IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

<u>Spl. (P) Case No. 28 of 2017 U/S 6 of POCSO Act, 2012.</u> (Arising out of Demow P.S. Case No. 135/2017)

State of Assam

-Vs-

Sri Sikandar Machuwa Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. Anil Ch. Dutta, Advocate

Date of framing Charge : 16.11.2017

Dates of Evidence : 08.12.2017, 08.01.2018, 01.02.2018

Date of S/D : 12.02.2018

Date of Argument : 12.04.2018 & 05.05.2018

Date of Judgment : 14.05.2018

J U D G M E N T

- 1. Prosecution case, in brief, is that on 15.06.2017, one Smt. Meenakshi Machuwa lodged an FIR with O/C, Demow P.S. alleging, inter alia, that her niece victim 'D' (name withheld), aged about 14 years was made pregnant by some unknown person. On asking, the victim did not disclose the name of the person responsible for causing her pregnancy.
- 2. On receipt of the FIR, Demow P.S. Case No. 135/2017 U/S 4 of POCSO Act, 2012 was registered and investigated. During investigation, accused was arrested and produced before the court for judicial custody. The victim was medically examined and got her statement recorded in the court U/S 164 Cr.P.C. On completion of investigation, I.O. has submitted Charge-Sheet U/S 4 of Pocso Act, 2012 against the accused person.

- 3. On receipt of charge sheet, cognizance of offence was taken. Accused was provided with the services of Legal Aid Counsel. After furnishing copy to the accused and after hearing both the sides, vide order dated 16.11.2017, charge U/S 6 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial.
- During trial, prosecution side has examined six witnesses including M.O. and I.O. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- It may be noted here that accused faced the entire trial as UTP. Initially accused was provided with the services of Legal Aid Counsel Mr. Dhiraj Dutta. However at the last stage of trial, due to appointment of Mr. Dhiraj Dutta as PP, Sivasagar, accused was defended by his engaged Advocate Mr. Anil Ch. Dutta, a senior member of Bar and due to waiting for taking Charge by Special PP, there was some delay in disposal of this case.
- 6. I have heard and reheard arguments of learned Special P.P. Mr. Srimanta Gogoi and Mr. Anil Ch. Dutta, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- 7. (I) Whether on the date of filing of the FIR the victim 'D' was pregnant?
 - (II) Whether accused Sikandar Machuwa has committed the penetrative sexual assault on the victim 'D' against her will and caused her pregnant?

DECISION AND REASONS THEREOF

8. Before going to decide the points formulated above, let me narrate the evidence on record for better understanding of facts and circumstances of this case.

9. PW-1 the victim D, who was produced from Snehalaya (Children home run by NGO) in her evidence deposed that accused Sikandar Machuwa is her relative as he married Meenakshi, sister of her father. From childhood, she called Sikandar as Mama. From her childhood, she was brought up by Sikandar Machuwa and Meenakshi Machuwa at their residence due to death of her parents. Presently she is aged about 14 years. PW 1 also deposed that that during her stay at the residence of accused, while she started growing up, since about last 3 years, at night hours accused Sikandar Machuwa came to her room and commits misdeed. He used to open her cloths and establishes physical relation. He did not care to her resistance and also used to threaten her not to divulge about commission of misdeed to others. When she reported the matter to Meenakshi Machuwa, she disbelieves her. She also asked her not to divulge the matter to others. By this way accused continued to make sexual relation with her for long. Lastly, on stopping of her menstruation, during house visit by local Asha workers, she informed them about stopping of menstruation. On knowing this, they took her to Demow Hospital and after having urine test, ascertained that she was pregnant. Meenakshi Machuwa has also accompanied us. On conforming her pregnancy, Asha workers took her to Demow police station. Police brought her to Sivasagar for Medical examination and also to Court. She gave statement in court. On that day also she deposed in similar lines. Her pregnancy was due to physical relation by her Mama Sikandar Machuwa. From Court, she was sent to Snehalaya, Sivasagar. Presently, she is staying at Snehalaya. About four months back, she delivered one male child at Sivasagar Civil Hospital. Said child is also at Snehalaya. In her cross by defence, PW 1 admitted that she cannot say her date of birth. She was not sent to school. She cannot say her exact age. She disclosed her age as 14 years on assumption. Accused Sikandar and Meenakshi has two minor daughters. She used to play with them. She also played with neighbouring child of her age. She was never kept confined at the residence of accused during her stay there. On first day of misdeed by accused, she informed the matter to Meenakshi but she

