HEADING OF JUDGEMENT IN SPECIAL CASES: DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 11/2018
UNDER SECTIONS: 448/376 IPC
READ WITH SECTION 6 OF THE POCSO ACT.

STATE OF ASSAM VS. AZINUR RAHMAN

PRESENT:- DIPAK THAKURIA, B.A., LL.M., AJS
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
A. U. AHMED, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 31-10-2018, 02-01-2019, 11-01-2019, 22-02-2019, 08-03-2019.

DATE OF ARGUMENT:- 01-04-2019.

DATE OF JUDGMENT :- 12-04-2019.

JUDGEMENT

- **1.** Accused Azinur Rahman stands trial for the offences punishable under sections 448/376 IPC read with section 6 of the POCSO Act for alleged commission of house trespass into the house of the complainant and committing rape on his minor daughter on 16-09-2017 at village Chagolia Pt. II under Golokganj police station.
- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 17th

September 2017 the complainant lodged a written ejahar before the in-charge of Chagolia Police Outpost with an allegation that on the previous day while his 10 year old daughter was alone in his house, then the accused Azinur Rahman gagged her mouth and by force committed rape on her. His daughter informed him about the incident while he returned home from his workplace.

- **3.** After receiving the ejahar in-charge of Chagolia police outpost forwarded the ejahar to Golokganj police station where a case as Golokganj P. S. Case No. 912/2017 under sections 448/376 IPC read with section 6 of the POCSO Act was registered.
- 4. The investigating officer arrested the accused, produced him before the Court and the Court remanded him to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C. Also recorded the statement of the victim girl under section 164 Cr. P. C. By completing the investigation, I. O. has submitted charge sheet against the accused person to prosecute him under sections 448/376 IPC read with section 6 of POCSO Act.
- **5.** Cognizance of the case was taken in charge sheeted sections. Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under sections 448/376 IPC read with section 6 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **6.** The prosecution examined six witnesses including investigating officer and closed the evidence.
- **7.** After completion of the prosecution evidence, the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.
- **8.** Heard learned counsels appearing for the parties and perused the evidence on record.

Whether the accused on 16-09-2017 at about 5 p.m. at village Chagolia Pt. II under Golokganj police station committed house trespass by entering into the house of the complainant and thereby accused is liable to be punished under section 448 IPC?

Whether the accused on the same date time and place committed rape on the minor daughter of the complainant and thereby accused is liable to be punished under section 376 IPC?

Whether the accused on the same day time and place committed aggravated penetrative sexual assault on the 10 year minor daughter of the complainant and thereby accused is liable to be punished under section 6 of the POCSO Act?

DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

- **9.** In order to establish the charges framed against the accused, the prosecution has examined six witnesses. Among them P. W. 1 is the victim girl. P. W. 2 is the complainant and father of the victim girl, P. W. 3 is the mother of the victim girl, P. W. 4 Momirul Akond and P. W. 5 Firoja Bibi are independent witnesses, P. W. 6 Anil Mazumdar is the investigating officer.
- **10.** The prosecution has exhibited the statement of the victim recorded under section 164 Cr. P. C as Ext. 1, Ejahar as Ext. 2, seizure list as Ext. 3, sketch map as Ext. 4 and charge sheet as Ext. 5. Birth certificate of the victim is exhibited as M. Ext. 1.
- **11.**The defence examined none. The accused has taken the plea in his statement recorded under section 313 Cr. P. C. that the father of the victim girl borrowed an amount of Rs. 70,000/ from his maternal uncle-in-law through him. Father of the victim did not return the borrowed money and one day he (father of the victim) intended to go to Delhi and he caught him and asked him to return money and after three days police arrested him.
- **12.** The wheel of the prosecution case started to move when the complainant (P. W. 2) lodged the ejahar (Ext. 2) before the in-charge of Chagolia police outpost. The complainant (P. W. 2) is an uneducated person who put his thumb impression in the

- ejahar and the prosecution exhibited the ejahar through the investigating officer (P. W. 6) and marked the same as Ext. 2.
- **13.** The contents of the ejahar (Ext. 2) show that on 16-09-2017 at about 5 p.m. the victim girl who was just 10 years old was alone in her house. The accused taking the advantage of absence of elder family members entered into the house of the complainant and gagged the mouth of the victim and committed rape on her. The victim girl disclosed the incident to her father when he returned home and on the next day he lodged the ejahar.
- **14.**The complainant (P. W. 2) while deposed in the Court during trial has fully corroborated the contents of the ejahar. His deposition shows that on the day of the incident at about 5 p.m. while his daughter was alone in his house, then the accused came to his house and asked his daughter to give him a glass of water. When his daughter offered the glass of water then the accused entered into his house and by force committed rape on her. At night while he returned home from his work place then his wife told him about the incident and then he confirmed the incident from his daughter. Next day he filed the ejahar.
- **15.**The defence categorically cross-examined him. In cross-examination he could not say the date of birth of his daughter. He has denied the suggestion of the defence that he did not disclose before the investigating officer that the accused visited his house and asked his daughter to give him a glass of water. He has stated that he does not know Idar Ali, maternal uncle-in-law of the accused. He has denied the suggestion of the defence that he borrowed Rs. 70,000/ from Idar Ali through the accused and when the accused sought back the money he filed a false case against him.
- **16.** After perusal the oral testimonies of the complainant it appears that his daughter i.e. the victim was alone at the time of incident and she disclosed the incident to her mother whom the prosecution examined as P. W. 3.
- 17.On perusal the evidence of the mother of the victim girl it appears that she has fully corroborated the oral testimonies of her husband (P. W. 2). According to her on the day of the incident at about 5 p.m. the accused came to her house, sought a glass of water from her daughter and thereafter the accused entered into her room, gagged the mouth of her daughter, removed her clothes and did bad work with her. Her daughter kicked the accused and then he left her house. On that night at about 3 a.m. her husband

returned home and they told him about the incident. After filing the case police seized the birth certificate of her daughter and gave her zimma. She produced the birth certificate of her daughter which prosecution exhibited as M. Ext. 1. In cross-examination she has stated that she did not disclose before I. O. that her daughter identified the accused at Chagolia police outpost. Before the incident she and her daughter had not seen the accused. She does not know Idar Ali. She has denied the suggestion of the defence that her husband borrowed an amount of Rs. 70,000/ from Idar Ali through the accused for supplying labour to Bihar and when the accused asked her husband to return the money then her husband filed a false case against the accused.

- **18.**In this case the most important witness is the victim girl whom the prosecution examined as P. W. 1. The victim girl is just 12 years old on the day of recording her statement in the Court during trial. To test her maturity some questions put to her and after being satisfied that she was matured enough to understand the questions put by Court her deposition was recorded without administering oath. Her oral testimonies show that on the day of the incident at about 4/5 p.m. she was alone in her house. Then accused came to her house and asked her to give a glass of water. She gave him a glass of water. The accused entered into their house, gagged her mouth, removed his pant and also removed her jangia and did bad work with her. She kicked the accused. Then he showed a dao and said that he would come again. While her mother returned home she told the incident to her. Her statement was recorded in the Court. The prosecution exhibited the statement of the victim girl recorded by Judicial Magistrate and marked the same as Ext. 1. Ext. 1 (1), (2) and (3) are the signatures of the victim girl. In crossexamination she has deposed that she did not know the house of the accused. Before the incident the accused did not visit their house. There are houses of several persons near to her house. She did not raise alarm when the accused sought water from her. She gave her jangia to her mother. She has denied the suggestion of the defence that the accused did not gagged her mouth, removed her jangia and committed bad work with her.
- **19.** The prosecution examined two independent witnesses. Evidence of Momirul Akond (P. W. 4) shows that about 1 year 4 months back mother of the victim girl told him that accused committed rape on her daughter and on being asked the victim girl confirmed the same to him. In cross-examination she has admitted that he had not seen the

incident. He has denied the suggestion of the defence that before the I. O. he had not disclosed that the mother of the complainant called her and told him about the incident. Another independent witness Firoja Bibi (P. W. 5) has deposed that she does not know the subject matter of the case. The prosecution declared this witness as hostile and cross examine her. She has denied the suggestion of the prosecution that she disclosed before the I. O. that the victim told her that on 16-09-2017 while she was alone in her house, at about 5 p.m. the accused visited her house and by removing cloth sexually exploited her.

- **20.** The prosecution examined the investigating officer Anil Mazumdar as P. W. 6. His deposition shows that after filing the case he was entrusted to investigate the case. Accordingly he visited the place of occurrence, inspected the same, prepared sketch map of the spot, recorded the statements of the witnesses, sent the victim to Dhubri Civil Hospital for medical examination and the Court for recording her statement and also seized the birth certificate of the victim girl and arrested the accused and forwarded him to the Court. After completing the investigation submitted charge sheet against the accused under sections 448/376 IPC read with section 6 of POCSO Act. He has deposed that witness Firoja Bibi told before him that on 16-09-2017 while she was alone in her house, at about 5 p.m. the accused visited her house and by removing cloth sexually exploited her. He has exhibited the ejahar as Ext. 2 and the signature of then In-charge of Chagolia police outpost Nabajyoti Ray as Ext. 2 (1). He has also exhibited the seizure list as Ext. 3, the sketch map of the spot as Ext. 4 and the charge sheet as Ext. 5. He has authenticated his signatures as Ext. 3 (1), 4 (1) and 5 (1). In cross-examination he has admitted that he seized no wearing dresses of the victim. The complainant did not disclose before him that accused visited his house and asked his daughter to give a glass of water. The mother of the victim did not disclose before him that her daughter identified the accused at Chagolia police outpost. Witness Momirul Akond did not disclose before him that the mother of the victim called him and told him about the incident.
- **21.** In the ejahar the complainant claimed that his daughter, at the time of incident, was just 10 years old. Regarding the age of the victim the defence raised no objection. During investigation vide Ext. 3 the I. O. seized the birth certificate of the victim girl which has been exhibited as M. Ext. 1. On perusal the M. Ext. 1 it appears that it was issued on 16-12-2008 from the concern office. The date of birth of the victim girl was

- 16-12-2006. The date of incident was 16-09-2017. Arithmetical calculation shows that on the day of the incident the victim was just 10 years 9 month old. Defence raised no question on genuineness of the birth certificate (M. Ext. 1). Without any hesitation it is concluded that on the day of the incident the victim was a child as defined under section 2 (d) of POCSO Act.
- **22.** During argument learned special public prosecutor B. R. Basumatary has submitted that at the time of the incident the victim girl was alone in her house. The accused by taking advantage that she was alone committed rape on her. The victim though a child; but she was matured enough. She gave her statement before Judicial Magistrate and in the Court. Her statement found consistent. Except one witness other prosecution witnesses supported the case of the prosecution.
- 23.On the other hand learned defence counsel Mr. A. U. Ahmed has submitted that it is very risky to accept the evidence of a child as the possibility of tutoring her by her parents cannot be ruled out. The allegation is that the accused visited the house of the victim and sought a glass of water and committed rape on her. The victim and her mother have deposed in the Court that the accused never visited their house before the incident. So, it is not trustworthy that a person who does not know the victim visited her house, sought a glass of water and committed rape on her. The area is thickly populated and the neighbouers were not aware about the incident. Learned defence counsel has further submitted that the father of the victim borrowed an amount of Rs. 70,000/ from the maternal uncle-in-law of the accused through the accused; but he did not return. When the accused asked him to return the money then a false case was filed against the accused just to harass him.
- 24. P. W. 1 being the victim girl is the most important witness for the prosecution. The victim being a child is most vulnerable witness. The evidence of 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 questions put to her and she is capable to giving reasonable answers. A child witness by reason of his/her tender age, is pliable witness. The child can be tutored easily either by threat, coercion or inducement. During the investigation the investigating officer produced the victim girl before Judicial Magistrate for recording her statement. On perusal the statement (Ext. 1) of the victim girl recorded by Judicial Magistrate it appears that her statement is corroborated with her oral evidence given in the Court. During trial while the deposition of the victim girl

was recorded by this Court tested her maturity by putting some questions to her and after analyzing her reply this Court was satisfied that the girl was matured enough to understand the questions put by the Court and thereafter her deposition was recorded. The defence while cross-examined the victim girl simply put some suggestions to her that accused did not gagged her mouth, removed her jangia and did bad work with her which the victim girl simply denied. The defence has not put a suggestion that she has given her deposition in the Court as she was taught by someone. So, the deposition of the victim was not tutored one.

- **25.**The victim girl at the time of the incident was alone in her house and whiles her mother returned home she told her about the incident. Her mother corroborated the same and she (mother of the victim) told her husband while her husband returned home from his work place at night 3 a.m. The father of the victim has also deposed that his wife told him about the incident and on the next morning he filed the ejahar. P. W. 4 Momirul Akond is the neighbor of the complainant. His evidence shows that the mother of the victim girl told him about the incident.
- **26.** After proper scanning the evidence on record, the oral testimony of the victim girl is found consistent as she disclosed the same story before the Judicial Magistrate. Her mother has corroborated the deposition of the victim girl. The father of the victim has also corroborated the deposition of the victim. The oral testimony of P. W. 4 is found trustworthy.
- **27.**The accused while he was examined under section 313 Cr. P. C. has taken the plea that the complainant, the father of the victim, borrowed an amount of Rs. 70,000/ from his maternal uncle-in-law Idar Ali through him and the complainant had not returned the same when he asked the complainant to return the money then the accused filed a false case against him.
- **28.**The defence has failed to establish the plea taken for defence. In this context Idar Ali would have been the best witness. But the defence had not examined him. Idar Ali being the relative of the accused, the defence could have been examined him. It is not known as to why the defence had not examined him.
- **29.**In view of the above discussion it transpires that on the day of the incident the accused entered into the house of the complainant and misbehaved the victim girl.

- **30.** Now let us scrutinize whether the act of the accused amounts to house trespass and rape or aggravated penetrative sexual assault to the victim or not.
- **31.**To establish the charge under section 448 IPC the prosecution has to establish the requirement as defined under section 442 IPC. When criminal trespass is committed in a dwelling house etc. it constitutes house trespass as defined under section 442 IPC punishable under section 448 IPC. From the evidence on record it transpires that the accused visited the house of the complainant when the victim was alone and sought a glass of water. The victim girl when offered the glass of water, the accused entered in to her room and misbehaved her. As soon as the accused entered the room of the complainant and gagged the mouth of the victim girl the accused committed the house trespass as defined in the Act.
- **32.**The complainant in his ejahar has alleged that the accused committed rape on his minor daughter.
- **33.** To establish the charge under section 376 IPC the prosecution has to establish any of the circumstances mentioned in section 375 IPC. Likewise to constitute the offence punishable under section 6 of POCSO Act the prosecution has to establish the requirements under section 3 and 5 of the POCSO Act. The main requirement of the offence of rape and penetrative sexual assault, the accused has to penetrate his penis, to any extent, into vagina, mouth, urethra or anus of woman or child. In the case in hand the victim girl simply stated that the accused gagged her mouth, removed his pant and also her jangia and did bad work with her. Her mother (P. W. 3) whom she immediately reported the incident has also stated same language that the accused gagged the mouth of her daughter, removed her cloths and did bad work.
- **34.** The prosecution has not examined the medical officer. The I. O. (P. W. 6) has deposed that he sent the victim girl to Dhubri Civil Hospital for medical examination. The name of the medical officer has not been mentioned in the witness column of the charge sheet (Ext. 5). On perusal the case record it appears that on 18-09-2017 the investigating officer sent the victim girl to Maternity Health Center, Dhubri for examination. The doctor has reported that the victim girl did not permit her to examine. Due to refusal of the victim girl she was not examined by the medical officer.
- **35.** So far allegation of rape or penetrative sexual assault to the victim is concerned there is

no medical evidence. If the accused was able to penetrate his penis into the vagina of the victim girl who was just 10 years old, the hymen of the victim girl would have been ruptured and there might be bleeding from the private parts of the victim girl. The mother would have been detected the blood stain in the body and cloth of her daughter. The victim girl might have been felt pain due to forceful penetration of the penis of the accused and definitely she would have been reported the same to her mother. But the mother of the victim girl has not deposed in the court regarding the complaint of pain of her daughter. She has not stated anything that she noticed blood stain on the body of her daughter or any kind of injury on any part of the body of her daughter.

- **36.** In view of the above discussion there is no iota of doubt that the prosecution has failed to establish the charge against the accused under section 376 IPC and section 6 of POCSO act.
- **37.** Now let us examine whether the act of the accused attracts any other offence or not.
- **38.**From the evidence of the victim girl and her mother it transpires that the accused on the day of the incident by entering into their house gagged the mouth of the victim, removed his pant, removed the jangia of the victim and did bad work. The intention of the accused was clear. The victim girl kicked the accused and then the accused left the place.
- **39.**Section 7 of the POCSO Act defines sexual assault. As per said section "Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."
- **40.** As the accused removed his pant, removed the jangia of the victim girl by gagging her mouth; so, the act of the accused was nothing but sexual assault as defined under section 7 of the POCSO Act.
- **41.**Under section 9 (m) of the POCSO Act whoever commits sexual assault on a child below twelve years is said to commit aggravated sexual assault. In the case in hand it has already been established that at the time of the incident the age of the victim girl was just 10 years 9 months. So, there is no iota of doubt that the accused on the day of the incident committed aggravated sexual assault to the victim girl punishable under section

10 of the POCSO Act.

- **42.** Sections 29 and 30 of the POCSO Act are important. Section 29 of the Act deals with mandatory presumption against the person prosecuted for committing or abetting or attempting to commit any offence punishable under section 3, 5, 7 and 9 of the Act that such person committed or abetted or attempted to commit that offence. Likewise section 30 of the Act deals with the presumption of culpable mental state of the accused.
- **43.**The presumption means "to believe or accept upon probable evidence" (State of Maharastra vs. Som Nath Thapa (1996) 4 SCC 639). The expression 'shall presume' leaves no discretion with the Court and there is legislative command to it to raise a presumption and regard such fact as proved unless and until it disproved. However, it is rebuttable and cannot be held to be synonymous with 'conclusive proof.'
- 44. In the case in hand, a little girl just 10 years old alleged that she was sexually assaulted by the accused. The plea of the accused was that her father borrowed money from one of his relatives through him and did not return the borrowed money. So, the father of the victim girl filed the case just to harass him. But the accused did not try to establish the plea taken by him in his examination under section 313 Cr. P. C. If it is assumed that the father of the victim girl borrowed money from the relative of the accused and when he visited the house of the complainant and when he came to know that the parents of the girl were not in their residence; he should immediately leave the place. Instead of leaving the place he sought a glass of water and thereafter entered in to the room of the victim girl and sexually assaulted her. The defence has failed to disprove the allegations leveled against him either by asking appropriate cross-questions to the material witnesses of the prosecution or adducing evidence in his support.
- **45.**In view of the above discussion and observation it is concluded that the prosecution is able to establish the requirements of the penal provisions under section 442 IPC punishable under section 448 IPC and section 7 and 9 of the POCSO Act punishable under section 10 of the POCSO Act.
- **46.**Though the charge under section 10 of POCSO Act has not been framed; but the prosecution is able to establish the charge against the accused under said section. There is no bar in holding the accused is guilty under section 10 of POCSO Act instead of section 6 of POCSO Act vide provision of section 222 (2) Cr. P. C.

- **47.**Hence, it is held that the prosecution is able to establish the charges against the accused under section 448 IPC and section 10 of the POCSO Act that on 16-09-2017 at about 5 p.m. at village Chagolia Pt. II under Golokganj police station the accused committed house trespass by entering the house of the complainant and also committed aggravated sexual assault to the 10 year 9 months old daughter of the complainant beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **48.** The criminal act of the accused gave the victim girl mental shock. It is the high time to protect the children from such person. Considering the nature of the case and its mode of execution I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **49.**Heard accused/convict on quantum of sentence.
- **50.** Also heard learned counsels appearing for the parties.
- **51.**Accused/convict has stated that this was his first offence. He has prayed to excuse him as it was his first offence and he will not repeat such type of offence in future.
- **52.**Learned counsel for the prosecution has submitted that the accused/convict should be given adequate punishment so that it becomes an example for the wrongdoer.
- **53.**On the other hand learned counsel for the defence has submitted that the accused is a young person just 30 years old. Already he is in judicial custody and got enough punishment. The prosecution has failed to show any criminal antecedent of the accused; so, has prayed to deal with him leniently considering his young age.
- **54.** Prescribed punishment under section 448 IPC is imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.
- **55.**Prescribed punishment under section 10 of the POCSO Act is imprisonment of either description for a term which shall not be less than five years and which may extend to seven years and shall also be liable to fine.

56.The accused/convict is a young person of 30 years old. The prosecution has failed to show any his criminal antecedent. Considering his age it is decided to impose following punishment.

ORDER

- **57.**The prosecution is able to establish the charges against the accused Azinur Rahman under section 448 IPC and section 10 of POCSO Act beyond all reasonable doubts and accordingly he is found guilty and convicted under said sections.
- **58.**The accused/convict is sentenced to undergo rigorous imprisonment for 1 (one) year and also pay fine of Rs. 1,000/ (rupees one thousand) in default rigorous imprisonment for 15 (fifteen) days under section 448 IPC.
- **59.** The accused/convict is further sentenced to go rigorous imprisonment for 5 (five) years and also pay fine of Rs. 5,000/ (rupees five thousand) in default rigorous imprisonment for 2 (two) months under section 10 of POCSO Act.
- **60.**Both the sentences will run concurrently.
- **61.** Fine amount, if realized, shall be given to the victim as compensation.
- **62.** The period underwent during investigation and trial shall be set off as per law.
- **63.**Return the seized birth certificate to the father of the victim girl after expiry of appeal period.
- **64.** Furnish a free certified copy of the judgment and order to the accused/convict as per provision of law forthwith.
- **65.**Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

66. The victim girl who was just 10 year 9 months old at the time of incident faced such a situation which cannot be explained and I am of the view that the victim girl is entitled to get compensation under section 357-A Cr. P. C.

67.So, District Legal Services Authority, Dhubri is asked to determine appropriate amount of compensation to the victim girl as per victim compensation scheme and pay the same as early as possible.

68. The bench assistant is directed to provide the name of the victim girl, her parents' name and address to the Secretary DLSA, Dhubri in a sealed envelope so that DLSA, Dhubri can communicate with the victim or her legal guardian.

69.Send a copy of this judgment and order to the Secretary DLSA, Dhubri for information and necessary action.

70. Given under my hand and seal of this Court this the 12th day of April 2019.

(D. Thakuria) Special Judge, Dhubri.