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

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Addl. Sessions Judge,

Kamrup, Amingaon

Special Sessions (POCSO) case No.14/2015

U/S-376 IPC R/W Section 4 of the POCSO Act, 2012

State of Assam

-Versus-

Sri Rabindra Kalita

s/o-Sri Rahma Kt Kalita

resident of vill -2 No. Amtola

P.S.-Chhaygaon

Dist.-Kamrup

-----Accused

Appearance:

Mr. A.K. Baruah. Addl. Public Prosecutor

-----for the State

Sri Parag Kalita, Advocate

-----for the accused

Date of evidence:21.11.2016, 16.03.2017, 17.05.2017, 04.09.2017,

27.04.2018, 08.10.2018, 22.11.2018 and 04.04.2019.

Date of Argument: 03.05.2019, 16.05.2019

Date of Judgment: 21.05.2019

JUDGMENT

- The Prosecution case in brief is that—on 16.01.2014 the complainant Nisha Kalita lodged an ejahar alleging that on 15.01.2014 at about 6.00 p.m the accused— Rabindra Kalita had committed forcible sexual intercourse with her minor daughter aged about 7 years by inducing her. Hence, this case.
- On the basis of the said ejahar, Chhaygaon P.S Case No. 17/2014 U/S-366
 (A)/376 (I) 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 present accused person U/S-366 (A)/376 (I) IPC r/w Section 4
 of the POCSO Act, 2012.
- 3. The case was duly committed and after hearing both the parties, charges were framed U/S- 376 IPC r/w Section 4 of the POCSO Act, 2012 against accused—Rabindra Kalita. The aforesaid charges 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 10 (ten) numbers of witnesses including the informant and the victim girl. 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 15.01.2014 at vill No.2 Amtola under Chhaygaon P.S the accused committed penetrative sexual assault on the victim girl and thereby committed an offence punishable U/S 4 of the POCSO Act, 2012?
- (II) Whether the accused person on the same date, time and place committed rape upon the minor daughter of the informant and thereby committed an offence punishable U/S 376 of IPC?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined as many as 10 (ten) numbers of witnesses.
- 7. P.W.1, Smti. Nisha Kalita is the informant. She has deposed in her evidence that she knows the accused. The incident took place on 15.01.2014 at about 5/6 p.m. At the relevant time her daughter (prosecutrix) aged about 7 years, had gone to one shop. She has sent the prosecutrix to bring some recharge voucher. Prosecutrix was studying in class-III. Then the accused—Rabindra Kalita induced the prosecutrix and took her to a courtyard-'baari' of one Surushree Kalita and raped her. Prosecutrix came screamed and came running. She caught hold of one neighbourhood girl—Pinki Kalita. P.W.1 further stated that one Rekha Kalita told her that the prosecutrix was crying and the accused had taken her to the 'baari' of Suru Kalita and committed rape upon her. Thereafter, P.W.1 went to the place of occurrence and brought back the prosecutirx to home. On enquiry, prosecutrix told her that the accused gagged her mouth and pulled her to Surushree Kalita's 'baari'. Then, she bit the hand of the accused and ran away near Pinki Kalita. Prosecutrix further told P.W.1 that the accused had pulled down her pant and inserted his fingers into her genitals. Thereafter, the accused ran away. Prosecutrix got scared after the incident. Next day, P.W.1 lodged the ejahar. Ext. 1 is the ejahar and Ext. 1 (1) is her signature. Police took the prosecutrix to the hospital for her medical examination. Ext.3 is the Medical report. Ext. 3 (1) is the signature of P.W.1 in the medical report.

In her cross-examination, P.W.1 disclosed that the place of occurrence is quite nearby to her house. At the time of incident, it was twilight and nearby persons were visible and far away persons were not visible. The approaching road to the shop, where the prosecutirx had gone on the day of the incident was a public road. P.W.1 did not hear the screams of the prosecutirx at the relevant time of incident.

8. P.W.2, is the prosecutrix. She has deposed in her evidence that the incident took place on 15.01.2014 at about 6 p.m. She was a student of class-III and aged about 7 years at the time of incident. At the relevant time, her mother P.W.1 asked her to bring the recharge voucher for mobile phone. Thereafter, P.W.2 went to the shop near her house. There, she purchased the recharge card for the mobile and

when she intended to return home, the accused Robindra Kalita was hiding behind that shop and he asked her to come with him. P.W.1 started walking with him, then the accused gagged her mouth with his hand and pulled her towards a 'Basti' of Surushree Kalita. P.W.2 further stated that the accused gagged her mouth with one hand and with another hand, he removed his pant and also removed her pant. Thereafter, he touched his genital on her genital. When P.W.2 tried to scream, the accused gagged her mouth more tightly. Then, P.W.2 bite his hand and tried to go towards the house of Surushree kalita. The accused threw away the mobile of her mother which was in her hand and broke it. Thereafter he went away. P.W.2 went to the courtyard of Surushree Kalita's house. She was scared. When P.W.2 reached the courtyard of Surushree Kalita, her daughter, namely, Pinki (Maina ba) asked her as to what had happened. Then, P.W.2 narrated the incident before said Pinki (Maina ba). Thereafter one neighbourhood sister Rekha went to call her mother. When her mother came, she asked her as to what had happened to her, then, P.W.2 narrated the incident to her mother and stated that the son of 'Dadi kaka' committed the incident upon her. Dadi Kaka is the father of the accsued-Rabindra Kalita. Thereafter, she went to her house with her mother. Her mother changed her clothes and bathed her at home. On the next morning, she went to the police station along with her and lodged the case. Police sent her for her medical examination and brought her before the Magistrate for recording her statement U/S-164 Cr. P.C. Ext.6 is the statement and Ext. 6 (1 & 2) are her signatures.

In her cross-examination P.W.2 had revealed that it takes 5 minutes walk to go from her house to the shop. The road which she took on that day to go from her house to that shop is used only by passerby and not by vehicles. While going to the shop, she did not see any person walking on that road. At that time, it was not very dark. The shop did not have any name plate. She disclosed that the person who had touched her body on the day of the incident, was wearing a red sweater and a pant, but she cannot say the colour of the pant. When the person had touched her body at the time of the incident on that day, she tried to scream, but he gagged her mouth. (On being asked by the court as to who is the person, she stated that she referred to Rabindra Kalita (accused).) P.W.2 also disclosed that the accused gagged her mouth on the relevant day and she had bit his hand. Then, he left her and she ran to the house of Surushree Kalita.

- 9. P.W.3, is the M/O, Dr. Sainjalee Haflongbar. She has deposed in her evidence that on 16th January, 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 Kukurmara GDE No. 296. Prosecutrix was aged about 7 years and student of class-III. She was accompanied by WPC 1227 Purnima Das.
- 10. On the physical examination of the victim P.W.3 found---

Her height—122cm, weight—20 kg, chest girth—67 cm, abdominal girth—59 cm, total 25 teeth were present and all were permanent. Scalp hair-10-12 cm in length, black in colour. Axillary hairs- absent, pubic hair absent. Her breast child like. No discharge per nipple on gentle squeezing of both breasts. Menarche—not attained.

On genital examination:-

Genital organs—Developed, vulva—labia majora covers labia minora and clitoris in lithonomy position. Redness is seen in the fold between labia minora and hymen in both sides. Hymen –intact and hymenal orifice admits tip of little finger. vagina—cannot be determined, Cervix— cannot be determined, Uterus—not palpable per abdominally, evidence of venereal disease –not detected clinically, vaginal swabs collected from – swabs collected from clitoris and labia minora.

Injury on the body—Abrasion, reddish brown in colour measuring 0.5 cm X 1 cm is present over the lateral aspect of right forearm, 6.5 cm above right wrist. Abrasion of size 7 cm X 0.5 cm reddish brown in colour present over the lateral aspect of right forearm 6 cm right elbow joint. A linear curved abrasion 0.5 cm in length is present int eh dorsal aspect of right thumb, 2.5 cm below the tip of the right thumb. Tenderness is present over the left ankle joint.

Wearing garments —Evidence of struggle and stain:- not detected at the time of examination. Her mental condition at the time of examination—Good, co-operation and behavior—Co-operative and good.

Laboratory investigation:-

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

Opinion:- 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 6 years and below 9 years at the time of examination.

Ext.3 is the medical report. Ext. 3 (1 and 2) are the signatures of the mother of the prosecutrix. Ext.3 (3 to 6) are her signatures. Ext.3 (7) is the signature of Dr. Arpan Majumdar and Ext. 3 (8) is the signature of Professor and Head Dr. R. Chaliha which she know. Ext.7 is the forwarding letter for medical examination. Ext.7 (1) is her signature. Ext. 7 (2) is the signature of Dr. Arpan Majumdar.

In her cross-examination P.W.3 has deposed that she has not stated in her report that whether the hymenal orifice of the victim admits tip of little finger of right hand or left hand. She did not mention as to whether the little finger referred to is male or female finger. The redness detected in the private part as mentioned above can be caused by any solid also.

- 11. P.W.4, Giren Kalita has deposed in his evidence that he only heard from some villagers that something had happened with the daughter of Moheswar Kalita but he did not know anything about the incident. This witness declared hostile by prosecution.
- 12. P.W.5, Smti. Pinki Moni Das has stated in her evidence that she knows both the parties. At the relevant time, she went to the house of her grandmother—Surushree Kalita. She heard noise of the prosecutrix from behind and she was crying. Thereafter, she called Rekha Kalita and they both called the mother of the prosecutrix and asked her to take the prosecutrix to her house. At the relevant time, prosecutrix was studying in class-II and was around 7 years old. When they asked the prosecutrix what had happened with her, prosecutrix told them that a boy dragged her but she did not disclose the name of the boy. Prosecutrix told her that if she saw the boy, she could identify him.

In her cross-examination P.W.2 stated that it was dark at relevant time. She was not present at the place of occurrence.

- 13. P.W.6, Sri Moheswar Kalita @ Moneswar Kalita is the husband of the informant. Prosecutrix is his daughter. He has stated in his evidence that the incident took place about 4 years ago at about 6.00 p.m. Prosecutrix was 6/7 years old at the time of incident. He was not at home. He was at his work place at Bijoynagar. Then he received a phone call from his wife. When he reached home at 7/7.30 p.m, he found village people gathering in his house. His wife—Nisha Kalita (P.W.2) told him that she had sent the victim girl to a nearby shop for recharging the mobile, then, the accused pressed her mouth with his hand and took her to the backyard of Surushree Kalita. The accused then tore off her clothes and threw her on the ground and he had forcibly sexual intercourse with her. P.W.6 stated that the incident was seen by one of the village girl whose name he did not know and she shouted on seeing the incident. Thereafter, the accused fled away and the prosecutrix was brought back to the house. Thereafter, his wife gave the ejahar.
- 14. P.W.7, Sri Suren Kalita deposed that prosecutrix is his niece. He heard from his wife—Smti. Latika Kalita over phone that the accused had raped the prosecutirx. He was not at home at the time of occurrence. At 7/7.30 p.m when he reached home, he found the village people gathering in his house. Then he heard from his wife and other people that his niece (prosecutrix) was taken away forcibly by the accused and she was raped in the backyard of the house of one Sri Dhiren Kalita. Thereafter, informant lodged the ejahar.
- 15. P.W.8 Sri Suren Das deposed that he heard that accused raped the prosecutrix. P.W.9, Sura Kalita deposed that she does not know anything about the incident.
- 16. P.W.10, ASI Kalicharan Roy has deposed in his evidence that on 15.01.2014, he was working as i/c Kukurmara P.P. On that day, he received a verbal information from Village Headman—Suren Kalita that some fight had taken place. On next day i.e. on 16.01.2014, an ejahar was lodged by one Smti. Nisha Kalita, w/o- Sri Moheswar Kalita in Chhaygaon P.S. Thereafter, O/C, Chhaygaon P.S registered a case vide Chhaygaon P.S Case No. 17/2014 U/S-366 (A)/ 376 (i) IPC R/W section 4 of the POCSO Act, and directed him to investigate the case. And accordingly, P.W.10 visited

the place of occurrence and recorded the statement of the witnesses. He also prepared the sketch map. Accused—Ramen Kalita was not found on house search. Thereafter, on 17.01.2014 he arrested the accused from Kukurmara Bus stand and produced him before the Court. He sent the prosecutrix for medical examination and produced her before the Magistrate for recording her statement U/S-164 Cr. P.C. He also collected the medical report of the prosecutrix. Thereafter, P.W.10 completed investigation and after finding sufficient materials against the accused, submitted charge sheet against the accused—Ramen Kalita U/S-366 (A)/376 (i) IPC R/W section 4 of the POCSO Act, 2012. Ext.8 is the sketch-map and Ext. 8(1) is his signature, Ext.9 is the charge-sheet and Ext. 9 (1) is his signature.

