HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 01/2018
UNDER SECTIONS: 448/376 IPC
READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

KADER ALI SHEIKH

PRESENT:- DIPAK THAKURIA,
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE. Y. A. BEPARI, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 29-01-2018, 26-02-2018,

26-03-2018, 10-04-2018,

17-04-2018.

DATE OF ARGUMENT:- 16-05-2018.

DATE OF JUDGMENT :- 29-05-2018.

J U D G E M E N T

- **1.** Accused Kader Ali Sheikh stands trial for the offences punishable under sections 448/376 IPC read with section 4 of the POCSO Act.
- **2.** The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 28-09-2017 at about 12.30 p.m. the 12 year old daughter of the complainant who is deaf and dumb was alone in her house situated at village Haripur under Tamarhat police

- station. Then the accused entered into the house of the complainant, bolt the door from inside and committed rape on the minor daughter of the complainant.
- **3.** On the same day the complainant lodged a written ejahar at Tamarhat police station where a case as Tamarhat P. S. Case No. 217/2017 under sections 448/342/376 IPC read with section 4 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. and statement of the victim was also recorded 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 4 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 4 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 eleven witnesses including medical and investigating officers 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.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 28-09-2017 at about 12.30 p.m. at village Haripur under Tamarhat 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 day 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 penetrative sexual assault to the minor daughter of the complainant and thereby accused is liable to be punished under section 4 of the POCSO Act?

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

- 9. In order to establish the charges against the accused, the prosecution has examined eleven witnesses. Among them P. W. 3 is the complainant and the mother of the victim girl. P. W. 7 is the victim girl, P. W. 4 and P. W. 9 are the brothers of the victim girl, P. W. 2 Niranjan Ray, P. W. 5 Gobinda Adhikary and P. W. 6 Kandarpa Sarma are independent witnesses. P. W. 1 Jayashree Bora is the Judicial Magistrate who recorded the statement of the victim girl under section 164 Cr. P. C. P. W. 8 Hara Prasad Choudhury is the teacher of Govt. BDS Deaf and Dumb School who interpreted the statement of the victim girl. P. W. 10 Dr. Muskura Ahmed is the medical officer who examined the victim girl after the incident and P. W. 11 Moizuddin Sheikh is the investigating officer.
- **10.** The prosecution exhibited the statement of the victim girl recorded by Judicial Magistrate under section 164 Cr. P. C. as Ext. 1, Ejahar as Ext. 2, two seizure lists as Ext. 3 and Ext. 4, medical report as Ext. 5, sketch map of place of occurrence as Ext. 6, scientific report as Ext. 7 and charge sheet as Ext. 8.
- **11.** The defence examined none. Plea of the defence is total denial of the case.
- 12. Learned Special Public Prosecutor B. Basumatary has submitted that the allegations against the accused that he committed rape on a deaf and dumb girl who is just 12 year old by entering into her room is very serious and heinous in nature. The prosecution examined all the important witnesses and all the witnesses have corroborated each other. The victim girl who is deaf and dumb was examined with the help of teacher of deaf and dumb school. There is nothing to disbelieve the prosecution witnesses. The

prosecution is able to establish the charges against the accused beyond all reasonable doubt. So, has prayed to hold the accused guilty under framed charges and impose adequate punishment to him.

