

**BEFORE THE JUVENILE JUSTICE BOARD, BONGAIGAON**

**Present:** Mrs. S. Handique, AJS

Principal Magistrate, JJB, Bongaigaon

Mr. D. C. Basak,

Member, JJB, Bongaigaon

Mrs. R. Choudhury,

Member, JJB, Bongaigaon.

**JJB Case no. 38/13**

**(u/s 4 of the POCSO Act, 2012)**

**State**

**V.**

**Mayadul Islam**

Evidence recorded on: 3-7-14, 24-7-14, 19-8-14

Juvenile examined u/s 313 Cr. P.C. on: 26-8-14

Arguments heard on: 28-8-14

Judgment delivered on: 9-9-14

For prosecution: Mr. T.K. Bhowmik

For defence: Mr. M. Rahman

**JUDGMENT**

1. The prosecution story of this case before the JJB is that S.I. Khirod Dey of Bongaigaon P.S. lodged an FIR on 10-9-13 stating that on 9-9-13 at about 10.30 P.M. he received an information over phone that a minor girl has been raped in Bhowlaguri area and a huge public had gathered. On receiving the information he arrived at the Masjid near Bhowlaguri and he came to know that a 19 year boy called Mayadul Islam has raped a nine years old girl named 'X' (name withheld) at about 2.30 P.M. The mother of the victim came to know about the incident after returning from her workplace and she informed the villagers. The villagers then

called the culprit and detained him in the shop of Md. Musharaf. The informant rescued the culprit and brought him to the police station. As the guardians of the victim did not lodge any FIR, so the informant lodged the FIR considering the gravity of the case.

2. The FIR was registered as Bongaigaon P.S. Case no. 446/13 u/s 376 (F) IPC. During investigation the I/O made a prayer before the Id CJM, Bongaigaon for inserting Section 4 of the Protection of Children from Sexual Offences Act, 2012 ( hereinafter referred to as POCSO Act) instead of Section 376 (f) IPC. The Id. CJM, Bongaigaon allowed the prayer made by the I/O, thereafter the case was forwarded to the court of Id. Sessions Judge for necessary action. The Id. Sessions Judge, Bongaigaon after perusing the matriculation certificate and ossification test report of Mayadul Islam declared him to be a juvenile and sent the case record back to the court of Id. CJM, Bongaigaon. The case was then received by this Juvenile Justice Board, Bongaigaon and the juvenile was released on bail.
3. The necessary copies were served upon the juvenile in conflict with law ( herein after referred to as JCWL) Mayadul Islam. The particulars of offence u/s 4 of the Protection of Children from Sexual Offences Act, 2012 were explained to him, to which he pleaded not guilty and claimed trial.
4. During enquiry nine witnesses were examined by the prosecution including the medical officer and the investigating officer. JCWL was examined u/s 313 Cr. P.C wherein he denied the incriminating materials put to him and also declined to adduce defence evidence. Heard arguments from both the sides.
5. The following points for determination have been framed in this case:

#### **POINTS FOR DETERMINATION:**

1. *Whether JCWL Mayadul Islam committed penetrative sexual assault upon the victim (minor) and thereby he committed an offence punishable u/s 4 of the Protection of Children from Sexual Offences Act, 2012 ?*

#### **DISCUSSIONS, DECISIONS AND REASONS THEREOF:**

##### **DECISION ON POINT NO. 1:**

6. The allegation against JCWL Mayadul Islam is that he raped the victim aged 9 years on 9-9-13 after calling her to his house on 9-9-13 at about 2.30 P.M. In this respect let us examine the evidence on record.
7. **PWI Abdul Mazid** deposed that he was informed over phone by Musaraf at 8.30 P.M that Mayadul has raped a minor girl who stays in Mayadul's house as a tenant. He then arrived at Musaraf's tea shop and saw that the

- public had detained Mayadul in front of the shop. According to him, he informed the police and the police took the culprit with them. He testified during cross examination that he does not know how and when the incident happened. According to him, neither the victim nor her guardians told him about it.
8. **PW2 Musaraf Hussain** is also a reported witness. He deposed that while he was sitting in his tea shop, Manulla Sheikh took him and Hanif Ali to Mayadul's house where they came to know that the victim's grandfather informed him that the juvenile had raped her. According to him, the juvenile confessed his guilt before them. Thereafter, they detained the juvenile in front of Musaraf's house. He stated that he informed VDP Secy. Abdul Mazid, who in turn informed the police. During cross-examination he testified that he does not know where did the alleged incident happened. He stated that neither he nor the public recorded the confessional statement of the juvenile.
  9. **PW3 Manulla Sheikh** deposed that while he was sitting in a tea shop, the grandfather of the victim came and told him that the juvenile had raped his granddaughter. Then he, Musaraf and Hanif went to Mayadul's house and interrogated him and detained him in front of Musaraf's tea shop. This witness also testified during cross examination that he did not ask the victim as to how and when the alleged incident took place.
  10. **PW4 Eusuf Ali** is the grandfather of the victim. He deposed that after returning from Namaz at 4 P.M he called out for his grand- daughter who was not at home. Then the victim came out of Mayadul's house. As her clothes were dirty, he asked her about it, she burst into tears and told him that Mayadul had raped her. When he asked her as to why did not she shout and raise alarm, then she replied that her mouth was gagged. He stated that he then informed the public and the police was informed by the public. During cross examination he testified that he did not state before the police that the victim came out of Mayadul's house when he called her and her dress was dirty. He also stated that he did not state before the police that the victim burst into tears as he enquired her. He further stated that he did not state before the police that the juvenile had gagged the mouth of the victim. He denied that the victim did not tell him that she had been raped.
  11. **PW5 Khirod Dey, S.I.** is the informant of this case. He deposed that on 9-9-13 the Officer-in-Charge of the police station informed him over phone that a minor girl had been raped in Bhowlaguri area and some disturbance is going on there. So he went to that place with his staff. After reaching there he saw a huge gathering of public and he came to know that Mayadul Islam had raped a 9 years old girl. According to him, the victim informed the matter to her mother when she came back after work and then her mother informed the villagers, who in turn interrogated the culprit and detained him. He stated that Mayadul Islam was then taken to the police station and the guardians of the victim were asked to lodge a case, but they did not lodge any FIR. So he lodged the FIR himself

considering the gravity of the crime. He exhibited the FIR as Ext. 1. He deposed during cross examination that after arriving at the place of occurrence he did not ask the victim or her mother about the alleged occurrence.

12. **PW6 Miss 'X'** is the victim of this case. She deposed that she knows the juvenile and the incident happened last year during Roja. She stated that while she was playing at her threshold, the juvenile took her to his house by holding her hands and pushed her into a chair and then removed her panty and then removed his own pant and inserted his "bostu" (thing). Thereafter when she told him that she will disclose it to others, then the juvenile gagged her mouth. According to her, the juvenile released her when her grandfather called out for her. She stated that she told her grandfather about it and her mother was informed when she came back from work. During cross examination, she testified that she did not disclose to the police that she was made to lie on a chair and her panty was removed and that the juvenile inserted the "bostu". She stated that she did not tell the police that she informed the matter to her grand father and mother. She testified that the police did not seize her panty. She stated that the juvenile was not holding any knife. According to her, they did not want to lodge any case but the police lodged the case on its own. She testified that she has deposed as asked by the police. According to her, she made her statement before the police as told to her by the police. She exhibited the statement made u/s 164 Cr. P.C as Ext. 2.

13. **PW7 Jerena Khatun** is the mother of the victim. She stated that she was at her workplace at the relevant time. After reaching home her father scolded her as to why she does not care to enquire where does her daughter roam around during the day. Then she hit her daughter with a lathi and her daughter disclosed that the juvenile took her to his house by threatening her and committed the 'beya kaam' (bad deed/work). After that she cried out aloud and the public gathered and her father told the public about the matter. She deposed during cross examination that she did not state before the police that the juvenile had threatened her daughter. She also admitted that she did not state before the police the details of the 'beya kaam' done by the juvenile. She stated that they did not lodge the case. She denied that the juvenile did not commit any 'beya kaam'.

14. **PW9 Ganesh Sarkar** is the Police officer who filed the charge sheet (Ext. 3). He deposed that he collected the medical report of the victim and filed the charge sheet u/s 4 of the Protection of Children from Sexual Offences Act, 2012 as per the order of the court. He deposed that the officer who investigated the case has expired. He testified that the victim did not state before the I/O that the juvenile made her to lie on a chair and inserted his 'bostu'/ thing. He also testified that the grandfather of the victim did not disclose before the I/O that when he asked for water, the victim came out of Mayadul's house and her dress was dirty. He

confirmed that the victim's mother did not disclose to the I/O that the juvenile took the victim to his house after threatening her.

15. **PW8 Dr. Minaxi Kalita** is the Medical Officer who examined the victim on 10-9-13 at 2.10 P.M. In this case the medical examination was done one day after the alleged occurrence. She testified as follows:

1. **Teeth 14/14.**
2. **Secondary sexual character not developed.**
3. **Hymn ruptured at 6 O' clock position.**
4. **Vagina admits one finger easily. No injury marks seen over her body and private parts.**
5. **Investigation :**
  1. **Urine for HCG – Negative.**
  2. **Spermatozoa not seen**
  3. **Clinically the age of victim is below 18 years.**
  4. **No opinion could be given whether she was raped or not.**

16. Ext. 4 is the medical report. It is thus seen that the medical examination of the victim does not disclose whether she was sexually assaulted or not. The absence of the hymn per se is not an indication of rape or sexual assault, more so when the victim is minor and no injury is found on her person. Therefore, we will have to consider the oral testimony of the witnesses to arrive at a conclusion in this case.

17. It is true that the sole testimony of a victim of rape or sexual assault, if inspire confidence, is enough to hold an accused guilty. The hon'ble Supreme Court in the case of **State of Rajasthan Vs. Om Prakash, AIR2002SC2235** held as follows:

*“The conviction for offence under Section [376](#) IPC can be based on the sole testimony of a rape victim is well settled proposition. In **State of Punjab v. Gurmit Singh and Ors. MANU/SC/0366/1996 : 1996CriLJ1728** referring to **State of Maharashtra v. Chandraprakash Kewal Chan Jain MANU/SC/0122/1990 : 1990CriLJ889**, this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the court, that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts could not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault along to convict an accused where her testimony inspires confidence and is bound to be reliable. Seeking corroboration of*

*her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.”*

It was further held ...

*“The evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy pray to tutoring. Wisdom requires that the evidence of child witness must find adequate corroboration before it is relied on {**State of U.P. v. Ashok Dixit and Anr. MANU/SC/0090/2000 : 2000CriLJ1436** }. We have already held that in the present case we have carefully examined the evidence of the child and other evidence. We find the reasons given by the High court for rejecting the said evidence wholly unconvincing. It is unfortunate that what to talk of considering, the High Court has not even noticed the testimony of the prosecutrix in the judgment under appeal. Learned counsel for the respondent contended that if there was any forcible sexual intercourse, it could have resulted in some injuries upon the prosecutrix and in support relied upon **Joseph s/o Kooveli Poulo v. State of Kerala MANU/SC/0313/2000 : 2000CriLJ2467** . This decision has no relevance. As observed therein, the injuries are not always a sine qua non to prove a charge of rape. Let us not be forgotten that we are considering the case of a rape on a girl child aged eight years and not on a grown up woman.*

*Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been sleep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well considered and well analyzed judgment of the trial court on the grounds like non-examination of other witnesses, when the case against the respondent otherwise stood established, beyond any reasonable doubt was not called for. The minor contradiction of recovery of one or two underwear was wholly insignificant.”*

Again the hon'ble Apex court in the case of **O.M. Baby (Dead) by L.Rs. Vs. State of Kerala, MANU/SC/0525/2012** ( 2012CriLJ3794) has held as follows regarding testimony of a victim of sexual assault:

*“The golden rule of appreciation of the testimony of a prosecutrix laid down in Rameswar v. State of Rajasthan [MANU/SC/0036/1951](#) : AIR (1952) SC 54 and amplified in State of Maharashtra v. Chandraprakash Kewalchand Jain [MANU/SC/0122/1990](#) : (1990) 1 SCC 550 has been consistently followed till date. It will, therefore, be useful to reproduce herein para 16 of the judgment of this Court in the above case of State of Maharashtra v. Chandraprakash Kewalchand Jain (supra):*

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

As regards child witnesses the view of the hon’ble Supreme Court can be summarised as follows:

**In Shivasharanappa and Ors. Vs. State of Karnataka & Jagadevappa and Ors. Vs. State of Karnataka and Ors., [MANU/SC/0470/2013](#) (Equivalent Citation: AIR2013SC2144)** the hon’ble Supreme Court discussed several case laws and held :

*“Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is*

*credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable.”*

In ***Dattu Ramrao Sakhare and Ors. v. State of Maharashtra*** [MANU/SC/1185/1997](#) : (1997) 5 SCC 341, while dealing with the reliability of witness who was ten years old, the Supreme Court opined that a child witness, if found competent to depose to the facts and reliable, such evidence could form the basis of conviction. The evidence of a child witness and the 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. Thereafter, the Court proceeded to lay down that there is no rule or practice that in every case the evidence of such a witness should be corroborated before a conviction can be allowed to stand but, as a rule of prudence, the court always finds it desirable to seek the corroboration to such evidence from other dependable evidence on record.

Again in ***Panchhi and Ors. v. State of U.P.*** [MANU/SC/0530/1998](#) : (1998) 7 SCC 177, it has been held thus: -

*“Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P. [MANU/SC/0005/1993](#) : (1992) 4 SCC 225, Baby Kandayanathil v. State of Kerala [MANU/SC/0339/1993](#) : 1993 Supp (3) SCC 667, Raja Ram Yadav v. State of Bihar [MANU/SC/0422/1996](#) : (1996) 9 SCC 287 and Dattu Ramrao Sakhare v. State of Maharashtra (supra).”*

Similar view has been expressed in ***State of U.P. v. Ashok Dixit and Anr.*** [MANU/SC/0090/2000](#) : (2000) 3 SCC 70.

**18.** But in the present case, it is found that the statement of the minor victim itself appears to be inconsistent. The victim ( PW6) stated during enquiry that she was at her threshold when the juvenile took her to his house by holding her hands. In her statement u/s 164 Cr. P.C ( Ext.2) she had stated that she was dragged from the road. The juvenile has admitted that the victim was with him at his house at the relevant time. But his

admission is not indicative of the fact that he took her in by holding her hands. While making statement u/s 164 Cr. P.C she stated that she was made to lie on a bed and then the juvenile removed her panty as well as his own and inserted his 'thing' into her urinating organ. But during enquiry she stated that the juvenile pushed her into a chair and inserted his 'thing' after removing her panty. The words 'chair' and 'bed' indicate two distinct things/ furniture. The victim is 9/10 years old, so she is capable of understanding the difference between a chair and a bed. Further she stated u/s 164 Cr. P.C. that the juvenile gagged her when she tried to shout. But during trial she stated that she had told him that she will disclose about it to others then he gagged her. She had earlier stated u/s 164 Cr. P.C. that her grandfather came looking for her and found her in Mayadul's house. However during enquiry she deposed that when her grandfather called her the juvenile released her. I find that the above mentioned contradictions are vital contradictions. Moreover, the victim has stated that she deposed as told by the police. It thus appears that her statement was influenced.

19. There are contradictions between the testimony of the victim and her grandfather. The grandfather of the victim (PW4) stated that the victim came out of Mayadul's house when he shouted for her and her dress was dirty. On the other hand the victim did not state that her dress was dirty. The victim stated that the alleged incident happened at about 2 P.M but her grandfather (PW4) stated that he came back from Namaz at 4 P.M and the victim came out of Mayadul's house after that. The victim had stated u/s 164 Cr. P.C also that the incident happened at about 2 P.M. So there is difference of about 2 hours between the testimony of PW 4 and PW6 and this time gap is vital. If we are to believe the statement of the victim that the juvenile released her when PW4 called out her name then this time gap of 2 hours becomes very vital. The Id. Defence counsel argued that the above inconsistencies in the statement of the victim make it hard to believe that such a type of incident has occurred. He relied upon the decisions of the hon'ble Gauhati High Court in *Narayan Majumdar Vs. State of Tripura, 2009 (2) GLJ 732* and *Sambhu Chakravarty Vs. State of Tripura, 2013 (3) GLJ 63*.

20. In instant case if we peruse the statement of the mother of the victim during enquiry and u/s 164 Cr. P.C. ( Ext. 3) it would appear that the victim disclosed about alleged occurrence to her when she asked her in the evening. According to this witness, her father (PW4) told her on her return that the victim was not at home during daytime and then she enquired about it from the victim. But the victim has deposed during enquiry that her grandfather narrated the incident to her mother. Unlike her mother the victim did not state that the juvenile criminally intimidated her before committing the crime. I, therefore, find that the statement of PW4, PW6, PW7 are contradictory to each other in material particulars. In fact PW4 has admitted that he did not state before the police that when he enquired the victim, she burst into tears and told him

that the juvenile raped him. The case diary reveals that this witness did not state before the police that the victim disclosed him about the alleged sexual assault. The fact that the victim did not inform her grandfather instantly after the incident and only disclosed to her mother in the evening and they were reluctant to lodge a case, casts some doubt over the entire prosecution case. It may be that a victim of sexual assault is quite often reluctant to initiate criminal proceedings against the culprit for fear of social stigma. But here in this case it appears that the guardians of the victim disclosed the matter to the villagers who accosted the juvenile, but they later on refrained from lodging any FIR. So the conduct of the family of the victim is suspicious.

21. The juvenile during his examination u/s 313 Cr. P.C stated that the victim used to stay in their house as tenants and she used to come to his house for watching T.V. According to him, the victim used to play ‘ panch guti’ ( a game which is played with pebbles). He stated that on the date of occurrence also the victim had come to his house and was playing ‘ panch guti’ when her grandfather came and took her. However he denied to have committed rape on the victim. The allegation against him is that he committed penetrative sexual assault on the victim as defined u/s 3 of the POCSO Act, 2012. Although the victim stated during examination-in-chief that the juvenile inserted his ‘thing’ but she testified during cross examination that she has deposed as told by the police. The victim is a minor girl of 9/10 years. Although she is capable of deposing before the court but it seems that she has been tutored.
22. The Id. Defence counsel argued that the conduct of the victim is suspicious in this case while placing reliance on the case of *State of Mizoram Vs. Sh David Lalthummawla & ors 2013 (4) GLJ 114*, wherein the hon’ble High court refused to rely upon the testimony of an alleged victim of gang rape on the ground that the victim did not disclose about the rape to the witness whom she met right after the alleged incident. We find that this case law applicable in the present case too. The Id. Defence counsel further argued that the allegation of penetrative sexual assault is belied by the medical examination report of the present victim. Reliance was placed on *Yerumalla Latchaiah V. State of A.P., (2006) 3 SCC (Cri) 373*.
23. In the present case the doctor who examined the victim could not opine as to whether the victim was sexually assaulted or not. There were no injury marks on her person, much less on her private parts. The victim was 9 years old at the relevant time. It is alleged that there was penetrative sexual assault. The lack any signs of injury on her private parts coupled with the inconsistent statement of the victim and her family members casts shadow over the prosecution case. The allegation of sexual assault is not proved beyond reasonable doubt against the present JCWL. The point no. 1 is decided in the negative.

## **ORDER**

24. In view of the above discussions this Board has come to the conclusion that the allegations brought against the juvenile are not proved beyond reasonable doubt. He is held not guilty u/s 4 of the POCSO Act, 2012 and he is acquitted on benefit of doubt. The juvenile is set at liberty forthwith. His bailbond stands discharged. Judgment is pronounced in the open in presence of the juvenile. Given under the hand and seal of this Juvenile Justice Board, Bongaigaon on 9-9-14.

Smt. S. Handique, AJS

Principal Magistrate, JJB, Bongaigaon

Sri. D.C. Basak,

Member, JJB, Bongaigaon

Smt. R. Choudhury,

Member, JJB, Bongaigaon