In his cross-examination P.W.10 disclosed that he was informed by the Village Headman at around 7.00 p.m. On that day, he did not go to the place of occurrence. Next morning, he went there. He did not find any object on the place of occurrence to connect the accused with the incident. None other witnesses told him that they saw the incident directly and that they saw the accused in the spot. The witnesses could not state before him the exact time of occurrence. He submitted the charge sheet against the accused as his name appears in the ejahar. Except the informant none of the witnesses showed him the place of occurrence.

17. Now, it has to be seen as to whether the accused committed penetrative sexual assault on the victim girl.

18. To prove the charge U/S-4 of POCSO Act against the accused, the prosecution is to prove that on the day of occurrence, the accused committed penetrative sexual assault on the victim, who is a minor girl.

19. Penetrative sexual assault is defined in Sec 3 of POCSO as follows:-

 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.

- 20. In this instant case, the victim is the vital witness. From the evidence on record it is found that the victim (P.W.2), in her evidence before the court stated that on the day of incident that the accused took her to the 'basti' of one—Surushree Kalita, gagged her mouth with one hand and with another hand, he removed his pant and also removed her pant. According to P.W.2, the accused touched his genital on her genital. But, she bite his hand and escaped. But, in her statement U/S-164 Cr. P.C recorded before the Magistrate (Ext.6), the victim stated that the accused held her hand and he gagged her mouth and forcibly took her to the backside of her neighbour's house, then as he was about to open the belt of his pant, she bit his hand.
- 21. It is alleged in the ejahar (Ext.1) that the accused committed forcible sexual intercourse on the victim. But, the contents of the ejahar (Ext.1) is not at all supported by the victim (P.W.2) herself because from her statements before the court and from her statement before the Magistrate it has come out clearly that no incident of penetrative sexual assault took place on the date of occurrence. Again, in her statement before the I/O recorded U/S-161 Cr. P.C, victim has alleged that the accused committed bad act upon her.

- 22. Therefore, the statements of the victim before the I/O, her evidence before the court and her statement before the Magistrate (Ext.1) are very much contradictory to each other. The testimony of the victim cannot be relied upon at all. She is not found to be trustworthy. Hence evidence does not inspire confidence at all.
- 23. Again, informant (mother of the prosecutrix) adduced evidence as P.W.1 and stated in her evidence that the accused raped their daughter by taking her to the 'basti' of Surushree Kalita. She is hearsay witness. P.W.5 has stated that she heard the noise of the prosecutrix (P.W.2) crying. It is in the evidence of P.W.5 that P.W.2 told her that a boy was dragging her but P.W.5 did not witness the incident. P.W.6, 7 and 8 are hearsay witnesses. They heard that the accused raped the prosecutrix. But, nowhere in her evidence, P.W.2 (Prosecutrix) that the accused raped her. So, the evidence of the witnesses are contradictory to each other.
- 24. Therefore, it is not proved that the accused committed penetrative sexual assault on the victim. Hence, the offence U/S-376 of IPC R/W Section 4 of the POCSO Act, 2012 are not at all attracted against the accused—Rabindra Kalita. He is entitled to get the benefit of doubt.
- 25. Considering the above facts and circumstance of this case and the evidences on record, it is concluded that the prosecution has miserably failed to establish the commission of offences u/s 376 IPC r/w section 4 of POCSO Act beyond all reasonable doubt against the accused person—Rabindra Kalita. Hence, the accused is held not guilty and he is , hereby, acquitted of the offence U/S-376 of IPC r/w Section 4 of the POCSO Act, and set at liberty forthwith.
- 26. His bail bond stands cancelled. Bailor is discharged from his liabilities.
- 27. The case is disposed of on contest.
- 28. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 21st day of May, 2019.

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Smti. Nisha Kalita

P.W.2, is the prosecutrix

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

P.W.4, Giren Kalita

P.W.5, Smti. Pinki Moni Das

P.W.6, Sri Moheswar Kalita @ Moneswar Kalita

P.W.7, Sri Suren Kalita

P.W.8 Sri Suren Das

P.W.10, ASI Kalicharan Roy

Prosecution Exhibits:-

Ext. 1 is the ejahar

Ext.2 is the printed form of the FIR

Ext.3 is the Medical report

Ext.4 original school certificate,

Ext.5 certificate from Sarkari Lat Gaonburah

Ext.6 is the statement

Ext.7 is the forwarding letter for medical examination

Ext.8 is the sketch-map

Ext.9 is the charge-sheet

Special Judge, Kamrup, Amingaon