IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>22 OF 2015</u>

(Under Section 6 of the POCSO Act, arising out of G.R. Case No. 1594 of

2015)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Subal Dey,

Son of Late Trejendra lal Dey, Resident of Ward No. 4, Dhekiajuli

Town,

Police Station - Dhekiajuli Dist:- Sonitpur, Assam

Date of framing Charge :- 09/02/2016

Date of Recording Evidence :- 21/03/2016,09/06/2016,

03/08/2016,08/08/2016, 20/08/2016 & 17/04/2017.

Date of examination of accused u/s :-

313 Cr.P.C

- 29/09/2016.

Date of Argument :- 28/07/2017

Date of Judgment :- 10/08/2017

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

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. P. Biswas, Advocate.

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JUDGMENT

- **1.** In this case accused Sri Subal Dey is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.
- 2. The factual matrix according to the FIR, in brief, is that on or about 12.30 p.m. of 29-06-2015 accused enticing the minor daughter of the informant while she went to his shop for marketing, took her to his house and raped her in his house. After committing the offence, accused threatened her to kill if she disclosed the matter to other persons. As the informant's wife came to know about the oozing of blood from the private parts of their minor daughter, so, they suspected that it is a case of rape committed by the accused. As the minor daughter of the informant out of fear did not disclose about the incident to them in time so it becomes delay in lodging the FIR. Hence, this prosecution case.
- 3. The ejahar was filed by informant Sri Naba Kumar Majumdar before the O/C of Dhekiajuli Police station on 01-07-2015. On being receipt the ejahar, the O.C Dhekiajuli P.S. registered the case vide Dhekiajuli P.S. Case No. 383/2015 under Section 376 (f) of the IPC read with section 4 of POCSO Act. After completion of usual investigation, The O/C of Thelamara PS sent up the case for trial against the accused Sri Subal Dey by filing charge sheet under Section 376 (f) of the IPC read with section 4 of POCSO Act.
- **4.** On being appeared the accused before this Court, my learned predecessor-in-Court, after hearing both parties, framed charge under section 6 of POCSO Act, 2012 against the accused Sri Subal Dey and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.
- **5.** To substantiate the case prosecution examined as many as 6 (six) numbers of witnesses and also one court witness.
- **6.** After completion of prosecution evidence accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and

evidence appears against the accused are put before him for explanation where he denied the evidence and allegation. In the statement u/s 313 Cr.P.C., the accused stated that he has been suffering from illness since his childhood. Initially the illness was caused due to septic of his left ear. Thereafter, sometimes he becomes mental illness. To buttress the defence accused examined one witness as DW 1.

7. I have heard the argument put forward by the learned counsels of both sides.

8. The point for decision in this case is that:

1. Whether on 29-06-2015, at about 12.30 noon. at your residence, at Ward No.4, Dhekiajuli under Dhekiajuli Police station, accused committed penetrative sexual assault on Miss X (aged about 10 years.)?

Reasons, Decisions and reason for decision.

- **9.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **10.** PW 1, Dr. Ila Rajkhowa, deposed that on 01-07-15 she was posted as Sr. Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day, at about 1.15 p.m. in the emergency outdoor, labour room complex of KCH, Tezpur, she examined Smt. Payel Majumdar, 10 years, D/O Sri Naba Kr. Majumdar of village Monojuli PS- Dhekiajuli, in reference to Dhekiajuli PS Case No. 383/15 U/s 376(f) of IPC, on being escorted and identified by Woman Home Guard Bina Borah of Dhekiajuli PS in presence of GNM sister. On examination she found the following:

Identification mark – multiple black mole both sides on face. Height – 136 cm., Weight – 34 Kg, Teeth – 6 in all four quadrants. LMP not attained puberty. History of bleeding per vagina on Monday two days before the examination. At the time of examination, the girl was found of normal built according to her age mentioned in the requisition form. She was well dressed, neat and tidy. Her breast and

areola are not developed. Axillary and pubic hair not developed. Vulva and vagina not fully developed. There is presence of mild abrasion in the left side of vagina in the perineal region. No fresh bleeding present per vagina at the time of examination.