did not rely her. On establishing sexual relation for the first time by the accused, she understand that it was misdeed with her. Asha workers frequently visits residence of the locality including her residence to take care education of the children. As her Mami, asked her not to disclose the incident, she did not inform the same to Asha Karmi and neighbours. She was also under fear of harm by accused, if she disclose the fact of misdeed to others. She denied to had illicit relation with local boy and that while the accused and his wife restrained her in maintain such relation, out of that grudge, she falsely implicated Sikandar in this case. She denied that accused never committed misdeed with her.

10. PW-2 Smt. Meenakshi Machuwa, wife of the accused, in her evidence deposed that victim D is the daughter of her brother. Victim used to call the accused as Mama. From her childhood, victim was brought up by them at their residence due to death of her parents. Presently, she is aged about 17 years. About three years back, she attained puberty. On knowing about stopping of her menstruation, on asking, the victim told her that accused used to go to her bed and through him, she become pregnant. On knowing this, she took the Victim to Demow Hospital and after having urine test, ascertained that she was pregnant of about 3 months. On that day, Munu Goala, Sanjay Goala and Mainu Machuwa accompanied them to Demow Hospital. On conforming Victim 's pregnancy, Munu Goala, Sanjay Goala and Mainu Machuwa took her and Victim to Demow police station. As asked, she lodged FIR at Demow PS. FIR was written by some body at police station. There from Victim was taken by police. She cannot say, where Victim resides since that day. From Munu Goala, she heard that Victim has delivered one male child. In her cross-examination, she admitted that victim's father died about 10 years back. Victim's mother died prior to her marriage. She disclosed the age of Victim as 17 years on assumption. Only after confirming pregnancy on victim, for the first time victim informed her that Sikandar used to go to her bed. On day time she and her husband went for job at Bagan. Her children stayed with Victim for the day time. Neighbouring adult persons of the locality also went to their workplace. In night hours, her husband used to sleep with her. She never saw her husband missing from bed at night hours. She had never seen any incident to doubt her husband for keeping any illicit relation with the victim. Had the victim informed her earlier regarding commission of misdeed, she could have protected her. She cannot say, if Sikandar restrained victim from keeping illicit relation with local boys. About three years back, victim left her home by making quarrel and they have to search her and brought back after three days.

11. PW-3 Miss Mainu Machuwa, a NGO Worker in her evidence deposed that in the month June/2017 the local members of her NGO informed that incident of Child abuse happened at the residence of Sikandar Machuwa. On knowing this, she along with Deepjyoti Goala, secretary of the NGO went to the residence of Sikandar and found the victim. After much reluctance and on their assurance, she told her about stopping of menstruation period and taking of some medicines. After discussing the matter with other NGO members, in the evening by taking consent from the wife of Sikandar, they took out Victim to Demow Hospital for medical examination and doctors have ascertained that Victim was pregnant. Wife of Sikandar was also with them. Victim told them that she was pregnant through Sikandar whom she used to call as MAMA. PW 3 also deposed that victim was an orphan girl and staying at that residence for last 7-8 years. She did not go to school. After confirmation of her pregnancy, they took the victim and wife of Sikandar to Demow PS and lodged an FIR. Police took Victim to medical. Thereafter victim was produced to Child Welfare Committee and there from Victim was sent to Snehalaya. In her crossexamination PW 3 admitted that Sikandar was not financially sound. Local NGO workers informed them that health condition of Victim was not good. On our asking about her pregnancy after medical examination, she disclosed the incident to them. They have not verified about the incident and role of Sikandar from villagers.

- 12. PW-4 Sri Deepjyoti Goala, NGO Worker, who accompanied the PW 3 in his evidence deposed in similar with PW 3. In his cross-examination he admitted that he cannot say how and when our Local NGO came to know about the incident. On their asking about her pregnancy after medical examination, she disclosed the incident to them and that she was pregnant through Sikandar Machowa.
- 13. P.W. 5 Dr. Sanjib Mahanta in his evidence deposed that on 16.06.2017 at about 12 noon, on police requisition, he examined the Victim in connection with Demow P.S. Case No. 135/17 findings are as follows:

Menarche – 3 to 4 years Back.

