IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

District: Kamrup, Amingaon Present: Smti. B. Kshetry Special Judge, Kamrup, Amingaon Special Sessions (POCSO) case No.80/2018 U/S- 448/342 of IPC R/W Section 4 of the POCSO Act, 2012 State of Assam -Versus-Md. Ballabh Ray s/o-Lt. Madhusudhan Ray Resident of vill -Kahibari P.S.-Boko Dist- Kamrup -----Accused Appearance: Mr. A.K. Baruah. Ld. Addl. Public Prosecutor -----for the State Mr. Abdur Rahim, Ld. Advocate -----for the

Date of evidence: 24.05.2019, 18.07.2019, 21.08.2019, 16.10.2019, 14.11.2019.

Date of Argument: 16.12.2019 and 19.12.2019.

accused

Date of Judgment: 23.12.2019.

JUDGMENT

- 1. The prosecution case, in brief, is that on 02.09.2018, informant Nivash Mandal lodged an ejahar alleging that the accused person- Ballabh Ray attempted to commit rape upon his minor daughter when she had gone to her Aunt's place after coming from school. Hence, the case.
- 2. On the basis of the said ejahar, Boko P.S Case No. 631/2018 U/S-448/342 of IPC R/W Section 4 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the accused person U/S-448/342 of IPC R/W Section 4 of the POCSO Act, 2012.
- 3. The case was duly committed and the Court after hearing both the parties, framed charges U/S- 448/342 of IPC R/W Section 4 of the POCSO Act, 2012 against accused— Ballabh Ray. The aforesaid charge were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined as many as 8 (eight) numbers of witnesses including the informant, victim and M.O and I/O. Statement of the accused person U/S-313 Cr. P.C is recorded. He denied committing the offence and declined to adduce evidence.

5. **POINT FOR DETERMINATION:**

(I) Whether the accused person on 01.09.2018 at about 3.30 p.m at village Kahibari committed house trespass by entering into the dwelling house of her Aunt with intent to sexually assault the minor daughter of the informant, and thereby, committed an offence of punishable U/S 448 of IPC?

- (II) Whether the accused person on the same date, time and place wrongly confined the victim in the house, and thereby, committed an offence of punishable U/S 342 of IPC?
- (III)Whether the accused person on the same date and time committed penetrative sexual assault on the informant's minor daughter and, thereby, committed an offence punishable U/S-4 of the POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined as many as 9 (nine) numbers of witnesses.
- 7. P.W.1, Sri Nibhash Mandal is the informant of this case. He knows the accused person—Ballav Ray. Prosecutrix is his daughter. The incident took place about 8/9 months ago at about 3.00 p.m. Prosecutrix was 12 years old at the time of occurrence. At the relevant time, P.W.1 was in the paddy field. At 4.00 p.m, he saw a crowd gathering in front of his house and the house of Minati Mandal. He came to know from the village people that the accused had taken the prosecutrix in the house of Minati Mandal and locked her from inside. On reaching home, P.W.1 met the prosecutrix and enquired her. She told him that after coming from school, she had gone to the house of her Aunt—MinatiMandal, who stays nearbyand then the accused came there and he raped her. At that time, MinatiMandal and her family members were not present in the house. P.W.1 called for a village meeting regarding the incident. As no decision was taken in the meeting so, he lodged the ejahar. Police recorded his statement.

In his cross-examination, P.W.1 deposed that he do not know the date of occurrence. Ejahar was written by one Pradip as instructed by him. On the next day of the incident, P.W.1 lodged the ejahar. About 30/40 people gathered in his house after the incident. Upen, Sitanath, Ananta, Bejobashi, Surpashi, Pagla, Rajib, Sagar, Nayan etc. were present there at 6.00 p.m. Accused was not present but prosecutrix was present in the meeting. P.W.1 stated that there are 5/6 houses between their house and the house of the accused and there are 4/5 houses between their house and the house of said Minati Mandal and P.W.1 did not know if the house of Minati was locked from outside or not on the date of occurrence. Tusti Ray, Nanigopal Ray, Bhakta Mandal, Deepak, Subbashi, Phulmala are their neighbours. They were in their houses on the date of incident. P.W.1 did not know Rahul Mandal. I do not know if there is love affair between the prosecutrix and one Rahul Mandal and that she speaks with him by from mobile phone of various people. Prosecutrix addresses the accused as 'Aata' (grandfather). P.W.1 did not know if the prosecutrix used the mobile phone of the accused to contact Rahul Mandal and on the date of occurrence she had rang Rahul Mandal from the mobile phone of the accused. P.W.1 know one Phulmala. He does not know her relation with the accused. He denied the defence suggestion that the accused did not come to the house of Minati Mandal and committed rape upon her.

8. P.W.2, is the prosecutrix. She stated that Informant of this case is her father. She knows the accused person—Ballav Ray. The incident took place about 8 months ago at about 3.30 p.m. P.W.2 was 12 years at the time of occurrence. She stated that at the relevant time, she was in my Aunt—Minati Mandal's house. Her Aunt and her family members were not in the house. P.W.2 was sitting in a chair under a tree in her courtyard. Then, accused came and asked her to go to the house of her Aunt—Minati Mandal. But she refused to go. Then, after some time she went to keep the chair inside her Aunt's house and the accused followed her to the house from her back side and he closed the door and locked it. P.W.2 alleged that the

accused pressed her mouth with his hand. He made her sit in a chair, opened her panty and had sexual intercourse with her. P.W.2 resisted him and shouted. Then, her another Aunt—Phulmala Biswas and Arati Mandal came after the incident and P.W.2 opened the door. They saw the accused person in the house of Minati Mandal. P.W.2 came to her house and told the incident to her parents. They called the village people for discussion. Accused did not come in the meeting. They enquired from her about the incident and he told them. Thereafter, her father gave a case. Police recorded her statement. Police sent me to the doctor for medical examination and brought her before the Magistrate for recording my statement U/S-164 Cr.P.C. Ext.1 is the statement. Ext. 1 (1& 2) are my signatures.

In her cross-examination, P.W.2 disclosed that she returned from school at about 2 p.m on the date of occurrence. She came to her house first and thereafter, she went to her Aunt's place at around 3.00 p.m. Her Aunt's house was not locked from outside even though nobody was there in the P.W.2 admitted that she knows his nghbour—Rahul Mandal but house. denied speaking with him over phone. She stated that she addressed the accused as Uncle (Moha). She stated that she was wearing long white frock and a green half pant at the time of incident. Police did not seize her dresses. P.W.1 further stated that the houses of Nanigopal Ray, TustiRay, Ananta Mandal, Rajib Mandal are located near her house. Nanigopal Ray and the accused have a common compound. The neighbouring people were present in their houses at the time of occurrence. Aunt—Phulmala stays near Minati's house while Arati stays near her house. On the date of incident, on hearing her 'hullah' her aunt-Phulmala and Arati arrived and just then she opened the door of Minati's house after the incident. When P.W.2 went to Aunt-Minati's house, she met her daughter Buli Karmakar, who asked her to accompany to the house of the accused but she refused to go with her and sat down in the courtyard under a tree. P.W.2 disclosed that any sound or noise from the house of my Aunt-Minati cannot be heard in the house of Arati.

There were about 20 village people present in the village meeting. One Ananta Mandal enquired the incident from her in the village meeting. He is her grandfather. This witness revealed that her Aunt—Minati's house is a katcha house with wooden door and hook. P.W.2 was sitting in a brown plastic chair.Phulmala and Arati saw the accused but they could not catch him as he fled away immediately. At 4.00 p.m people gathered in the house regarding the incident. She denied the defence suggestion that the accused did not have any sexual intercourse forcibly and that I deposed falsely today against him as tutored by my parents.

9. P.W.3, Aroti Mandal deposed that she knows botht he parties. She testified that the incident took place about 8/9 months ago at about 3.30 p.m. Prosecutrix was 12 years at the time of occurrence. At the relevant time, P.W.3 was in her courtyard. Then, her neighbour Phulmala Biswas waved and called me. P.W.3 came near her. Then, they both went to the house of Minati Mandal. We found accused inside the house of MinatiMandal, w/o-DilipKarmakar. The entrance door was open. But she did not see any incident nor heard about it. Police recorded my statement.

In her cross-examination P.W.3 disclosed that the house of Minati Mandal is ½ km away from her house. P.W.3 does not know the relationship between accused and Phulmala. She denied the suggestion that she did not go to the house of Minati and deposed falsely in the court.

10. P.W.4, Sri Dipak Mandal deposed that prosecutrix is his related sister. The incident took place about 10 months ago at about 3.00 p.m. Prosecutrix was 12 years at the time of occurrence. At the relevant time, P.W.4 was in his paddy field. Then, at 4 p.m when he returned home, then he heard from the informant, who is his related uncle that prosecutrix went to her Aunt—Minati Karmakar's house but there was nobody in the house. The accused, who is the neighbour of her Aunt saw the prosecutrix and he pulled and took her inside the house of Minati Karmakar by closing her mouth with

his hand. He closed the door from inside. Then, the prosecutrix shouted. The neighbours—Arati Mandal and Phulmala Biswas upon hearing her shouts came and the accused opened the door from inside and he fled away. P.W.4 met Arati Mandal and Phulmala Biswas and they told him that upon hearing the shouts of the prosecutrix coming from the house of Minati Karmakar, they arrived there and on seeing them, the accused opened the door from inside and fled away. They found the prosecutrix inside the house of Minati Karmakar.

In his cross-examination, P.W.4 disclosed that he did not see the accused in the place of occurrence when he returned from the paddy field. Police recorded his statement after 4 days of the incident in the police station. This witness did not know Rahul Mandal and if there was any affair between him and the prosecutrix. He disclosed that he and Phulmala Biswas are not in talking terms with the accused.

11. P.W.5, Sri Bijoy Mandal stated that prosecutrix is his cousin sister. The incident took place about 11 months ago at about 3.00/3.30 p.m. Prosecutrix was 12 years at the time of occurrence. At the relevant time, he was outside the house for work. Then, at 6 p.m when he returned home, he heard from Arati Mandal and Phulmala Biswas that prosecutrix after returning from school went to her Aunt—Minati Karmakar's house but there was nobody in the house. P.W.5 heard that the minor daughter of Minati was nearby. Then the accused came and took her inside the house of Minati Karmakar by closing her mouth with his hand. He closed the door from inside. Phulmala saw the incident and she told Arati. Then, Arati Mandal and Phulmala Biswas came there. Then, the accused opened the door from inside and he fled away.

In his cross-examination, P.W.5 deposed that he was in talking terms with the accused before the incident. Police recorded his statement after 3/4 days of the incident in the police station. He denied knowing Rahul

Mandal and if there was any affair between him and the prosecutrix. Phulmala Biswas is not in talking terms with the accused.

12. P.W.6, Dr. Rechma Talukdar is the M/O of this case. She stated that on 04.09.2018, she was working as a Medical Officer, Department of Forensic Medicine at GMCH. On that day, she examined one Sri Madhumala Mandal, female, 12 years of age brought in reference to Boko P.S case No. 631/18 U/S-448/342 of IPC R/W Section 8 of the POCSO Act, 2012. She was accompanied and identified by WPC, 606Mridula Rabha. The victim stated before her that the accused—Bhalab Mazumdar had sexually assaulted her on 01.09.2018.

On the physical examination of the victim found---

Her height—129 cm, weight—40 kg, chest girth—79 cm, abdominal girth—69 cm, total 27 teeth were present and all were permanent. Scalp hair-33 cm, black in color, Axillary hair—sparse, pubic hair—on pubic part not covering labia majora, her breast—hemispherical, areola and nipple black in colour. Menarche—6 months back, cycle-regular, last menstrual period—29.08.2018.

On genital examination:-

Genital organs—healthy, vulva—labia majora and minora exposed on abduction of legs, Hymen –old tear present at 5, 7 and 11 o'clock position, vagina—rugocity present, Cervix—healthy, Uterus—not Palpable per abdomen, evidence of venereal disease –not detected clinically at the time of examination, vaginal swabs collected from – from around the cervix and posterior fornix, injury on the body—Not detected at the time of examination, her mental condition at the time of examination—Normal, cooperation and behavior—Co-operative and average, intelligence and memory—Average, gait—Normal.

Laboratory investigation:-

Vaginal smears does not show any presence of spermatozoa or gonococcus.

<u>Opinion:</u> On the basis of physical examination, radiological and laboratory investigations done, P.W.6 opined that:-

- 1. There is no evidence of recent sexual intercourse detected on her person at the time of examination.
- 2. No any violence mark noted on her person at the time of examination except old hymenal tear.
- 3. Her age is above 12 years and below 14 years of age.

Ext. 2 is the medical report. Ext. 2 (1 to 3) are her signatures.

13. P.W.7, Smti. Phulmala Biswas deposed that the incident took place about a year ago at about 3.30 p.m. Prosecutrix was then 12 years old. At the relevant time, P.W.7 was outside the house on the road. She went to the house of the Minati Karmakar (prosecutrix's maternal Aunt). P.W.7 heard someone was speaking inside the house and she tried to push the door and called 'Buli' (daughter of Minati Karmakar) from outside but nobody opened the door. Thereafter, I met Arati Mandal and told her about it. They both together again went to the house of Minati Karmakar and knocked the door. Prosecutrix was inside the house and she opened the door. She was shivering when they enquired what happened to her. She asked them to look under the bed. Then, they saw accused hiding under the bed. Thereafter, they returned back home. and told the incident to the informant (prosecutrix's father).

In her cross-examination, P.W.7 deposed that accused stayed to the opposite of my house. She denied the defence suggestion that they have previous enmity with the accused since 15 years back. I did not tell the police specifically that she called 'Buli'. She also denied the suggestion that she deposed falsely that she went to the house of Minati on the date of occurrence.

14. P.W.8, Inspector Mintu Boro is the Investigating Officer of this case. He deposed that on 02.09.2018, he was serving as i/c Chamariah P.P. under Boko P.S. On that day on receiving an ejahar lodged by one Sri Nivas Mandal, P.W.8 made a G. D. Entry bearing No. 20 dated 02.09.2018 and forwarded the ejahar to O/C, Boko P.S. P.W.8 recorded the statement of the informant including the victim. P.W.8 visited the place of occurrence along with other staffs and recorded the statements of the witnesses. P.W.8 also prepared the sketch map. Ext.3 is the sketch-map and Ext. 3 (1) is his signature. The O/C, Boko P.S registered a case bearing Boko P.S Case No. 631/2018 U/S-448/342 of IPC R/W Section 8 of POCSO Act, 2012 and directed him to investigate the case. The accused—Ballav Rai was not found on search as he fled away. Later on, he was arrested and produced before the court. P.W.8 send the victim for her medical examination and brought her before the Court for getting her statement recorded U/S-164 Cr. P.C before the Magistrate. Thereafter, P.W.8 collected the medical report and completed the investigation. On finding sufficient materials against the accused—Ballav Rai, P.W.8 submitted charge sheet against him U/S-448/342 of R/W Section 4 of POCSO Act. Ext.4 is the charge-sheet and Ext. 4 (1) is his signature. P.W.8 seized the Birth Certificate of the victim girl and gave it in the zimma of her guardian. Ext. 5 is the seizure list. Ext. 5 (1) is his signature.

In his cross-examination, P.W.8 deposed that P.W.1 did not state before him that the accused raped the victim. P.W.2 did not state before him that the accused made her sit in a chair, opened her panty and had sexual intercourse with her, she resisted the accused and that Phulmala Biswas and Arati Mandal saw the accused person in the house of Minati Mandal. P.W.3 did not tell him that he heard the incident from the mouth of the informant. The witness told him that he heard the incident from the village people. P.W.5 did not tell him that he returned home at 6 p.m and that he heard the incident from Arati Mandal and Phulmala Biswas and that the daughter of Minati Mandal was standing there with the prosecutrix. He also did not tell P.W.8 that the accused closed the mouth of the prosecutrix with

his hand and that he closed the door from inside. He did not state before P.W.8 the specific names of the two ladies namely, Arati Mandal and Phulmala Biswas, who heard the shouts of the prosecutrix and knocked the door of the house of Minati Mandal. P.W.5 did not tell P.W.8 specifically that the accused open the door. P.W.7 did not tell P.W.8 that she and Arati Mandal went to the house of the accused twice on the day of the occurrence. She did not tell P.W.8 that she told the incident to the informant. P.W.8 did not examine Nirod Biswas, Nani Gopal and Dilip Karmakar whose names are mentioned in the sketch-map and the other neighbouring people of the informant.

- 15. I have heard the arguments of the Learned Counsels of both the sides. Learned Defence Counsel argued that the accused has been falsely implicated in the case due to enmity. He further submitted that there are major contradictions in the evidences of the pws and as per the allegation made in the FIR here was an attempt to rape, so section 4 of the POCSO Act is not attracted in this case.
- 16. Perused the FIR lodged by father of the victim girl. It is alleged that the accused Ballav Ray attempted to rape the prosecurix/victim girl and when she shouted out , the nearby people arrived , But , the accused fled away. Coming to the evidence of the prosecutrix before the court as (pw-2), she stated that on the date of occurance at 3.30 p.m , when she went to her Aunt- Minati Mandal's house, she and her family members were not there and Pw-2 sat in a chair under a tree in her courtyard , then the accused asked her to go to her Aunt's house but she refused . Her version is that after sometime, when she went to keep the chair inside her Aunt's house, then the accused followed her inside the house and he closed the door and locked it. Allegation of pw-2 is that the accused pressed her mouth with his hand and made her sit in a chair . He opened her panty and had sexual intercourse with her. As pw-1 resisted him and shouted , her Aunt —Phulmala Biswas(pw-7) and Arati Mandal (pw-3) arrived and pw-2 opened the door. Her evidence is that they

saw the accused in the house of Minati Mandal and then, she came to her told the incident to her parents. Now , evidence of pw-3 reveals that at the time of occurance, she and pw-7 went to the house of Minati Mandal and they found the accused inside the house of Minati Mandal . According to pw-3, the entrance door of the house of Minati Mandal was open but they did not see any incident nor heard about it. Her evidence is very much contradictory to the evidence of pw-2. Another witness, pw-7 testified that at the time of occurance, she went to the house of Minati and heard some voices inside, she tried to push the door from outside but nobody opened the door. Thereafter, she met pw-3 and told her about it . She and pw-3 again together went to the house of Minati and knocked the door. It is in the evidence of pw-7 that pw-2 (prosecutrix) was inside the house and she opened the door. According to pw-7, pw-2 was shivering and on enquiry, she asked them to look under the bed and they saw the accused hiding inside the bed. Thereafter, pw-3 and pw-7 returned back home and told the incident to pw-1 (father of the prosecutrix). Again, the evidences of pw-2, 3 & 7 are contradictory to each other. Nowhere, in her evidence, pw-2 stated that she opened the door and showed pw-3 and pw-7 that accused was hiding under the bed in the house of Minati. Further, Pw-1 and pw-5 are hearsay witnesses. It comes out from the evidence of pw-5 that he heard from pw-3 and pw-7 that the prosecutrix was taken to the house of Minati by the accused by closing her mouth with his hand and he closed the door from inside. This witness heard from pw-3 and pw-7 that Pw-7 saw the incident and told to pw-3 and then, both of them came there, then, accused opened the door from inside and fled away. None of these witnesses alleged that the accused had sexual intercourse with the prosecutrix . It further comes out that the prosecutrix also did not tell them that the accused had forcible sexual intercourse with her by locking the door of the house of Minati. Apart from the prosecutrix and her father, no other gave such allegation. It is in the evidence of pw-1 (father of pw-2) that at 4.00 PM when he returned from the paddy field, he saw a crowd outside his house and he came to know from the village people that the accused had taken the prosecutrix to the house of Minati Mandal and locked her from inside. His further evidence is that pw-1 told him that the accused raped her when she had gone to the house of Minati Mandal.

- 17. Learned Defence Counsel pointed out that there are major contradictions in the evidences of the pws before the court and in their statements recorded by the I.O u/s 161 Crpc. The Ld. Defence Counsel also submitted that the victim did not stated in her statement before police U/S-161 Cr. P.C that the accused had done sexual intercourse with her. A bare perusal of the statements of the victim before police U/S-161 Cr. P.C reveals that there is contradiction in the statement of the victim of U/S-161 Cr. P.C and U/S-164 Cr. P.C. I/O (pw-8) confirmed that Pw-1 did not tell him that the accused raped pw-2. He also confirmed that pw-2 (prsecutrix) did not tell him that the accused made her sit in a chair, opened her panty and had sexual intercourse with her and that she resisted the accused and pws-3 and 7 saw the accused in the house of Minati Mandal . M.O (pw-4) who examined pw-2 gave the opinion that there is no evidence of sexual intercourse on her person at the time of examination. Therefore, there is major contradiction in the allegations made in the FIR and in the evidences of pws-1 & 2, which raises a doubt regarding the prosecution story. Pw-3 confirmed that she neither saw the incident nor heard about it , which is in total contradiction with the evidence of the prosecutrix (pw-2). Again , pw-5 deposed a totally different story. He heard that the accused took pw-2 inside the house of Minati by closing her mouth with his hand. Furthermore, pw-2 stated that she opened the door of the house of Minati when pw-3 and pw-7 came there but pw-3 claimed that the door was open. Pw-5 heard that the door was opened by the accused.
- 18. On careful scrutiny of the evidences on record, the entire prosecution story appears to be concocted, fabricated and after thought. Pws have stated new facts which is nowhere mentioned in the FIR. The sole evidence of pw-2 is not found to be trustworthy and reliable. From the evidence of the I/O, P.W.8, it is seen that the whole evidence before the court

and the evidence before the police was different because it is proved that the

witness did not tell the story as it is which is stated before the court.

Therefore, in the midst of such contradictory statements, the accused is

entitled to get the benefit of doubt. So, the offences U/S- 448/342 of IPC

R/W Section 4 of the POCSO Act is not at all attracted in this instant case.

19. In the result, the prosecution has miserably failed to prove the

case beyond all reasonable doubt against the accused person—Md. Ballabh

Ray. Accordingly, the accused is held not guilty. He is hereby acquitted of the

offence U/S-448/342 of IPC R/W Section 4 of the POCSO Act, and set at

liberty forthwith.

20. His bail bonds shall remain in force for next 6 (six) months U/S-437

(A) Cr. P.C.

21. The case is disposed of on contest.

22. The Judgment is pronounced in open Court and written on

separate sheets.

Given under my hand and seal of this Court on this 23rd day of

December, 2019.

Special Judge,

Kamrup, Amingaon

Dictated and corrected by me

Special Judge,

Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Sri Nibhash Mandal

P.W.2, is the prosecutrix

P.W.3, Aroti Mandal

P.W.4, Sri Dipak Mandal

P.W.5, Sri Bijoy Mandal

P.W.6, Dr. Rechma Talukdar

P.W.7, Smti. Phulmala Biswas

P.W.8, Inspector Mintu Boro

Prosecution Exhibit

Ext. 1 is the statement of the victim recorded U/S-164 Cr. P.C.

Ext. 2 is the medical report

Ext.3 is the sketch-map

Ext.4 is the charge-sheet

Ext. 5 is the seizure list

Special Judge, Kamrup, Amingaon