- 13. On the other hand learned counsel appearing for the defence Mr. Y. A. Bepari has submitted that the accused was the victim of circumstances. He committed no offence; but he was booked as he had dispute with some boys who demanded heavy Puja donation and on refusal to pay the donation as per their demand he was physically assaulted and in this connection an ejahar was filed against those boys and just to take revenge a false case filed against the accused. There are lots of contradiction between the contents of the ejahar and oral testimony of its author. The medical report and scientific report do not support the case of the prosecution. The prosecution has failed to establish the charges against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.
- **14.**Before we proceed, let us reproduce the material parts of the witnesses examined by the prosecution during trial.
 - **14.1** P. W. 1, Jayashree Bora has deposed that on 03-10-2017 she was working as SDJM, Dhubri. On that day, CJM, Dhubri directed her to record the statement of victim girl who is just 12 years old and a special child. She was speech and hearing impaired. So she directed IO to arrange a special educator for interpret sign language of the victim. On 16-10-2017 the I.O. produced the victim girl with interpreter Hara Pr. Choudhury, BDS, Deaf and Dumb School Kahilipara Guwahati. The statement of the victim was recorded with the help interpreter in presence of mother of the victim. As the victim was just 12 years old so no oath was administered to her. Before recording statement interpreter Hara Prasad Choudhury administered oath to the effect that he would interpret correctly. After recording statement of the victim her Bench Asstt. took her thumb impression in her presence. The interpreter has also put his signature in the statement. The victim was identified by WPC Sweety Das. Ext-1 is the statement of the victim recorded by her. Ext-1(1) is her signature. In cross-examination she has deposed that she does not know sign language. After recording the statement of the victim the interpreter put his signature in the statement. No birth certificate of the victim was produced before her, but her mother was present. Interpreter did not produce any certificate before her.

14.2 P. W. 2 Niranjan Ray has deposed that he knows the complainant and the accused. The victim is a girl of 12 years and she is physically handicapped. About six months back, on the day of Durga Puja (Astomi Puja) at about 01:00 p.m., he received a phone call from one Gobinda Chakraborty, who requested him to come to the house of complainant as an incident took place there. He immediately came to the house of the complainant and found several persons there. The complainant told him that the accused committed rape on her daughter. Thereafter, the persons gathered in the house of the complainant went to the house of the accused and demanded his family members to handover the accused to them. Then Kashem Ali, elder brother of the accused tied the hands of the accused with rope and handed over the accused to the persons gathered there. Thereafter, they called police and handed the accused over to police. At the time of incident, he was at Durga Puja pendal which is situated just 250 meters away from the house of the complainant. In cross-examination he has deposed that the family members of the accused lodged a case against some boys for allegedly taking out the accused from the house. He came to the house of the complainant alone. In the house of the complainant he found Radha Gobinda Adhikary and others. He found Ramesh Ray, Hare Ray, Pappu Ray and Prasenjit Ray near the house of the complainant. The house of the accused is situated at a distance of 50 meters from the house of the complainant. The houses of Nirendra Ray, Pabitra Ray and Radha Gobinda Adhikary are situated near to the house of the complainant. At the time of incident, he was a member of Gaon Panchayat. His party was Congress. Ramesh Ray, Hare Ray, Pappu Ray and Prasenjit Ray are not the members of AAKRASU. Ramesh Ray, Hare Ray, Pappu Ray and Prasenjit Ray were the members of Puja Committee. He has denied the suggestion of the defence that Ramesh Ray and others demanded heavy Puja donation from the accused and the accused paid only Rs.100/- so, there occurred exchange of hot words between accused and Ramesh Ray and others and the accused was physically assaulted and filed a false case against him. He has also denied the suggestion of the defence that the accused in his Gaon Panchayat election opposed his candidature; so, he deposed against the accused. He has denied the suggestion of the defence that he did not disclose before I.O. that he heard about the incident from the complainant. He has denied the suggestion of the defence that he did not disclose before

- I.O. that the persons gathered in the house of the complainant went to the house of the accused and demanded his family members to handover the accused to them. Then Kashem Ali, elder brother of the accused tied the hands of the accused with rope and handed over the accused to the persons gathered there.
- 14.3 P. W. 3 is the complainant and mother of the victim girl. She has deposed that her daughter is just 12 year old and she is deaf and dumb. In the last Durga Puja, on the day of Astomi Puja, she was in Puja Pendal as she installed a shop there. Her daughter was alone in the house. At noon the accused entered into her house and then her 9 year old son came to house and noticed that accused caught hold the hands of her daughter. He raised hue and cry and the neighbouring people rushed to her house and then accused fled away. The person gathered in her house chased the accused to his house, brought him from his house and handed him over to police. Thereafter, her son informed her about the incident. She returned home and her daughter through gesture and posture told her that accused caught her hands, gagged her mouth, touched her breast. She was crying. On the same date, she lodged the ejahar. Ext-2 is the ejahar and ext-2(1) is her signature. Police seized birth certificate of her daughter and her clothes. Ext-3 and ext-4 are seizure lists. Ext-3(1) and ext-4(1) are her signatures. In crossexamination she has deposed that there are seven members in her family. Victim is her eldest child. The Puja pendal is near to her house. As on the day of the incident was Astomi Puja; so, there were lots of people in the Puja pendal and on the road. After hearing the incident from her son, she immediately returned to the house without telling anything to the persons who were near to her shop. There was no boundary dispute with the accused. The house of the accused is near to her house. She has denied the suggestion of the defence that there was boundary dispute between her and accused. She has denied the suggestion of the defence that the certificate seized by police was not the certificate of her daughter. She has denied the suggestion of the defence that the clothes seized by police had no connection with the incident. She has denied the suggestion of the defence that she did not disclose before I.O. that her daughter through gesture and posture told her that accused caught her hands, gagged her mouth, touched her breast. She has denied the suggestion of the defence that she lodged a false case

- against the accused as per instruction of some boys of AAKRASU, Member of Gaon Panchayat Niranjan Ray as the accused opposed his candidature, refused to pay heavy Puja donation demanded by members of Puja committee.
- P. W. 4 is the 9 year son of the complainant. He has deposed that in the last Puja, one day, he returned home from Durga Puja pendal and saw that accused caught hands of his sister, gagged her mouth and touched her breast. Then he raised alarm. At that time his mother was in Puja pendal. He told the incident to her at Puja pendal. In cross-examination he has deposed that there was a quarrel between his father and the accused regarding boundary of bamboo garden. After he raised alarm, then accused ran away from his house. He saw him from his back.
- 14.5 P. W. 5 Radha Gobinda Adhikary has deposed that on 28-09-17, it was the day of Astomi Puja, he was in Puja Pendal which is situated near to the house of the complainant. At about 12:30 PM, minor son of the complainant, informed him that his sister was misbehaved by the accused. Then, he came to the house of the complainant. Already several persons gathered there. The persons gathered in the house of the complainant went to the house of the accused. The matter was informed to the brother of the accused. Then, Kashem Ali, elder brother of the accused, tied the hands of the accused by rope and handed him over to the public. Thereafter, the accused was handed over to police. In cross-examination he has deposed that he had not seen the incident. The Puja pendal is situated just 250 meters away from the place of occurrence. There were several persons in the road and Puja pendal. On spot, he found several persons among them Ramesh Roy, Hare Roy, Papu Roy and Biswajit Chakraborty were there. He does not know whether from the house of the accused there filed any case against above mentioned persons or not. He has denied the suggestion of the defence that on the day of incident Ramesh Roy, Hare Roy, Papu Roy and Biswajit Chakraborty went to the house of the accused and demanded Rs. 2,000/- as Puja donation and accused Kader Sk intended to pay Rs. 100/- as Puja donation and then Ramesh Roy, Hare Roy, Papu Roy and Biswajit Chakraborty physically assaulted accused Kader Sk in his house. He has denied the suggestion of the defence that there was boundary dispute between the complainant and the accused. He has denied the suggestion of the defence that that accused and

his family members did not support Niranjan Roy in Panchayat Election; so, a false case was filed against the accused through the complainant. He has denied the suggestions of the defence that he did not disclose before I. O. that the son of the complainant informed him about the incident and elder brother of the accused handed over the accused by tying his hands by rope to the public.

- **14.6** P. W. 6 Kandarpa Sarma has deposed that on 28-09-17, he was at Mejpara. At about 12:30 PM, Niranjan Roy over mobile phone told him that accused Kader raped on the victim girl; so requested him to come to the house of the complainant. Immediately, he came to the spot and found several persons in the house of the complainant. He informed the matter to Tamarhat Police Station by mobile phone. Police came and investigated the case and had taken away the accused. Police seized frock, genji and jangia vide ext-4 seizure list and he put his signature thereon as witness. Ext-4(2) is his signature. In cross-examination he has admitted that he had not seen the incident. At the time of incident, his wife Nilima Sarma was the President of Dingdinga Gaon Panchayat. Niranjan Roy was the member of the Gaon Panchayat. He heard that family members of the accused filed a case against Ramesh Roy, Hare Roy, Papu Roy and Biswajit Chakraborty. He has denied the suggestion of the defence that Ramesh Roy, Hare Roy, Papu Roy and Biswajit Chakraborty demanded huge amount from the accused as Puja donation and as the accused failed to fulfill the demand, so he was physically assaulted by them. He has further denied the suggestion of the defence that as accused did not support his wife in the Election; so, a false case was filed against him through the complainant.
- **14.7** P. W. 7 is the victim girl. She has deposed that accused touched her breast, gagged her mouth and also touched her vagina. She has denied the suggestions of the defence that she deposed as tutored by her mother and the accused did not touch her breast and vagina.
- 14.8 P. W. 8 Hara Prasad Choudhury who is a teacher of BDS, Deaf and Dumb School Kahilipara has deposed that on 16-10-2017, the investigating officer of the case called him to the court to interpret the statement of the victim girl who is a deaf and dumb girl. The victim was produced before S.D.J.M.(S) Dhubri in his presence. As per his interpretation, the statement of victim was recorded by S.D.J.M(S), Dhubri. He put his signature in the statement of the

- victim girl as interpreter. Ext-1(2) is his signature. In cross-examination he has deposed that on the day of recording the statement, the victim did not disclose the name of the accused. The victim girl has not taken any education from Deaf and Dumb School. On the day of recording her statement, he met the victim girl for the first time.
- P. W. 9 is another minor son of the complainant. He has deposed that in the last Durga Puja, he was at Puja Pendal. At about 12 noon, he returned home. Before him, his brother returned home. The door of the room was closed. He pushed the door and saw the accused was inside the room. Seeing him the accused ran away from their house. Thereafter, his brother informed the incident to his mother who was also at Puja pendal. At the time of incident, his sister, the victim, was at their residence. In cross-examination he has deposed that Ramesh Roy, Hare Roy, Papu Roy and Prasenjit Roy visited the house of the accused, physically assaulted him and handed him over to police. His brother returned home from Puja pendal and after 10 minutes, he was also returned home from Puja pendal. The accused left his home seeing him and his brother.
- **14.10** P. W. 10 Dr. (Mrs) Muskura Ahmed has deposed that on 29-09-2017, she was posted at Civil Hospital, Dhubri as the Sr. Medical & Health Officer. On that day, she examined the victim girl who was escorted by WPC Sweety Das in connection with Tamarhat P.S. case No. 217/17. According to the guardian of the victim, on the day of incident at about 12:30 p.m. when victim was alone in her house, a person entered into the house forcefully and committed physical assault on her. While her brother came, she shouted and then the person fled away. On examination, she found the patient was normal. She did not find any mark of injury on her body. She also did not find spermatozoa in the vaginal smear. She did not find any evidence of recent sexual intercourse on the victim at the time of examination. Ext-5 is the report prepared by her and ext- 5 (1) is her signature.
- **14.11** P. W. 11 Moizuddin Sheikh is the investigating officer. He has deposed that on 28-09-2017, he was working at Tamarhat P.S. as Asstt. Sub-Inspector of Police. On that day, the complainant lodged a written ejahar before O/C, Tamarhat P.S. with an allegation that on that day at about 12:30 pm, while her minor daughter who is physically disabled was home alone and then accused Kader Ali Sk entered into the house, closed the door and committed

rape on her minor daughter. After receiving the ejahar, O/C. Tamarhat P.S. registered a case and entrusted him to investigate the case. At about 1:30 pm, he visited place of occurrence i.e. the house of the complainant, inspected the place of occurrence and prepared a sketch map of place of occurrence. There were several persons on spot. The public confined accused Kader Ali Sk. The accused was arrested by him. He has recorded the statements of witnesses. Next day, the victim girl was forwarded to Dhubri Civil Hospital for her medical examination. The victim was produced before Judicial Magistrate for recording her statement u/s 164 Cr.P.C. He seized one birth certificate, one Frock, one Genji and one jangia. The seized cloths were sent to FSL for forensic examination. The accused was produced before the court. He collected the report from scientific officer Serology Division, DFS, By completing the investigation, he has submitted charge sheet against the accused u/s 448/376 IPC, r/w section 4 of POCSO Act. He has exhibited the seizure lists as Ext-3 and 4 and ext-3(2) and 4(3) are his signatures. Ext-6 is the sketch map of place of occurrence. Ext-6(1) is his signature. Ext-7 is the report of scientific officer which he collected. Ext-8 is the charge sheet and ext-8 (1) is his signature. In cross-examination he has deposed that he heard that the family members of the accused filed a case against Ramesh Roy, Hare Roy, Papu Roy and Prasenjit Roy. The ejahar was written by one Ashok Kr. Saha. He did not examine him. The house of Maya Rani is near to the place of occurrence. She was not examined. Her family members were also not examined. On the day of recording the statement of the victim girl u/s 164 Cr.P.C., the accused was not present in the court. Witness Niranjan Roy did not disclose before him that he heard about the incident from the complainant. Witness Niranjan Roy did not disclose before him that Kashem Ali, the elder brother accused tied the hands of the accused with rope and handed over the accused to the persons gathered there. The complainant disclosed before him that from gesture and posture of her daughter she came to know that the accused Kader committed rape on her. Witness Radha Gobinda Adhikary told him that he heard about the incident from the sons of Bishnu. Witness Radha Gobinda Adhikary did not tell him that elder brother of the accused handed over the accused by tying his hands by rope to the public.

- **15.**On perusal the evidence on case record it appears that P. W. 3, the mother of the alleged victim lodged the ejahar before O. C. Tamarhat police station on 28-09-2017 and on the basis of the ejahar a case as Tamarhat P. S. case No. 217/2017 under sections 448/342/376 IPC read with section 4 of POCSO Act was registered. On perusal the contents of the ejahar (Ext. 2) it appears that on the day of alleged incident i.e. 28-09-2017 the alleged victim who was just 12 year old was alone at her house. About 12.30 p.m. the accused entered into the house of the complainant, closed the door and committed rape on her 12 year minor daughter.
- 16. It appears that on the day of the alleged incident it was Durga Puja (Astomi Puja). The complainant installed a shop at Durga Puja Pendal celebrated near to her house. The distance of Puja pendal and her house was just 200 meters. Her two minor sons (P. W. 4 and P. W. 9) were also with her and her minor daughter who is deaf and dumb was alone at her house. Around 12.30 p.m. both her minor sons came to house one after another. P. W. 4 who came first to his house saw the accused inside the house. His evidence shows that he saw that the accused caught hold the hands of his sister, gagged her mouth and touched her breast. P. W. 9 who arrived at the spot just after his brother (P. W. 4) and saw that the door was closed, he pushed the door and seeing him the accused ran away. P. W. 4 after seeing the incident immediately informed his mother who returned home from Puja Pendal. In the meantime the news of the incident spread like wild fire and several persons gathered in the house of the complainant. Some persons rushed to the house of the accused and from his house the accused was apprehended and ultimately police came and had taken him to police station.
- 17.P. W. 2 Niranjan Ray has deposed that after the incident a group of persons visited the house of the accused, demanded his family members to hand over the accused to them and then the elder brother of the accused tied the hands of the accused with rope and handed over the accused to the persons gathered there. The defence has denied the fact that the accused was handed over by his elder brother on demand of a group of persons. The prosecution has failed to lead evidence to that effect. From the evidence on record it appears that the family members of the accused filed a case against some boys. The accused may be or may not be handed over by his elder brother to a group of persons; but it is established that on the day of the incident the accused was brought by some persons from his residence and confined him and the investigating officer arrested him on that day.

- **18.** After perusal the evidence on record it is clear that the alleged incident took place inside the house of the complainant. In the sketch map (Ext. 6) the I. O. has also shown the place of incident inside the house of the complainant. The defence has not challenged the sketch map of place of occurrence which was drawn by I. O. on the day of the incident.
- **19.**The complainant in her deposition has deposed that the age of victim was 12 years. During investigation the I. O. seized birth certificate of the victim girl vide Ext. 3. In the birth certificate the name of the victim is shown different. The complainant in her deposition clarifies that her daughter is also known in the name mentioned in the birth certificate. In the birth certificate the date of birth of the victim girl is shown as 02-10-2003. The alleged incident took place on 28-09-2017. Arithmetical calculation shows that on the day of the alleged incident the age of the alleged victim was 13 year 11 month 26 days.
- **20.**Undoubtedly the alleged victim is the vital witness in this case. But she is deaf and dumb. After the incident the victim was produced before learned SDJM (S) Dhubri for recording her statement and learned SDJM (S) recorded her statement with the help of special educator.
- 21. From the deposition of learned SDJM (S) Dhubri Jayashree Bora it appears that she recorded the statement of the victim girl with the help of special educator as the victim was speech and hearing impaired and in presence of the mother of the victim. Before recording the statement under section 164 Cr. P. C. the interpreter administered oath to the effect that he would interpret correctly. The prosecution examined the special educator as P. W. 8. His deposition shows that as per his interpretation learned SDJM (S) Dhubri recorded the statement of the victim girl. In cross-examination he has clarified that at the time of recording the statement of the victim girl she did not disclose the name of the accused. The investigating officer (P. W. 11) has also clarified that at the time of recording the statement of the victim girl in the Court, the accused was not present. Learned defence counsel has pointed out that in the statement of the victim girl (Ext. 1) recorded by learned SDM (S) Dhubri the name of the accused is mentioned. So the statement of the alleged victim recorded by learned SDJM (S) Dhubri is not as per law as it was not the statement of the victim girl.

- 22. As the victim girl is suffering from hearing and speaking impaired and the accused was not present in the Court at the time of recording her statement and it is not possible to disclose the name of accused by gesture and poster by the victim and the interpreter has clarified that the victim girl did not disclose the name of the victim; so, it is not known how learned SDJM (S) mentioned the name of accused while she recorded the statement of the victim girl. So the statement of the victim girl (Ext. 1) recorded by P. W. 1 is not accepted.
- 23. During trial the prosecution examined the victim girl as P. W. 7 and her gesture and poster has been interpreted by special educator Hara Prasad Choudhury (P. W. 8). On the day of recording the deposition of the victim girl the accused was present in the Court. From her gesture and posture the special educator interpreted that accused touched the breast, gagged her mouth and also touched her vagina. In cross-examination the victim girl has denied the suggestion of the defence that she deposed as she was tutored by her mother.
- **24.** After the incident the independent witnesses examined by the prosecution arrived at the place of occurrence and all the witnesses have deposed that they heard that the accused misbehaved the daughter of the complainant.
- **25.**The defence has taken a plea in the cross-examination that some members of the Puja Committee demanded heavy donation from the accused. The accused was ready to pay only Rs. 100/; so, the boys of the Puja Committee physically assaulted the accused and the family members of the accused filed a case against those members of Puja Committee. As the family members of the accused filed a case against some members of Puja Committee; so, a false case was filed against the accused through the complainant.
- **26.**The complainant was no way involved with the affairs of Durga Puja Committee. She just installed a shop at Puja Pendal. If there was any nexus between the complainant and the Puja Committee then the defence has to lead strong evidence. Mere putting some suggestions that just to take revenge against the accused a false case was filed is not sufficient to dilute the positive evidence led by prosecution.
- **27.**In the case in hand the most vital witnesses are the victim girl and her two minor brothers who had seen the incident. On perusal the evidence of the two brothers of victim girl it appears that the younger brother (P. W. 4) who came first to his residence has deposed that he saw that the accused was inside of their house, caught hands of his

sister, gagged her mouth and touched her breast. His deposition is corroborated the victim girl herself. But another brother (P. W. 9) who came to the house just few minutes later has deposed that while he reached home he found the door of their room was closed, he pushed the door and saw that the accused was inside of the room. Seeing him the accused ran away. On the day of recording the depositions of the two brothers of the victim it appears that P. W. 4 was 8 years old and P. W. 9 was 12 years old. Though their depositions were recorded in camera; still the atmosphere of the Court was not familiar to them. The Hon'ble Supreme Court in **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat Cr. L. R. (S. C.) 1983** has observed that *by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

- **28.**Two young boys aged about just 8 and 12 year witnessed a very unfortunate and unexpected scene in their house and they deposed in the Court after few months of the incident; so the possibilities of getting confused regarding sequence of events by them cannot be ruled out. After considering the oral testimonies of other witnesses I find nothing to disbelieve the depositions of the victim girl and her two minor brothers.
- 29.On the next day of the alleged incident the medical officer examined the alleged victim and medical officer (P. W. 10) found no injury on her body, did not find spermatozoa in her vaginal smear and did not find any evidence of recent sexual intercourse. The investigating officer (P. W. 11) seized undergarments of the victim girl and sent the same to FSL for scientific examination. The I. O. collected the report of Scientific Officer, Serology Department, DFS Assam and exhibited the same as Ext. 7. The Scientific Officer found negative test for semen. As the alleged victim girl was just 13 years old at the time of the alleged incident, if the accused was able to enter his genital definitely the medical officer would be able to find out that hymen of the alleged victim had torn.
- **30.** There is no evidence in the case record that after the arrest of the accused he was produced before medical officer with a view to collect evidence as per provision of section 53-A Cr. P. C.
- **31.**To book the accused under section 376 IPC or section 4 of the POCSO Act the prosecution has to fulfill the requirements of section 375 of IPC and section 3 of POCSO Act. As per section 375 IPC a man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling

under any of the descriptions mentioned in that section. Likewise section 3 of POCSO Act defines the penetrative sexual assault. It provides that if a person penetrates his penis, to any extent, into the vagina, mouth etc of a child then the person is liable to be punished under section 4 of the POCSO Act. In the case in hand, after perusal the materials on record it appears that there was no penetration of the male organ of the accused to the vagina of the alleged victim. So, there is no iota of doubt that the prosecution has failed to establish the charges against the accused either section 376 IPC or section 4 of the POCSO Act.

- **32.** Now let us scrutinize whether the act of the accused covers any of the penal provision or not. Section 7 of the POCSO Act defines sexual assault. It provides that a person is said to commit sexual assault if he with sexual intent touches the vagina, penis, anus or breast of a 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.
- 33.In the case in hand, the accused on the day of the alleged incident at about 12.30 p.m. entered into the house of the complainant, gagged her mouth, touched her breast and vagina. The defence while cross-examined the complainant has put a suggestion that there was boundary dispute with the accused which the complainant denied. The sketch map of the place of occurrence drawn by I. O. (Ext. 6) shows that the house of the accused is situated about 100 meters away from the house of the complainant. So, question of having boundary dispute between the complainant and the accused does not arise. The defence has failed to substantiate the plea of enmity taken in cross-examination by adducing cogent evidence. The defence has failed to show any good ground that the complainant filed a false case against the accused. So entry of the accused into the house of the complainant at odd time i.e. at about 12.30 p.m. while a deaf and dumb girl was alone itself doubtful. His act towards the alleged victim was indecent. The acts of accused holding the hands of the alleged victim, gagging her mouth, touching her breast and vagina clearly show that the indecent act of the accused was with sexual intent which involves physical contact without penetration.
- **34.**In view of the above discussion and observation it is concluded that the prosecution is able to establish the requirements under section 442 IPC and section 7 of POCSO Act and hence able to establish the charge against the accused under section 448 IPC and section 8 of POCSO Act.

- **35.**Though the charge under section 8 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 8 of POCSO Act instead of section 4 of POCSO Act vide provision of section 222 (2) Cr. P. C.
- **36.**So, it is held that the prosecution is able to establish the charge against the accused under section 448 IPC and section 8 of POCSO Act beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **37.** The accused/convict is neighbor of the complainant. His indecent act towards a girl of 13 year who is speech and hearing impaired is simply condemnable. So, I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **38.**Heard accused/convict on quantum of sentence.
- **39.** Also heard learned counsels appearing for the parties.
- **40.**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.
- **41.**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.
- **42.**On the other hand learned counsel for the defence has submitted that the accused is a young boy and has no criminal antecedent; so, has prayed to deal with him leniently considering his young age.
- **43.** 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.
- **44.** Prescribed punishment under section 8 of the POCSO Act is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.
- **45.** The accused/convict is a young boy just 27 years old. Considering his age it is decided to impose following punishment.

ORDER

- **46.** The prosecution is able to establish the charges against the accused Kader Ali Sheikh under section 448 IPC and section 8 of POCSO Act and accordingly he is convicted under said sections.
- **47.**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.
- **48.** The accused/convict is further sentenced to go rigorous imprisonment for 4 (four) years and also pay fine of Rs. 5,000/ (rupees five thousand) in default rigorous imprisonment for 2 (two) months under section 8 of POCSO Act.
- **49.** Fine amount, if realized, shall be given to the victim as compensation.
- **50.** The period underwent during investigation and trial shall be set off as per law.
- **51.** Furnish a free copy of the judgment and order to the accused/convict as per provision of law.
- **52.**Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

- **53.**The victim girl who was speech and hearing impaired and just 13 year 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. 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.
- **54.** 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.

- **55.**Send a copy of this order to the Secretary DLSA, Dhubri for information and necessary action.
- **56.**Given under my hand and seal of this Court this the 29th day of May 2018

(D. Thakuria) Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 01/2018

UNDER SECTIONS: 448/376 IPC READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM VS. KADER ALI SHEIKH

<u>A P P E N D I X</u>

A. Prosecution exhibits:

Ext. 1 : Statement of the victim.

Ext. 2 : Ejahar.

Ext. 3 & 4 : Seizure lists.

Ext. 5 : Medical report.

Ext. 6 : Sketch map of place of occurrence.

Ext. 7 : Scientific report.

Ext. 8 : Charge sheet.

B. Defence Exhibits: Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Jayashree Bora,

P. W.2: Niranjan Ray,

P. W.3: Complainant,

P. W.4: Brother of the victim,

P. W.5: Radha Gobinda Adhikary,

P. W.6: Kandarpa Sarma,

P. W.7: Victim,

P. W.8: Hara Prasad Choudhury,

P. W.9: Brother of the victim,P. W.10: Dr. Muskura Ahmed &P. W.11: Moizuddin Sheikh.

E. Defence Witness: Nil.

F. Court Witness: Nil.

(D. Thakuria)

Special Judge, Dhubri.