

IN THE COURT OF THE SPECIAL JUDGE :::::: CHIRANG, KAJALGAON.

Special(P) Case No. 26(D)/2017U/S 376 IPC R/W Section 4 of POCSO Act.

State of Assam

Md. Yasin Haque @ BikiAccused

PRESENT:

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Md. N.I. Siddique, Ld. Advocate

Date of Evidence : 13.02.18, 27.02.18,

19.06.18, 13.08.18

Date of Argument: 07.09.18, 18.09.18 & 20.09.18

Date of Judgment: 04.10.2018

JUDGMENT

The prosecution case as revealed during trial in brief is that on 1. 04.10.2017, the informant Champa Ray lodged an FIR before Dhaligaon P.S. alleging that on that day at about 6.00 P.M., while her niece Miss 'X' (name is withheld) was going towards her uncle's house and when she was returning, on the way, accused Yasin Haque @ Biki pulled her by holding her hand and gagging towards the nearby jungle and forcefully committed sexual intercourse upon her. As she was raising hue and cry, some local people rushed to the spot and caught both the accused and victim girl. On asking,

victim girl told that she was raped. Then villagers handed over the accused to police. Informant was reported by a child. Hence she lodged the FIR.

- 2. After receiving the FIR, the O/C of Dhaligaon P.S. registered a case being numbered as Dhaligaon P.S. Case No.199/17 U/S 376 IPC R/W Section 4 of POCSO Act and entrusted SI Dewan Wahidul Islam for investigation of the case. Accordingly, the Investigating Officer arrested the accused, visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C, collected the medical report and after completion of investigation, he submitted charge-sheet against the accused Yasin Haque @ Biki U/S 376 of IPC. After receiving charge sheet, copies of relevant documents were furnished to the accused person. Accused person was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, my learned predecessor framed formal charge U/S 376 IPC read with Section 4 of POCSO Act against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. Later on, accused person was released on bail during trial.
- 3. In support of the case prosecution side examined as many as 7 (seven) witnesses including the M.O. and I.O.

Following witnesses were examined:-

- (1) Victim Miss 'X' (name is withheld) as PW 1
- (2) Smt. Champa Ray as PW 2
- (3) Sri Manik Ray as PW 3
- (4) Sri Kanai Ray as PW 4
- (5) Md. Nazrul Ali as PW 5
- (6) S.I. Dewan Wahidul Islam (I.O.) as PW 6
- (7) Dr. Kukumoni Basumatary (M.O.) as PW 7
- 4. Statement of the victim recorded U/S 164 Cr.P.C. was exhibited as Ext.1. FIR was exhibited as Ext.2. Sketch map was exhibited as Ext.3,



charge-sheet was exhibited as Ext.4, Medical Report was exhibited as Ext.5 and Radiological Report was exhibited as Ext.6.

- 5. Defence plea is of total denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced no evidence.
- 6. Heard argument from both sides. I have perused the written arguments submitted by the learned counsel for the defence. I have perused the entire evidence on record. I have also considered the statement of the accused recorded u/s 313 Cr.P.C. I have also perused the case laws supplied by learned defence counsel.

7. **POINTS FOR CONSIDERATION**:-

For the offence U/S 376 of IPC

1. Whether on 04.10.2017, at about 6.00 P.M. at village West Ankarbari (Kadamtola) under Dhaligaon P.S., the accused committed rape on Miss 'X' (name is withheld)?

For the offence U/S 4 of POCSO Act

2. Whether on same date, time and place, the accused committed penetrative sexual assault upon Miss 'X' (name is withheld), a minor girl under the age of 18 years?

DISCUSSION, DECISION AND REASONS THEREFOR:-

- 8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned both points simultaneously for the sake of convenience.
- 9. PW 1 is the victim. She deposed that she read up to Class V in Rani Dutta M.E. School. She failed two times and she left the school two years ago. PW 1 deposed that informant was her maternal aunt. According to the victim, she did not know the accused prior to the incident. On the date of occurrence, she was proceeding to the house of her maternal aunt from the

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house of the informant. On the way, at about 6.30 PM, accused met her. He followed her. According to PW 1, one Bodo boy was also present along with the accused. After that accused caught her leg from the backside as a result, she fell down. Then he took her to nearby jungle by carrying her on his lap. At that time, some Bodo girls were witnessing the entire incident. When they reached the jungle, accused laid her on the ground and undressed her. He also put off her half pant and after that he committed sexual intercourse with her. Then she cried but accused told her not to cry. After committing sexual act, accused directed the victim to put on her cloth. They were within jungle for a period of half an hour. Accused told her that he would first go from the jungle, after that victim would leave but she came out first. According to PW 1, on the date of occurrence, accused proposed her. So, he started to love her on the date of occurrence. When she came out from the jungle, the Bodo girls asked her about the incident. Then she told them what was happened within the jungle. The Bodo girls and other persons beat the accused. She immediately went to the house of her maternal uncle. Victim further deposed that her maternal uncle beat her. After knowing the incident, her maternal aunt lodged the present case. This witness gave statement before the Magistrate U/S 164 Cr.P.C which was exhibited as Ext.1.

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During the cross-examination, PW 1 stated that they had four sisters and she was the elder one. Younger sister of the victim was married to another boy. She eloped with the boy first and after that she married him. It is also revealed that prior to this incident, victim was residing in Delhi. She also worked at Siliguri. Prior to this case, another case was lodged against some other persons alleging that they had committed sexual intercourse with her. When she was residing in Delhi, then also she lodged a case when a person had committed sexual intercourse with her. She clearly stated that there was no any birth certificate. Learned defence counsel during the cross-examination of PW 1, pointed out that this witness stated before the Investigating Officer that she had known the accused prior to the incident and she had not gone to the school. Both points were denied by PW 1. She also denied the fact that when she was examined by Investigating Officer, she did not state that accused had caught her leg, as a result, she fell down and he carried her on his lap and Bodo girls witnessed the occurrence. These facts were also not

stated by her before the Magistrate when her statement was recorded U/S 164 Cr.P.C.

10. PW 2 is the informant, who is the maternal aunt of the victim. According to PW 2, at the time of occurrence, age of the victim was about 16/16 $\frac{1}{2}$ years. On the date of occurrence, victim was going from the house of her maternal uncle to the house of the informant and on same day she returned to the house of her maternal uncle. At about 6/6.30 PM, she was returning from her home. According to PW 2, after half an hour, she knew that villagers caught the victim along with the accused. She further deposed that victim made hue and cry. It is also stated by PW 2 that during interrogation, victim told her that accused had committed physical relationship with her and there was scratch mark on her breast. According to PW 2, she heard from the victim that accused took her to nearby jungle and within the jungle, he committed sexual intercourse. After knowing the incident, she lodged the FIR. During the cross-examination, this witness stated that there was no any birth certificate of the victim. She failed to state the year in which victim was born. Learned defence counsel suggested that at the time of occurrence, age of the victim was about 18 years but same was denied. This witness also admitted the fact that prior to this incident, younger sister of the victim fled away with a boy. According to learned defence counsel, this witness did not hear any facts from the victim which was denied by her. The defence lawyer suggested that accused did not commit any sexual assault upon the victim which was denied. It is found from the evidence of the PW 2 that villagers took the accused and victim to nearby club.

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11. PW 3 Manik Ray is the maternal uncle of the victim. According to this witness, at about 4 PM, he heard hue and cry and after hearing hue and cry, he went to the place of occurrence and met his niece, the victim. Then she reported him that when she was coming to his home, on the way, accused pulled her to the jungle and committed rape. Local people caught the accused. According to PW 3, at that time, the age of the victim was about 23 years. Villagers informed the matter to police and police took the victim along with the accused to the police station. Police sent the victim to the hospital for medical examination. This witness also admitted that prior to this incident

another case was lodged by the victim. At that time, she was residing at Bengtol. Prior to that, she was residing in Delhi for a period of two years. According to learned defence counsel, this witness did not hear anything from the victim but same fact was denied by the PW 3.

- 12. PW 4 Kanai Ray deposed that on the date of occurrence, at about 5.30/6.00 PM, he was in his home. He heard hue and cry. After that he went to the place of occurrence and then he found that local people caught the accused only. The victim left the place of occurrence before he reached the place of occurrence. According to this witness, accused was taken to a nearby club. Members of the Student Union informed the matter to the police. He met the victim in the house of her maternal uncle but he did not ask anything to her. After the incident, victim took shelter in his home.
- 13. PW 5 Nazrul Ali deposed that he knew the accused and victim. Accused was belonged to his village. On the date of occurrence, at about 6.00 PM, he was in the market. Then one members of AAKRSU informed him over phone that one boy of their village was caught by them because he was found with a girl. Immediately, he visited the place of occurrence and found that both the accused and victim were kept in a room of a club. He did not ask anything to them. He informed the police.

PW 6 is the I.O., who deposed that he interrogated the

informant and witnesses at police station. He also interrogated the victim at police station. He visited the place of occurrence and drew sketch map. He sent the victim to the court for recording her statement U/S 164 Cr.P.C. According to PW 6, there was no birth certificate of the victim for which her age was ascertained on the basis of medical examination. He collected the medical examination report. He also arrested the accused as he was produced before the police station by the villagers. According to PW 6, as doctor opined that age of the victim was above 17 years and below 20 years, he submitted

charge-sheet U/S 376 IPC against the accused. During the cross-examination,

PW 6 categorically stated that both the accused and victim were present at

police station. He did not made any G.D. Entry prior to filing of the FIR. This

witness admitted that he recorded the statement of the related witness only

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except Nazrul Ali. He did not seize any articles in respect of this case. He did not collect school certificate of the victim because she never go to the school. During the cross-examination, PW 6 confirmed that victim (PW 1) stated before him that she knew the accused and his name was Biki.

15. PW 7 is the Medical Officer, who examined the victim. He deposed that on 05.10.17, she was working as Medical & Health Officer-1 at JSB Civil Hospital, Kajalgaon. On that day, she examined the victim in connection with Dhaligaon P.S. Case No. 199/17 U/S 376 IPC R/W Section 4 of POCSO Act escorted by Woman Home Guard Durgabati Daimary and Champa Ray. On examination, she found the following:-

She was conscious well oriented. Built – Average. Auxiliary hair – Present. Breast – Moderately developed. Mild abrasion on right breast. CVS – S1, S2 – Positive. Chest – Bilaterally clear. CNS – Conscious oriented. P/A – soft. PS – Positive. No. of teeth – 7/7/, 7/7. Perineum injury marks – Absent. Stain of semen – Absent. Pubic hair – Present. Per vaginal examination – Stain of semen – Absent. Mucosal tear or laceration – Absent. Hymen – ruptured. Vaginal swab examination – Spermatozoa not seen.

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According to radiological report, right elbow – All epiphysis of lower end of humerus are fused. Right elbow joint – Lateral view – Epiphysis of radial head and proximal ulna are fused. AP view – Epiphysis of lower end of radius and ulna are in stage of fusion. Right wrist joint – Lateral view – Epiphysis (base) of first metacarpal is recently fused. Right iliac crest – AP view – Epiphysis of femoral head and greater and lesser trochanter are fused. Epiphysis of ischeal tuberosities appeared but not fused. Lateral view – Epiphysis of iliac crest are in early stage of fusion.

Urine for pregnancy test - Negative.

Medical Officer opined that from clinical and radiological examination, her age seems to be above 17 years but below 20 years. About injury, violent mark on her body or private part, mild abrasion on right breast.

During cross-examination, PW 7 stated that age of the victim might be above 18 years on the date of occurrence and abrasion might be happened due to other ground.

16. Learned defence counsel, in his written argument, stated as follows:-

In POCSO Act, 2012 Act, Child is defined u/s 2(d) as any person below the age of eighteen years.

From the entire evidence on record, it is crystal clear that the prosecution failed to prove that the age of victim as below 18 years. She has no birth certificate, no school certificate and during deposition her version about the age was not corroborated by other evidence. Her maternal uncle deposed that her age was 23 years at the time of incident. As per Medical Report, her age is in between 17 to 20 years. So, prosecution miserably failed to ascertain the actual age of the victim at the time of incident. So, benefit goes in favour of the accused.

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He further stated that in our case, from the entire evidence of victim as PW 1, it is seen that accused tried to communicate her in road she did not resist herself prior to the incident when accused took her to the jungle, she neither resist nor protest for that act. Prior to the incident, when the accused person undressed her she also did not resist and did not raise hue and cry at that time. After the incident, though the victim deposed that she was shouting, but she did not tell what type of shouting because she may be shouting for excitement for enjoying sex in orgasm with the accused person other is she wants to help at the same time victim also deposed that after the incident she stayed half an hour in jungle and conversation between them. In her deposition, victim neither said the incident to her maternal uncle nor her aunty. She also did not depose anything about her injury on breast. From the entire deposition of the victim, it is confirmed that she has no any objection, no resistance and totally consent during the incident. Victim has no any allegation of threat or coercion also.

From the evidence of Doctor (PW 7), who examined the victim within 24 hours of incident and she found one abrasion mark on the breast of the victim, but doctor clarify that she could not ascertain the age, colour, measurement and also the cause of said injury. She further deposed that the said abrasion may be happened due to other ground and the age of the victim may be above 18 years.

It is mentioned here that the victim of this instant case, also deposed in her cross-examination that she was previously treated as victim in Special Case No. 3 (RKT)/2017 and in that case, during her 164 statement she stated that accused sexually assaulted her and raped her, later she was declared hostile by the prosecution, so her version is not acceptable without corroboration of other material witnesses, is totally unsafe.

From the previous conduct of the victim, prior to the incident, when accused took the victim to jungle from road and after the incident, without any delay victim did not return to her maternal uncle home and this portion of evidence without any explanation created doubt.

PW 1 also contradicted in material part with Ext.1 during the presence of any person at the time of incident. Contradiction between the deposition of victim (PW 1) and informant (PW 2) with FIR, after the incident the victim went to her uncle home.

PW 6, Investigating Officer, did not conduct his investigation properly. He did not seize any wearing clothes of victim and the accused, did not examine the so called eye witnesses or local villagers. Without examining natural witness he submitted charge sheet against the accused.

17. In support of his argument, learned defence counsel cited several case laws. I have gone through it. It is settled law that prosecution must have to prove its case beyond all reasonable doubt. If any doubt occurs, it will go to the accused as benefit. In this regard, in *State of Punjab vs. Gurmeet Singh* reported in *(1996) 2 SCC 384*, Hon'ble Supreme Court held as follows:-

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"The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The 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 and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assaults stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must be over-looked 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. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice

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a casualty. Courts cannot cling to a fossil formula and insists upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarized the position in the following words:

"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the

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court should ordinarily have no hesitation in accepting the evidence."

- 18. Learned defence counsel further argued regarding point of consent.
- 19. The consent is defined U/S 90 of IPC as follows:-

"90. Consent known to be given under fear or misconception.- A consent is not such a consent as it intended by any section of this Code. If the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception, or

Consent of insane person. - If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

In this case, to prove the offence U/S 4 of POCSO Act, 20. prosecution must have to prove the age of the victim as below 18 years on

the date of occurrence. From the prosecution evidence, it is found that there was no any document seized by the Investigating Officer to ascertain the age of the victim. The maternal aunt did not know about the date of birth of the victim. On the other hand, maternal uncle (PW 3) clearly stated that on the date of occurrence, age of the victim was about 23 years. According to I.O., on the basis of medical evidence, he found that age of the victim was above 18 years for which he submitted charge-sheet U/S 376 IPC. After going through the evidence of PW 7, it is found that considering both the clinical and radiological examination, she opined that age of the victim was in between 17 to 20 years. In her cross-examination, she stated that age of the victim might

be above 18 years on the date of occurrence. So, it is not proved from the entire evidence that victim was below 18 years on the date of occurrence. Therefore, Section 4 of POCSO Act cannot be attracted against the accused.

- 21. Now, I come to Section 376 IPC regarding the allegation.
- 22. According to learned defence counsel, in present case at hand, it is not proved from the evidence of the victim that she had no consent at the time of occurrence.

I have found that PW 1 deposed that at the time of occurrence, one Bodo boy was present along with the accused. Another point she stated that some Bodo girls witnessed the occurrence when she was carried by the accused on his hand to the jungle. No any hue and cry was made at that moment by the victim. She also did not state anything to the Bodo girls for help. The Investigating Officer did not examine the Bodo girls or the Bodo boy, who were present on the road at relevant point of time. It is confirmed by the I.O. that PW 1 stated before him that she knew the boy, particularly the accused prior to the incident and she also told his name as Biki. In her later deposition, PW 1 stated that she did not know about the accused. It is also found from her evidence that maternal uncle (PW 3) Manik Ray beat her after knowing the incident. Another point revealed from the evidence of the PW 5 that both accused and victim were kept by the local boys within a club. No any hue and cry was made by the victim when she was taken to the jungle by the accused. So, it is found from her conduct and other evidence on record that she is not a trustworthy witness. She cannot be treated as wholly reliable witness. On the basis of her lone statement accused cannot be booked for the alleged offence.

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More over it is not proved from her conduct that she had no consent at the time of sexual act allegedly committed by the accused. It is revealed from her medical evidence that at the time of occurrence, her age might be above 18 years. So, she was not below 18 years, for which consent plays vital role. If she was consenting party, then there was no offence U/S 376 IPC. Regarding consent, I have found that the victim co-operated with the accused

and she knew him and she also stated that accused started to love her. That means, there was love affection between her and accused. She told the name of the accused as Biki which is revealed from the cross-examination part of the PW 6, the I.O. So, as she was consenting for the sexual act, therefore, it cannot be concluded beyond all reasonable doubt that accused committed rape as defined U/S 375 IPC. Moreover, medical evidence did not support the allegation that she was raped. Except some bruises over the breast of the victim no any other injury or redness was found upon the private part of the victim. Doctor did not find any evidence regarding sign of forceful or any sexual intercourse during the time of examination of the private part of the victim. The entire facts narrated by PW 1 and the medical evidence create doubt about the prosecution story. As there is doubt that victim was consenting party, so accused cannot be booked for the offence U/S 376 IPC also. Accused is not found guilty U/S 376 IPC R/W Section 4 of POCSO Act beyond all reasonable doubt. Both points mentioned above are remained as not proved.

ORDER

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- 23. Prosecution failed to prove the case U/S 376 IPC R/W Section 4 of POCSO Act against accused Md. Yasin Haque @ Biki beyond all reasonable doubt. Accused is acquitted on benefit of doubt and set at liberty.
- 24. He is directed to furnish bail bond of Rs. 10,000/- with one suitable surety of the like amount for a period of six months as required U/S 437(A) Cr.P.C. Till then, he is allowed to remain in previous bail.
- 25. A copy of the Judgment shall be given to the District Magistrate, Chirang for information.

Given under my sign and seal of this Court on this the 4th day 26. of October, 2018, at Kajalgaon, Chirang.

Dibyajyot Mahanta (D.J. Mahanta) Special July 1990 Chillian Malagaon

Dictated and corrected by me,

20 4/10/18 (D.J. Mahanta)

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APPENDIX

Prosecution witness:

PW 1 - Victim Miss 'X' (name is withheld)

PW 2 – Smt. Champa Ray

PW 3 – Sri Manik Ray

PW 4 - Sri Kanai Ray

PW 5 - Md. Nazrul Ali

PW 6 – S.I. Dewan Wahidul Islam (I.O.)

PW 7 – Dr. Kukumoni Basumatary (M.O.)

Exhibit (Prosecution):

Ext-1 Statement of the victim U/S 164 Cr.P.C.

Ext-2 FIR

Ext-3 Sketch map

Ext-4 Charge-sheet

Ext-5 Medical report

Ext-6 Radiological report

Material Exhibit (Prosecution):

Nil.

Defence Witness:

Nil.

Defence Exhibit:

Nil.

(D.J. Mahanta)

Special Judge,
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