LMP: ?Feb 2017

Maritual Status- Unmarried.

Teeth - 14/14.

Hymen - Absent.

<u>Abdominal Examination</u> – Uterus: 20-24 weeks size,

Pregnancy Test (H.C.G. In urine)- SVIP (Single viable intrauterine Pregnancy of 24.4 wks.

Radiological examination:

Skiagram of the left wrist and elbow joints showed complete fusion of the epiphyses.

In his evidence PW 5 has opined that the victim girl was above 18 years of age at the time of examination. There was no evidence of injury or recent sexual intercourse detected during examination. She was carrying 24 Wks. of viable pregnancy at that time. He proved the medical report as Ext.1, his signature as Exbt. 1(i) and X-Ray report of Dr. Ranjit Hazarika as Exbt. 1(2). In his cross-examination, PW 5 deposited that he is specialist in Gynaecology. In cases of continuous act of sexual relation, there is every possibility of become pregnant by the women. During his examination, he did not get any sign of earlier abortion.

14. PW-6 Sri Ashim Jyoti Buragohain, the I/O of this case in her evidence deposed that on 15.06.2017, O/C Demow PS has received one written

FIR from Smt. Meenakshi Machuwa and registered Demow PS case No. 135/17 u/s 4 of POCSO Act and entrusted him to investigate the case. Exbt. 1 is the FIR. On taking charge of investigation, he examined the informant and victim at PS campus. Thereafter, victim was sent to Snehalaya for night stay and on the next day she was sent for medical examination and also to court for recording her statement u/s 164 Cr.P.C. Accused Sikandar Machuwa on his own appeared at the PS and he was kept at PS. On the next the accused was arrested. On 18.06.2017 he went to the place of occurrence i.e. residence of informant and accused at Khorhat Machi Line and drawn a sketch map of the PO. Exbt. 2 is the said sketch map. During investigation he has collected the medical report and statement given by victim in court. Exbt. 3 is the statement of the victim given in Court u/s 164 Cr. P.C. He could not collect age proof document of the victim as she did not go to school. On completion of investigation, he has submitted charge sheet against the accused u/s 376 IPC. Exbt. 4 is the charge sheet. In his cross-examination, the I/O admitted that by relying on the age of the victim, as mentioned in medical certificate, he has submitted charge sheet u/s 376 IPC. He did not make any other inquiry on the age of the victim. From the statement of the victim, though it appears that alleged act of physical relation continued for about 3-4 years, he did not make any investigation on the matter of use of contraceptive by the victim during making physical relation by the accused to avoid pregnancy. I/O has denied the defence suggestions that as the physical relation was on consent, submission of charge sheet u/s 376 IPC was not proper.

- 15. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 16. <u>Point No. I:</u> So far point No. I is concerned, from the evidence of victim (P.W. 1) it appears that on stopping of her menstruation, during house visit by local Asha Karmi, she informed her about stopping of her menstruation. On knowing this said Asha Karmi took her to Demow Hospital and after having urine test, her pregnancy was ascertained. This part of evidence so far the fact

that on the date of filing of the FIR victim was taken to Demow Hospital was not challenged. P.W. 2, the informant Meenakshi Machuwa, P.W. 3 Miss Mainu Machuwa and P.W. 4 Sri Deepjyoti Goala, who accompanied the victim to hospital for her pregnancy test has supported the evidence of the victim that upon urine test her pregnancy was confirmed by the attending Doctor. This is also not in dispute that thereafter FIR was lodged and police took her for medical checkup at Sivasagar Civil Hospital. From the evidence of P.W. 5, Medical Officer of Sivasagar Civil Hospital who has examined the victim 'D' after registration of the case, has deposed that on 16.06.2017 he examined the victim 'D' at Sivasagar Civil Hospital and upon examination he determined that the victim was carrying 24 weeks of single viable intra-uterine pregnancy. M.O. has proved his report as Exbt. 5. From the evidence of P.W.1, the victim it also appears that she has delivered one male child at Sivasagar Civil Hospital and said child was living with her at Snehalaya, Sivasagar. All these facts though put to the accused in his 313 Cr.P.C examination, he simply stated his ignorance about the pregnancy and delivery of child by the victim. The evidence of the witnesses and M.O. (P.W. 5) clearly proved that on the date of filing FIR, the victim was pregnant for about 24 weeks.

- 17. <u>Point No. II:</u> Now the question falls for determination is whether the accused was responsible for causing the pregnancy of victim. Before dealing with, there is an interrelated question regarding age of the victim on the date of alleged occurrence.
- 18. In the course of argument hearing, learned Special P.P. by referring to the contents of the FIR and the evidence of P.W. 1 and 2 has submitted that in the FIR, age of the victim was mentioned as 14 years by P.W. 2 who is the wife of the accused. During her evidence on 08.12.17, the victim claimed her age as 14 years, whereas P.W. 2 has claimed the age of the victim as 17 years. However, in the medical report (Exbt. 5), P.W.5, the M.O. has opined that the age of the victim as above 18 years on the date of examination. M.O. did not gave the upper age limit. Learned Special P.P. has submitted that

as the medical determination of age is just an opinion and that law is well settled that such opinion may vary for two years on either side, court should presume that the victim girl was below 18 years of age, both on the date of examination and on the date of alleged occurrence of penetrative sexual assault leading to her pregnancy. Refuting the arguments on age, learned Advocate Mr. Anil Ch. Dutta, appearing for the accused by referring to the cross examination of the victim and P.W. 2 has submitted that both the witnesses have admitted that they disclose the age of the victim on assumption. As such, this court has no option but to accept the age as determined by P.W. 5, M.O. who ascertained the age of the victim on the basis of radiological report which appears to be more reliable in the present circumstances of the case. I have considered the submissions of both the sides.

- 19. Admittedly, the victim did not go to school and have no birth certificate of her own. It is in the evidence that on the death of father of the victim, the P.W. 2 being aunt, keep the victim with her since her childhood. It may be noted here that P.W. 2 in her evidence stated that (deposing on 08.12.17) victim attained puberty about three years back. This fact has find place in the medical examination report as noted by medical officer. Thus taking this clue and having general presumption that the girl of this region attains puberty at the age of 13-14 years, if we take the time of puberty three years back, it appears that the age of the victim as disclosed by P.W. 2 though on assumption as 17 years, appears to be more reliable. As the medical evidence can vary two years on either side and the Doctor has opined the age above 18 years, it appears to me that, if we deduct two years from the age determined by the M.O. (P.W. 5) it will be proper to accept the age of the victim as about 17 years on the alleged date of filing FIR. My above finding also appears to be probable by considering the number of teeth (14/14) in the medical report.
- 20. Even for argument sake, if it is taken that the age of the victim is above 18 years on the date of examination, then also in this case from the

evidence of P.W. 1, the victim it appears that while she started growing up since last about three years accused used to sneak into her room at night hours and commits misdeed. So offence of penetrative sexual assault took place while admittedly the victim was minor i.e. below 16 years of age.

- 21. Apart from above, in a allegation of rape, the age of a victim is normally has no relevance if the alleged occurrence of sex was done without consent or such consent obtained by fraud, under fear or coercion. Hence in a case of this nature if it proved that there was cohabitation with the victim by the accused the burden that it was on consent shifted to accused.
- 22. To ascertain all these, let me first decide the role of the accused. In the course of argument hearing, learned P.P. has submitted that by applying the provision of Section 29 of POCSO Act, 2012 court shall presume that whatever the allegation brought by the victim against the accused with whom she used to reside since her childhood be treated as true as the defence has failed to rebut the said allegation brought against him which are otherwise found probable in all circumstances. On the other hand learned Advocate Mr. Anil Ch. Dutta, appearing for the accused in his pain taking argument has submitted that the allegations as leveled have many flaws and cannot be relied upon due to inconsistency and lack of normal human behaviour. Learned defence counsel has submitted that according to the victim, she was subjected to cohabitation for last three years and there was no evidence of any pregnancy during that long period of cohabitation and only after having 24 weeks pregnancy, on visit of NGO workers (Asha Karmi) the victim disclosed the fact of stopping of menstruation and this cast a serious doubt on the reliability of the evidence of the victim and applicability of Section 29 of POCSO Act 2012. Learned defence counsel has also argued that as the victim was above 18 years of age, even if it is presumed that accused has cohabited with her, it must be treated with her consent, as she never made any complaint or allegation of physical co-habitation to anybody else till the date of filing FIR. In support of his argument, learned defence counsel has relied the following case laws: (i)

2017 (1) GLT 276, (ii) 2011 SCC (14) 671, (iii) 2007 CRI. L.J. 1615, (iv) 2006 (3) GLT 585, (v) AIR 2011 SC 2564 and (vi) 2016 (2) Crimes 340. I have considered the submission of both the sides.

23. There is no dispute to the fact that from the childhood the victim was brought up by the accused at his house and that in that house accused used to reside with his wife and 2 children. This fact was duly corroborated by the evidence of P.W. 1 and P.W. 2 and was also admitted by the accused in his 313 Cr.P.C. examination. There is also no dispute to the fact that on the date of filing FIR, on visit of the Asha Karmi victim disclosed the fact of stopping of her menstruation and accordingly she was taken to hospital where her pregnancy was confirmed and then FIR was lodged by the wife of the accused. There is nothing on record to show that prior to this the victim has disclosed the alleged penetrative sexual assault by the accused on her except P.W. 2. The victim in her examination-in-chief has categorically stated that since about last three years, at night hours, accused Sikandar Machuwa came to her room and commits misdeed by opening her cloths by establishing physical relation. Accused did not care to her resistance and also used to threaten her not divulge about commission of misdeed to others. When she reported the matter to Meenakshi Machuwa (P.W. 2), wife of the accused, she disbelieved her. She also asked her not to divulge the matter to others and by this way accused continued to make sexual relation with her for long. During her cross examination she reaffirmed that though Asha Karmi used to visit frequently residence of the locality, but as her maternal aunt asked her not to divulge the matter, she did not inform the matter either to Asha Karmi or to neighbours. She also reaffirmed that out of fear of harm by accused she did not disclose the matter to others. She denied the defence suggestion that she had illicit relation with a local boy and on being restrained by accused and his wife, she has falsely implicated the accused. From the evidence of P.W. 2 it appears that on knowing about stopping of her menstruation, on asking the victim told her that accused Sikandar Machuwa used to sneak on her bed and through Sikandar she

became pregnant. In her cross examination P.W. 2, wife of the accused has affirmed the fact that victim has reported the matter to her. Though she stated that at night hours her husband used to sleep with her and she never seen her husband missing from bed or that she never doubt on her husband for keeping illicit relation with the victim, but this much of evidence failed to demolish the evidence of P.W. 1, the victim as fact of reporting of sexual relation got admitted by PW 2. The defence suggestion as put forward to victim that the victim had illicit relation with a local boy did not get any support from P.W. 2. P.W. 3 and P.W. 4 who are the NGO workers took the victim to hospital on knowing about the incident of child abuse in the locality came to the house of the accused Sikandar Machuwa and with the consent of his wife they took the victim to Demow Hospital with the wife of the accused. They also deposed that on asking the victim told them that she was pregnant through Sikandar whom she used to call as Mama. Thus it appears that at the first instance she took the name of accused and there is nothing to disbelieve her on this count. So from the above discussions it appears that the evidence of victim so far implicating the accused Sikandar Machuwa for making physical relation with her is found reliable and trustworthy.

It may be mentioned here that the argument of learned defence counsel that the victim did not disclose the incident for long three years has to be looked into on the factual situation by keeping in mind that the victim was brought up by the accused and P.W. 2 since her childhood as she was orphan. Her evidence is that accused used to threaten her for not to divulge the incident to others and that P.W. 2, the wife of the accused who lodged the FIR after knowing the incident also asked her not divulge to others clearly shows that the victim was under threat of her future. In her cross-examination victim has categorically admitted that she was also under fear of harm by accused, if she disclose the fact of misdeed to others. In this context, it is pertinent to mention here that the victim is a rural rustic uneducated orphan girl having not attained so much of maturity must be concerned of her future and there is

every reason for not divulging the incident of penetrative sexual assault or stopping of menstruation on her by the accused to the neighbours or the Asha Karmi on earlier occasion out of fear of displacement or losing of shelter.