Investigation given and report-

- 1. Vaginal smear examination was not given as the victim girl does not give consent to do vaginal PV examination to take smear for vaginal smear examination. So the patient was referred to Gynecologist. Since the victim girl does not give consent to examined by Gynecologist. Therefore investigation given could not be done.
- **2.** X-ray for age determination (hand, wrist joint, elbow joint and iliac crest) given.
- **3.** Sonography of pelvis given.

X-ray report:

4. Determination (wrist joint, elbow joint and iliac crest) Done at Assam X-ray Clinic & Laboratory by Radiologist Dr. P.K. Barman on 17-09-2015

Impression : Age of the person under investigation is appears to be below 11 years.

OPINION:

- There is recent sexual intercourse happen or not cannot tell since vaginal smear examination can not be given since the victim girl does not give consent to do vaginal PV examination to take smear for vaginal smear examination.
- 2. Age of the person under investigation is appears to below 11 years.
- 3. There is presence of mild abrasion in the left side of the vagina in the perineal region.
- 4. There is no other violence or injury found in other parts of the body

Ext. 1 is the Medical Report and Ext. 1(1) is her signature.

In cross-examination, she admitted that the abrasion may be caused if a girl tried to climb a rope or rough substance, such injury may be caused. Apart from abrasion, she found no injury in other parts. As vaginal smear was not given she could not opined as regards whether there is recent sexual intercourse or not.

11. PW 2 Sri Naba Kumar Mazumdar, the father of victim and complainant stated that the incident took place on or about 12.30 noon of 29-06-2015. At the time of incident, he went to the Office of the SDC at Dhekiajuli. At about 1 p.m. he returned home. At home he saw his daughter (victim) was lying sleep. While he enquired the matter his wife suspected that their daughter attained puberty. In the next day, when the bleeding of their daughter was stopped, they asked their daughter she did not state anything initially out of fear but lateron she stated that accused with a lure of giving chips took her to his house. In his house, accused after opening her pant inserted his male organ into her private parts. For this incident there was a hue and cry in his village then accused immediately left his shop. Accused threatened the victim not to disclose the matter to anyone so she initially did not disclose the matter to anyone. On 01-07-2015 he filed the ejahar. In the ejahar he has clearly stating the reason for lodging the same in late. Ext. 2 is the ejahar and Ext. 2(1) is his signature.

In cross-examination, he admitted that at the relevant time accused was suffering from illness of ear. Though he has been exposed to long cross-examination the evidence as to – at the relevant time accused with a lure of giving chips took his minor daughter to his house and there he committed rape and for which a hue and cry was arose, as the accused threatened in dire consequence to the victim so initially she did not disclose about the matter to them but lateron she disclosed about the incident. On 01-07-2015 he lodged the ejahar, Ext. 2 has remained unchallenged.

12. PW 3 Smt. Mousumi Mazumdar, mother of the victim, stated that in the year 2015 her victim daughter came from school after attending

her last half yearly examination. During that time her daughter was attained about 10 years. Accused came to their house, took her victim daughter to his house for playing. After about 10/15 minutes their daughter came to their house with bleeding from her private parts. She suspected her daughter attained puberty. On arrival of her husband, she told about the incident to him. But in the next day, while the bleeding was stopped, on being asked the victim daughter stated that she sustained hurt in her bed. While she opened her pant she noticed some injury in her private parts. Then, aunt of the victim Geeta Dey Aice while asking the victim, the victim stated that accused by opening her pant committed rape on her. Victim also stated to her that accused threatened her to kill if she disclosed the matter to others.

Though he has been exposed to long cross-examination except giving many suggestions, the evidence as to – on the day of incident, the accused called her minor daughter to his house, after 10/15 minutes her victim daughter returned with bleeding, she suspected that her daughter attained puberty, in the next day when the bleeding was stopped, while she asked her daughter, she stated that she sustained hurt on his bed, while she opened her daughter's pant, she noticed injury on her private parts, while Geeta Aice, the "pehi" of the victim asked her, victim stated that accused by opening her pant committed rape on her has remained unchallenged.

13. PW 4 the victim, examined after testing her intelligence. She stated that on the day of incident at about 12.30 p.m. on returning from school, accused called her to their home to playing with his nephew. Accused came to bring water from their home. Accordingly, she went to the house of the accused. In his house, accused closed the door, while she resisted accused threatened her, then accused after opening his pant inserted his sexual organ into her private parts. Then she sustained hurt and blood was also coming from her private parts. Accused again threatened her to kill if she disclosed the matter to any other persons. Then she returned to her home. Her mother noticed her bleeding. Out

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of fear she did not disclose anything to their family members. In the next day, she told about the incident to her mother and her Pehi Geeta Aice. She also narrated the whole story to her father. Then she was taken to the hospital. Her statement was also recorded through the learned Magistrate. Ext. 3 is her statement u/s 164 Cr.P.C and Ext. 3(1) and 3(3) are her signatures.

In cross-examination, she admitted that she called accused as "dada". Accused never suffering from any mental disease. After the incident local public enraged and setting fire to the house of the accused. Though she has been exposed to long cross-examination except giving many suggestions the evidence as to — at the relevant time she was called to the house of the accused, at home accused by closing the door, opening her dress, threatening her, inserted his private parts into her private parts and as a result she has been bleeding and sustained hurt has remained unchallenged.

- **14.** PW 5 Sri Ranjit Saikia has stated that on 03-07-2015 he was posted at Dhekaijuli Police station as SI of Police and on that day, the then O/C of Dhekiajuli Police Station endorsed him this case for investigation. Accordingly, he has thoroughly perused the case diary. It cames to know that earlier I.O. SI Naren Sonowal has already completed the preliminary investigation and on the basis of the said preliminary investigation he has submitted the charge sheet against the accused Subal Dey u/s 376(f) r/w section 4 of the POCSO Act. Ext. 4 is the charge sheet and Ext. 4(1) is his signature.
- **15.** PW 6 Sri Naren Sonowal, SI of Police stated that on 30-06-2015 he was working as attached Officer at Dhekiajuli Police Station. On that day, at 9.30 p.m., the then O/C of Dhekiajuli Police station informed him that in Ward No. 4 of Dhekiajuli town got information while he was on patrolling duty that one Subal Dey has committed sexual assault on the victim. The neighbouring people assembled there. On receipt of information, O/C Dhekiajuli PS directed him for investigation and accordingly they made a GD Entry being No. 729 dt. 30-06-2015 of

Dhekiajuli PS at about 9.30 p.m. Thereafter, he reached at the place of occurrence at about 10 p.m. He recorded the statement of the victim and other witnesses, prepared the sketch map. On the same day he also sent the victim to Kanaklata Civil Hospital for medical examination.

In the next day, he sent the victim to the learned Magistrate to record the statement of the victim u/s 164 Cr.P.C. After recording the statement he has collected the said statement. After giving proper treatment accused was produced before the learned Magistrate on 03-07-2015. After collecting medical certificate he has completed the investigation. On 27-07-2015 he was transferred and so handed over the case diary to the then O/C of Dhekiajuli Police Station. During investigation, on 01-07-2015 O/C Dhekiajuli PS Sri Tileswar Saikia received an ejahar from Naba Kr. Mazumdar, S/O Narendra Mazumdar of Ward No. 5 of Dhekiajuli.

During cross-examination, he admitted that at the time of visiting at the place of occurrence, they found the victim in normal condition and therefore, he has recorded her statement at the spot. He has recorded the statement of Naba Mazumdar at about 10.35 p.m. Public of the locality on enraged attempted to set fire the house of the accused.

As they were busy in controlling the local public so he forget to mention about the incident of setting fire in the case diary. They returned to the police station at about 11.45 p.m. He has not got any information if the accused is mentally retarded person. After attempt to commit suicide by the accused, as per doctor's advice they have send the accused to LGB Mental Health Institute, Tezpur. After receiving the FIR he did not visit the place of occurrence as they have already conducted the investigation. He has recorded the statement of witnesses at the place of occurrence. None of the witnesses stated that the accused was mentally ill. During investigation, he did not meet Gita Aich so he could not record her statement.

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16. CW 1 Smt. Geeta Aich stated that she knows the accused Subal Dey whose house is situated infront of the house of her father. The occurrence took place on 29-06-2015. She came to know about the occurrence on the next day. She had heard that the occurrence took place during the day time of the previous day. In fact on the next day of the day of occurrence she had gone to the house of her father. Her mother informed her that the victim girl attained puberty. At that time she wondered if such a small girl can attain puberty. She questioned the victim about the said fact. Then she told her that the accused had removed her pant and thereafter committed rape upon her. She told her that after her return from school while she was sitting inside the house, the accused came and called her out. The accused came to her house to draw water from the well and on that pretext he called the victim. She reportedly went with the accused when he called her. The victim told her that the accused took her to his shop where he resides also. She simply told that the accused committed rape upon her after removing her pant. The victim did not immediately report the matter to her parents because the accused threatened her to kill if she disclosed the matter to any other person.

Though she has been exposed to long cross-examination except giving many suggestions the evidence as to in the next day of incident, when she went to her father's house, her mother informed her that the victim attained puberty, she was wondered such a small girl can be attained puberty such a minor age, when she asked the victim, the victim told her that the accused had removed her pant and thereafter committed rape upon her has remained unchallenged.

17. When the above incriminating evidence put to the accused he denied the same and stating as false. He stated that he is an innocent person. He has been suffering from illness since his childhood. Initially the illness was caused due to septic of left ear. Thereafter, sometimes it became mental illness.

It has already stated that defence examined one witness i.e. Smt. Moni Dutta as DW 1 who stated that he heard that the complainant has filed this case against the accused. He heard that the accused is person sufferings from mental illness. The mother of the accused was also suffering from mental illness. They have 3 ½ kathas of road side land. In that land Naba Kumar Majumdar along with some other persons trying to occupy the same. Probably on the day of incident accused entered into the house of the complainant and then complainant filed this case. The accused is a mentally retarded person. He sometimes without any permission entered into other's house. At present, the accused is treated at Mental Hospital, Tezpur. In earlier occasion he treated at Guwahati.

In cross-examination, he admitted that his house is situated at a distance of 15/20 house from the house of the accused. He has not seen any medical certificate of the accused. As he himself is not a doctor so he cannot say in what illness accused suffers. He also did not know the Dag and Patta No. and location of aforesaid $3\frac{1}{2}$ kathas of land belongs to Subal Dey. He also did not know if there is any case pending pertaining to the aforesaid land.

- **18.** These much is the evidence of the prosecution case
- 19. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. Firstly, other than the victim none has supported the prosecution case. Even other than victim none was eye witness to the occurrence. Secondly, there is no such injury was found not only on the private parts of the victim but also on the other parts of the victim. In regard to presence of mild abrasion in left side of the vagina in the perineal region as stated by Doctor the victim herself admitted that she sustained injury on the bed. The law is well settled that if a minor girl is forcefully raped she must be sustained injury not only on her private parts or any other organs of her body, but no such injury was found by doctor. Thirdly, there is a land dispute in between the complainant and the accused

which is admitted by PW 3 and also the defence witness DW 1. Therefore, out of the said enmity, the complainant filed this false case against the accused. **Fourthly**, learned counsel for the accused submitted that even such incident is committed by the accused, the accused at the relevant time was suffering from mental illness therefore, he is getting the benefit in terms of General Exception provided in Section 84 of the IPC. **Fifthly**, the FIR was lodged by the complainant after 2 days of the incident without any justified reasons for delay in lodging the ejahar and **Sixthly**, the statement of the victim was recorded very lately but the cause of late examination of the victim u/s 164 Cr.P.C. was not clearly explained by the I.O.

- **20.** Per contra, learned Special Public Prosecutor, Sonitpur, Tezpur submitted that the prosecution has ably proved the case beyond any reasonable doubt, as such, accused is required to be convicted under the charged section of law.
- **21.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case.
- 22. A close scanning of the record including the evidence of the aforesaid witness, it is seen that except the victim there is no eye witness to the occurrence. There is an evidence of prosecutrix that on the day of incident after her school was over, accused came to their house, called her to his house to play with his nephew. Accordingly, she went there. In his house, accused closed the door, opened her dress and accused also opened his pant and forcefully raped her. After about 10/15 minutes she returned to home with bleedings which was noticed by her mother. On being seen the bleedings her mother suspected she attained puberty. When on the next day bleeding was stopped her mother asked about the matter and on seeing her private parts her mother noticed some injury. On being asked the victim stated to her mother that she sustained injury in her bed. She made such statement as directed by the accused. There is an un rebuttable evidence that accused repeatedly threatened her to kill if she disclosed the matter to

her parents. So she did not disclose the matter immediately after the incident. Then after one day her father filed this case. After instituting the case she was medically examined at KCH, Tezpur. She was also brought to the Court to record her statement. Though she has been exposed to long cross-examination but the evidence as to about 12 noon of the said day, she was called by the accused to his house to play with his nephew. Accordingly, she went there where accused closed the door, undressed her, forcefully sexual intercourse with her, her private part was bleeding and she sustained pain, at home on being seen her bleeding her mother suspected victim attained puberty and when on the next day her bleeding stopped, her mother noticed her private parts with some injury, though victim initially stated that she sustained injury in the bed, she made such statement at the direction of the accused, but while her mother and her aunt (Pehi) asked her, she stated to them about the whole incident has remained unchallenged.

- 23. In this case, the victim, her parents and independent witnesses categorically narrated about the whole incident. Their statements are corroborated with each other. During cross-examination, the same has not been disputed at all by the defence. The victim has been consistent with regards to the incident that on the day of incident accused called the victim to his house, in his house he closed the door, undressed her and committed rape on her where she was bleeding and sustained pain has corroborated. The victim has also stated so before the Magistrate when her statement was recorded u/s 164 Cr.P.C. and before the police while her statement was recorded u/s 161 Cr.P.C.
- 24. The unrebuttable evidence of doctor is such that she found the victim who has not attained the puberty but there is history of bleeding on Monday i.e. on the day of incident. Besides, the doctor also opined that (i) there is recent sexual intercourse happen or not cannot tell since vaginal smear examination can not be given since the victim girl does not give consent to do vaginal PV examination to take smear for vaginal smear examination, (ii) age of the person under investigation is appears

to below 11 years, (iii) there is presence of mild abrasion in the left side of the vagina in the perineal region and (iv) there is no other violence or injury found in other parts of the body. Though the doctor in cross-examination stated that abrasion may be caused if a girl tried to climb a rope or rough substance but there is no evidence adduced by the accused that the victim tried to climb a rope or rough substance. Though the victim initially disclosed before her mother that she sustained such abrasion as she sustained hurt on the bed but in cross-examination she admitted that accused has repeatedly directed to make such false statement, therefore she stated so. Due to forceful intercourse mild abrasion in the left side of the vagina of the perineal region cannot be ruled out.

- 25. In the present case victim was examined without taking oath by putting some questions to test her ability to give rational answers and intelligence. Apart from that PW 2, 3 and CW 1, father, mother and aunty (Pehi) respectively of the victim supported the evidence of the victim. There is nothing in the cross-examination of any of the prosecution witnesses which could suggest that they were deposing falsely in any manner. Though they have been subjected to vigorous cross-examination, but all the witnesses vehemently denied. PW3 mother of the victim stated that there is a quarrel for land in between them but there may be a quarrel between the parties. But, it is impossible to think that one cannot falsely give evidence by implicating their own minor daughter involving in such a heinous crime.
- **26.** 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.

27. 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.

- **28.** 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.
- **29.** Coming to the present case, whether the conviction can be recorded on the sole testimony of a child witness or not?

Such type of 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."

30. A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.

- 31. 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.
- **32.** 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.
- **33.** In the present case as stated above, the victim was examined after testifying her rationally by putting some questions where she without hesitation makes statement.
- **34.** Another point may be discussed in the present case is that PW 2, PW 3 and CW 1 are respectively, father, mother and aunty (Pehi) of the victim, therefore, the question may arise as to the interestedness of their evidence.

In state of Uttar Pradesh Vs. Jag Deo reported in AIR 2003 SC 660 it has been held that –

"Most of the times eye witnesses happen to be family members of close associates because unless a crime is committed in a public place, strangers are not likely to be present at the time of occurrence. Ultimately eye witnesses have to be persons who have reason to be present on the scene of occurrence because

they happened either to be friends or family members of victim. The law is long settled that for the mere reason that an eye witness can be said to be an interested witness, his/her testimony need not be rejected. For the interest of which an eye witness may have, the court can while considering his or her evidence exercise caution and give a reasonable discount, if required. But this surely cannot be reason to ignore the evidence of eye witness."

- **35.** Coming to the present case, it is true that PW 2, 3 and CW 1 respectively are father, mother and aunty (Pehi) of the victim. As stated above, there is no eye witness except the victim as the incident took place inside the house of the accused so it would be futile to expect of prosecution to produce independent outsider as a witness. More so, in the instant case, it is not that only PW 2, 3 and CW 1 who have supported the prosecution case, there are other evidence such as Medical evidence as discussed herein above which also supported the prosecution case. Therefore, the evidence of PW 2, 3 and CW 1 cannot be thrown overboard simply on the ground of interestedness of their evidence.
- **36.** In the present case it appears that mother of the victim PW 3 admitted that there is a quarrel for a land dispute in between the accused and them. It is not explained as to why the victim of sexual assault would blame accused sparing real culprit. That apart, there appears no any reason that the complainant being the father of the victim would put his own minor daughter at stake by falsely pressing commission of sexual intercourse. Therefore, the statement of victim is found to be worthy of credence, convincing and reliable. As such the charge of penetrative sexual assault is proved.
- **37.** According to the learned counsel for the accused submitted that the accused is a mentally retarded person so without any permission he may enter in any of the house. For argument sake, even if committed

the alleged offence, the accused is entitled to get the benefit of section 84 of the IPC.

- **38.** Section 84 of the IPC states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law.
- **39.** To commit a criminal offence, 'mens rea' is generally taken to be an essential element of crime.
- **40.** Every normal and sane human being is expected to prossess some degree of reason to be responsible for his/her conduct and acts unless contrary is proved. But a person of unsound mind or a person suffering from mental disorder cannot be said to possess this basic norm of human behavior.
- **41.** In SURENDRA MISHRA Vs. STATE OF JHARKHAND 2011 (3) SCC (Cri), the Honourable Apex Court observed as under:-

The expression unsoundness of mind has not been defined in the Indian Penal Code. It has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or the behavior is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code.

- **42.** Section 84 IPC gives statutory recognition to the defence of insanity as developed by the Common Law of England in a decision of the House of Lords rendered in the case of R. Vs. Daniel Mc Naughten ([1843 RR 59: 8ER718(HL)]).
- **43.** The law regarding insanity/unsoundness of mind has been discussed elaborately in the recent judgement of the Apex Court in

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Surendra Mishra (Supra). The law laid down therein, as stated earlier, as would be applicable to the present case, may be underlined hereunder:-

- i) The accused has to prove legal insanity and not the medical insanity.
- ii) Every person who is suffering from mental disease, is not ipso facto exempted from criminal liability.
- iii) The onus of proving insanity or unsoundness of mind which is one of the exception mentioned in Chapter IV of the Cr.P.C., lies on the accused on preponderance of probabilities. To discharge the onus, the accused must prove his conduct prior to offence, at the time or immediately after the offence, with reference to his medical condition. Whether the accused knew that what he was doing was wrong or it was contrary to law is of great importance and may attract culpability despite mental unsoundness having been established.
- **44.** It has been held in Gudulu Orang Vs. State of Assam, reported in (2013) 2 NEJ 443-

"Onus of proving unsoundness of mind is on the accused by adducing evidence. Failure to do so would not make the prosecution blamable for failure in discharging it duties and can not subsequently become ground for defence to challenge the conviction."

45. In order to prove a case of mental disorder or unsoundness of mind/insanity the defence seriously relied on the conduct of the accused immediately before he committed the offence. Learned counsel for the accused strenuously argued that it is the accused who entered anybody's house without permission and since the accused and complainant has a land dispute, on such entering into the house of complainant, so complainant filed this false case. Whether accused's behaviour of taking victim to his house and forcefully committed rape itself is sufficient proof of his insanity or mental disorder, is to be considered on the touchstone of law in enunciated in various case including Surendra Misra (Supra) wherein it has been held that in order to ascertain medical insanity it is imperative to take into consideration the circumstances and behaviour proceeding, attending and following the crime. There is nothing on record, how the accused was behaving

just before the commission of offence or whether there was abnormal activities in the past. Rather almost all the unofficial witnesses including the victim unanimously stated that accused never suffered any mental disease. They have not been heard any abnormality of the accused. Nothing has been placed on the record by the defence that in the past and just before the commission of offence, the accused was behaving abnormally. Without placing any abnormal behaviour in the past and just prior to the incident, the defence hastily demanded to treat the accused a man of mental disorder/unsoundness of mind simply because he committed rape on a minor girl. Legally speaking there is no enough reason to exempt the accused from the criminality. The law is well settled that every person who is suffering from mental disorder is not ipsofacto exempted from criminal liability and also that every man is presume to be sane and to possesses a sufficient degree of reasons to be responsible for his acts unless contrary is proved.

46. It has already stated herein before that the accused has examined on DW 1 to defend his case. It appears the said DW 1 has appeared before the court not on summons but appeared on request. Though DW 1 stated that accused is a mentally retarded person but he admitted that he has not seen any such documents of treatment of Doctor. Besides though he stated that the complainant and other persons have occupied a plot of land measuring 3½ kathas belonging to the accused but he is not known any details of said land (Dag No. or Patta No.) as to his claim of allegation of forceful occupation by the complainant and other persons. It is true, the evidence of defence witness is not to be ignored by the courts. Like any other witnesses, his evidence has to be tested on the touchstone of reliability, credibility and trustworthiness, particularly when he attempts to resile and speak against the records in derogation of accused earlier conduct and behaviour.

The defence of insanity is not available since the accused did not succeed in making out that he had such a mental case when he

committed the act and further that he did not know the nature of acts committed by him by reason of such mental impairment.

47. The striking evidence on record is that accused came to the house of the complainant for bring water, asked the victim to come to their house to play with his nephew and when the victim go there accused closed the door from inside, undressed her and committed rape on her as a result she was bleeding and sustained pain. The victim was also threatened that if she disclosed the matter to anybody, she will be killed. Even she was directed that if someone asked her about the injury sustained in her private parts she has to tell that she sustained injury on her bed.

48. In this case, the other circumstances relied by the prosecution are as follows:

Firstly, there is an evidence that at about 12 O'clock on the day of incident accused came to the house of the complainant, called the victim to his house to play with his nephew, while the victim go there, he closed the door, accused undressed her, while she opposed accused threatened her, then accused by opening his pant inserted his sexual organ into her private parts as a result, her private part was bleeding and she sustained injury. Secondly, other than accused at the relevant time none was there in the room. Thirdly, on being seen the bleedings of private parts, her mother initially suspected that she attained puberty but in the next day when her bleeding was stopped, her mother opened her pant and noticed injury on her private parts. Though initially, the victim did not stated about the incident but ultimately victim disclosed about the incident to her mother. Fourthly, while victim's aunty (pehi) asked about the incident she disclosed clearly about the incident in toto. Fifthly, the doctor found the presence of mild abrasion on the left side of the vagina in the perineal region. Though the doctor has been suggested that such type of injury may be caused if a girl tried to climb a rope or rough substance but there is no evidence that the victim climb a rope or rough substance. Sixthly, after the incident, ultimately the victim has reported the matter to her parents. Seventhly, there is an

evidence that immediately after the incident, local people enraged about the act of the accused and as such they set fire into the house of the accused. Eighthly, though the accused taken a plea that he was suffering from mental illness at the relevant point of time but as already stated that there is no any instances or evidence that accused has been suffering from such mental illness immediately before the incident or during the period of incident. Lastly, the accused simply denied his guilt but stated in his statement recorded u/s 313 Cr.P.C. that he has been suffering from illness since his childhood. Initially, the illness was caused due to septic of his left ear, thereafter, sometimes it becomes mental illness, but he failed to prove by adducing any evidence.

- **49.** All these facts taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probabilities that it is none but accused who committed penetrative sexual assault to the victim in his house. These established circumstances did not admit of explanation of any other hypothesis then that of the guilt of the accused Sri Subal Dey.
- **50.** In view of the aforesaid discussions, I am of the opinion that from the evidence of the victim, other witnesses, medical report and other documents available in the record, the prosecution has successfully proved the guilt of the accused Sri Subal Dey u/s 4 of the POCSO Act. As the prosecution has failed to prove the exact age of the victim that she was below 12 years by cogent evidence therefore, I acquit the accused from the charge u/s 6 of the POCSO Act.
- **51.** The accused is heard on the point of sentence. He has submitted that he is the only earning member of his family. Hence, praying for leniency.
- **52.** The learned defence counsel for the convict submits that the convict Sri Subal Dey is a man of 37 years and he is a businessman. He was not previously convicted in any offence and he is one of the major earning members of their family. Hence, praying for leniency.

- **53.** I have carefully considered the submissions made by learned Public Prosecutor, Sonitpur, Tezpur as well as learned defence counsel. I have also gone through the case record.
- 54. 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 the victim and to her family members, but considering the mitigating circumstances, the accused was hardly 37 years of age at the time of the incident. It is not brought to the notice of this Court that before this incident, the accused had committed any other offence. The statute u/s.4 of POCSO Act prescribes minimum punishment for a term of seven years with fine. When the intention of the legislator is to impose stringent punishment for not less than seven years, this court has no option but to impose minimum punishment of seven years.

ORDER

- **55.** I convict the accused Sri Subal Dey u/s. 4 of POCSO Act and sentence him to Rigorous Imprisonment for 7 (seven) years and also to pay a fine of Rs.5000/- (Rupees five thousand only), in default, Rigorous Imprisonment for 1 (one) month for the offence u/s 4 of POCSO Act. The period, which he detained in custody, shall be set off from the period of imprisonment, imposed on him according to the procedure of 428 of Cr.P.C.
- **56.** 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. 30,000/- (Rupees thirty thousand) only is awarded as

compensation. The Secretary, District Legal Aid 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 Aid Services Authority, Sonitpur, Tezpur for her necessary action.

- **57.** A copy of this judgment be furnished to the accused free of cost immediately.
- **58.** 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 10th day of August, 2017.

(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

APPENDIX

Prosecution Witness

Prosecution Witness No.1
 Prosecution Witness No.2
 Prosecution Witness No.3
 Prosecution Witness No.3

Dr. I. Rajkhowa, M.O.
Sri Naba Kumar Mazumdar,
Smt. Mausumi Mazjumdar.

4. Prosecution Witness No.4 :- Victim

5. Prosecution Witness No.5 :- Sri Ranjit Saikia, I.O.6. Prosecution Witness No.6 :- Sri Naren Sonowal, I.O.

Court Witness.

1. Court witness :- Smt. Geeta Aich

Defence Witness.

1. Defence witness :- Sri Moni Dutta.

EXHIBITS.

Exhibit 1 :- Medical report

Exhibit 2 :- Ejahar

Exhibit 3 :- statement of the victim u/s 164 Cr.P.C

Exhibit 4 :- Chargesheet.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

<u>Spl POCSO Case No. 22 of 2015</u>