29, if a person is prosecuted for committing or abating or attempting to commit any offence u/s.3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abated or attempted to commit the said offence as the case may be unless the contrary is proved. However, in the present case, the accused has completely failed in discharging his burden even by preponderance of probabilities much less beyond reasonable doubt.
- **34.** Coming now to the fact 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**, which are reproduced as under:

"The Evidence Act 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 who may testify – all persons shall be competent to testify unless the Court considers 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."

- **35. In Dattu Ramrao Sakhare Vs State of Maharashtra, (1997) 5 SCC 341,** it was held that 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 answer 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.
- **36.** Subsequently, in **Ratansingh 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.

Coming to the present case, as discussed herein above, the victim made stated on oath after putting many questions, she replied the same without any hesitation and this court hold that the victim was able to administer oath and thereafter, her statement was recorded on oath. Apart from that PW 1 and 2 clearly supported the evidence of victim (PW 5). The prosecution has ably proved the age of the victim as discussed herein before.

On appreciation of evidence given by the victim, her father informant PW 1 and her brother PW 2 and other independent witnesses, I find that accused Mofijul Karim sexually assaulted the victim. It appears that medical evidence no way supported the materials of penetrative sexual assault as the doctor stated that (1) no sign of recent sexual intercourse at the time of examination and (2) there is no any sign of injury or violence on her body as well as on her private parts at the time of examination.

Here in the present case, the victim is a minor however according to the doctor she was below 18 years of age.

From the aforesaid discussions, it appears that the prosecution has ably proved the case beyond any reasonable doubt against accused Smti Karmila Munda that she has abetted the other accused Md. Mofijul Karim @ Rahul @ Babul in commission of the sexual assault on victim. Therefore, accused Smti Karmila Munda is held guilty for the offence u/s 17 of the POCSO Act.

The prosecution has also able to prove that accused Md. Mofijul Karim @ Rahul @ Babul at the relevant time committed the offence of sexual assault to the victim and therefore he is also held guilty for the offence u/s 8 of the POCSO Act.

- **37.** The accused persons are heard on the point of sentence where they praying for leniency stating that they are the only bread earners of their respective families. Besides they have been in custody for long time, hence praying for leniency.
- **38.** I have heard learned counsel for the accused persons as well as learned Special Public Prosecutor, Sonitpur.
- **39.** Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between aggravating circumstances and mitigating circumstances. The aggravating circumstances relate to the crime and 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 to the victim but that of entire family members, but considering the mitigating circumstances, the accused Md. Mofijul Karim @ Rahul @ Babul was hardly 22 years of age and accused Smti Karmila Munda was hardly about 30 years at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused persons had committed any other offence. There is likelihood of their reformation, but the statute u/s. 8 of POCSO Act prescribes minimum punishment for a term of three years with fine and for abetment of the aforesaid offence is also the same punishment as to the offence abetted. When the intention of the legislator is to impose stringent punishment for not less than three years, this court has no option but to impose minimum punishment of three years.

ORDER

40. I convict the accused Smti Karmila Munda u/s. 17 of POCSO Act and sentence her to Rigorous Imprisonment for 3 (three) years and also to pay a fine of Rs.500/- (Rupees Five Hundred only), in default, Rigorous Imprisonment for one month.

I also convict the accused Md. Mofijul Karim @ Rahul @ Babul u/s 8 of POCSO Act and sentence him to Rigorous Imprisonment for 3 (three) years and also to pay a fine of Rs.500/- (Rupees Five Hundred only), in default, Rigorous Imprisonment for one month.

The period, which they detained in custody, during the period of investigation, trial etc. shall be set off u/s 428 of Cr.P.C.

41. As per provision of section 357 (A) of the Cr.P.C, the victim compensation is permissible in law. After going through the statement of witnesses, I think the victim is entitled to get the compensation. To mitigating the mental agony and trauma suffered by the victim, an amount of Rs.25,000/- (Rupees Twenty five thousand) only is awarded as compensation.

The Secretary, District Legal Services Authority, Sonitpur, Tezpur be asked to give the compensation to the father of the victim after proper enquiry.

Let a copy of the Judgment be sent to the Secretary, District Legal Services Authority, Sonitpur, Tezpur for her necessary action.

42. A copy of this judgment be furnished to the accused persons each free of cost immediately.

Let another copy of Judgment be sent to learned District Magistrate, Sonitpur, Tezpur, u/s 365 of Cr.P.C.

Given under my Hand and Seal of this Court on this the 4th day of September, 2018.

(Ashok Kumar Borah)
SPECIAL JUDGE,
SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

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APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Sri Monoj Baghowar, informant

Prosecution Witness No.2
 Prosecution Witness No.3
 Prosecution Witness No.4
 Prosecution Witness No.4
 Prosecution Witness No.5
 Prosecution Witness No.5
 Prosecution Witness No.6
 Prosecution Witness No.6

7. Prosecution Witness No.7 :- Dr. Ila Rajkhowa, M.O.

8. Prosecution Witness No.8 :- Sri Lakhi Prasad Kachary, I.O.

EXHIBITS.

Exhibit 1 :- Ejahar

Ext. 1(1) :- Signature of the informant

Exhibit 2 :- 164 Cr.P.C. statement of the victim.

Exhibit 2(1) & 2(2) :- Signatures of the victim.

Exhibit 3,4 & 5 :- Medical reports

Exhibit 3(1) to 3(5) :- Signatures of M.O.

Exhibit 4(1) :- Signature of Dr. D. Mahanta, Pathologist.

Exhibit 5(1) :- Signautre of Dr. P.K. Barman, Radiologist

Exhibit 6 :- sketch map

Exhibit 7 :- Chargesheet

Exhibit 8 :- Case diary of Tezpur PS Case No.1751/17

Exhibit 8(1) :- Relevant portion of statement of Bipul

Orang.

Exhibit 6(1),7(1) & 8(2):- Signatures of I.O. Lakhi Prasad Kachary.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR