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

District: Kamrup, Amingaon

Present: A.F.A. Bora

Sessions Judge, Kamrup, Amingaon

Special Sessions (POCSO) Case No. 4/2016

State of Assam.....Complainant

-Versus-

Sri Jitu Kr. Thakuria

S/o- Jogen Ch. Thakuria

Vill- Kokjhar

P.S- Palashbari

Dist- Kamrup, Assam - Accused

Appearance:

Smt. P. Deka, Public Prosecutor

-For the State

Mr. G.K. Thakuria,

Advocate for the accused.

Date of Argument: 26-07-2017, 29-08-2017

Date of Judgment: 07-09-2017

J U D G M E N T

1) The factual matrix of the case as revealed from the record is that one Smt. Panchami Rava lodged a complaint before the court of Chief Judicial Magistrate, Kamrup, Guwahati alleging inter-alia that some

1½ months ago before lodging of the complaint when the informant came to Boko Bazar, she met one Smt. Koli Rava whom the complainant addressed as Pehi. The said Koli Rava took the complainant to the house of Smt. Shyam Das, wife of Dr. Pramod Das at Gotanagar, Maligaon, Guwahati and kept the informant in that family to work as maid servant. The complainant accordingly remained there in the house of Shyam Das working as a maid servant. After about one month of her stay in the house of said Shyam Das, one day the mother of Shyam Das came there and Shyam Das sent the complainant to the house of her mother situated at Bijoynagar, Rangamati.

- 2) According to the informant while she was in the house of the mother of Shyam Das, at midnight one youth came to the said house and knocked at the door. The mother of Shyam Das opened the door and the youth in a drunken condition came into the house and threatened the inmates of the house and switched off all the electric lights inside the house. There were two beds in the said room of mother of Shyam Das and the door was kept opened. While the complainant was sleeping in one of the two beds and the inmates were sleeping, the youth came to the bed of the complainant, caught hold of her threatening to kill if she uttered any voice and raped her by pressing cloth on her mouth. As per the complainant, she made attempt to save herself from the clutches of the said unknown person, but could not. In the next morning the complainant reported the incident to the mother of Shyam Das and another girl called Bana, but in return they told that the boy called Jitu is not such type of boy and they cannot ask him about the incident.
- 3) According to the complainant said Jitu came to the house on the following day at around 6 PM and gave a tablet to her to swallow telling her that he will kill her if she divulged the matter to anybody else. Out of fear the complainant swallowed the tablet and she stayed

- for two days in the house of the mother of Shyam Das and in both the nights Jitu raped her by force putting her in fear of death.
- 4) After two days said Shyam Das and Dr. Pramod Das took the complainant back to their house at Maligaon, Gotanagar. The story is narrated further by the complainant that after five days said Jitu again came to the house of Shyam Das and used to stay at night. There is no inner door except the main door in the house of Shyam Das and taking advantage again said Jitu went on committing rape upon her putting in fear of death. The complainant narrated the incident to Shyam Das, but she did not give any interest in such a serious matter, rather told her that Jitu is a good boy and she will not ask Jitu in this matter.
- 5) In the complaint petition, it is narrated further that being a poor girl she could not dare to challenge the nepharious activities of Jitu for fear of her life. The complainant further collected the address of Jitu as Jitu Thakuria of Bijoy Nagar, P.S. Palashbari. The complainant being threatened with the aforesaid acts of Jitu, was trying to escape from the house of Shyam Das and in the meantime suddenly her uncle's son Rahul Rava contacted her over phone. She immediately narrated the incident to said Rahul Rava and he assured her to rescue her from the house of Shyam Das. Ultimately Jalukbari P.S. rescued her and brought her to Jalukbari P.S. where she told the incident in details. It is alleged inter-alia that the complainant was under threat of Jitu Thakuria and she could not lodge formal ejahar to police. According to her Smt. Koli Rava took her to the house of Shyam Das conspiring with Jitu Thakuria for monetary gain and there is a little delay in filing this petition by the complainant.
- 6) With the above facts complaint filed before the Chief Judicial Magistrate, Kamrup, Guwahati was forwarded to police for investigation U/S 156 (3) of the Cr.P.C. Accordingly Palashbari P.S. registered a case vide Palashbari P.S. Case No. 228/2013 U/S 120 (B)/376/506 I.P.C.

- 7) Police investigated into the matter, caused examination of the victim girl by medical officer and on completion of investigation submitted charge-sheet against one Jitu Kr. Thakuria U/S 376/506 I.P.C. vide C.S. No. 16/2014 referring to Palashbari P.S. Case No. 228/13.
- 8) The case was duly committed to the Court of Sessions and after hearing the parties this Court framed charges U/S 376/506 I.P.C. R/W Section 4 of POCSO Act and charges were read over and explained to the accused to which he pleaded not guilty.
- 9) At the trial, the prosecution side examined 9 witnesses including the Medical Officer and Investigating Officer. After completion of prosecution evidence, the accused person was examined u/s 313 Cr.P.C. The defence adduced evidence to substantiate the plea of innocency.

10. **POINT FOR DETERMINATION**

- (i) Whether the accused person committed rape upon Smt. Panchami Rava and thereby committed an offence U/S 376 I.P.C.?
- (ii) Whether the accused person committed criminal intimidation upon Smt. Panchami Rava and thereby committed an offence U/S 506 I.P.C.?
- (iii) Whether the accused person committed penetrative sexual assault on Smt. Panchami Rava, aged about 15 years and thereby committed an offence U/S 4 of the POCSO Act?

DISCUSSION AND REASONS THEREOF:

- 11. Before going to discuss the ingredients of offences and incriminating materials available on record, I would like to place the relevant portion of testimony of prosecution witnesses one by one and to testify the varsity of prosecution story and to find out the relevancy of the fact as narrated by the witnesses.
- 12. P.W. 1 is the prosecutrix. She deposed in her evidence that she is illiterate and her financial condition is very poor and her parents had expired in her childhood. She is staying in the house of one cousin and in return does some household works. She stated that she could not tell the exact time of occurrence as she is illiterate. However, the incident took place at night. Prior to the incident one day at Boko Bazar one Sunty met her and took her to Bijoy Nagar to the house of Borma of the accused and she stayed there as a domestic help for some time. It is alleged that in that house at Bijoy Nagar the accused Jitu Thakuria came there and did sexual intercourse at night in the room of his Borma after gagging her mouth. In that room there were two beds and the Borma of the accused was sleeping on one bed and in the other bed she was sleeping and the accused committed rape upon her by threatening her and gagging her mouth with cloth. She stated that she could not raise screams as her mouth was gagged. According to her on the next day, the accused administered her some medicine under threat. It is further stated that on that day, when she disclosed the entire incident before the Borma of the accused, she did not give any attention.
- 13. The testimony of P.W. 1 reveals further that thereafter one Shyam, daughter of Borma of the accused came and took her to her house at Gotanagar at Guwahati. It is stated by P.W. 1 that when someone calls her from her house, they said over phone that the prosecutrix was working in Maggie company and when she wanted to speak to her family members they did not allow her and threatened her. When the prosecutrix told Shyam about the Bijoynagar incident she did not give much attention to it. According to her, there also accused Jitu Thakuria

came and committed rape upon her. She again told to Shyam about the incident, but she did not give attention saying that accused is a good boy. Another girl Mamata worked as part timer in their house and upon her opening the door she escaped from the house and went to Jalukbari Outpost and contacted her related brother over phone. She informed the incident to the Police, but they did not give much attention.

- 14. According to P.W. 1 she lodged the Case before the Court and after lodging of the case, the police came and examined her and also recorded her statement. The prosecutrix stated before police that rape was committed upon her two times by the accused at Bijoynagar and then at Gotanagar, Guwahati. She also told before police that at the time of committing of rape upon her, her mouth was gagged by the accused for which she could not scream. She stated further that police did not give much attention to her narration of the incident as she was poor and therefore, there was some delay in lodging the case before the Court.
- 15. After lodging of the complaint, police had taken the prosecutrix to GMCH for medical examination and at the time of the incident she is aged about 15 years as claimed.
- 16. In cross P.W.1 admitted that her cousin brother Rahul Rabha knew about her age and she came to know her age from him. She admitted that after lodging of the case, police did not enquire about any certificate regarding her age. Police also did not examine her elder sister in connection with her age. It is admitted by P.W. 1 that she has a personal mobile phone. Before coming to stay in that house at Bijoynagar she had never stayed at anyone's house as a domestic help. On the night of the incident the accused had knocked the door of the room in which she was sleeping along with Borma and she opened the door as instructed by the elderly lady. She claimed that thereafter, the accused came inside the room and after gagging her mouth he committed rape upon her. At that time, though the lights of the room

- were off, the elderly lady was lying on the bed, but she was awake and she did not give any attention to the incident. The incident took place in the presence of elderly lady, but the lights of the room were off.
- 17. Again during cross examination, the defence puts a suggestion to the victim that she made a statement that accused committed rape upon her at Bijoynagar on one occasion as written in the FIR, but the witness gave an explanation that it was mistakenly written in the FIR that rape was committed on two occasions. It is further explained by P.W. 1 that she has written mistakenly that initially she was taken to Gotanagar at Guwahati and thereafter, to the house at Bijoynagar, but in fact she was first taken to Bijoynagar and thereafter taken to Gotanagar. It is admitted by P.W. 1 that she was taken to Gotanagar, Guwahati from Bijoynagar, Rangamati by Shyam alias Chan @ Sima during night hours in a private car belonged to said Sima alias Shyam.
- 18. During cross examination it has been raised by the defence putting a question to the witness that she had not told said Shyam alias Sima that she wanted to go back after such incident. During cross examination it is further admitted by the victim that her mobile phone was snatched away by the family members and was broken and according to her prior to breaking of the mobile phone, she received a call from Rahul Rabha and she told her about the incident. The defence further puts certain suggestions that after the incident and after leaving the house of Sima at Gotanagar she along with another person had asked Sunti to demand Rs. 50,000/- from the house of Sima at Gotanagar which is denied by P.W. 1. There are certain contradictions which defence had made an attempt to dis-credit the testimony of P.W. 1 and according to the defence the contradictory statement on several points had impeached the credibility of the witness and is not safe to be relied upon.
- 19. The next witness P.W. 2 Sri Rahul Rabha is the cousin brother of prosecutrix who is the guardian of the prosecutrix after the death of

her parents. His testimony reveals the fact that alleged incident upon the prosecutrix took place in the house of Borma (aunt) of the accused at Rangamati, Bijoynagar. According to him, the incident also took place in the house of Chan alias Sima, the elder sister of the accused at Gotanagar, Maligaon where she has been allegedly raped by the accused. According to him prosecutrix was raped two times at Rangamati Bijoynagar and also in the house of Chan at Gotanagar, Maligaon. According to him, the prosecutrix was confined by the family members of the accused at Gotanagar for many days and Koli @ Sunti Rabha was also involved in such confinement. According to him at the relevant time, the prosecutrix was of the age of 15 years. He further corroborated the fact that prosecutrix told him over phone that said Sunti Rabha took her from Boko Bajar with a promise to give her a job in a Maggie company, but instead of doing so, she was taken to the house of said Borma (aunt) of the accused at Rangamati Bijoynagar.

- 20. The testimony of P.W. 2 further reveals that prosecutrix was taken from Bijoynagar to the house of Sima at Gotanagar where the subsequent incident took place. P.W. 2 further stated that he advised the prosecutrix to escape from that house and accordingly the prosecutrix escaped from there and came to Jalukbari Police Outpost. By corroborating the testimony of P.W. 1 this witness had further stated that at Jalukbari Police Outpost he met the prosecutrix and he also informed the incident to the Police and he took back the prosecutrix to their house. According to him after one month he along with the prosecutrix had gone to Bijoynagar Police Outpost to lodge a case regarding the incident, but Police said that the case cannot be lodged there. P.W. 2 further narrated the fact that they went to Guwahati and lodged the case in the Court and after that Police came to their place and examined him and recorded his statement.
- 21. The testimony of P.W. 2 again reveals that after three days of bringing back the prosecutrix he was called by Koli @ Sunti Rabha that prosecutrix was to receive Rs. 3000/- from her and he was called to

- Bhagawatipara near Bijoynagar to receive the same. Accordingly, P.W. 2 went there and there in a room marked as Control Room, the accused and his family members along with Koli @ Sunti Rabha were present and they requested him not to lodge the case and no money was given to him and it was the first day when he met the accused.
- 22. During cross examination it has been brought from the testimony of P.W. 2 that he had not submitted any birth certificate of the victim and suggestion was put to him that prosecutrix was above 18 years of age at the time of the incident which has been denied by P.W. 2. It further reveals from the cross examination of P.W. 2 that his father was the legal guardian of the prosecutrix and he claimed that if necessary, he can produce document. He denied the suggestion put to him that he is not the legal guardian of the prosecutrix. Admittedly, before the incident prosecutrix was working as domestic help at Singra and she stayed there for 1 ½ months. Admittedly prosecutrix was brought back to their house by P.W. 2. It is admitted further that thereafter prosecutrix disappeared from their house and after six months of her disappearance he received a phone call from her and she stated that she was working in a Maggie company.
- 23. It is further admitted that subsequently one day when he came to Guwahati, he telephoned the prosecutrix and then the prosecutrix told him about the incident. This fact has been brought by the defence while cross examining P.W. 2 and it has corroborated the story which has been narrated by P.W. 1 about the telephonic conversation made by P.W. 2. The other part of the cross examination reveals no inconsistency to deviate from the story what has narrated by the prosecution during her communication with P.W. 2 and coming to the Police station at Jalukbari etc. P.W. 2 has denied the suggestion put to him that prosecutrix fled away from the house of Shyam @ Sima upon the advice of P.W. 2 without informing said Sima. The P.W. 2 has denied the suggestion put to him that he never informed the incident to Police at Jalukbari or at Bijoynagar Police Outpost and Boko Police

station. He further denied the suggestion put to him that he told Koli @ Sunti Rabha along with victim to demand Rs. 50,000/- from Dr. Das, husband of Chan @ Sima. He further denied that along with others he threatened Koli @ Sunti that she will be implicated in a case if she does not get the money of Rs. 50,000/- from Dr. Das. P.W. 2 has further denied that he had no knowledge about bringing any case against him and the prosecutrix at Boko P.S. on 09-07-2013 by Koli @ Sunti Rabha. Admittedly, he accompanied the prosecutrix in lodging a case at Guwahati Court on 17-07-2013. He further denied the suggestion put to him that it is a pre-plan conspiracy after the prosecutrix came back from the house of Chan and he denied the above suggestion that accused is in fact not involved in the incident.

- 24. In the backdrop of the evidence of two witnesses I like to place on record the evidence of remaining witnesses as examined by the Prosecution one by one to find out whether there is any noticeable contradiction or whether the other witnesses have narrated the story as alleged by the prosecutrix or not. In the present case P.W. 3 Nikunja Thakuria is the aunt (Borma) of the accused who stated before the Court that no incident took place as alleged by the prosecutrix in her house. According to her prosecutrix had gone to the house of her daughter Sima @ Chan to work as a domestic help and stayed there. She further stated that after some days she sent Prativa, her domestic help to the house of her daughter Sima @ Chan where she worked for 3/ 4 days. She stated that she sent the informant to the house of her daughter Sima through one boy Dipu as she got another domestic help to work in her house. She further stated that accused Jitu used to visit her house prior to the incident ,but at the time of the incident he had not visited her house.
- 25. With the above evidence of P.W. 3, was declared hostile by the prosecution suggesting the fact that as accused Jitu is her nephew she has given false evidence in the interest of her nephew Jitu (accused). This witness has slightly contradicted the prosecution story and has not

- corroborated the evidence of prosecutrix for which she was declared hostile by the prosecution. However, it is a fact that prosecutrix was there in her house for a period of certain time at the relevant time.
- 26. P.W. 4 Smti. Sima Das @ Chan is none but the cousin sister of the accused. According to her in the year 2013 when her son was unwell she told her elder sister for a domestic help and she informed one Sunti @ Koli and accordingly she brought the informant to her house. She narrated a story that said prosecutrix stayed in her house for few days and in the meantime her mother along with her domestic help Prativa came to her house to inquire about her son. She deposed that since her son used to like the domestic help of her mother namely Prativa, she was kept in her house by her mother and took back the prosecutrix to the house of the mother of P.W.4. This story is little contradictory to the fact as narrated by P.W. 3. However, P.W. 4 further stated that informant stayed in her house of her mother for three days and thereafter her brother Dipu brought her back to her house. According to her, prosecutrix has not disclosed to her anything regarding any bad act committed by the accused upon her while she was staying in the house of her mother. According to P.W. 4 the prosecutrix was staying in her house for a month and during that period accused Jitu came to their house for two occasions to inquire about her son who was unwell for illness etc. She further stated that she used to see phone calls of the prosecutrix on her mobile phone while she was in her house.
- 27. P.W.4 narrated a story that when this fact has been informed to the accused by P.W. 4 about making phone calls by the prosecutrix, the accused scolded her for making such calls etc. P.W. 4 has narrated some story regarding handing over the phone by the prosecutrix and according to her on 1st July, 2013 the informant disappeared from her house and she had denied the story of rape upon the prosecutrix by the accused.

- 28. With the above evidence adduced by P.W. 4 she was declared hostile by the prosecution wherein prosecution suggested that being a relative of the accused, P.W. 4 has given false evidence and also put a suggestion that they brought the informant to her house with a false promise of giving her employment in Maggie company which has been denied by P.W. 4. P.W. 4 has further denied the suggestion that the mother of the informant is still alive and she is living in an interior village at Boko. The above two witnesses viz. P.W. 3 and P.W. 4 are not found corroborating the prosecution allegation and it is natural that being a close relative of the accused it is not expected to get a positive response from the witness to implicate the accused as alleged by the victim. However, this two witnesses to certain extent have not contradicted the prosecution story regarding engagement of the prosecutrix in the house of P.W. 3 and P.W. 4 at different point of time and visit of the accused to the house of P.W. 4 has been corroborated admitting the fact that accused scolded the prosecutrix for making phone calls at certain point of time while she was staying in the house of Sima (P.W.4).
- 29. Now coming to the next witness P.W. 5, Sri Pradip Rabha who is the co-villager. He had shown the house of the informant to the police. This witness has narrated a different story which is apparently not relevant to prosecution. According to him the informant was caught with a boy in the village and thereafter, though the boy ran away there was a village meeting where he was present. According to him, the said boy was not from their village and since he could not be found, it was decided in the village meeting that the informant would be handed over to the family of one Kanu Das in the house of whom she was staying as a domestic help. Further, this witness has not narrated any story involving the present accused saying that he did not know anything about the present case. His irrelevant statement about the stay of the prosecutrix and her conduct are found not material for determining the alleged case brought against the accused.

- 30. The next witness examined by the prosecution is Smt. Mamata Paswan. She is also a witness who used to work in the house of Sima @ Chan in Gotanagar, Maligaon as a part timer. According to her she met the prosecutrix there and beyond that she knows nothing about the incident. This witness has not established any corroborating circumstances about the allegation that has been brought by the prosecutrix against the accused. It is denied by P.W. 6 during her cross examination that prosecutrix escaped from the house of Chan upon opening the door by her which is not a corroborating circumstance to the prosecution story.
- 31. P.W. 7 Dr. Tribeni Athporia is the Medical Officer who examined the prosecutrix on 05-08-2013 under police requisition. Her opinion is that on the basis of physical, radiological and laboratory, investigation, she found the following.
 - i) The age of the alleged victim is above 18 years and below 19 years.
 - ii) There is no evidence of recent sexual intercourse detected on her person.
 - iii) There is no evidence of any injury mark detected on her person.

She testified Ext.1 as Medical report and Exts. 1 (i), 1 (ii) and 1 (iii) as her signatures. She further testified Ext. 2 the forwarding for Medical report and Ext. 2 (i) as her signature on it. In the aforesaid Ext. 1 the medical report, the Medical Officer made a finding on genital examination and according to her genital organs are well developed. Vulva-Labia Minora covers Labira Majora at lithotony position. Hymen-Old tear at 2 O' clock position. Vagina-healthy. Cervix-healthy. Uterus-healthy, not palpable per abdomen. Evidence of venereal diseases- not detected at the time of examination. Vaginal swabs- Two smears taken one from lateral fornix and posterior fornix. According to her opinion there was no injury detected and wearing cloths- evidence of struggle and stains are not detected. Mental condition- no abnormality detected at the time of examination. According to her patient was corroborating and her intelligence and memory- average.

- 32. In the backdrop of the above report it cannot be expected after 1½ months any recent sexual intercourse will be detected or there will be evidence of strain etc. on the wearing apparels of the prosecutrix. But ,however the genital examination reveals that hymen is having old tear at 2 O'Clock position which to some extent indicates that there was indication for having sexual intercourse though not narrated by the Medical Officer examined by the prosecution. This witness is cross examined by the defence on the fact that no injury was detected and according to the Doctor the age of the victim on the basis of Radiological and Physical examination is authentic.
- 33. P.W. 8, Sri Dhruba Jyoti Bora is the I/O. According to him, while he was at Bijoynagar Outpost on 23-07-2013 he received the FIR of this case for investigation. He is a formal official witness and testified the prosecution documents including Ext. 5, the Sketch Map. According to him, he collected the Medical report from GMCH. It is, further stated by P.W. 8 that he examined one Kanchan Rabha, the mother of the prosecutrix along with Ajit Rabha, Gaonburha and another Pradip Rabha of the said village. According to him, co-accused Sunti Rabha was not found and he testified Ext. 1 as the house search and Ext. 1 is his signature. This witness was cross examined by the defence. During cross examination it is has been admitted by P.W. 8 that he had not sent the prosecutrix for recording her statement u/s 164 Cr.P.C. During cross examination it is admitted by P.W. 8 that the room in which the incident has allegedly taken place, there are four doors which are connected with other rooms and there are two beds in the said room and there is one meter difference between them.
- 34. The defence however, brought the fact that with the dwelling house of the place of occurrence there are other houses in an around and P.W. 8 while visiting the place of occurrence nobody had contacted with him regarding the alleged incident. He further admitted that he recorded the statement of the mother of the prosecutrix at Dekapara. He further admitted that he had not come to Jalukbari Police Station for inquiry in

this regard. With the above evidence the testimony of the P.W. 8 remains confined with the above fact that a case was registered and he went out for investigation and prepared the Sketch map vide Ext. 5 which indicates that the alleged place of occurrence at the house of P.W. 3 Sri Nikunja Thakuria is connected with doors towards outside and towards other room as indicated in the Sketch map. His evidence is formal in nature and invites no further discussion. No material inconsistancy is established, but however this witness has not investigated the case by collecting any material fact from the Jalukbari Police station as well as from Boko Police station where the informant has allegedly visited before lodging of the complaint.

- 35. P.W. 9 is Sri Mintu Boro, another police officer who took up the investigation of this case and examined one witness Mamata Paswan and also examined one accused namely Miss Khayanti Rava and recorded her statement. Subsequently, she was not sent for trial. According to him, on completion of investigation he submitted charge sheet against accused Jitu Thakuria u/s 376/506 IPC and testified Ext. 6 as Charge Sheet. He was cross examined by the Defence and according to him he visited the house of Doctor Pranab Das at Gotanagar, Guwahati in respect of the present incident and according to him he could not receive any information regarding the incident from the said locality, but admittedly he had not visited the Jalukbari Outpost.
- 36. Having such evidence on record, it is found that testimony of P.W. 8 and P.W. 9 are merely formal in nature and have supported the prosecution case to the extent that they have received a complaint and accordingly visited two of the places of occurrence and examined some witnesses and on completion of investigation submitted charge sheet against the accused.
- 37. Now, before going to discuss further on the evidence of the prosecution, the Defence witnesses are placed on record to see how the plea taken by the Defence is substantiated during trial. The plea of

the accused is that Rs. 50,000/- has been demanded in connection with this case over phone by a male voice. According to him his brother Dipu received the said call on his mobile phone and demand of money had gone up to Rs. 80,000/- etc. which was the plea taken by accused while he was examined u/s 313 Cr.P.C. Here D.W. 1 Smt. Raju Thakuria, who is the mother of the accused, is examined and according to her the accused is working as a Junior Engineer. She has supported the case as stated by P.W. 3 and P.W. 4. She has further stated that her another son Dipu has been telephoned by the prosecutrix and demanded money with regard to this case and according to her a false case upon her son was instituted. This witness is cross examined by prosecution putting several question regarding the prosecution case but it is admitted by D.W. 1 that she could not say the actual date and time in which some person related to the prosecutrix had telephoned her son Dipu regarding money amounting to Rs. 50,000/- and Rs. 80,000/- on different occasions.

- 38. D.W. 2 Dipu Kr. Thakuria is the brother of the accused. According to him, he received telephone calls and the person on the other side had demanded Rs. 50,000/-. At that time he ignored the demand, but after two days another telephone call came to him demanding Rs. 80,000/- and the money was demanded for settling the case which was lodged against his brother. This witness was cross examined by the prosecution on different aspects when and how the prosecutrix was bought by him to the house of aunt (Borma) and his sister Sima's house. D.W. 2 during cross examination admitted that he did not know about the incident because he had not seen the incident by himself. D.W. 2 has further denied the suggestion put to him that accused committed rape upon the prosecutrix at two places on two occasions.
- 39. Having such evidence on record the accused put forward written argument wherein it is submitted that a Case u/s 376 IPC with additional charge of Section 4 of POCSO Act, 2012 has been charge-sheeted. It is argued that Section 4 of POCSO Act, 2012 is not

- applicable in the instant case. It is indicated that the age of prosecutrix is claimed to be 16 years on 17-07-2013 whereas on the date of her evidence recorded in the Court on 02-01-2016 after about 3 years she stated that her age is 17 years which indicates that prosecutrix tried to prove her to be a minor at the time of alleged offence.
- 40. Here before going to other part of testimony as pointed out by the Defence, I have taken note on the Medical report wherein it has been clearly opined that the age of the victim is above 18 years and below 19 years at the time of examination. We can accept the expert opinion as argued by the defence citing case law like State of Madhya Pradesh-vs- Anup Singh(2015) 7 SCC 773(2015) 4 SCC (Criminal) 208 (2015) 6 Supreme 478 (2015) 3. I find force in the argument of the Defence that at the time of occurrence the victim cannot be considered to be below 18 years of age conclusively basing on evidence on record. Hence the case brought against the accused does not come u/s 4 of the POCSO Act, 2012 and as such the present case is required to be scrutinized only for the offence u/s 376 IPC only. To find out whether any conclusive evidence is there against the accused to tie him under provision of section 376 IPC. As such further discussion as placed in the written argument by the accused needs no discussion in details for offence under POCSO Act.
- 41. The question that arises in the instant case is whether the testimony of the prosecutrix inspired confidence and whether the other evidence corroborated her testimony or not. It is pointed out that in a rape case to insist on corroboration is necessary in the rarest of the rare case. But when the testimony of the prosecutrix itself raises suspicion, the Court has to show greater responsibility when trying an accused on charge of rape as pointed out in the written argument.
- 42. It is pointed out that on the FIR though is not a substantive piece of evidence, yet the prosecutrix filed a complaint case before the Ld. Chief Judicial Magistrate, Kamrup, Guwahati on 17.07.2013 and in the aforesaid complaint, it is alleged that offence was committed by the

accused some 1 ½ months ago and she claimed that her age was 16 years. In para 3 she stated that Koli Rabha took the complainant to the house of Shyam Das (P.W.4) at Gotanagar, Maligaon to work as maid servant. As per complain petition after one month she was sent to Rangamati Bijoynagar by Shyam Das with her mother. According to her at Rangamati, Bijoynagar she was raped by the accused on two occasions. As per complaint petition after two days she was taken back to Gotanagar, Maligaon by Shyam Das and her husband.

- 43. As pointed out by the defence, the prosecutrix stated on oath that one Sunti Rabha met her in Boko bazar and took her to Bijoynagar to the house of Borma and she was kept in that house as domestic help at Bijoynagar. According to her she stayed there for some period of time where accused Jitu came there and had sexual intercourse with her at night. According to her thereafter one Shyam @ Chan @ Sima (P.W.4) took her to the house at Gotanagar. This contradictory statement has been pointed out by the Defence that as per complaint petition she was first taken to Maligaon and whereas she stated before the Court while adducing evidence that first she was taken to Rangamati, Bijoynagar and thereafter she was taken to Maligaon.
- 44. In this regard I have carefully looked into the testimony of P.W. 1 and in her cross examination prosecutrix made an explanation that the fact narrated in the complaint petition that she was first taken to Maligaon, Gotanagar and thereafter to the house at Rangamati, Bijoynagar is a mistake committed while drafting the complaint petition. She has asserted in her cross examination denying the suggestion put to her that she has given a false and concocted story as she has narrated different facts in the FIR contradicting her statement made in the Court.
- 45. To my opinion drafting of a complaint by a lawyer while narrating such story may cause certain omission or mistake. An illiterate lady put her thumb impression on the complaint petition may not narrate the story in a chronological order. Since she was under stress and tomatic situation, there may be some probability of mistake which has not

- discredited the whole evidence. However, for the reason of such contradiction no adverse opinion can be drawn on the testimony of P.W. 1.
- 46. The defence further pointed out that delay of lodging FIR although by itself may not be a ground of disbelieving entire prosecution evidence but each case much be judged on its own fact. It is argued that prosecutrix in her complaint petition and in her statement narrated the fact that she was rescued by Jalukbari Police from the house of Shyam at Gotanagr, Maligaon. The prosecutrix in her cross examination admitted that from Jalukbari police out post her cousin Rahul took her to Bijoynagar police outpost and thereafter to their house. It is pointed out further that P.W. 8 stated that on 23-07-2013 she arrived at Bijoynagar police outpost with an Ejahar forwarded from the Court. The point raised by the Defence is that if the fact is true then why she had not filed any ejahar in Bijoynagr Police Outpost and she could have also lodged FIR at Jalukbari Police station initially on the day when she was rescued. But she had not done it and waited for 1½ months to file the final complaint before the court by an Advocate.
- 47. On perusal of the complaint and statement it appears that the prosecutrix has made an explanation stating that she had narrated the story to police, but the police had not given any attention to her narration. It is further stated that since the police had not taken any attention to her oral complaint and being a poor lady she could not come forward to lodge the formal complaint, thereby there is a delay in lodging the FIR after 1½ months of the incident. From the evidence on record it appears that the prosecutrix escaped from the house of P.W. 4 and under instruction of her cousin brother she appeared at Jalukbari police station.
- 48. The filing of written FIR at the police station is not always necessary.

 Police could have written her statement considering the same as FIR.

 As such not filing the written FIR at the police station by an illiterate lady cannot be considered as a ground to hold a view otherwise.

- 49. According to the victim she was under threat and was confined in the house of Shyam Das and she could not lodge the formal FIR in time. Hence delay in lodging formal complaint through the Court of Ld. Chief Judicial Magistrate, Kamrup, Guwahati by the prosecutrix is not an inordinate delay and the prevailing circumstances may be considered for taking a view that a rustic lady being a victim of circumstances as narrated there may be such delay and no time bound action on her part is expected as in case of a literate lady.
- 50. The Defence again pointed out the inconsistency and contradiction of P.W. 1 as well as P.W. 2 in respect of the age of the victim which is found not correct as per opinion of P.W. 7, (Medical Officer). It is further pointed out that prosecutrix stated in chief that her parents had expired during her childhood. P.W. 2 has also stated that his father Anil Rabha is the guardian of the prosecutrix as her parents are no more. But P.W. 8 the investigating officer admitted that during investigation he visited the house of prosecutrix and there he examined Kanchan Rabha, the mother of the prosecutrix.
- 51. But on scrutiny of record, it appears that if the investigating officer has examined said Kanchan Rabha during investigating then question comes why said Kanchan Rabha was not made a witness in the said charge sheet. If it is a contradictory story narrated by the prosecutrix then the Defence could have also examined the said witness to support the fact that prosecutrix was having her mother alive and is not staying under the custody of the father of P.W. 2. As such the role of the Investigating Officer in the present case disclosing the fact that mother of the prosecutrix is alive, has not caused any serious doubt in the veracity of the prosecution story and at the same time it cannot be a ground to disbelieve the testimony of the prosecutrix totally for the said reason.
- 52. There is a contradiction between the testimony of P.W. 1 and P.W. 5 wherein P.W. 1 admitted during cross examination that she had never stayed in any one's house as domestic help before staying in the house

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at Bijoynagar. But P.W. 5 has stated categorically that prosecutrix was staying in the house of one Kanu Das of Singra as domestic help. This witness has also narrated a different story affecting the character of the prosecutrix which has already been discussed in the relevant testimony of the witness. The testimony of said Rahul Rabha as per the Defence is not reliable as he has made some contradictory statement regarding the age of the victim as pointed out that his statement is not in-conformity with the testimony of P.W. 1. I find it not necessity to discuss the testimony of P.W. 3 and P.W. 4 as they are declared hostile by prosecution. The defence made argument pointing out the fact that P.W. 5, P.W. 6, P.W. 7 and P.W. 8 have not corroborated the version of the prosecutrix.

53. Now in the backdrop of the above facts, the defence took reliance on some reported case laws which are to be discussed keeping relevancy to this case. One of the case referred is Md. Baharuddin -vs- State of Assam. In the aforesaid case the occurrence took place on 06-02-2006 at around 6.00 PM and the matter was reported to police on 08-02-2006 around noon. Thus, there is huge delay in launching the case and such delay remained totally unexplained. In the aforesaid judgment Hon'ble Gauhati High Court observed that since delay in lodging the Case remained unexplained, the Court is duty bound to take an adverse presumption to the effect that the allegations made against the appellants in the FIR which ultimately gave rise to Sessions Case No. 58/06 were based not on facts but on fictions and concoctions, more so when in the heart of the matter lies the allegation of kidnapping of a young girl. The fact of the aforesaid case is totally different from our present case and in our present case delay has been explained by the prosecutrix who was incapable of coming out from the custody of her Mistress where she was working as a maid servant and she has narrated the cause of delay on her part stating that initially she went to police and police refused to pay any attention to her allegation and then she came to the Court and filed a complaint before the Chief Judicial Magistrate, Kamrup, Guwahati.

- 54. The Case law referred is relating to a case of gang rape and in the aforesaid case it was observed that the accused need not establish his plea in a Criminal Case beyond all reasonable doubt. His burden is to parabolise his claim. In the aforesaid case Hon'ble Court rejected the version of the prosecutrix for the reason that doctor did not find any injury in any part of the body of the victim when he examined her after three days of the incident. Having such discussion on the cited case law it appears to me that facts and circumstances of the case law cited is totally different from the present case.
- 55. Another case cited by accused is Sahab Uddin Laskar –vs- State of Assam in which it was observed that delay of lodging FIR by 7 days and prosecution was silent for such delay and it was observed in the said case law that delay in lodging FIR is always doubtful unless it is substantially explained. In the said case law several inconsistency were observed in the evidence of the prosecution witnesses and having earlier enmity between the parties and coupled with delay in lodging of the FIR the possibility of false acquisition can not be ruled out as it is observed. But in the present case in our hand there is no any such facts and circumstances established by the defence that there was any possibility of false acquisition made by the prosecutrix to an unknown boy to whom prosecutrix had no earlier communication or enmity etc. since he was not known to her before the alleged occurrence.
- 56. The defence again cited a case law- Krishna @ Krishnappa –vs- State of Karnataka which is a case vide Crl. Appeal No. 162/2009 decided by the Hon'ble Apex Court on 14-11-2014. In the aforesaid case the sentence awarded by the High court is set aside as the medical evidence has not supported the story of the prosecution. In the aforesaid case there is inimical relationship between the parties as Civil and Criminal cases pending between them. It was suggested to the prosecution witnesses in their cross examination that appellant was related to the prosecutrix and there were Civil and Criminal Cases pending between the parties in support of which contention certified

copies of Civil Suit and Criminal Case were also filed. The Medical Officer also opined that nothing was found to show that the victim was subjected to sexual intercourse and in the given circumstances Hon'ble Apex Court acquitted the accused in a case which is not similar to the case in our hand. However, the principle established by the Apex Court in the above case is established principle of law.

- 57. The defence referred another case law- State of Himachal Pradesh vs-Thakur Dass which is a case of acquittal by the trial court against that the appeal has been preferred by the State in which the court observed that the defence witnesses who deposed as DW1, DW2 and DW3 hence voiced in their respective deposition that they are in close proximity to the house of the prosecutrix and that they are closely related to the prosecutrix yet in one voice they have unanimously deposed that no disclosure qua the incident was made to them by the prosecutrix. The entire story of the case cited above is completely different from our case. In the cited case it was alleged that accused came to the house or prosecutrix threatened and abused her and also threatened her not to disclose the matter to any person and out of fear and shame she could not report the matter to any person. But on 3rd day of the incident, she went to the District Court Mandi where she got written an application from an Advocate and the same was submitted to S.P., Mandi. The said application is deposed to be Exhibit PA and bearing her thumb impression and thereafter, she submitted the said application at police station Sadar and the case was registered against the accused.
- 58. The above story of the cited case law is something different and in our present case the prosecution has claimed to inform the matter to her cousin brother and she accompanying her cousin went to the police station to report the incident after coming out from the house of her Mistress. Hence the case law has no support to the present case.
- 59. In the backdrop of the argument put forwarded by the Defence we like to place on record a reported case law Rajindra @ Raju-Vs- State

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of H.P. in a case of Hon'ble Supreme Court in criminal Appeal No. 670/2003. In the aforesaid case law it has been observed in para 14 of the judgment that –

" In Sadashiv Ramrao Hadbe, this Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of prosecutrix if it is capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated:

It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by ay medical evidence or the whole surrounding circumstances are highly improbable and believable the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

In the aforesaid case the Hon'ble Apex Court at para 18 of the Judgment referring a case of Radhu where the evidence of the prosecutrix was found full of discrepancies and not worthy of credence. The medical evidence also did not corroborate the case of sexual intercourse or rape. In Radhu the Hon'ble court reiterated the legal position which read as under:

"6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an

inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent."

- 60. It now becomes an established principle of law that the sole testimony of victim may be sufficient for convicting an accused person without corroboration but that too considering the fact that entire case is not improbable and unlikely to happen. As discussed in the aforesaid case law by the Hon'ble Apex Court in the context of Indian culture a woman/victim of sexual aggression-would rather suffer silently than to falsely implicate somebody.
- 61. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime she could not blame anyone but the real culprit. It has been further narrated in para 21 of the aforesaid Judgment that while appreciating the evidence of the prosecutrix the Court's must always keeping mind that no self respecting woman put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix.
- 62. Now in the present case it has been established clearly that prosecutrix went to the house of one elderly lady for working as domestic help where she was alleged to have committed rape by an unknown person (relative of the elderly lady). The question arises why she will falsely implicate an unknown person at the cost of her chastity and humiliation. It cannot be accepted without establishing the facts that for any kind of demand for money etc. she had lodged a case and thereafter, she had made attempt through other person to demand money from the accused as alleged. This story of the defence becomes highly improbable. On the other hand the facts narrated by the

prosecutrix is probable and the sole version of the prosecutrix inspires confidence in supporting the prosecution allegations.

- 63. In the case of rape a man is said to commit rape if he-
 - (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
 - (b) insects, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
 - (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
 - (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:-

First- Against her will.

Secondly- Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death of hurt.

Fourthly- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of it to which she gives consent.

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Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

- 64. In our present case in hand the question of consent does not arise as the prosecutrix aggressively came out and lodged FIR and she had shown her helplessness while she was working as maid servant under her Mistress who had not allowed her to come out and even she was restricted to use her mobile phone. There is no circumstance that her consent was obtained and that she was not unsound of mind and under intoxication, but the totality of the evidence and the circumstance that prevailed and the chain of happenings prove that the act of rape has been committed upon the prosecutrix without her consent.
- 65. It is true that no mark of injury or other circumstance is established by the prosecution to show that there was protest against the act of the accused for which it cannot be said that there was any consent. Consent means unequivocal voluntary agreement with the woman by words, gesture or any form of verbal and non verbal communication communicates willingness to participate in sexual act. In our case in hand it is categorically stated by the prosecutrix that her mouth was gagged and she was put under threat. As per version of P.W. 1 rape was committed upon her when she was sleeping and she was threatened and gagged her mouth with cloth. As such the statement made by the prosecutrix appears to be confident enough establishing the fact that accused committed rape upon her forcibly and the said act of the accused under the prevailing circumstance cannot be regarded that prosecutrix is a consenting party.
- 66. In our present case in hand the age of the victim is proved to be more than 18 years and as such she is not a minor and hence the offence alleged against the accused is an offence u/s 375 IPC for which punishment is provided u/s 376(1) IPC. At the same time the medical report indicates that no evidence of recent sexual intercourse is

- detected, but in the said report it is indicated that there is a old tear in hymen recording as :- hymen —old tear at 2 O' clock position.
- 67. From the evidence as already discussed in the forgoing para and also the point raised by the defence it appears to me that age of the victim is not below 18 years and as such no offence u/s 4 of the Protection of Children from Sexual Offence Act, 2012 is found established by the prosecution. At the same time the offence u/s 506 IPC is also not found proved by the prosecution as required by law. Hence, accused is acquitted from the above two offences.
- 68. But so far, the offence u/s 376 IPC is concerned, I have carefully analyzed the evidence specially the testimony of the prosecutrix. It is very difficult to accept the view that for any illegal act like demand of money etc. by lodging a case at the cost of a woman's chastity and humiliation is not probable in our society.
- 69. As already discussed the point raised by the defence by adducing evidence is improbable view and cannot be accepted safely. But on the other hand the story narrated by the prosecutrix supported by P.W. 2 is found confident enough to hold a view that accused at two different point of time committed sexual intercourse with the prosecutrix which may be termed as rape under the definition of the Indian Penal Code. The sole testimony without corroboration may lead to a conclusion that offence of rape has been committed upon the prosecutrix as the fact narrated by her is found probable in the circumstance established by the prosecution. As such in our present case, it is held that prosecution has succeeded in proving the case u/s 376(i) IPC against the accused beyond all reasonable doubt. Accordingly, accused is convicted for the said offence.
- 70. Before awarding any sentence the accused is heard on the quantum of sentence. Accused is a man of the age of 34 years and has denied the allegation claiming innocency. Considering the nature of offence and considering the fact that this type of offence upon a helpless lady

invites some punishment and accordingly the minimum punishment provided by the law is to be awarded upon the accused.

71. Considering the age, social status and the type of offence etc. the accused is convicted and sentenced to minimum 7 (seven) years Rigorous imprisonment and also to pay a fine of Rs. 10,000/- I/D another period of imprisonment for 1(one) month. If the fine is realized, the same may be paid to the victim as compensation.

72. At the same time it appears that compensation awarded u/s 357 Cr.P.C. is not sufficient and accordingly by invoking provision of section 357(A) (2) and (3) Cr.P.C. it is recommended that Legal Service Authority will provide adequate compensation as permissible under Victim Compensation Scheme and as DLSA in this district is not constituted, yet the matter is referred to Member Secretary, State Legal Service Authority for necessary action by sending copy of this order.

A free copy of the judgment be furnished to the accused person immediately.

A copy of this order and judgment shall be sent to the District Magistrate, Kamrup, Amingaon in compliance with section 365 Cr.P.C.

Given under my hand and seal of this Court on this 7^{th} day of September, 2017.

Sessions Judge, Kamrup Amingaon

Dictated and corrected by me

Sessions Judge Kamrup, Amingaon

<u>Appendix</u>

Prosecution witnesses

- P.W.1 Prosecutrix
- P.W.2 Sri Rahul Rabha
- P.W.3 Smti.Nikunja Thakuria
- P.W.4 Smti. Seema Das @ Chan
- P.W.5 Sri Pradip Rabha
- P.W.6 Smti. Momota Paswan
- P.W.7 Dr. Tribeni Athporia
- P.W. 8- Sri Dhruba Jyoti Bora
- P.W.9 Sri Mintu Boro

PROSECUTION EXHIBITS

- Ext. 1 Medical report
- Ext. 2 Forwarding for examination
- Ext.3 The complaint
- Ext. 4 Printed form of FIR
- Ext. 5 Sketch map
- Ext. 6 Charge sheet
- Ext. A House search

Sessions Judge Kamrup Amingaon