- 25. The other argument as advanced by learned defence counsel that the victim should be treated as a consenting party. Let me look at the law on this aspect.
- 26. In the case of Zakir Ali VS State of Assam, [2007 (3) GLT 497: 2007 Cri. LJ 1615] as cited by learned advocate for the accused, while dealing with section 90 IPC Hon'ble Gauhati High Court has held as follows:
 - "(12) While considering the above aspect of the case, it needs to be pointed out that the Indian Penal Code does not define "consent" in positive terms. There is, however, a negative definition of the word "consent" in Section 90 of the Indian Penal Code, which lays down as to what cannot be regarded as "consent" under the Indian Penal Code. The relevant provisions of Section 90 IPC read as under:
 - "90. Consent known to be given under fear or misconception.-A consent is not such a consent as is 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. "
 - (13) From a minute reading of Section 90 IPC, which explains as to what cannot be regarded as 'consent' for the purpose of the Indian Penal Code, it becomes clear that 'consent' given under fear of injury, or under a misconception of fact, is not a 'consent' at all. It is, however, worth noticing that giving of 'consent' under fear of injury or misconception of fact is not sufficient to hold that no consent existed unless it is further established that the wrongdoer knew, or had reason to believe, that the consent given was in consequence of such fear or misconception. The factors, set out in the first part of Section 90, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent are from the point of view of the victim; whereas the factors, set out in the second part of Section 90, namely, that the person doing the act knows, or has reason to believe, that consent was given in consequence of such fear or misconception are corresponding provisions from the point of view of the accused. Thus, the second part of Section 90 lays emphasis on the

knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence of fear of injury or misconception of fact. What is, however, of paramount importance to note is that the existence of the twin requirements of Section 90 must be cumulatively satisfied in order to enable a Court to hold that no consent in law existed at the relevant time. In other words, when these two conditions precedent are co-existent in a case, it can be safely held that no consent, as envisaged under the Indian Penal Code, existed. Such a finding can be reached by examining as to whether the person, giving consent, had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception of fact, 'consent' would not have been given. These aspects of the word "consent", as envisaged under the Indian Penal Code, have been succinctly described in Deelip Singh @ Dilip Kumar Vs. State of Bihar, reported in (2005) 1 SCC 88.

- (14) In the light of what has been indicated above, it becomes clear that the submission of the body by a woman under fear or misconception of fact cannot be construed as consented sexual act for the purpose of Section 375 IPC, for, Section 375 IPC requires voluntary participation by the victim not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Whether consent existed or not has to be ascertained on the basis of the facts of a given case. [see State of Himachal Pradesh Vs. Mango Ram, reported in (2000) 7 SCC 224."
- (19) Referring to its observations, made in Uday's case (supra), that it is the prosecution's burden to prove absence of a valid 'consent' in order to attract the ingredients of the offence of rape, the Apex Court, in Deelip Singh (supra), has clarified that while reading its said observations made in Uday (supra), the Courts must remember that this proportion would not apply if a case is covered by the provisions of Section 114a of the Evidence Act, which, I may point out, lays down that in a prosecution for rape under sub-section (2) of Section 376 IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.
- (20) What transpires from the above observations made in Deelip Singh (supra) is that in a prosecution under Section 376 (2) IPC, when sexual intercourse by the accused with the prosecutrix is proved to have taken place and the prosecutrix, in such a case, claims, in her evidence before the Court, that she had not consented to the sexual act, the Court shall draw a presumption that she had not consented to

the sexual act and the burden would, then, shift to the accused to prove that his sexual act with the prosecutrix was with her consent. The burden on the accused to discharge such presumption would, however, not be as heavy as on the prosecution if the prosecution, in a given case, is required to prove that the consent did not exist.

- Assam [2006 (3) GLT 585] as cited by defence has expressed similar opinion on the meaning of consent and further held that whether the consent was given under a misconception of fact and, in the ultimate analysis, it is on the basis of the facts of each case, as may be discernible from the evidence on record and the surrounding circumstances, that the Court has to decide the question a to whether the consent given was voluntary or was under a misconception of fact."
- This from the above case laws it appears that once when sexual intercourse by the accused with the prosecutrix is proved to have taken place and the prosecutrix, in such a case, claims, in her evidence before the Court, that she had not consented to the sexual act, the Court shall draw a presumption that she had not consented to the sexual act and the burden would, then, shift to the accused to prove that his sexual act with the prosecutrix was with her consent. The burden is on the accused to discharge such presumption would, however, not be as heavy to prove that the consent exists.
- 29. Hon'ble Supreme Court of India in the case of K.P. Thimmappa Gowda v. State of Karnataka, (2011) 14 SCC 475 : AIR 2011 SC 2564 as relied by learned defence counsel, has observed as followed:
 - "6. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the

appellant with her consent and hence there was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape."

- 30. This ratio of K.P. Thimmappa Gowda cannot be applies in the case in hand simply because in the case in hand, as held by me there in no consent from the victim. Moreover, the ratio is also otherwise not applicable as it relates to law prior to amendment of definition of rape as well as coming of Pocso Act in force.
- 31. Learned advocate of the accused by placing releiance on the reported case of Amar Bahadur Singh v. State of U.P. (2011) 14 SCC 671 also submitted that accused being a poor tea garden worker and lived in small house, there is no possibility of sex with the victim at night hours without the knowledge of his wife and children, cannot be accepted to hold water to show that either there was no physical relation or it was with consent of the victim being major. In this case Hon'ble Supreme Court of India in a particular fact has held as follows:
 - "5. We find merit in this plea. We find that under the circumstance the possibility that rape could have been committed on her in the presence of so many members in a small house is difficult to believe. On the contrary the findings of the High Court that the prosecutrix was a consenting party appear to be correct and it was perhaps when the accused and the prosecutrix had been caught red-handed that the story of rape had been cooked up, to salvage some of the family honour. This is often the tendency in such matters. The High Court has therefore gone completely wrong in dismissing the appeal even after its categorical observations."
- 32. Above ratio cannot be applies in the case in hand simply because defence has failed to take any description of the rooms to show that sneaking into the room of the victim is not possible by the accused without the knowledge of the other family members.
- 33. From the above case laws it appears the defence argument cannot be accepted because, in her evidence as P.W.1 the victim has categorically stated that though she resisted the accused, but accused did not

care for the same and after threatening her made physical relation. Even if assuming that consent was given by the victim due to long relation, it must be held that consent, if any, same was obtained under threat and as such consent cannot be treated as valid consent. Moreover in view of the fact that victim was a minor girl on the date of filing FIR, value of any such consent becomes immaterial.

- 34. The last limb of argument by defence is of delay in lodging FIR i.e. after six week of pregnancy and three years of sexual relationship by accused. In the course of argument learned advocate for the defence has place reliance on the reported case of Nazimul Hussain VS. State of Assam & Anr. [2017 (1)] GLT 276]. In this case as relied by defence, Hon'ble Gauhati High Court has set aside the conviction of the accused on the fact that FIR was lodged after about 15 months and that there was doubt regarding presence of accused in the village at the relevant time. The ratio of this case cannot be applied in the case in hand as facts are clearly distinguishable. As discussed earlier, from the PW 3 and 4 it appears that knowing about incident of sexual abuse at the residence of accused, they went there and after much persuasion and assurance, the victim disclosed about stopping of her menstruation and named the accused as responsible for her pregnancy. Immediately on the same day she was taken to Demow PS the FIR got lodged. I have already held that the victim being orphan and was out of fear, she could not divulge her physical condition cannot be ignored in deciding the point of delay in bringing the matter to police. Under the facts of this case, I held that the so called delay in filling the FIR is not fatal to prosecution.
- 35. At this stage I would like to deal with the prosecution argument regarding applicability of Section 29 of POCSO Act 2012 in this case. Section 29 of Pocso Act read as follows:
 - "29. Presumption as to certain offences Where a person is prosecuted for committing or abetting or attempting to commit any offence under <u>Section 3, 5, 7 and Section 9</u> 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."

- 36. Hon'ble Gauhati High Court in the case of Manik Lodh VS State of Assam [2007 (3) GLT 207] had the occasion to deliberate upon on meaning of "presumption of law" as held as follows:
 - (18) What is, now, of immense importance to note is that while a presumption of fact can be rebutted by an accused by offering an explanation, which is reasonable and plausible, a presumption of law cannot be discharged by explanation alone. What must be proved is that the explanation is true.
- As discussed earlier, in this case the defence has failed to rebut the presumption exists in favour of prosecution that victim is telling the truth. Evidence of the victim is otherwise also found reliable and trustworthy, even without presumption of this Section.
- 38. Considering all above, I have no hesitation to hold that accused Sikandar Machuwa has committed the offence of penetrative sexual assault upon the victim 'D', a minor girl and make himself liable for punishment under the provision of POCSO Act 2012.
- 39. In view of the evidence of the victim that she was subjected to continuous penetrative sexual assault by the accused and that the accused is a relative being the husband of her father's sister and that he made the victim pregnant as a consequence of continuous sexual assault under the provision of Section 5 (j) (ii), 5 (l) and 5 (n) of POCSO Act 2012, the offence of penetrative sexual assault becomes aggravated penetrative sexual assault and he made himself liable for punishment U/S 6 of POCSO Act 2012. 22.
- 40. To sum up the discussion, I am of the considered opinion that prosecution has been able to prove the ingredients of offence as made punishable u/s 6 of POCSO Act 2012.
- In view of above, I hold the accused Sikandar Machuwa guilty for the offence punishable U/S 6 of POCSO Act, 2012 and accordingly he is convicted for the offence punishable U/S 6 of POCSO Act, 2012.

- I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. Considering the nature of the offence proved by the prosecution and also considering the punishment provided for the offence, I am not inclined to extend the benefit of the benevolent provisions of law to the accused.
- Heard the accused on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. Learned Special PP has prayed for awarding maximum punishment for the accused. Learned defence counsel has prayed for leniency in sentence by narrating the family background of the accused.
- Considering the aggravating and the mitigating circumstances, family back ground of the accused, I am of the considered opinion that the minimum punishment provided by law for committing aggravated penetrative sexual assault on a child will meet the ends of justice.
- Accordingly, convict Sikandar Machuwa is sentenced to undergo rigorous imprisonment (RI) for 10 (ten) years for committing the offence punishable U/S 6 of Pocso Act, 2012 and also to pay a fine of Rs. 2000/- only, i/d further SI of 2 (two) month.
- 46. Convict Sikandar Machuwa is remanded to District Jail, Sivasagar to serve out the remaining part of sentence.
- 47. Convict Sikandar Machuwa is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 48. Considering the fact of imposing meager amount of fine due to poor financial back ground of the convict, no order is passed for payment of compensation to victim s U/S 357 Cr.P.C.
- 49. Considering the fact and circumstances of the case, the matter is referred to DLSA Sivasagar for exploring the possibility of granting compensation U/S 357A Cr.P.C. to the victim, who is now residing at

Snehalaya, Sivasagar (a children home run by NGO). Send a copy of the judgment to Secretary DLSA Sivasagar for needful action.

- 50. Let a free of cost copy of the judgment be given to the convict Sikandar Machuwa immediately as per the provisions of Section 363(1) Cr.P.C.
- 51. Convict Sikandar Machuwa is informed about his right of appeal against the judgment and order of conviction and sentence either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.
- 52. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 14th day of May, 2018 at Sivasagar.

Special Judge, Sivasagar

<u>APPENDIX</u>

1. Prosecution witnesses -

- P.W.1 Victim 'D'
- P.W.2 Smt. Meenakshi Machuwa (Informant)
- P.W.3 Miss Mainu Machuwa
- P.W.4 Sri Deep Jyoti Gowala
- P.W.5 Dr. Sanjib Mahanta (M.O.)
- P.W.6 Sri Ashim Jyoti Buragohain (I.O.)
- 2. <u>Defence witnesses</u>: None
- 3. <u>Court witnesses</u> : None
- 4. Exhibits by prosecution -
 - Exbt.1 FIR
 - Exbt.2 Sketch map
 - Exbt.3 164 Cr.P.C. statement of the victim 'D'
 - Exbt.4 Charge-Sheet
 - Exbt.5 Medical examination report of victim 'D'

Special Judge, Sivasagar: