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

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.13/2014

U/S-4 of POCSO Act, 2012

State of Assam

-Versus-

Sri Deepak Palowan

s/o-Nikhil Palowan

Resident of vill -Manabasti Campo

P.S.-Boko

Dist- Kamrup, Assam

-----Accused

Appearance:

Mr. A.K. Baruah. Ld. Addl. Public Prosecutor -----for the State

Mr. H. Khaklary, Ld. Advocate -----for the accused

 $\hbox{ Date of evidence: } 24.06.2016, \ 30.03.2017, \ 01.07.2017, \ 20.02.2018, \\$

30.01.2019

Date of Argument:26.03.2019

Date of Judgment:09.04.2019

JUDGMENT

- The Prosecution case, briefly narrating is that on 25.12.2013 the complainant Smti. Ganga Sarkar lodged an ejahar alleging that on that evening at about 7.00 p.m, her elder daughter went to urinate in the backside of her house. When she did not return after 5 minutes, the complainant searched for her. Then, after she was traced, she told her mother (Complainant) thatthe accused person— Deepak Palowanhad committed penetrative sexual assault upon her. Hence, this case.
- 2. On the basis of the said ejahar, Boko P.S Case No. 503/13 U/S- 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 present accused person U/S- 4 of the POCSO Act, 2012.
- 3. The case was duly committed and this Court after hearing both the parties, framed charge U/S- 4 of the POCSO Act, 2012 against accused—Deepak Palowan. The aforesaid charge was 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 5 (five) witnesses including the victim girl. Statement of the accused person U/S-313 Cr. P.C is dispensed with as there is no incriminating material against him.

5. **POINT FOR DETERMINATION**

(I) Whether the accused person on 25.12.2013at around 7.00 p.m at village—Malibasti Champo under Boko P.S 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 evidences on record. Heard Ld. Counsels for both the sides.

- 7. P.W.1, is the prosecutrix. She deposed in her evidence that the informant of this case is her mother. She knows the accused person, who is her neighbouring person. On the date of incident at around 7p.m, P.W.1 had gone outside the house to urinate. Then the accused suddenly grabbed her from behind and pulled her a little distance back side to her house and gagged her mouth. Then, the accused opened her innerwear garment and as well as his innerwear and inserted his genital inside her genital. Her mother came searching for her with a lamp and on finding, her she brought her back. Thereafter P.W.1 narrated the incident to her mother. P.W.1 further stated that as the accused grabbed her mouth and her neck so she had pain on her neck and mouth. On knowing the incident, her mother lodged the ejahar against the accused person. After lodging of the case, police came to their house and examined her and recorded her statement. Police sent her for her medical examination and brought her before the Magistrate for recording her statement. Ext.1 is her statement. Ext.1 (1 &2) are her signatures. At that time, prosecutrix stated that she was aged about 12 years and was studying in class-VI and the incident took place in the year 2013.
- 8. In her cross-Examination P.W.1 revealed that the house of the accused is located near her house. Prior to the incident, the relationship between her and the accused was good and she used to call him as 'Dada'. It was dark at the time of incident. She had gone to the back side of the house to urinate. There are no houses in the back side of her house. She stated that the accused grabbed her from behind on the relevant night. She wanted to scream but could not do so. The accused had dragged her to the *khet*(field) in the back side of their house. After the incident, police seized her panty (underwear). The panty which she was wearing dark blue in colour.
- 9. Pw-2, Smti. Ganga Sarkar is the informant of this case. She deposed in her evidence that prosecutrix is her daughter. She knows the accused person and he is the neighbouring person. She stated that at the time of lodging the case she had come to the P.S along with the prosecutrix. The ejahar was written by scribe in the P.S on her instruction and dictation. P.W.2 stated that the contentions of the ejahar do not match with what she had instructed to the scribe at the police station at the time of lodging of the ejahar. The contents of the ejahar was not read over to her after written. Ext.2 is the printed form of the FIR and Ext.2 (1) is her signature. Police did

not record her statement. Police also did not seize any panty from her, with regard to the incident. Ext.3 is the seizure list. Ext.3 (1) is her signature. Ext.4 is the ejahar but she denied the signature in the ejahar.

On the prayer of the prosecution, the witness is declared hostile and allowed to be cross-examined by the prosecution. In her cross by prosecution, P.W.2 stated that it is a fact that that it is stated in the ejahar that on 25.12.2013 at about 7 p.m in the evening, when her elder daughter (prosecutrix) went to the back side of her house to urinate, but did not return after 5 minutes, she called her out and upon not getting any response, she went out to search for her with a lamp in her hand. She further stated that it is also a fact that when P.W.2 came back to the back side of their house and found the prosecutrix, she came to know that the accused had gagged the mouth of her daughter and committed rape upon her. She also admitted that she told the scribe, who wrote the ejahar that—but not finding her there, when I again went on way to home, the accused running from the backside of our house collided against me and on telling him to stop, he ran away. Thereafter, upon my coming to backside and checking, I saw my daughter the prosecutrix there and from her, I came to know about all the bad acts and rape committed by the accused. He had raped her after gagging her mouth. My daughter being aged 12 years, she is undergoing lot of mental and physical pain.

- 10. In her cross examination by Defence, she admitted that she did not submit any age proof documents pertaining to the prosecutrix. At present, prosecutrix is married. She did not see by herself the commission of any rape on the prosecutrix by the accused person. The panty which was given by the doctor was the same worn by the prosecutrix while going for the medical examination. And it was the same panty worn by the prosecutrix at the time of incident and it was not washed till her medical examination. It was dark blue coloured panty.
- 11. P.W.3, is the M/O, Dr. Sainjalee Haflongbar. She has deposed in her evidence that on 29.12.2013 she was working as PG on duty, Department of Forensic Medicine at GMCH. On that day, the prosecutrix was examined by her in connection with Boko P.S Case No. 503/2013, U/S-4 of the POCSO Act, 2012. She was accompanied by WPC 436 Prativa Das.

12. On the physical examination of the victim P.W.3found---

Her height—137cm, weight—30 kg, chest girth—67 cm, abdominal girth—59 cm, total 25 teeth were present and all were permanent. Scalp hair-28-30 cm in length, black in colour. Axillary hair 0.2 to 0.4 cm, light brown in colour and pubic hair 0.2 to 0.3 cm, light brown in colour. Her breast were bud developed, nipple is small and nipple and areola light brown in colour. Menarche—03.11.2013, regular, 28 ± 3 days, duration—6 to 7 days. Last menstrual period— 03^{rd} Dec, 2013.

On genital examination:-

Genital organs—Developed, vulva—labia majora and clitoris are exposed in lithotomy position, Hymen —Old tears seen at 2 o'clock, 5 o'clock positions, vagina—Healthy, Cervix—healthy, Uterus—not palpable per abdominally, evidence of venereal disease —not detected clinically, vaginal swabs collected from — lateral fornix and posterior fornix. injury on the body—Abrasion, red in colour measuring 0.1 cm X 1 cm is present in inner surface of upper lip in the right side opposite to upper right canine. Wearing garments —Evidence of struggle:- not detected at the time of examination; evidence of stain:- a stain of size 5 cm X 4 cm is present in underwear garment which is sent to DFS, Kahilipara for seminal analysis. Her mental condition at the time of examination—No abnormality detected, co-operation and behavior—Co-operative and good.

<u>Laboratory investigation:-</u>

Microscopic examination of vaginal smears did not show any presence of spermatozoa or gonococcus.

<u>Opinion:</u> On the basis of physical examination, radiological and laboratory investigations done, P.W.3 opined that:-

- 1. There is no evidence of recent sexual intercourse detected on her person.
- 2. Injury detected on her person is described above.
- 3. Her age is above 12 years and below 14 years at the time of examination.
- 4. Two vaginal slides and a underwear has been sent to DFS, Khilipara for detection of spermatozoa but no report has been received till the writing of this report.

Ext.5 is the medical report. Ext. 5 (1to 3) are her signatures. Ext.5 (4) is the signature of Professor and Head Dr. R. Chaliha which she know. Ext.5 (6) and 5 (7) are the signatures of the prosecutrix. Ext. 6 is the police forwarding letter. Ext.6 (1) is her signature. Ext.7 is the forwarding letter by which she had sent the underwear of the victim for forensic examination. Ext. 7 (1) is her signature.

- 13. In her cross-examination P.W.3 has deposed that her opinion regarding the age of the victim is based on radiological report as well as physical examination. The victim was produced before her by police and identified by her guardian. P.W.3 examined the victim on 29.12.2013 i.e. after 4 days of the incident.
- 14. P.W.4, Sri Sankar Ch. Rabha. He has deposed in his evidence that on 10.02.2014 he was working as Jr. Scientific Officer, Serology Division, Directorate of Forensic Science, Assam, Kahilipara, Guwahati-19. On that day, he received a parcel through Director, Forensic Science, Assam in connection with Boko P.S Case No. 503/13 U/S-4 of the POCSO Act, 2012. The parcel was one sealed big size paper envelope consists of two exhibits. After opening the parcel, P.W.4 found the following articles:-

15. <u>Description of Articles---</u>

1. Two Nos. of vaginal smear glass slide prepared by doctor, Forensic Medicine,

GMCH. His examination No. Sero 3286/A.

2. One blue coloured panty with stain of suspected blood and semen. His examination no. Sero 3286/B.

After examination, P.W.4 found the following result.

Result of Examination:-

1. Exhibit No. Sero 3286/A and Sero 3286/B gave negative test for spermatozoa

(Semen).

2. Exhibit No. Sero 3286/B gave positive test for human blood

Ext.8 is the forwarding letter to FSL. Ext. 8 (1) is the signature of Director of FSL. Ext.9 is the report. Ext. 9 (1) is his signature.

- 16. In his cross examination P.W.4 disclosed that as per his report, no positive semen test is detected in the sample which he examined. He cannot say from his report for which cause the blood stain was detected in the sample. From his report, P.W.4 cannot say whether the blood stain was belonged to the suspect or any other person.
- 17. P.W.5, S/I Sri Mukut Baishya is the investigating officer of this case. He deposed that on 28.12.2013, he was serving as Attached Officer, Boko P.S. On that day after receiving an ejahar lodged by one Smti Ganga Sarkar at 4.45 p.m, the O/C, Boko P.S—Sri Jogen Barman registered a case bearing Boko P.S Case No. 503/2013 U/S-4 of POCSO Act, 2012 and directed him to investigate the case. Accordingly, on the same day at 4.50 p.m, he visited the place of occurrence along with other staffs and recorded the statements of the witnesses including the victim girl. He also seized one deep blue colour under wear of the victim and sent it to FSL, Guwahati. Ext.3 is the seizure list. Ext. 3 (2) is his signature. He also prepared the sketch map. Ext.10 is the sketch-map and Ext. 10 (1) is my signature. The accused—Dipak Palwan was arrested and brought to the police station. P.W.5 sent 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. The victim was allowed to go in the zimma of her guardian after her statement was recorded. Thereafter, he collected the medical report (Ext.5) and FSL Report (Ext.9) and completed the investigation. On finding sufficient materials against the accused— Deepak Palwan, he submitted charge sheet against him U/S-4 of POCSO Act. Ext.11 is the charge-sheet and Ext. 11 (1) is his signature. Material Ext. 'A' is the seized article which is seen by him today in the court.
- 18. In his cross examination P.W.5 disclosed that he did not examine the neighbouring people as there were no houses near the house of the informant. He did not get any independent witness in the spot. The incident took place in an isolated place.

- 19. Heard the arguments for both the sides. Learned Counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. He argued that other than the prosecutrix/victim, there are no eye witness to the incident. In contra , the Learned Additional Public Prosecutor submitted that the prosecution has ably proved the case beyond all reasonable doubt. As such, accused is required to be convicted under the charged section of law.
- 20. Now , the question comes Whether on the evidence adduced by the complainant and victim , the accused can be convicted ?
- 21. In this instant case, the accused is charged U/S-4 of the POCSO Act.
- 22. To bring the charge under section 4 of the POCSO Act , prosecution must prove the ingredients mentioned in Section 3 of the POCSO Act.

Section 3 of the POCSO Act deals with penetrative sexual assault.

- **3. Penetrative sexual assault**—A person is said to commit "penetrative sexual assault" if—
 - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
 - (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or
 - (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4 of the POCSO Act deals with punishment for penetrative sexual assault.

- 23. Coming to the present case, according to the victim (P.W.1), the occurrence took place in the year 2013 and she was aged 12 years and reading in class VI. It is in her evidence that on the night of occurrenceat 7pm, she had gone outside the house to urinate. Then, the accused grabbed her from behind and took her to the backside of the house and he gagged her mouth. Her evidence further reveals that the accused opened her inner wear and inserted his genitals inside hers. She told the incident to her mother (pw-2), who came searching for her carrying a lamp. In her statement (Ext-1) recorded by the Magistrate u/s 164 Crpc, victim narrated the same story. There is no slight variation regarding the incident in the evidence of the victim before the court and her statement (Ext-1).
- 24. Pw-2, mother of the victim disclosed in her evidence that she stated before the scribe , who wrote the ejahar that on not finding the victim , when she again went on way to home, the accused running from the backside of their house collided against her and on telling him to stop, he ran away. Thereafter , upon her coming to the backside of the house and checking , she saw the victim there and from her , she came to know about all the bad acts and rape committed by the accused. He raped her after gagging her mouth. Her daughter being 12 years . Furthermore, Pw-2 clearly admitted that that it is stated in the ejahar that on 25.12.2013 at about 7 pm, when her elder daughter went to the backside of their house to urinate but did not return after 5 minutes , she called her out and upon not getting any response , she went out to search for her with a lamp in her hand. So, the evidence of pw-1 is corroborated by pw-2 , who met her immediately after the incident. Though it is clear from the cross-examination of pw-2 that she is not the eye-witness to the incident. she is a hearsay witness only.
- 25. Admittedly in this instant case , there was no eye-witness to the occurrence except the victim (pw-1). The law is settled that the main evidence in all such cases is that of the victim herself . The other evidence being merely corroborative. The testimony of the victim, should in itself be sufficient to sustain conviction.

- 26. The evidence of the victim cannot be discarded at all, who has no any sort of animosity and hostility with the accused. Rather, they have good family relation being neighbours and even than, the accused exploited the victim girl sexually taking advantage of her loneliness.
- 27. It is found that the incident took place on 25.12.13 .The victim was examined on 29.12.13 but there is no sign of recent sexual intercourse . An old tear present in her hymen. But, however for having no sign of such sexual assault does not itself negate the version of the victim. M.O made it clear that the inner clothes (under garment) that was stained after the incident was preserved and brought alongwith the victim to FMT Department. Furthermore, it reveals from the evidence of pw-1 and from the medical opinion that the victim was a minor at the relevant point of time and their evidence in totality suffers from no sort of omission or contradiction so as to discredit their evidence. Rather the evidence of the victim is found inspiring and convincing so as to accept the authencity of the occurrence. The defence could not shatter the evidence of pw-1 in any manner save and except giving certain suggestions.
- 28. In (1996)2 SCC 384 (State of Punjab vs Gurmit Singh & ors) , the Hon'ble Apex Court held that the testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement , the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Therefore, there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. Evidence of a victim of sexual assault is entitled to great weight , absence of corroboration withstanding.
- 29. In the case of Md Iqbal and Another vs State of Jharkhand reported in, AIR 2013 SC 3077 , the Hon'ble Supreme Court has held that there is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement to be corroborated by the statement of other witnesses.
- 30. In the case of Radhakrishna Nagesh vs State of Andhra Pradesh reported in (2013) 11 SCC 688, the Hon'ble Apex Court opined that 'penetration itself proves

offence of rape , but contrary is not true i.e even if there is no penetration , it does not necessarily mean that there is there is no rape- Penetration may not always result in tearing of hymen and same will depend upon facts and circumstances of a given case.'

- 31. From the facts and circumstances of this instant case, it can be safely concluded that the testimony of victim (P.W.1) is found to be reliable, trustworthy and inspires confidence.
- 32. Therefore , it can be concluded that accused Deepak Palowan has committed the offence of penetrative sexual assault on the victim girl u/s 3 of the POCSO Act, which is an offence punishable u/s 4 of the POCSO Act.
 - 33. Regarding the culpable mental state of the accused , we may refer to Section 30 of the POCSO Act. As per **Section 30 of POCSO Act** , the culpable mental state of the accused should be presumed .The section reads as follows —:
 - (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental State with respect to the act charged as an offence in that prosecution.
 - (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
- 34. In this instant case, it comes out that the accused caught the victim when she was alone outside the house at night and committed penetrative sexual assault on her. The accused did not rebut the said presumption. Therefore, it must be presumed that he had culpable mental state in committing the alleged offence. There is no doubt that the accused committed the offence of penetrative sexual assault on the victim (pw-1). That apart, the presumption of guilt under

section 29 of the POCSO Act also needs to be applied as all the necessary facts regarding commission of the offence under the POCSO Act have been proved.

- 35. In the result , from the facts and circumstances of the case and above discussion , it is held that the prosecution has succeeded in bringing home the charges under section 4 of POCSO Act against accused –Deepak Palowan beyond all reasonable doubt. Hence, he is held guilty of committing the offence punishable under section 4 of POCSO Act and is convicted under the said section of law.
- 36. The minimum sentence prescribed under Section 4 of the POCSO Act is rigorous imprisonment for seven years which cannot be modified or altered. Therefore, keeping in view the nature of the offence, the Probation of Offenders Act is not applicable to this instant case. As such, accused is not entitled to get the benefit under the provisions of the said Act.
- 37. Heard the accused on the question of sentence. Also heard the Learned Defence Counsel as well as the Addl. Public Prosecutor. Accused has stated that he has not committed the offence and he has no earlier criminal antecedent. He submitted that he is a petty businessman and also works as a labourer. He has pleaded leniency in awarding the punishment.
- 38. In this instant case, the commission of sexual intercourse with the victim girl by the accused was penetrative sexual assault and the victim girl was alone at the time of occurrence. The accused, being the neighbour, this act of the accused has caused mental trauma to the victim, who was minor child at the time of occurrence.
- 39. Considering the entire facts and circumstances of the case , the grave nature of the offence and the mental injury suffered by the child victim, the accused –Deepak Palowan is sentenced to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of Rs 10,000/- (Rupees ten thousand) only in default to undergo rigorous imprisonment for 1 (one) year , for the offence under section 4 of POCSO Act., which in my opinion ,will meet the ends of justice in this case.

- 40. The period of detention already undergone by the accused will be set off from the sentence of imprisonment.
- 41. His bail –bond stands cancelled . Issue Jail Warrant.
- 42. Now, coming to the aspect of compensation to the victim, who is a minor girl. She needs to be provided with restorative and compensatory justice. So, the Learned Secretary, District Legal Service Authority, Kamrup, Amingaon is directed to assess and grant adequate compensation to the victim (P.W.1). The said compensation amount shall be used by the parents of the victim for her welfare and rehabilitation.
 - 43. The Judgment is delivered in open Court and written on separate sheets.
 - 44. A free copy of the Judgment be furnished to the convict immediately. A copy of this order and Judgment be sent to the District Magistrate, Kamrup, Amingaon as per provision of law.
 - 45. Given under the hand and seal of this Court on the 09th day of April, 2019.

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, is the prosecutrix

Pw-2, Smti. Ganga Sarkar

P.W.3, is the M/O, Dr. Sainjalee Haflongbar

P.W.4, Sri Sankar Ch. Rabha

P.W.5, S/I Sri Mukut Baishya

Prosecution Exhibit

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

Ext.2 is the printed form of the FIR

Ext.3 is the seizure list

Ext.4 is the ejahar

Ext.5 is the medical report

Ext. 6 is the police forwarding letter

Ext.7 is the forwarding letter by which the underwear of the victim was sent for forensic examination

Ext.8 is the forwarding letter to FSL

Ext.9 is the report.

Ext.10 is the sketch-map

Ext.11 is the charge-sheet

Special Judge, Kamrup, Amingaon