IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>10 OF 2015</u>

(Under Section 6 of the POCSO Act, arising out of G.R. Case No. 1051 of

2015)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Kushal Nath

Son of Late Kamal Nath Resident of Bamunbari Police Station – Jamuguri, Dist:- Sonitpur, Assam

Date of framing Charge :- 18/08/2015

Date of Recording Evidence ;- 28/09/2015, 16/11/2015,

18/01/2016, 16/02/2016 15/03/2016, 11/05/2016, 09/01/2017,24/01/2017,

& 07/02/2017

Date of examination of accused u/s :- 07

313 Cr.P.C

07/02/2017

Date of Argument :- 03/05/2017

Date of Judgment :- 11/05/2017.

Counsel for the Prosecution :- Mr. Hari Prasad Sedai

Public prosecutor

Sonitpur.

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

JUDGMENT

1. In this case accused Sri Kushal Nath is put for trial for allegation of charge under Section 6 of the POCSO Act, 2012.

- 2. The prosecution case according to the FIR in brief is that on or about 12.45 p.m. of 07-05-2015 while the students were playing outside the school campus of NC Balijuri Prathamic Bidyalaya, accused came to the class and covered the face of 9 years old daughter of the informant with a black cloth, dragged her to the room and committed rape on her. As a result of rape, informant's daughter got fainted and blood was oozing from her private parts. The Head Master of the school informed him over telephone that informant's daughter was lying unconscious. On being came to know about the incident, the informant rushed to the place of occurrence and saw the girl was lying smeared with blood. Immediately, informant took his daughter to North Jamuguri Community Health Centre. While informant's daughter regained sense, she reported the informant that accused committed rape on her. Hence, this prosecution case. The ejahar was filed by one Durga Bahadur Chetry before the O/C of Sootea Police Station on 10-05-2015...
- **3.** On receipt of the ejahar, the Incharge of Itakhola Out Post giving GD Entry No. 157 dated 10-05-2015. After completion of usual investigation, the O/C Tezpur Police Station sent up the accused for trial by filing charge sheet u/s 5(f)(m)/6 of the POCSO Act against the accused Sri Kushal Nath.
- **4.** On being produced the accused before this Court, after hearing both parties, my learned predecessor-in-court framed charge under section 6 of the POCSO Act, 2012 against the accused 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 fifteen numbers of witnesses. After completion of prosecution evidence, accused was 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. To buttress the defence, the accused initially wants to give defence evidence. But subsequently, he failed to examine any of the said defence witness.

- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -

(1) "Whether on or about 12.45 p.m. of 07-05-2015, at NC Balijuri L.P. School under Sootea Police Station, the accused committed penetrative sexual assault on the victim Miss X (9 years) and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

Reasons, Decisions and reason for decision.

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- 9. **PW 1**, the victim stated that the accused is her class teacher. On the day of incident she went to school. At 12 noon she went to take rice at school. Other boys and girls also took lunch. After taking food when she went to keep her utensil in a room, the accused put a black cloth on her face and took her somewhere. When she regained her sense she found the accused on her, she was lying on bench. Her pant was removed. The accused did something in her private parts, she could not explain. The accused went away through a window. Her private part was bleeding and she was having severe pain. Thereafter she fainted. Her parents met her outside the school. She does not know how she went there. Lateron she was taken to Kanaklata Civil Hospital. She was also brought to the court. She stated the facts before the Magistrate. Ext. 1 is her statement and Ext. 1(1) to 1(4) are her signatures.

Though she has been exposed to long cross-examination, the evidence as to while she went to keep her utensil in a room after having lunch, accused put a black cloth on her face and took her somewhere, when she regained her sense she found the accused on her, she was lying on bench, her pant was removed, the accused did something in

her private parts, she could not explain, the accused went away through the windows, her private part was bleeding and she was having severe pain has remained unchallenged.

10. PW 2 Smt. Rita Devi, mother of the victim, stated that on the day of incident, the Head Master of school informed her husband at about 1 p.m. that their daughter is ill. They went to the school. They met her daughter sitting on a culvert near school. Her daughter was severely bleeding from her Urinary tract (private parts). immediately brought her daughter to Pharmacy. Thereafter, she took her daughter to North Jamuguri Hospital. From Jamuguri Hospital they came to KCH, Tezpur on reference. Her daughter was kept for one day in KCH, Tezpur. She was also given blood and saline. In civil hospital, Doctors informed them that it was a rape case. After three days, her husband lodged an FIR. After that police took her daughter to B/Chariali hospital. Her daughter was admitted at B/Chariali hospital for eight days. In the meeting called by Headmaster, her daughter identified the accused. On the day of meeting her daughter told them that the accused covered her face with black cloth and took her by holding her hands and she became senseless. Lateron her husband lodged the FIR. The blue coloured panty, which was put by the victim was found soaked with blood was seized by police.

Though she has been exposed to long cross-examination the evidence as to- on the day of incident, on being came to know from Head Master that her daughter was ill, they went to the school, met her daughter sitting on a culvert near school, her daughter was severely bleeding from her Urinary tract, she immediately brought her to Pharmacy, then to North Jamuguri Hospital, then to KCH, Tezpur on reference where her daughter was given blood and saline, in civil hospital, Doctors informed them that it was a rape case, in the meeting convened by head Master, her daughter identified the accused and told her that the accused covered her face with black cloth and took her by holding her hands and she became senseless has remained unchallenged.

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11. PW 3 Sri Durga Bahadur Chetry, father of the victim, stated that the incident took place on 07-05-2015, when her daughter was 9 years and a student of Class V. On the day of occurrence, his daughter went to school. Headmaster informed him over phone that his daughter was ill and bleeding. He along with his wife went to School and found his daughter sitting on a culvert near the school. She was bleeding from her private parts and she was crying. Thereafter, his wife took his daughter to a Pharmacy at Kherbari but she was taken to Dholaibil Hospital as there is no such facilities available for treatment. From Dholaibil Hospital his daughter was referred to Kanaklata Civil Hospital, Tezpur. When he enquired his daughter, she informed that the accused held by her hands and covered her face with black cloths from backside and she became unconscious. When she gains sense, accused was found sitting near her. She also informed that she was profusely bleeding. Thereafter, he informed the matter to Headmaster and Headmaster called a Meeting. Accused was also called to that meeting. As soon as his daughter saw accused she started crying. Thereafter, he lodged an FIR. Ext. 2 is the FIR and Ext. 2(1) is his signature. Then police took her daughter to Biswanath Chariali Civil Hospital for medical examination. She stayed there for 8 days for treatment. After recovery, victim was brought to Tezpur Court for recording her statement.

Though he has been exposed to long cross-examination but the evidence as to – on being came to know from the Headmaster that his daughter was ill and bleeding, he along with his wife went to School and found their daughter sitting on a culvert near the school, she was bleeding from her private parts and she was crying, took her daughter to Dholaibil hospital, from Dholaibil Hospital his daughter was admitted in Kanaklata Civil Hospital, his daughter informed him that the accused held by her hands and covered her face with black cloths from backside and she became unconscious, when she gained sense she saw accused was sitting near her, she was profusely bleeding, thereafter, he informed the matter to Headmaster and Headmaster called a Meeting, where accused was also called for, as soon as his daughter saw accused

she started crying and thereafter he lodged an FIR has remained unchallenged.

12. PW 4 Smt. Tara Saikia stated that the incident occurred on 07-05-2015 in the NC Balijuri Primary school. She was informed by the Principal of School that in their school, victim was crying. She saw the blood in the hands and legs of victim and so they think that the victim has attained puberty. On 10-05-2015 a meeting was called by Head Master, where accused was also called. The accused was wearing a black cap. On seeing the accused, the victim jumped into her mother's lap and she was very much afraid of accused. On enquiry, the victim told her that accused had held her with black cap. They went to police station, however the accused fled away therefrom.

Though she has been exposed to long cross-examination except giving many suggestion the evidence as to on being came to know from the Principal about the incident she went to school and saw the blood in the hands and legs of victim, on 10-05-2015 in the meeting held at Namghar the accused came by wearing a black cap, on seeing the accused, the victim jumped into her mother's lap and the victim was very much afraid of on seeing the accused and on enquiry, the victim told her that accused had held her with black cap and then accused fled away has remained unchallenged.

13. PW 5 Dr. Mina Bora Biswasi has stated that on 11-05-2015 she was posted as working as Sr. Medical & Health Officer at Sub-Divisional Civil Hospital, Biswanath chariali and on that day, at about 10 a.m, she examined Miss Tilorupa Devi, 10 years, D/O Durgabahadur Chetri of village Dakhin Balijuri, PS Sootea, Sonitpur, Assam, in reference to Sotea PS GDE NO. 172 dt. 10-05-2015. The patient was admitted in the hospital on 10-05-2015 and she was discharged on 16-05-2015. On examination found the following:

Alleged history of rape four days ago. On local examination she found :

She found blood stained undergarments. Oozing of blood still present from vaginal canal. Vaginal canal did not admit tip of the finger.

Tear present on the left side of the lateral vaginal wall. Hymen ruptured. Entire perineum shows echymosis. She advised for X-ray of both wrist joints for determination of age.

Remarks:

Injury marks present in her private parts.

Patient was subjected to sexual intercourse.

Ext. 3 is the Medical Report and Ext. 3(1) is her signature. Ext. 4 is the Discharge Certificate of Biswanath Chariali Sub-Divisional Civil Hospital, Biswanath chariali.

In cross-examination, the Doctor admitted that as per the history given by the parents of the victim, she was subjected to sexual assault about four days ago, such injury of private part may not occur by falling because in case of falling there would be other injuries also.

14. PW 6 Sri Jiban Sarmah stated that the incident took place on 07-05-2015. When he reached there at school, the victim informed him that there is bleeding from her private parts. At that time the accused was about 7/8 feet away. Thereafter, he sent victim to her house with Ganga and Kabita. Next day, he came to know that the victim was referred to Tezpur Hospital from Dhalaibil Hospital where she was given blood. On 09-05-15 at about 7 a.m. he was informed by father of the victim that victim was raped. On 10-05-2015 in the meeting the accused, VDP secretary, Goanburha, teachers and other people were present. On seeing the accused, the victim became afraid and went to lap of her mother. Thereafter, they went to Itakhola Police Post. Though the accused was supposed to go to police post but he did not go.

Though PW 6 has been exposed to long cross-examination but the evidence as to incident took place on 07-05-2015 when he arrived at the school the victim informed him that there is bleeding from her private parts, at that time the accused was about 7/8 feet away, he sent

victim to house with Ganga and Kabita, when he went to their house he saw the victim along with her grandmother coming out from Pharmacy and going to Hospital, in the next day, the father of the victim informed him that the victim was referred to Tezpur Hospital and the victim was given blood. On 09-05-15 at about 7 a.m. the father of the victim called him to his aunt's house and informed that his daughter was raped. On 10-05-2015 in the meeting held at the village Namghar, accused was also present and on seeing the accused, the victim became afraid and went to lap of her mother, had remained unchallenged.

15. PW 7 Dr. Sisir Baidya stated that on 07-05-2015 he was working as Sr. Medical & Health Officer in the North Jamguri CHC and on that day he was on duty in the CHC and he examined the victim, 9 years, Female. The patient was accompanied by her father and mother along with Khemraj with complaint of vaginal bleeding. On the examination found the following:

Bruise and injury seen on vagina and the patient was referred to Kanaklata Civil Hospital Tezpur to consult Gynaecologist.

Ext. 5 is the Medical report and Ext. 5(1) is his signature.

In cross-examination, the Doctor admitted that the parent accompanying the victim gave history of vaginal bleeding.

- **16. PW 8** Sri Ratul Mech, stated that on 23-05-2015 he was working as Police Constable at Itakhola Police Out Post at the direction of I/C he accompanied SI Dhariti Choudhury went to the house of the victim. In the house of the victim, SI Dhariti Choudhury took statement of the victim and recorded the statement in video-graph. Then the compact Disk (CD) of the video graph was handed over to the Incharge of Itakhola Police Out Post. Ext. 6 is the seizurelist and Ext. 6(1) is his signature. Material Ext. 1 is the said compact Disk (CD).
- **17. PW 9** Sri Gopal Chetry stated that he came to know about the incident on 10-05-2015. On that day, Head Master of NC Balijuri LP

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School called a meeting in the school premises. In meeting when the accused came, the victim became frightened and went to her mother's lap and started crying. Then accused fled away there. Then the father of the victim lodged an FIR. Police seized a panty (blood stained) of the victim. Ext. 7 is the seizure-list and Ext. 7(1) is his signature. Material Ext. 2 is the said panty seized by the I.O.

- **18. PW 10**, Sri Hemanta Barah stated that on 23-05-2015 he was working as Home Guard at Itakhola Police Out Post, at the direction of Incharge of Itakhola Police Out Post he accompanied SI Dhariti Choudhury, who was in Civil dress, went to the house of victim. In the house of the victim, SI Dhariti Choudhury took statement of the victim and made video-graph. The compact Disk (CD) of the video graph was hended over to the Incharge of Itakhola Police Out Post. Ext. 6 is the seizurelist and Ext. 6(2) is his signature.
- **19. PW 11** Sri Santosh Kr. Koushik stated that in the next day, he came to know that the victim was in Hospital. On 10-05-2015 he was called by Head Master of their school to attend a meeting regarding the incident. In that meeting the parents of victim and the accused were also present. On seeing the accused, the victim out of fear, went to the lap of her mother. In the meeting everyone suspected that the accused is involved in the incident. Lateron, father of the victim lodged an FIR.
- **20. PW 12** Smt. Dhariti Choudhury, WSI, stated that on 23-05-2015 she was posted at Biswanath Chariali Police station. On that day she was sent to Itakhola Put Post. She accompanied with two constable went to the house of the victim. She was on plain clothes. She had recorded the statement of the victim u/s 161 Cr.P.C. The statement was recorded infront of the Video Camera. The parents of the victim were present at that time. The CD containing the recordings of the Video Camera was handed over to I/C Subleswar Deka. Ext. 6 is the seizure list and Ext. 6(3) is her signature. Material Ext. 1 is the CD containing the Video recording of the statement of the victim.

21. PW 13 Sri Subaleswar Deka, the I.O., stated that on 10-05-2015 he was posed as an Incharge of Itakhola Police Out Post. At about 1 p.m. complainant Durga Bahadur Chetry lodged one written ejahar. He entered GD Entry No. 157 dated 10-05-2015. The original ejahar was sent to O/C Sootea PS. Ext. 2 is the said ejahar and Ext.2(2) is his signature with note. Then O/C Sootea PS registered a case vide Sootea PS Case No. 60/15 dated 10-05-2015 u/s 5(f)(m)/6 of POCSO Act. He has recorded the statement of the complainant, other witnesses like Rita Devi, Tara Saikia, Jiban Sarmah, Dimbeswar Saikia, Mahesh Sarma, Gopal Chetri and Sashan Subba at the Police station. Then he rushed to the place of occurrence. Ext. 8 is the said certified copy of GD Entry and Ext. 8(1) is his signature. Ext. 9 is the sketch map and Ext. 9(1) is his Due to injury sustained by victim, the victim was signature. immediately sent to Dholaibil PHC, but as referred to KCH, Tezpur so the complainant side took the victim to KCH, Tezpur. On being seen the gravity of the injury, the patient was given one unit of blood. Since the injury sustained by victim is due to rape, so the doctor discharged the patient.

On 10-05-2015 the victim was sent to B/Chariali hospital. As there were no female police officer so they requested Smt. Dhariti Choudhury to record the statement of the victim. Accordingly, said woman Police SI recorded the statement of the victim and she prepared a cassette. On 25-05-2015, he sent the victim for recording her statement u/s 164 CR.P.C. As the victim was hospitalized and due to her illness the statement of the victim was recorded lately. Material Ext. 1 is the said Cassette containing the video recording of statement of victim. Ext. 6(4) is his signature in the seizurelist. During investigation he seized one light blue coloured blood stained panty which was used by the victim at the time of occurrence. Ext. 7 is the seizurelist and Ext. 7(1) is his signature. After collecting the medical report and statement of the victim, he filed the charge sheet against accused u/s 5 (f)(m)/6 of the POCSO Act vide Ext. 12 and Ext. 12(1) is his signature.

- **22. PW 14** Miss J. Bora, Munsiff -Judicial Magistrate, 1st class, Rangia, stated that on 25-05-2015 she was working as Judicial Magistrate, 1st class, Tezpur. In reference to Sootea PS Case No. 60/15 u/s 5 (f) (m)/6 of POCSO Act she has recorded the statement u/s 164 Cr.P.C. of the victim at her court chamber who was identified and escorted by WPC 598 Rekha Kotoki. Since the witness was nine years old minor, so she has put some questions and on her answer she is satisfied, accordingly, she had recorded her statement. The witness made statement before her voluntarily. After recording her statement she has read over the contents of the writings and on her acceptance she put her signature thereon. Ext. 1 is the statement of the victim and Ext. 1(5) is her signature.
- **23. PW 15** Kaji Nur Hussain, the scribe of the ejahar, stated that that on 10-05-2015 he was at his Tarani shop situated at Sootea Centre, at the request of complainant he wrote the ejahar and read over to the complainant and then complainant put his signature thereon. Ext. 1 is the ejahar and Ext. 1(3) is his signature as a scribe. In the heading of the ejahar, the date of 10-05-2015 was interpolated with whitener himself.
- **24.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- Learned counsel for the accused submitted that the prosecution has failed to prove the case beyong any reasonable doubt. Firstly, other than the victim none has supported the prosecution case. Even the statement of the victim, there is no any direct evidence as to the alleged offence. Secondly, the black cloth which was alleged to be covered the face of the victim was not seized by the police. Thirdly, though a blue colour panty which was used by the victim at the relevant point of time was found to have been blood stained but that was not sent to FSL to test the blood whether the blood is human blood or animal blood. Thirdly, non-examination of Anamika, Barnali, Gaurab, Bitu etc. who are material witnesses also caste doubt to the prosecution case. Forthly, the

doctor stated that the victim has been hospitalized for four days but the victim stated that she regained her sense after three days of the occurrence. Fifthly, according to PW 4, the village meeting held for the incident, the accused was wearing a black cap but accused has not taken any black cloth. Sixthly, the Cassette prepared by Woman SI of police was not shown in the court. Sevently, the statement of the victim was recorded very lately but the cause of late of examination of victim u/s 164 Cr.P.C. was not clearly explained by the I.O.

26. Per contra, learned Public Prosecutor, Sonitpur, Tezpur submittd 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. First, the victim supported the case clearly. Her evidence clearly reveals that at the relevant time she has been taken to the room by the accused covering her face with a black cloth, as a result, she became unconscious. When she regained her sense she saw accused infront of him and blood was oozing from her private parts. Her statement is corroborated with the FIR, statement u/s 161 and 164 Cr.P.C. Secondly, the doctor PW 5 stated that on examination she found blood stained undergarments. Oozing of blood still present from the vaginal canal. Besides, hymen was found ruptured. Entire perineum shows echymosis and remarked that the injury marks present in her private parts and patient was subjected to sexual intercourse. Though the doctor has been exposed to long cross-examination but the doctor admitted that victim was subjected to sexual assault about 4 days ago and the doctor also admitted that such injury may not occur by falling because in case of falling there would be other injuries also. Thirdly, none of the witnesses was cross-examined by the defence that there is any enmity in between the parties to implicate the accused in such type of heinous activities. Forthly, the statement of PW 1,2,3 and 4 are corroborated to each other. There is nothing to disbelieve the statement of the aforesaid witnesses. Fifthly, the circumstantial evidence of the case also infer the accused in commission of the crime, as such, accused is required to be convicted under the charged section.

- **27.** To fortify the submissions, learned Public prosecutor has submitted the following case laws:-
 - (1) 2008 Cr.L.J (SC) 710 (A) para 15.
 - (2) 2012 Cr.L.J (SC) 693 (B) para 15.
 - (3) 2010 Cr.L.J (SC) 4283 (A) para 15
 - (4) 2006 (SUP) 1 GLT 258 (B) para 16 and 17
 - (5) 2010 Cr.L.J (SC) 889 (A) Para 8 (B) Para 8(C) Para 8
 - (6) 2009 Cr.L.J. (SC) 4133 (B) page 21.
- **28.** I have thoroughly perused the case laws cited by the learned Public prosecutor, Sonitpur, Tezpur.
- **29.** Keeping in mind the argument advanced by learned counsels of both sides, I am going to dispose of the case.
- 30. 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 at school, after having their lunch she went to keep her utensil in a room, accused put a black cloth on her face and took her somewhere, when she regained her sense she found the accused on her, she was lying on a bench, her pant was removed, the accused did something in her private parts, she could not explain, the accused went away through the window, her private part was bleeding and she was having severe pain and thereafter she fainted. Her parents met her outside the school. Lateron she was taken to Kanaklata Civil Hospital. She was also brought to the court to record her statement. Ext. 1 is her statement and ext. 1(2) to 1(4) are her signatures. Though she has been exposed to long cross-examination but the evidence as to at the relevant time after having lunch while she went to kept her utensils in a room, accused put a black cloth on her face and took her somewhere, when she regained her sense she found the accused on her, she was lying on bench, her pant was removed, the accused did something in her private parts which she could not explain, after that her private part

was bleeding and she was suffering from severe pain has remained unchallenged.

- 31. In this case, the victim and her parents and the independent witnesses categorically stated about the incident. Their statements are corroborated with each other. During their cross-examination same has not been disputed at all by the defence. The victim has been consistent with the material particular with regards to the incident that on the day of incident while after having her lunch she went to kept her utensil in a room accused put a black cloth on his face and took her somewhere and when she regained her sense accused was found on her, she was lying on bench, her pant was removed and the accused did something on her private parts which she could not explain, accused went away through window and blood was oozing from her private parts and thereafter she got fainted. The parents met her outside the school. The victim 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.
- **32.** The unrebuttable evidence of doctor is such that at the time of examination of the victim, the doctor found blood stained undergarment and also found bleeding from the vaginal canal, tear present on the left side of the lateral vaginal wall, hymen was found ruptured, entire perineum shows echymosis and the patient was subjected to sexual intercourse. The doctor also admitted that such type of injury may not occur by falling. Thus, such injury sustained in the private parts of the victim due to sexual assault, the doctor has also supported.
- **33.** In the present case at the time of examination of victim some questions were put to her and she replied the same without any hesitation and this court has held that the victim has able to give rational answers thereafter her statement was recorded without oath. Apart from that, other witnesses including the parents of the victim i.e. PW 2 and PW 3 supported the evidence. Besides them, PW 4 and PW 9 have also supported the evidence of the complainant. 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 suggestions but all the witnesses vehemently denied. The evidence of the victim is cogent and reliable. There cannot be any doubt to disbelieve the evidence of the victim. On the other hand, at the time of recording of statement u/s 313 Cr.P.C. all incriminating evidence appears against him are duly put to accused where he denied the evidence and allegation. He simply stated that he is an innocent. At the relevant time he and the Head Master was taking rest at the back side of the verandah of their school. In the mean time Anamika Newar came to them and informed them that there were spirits appeared in the room then he told her that he has been there for last five years but there is no instances appears to him of any appearance of spirit or ghost. Then Anamika came out from the room and told that the victim was crying as because she was bleeding. While the other students were left the place, he by removing her wearing skirt, saw blood was oozing. Then he gave warning to them. He stated that oozing of blood because she applied finger in her private parts. Though accused initially stated that he would like to give evidence through Anamika Newar, Rudra Newar and other one person but ultimately he did not adduce any defence evidence.

34. In Munna Kr. Upadhaya @ Munna Upadhaya Vs. State of Andhra Pradesh reported in **2012 Crl.L.J. 3068**, the Hon'ble Apex Court pleased to held –

"Statement made by the accused u/s 313 Cr.P.C. serves a dual purpose. Firstly, to afford to the accused an opportunity to explain his conduct and secondly, to use denial of established facts as incriminating evidence against him if the accused given incorrect or false answers during the course of his statement u/s 313 Cr.P.C., the court draw an adverse inference against him"

In the instant case the absurd explanation as to his conduct and to deny the established fact by the accused can easily drawn an adverse inference against him.

- **35.** 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.
- **36.** 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.

- **37.** Similarly, Section 30 of POCSO Act mandates that the Special Court shall draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of the accused. Section 30 reads as under:
- "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume that existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probabilities.
- **38.** 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."

- **39.** 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.
- **40. 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.
- **41.** 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.

42. 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.

Learned counsel for the accused submitted that non examination of Anamika, Barnali, Gaurab, Bitu etc. who were material witnesses caste doubt to the prosecution story. It is true that the prosecution has failed to examine the aforesaid witnesses who were present in the school.

- 43. In this case, I may mention a case law i.e. Md. Khalid Vs. State of West Bengal reported in 2002 SCC Crl. 1734. It has been held that "Normally, the prosecution's duty is to examine all the eye witnesses, the selection of whom has to be made with due care, honestly and fairly. The witnesses have to be selected with a view not to suppress any honest opinion, and due care has to be taken that in selction of witnesses, no adverse inference is drawn against the prosecution, However, no general rule can be laid down that each and every witness has to be examined even though his testimony may or may not be material. the most important factor for the prosecution being that all those witnesses strengthening the case of the prosecution have to be examined, the prosecution can pick and choose the witnesses who are considered to be relevant and material for the purpose of unfolding the case the prosecution. It is not the quantity but the quality of the evidence that is important. In the case at hand, if the prosecution felt that its case has been well established through the witnesses examined, it cannot be said that non-examination of some persons rendered its version vulnerable."
- **44.** Coming to the present case, it appears that according to the prosecution story after the occurrence the aforesaid witnesses were

present. But there is no any evidence that the victim has informed about the incident to any of the aforesaid students, therefore, when there is other convincible and reliable witness, so non-examination of aforesaid witnesses cannot be a ground to discard the prosecution story.

45. Another point may be discussed that PW 2 and PW 3 are the mother and father respectively of the victim, therefore, the question may raise at to the interestedness of their evidence.

Law is well settled that the interested witnesses are not necessarily false witness. Though the fact that those witnesses have personal interest or stake in the matter must put the court of its guard, that the evidence of such witnesses must be subjected to close scrutiny as the court must assess the testimony of each important witness and indicates the reasons for accepting or rejecting it and that no doubt should be at once discarded simply because, it came from interested parties. [Vide – (a) Siya Ram Rai Vs, State of Bihar (1973) 3 SCC 241; (b) Sarwan Sing Vst. state of Punjab (1976) 4 SCC 369; (c) Birbal Vs. Keder AIR 1977 SC; (d) Anvaruddin Vs. Shakoor JT (1990) 2 SC 83].

- **46.** Coming to the present case, it is true that PW 2 and 3 respectively are mother and father of the victim. As stated above, there is no eye witness except the victim as the incident took place inside a room of a school 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 and 3 who have supported the prosecution case, there are other witnesses i.e. PW 4, PW 6, PW 9 and PW 10 who also supported the prosecution case. Therefore, the evidence of PW 2 and 3 cannot be thrown overboard simply on the ground of interestedness of their evidence.
- **47.** In the present case it appears that neither the prosecutrix nor any of the witnesses has been examined on any bitter enmity in between the victim and the accused. There is no any evidence that there is any quarrel which led to enmity in between the family members of the victim with the accused. There is no any iota of evidence that the

victim has been subjected to punishment for different means by her teacher (accused) for which the victim planned to trap the accused to retaliate. 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 minor daughter at stake by falsely pressing commission of penetrative sexual intercourse. Therefore, the statement of victim is found to be worthy of credence, convincing and reliable.

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

Firstly, there is an evidence that after 12 O'clock of the day of incident, the accused by putting a black cloth on the face of the victim took her to a room from the room where the victim went to keep her utensils, when she regained her sense she was found accused on her, she was on bench. Her pant was removed, the accused did something in her private parts and her private parts was bleeding then accused went through the window. Secondly, other than accused at the relevant time none was present in the room. Thirdly, on being informed by Head Master at about 1 p.m. about the incident of illness of victim, the parents of the victim rushed to the school and met the victim sitting on a culvert near the school, they found severe bleeding from the private parts of the victim, so they took the victim immediately to North Jamuguri hospital, then to KCH, Tezpur where she was given blood and saline and gave treatment by the doctor. The doctor opined that that was a rape case. Fourthly, the doctor found profuse bleeding in the private parts of the victim, tear present on the left side of the lateral vaginal wall, hymen was found ruptured, entire perineum shows echymosis and the victim was subjected to sexual intercourse. Fifthly, the victim reported the incident to her parents. Sixthly, after the incident, the victim has been treated for more than 8 days for injury of private parts. Seventhly, in the meeting called by the Head master of the school, local public, VDP secretary, teachers, parents of the victim were also present. In the said meeting accused was present by wearing

a black cap, where the victim identified the accused and on being seen the accused out of fear the victim jumped into the mother's lap and after the meeting the parent and teachers all were decided to go Police station where accused was also supposed to go but he fled away. Eighthly, there is no enmity appears in between the family members of the victim with the accused. Ninthly, the evidence of the attitude, conduct of the accused that he being a teacher even after see the profuse bleeding of a student (victim) he failed to inform the matter to the Head Master or to the doctor. Lastly, the accused simply denied his guilty but gives an absurd explanation of appears of ghost/spirit while his statement was recorded u/s 313 Cr.P.C.

- **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 the school. These established circumstances did not admit of explanation of any other hypothesis then that of the guilt of the accused Kushal Nath.
- **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 Kushal Nath 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 Kushal Nath is a man of 45 years and he is a teacher. 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 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 46 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 Kushal Nath 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. 25,000/- (Rupees twenty five 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.

57. A copy of this judgment be furnished to the accused free of cost and a copy thereof be sent to the District Magistrate, Sonitpur, Tezpur, as per provisions of law.

Send a copy of this Judgment to the Central Jail, Sonitpur, Tezpur.

Given under my Hand and Seal of this Court on this the 11^{th} day of May, 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

1. Prosecution Witness No.1 :- Victim.

2. Prosecution Witness No.2 :- Smt. Rita Devi.

3. Prosecution Witness No.3 :- Sri Durga Bahadur Chetry, informant.
4. Prosecution Witness No.4 :- Smt. Tara Saikia, VDP Secretary.

5. Prosecution Witness No.5 :- Dr. Mina Bora Biswasi, M.O.

6. Prosecution Witness No.6 :- Sri Jiban Sarmah
7. Prosecution Witness No.7 :- Dr. Sisir Baidya, M.O.
8. Prosecution Witness No.8 :- Sri Ratul Mech,
9. Prosecution Witness No.9 :- Sri Gopal Chetry,

9. Prosecution Witness No.9 :- Sri Gopal Chetry, 10. Prosecution Witness No.10 :- Sri Hemanta Borah

11. Prosecution Witness No.11 :- Sri Santosh Kr. Kousihk.
12. Prosecution Witness No.12 :- Smt. Dhariti Choudhury, WSI,

12. Prosecution Witness No.12 :- Smt. Dhariti Choudhury, WSI, 13. Prosecution Witness No.13 :- Sri Subaleswar Deka, I.O.

14. Prosecution Witness No.14 :- Miss J. Bora, Munsiff -Judicial

Magistrate, 1st class, Rangia

15. Prosecution Witness No.15 :- Kaji Nur Hussain.

EXHIBITS.

Exhibit 1 Statement of the victim u/s 164

Cr.P.C.

Exhibit 2 :- FIR

Exhibit 3 :- Medical report

Exhibit 4 :- Discharge certificate of B/Chariali

Sub- Divisional Civil Hospital.

Exhibit 5 :- Medical report.

Exhibit 6 & 7 :- Seizurelists.

Exhibit 8 :- Certified copy of GD Entry

Exhibit 9 :- sketch map

Exhibit 10 :- Blood bank ticket.

Exhibit 11 :- KCH certificate about giving of

blood.

Exhibit 12 :- Chargesheet.

Material Exhibit.

1. Material Exhibit 1 : Compact Disk

2. Material Exhibit 2 : Panty of the victim.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR