



IN THE COURT OF THE SPECIAL JUDGE, NAGAON.

PRESENT : Smti. R.Kar,
Special Judge,
Nagaon.

SPECIAL CASE NO.10(N) OF 2014

Under sections 376 IPC R/W 4 of of POCSO Act.

State of Assam **Complainant**
—Versus—
Uttam Ray **Accused Person**

ADVOCATES WHO APPEARED IN THIS CASE

For the State : Smti. B. Phukan,
Public Prosecutor.

For the accused : R.D.Sonari,
Advocate.

Date of evidence : 29-10-2014, 22-07-2015,
30-09-2015, 04-02-2016,
09-05-2016, 21-06-2016.

Date of Argument : 23-11-2016.

Date of Judgment : 14-12-2016.

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JUDGMENT

1. The prosecution case as unfolded from the entire FIR is that on 18-04-2014 complainant lodged an FIR with the Officer-in-charge of Hojai Police Station alleging that on the same day i.e. on 18-04-2014 at the 3.30 p.m., taking the advantage of absence of other inmates of the house, the accused Uttam Ray entered into the house of victim and committed rape on his minor granddaughter, namely, 'X' aged about 10 years. Hence, the F.I.R.
2. On receiving the F.I.R., the O/C of Hojai P.S. registered the Hojai P.S. Case No. 176/2014 U/s. 376(A) of IPC Read with Section 12 of Prevention of Children from Sexual Offence Act, 2012 against accused Uttam Rai and started usual investigation thereon. Upon completion of the investigation police laid charge sheet in the case U/s. 376(A) of IPC Read with Section 4 of Prevention of Children from Sexual Offence Act, 2012 against accused Uttam Ray @ Rai. Thereafter, the case was received in the court of learned Sub-Divisional Judicial Magistrate, Hojai, Sankardev Nagar for disposal.
3. The case being exclusively triable by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate, Hojai, Sankardev Nagar, committed the case for trial to the Court of Sessions. Accordingly, the accused person was furnished with all the necessary copies as required U/s. 207 of Cr.P.C by the court.
4. After receiving the case and appearance of the accused person before this court a formal charge U/s. 376 of IPC read with Section 4 of POCSO was framed against accused Uttam Ray after perusal of police papers U/S 173 of Cr.P.C. and also after hearing the learned counsels for both sides. The charge was also read over and explained to the accused person and he pleaded not guilty and claimed to be tried.
5. During trial of the case the prosecution side examined altogether 9 PWs while the defense side examined none in his support.

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6. After hearing arguments for both sides, I hereby proceed to deliver my judgment in this case.

7. Now, the points for decision before me are as follows :-

- i) Whether on or about 18-04-2014 at 3.30 p.m. at Tanmatikhola under Hojai P.S. the accused person committed rape upon a minor girl of 10 years, namely 'X' and thereby committed an offence punishable U/s. 376 of IPC ?
- ii) Whether on the same day, time and place the accused person did some act upon minor girl, namely 'X' with sexual intent which involves penetrative sexual assault and thereby committed an offence punishable u/s 4 of POCSO Act.

8. Discussion of evidence, decision thereon and reason thereof :-

Before entering into the decision, the gist of the prosecution evidence is laid down below.

PW 1, is the victim who was examined without oath in questions and answers form. P.W.1 has deposed that she knows the accused Uttam Ray and the incident took place at about 12 mid day while she was taking meal. P.W. 1 further deposed that the incident took place at their house. P.W.1 further deposed that while she was alone in her house accused came to their house and asked her to prepare eggs but she called her nearby aunt and her aunt prepared eggs and went back to her house. P.W.1 further deposed that then the accused gave her Rs.10/- to bring atta (wheat) and accordingly the accused and herself prepared chappati and ate the same. P.W.1 further deposed that at this the accused caught hold of her and removed her panty and inserted his male organ to her urinal organ and thereby committed 'bad act'. P.W.1 further deposed that

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she got hurt and after freeing herself from the grip of accused, she went to her aunt's house and narrated the bad act of the accused. P.W.1 further deposed that thereafter her aunt told the incident to his grand-father. P.W.1 further deposed that her mother died when she was 5 years old. P.W.1 further deposed that her father came to their house on the next day of the incident. P.W.1 further deposed that FIR was lodged by her grand-father.

P.W. 2 has deposed that he lodged the FIR against the accused and victim is his grand-daughter. P.W.2 further deposed that the incident occurred 6 months ago and at the time of incident he was at his own house. P.W.2 further deposed that near his house his grand daughter lives with her father. P.W.2 further deposed that at the time of incident at about 4 p.m. her grand daughter was alone in their house. P.W.2 further deposed that his married daughter Srimoti Bain lives adjacent to the house of victim. P.W.2 further deposed that his daughter told him that accused Uttam committed rape on her grand daughter at their house. P.W.2 further deposed that on his enquiry , victim also told him that accused committed rape on her. P.W.2 further deposed that victim was shifted to Govt. Hospital by boarding an auto and on the same day he lodged the FIR at Hojai Police Station. P.W.2 further deposed that ejahar was written by a person at the Police Station and he put his thumb impression. P.W.2 further deposed that police caused her medical examination and produced her to record her statement before a Magistrate at Sankardev Nagaon. P.W.2 further deposed that police also recorded his statement.

P.W.3 has deposed that accused is his neighbour and complainant is his father. P.W.3 further deposed that victim namely 'X' is his daughter and the incident took place some one years ago. P.W.3 further deposed that at the time of occurrence his daughter was aged about 8 years and at that time he was absent in his house and stayed at Lamsakhand. P.W.3 further deposed that victim's mother expired some time before. P.W.3 further deposed that incident took place at about 2 p.m. of the day and in that evening his father called him over phone to his house but he could reach his home on the next day at about 10 a.m. of the day. P.W.3 further deposed that his father told him that the

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accused Uttam committed rape on his daughter namely 'X'. P.W.3 further deposed that then he enquired to his daughter and she also told that she was raped by accused Uttam. P.W.3 further deposed that he came to know that the villagers took his daughter to hospital and his father lodged the Ejahar. P.W.3 further deposed that he daughter also gave statement before Magistrate and his statement was recorded by police.

P.W.4 has deposed that complainant is his father and victim is his niece. P.W.4 further deposed that incident occurrence 10/11 months ago from his deposition and at that time victim was reading in class III(three) and her age was 10 years. P.W. 4 further deposed that incident occurred at about 4 p.m. and at that time he was cutting soil at his house. P.W.4 further deposed that at that time victim came along with Srimoti Bain and told him that Uttam committed rape on her. P.W.4 further deposed that then his father took the victim to hospital and also lodged the ejahar. P.W.4 further deposed that police also recorded his statement.

P.W.5, Nandalal Biswash has deposed that he heard from the village people that accused Uttam Rai committed rape on victim and beyond this he did not know anything about the incident. This witness was declared hostile by the prosecution.

P.W.6 has deposed that complainant is her father and victim is her niece. P.W.6 further deposed that at the time incident victim was reading in class IV at Harijan School and her age was 9 years. P.W.6 further deposed that at the time of incident she was at her house and heard screaming from the house of her brother and went there. P.W.6 further deposed that there she saw victim lying senselessly on the ground and accused Uttam ran away in front of her. P.W.6 further deposed that on enquiry, victim told her that while she was at her home accused came and committed rape on her. P.W.6 further deposed that then she narrated the incident to her father and her father called the father of victim from his place of work at Lamsakhand. P.W.6 further deposed that thereafter her father lodged the ejahar.

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P.W.7, Dr. Kabita Baruah deposed that on 19-04-2014 she was serving as Senior Medical & Health Officer at B.P.Civil Hospital, Nagaon and on that day at about 11.15 a.m. she examined the victim namely, 'X', aged 10 years, D/O Satya Bain of village Tanmatikola under Hojai P.S. in reference to Hojai P.S. Case No.176/2014 u/s 376 of IPC R/W Sec.12 of POSCO Act, on being escorted and identified by WHG Rukia Begum of Hojai P.S. in presence of LHV-Jaymati Bora.

On examination, she found the followings:-

Identification mark :-

1. One black mole on the middle frontal head.
2. One black mole on the right side of the knee.

Her height is 118 cm., Weight 20 kgs, teeth upper and lower 12/12, Breast- not developed, auxillary hair and public hair absent, hymen no tear, vaginal injury Nil. Marks of violence – Absent. Clothings- No stain.

Vaginal Smear examination :-

Vide Regn. No.486 Laboratory No.134 dated 19-02-2014 reported by pathologist Dr. J.Bori, BPCH, Nagaon shows no spermatozoa.

X-ray examination of right wrist joint, elbow and iliac crest – vide plate No.3871 + 72 + 73, dated 19-04-2014, reported by radiologist Dr. S.M. Bora shows her radiological age as 10-11 years.

Right Wrist Joint – The Ossification of the lower end of radius appeared (1 to 2) and ossification of the lower end of ulna appeared (5to 8 years).

The right elbow joint – The epiphysis of the medial epicondyle appeared (5 to 8 years). Ossification of the external epicondyle appeared (10-12 years).

Right iliac crest – The ossification of right iliac crests have not appeared (below 13 years).

Opinion:

1. Her age is 10 to 11 years at the time of examination.
- 2.No evidence of sexual intercourse with her
- 3.No injury marks seen on her private parts or on her body at the time of examination.

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P.W.7 has exhibited Ext.1 as the medical report and Ext.1(1) as her signature.

P.W.8, Smti. Sumali Mandal deposed that she has no knowledge about the incident and police also did not interrogate her. This witness was also declared hostile by the prosecution.

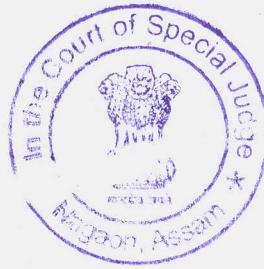
P.W.9, SI Sanjib Terang deposed that on last 18-04-2014 he was serving as Sub-Inspector of Police attached to Hojai P.S. and on that day, O/C of the P.S. namely, Inspector Munin Chamuah received the FIR from the informant alleging inter-alia that on the same day at 3.30 p.m. his minor grand-daughter was subjected to sexual assault by accused Uttam Ray. P.W.9 further deposed that on the basis of said FIR, the Hojai P.S. Case No.176/2014 was registered u/s 376(A) IPC R/W Sec.12 of the Protection of Children from Sexual Offences Act (POCSO) by O/C of the P.S. and he was entrusted with the investigation of the case wherein Ext.2 is the FIR and Ext.2(1) is the signature of O/C of Munin Chamuah with his endorsement. P.W.9 further deposed that on completion of investigation, he having found a prima facie case u/s 376(A) of IPC R/W Section 4 of the POCSO Act against accused Uttam Rai, filed charge-sheet against him under the said section of law wherein Ext.4 is the charge-sheet and Ext.4(1) is his signature.

9. Before appreciating the evidence, let us have a look into Sec.3 of the POCSO Act, where offence of penetrative sexual offence has been defined and Section 4 which has laid down the penal provision for committing offence u/s 3 of the POCSO Act.

Section 3 – A person is said to commit “penetrative sexual assault” if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

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(b) he inserts, to any extent, any object or a part of the body not being the penis, into the vagina, the urethra or anus of the child to do so with him or any other person, or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4 – Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

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10. Section 376(2)(i) deals with committing rape on a woman when she is under 16 years of age.

11. Now let us appreciate the evidence to ascertain how far prosecution has succeeded to establish the charge levelled against the accused.

From the evidence of P.W.1(the victim) it appears that at the time of incident she was alone in her house. After the incident she reported the matter to her aunt who thereafter reported the incident to her father (P.W.2, the informant). There is no eye witness in this case. As such it is the mandate of law that in such case sole evidence of the victim requires careful scrutiny to test her credibility. Age of the victim as per FIR is 10 years. As per evidence of P.W.7 (M.O.) and as per Medical Report (Ext.1) also the age of the victim is 10 to 11 years.

In course of cross-examination, suggestion has been given to the victim (PW 1) that as there was quarrel between her father and the accused, as



such her grand-father has lodged the false case against the accused and she deposed falsely on being tutored by her father. But P.W.1 inspite of her tender age has denied this suggestion. P.W.2 (the informant) and P.W.6 have corroborated her statement to the extent of reporting the incident to them.

12. Now, it is the argument of defence side that as per medical report of the victim there was no sign of sexual intercourse and no injury marks on her private parts of the body and as such statement of the victim (P.W.1) cannot be relied into.

13. Now, the victim in her evidence has stated that the accused inserted his male organ in her genital and she got hurt. She nowhere in her evidence has stated that she sustained injury on her vagina or bled per vagina as a result of the penetration of the penis in her vagina. In order to constitute offence u/s 376 IPC of Section 4 of the POCSO Act, penetration of penis to any extent is sufficient. It cannot be expected that in each and every case there will be injury in the private part.

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Observation of Hon'ble Supreme Court in the case of Ranjit Hazarika vs. State of Assam (1998) 8 SCC 635 is laid down below :

"The argument of learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the



cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons" - unquote.

Accused in his statement u/s 313 Cr.P.C. has taken the plea that he has boundary dispute with the informant as such he (the informant) has falsely implicated him in this case through his grand-daughter. But the accused either by adducing independent evidence or in course of cross-examination of P.W.1, (the victim), P.W.2 (the informant), P.W.3 (the father of the victim) has failed to extract anything from their mouth so to establish the fact that he has been falsely implicated in this case. There is minor contradiction in the evidence of P.W.6 regarding the reporting of the incident to her but material fact has remained intact that the accused was indulged with sexual act with the victim while she was alone in the house. As such minor contradiction found in the statement of P.W.6 will not have any effect on the statement of the victim when the defence has failed to shake her evidence. In the instant case evidence of the victim (PW 1) is found natural. She is of very tender age and unable to understand the complicity of legal procedure yet she has narrated the incident on her own way. Defence has failed to prove that accused had land dispute either with the informant or his son (PW 3) and the victim was tutored and when he has failed to do so there is no reason why the informant or his son will put the reputation of the victim girl of tender age at stake. Considering all aspects, I do not find any reason to disbelieve the evidence of the victim (PW 1). thus from the evidence of the victim it is established that on the date of alleged

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incident accused was indulged in penetrative sexual act with the victim and accordingly he is found guilty of committing offence u/s 4 of the POCSO Act, 2012.

14. **Finding :** I have heard submission of both sides and gone through the evidence and materials on record and I have arrived at the finding that prosecution has succeeded to bring home the charge u/s 4 of the POCSO Act, 2012 against accused Uttam Ray and accordingly he is convicted under this Section.

15. Considering the nature of offence and punishment prescribed therefore, I am not inclining to extend the benefit as provided under the Probation of Offender's act, 1958 of Sec.360 Cr.P.C. to the accused.

16. **Sentence –** I have heard the accused on sentence. His statement on sentence hearing is recorded separately. Accused has submitted that he is a married person having three children and he is the sole earner of his family. Accused has prayed for showing leniency in imposing sentence.

17. Considering the submission of the accused and also considering the facts and circumstances of the case, accused Uttam Ray is sentenced to undergo Rigorous Imprisonment for 7(seven) years and also to pay fine of Rs. 10,000/- (Rupee Ten thousand) only in default R.I. for 3 (three) months.

18. Period of detention undergone be set off as per provision of Section 428 Cr.P.C.

19. Free copy of the judgment be furnished to the accused immediately.

20. Copy of the judgment be sent to the District Magistrate, Nagaon as per provision of Section 365 Cr.P.C.

[Signature]
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Judgment is given on this 14th day of December, 2016 under my hand and seal of this Court.

Dictated & Corrected by

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(Smti R. Kar)
Special Judge
Special Judge
Nagaon ; Assam
Nagaon, Assam.

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(Smti R. Kar)
Special Judge
Special Judge
Nagaon ; Assam
Nagaon, Assam.

Dictation taken &
transcribed by-

Nepen Rajkhowa
(N.Rajkhowa)
Stenographer



ANNEXURE

Prosecution Witness :

1. P.W. 1 Victim
2. P.W.2 Gour Bain
3. P.W.3 Satya Bain
4. P.W.4 Lakhan Bain
5. P.W.5 Nandalal Biswash
6. P.W.6 Srimoti Sarkar
7. P.W.7 Dr. Kabita Baruah
8. P.W.8 Sumati Mandal
9. P.W.9 SI Sanjib Terang.

Prosecution Exhibit :

1. Ext.1 Medical examination report.
2. Ext.2 Ejahar
3. Ext.3 Sketch map
4. Ext.4 Charge-sheet.

Defence Witness :

Nil.

Defence Exhibit :

Nil.

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