

**IN THE COURT OF THE SPECIAL JUDGE :: :: MORIGAON, ASSAM**

*Present: Sri S. K. Poddar, AJS  
Sessions Judge cum Special Judge  
Morigaon, Assam.*

**POCSO Case No. 22/2017**  
**U/S 376(2)/506 IPC r/w Section 4 of the POCSO Act**

State of Assam

**-VS-**

Sh. Bibek Roy @ Bibekananda  
S/o Late Chasindra Roy  
R/o Village- Singimari, Bilormur  
P.O.- P.S. – Morigaon  
Assam. .... Accused

Date of Charge : 01.11.2017.  
Date of Evidence : 18.09.2018, 26.10.2018, 27.11.2018,  
05.02.2019, 12.03.2019, 11.07.2019.  
Date of S/D : 06.08.2019  
Date of Argument : 07.01.2020  
Date of Judgment : 21.01.2020  
Judgment delivered on : 24.01.2020

**Appearance for the Parties**

Advocate for the State :- Mr. A. Kalam, Spl PP, Morigaon.

Advocate for the Accused :- Mr. U. C. Roy, Advocate.

**J U D G M E N T**

**1.** Prosecution case in brief is that on 23.12.2015, Sri R Biswas lodged a FIR with Morigaon Police Station alleging inter-alia that on 21.12.2015, at about 1:00 PM, the accused called the victim 'J' (name withheld), aged about 8 years, daughter of the informant from the road and took her inside his house and after locking the door, accused pulled the panty of the victim, laid her on the bed and forcefully committed rape on the victim. The accused also restrained the victim from disclosing the incident to others and gave Rs. 500/-

for the same. The accused further criminally intimidated the victim for her life in the event of disclosure of the incident to others. It is also mentioned in the FIR that, prior to this also, the accused committed forceful sexual intercourse with the victim by calling her to his house and sent her back by paying Rs. 20/- Rs. 25/- on such occasions.

**2.** On receipt of the FIR, Morigaon PS Case No. 358/2015 u/s 342/376(2)(i)/506 IPC r/w Section 4 of the POCSO Act, 2012 was registered and investigated into. During investigation, the victim was medically examined and statement of the victim was recorded u/s 164 Cr.P.C and on completion of investigation, the Investigating Officer (i/o) submitted charge sheet against the accused Sh. Bibekananda Roy @ Bibek Roy for trial u/s 342/376(2)(i)/506 IPC r/w Section 4 of the POCSO Act, 2012.

**3.** It may be mentioned herein that during investigation, on 19.09.2016, the accused surrendered before this Court with a prayer for bail but his prayer was rejected and he was remanded to judicial custody. Subsequently, vide order dated 16.12.2016, the accused was allowed to go on bail.

**4.** On 14.07.2017, charge sheet was laid before this Court. After compelling attendance of accused, vide order dated 01.11.2017, charges u/s 376(2)/506 IPC r/w Section 4 of the POCSO Act, 2012 were framed and explained to the accused to which he pleaded not guilty. During trial, prosecution has examined as many as eight witnesses including the Medical officer and the Investigating Officer.

**5.** Upon completion of prosecution evidence, the accused was examined u/s 313 Cr.P.C. The accused denied to adduce defence witness when he was called upon to do so. The defence case is of total denial and false implications.

**6.** I have gone through the record. Heard Mr. A. Kalam, learned special public prosecutor appearing for the State and Mr. U. C. Roy, learned defence counsel for the accused person. During arguments hearing, learned

counsel for the accused has relied upon the reported case of (i) **2018 SC AJ 252 Dola @ Dolagobinda Pradhan and Anr. Versus State of Odisha** & (ii) **2019 (1) GLT 17 Abhijit Dutta vs. State of Assam & Anr.**

**POINTS FOR DETERMINATION ARE:**

7. (i) *What is the age of the victim on the date of the alleged occurrence?*
- (ii) *Whether the victim was subjected to penetrative sexual assault by the accused?*

**DISCUSSION, DECISION AND REASONS THEREOF**

8. PW-1, Sri R Biswas, the informant of the case and father of the victim, in his evidence deposed that on 21/12/2015 the victim was aged about eight years. On that day, on returning home, seeing his daughter and wife were weeping, on asking the victim told him that while she was going to the paddy field to call him and while crossing the house of the accused, she was taken by the accused to his house and after closing the door of the house, accused removed her underwear and committed sexual intercourse with her. On knowing this, he informed about the matter to the villagers, local woman organization and VDP secretary of their village. In the meantime, the accused fled away. As advised by villagers, he lodged the case before the police station. There was two days delay in filing the case due to the assurance of the village people to organize a meeting (*Bichar*). Exhibit 1 is the FIR lodged by him. In cross-examination, PW 1 stated that the distance between his house and the Morigaon P.S. would be about 3-4 km. The FIR was written by an advocate named Salam. He has not cause of two days delay in lodging the said ejahar. Houses of Bhimeswar Konwar, Dipak Bordoloi, Ranjit Bordoloi are located near the house of accused. There are about fifteen households located in that area. There is a *Morapat Kheti* between the house of accused and his house. The family of the accused had lodged a rape case against him but after this case. The house complex of the accused has a residential house and a kitchen separately. On the day of the incident, he reached his home at about 1:30 PM. At that time, he did not find any other persons in his house, apart from his wife

and his daughter. VDP Secretary is Chandra Kanta Nath and the name of their Gaon Burah is Hareswar Bordoloi. After the incident, he did not take his daughter for any medical examination to the doctor. After the incident, he informed about the incident to the Gaon Burah, VDP Secretary, Nigam Biswas, Dhiren Sarkar, Keshab Master. No formal village *Bichar* was held with regard to the incident. He has three children and victim is his youngest child. There is a road in front of his house and people often commute on the road. Most of the people in that area are cultivators. The accused is a married person and his own daughter is little elder to victim. In the village, there are many children of the age of victim and they often play together. He denied the defence suggestion that *victim did not tell him about any such incident as narrated by him in his evidence*. The Mahila Santha of their village to whom he informed about the incident has members and he knows one of them, namely, Binu Konwar. He denied the suggestion that as the rape case lodged upon him by the family of the accused prior to this case and that due to said case lodged upon him by the family of the accused, he has lodged the instant case.

**9.** PW-2, the victim in her evidence deposed that at the time of incident she was eight years old. On that day, in the morning her father was in the paddy field and she had gone to the field to call her father. On the way to the field, when she was passing by the house of the accused, he told her to see some movies on the mobile phone. Accordingly, she went to his house and thereupon, accused put on the hook of the door of the house. Thereafter, the accused threw her on the bed, gagged her mouth with a *Gamocha*. Then he removed her pant and forcefully committed sexual intercourse (*Beya Kaam*) on her. She got pain and cried. After some time, he gave her ₹ 500/- and told her that she should not tell about it to her parents and that if she does so, he would kill her. At that time, the other family members of accused had gone to the house of his relative (*Mama*). Then she went to her house and was crying. Upon asking by her mother, she told about the incident. After some time, her father came back from the field and then she told about the incident to her father also. After few days, she was taken to the police station. The police took

her to the doctor. The police also took her to the court where she stated before the court. Exhibit 2 is her statement that she made before the court and Exhibit 2(1), 2(2) and 2(3) are her signatures thereon. In cross-examination, the victim stated that in their locality, there are many children of her age. On the day of the incident, when she had gone to the paddy field to call her father, she cannot say as to in which direction she had gone. She does not remember as to how many days after the incident the police had gone to her house. But the police had come when they took her to doctor and court. On the day of the incident, when she had gone to the paddy field to call her father, she was wearing top, gown and pant. Near the house of the accused, house of Rajkumar and two other houses are located at some distance. At the time of the incident, when the accused was committing misdeed (*Beya Kaam*) upon her, she was crying but no persons had come there. Due to misdeed by accused, she had some bleeding. After the incident, she came back to her house, wearing the same clothes, which she was wearing. She was given some medicine by one Pradip Biswas. She denied the suggestion that she had not stated before the police that her father was in the paddy field and she had gone to the field to call her father; that when she was passing by the house of the accused, he told her to see some movies on the mobile phone; that accused gagged her mouth with a Gamocha. She denied the defence suggestion that she has falsely deposed regarding taking her inside the house, gagging her mouth, committing misdeed and paying Rs. 500/- and for criminal intimidation by accused. She also denied that she has deposed in the court on the tutoring of her parents. She also denied the suggestion that the accused did not commit the misdeed (*Beya Kaam*) with her.

**10.** PW-3, Sh. Birkumar Roy in this evidence deposed that at the time of the incident the victim was aged about 7-8 years. He came to know about the incident but he does not know the details of what happened in that incident. The defence declined to cross-examine him.

**11.** PW-4, Smti. A. Biswas deposed, mother of the victim in her evidence that at that time of incident, the victim was aged about 8 years. On the day of the incident, the victim went out for looking her father in the field. After sometime while she was cooking in the kitchen, the victim came home crying and upon asking, she told her that while she was going to meet her father, upon reaching near the house of the accused, the accused told her to come to his house and watch TV. Accordingly, she went to his house and then the accused closed the door and gagged her mouth and committed sexual intercourse upon her. She stated that she examined her genitals and found bleeding. Thereafter, she made her take bath. The victim further told her that the accused gave her Rs. 500/- and told her not to tell about the incident to anyone. Subsequently, she and her husband went to the Doctor and brought some medicine for the victim. Thereafter, they took the matter to the Village Ladies Organization and who told that they will try to do a *Bichar*. In the meantime the accused went missing from his house. Subsequently, her husband lodged the instant case upon the accused. In cross-examination, she stated that the distance between her house and the house of the accused is covered by one Bigha Land. On the day of the incident, when her daughter had gone out to the paddy field to meet her father, she came back to the house after about half an hour. On the day of the incident, the victim was wearing a frock and an under-pant beneath. She admitted that the victim was having bleeding from her genitals, which has also stained her underwear and she had also washed it. They had consulted doctor Pradeep for victim after the incident. She further stated that after the victim came home crying after the incident, a little while later, one Subhadra came to their house. The accused is not related to them in any way. Her husband lodged the case two days after the incident. The distance between their house and Morigaon police station and Morigaon Civil Hospital would be about 4 kilometers. Vehicles travel on that road. She admitted that one rape case was filed against her husband and they had requested for a compromise in that case but other side did not agree. She denied the suggestion that the accused was a witness in the said rape case. Police had not

seized the under-pant or any other clothes of the victim. She had applied medicines to the genital of the victim for one week. She denied the suggestion that she falsely stated about the incident. She admitted that she had not given the Rs. 500/- to the police which the accused had given to the victim after the incident. Subhadra is the Secretary of the Mohila Samiti and the VDP secretary is Chandra Nath. She denied the suggestion that she has falsely stated that they had requested for a village *bichar*. She also denied the suggestion that the accused is not involved in the incident. She denied the suggestion that they have lodged a false case upon the accused due to the rape case lodged upon her husband. Their case was lodged prior to the lodging of that case.

**12.** PW-5, Sh. Jatin Mandal in his evidence deposed that on 21.12.2015 and on that day, he was informed on telephone by R. Biswas (PW-1) that accused had committed sexual intercourse with his minor daughter the victim. Thereupon, he advised him to call for a village meeting to address the issue. He also went to the house of the informant and talked with the victim who told him that the accused called her from the road and took her to his house and committed sexual intercourse upon her. The victim also told him that the accused had done this on several occasions. She also told him that the accused told her not to reveal the matter to anyone and that the accused used to pay her some money from time to time after committing sexual intercourse. In Cross-Examination, he stated that the distance between his house and the house of the informant would be about 2 KMs. When the informant (PW-1) telephoned him, he was at home and it was about 1 PM. He came to the house of the informant on the next day and upon reaching there he found about 10-12 persons present there, but he does not know their names. The informant is his younger brother in relation. On the day of the incident itself, the victim was brought to the Morigaon Civil Hospital by police for medical examination. He denied the suggestion that he did not state before the police that - *She told his that the accused called her from the road and took her to his house and committed sexual intercourse upon her; that the accused had done this on several occasions; that the accused told her not to reveal the matter to anyone;*

*that the accused used to pay her some money from time to time after committing sexual intercourse.* He also denied the suggestion that he has falsely deposed about the incident by accused. The wife of the accused had lodged a rape case against the informant R. Biswas. This case was lodged around the same time after lodging of the case by R. Biswas. He stated that he has stated about the commission of sexual intercourse upon the victim by the accused on the basis of what he was told by R. Biswas (PW-1).

**13.** PW-6, Samsul Alam, the Investigating Officer in his evidence deposed that during investigation of Morigaon PS Case No. 358/2015 he visited the place of occurrence, drew a sketch map ( Ext. 3), examined the victim and thereafter also forwarded her to the court for recording her statement before the Magistrate. Ext. 2 is the said statement of the victim recorded before the Magistrate. Though he had searched for the accused but could not find him. Later, he collected the Medical Report of the victim. In Cross-Examination, PW 6 deposed that as per the ejahar, the date of occurrence is 21.12.2015 and the case was registered on 23.12.2015. He has not found any GD Entry in his case diary regarding the incident between 21.12.2015 and 23.12.2015. Reason for delay of 2 days in lodging the same was not mentioned in the FIR. There is no evidence of any village *bichar* regarding the incident. He had not recorded the statement of VDP Secretary Chandra Kanta Nath and the Gaonburha Hareswar Bordoloi. He has also not recorded the statements of persons namely, Bhimeswar Konwar, Dipak Bordoloi and Ranjit Bordoloi. He has also not recorded the statement of any person Subhadra. He admitted that witness Jatin Mandal (PW-5) did not state before him that he had heard about the incident from the victim. He also admitted that said witness Jatin Mandal (PW-5) did not state before him that - *She told him that the accused called her from the road and took her to his house and committed sexual intercourse upon her; the accused had done this on several occasions; that the accused told her not to reveal the matter to anyone; that the accused used to pay her some money from time to time after committing sexual intercourse.* He did not seize any clothes etc, including any undergarments from them. During investigation, he

did not examine any pharmacist or indigenous village doctor. The informant side had not submitted before him any prescription etc. for the period from 21.12.2015 to 23.12.2015. During investigation, he collected the Medical Report of the victim from the Morigaon Civil Hospital, Morigaon.

**14.** PW-7, Sh. Kamakhya Mishra, another Investigating Officer in his evidence deposed that on taking charge of further investigation, finding that the investigation was almost completed, he after recording the statement of the accused who was in jail custody submitted charge-sheet against the accused u/s 342/376(2)(i)/506 IPC r/w section 4 of the POCSO Act. Ext. 4 is the charge-sheet. In cross-examination, he stated that he received the case diary from his Officer-in-Charge on 20.09.2016. He had not visited the place of occurrence. He submitted the charge-sheet on 19.11.2016.

**15.** PW-8, Dr. Nashrin Ahmed who conducted the medical examination of the victim in her evidence deposed that that on 23.12.2015, she examined victim 'J' D/o Sh. R Biswas in connection with Morigaon PS case No. 358/2015, who came to her with history of rape upon her by Vivek Roy on 21.12.2015 at 12.30 PM. She also recorded that there were attempts of rape upon the victim by the accused on several occasions before. On examination, she did not find any external or internal injury. The test of vaginal smear gave negative test for spermatozoa. Urine test for pregnancy was found to be negative. The Medical Officer opined that at the time of examination there was no evidence of recent sexual intercourse. There was no evidence of recent internal or external injury. Clinically the age of the victim was 11 to 12 years. She exhibited the Medical Report vide Ext. 5 and her signature thereon vide Ext. 5(1). In cross-examination, the Medical Officer stated that during examination, the vaginal hymen was found to be intact. The genital parts of a girl of 11 to 12 years of age would be comparatively softer. In case of any injury on the genital parts, it would be found during the examination. Such injuries, if any, could be present for 4-5 days. During examination no redness or inflammation was found on the

genitals of the patient. She stated that in case of commission of rape on such a girl, the vaginal hymen would most probably be absent.

**16. Point No. I:** So far, the age of the victim is concerned, PW-1, father of the victim, in his evidence claims that at the time of the incident, his daughter was aged about 8 years. Similarly, PW-4, the mother of the victim, PW-3 a neighbor and PW-2, the victim herself claims her age as 8 years. No challenge was made by the accused side regarding the age. The Medical Officer however, in her evidence stated that age of the victim was about 11 to 12 years. No other documents were collected by the Investigating Officer regarding the age of the victim. Under these circumstances, considering that the parents of the victim are the best persons to say about the age of their daughter, I held that, at the time of the incident, the victim was about aged 8 years.

**17. Point No. II** So far the alleged incident of penetrative sexual assault on the victim is concerned, it appears that PW-1 and PW-4, parents of the victim came to know about the incident from the victim who after return from the house of the accused informed the matter to them. Upon looking at the evidence of the victim as narrated herein before, it appears that on that day, while she was going to the paddy field to call her father, the accused called her to his house on the plea of showing some movies on the mobile phone and thereafter, she was taken inside the house, door was closed and after gagging her mouth with a gamocha, her panty was removed and forceful intercourse was committed. This part of evidence is corroborated by PW-1 and PW-4, the parents of the victim. However, the medical evidence as mentioned here-in-before do not support the same as no injury was found in the private part of the victim. It may be mentioned herein that the incident took place on 21.12.2015, at about 1:00 PM, and the victim was examined by the Medical Officer on 23.12.2015, at 2:30 PM i.e. almost after 50 hours. Though in the evidence, PW-7 has mentioned the date of examination as 20.09.2016 but on looking at the Ext. 5, the date of examination is mentioned as 23.12.2015. On

looking at the Medico-legal Report, it appears that at the time of the examination of the victim, said Medical Officer did not find evidence of recent sexual intercourse and no evidence was found regarding any injury on the private part of the victim. In her cross-examination, the Medical Officer has stated that in case of any injury on genital parts of the age of victim, it would be found during examination and such injury can be present for 4 - 5 days. She also did not find any redness or inflammation in the genitals of the victim. Moreover, in case of commission of rape on such girl, the vaginal hymen would be found absent but in this case same was found intact.

**18.** If we look at the evidence of PW-4, the mother of the victim, it appears that after return of the victim from the house of the accused, she found bleeding from the vagina and then she and her husband brought some medicine from doctor. In her cross-examination, PW-4 admitted that, she had applied medicines to the genitals of the victim for one week. This part of the evidence of the mother of the victim clearly contradicts the evidence of the Medical Officer as discussed earlier. It may be mentioned here that at the time of the examination of the victim, the Medical Officer recorded history of penetrative sexual assault on the victim and as such, it can be presumed that she has examined the victim carefully. Thus, non finding any injury mark on the genitals of the victim who was aged about 8 years inspite of alleged forceful penetrative sexual assault by the accused who was apparently aged about 36 years old at the time of the incident clearly casts serious doubt on the allegation of penetrative sexual assault.

**19.** It may be mentioned herein that it is in the FIR and also in the evidence of the victim that prior to the incident of 21.12.2015, on earlier 2-3 occasions the accused used to take her to his house and forcible penetrative sexual assault was made on the victim. Had that been so, certainly the Medical Officer could not have found the hymen intact. Though, to become an offence of penetrative sexual assault even putting of the penis into libia majora can be amount to rape, but in this case the evidence is of forceful penetration on 3 - 4

occasions. Under that facts and circumstances, not getting injury is a vital aspect.

**20.** Hon'ble Supreme Court of India in the case of *Sadashiv Ramrao Hadbe v. State of Maharashtra*, (2006) 10 SCC 92 observed as follows:

*"9. It is true that in a rape case the accused could be convicted on the sole testimony of the victim, if it is capable of inspiring confidence in the mind of the court. If the version given by the victim is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the victim, the court shall not act on the solitary evidence of the victim. The courts shall be extremely careful in accepting the sole testimony of the victim when the entire case is improbable and unlikely to happen."*

**21.** This case was relied in the case of Dola @ Dolagobinda Pradhan and Anr. Versus State of Odisha [**2018 SC AJ 252**] as relied by learned counsel for defence.

**22.** Hon'ble Supreme Court of India in the case of K. Venkateshwarlu v. State of A.P., (**2012**) **8 SCC 73**

*"9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the*

*evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it."*

**23.** This case was relied in the case of Abhijeet Dutta Versus State of Assam [**2019 (1) GLT 17**] as relied by learned counsel for defence.

**24.** Apart from the above, if we look at the evidence of the victim, it appears that in her evidence during trial, she stated that the accused threw her on bed, gagged her mouth with a gamocha and he removed her panty. However, on looking at the statement of the victim recorded u/s 164 Cr. PC, it appears that the accused asked her to sleep on the bed and on asking to open her panty, she on her own opened her panty and thereafter penetration was done on her vagina. In her 164 Cr.P.C statement, she is totally silent regarding throwing her on the bed, gagging her mouth with a gamocha and removing her pant by the accused. This part of evidence shows inconsistency in evidence as to how the incident happened.

**25.** Apart from the above, it is in the FIR that after committing the penetrative sexual assault on 21.12.2015, the accused gave Rs. 500/- to the victim so as not to disclose the incident to other. However, PW-1 is totally silent regarding payment of Rs. 500/- on that day. The victim is also silent regarding payment on that day. However, PW-4, mother of the victim has stated that upon return of the victim, she told her that the accused gave her Rs. 500/- for not to tell the incident to other. In cross-examination, she admitted that she did not give the Rs. 500/- to police which was given to her daughter. The victim in her statement recorded u/s 164 Cr.P.C, however told different facts on this point. According to her, after the incident dated 21.12.2015, she was allowed to go back her home. The victim admitted that the accused paid Rs. 500/- ten days back at the time of doing penetrative sexual assault on the first occasion. Thereafter, she was subjected to penetrative sexual assault on other 2 - 3 occasions for which she was paid Rs. 20/- on each day by the accused.

**26.** All this above discrepancies in evidence clearly shows that the victim who was the best witness, has deviated from her previous statements on

material points and thereby makes herself unbelievable and untrustworthy evidence.

**27.** Section 29 of PocsO Act provides for drawing of presumption about truthfulness of the evidence of the victim. Hon'ble Gauhati High Court in the case of **Latu Das Vs State of Assam** (Crl. Appeal (J) No. 55 of 2018) decided on 29.10.2019 has interpreted Section 29 as follows .....

*24. We also take note of the presumption under Section 29 of the POCSO Act which provides that when a person is prosecuted for committing or abetting or attempting to commit any offence under Section 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. The above statutory presumption, which a Court is bound to raise in a prosecution for offence under Section 3, 5, 7 and 9, of the POCSO Act put a reverse burden on the accused, which is an exception to the general principle of criminal justice, that burden to prove the guilt beyond reasonable doubt lies on the prosecution, and the accused has a right to remain silent. The statutory presumption under Section 29 of the POCSO Act creates a restriction on the accused's right to remain silent. Because once there are adequate material for raising a presumption under Section 29 of the PCSO Act, the special court is justified in recording conviction on the basis of such presumption, unless the accused rebut, the presumption, or proves the contrary, to what was/were the basis of raising presumption.*

*25. However, one must bear in mind that presumption is not in itself evidence, it is only inference of fact drawn from other known or proved facts; and as such, in order to draw a presumption, statutory or otherwise, there must be existence of proved facts, from which a presumption can be raised. Therefore, presumption under Section 29 of the POCSO Act, does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt. It only lessen its burden to some extent and put a corresponding burden on the accused. Initial burden in a criminal case is always on the prosecution to bring on record reasonable evidence and materials to prove that the accusation brought against the accused is true. Once such evidence or*

*materials are brought on record prima facie establishing the case of the prosecution, then only the Court is obliged to raise presumption under Section 29 of the POCSO Act and in that situation only the burden stands shifted to the accused to rebut the presumption. If the accused fails to rebut the presumption, Court is justified to hold the accused guilty of offence under Section 3, 5, 7 & 9 of the POCSO Act."*

**28.** Keeping the above interpretation of law in mind, if we turn to the case in hand, in view of the discussions made here-in-above, I am of the opinion that Section 29 of the POCSO Act, 2012 cannot be applied in this case to draw a presumption regarding truthfulness of the evidence of the victim. Considering the infirmities as discussed, I am of the opinion that presumption stands rebutted and the prosecution has to prove the allegation beyond reasonable doubt.

**29.** Looking at the evidence for proving the case beyond reasonable doubt, from the evidence, it appears that after the incident, the matter was informed to the villagers particularly Mahila Samity members but none of them were brought on record. PW-3, the neighbor of the victim and the accused appears to know some incident but he admitted that he does not know details as to what happened in the incident. PW-5 in his evidence, though stated that he heard from the victim about the incident, but the victim remained silent regarding informing to the PW-5. Even the Investigating Officer has claimed that PW-5 has not stated before him about hearing the incident from the victim. As such, PW 5 has exaggerated his evidence from his previous statement. Subhadra, the Mahila Samilty secretary who came to the house of victim just after the alleged incident, the local doctor Pradeep who provided medicine to the victim were not produced before court for evidence and no reason was shown for their non examination certainly amount to withholding material evidence.

**30.** It is the prosecution case that soon after the incident, the informant has informed the matter to the woman organization existing in the village and also informed the matter to the VDP Secretary of the village but

none of them was examined by police as witness. No evidence was laid to show that any village meeting was called on this incident. This fact was admitted by the Investigating Officer. During investigation he did not find any evidence of village meeting. Under these circumstances, delay of two days in filing the FIR more particularly when the police station is at a distance of 3-4 KM from the house of the informant, casts serious doubt on the prosecution story.

**31.** Apart from the above, admittedly on the allegations of rape by the informant, an FIR was lodged against him by the accused and this fact was admitted by the witnesses particularly PW-3 and PW-5. As such, possibility of false implications against the accused cannot be totally ruled out.

**32.** From the above discussion, I am of the opinion that in this case, prosecution has failed to bring home the charges against the accused beyond reasonable doubt and the accused is entitled for benefit for doubt.

**33.** Consequently, accused Sri Bibekananda Roy @ Bibek Roy is acquitted from the charges u/s 376(2)/506 IPC r/w Section 4 of the POCSO Act, 2012 and set at liberty forthwith.

**34.** Bail bond executed by the accused and his surety are extended for another six months from today U/S 437-A Cr.P.C.

**35.** Considering the nature of the case, the matter is not referred to DLSA for granting compensation U/S 357 A Cr.P.C.

**36.** Send a copy of the judgment to learned District Magistrate, Morigaon U/S 365 Cr.P.C.

**37.** Judgment is pronounced in open court. The case is disposed of on contest. Due to absence of accused on 21.01.2020 and same is delivered today in presence of accused.

Given under my hand & Seal of this Court on this the, 24<sup>th</sup> day of January, 2020.

Special Judge,  
Morigaon:

## **APPENDIX**

### **1. Prosecution witnesses :**

- P.W.1 - Sri R Biswas (Informant).
- P.W.2 - Victim 'J'.
- P.W.3 - Birkumar Roy.
- P.W. 4 - Smt. A. Biswas.
- P.W. 5 - Sh. Jatin Mandal.
- P.W. 6 - Sh. Samsul Alam. (I/O)
- P.W. 7 - Sh. Kamakhya Mishra. (I/O)
- P.W. 8 - Dr. Nashrin Ahmed (MO)

### **2. Defence witnesses - None**

### **3. Court witnesses - None**

### **4. Exhibits by prosecution:**

- Exbt. 1 - Ejahar.
- Exbt. 2 - 164 Cr.P.C. statement of the victim.
- Exbt. 3 - Sketch map.
- Exbt. 4 - Charge sheet.
- Exbt. 5 - Medical Report.

Special Judge,  
Morigaon