IN THE COURT OF ADDITIONAL SESSIONS JUDGE (FTC), DARRANG, MANGALDAI

PRESENT: Mr. J.M.Barman, A.J.S.,

Additional Sessions Judge(FTC),

Darrang, Mangaldai.

Special (POCSO) Case No. 26 of 2018.

(U/S: 376/511, 354 of I.P.C. R/W 12 of POCSO Act)

(G.R. Case No. 642/2018 arising out of Sipajhar P.S. Case No. 180/18.)

State of Assam

-Versus-

Birendra Deka,

S/O. Late Megheri Deka,

Vill.- Pithakhowapara,

P.S. Sipajhar,

Dist.- Darrang (Assam),

...... Accused person.

APPEARANCE:

Advocate for the State : Sri Dulal Kr. Ghosh, learned Addl.P.P.,

Advocate for the accused : Sri S.N. Basak, Learned Counsel.

Date of framing charge : 03-05-2019.

Date of prosecution evidence: 31-05-19, 26-06-19, 15-07-19, 28-08-19.

Date of defence evidence : 3.10.2019 & 11.11.2019

Date of argument : 17.12.2019

Date of judgment : 18.01.2020 (on 4.01.2020 judgment could not be delivered, as self

attending the training programme at Assam Judicial Academy, Amingaon)

JUDGMENT PROSECUTION CASE

1. The prosecution story, in brief, is that informant Pankaj Deka lodged an F.I.R. before the Officer-In-Charge of Sipajhar Police Station on 09-03-2018, alleging that on 08-03-2018 in the evening

at about 6.30 P.M his minor daughter along with her friends were watching T.V programmme in the house of the accused and thereafter, the accused after closing the T.V. came to keep his daughter in her house. But on his way, accused person with bad intention in the "Jungal" on the back side of his house side, gagged the mouth of his daughter and disrobed her. As his daughter started hue and cry, neighboring people after hearing the sound rushed to the place of occurrence and then the accused person fled away by running. Hence this case.

INVESTIGATION

2. After receiving the ejahar from the informant, the officer-in-charge, Sipajhar P.S. registered a case as Sipajhar P.S.Case No. 180/18, under section 354 of IPC R/W Section 12 of POCSO Act and entrusted S.I. Mr. Jadab Ch. Kalita to investigate the case. Upon completion of investigation, the investigating officer filed Charge-sheet against the accused Birenbdra Deka under section 354 of IPC read with Section 12 of POCSO Act.

TRIAL

3. After receiving the case record , from learned Chief Judicial Magistrate, Darrang, Mangaldai , by learned Sessions Judge, Darrang Mangaldai , same is registered as Special (POCSO) No. 26 of 2018 and the learned Sessions Judge, Darrang, Mangaldai is pleased to transfer the case record to this court for trial. After appearance of the accused person, copies of the relevant documents were furnished to him and after hearing the submission of the learned Addl. P.P for the State as well as learned defence counsel on the point of charge and after going through the relevant documents as furnished by the investigating officer under section 173 of Cr.P.C, I have found prima facie material against the accused person under section 376/ 511, 354 of I.P.C read with section 12 of

POCSO Act. Accordingly, charge under the above mentioned offences were framed against the accused person and contents of the charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

4. The prosecution side has examined as many as 8 (eight) Nos. of witnesses and exhibited some documents in support of its case. Thereafter evidence for the prosecution side is closed and the statement of accused under section 313 Cr.P.C was recorded. The plea of the accused is of total denial. Accused person also adduced evidence of two witnesses for his defence.

Points for determination:

- (I) Whether on 8-3-18 in the evening at about 6-30 P.M, the accused attempted to commit rape on the victim X, a minor girl aged 6 years, in a jungle of backside of her house at village-Pithakhowapara under Sipajhar P.S. and thereby committed an offence punishable under Section 376/511 of Indian Penal Code?
- (II) Whether on the same day, time and place the accused used criminal force on the victim with intent to outrage her modesty by removing her wearing apparels and thereby committed an offence punishable under Section 354 of Indian Penal Code?
- (III) Whether the accused on the same day, time and place touched the body of the victim, a minor girl and thereby sexually harassed her and thereby committed an offence punishable under Section 12 of the POCSO Act?

DISCUSSION, DECISION AND REASONS THEREOF:

- 5. I have perused the evidence on record and also heard the submission of learned defence counsel as well as learned Addl.P.P for State. Let me describe in brief of the prosecution evidence.
- 6. P.W-1 (Pankaj Deka), the informant deposed that he knows the accused who is his co-villager. The victim is his daughter. At the time of incident her age was 6 years. The incident occurred about 1 year 2 months back in the evening at about 6.30 P.M. On the date of incident, while he returned home from work, his wife told him that she along with her daughter went to the house of accused for watching TV. Programme and his wife after watching T.V. came home earlier and his daughter was watching T.V. in the house of the accused. Later on while his daughter wanted to come back to her house, the accused came along with her and then the accused took his daughter to inside jungle and removed her pant. At that time his related brother Jayanta came there to urinate and seeing his daughter, rescued his daughter and brought to their house. Then the accused fled away. Later on, while he asked his daughter about the occurrence, she told them the incident as describe above. On the next day of the occurrence, he lodged the ejahar. He put thumb impression on the ejahar. Thereafter, police took his daughter to Sipajhar Hospital for medical examination. The statement of his daughter was recorded in Mangaldai Court. Police took a photo copy of Birth Certificate of his daughter from him.
- 7. In his cross-examination he denied the suggestion put by the defence side. He denied to a suggestion of defence side that on the date of occurrence his daughter came to his residence along with her friend, and accused person was not along with her daughter at the relevant time, which is denied by this witness.
- 8. P.W-2 Kalpana Deka is the mother of the victim and deposed in her evidence that accused is her co-villager. The

incident occurred about 12 months back in the evening at about 6.30 P.M. On the date of occurrence she along with her daughter went to the house of accused for watching T.V programme. After watching T.V. for some time, she returned back home earlier as her daughter told her that she would come later. Later on, while his daughter wanted to come to her home, the accused came along with her to drop her in her house and then the accused on the side of the road gagged the mouth of her daughter and pulled his daughter towards jungle. At that time Jayanta Deka came there to urinate and had seen the accused and her daughter. PW-2 further deposed in her evidence that the accused removed pant of her daughter and his put finger through her (daughter) vegina. While Jayanta tried to catch the accused, the accused fled away. Jayanta brought her daughter to her house. On being asked, her daughter told that the accused gagging her mouth pulled her inside the jungle and removed her pant. On the next day ejahar was lodged by her husband. Police provided medical treatment to her daughter at Sipajhar Hospital. Her daughter was produced before Mangaldai Court and her statement was recorded. At the time of incident the age of her daughter was 6 years and was reading in Class-I. Police had taken a photo copy of Birth Certificate of her daughter.

9. In her cross examination she deposed, near the place of occurrence, resident of Rameswar Deka, Chandrakanta Deka, Puspa Deka, Dugdha Deka are situated and all of them came to the place of occurrence after hearing the hue and cry. She further deposed in her cross-examination that no any panty of her daughter was seized by the investigating officer. It also reveals from her cross-examination that the incident took place after 10 minutes of her reaching home from the residence of the accused person. She further denied to a suggestion of defence side that her daughter returned home along with her friends.

- 10. P.W-3 (Jayanta Deka) deposed in his evidence that the informant is the son of elder brother of his father and the victim is his niece. He knows the accused person, he is his co-villager. On the date of occurrence, in the evening at about 7.00 P.M after coming back home from work, he went to backside of his residence to urinate and at that moment Bul Deka on hearing some sound in the jungle had shouted and then he put on the torch-light in his hand and then he saw the accused by holding the hands of his niece running towards home-stead ahead. Then he, along with Bul Deka and Beli Deka chased the accused. But the accused leaving his niece alone in the middle of home-stead and went away. Thereafter Beli Deka brought his niece to the house of Chandra Kanta. Thereafter the accused came to the court-yard of Chandra Kanta and stated that he had taken the girl inside the jungle for giving some fear in her mind about fox. His niece was crying at that time and taking her half pant in her hands. Thereafter, the informant lodged the case.
- 11. He deposed in his cross-examination that the place of occurrence is situated near his residence. In his cross-examination, he deposed that his torch light was not seized by the investigating officer. He denied to a suggestion of defence side that he had some enmity along with the accused person in the village and due to the aforesaid enmity he had deposed falsely against the accused person.
- 12. P.W-4 (Bul Deka) deposed that he knows the informant, the accused person as well as the victim. The incident occurred about 1 year 3 months back. On that day after returning from work, he came to the house of Beli at about 6 P.M. Then he had seen the victim in the court-yard of Beli and thereafter her mother had taken her.

- 13. This witness was declared hostile on the prayer of prosecution side. Thereafter, he was cross-examined by the prosecution side as well as defence side.
- 14. In his cross-examination by defence side, he has stated that Beli Deka is the son of Chandra Kanta Deka . He has further stated that he did not see Jayanta and Pankaj in the house of Beli Deka. He has further deposed that both the informant and the accused are not his relatives.
- 15. P.W-5 Dr. Archana Baruah (medical officer) deposed that on 11.3.18 she was posted at Sipajhar PHC as Senior Medical and Health Officer. On that day at 11.15 AM, she had examined the victim, 7 years old, according to her guardian, D/O- Pankaj Deka, vill- Pithakhowapara, PS- Sipajhar escorted by HG Dipali Das. She examined the victim in presence of GNM Pranita Saharia.

Identification Marks- Bruise over right side 3 c.m.

History of alleged assault: According to her guardian the alleged assault was done on 9.3.18 at 6 pm.

History of Menstruation –

Physical Examination: Height 3' 4", Weight- 10.5 KG., Teeth. Hair-Short, Axillary hair- Not developed, Pubic Hair - Not developed, Breast- Not developed, Hymen-torn, Vulva-Uterus- Vagina- Libia; Mazora- Developed, Libia: Minara- Developed.

Any injury mark in her private parts and her body – Not seen. Mental condition- Good.

In her opinion- she was raped and her hymen was torn.

16. She exhibited her medical examination report as Ext-1 and Ext-1(1) is her signature.

- 17. In her cross-examination she deposed that at the age of seven years, it is not possible to tear the hymen, while playing.
- 18. P.W-6, the victim-X {(name withheld due to nature of the offence, herin after referred as victim -X) who is a minor, aged about seven years, due to which after putting some preliminary questions to her and after satisfying her answer that she had matured enough to understand the question put to her, I had recorded the evidence of the child victim.}
- 19. PW-6 (Victim-X) deposed that the informant is her father and the accused is her "Bordeuta" (elder brother of her father). From the date of the incident she has no talking terms with him. On the day of incident she and her mother went to the house of the accused to watch T.V programme and after watching T.V programme for sometime time, her mother returned home. She also wanted to come back to home, but the accused asked her to go later on, as he assured her that he would drop her in her residence. After some time while the accused was coming to keep her at her home, on his way to her home, in front of the house of Jayanta , the accused gagged her mouth by his hands and thereafter he pulled her in the middle of the jungle and opened her wearing apparel ie half pant and put his finger on her vegina. While she attempted to scream, the accused gagged her mouth and then her uncle Dilip, Jayanta and Bul had seen them. While her uncles raised hue and cry, the accused was pulling her inside the jungle. Thereafter the accused left her in the middle of jungle alone and later on, her uncles Jayanta, Dilip and Bul brought her to her house. She reported all about the incident to her mother. She was taken to hospital for her medical examination. Later on, she gave her statement before the Magistrate and she put her thumb impression in her statement.

- 20. In her cross-examination she clarified that while she was returning home along with the accused person, none of her friends were along with her. She further deposed in her cross-examination that she also deposed before the police about the fact of inserting the finger by the accused person in her vagina. She further denied to a suggestion of the defence side that she had not deposed the incident to her mother and she deposed before the court as tutored by her parents.
- 21. P.W-7 (Beli Ram Deka) deposed that that he knows the informant, the accused person as well as the victim. On the day of occurrence while he was going towards his house after his work, he had seen the girl taken by her mother on the road in front of his house. Till date, he had not heard about the incident. This witness was declared hostile on the prayer of the prosecution side.
- 22. Thereafter he was cross-examined by the prosecution side as well as defence side.
- 23. In his cross-examination by defence side, he stated that the houses of the accused and the informant are some distance away from his house and the accused is not his relative. The mother of the victim did not state anything to him.
- 24. P.W-8 (Jadav Kalita), the investigating officer deposed that on 9-03-2018, he was working as Attached Officer at Sipajhar P.S. On that day having received the ejahar lodged by the informant, the officer –in-charge, Sipajhar P.S. registered a case as Sipajhar P.S. Case No. 180/18, under section 364 of I.P.C. read with 12 of POSCO Act. Ext-2 is the ejahar and Ext-2(1) is the signature of officer in charge, Mr. Chandra Kumar Barooah , which he knows. He found the informant Pankaj Deka in the Police Station and interrogated him. Thereafter he went to the place of occurrence and had drawn up a sketch map of the place of occurrence. Ext-3 is

the sketch map and Ext-3(1)is his signature. He found tree leaves at the place of occurrence in scattered condition. He recorded the statements of the witnesses near the place of occurrence. As the victim was minor, he asked the guardian to bring her to the Police Station. He went in search of the accused, but did not find him out. On the next day the guardian of the victim girl brought the victim to the Police Station and the victim was medically examined giving police requisition through medical officer. On the next day on 11-03-2018, the statement of the victim under section 164 Cr.P.C was recorded in the court by the Magistrate. He collected the statement of the victim from the court. Ext-4 is the statement of the victim U/S. 164 Cr.P.C. On 11-03-2018 he arrested the accused after interrogation and forwarded him to the court. Thereafter on completion of investigation, he submitted Charge-sheet against the accused, under section 354 of I.P.C. read with Section 12 of POCSO Act. Ext-5 is the Charge-sheet and Ext-5(1) is his signature.

- 25. The prosecution side further confirms the hostile part of the witness namely Bul Deka and Buli Deka through the investigating officer.
- 26. In his cross-examination, he deposed that as per the ejahar the incident occurred on 8/03/2018 and about 6:30 PM in the evening and he was entrusted the investigation of the instant case on 9/03/2018 at about 11:50 AM in the morning. He further clarified in his cross-examination that, as the victim is a minor, she could not be examined on 9/03/2018, at the time of examination of the complainant as because and the relevant time he was in his official dress and there was no any woman constable along with him, due to which he asks the guardian to bring the victim and the police station on the next date. He further deposed in his cross-examination that he had not seized any wearing apparel of the victim.

- 27. Defence side also adduces the evidence of two numbers of witnesses namely Chandra Kanta Deka as DW-1 and Mr. Narayan Deka as DW-2.
- 28. Mr. Chadra Kanta Deka (DW-1) deposed in his evidence that on the date of occurrence at about 6 to 6:30 PM in the evening, he was sitting in the baranda of his house and then he saw 3 to 4 numbers of minor girls were coming out from the residence of accused and proceeding towards Western side. But the daughter of the complainant ie the victim returned back to his house, and while he asked as to why she had returned back, she told him that due to fear she returned back. Thereafter the mother of the victim came to his house and took her daughter.
- 29. In his cross examination he deposed that he does not know the name of the minor girls who were along with the victim girl at the relevant time of incident. He further explained in his crossexamination that the residence of three for girls, who came to the residence of the accused person are near to the residence of the complainant. He further admitted in his cross-examination that accused person is his relative.
- 30. DW-2 Narayan Deka deposed in his evidence that on the date of occurrence after day's work, he returned home at about 6 to 6:30 PM in the evening and saw that the victim along with 2 to 3 minor girls came to the residence of his elder brother (accused) for watching TV programme. He further deposed in his evidence that after watching the TV programme , all the minor girls went back to their residence from the residence of accused person.
- 31. In his cross-examination he deposed that the distance between his residence and the residence of his elder brother (accused) is about 24 feet.

- 32. Learned Addl. P.P appearing on behalf of the state submitted in his argument that in the instant case the evidence of the victim inspire confidence, and in the basis of the evidence of the victim the accused person can be convicted. Moreover the other witnesses also supported the version of the victim. According to him as the prosecution side able to prove the charge against the accused person beyond all reasonable doubt, he therefore prays to convict the accused person as per procedure of law.
- 33. Learned counsel appearing on behalf of the accused person during his argument submitted that in the instant case prosecution side examined a related witnesses of the victim and hence reliance cannot be place in their evidence. He further submitted that witness Jayanta Deka in his evidence specifically deposed that he had identified the accused on the light of the torch light, but aforesaid torchlight was not seize by the investigative officer during investigation. Moreover according to him the prosecution side failed to examine some of the material witnesses ie Dilip Deka who was present at the place of occurrence as per version of the victim. Moreover delay was cause in lodging the ejahar and hence same is fatal to the prosecution side. Learned defence counsel further pointed out that there are a lot of contradiction in the evidence of the victim as well as the other prosecution witnesses for which the whole prosecution case is not reliable at all. He further pointed out that although in the instant case as per version of the victim, witness Bul Deka , Jayanta Deka and Beli Deka had seen the occurrence, but Bul Deka and Beli Deka has not supported the prosecution story in both of them are declared hostile by the possession side. He further pointed out that where there are two views, appeared in the evidence of prosecution side, the view supporting the accused side, has to be accepted and accordingly he prays to acquit the accused as the prosecution side failed to prove

the charge against the accused person beyond all reasonable doubts. To support his contention he has referred the following judgement-

- a. 2005 Crl L.J 2152 (Hem Raj & others –vs- state of Haryana)
- b. 2017 Crl.L.J 169 (Harbeer Singh –vs- state of Rajasthan)
- c. 1996 Supply (4) scr 631 (State of U.P –VS- Ramesh Prasad Mistra & another)
- d. 2017 Crl. L.J 418 (Manoj Kumar Sharma –vs- state of Chhattisgarh & another)
- e. 2007 (2) GLR 445 (Parimal Gowala & others –vs- state of Tripura)
- f. 1998 Crl. L.j 4044 (Panchi & others –vs- state of U.P)
- 34. I have heard the submission of learned counsels appearing on behalf of accused person as well as prosecution side and meticulously scan the evidence of the prosecution side as well defence side.
- 35. In the instant case, the investigating officer has not seized any birth certificate or the school certificate of the victim, although it reveals that the victim is a school going girl. The complainant (PW-1), who is the father of the victim while lodging the ejahar before the police station, mention the age of her daughter as 6 (six) years in the ejahar. The victim, while deposing before the court deposed her age as 7 (seven) years. The victim while giving her statement recorded by the Judicial Magistrate under section 164 of CR.P.C, has mention her age as 6 (six) years, which was taken by learned JMFC, Darrang Mangaldai on 12.03.18. The medical officer who had examined the victim also mention the age of the victim in her report (Ext-1) as 7 years. On physical

appearance also, while the victim appeared before the court for adducing evidence, it appears the victim is about 6-7 years old girl. The defence side also has not disputed the age of the minor girl. So it is proved that at the time of occurrence the victim is a minor, aged about 6-7 years.

- 36. In the instant case prosecution side charged the accused person under section 376/ 511, 354 of IPC of IPC read with section 12 of POCSO Act.
- 37. Before I proceed further, let me first define section 375 of IPC.

38. **Section 375 defines rape. It reads as:**

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-First: Against her will.

Secondly: Without her consent.

Thirdly: With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: With her consent, when, at time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: With or without her consent, when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

- 39. On the basis of above-mentioned ingredient, let me now scrutinize the evidence of the victim to see whether the star witness is able to prove the ingredient of the offence mention above.
- 40. From the evidence of the victim (PW-6), it is evident on the date of occurrence she along with her mother went to the residence of accused person at about 6 to 6:30 PM in the evening for watching TV programme, and her mother (PW-2) after watching TV programme for some time, returned back home. Although she also wanted to come back along with her mother, but accused asked her to watch TV programme, and assured her that he will drop her in a residence later on. It is also evident from the evidence of the victim that after sometimes the accused person came out along with the victim to drop her in her residence, and on the way near the residence of Jayanta Deka, accused person gagged her mouth and took her toward the Jungle nearby the road. Thereafter accused person disrobed her by removing her panty and inserted his finger through her vegina. While she tried to raise hue and cry, accused gagged her month. According to the victim at that moment her uncle namely Dilip, Jayanta and Bul had seen the accused person along with her. It is also evident from the evidence of the victim that while aforesaid persons raise hue and cry, accused person took her towards jungle and thereafter left her alone inside the jungle.
- 41. The aforesaid fact fully corroborated by her mother (PW-2) regarding coming to the residence of the accused person along with her daughter for watching TV programme and after watching sometimes she came back to her residence alone as her daughter wanted to return lateron after watching some TV programme.

- 42. The presence of the victim at the relevant time of incident in the residence of the accused person also admitted by both the defence witnesses, as both of them deposed that in the evening time they had seen the victim in the residence of the accused person along with 2/3 minor girls, who came for watching TV programme.
- 43. PW-3 Jayanta Deka also corroborated the evidence of the victim regarding witnessing the accused person with the victim inside the jungle on the back side of his residence. It is evident that on the date of occurrence after coming back home, he went back side of his residence for urinate, then heard the commotion of Bul Deka having witnessing someone inside the jungle and while he (PW-3) put on his torchlight, he had seen the accused person along with the victim inside the jungle. It is also evident from his evidence that thereafter accused person took the victim toward the *Basti* and he along with the Bul Deka chased the accused person, and recovered the victim.
- 44. The evidence of the victim also corroborated with the statement given by her before the Judicial Magistrate under section 164 of CRPC.
- 45. Now while appreciating the evidence of the victim, it reveals that while the accused person took her towards a jungle, on his way to drop her in her residence, he forcefully removes the panty and inserted his finger inside her vegina. The aforesaid evidence also deposed by her, while giving her statement before the Judicial Magistrate under section 164 of CRPC. But the aforesaid facts regarding insertion of finger through her vegina was not deposed, while giving her statement before the investigating officer section 161 of CRPC. The mother (PW-2) of the victim also although corroborated all the other facts, the regarding the removing of the panty of the victim by the accused person inside the jungle, has

- not deposed about the fact of inserting of finger through the vegina of the victim in her statement given before the police.
- 46. In an offence of rape, the prosecution side has to prove the penetration to prove the offence of commission rape by the accused person to the victim. No offence under Section 376 IPC can be made out unless, there was penetration to some extent. In absence of penetration to any extent would not bring the offence of accused within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC.
- 47. The ingredients of the offence have also been examined by the Kerala High Court in the case of **State of Kerala v.** Kundumkara Govindam (1969 Cr.L.J 818). The Hon'ble Court observed as under: "The crux of the offence u/s 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between

thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

- 48. Keeping in mind of the aforesaid criteria, although there is evidence to outrage the modesty of the victim, but there is no any evidence of rape upon the victim. Moreover, although the medical officer (PW-5) in her evidence deposed before the court that rape was committed upon the victim, but in a report (Ext-1) she has not uttered a word regarding commission of rape upon the victim. It appears from the report of the medical officer that although she has examined the victim, on the basis of the requisition given by the investigating officer for medical examination, but strangely she has not filled up the format, by giving her opinion in the report and filed the same before the court.
- 49. Now, question is whether the act of the accused person by which he forcefully taking the victim inside the jungle nearby the road and removed her panty at night ie in a lonely area at night can be term to out raged the modesty of the victim.
- 50. Section 354 of IPC reads as under: "Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."
- 51. The essential ingredients of the offence under Section 354 IPC are as under:
 - a) that the person assaulted must be a woman.
 - b) that the accused must have used criminal force on her; and
 - c) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

- 52. So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of the women or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.
- 53. The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady.
- 54. The Hon'ble Apex Court in **Bishewhwar Murmu v. State 2004 CrLJ 326 (Jharkhand)** held that "The evidence showed that accused caught hold hand of informant/victim and when one of the prosecution witnesses came there hearing alarm of victim, offence u/s 376/511 was not made out and conviction was converted into one u/s 354 for outraging modesty of victim."
- 55. In the instant case, also as I discuss earlier there is sufficient evidence against the accused person 354 of I.P.C, as the accused person on the night of occurrence in lonely place, took the victim inside the jungle and removed her panty by gaging her mouth so that she could not be able made hue and cry. By that act, accused used criminal force to out rage the modesty of the victim girl.
- 56. In a sexual offence, there is hardly any eyewitness of the incident as the offender always took the precaution to conceal his presence at the place of occurrence. In the instant case also, the

accused person took all the precaution to commit the crime so that none can seen his illegal act. The fact that mother of the victim along with her daughter went to watch TV programme in the residence of the accused person itself shows that there is a relationship between the family members of both the parties, and hence accused person told the mother of the victim that he will drop the victim in her home later on, she (mother) took his assurance easily. Even while the accused person took the victim to drop her in her resident, she without any fear/ objection came with him, but taking advantage of the innocence of the minor victim, accused person on a lonely place gagged the mouth of the victim and forcefully taken her inside the jungle and disrobed her by removing the panty of the victim. From the conduct of the accused person, it is clear that he has taken all the precaution so that none can even suspect him while committing the alleged crime on the minor victim.

- 57. Learned counsel appearing on behalf of the accused person during his argument pointed out the victim being the minor, there is every possibility of tutoring her by her parent and in that circumstances, it will not be safe to rely her evidence in toto.
- 58. Now, question is, as victim being the minor, whether her testimony can't be be accepted as a whole simply on the ground that there is a scope for tutoring her evidence, although she has deposed reliable piece evidence? In this regard my attention goes through following judgment delivered by Apex Court.
- 59. In <u>Dattu RaMr. ao Sakhare v. State of Maharashtra</u>,

 (1997) 5 SCC 341 the Supreme Court explained:" 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 under Section 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."

- In State of U.P. vs. Krishna Master and Ors., AIR 2010 SC 3071, while dealing with the testimony of child witness, the Hon'ble Apex Court held that the child at a tender age is incapable of having any malice or ill will against any person and there must be something on record to satisfy the court that something had gone wrong between the date of the incident and recording the evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of serious nature.
- 61. In 'State of U.P. v. Krishna Master': AIR 2010 SC **3071**, the Supreme Court held : "There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between

the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature."

- although she at the relevant time of incident is of tender age, but it found that she possess intellectual capacity to understand the question and give a rational answered to question put by the court before recording her evidence before the court. Even in her cross-examination, defence side could not demolish her evidence on material points. Hence, in my opinion, there is no any scope to give a second thought she is being tutored. Where the victim has adduced a reliable piece of evidence and other prosecution witnesses also corroborated the same, in my considered opinion, accused can be convicted basing upon the prosecution evidence.
- 63. In the instant case, as I discuss earlier the evidence of the victim is reliable and trustworthy, and she could not be demolished by the defence side on the material point. The defence side failed to prove any enmity along with the complainant, so that an inference could be drawn against the complainant lodging a false case against the accused to take revenge or the victim deposing falsely. Rather it appears from the evidence of the mother as well as the victim, that both the family, prior to the incident has visiting terms, as they are the neighbouring people.
- 64. Hence in my opinion, although the victim is a tender age child, but her evidence is reliable and trustworthy and her evidence is intact at the time of cross-examination of the defence side. I have not found any valid reason to discard her evidence. In my opinion prosecution side has been able to prove that the accused person with a guilty mens rea, by taking advantage of lonely place forcefully took the minor victim nearby jungle and removed her panty, thereby using criminal force upon the victim to outrage her modesty. The accused person failed to rebut the evidence of the

victim through any effective cross-examination of the victim as well as the other prosecution witnesses and through his defence evidence. The accused person at the time of recording his statement under section 313 of CRPC, although put the incriminating evidence against him, but surprisingly except mere denial, he failed to explain the incriminating evidence against him.

- 65. Where the prosecution side is able to prove the initial burden against the accused, naturally the provision of section 29 of POCSO act ie the presumption against the accused regarding commission of sexual assault upon the victim will arise. Moreover, as I discuss earlier, the presumption of culpable mental state as defined under section 30 of POCSO Act also can be taken against the accused, as the accused person has taken all precaution before committing the sexual assault upon the victim, that is, he selected the road where there is is no any rash of people, and then overpowered the victim by gagging her mouth and took her nearby jungle to commit the sexual assault, and all those conduct, of the accused person who is a married person having children, itself shows he has the required mens rea to commit the offence and as per his plan he committed the sexual assault upon a helpless minor child.
- 66. It is a settled principle of law that in a case of sexual assault upon the victim, a conviction can be based on the sole testimony of the victim, if same is found a reliable and trustworthy.
- 67. In State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, referring to State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, the Hon'ble Supreme Court held that "it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision

that testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury".

Related witness:

- 68. In the instant case, learned defence counsel during his argument submitted that in the instant case prosecution side examined the related witnesses ie their family member and hence their evidence cannot be relied upon.
- 69. In AIR 1952 SC54 (Rameshwar v. State of Rajasthan) hon'ble Apex Court held that "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."
- 70. In (1981) 3 SCC 675 (Hari Obula Reddy v. State of A.P.), the Hon'ble Apex Court has ruled that evidence of interested witnesses per se cannot be said to be unreliable evidence. Partisanship by itself is not a valid ground for discrediting or discarding sole testimony and Hon'ble Apex Court held that

"An invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

- 71. In the instant case also, some of the prosecution witnesses although the family member of the victim, but they have put forward a reliable piece of evidence in their evidence cannot be discarded only on the ground that they are related to the victim.
- that in the instant case the investigating officer failed to seize the torchlight by which PW-3, able to identify the accused person and hence same is fatal to the prosecution side. In my opinion the aforesaid submission of the learned defence counsel cannot be sustained, as because accused in a nearby resident of the victim, and called accused as "bardeuta" (elder brother of her father), and hence there is no question arise regarding the identification of the accused person and in that circumstances non- seizure of the torchlight of PW-3 has no any relevancy in the instant case and not fatal to the prosecution case.
- 73. Learned counsel during argument further pointed out non examination of material witnesses as well as contradiction among the witnesses which are fatal to the prosecution side.
- 74. I have already discussed that in the case upon sexual assault upon a woman, the accused person can be convicted on the basis of sole testimony of the victim, if the evidence of the victim is found reliable and genuine. In the instant case I have already hold

that the evidence of the victim is found reliable and trustworthy on the basis of which the accused person can be convicted. Moreover the other prosecution witnesses also supported the version of the victim. Hence non-examination of Dilip Deka, as per version of the defence side cannot be held fatal to the prosecution side.

- 75. Moreover, Hon'ble Apex court as well as our own High Court in catena of judgement observed that the court while assessing the evidence of the witnesses in a criminal trial, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where there is a minor contradiction, on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.
- 76. In the instant case also there is no any major contradiction among the deposition of the witnesses on the material point and hence in my opinion said minor contradiction is not fatal to the prosecution case.
- 77. Regarding the question of delay in lodging the ejahar as raise by the learned defence counsel during his argument , in my considered opinion in the instant case there is no any inordinate delay in lodging the ejahar. As per ejahar, the incident occurred on 8.03.18 at about 6:30 PM in the evening, and the complainant had lodged the ejahar before the officer in charge of Sipajhar police station on 9.03.18 at about 11:50 AM in the morning. Hon'ble Apex court in a catena of judgement held that in a sexual offence committed upon a woman, some delay in lodging the ejahar, is not fatal in every case. The incident occurred at night and in the morning time on the next date, the complainant (father of the victim) had lodged the ejahar before police relating to the incident and in my considered opinion the aforesaid delay of some hours is

not at all fatal to the prosecution case. Moreover the judgment referred by the defence side in support of their plea, is not related to the facts and circumstances of the instant case and hence cannot be relied upon.

- 78. Considering all this aspect, in my opinion, in the instant case, prosecution side is above to prove the charges against the accused person namely Birendra Deka under section 354 of I.P.C. In my considered, there is no sufficient evidence against the accused person under section 376/511 of I.P.C read with section 12 of POCSO Act. I therefore acquitted the accused person from the offence punishable under section section 376/511 of I.P.C read with section 12 of POCSO Act. But I have sufficient incriminating evidence against the accused 354 of I.P.C against the accused person and accordingly I found the accused guilty for committing the offence punishable under section 354 of I.P.C.
- 79. Heard the convicts Birendra Deka on the point of sentence. The convict at the time of hearing upon the sentence deposed before the court that he has his wife and 5 numbers of children out of which two numbers of sons and three numbers of daughters and all of them are now major and married. He further submitted both of his sons have been living separately and his wife has been living with him. Hence he pleads for taking a lenient view in imposing the sentence against him.
- 80. I have also heard the submission of learned Addl. P.P namely Mr. Dulal Chnadra Ghosh and learned defence counsel on the point of sentence of the convict. The conduct of the convict, being a married person having grandsons/daughters of same age, as of the victim, and by taking advantage of innocence of the victim, using of criminal force upon her while removing her panty , amount to outrage her modesty and conduct of the accused person on the date on occurrence at night on the helpless minor , does not allow

my conscience to deal the matter leniently. In my opinion it is the duty of the court to impose appropriate punishment as per law when the prosecution side is able to prove the charges against a person.

- 81. Accordingly, convict Birendra Deka is sentenced to undergo R.I for 2 years with fine of Rs. 3,000/- (Rupees three thousand), in-default of payment of fine, to undergo S.I for 4 (four) months under Section 354 of I.P.C. The period of detention already undergone by the accused is to be set off. If the fine is realized from the accused person, then the whole amount be given to the victim as compensation under section 357 of Cr.P.C.
- 82. Send the Convict to Jail Hazot to serve the sentence as mention above. Bail bond stands cancelled.
- 83. Furnish a free certified copy of judgment to the convict immediately.
- 84. Furnish a copy of this judgment to the District Magistrate, Darrang Mangaldai , under Section 365 Cr.P.C.
- 85. Judgement is delivered in open court.
- 86. Given under my hand and seal of this court on this 18th day January, 2020 at Darrang, Mangaldai.

Sd- J.M Barman

Special Judge, Darrang, Mangaldai

Transcribed and typed by:

Smti S.Devi.(Stenographer).

APPENDIX:

Prosecution witnesses:

PW:1- Pankaj Deka (informant)

PW:2- Kalpana Deka

PW:3- Jayanta Deka

PW:4- Bul Deka

PW:5- Dr. Archana Baruah (M.O.)

PW:6- Geetanjali Deka (victim)

PW:7-Beli Ram Deka

PW:8-Jadav Kalita (I.O.)

Prosecution exhibits:

Ext:1- Medical Examination Report

Ext:2- Ejahar

Ext:3- Sketch map

Ext:4- Statement of the victim recorded U/S. 164 Cr.P.C

Ext:5- Charge-sheet

Defence witnesses:

Nil.

Defence exhibits:

Nil.

Sd- J.M Barman **Special Judge**, **Darrang**, **Mangaldai**