DISTRICT: DHUBRI

IN THE COURT OF THE SESSIONS JUDGE, DHUBRI

PRESENT: - Shri D. Thakuria,

Special Case No. 58 OF 2017

U/S 376 IPC, r/w section 4 of POCSO Act Corresponding to G.R. Case No.2290/2017

State of AssamComplainant

Versus

Ashan Ali ... Accused

Evidence recorded on : 10-04-2018, 19-06-2018,

13-09-2018, 13-02-2019,

14-05-2019

Argument heard on : 08-07-2019 Judgment delivered on : 22-07-2019

Advocates who appeared in this case

Shri B.R. Basumatary, Special P.P. for the Prosecution

Shri Y.A. Bepari, Advocate, for the Defence

JUDGMENT

- The accused Ashan Ali stands trial for the offences punishable under Section 376
 of the IPC, read with section 4 of POCSO Act for committing rape on the minor
 daughter of the complainant.
- **2.** The facts of the case, in brief, as appeared from the ejahar are as follows: That, the complainant on 02-06-2017 lodged a written ejahar before I/C, Athani Police Outpost with an allegation that on 03-05-2017, it was Wednesday, at about 02:30 P.M. the accused called her daughter to his house and committed rape on her.
- **3.** On receipt of the ejahar, In-Charge, Athani Police Outpost made G.D. Entry vide No. 21 dated 02-06-2017 and forwarded the ejahar to Officer-In-Charge of Gauripur Police Station for registration of a case. Accordingly, Officer-In-Charge, Gauripur P.S. registered a case against the accused as Gauripur P.S. case no. 641/2017 u/s 342/376 IPC, r/w section 4 of POCSO Act.

- **4.** After registering the case, police started investigation. During investigation, The I.O. visited the place of occurrence, recorded the statements of the witnesses under section 161 Cr. P. C., sent the victim girl to Medical for examination and collected its report, also sent her to the court for recording her the statement u/s 164 Cr.P.C. Thereafter, the I.O. arrested the accused and produced him in the court and by completing the investigation submitted charge sheet against the accused to prosecute him under sections 342/376 IPC, r/w section 4 of POCSO Act.
- **5.** During investigation, the accused was granted bail.
- **6.** After taking cognizance of the case, copies were furnished to the accused and after hearing both the parties and perusal of the case record and case diary, formal charge against the accused u/s 376 IPC, read with section 4 of POCSO Act was framed. Charge so framed was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.
- **7.** The prosecution examined nine witnesses and closed the evidence.
- **8.** The accused was examined u/s 313 Cr.P.C. He denied the allegation and also declined to adduce evidence in defence.
- **9.** Heard argument advanced by learned counsels of the parties and perused the evidences on record.
- **10.** Following points have been set up for determination:

Whether the accused on 03-05-2017, at about 02:30 pm, at village Bagulamari Part-I, under Dhubri PS committed rape on the daughter of the informant, and thereby the accused is liable to be punished u/s 376 IPC?

Whether the accused on the same day, time and place committed penetrative sexual assault on the victim, a child under 18 years of age and thereby the accused is liable to be punished u/s 4 of POCSO Act?

DISCUSSION ON THE POINTS FOR DETERMINATION AND DECISION ARRIVED THEREON WITH REASONS

11. In order to establish the charge framed against the accused, the prosecution has examined nine witnesses. The prosecution has examined the complainant as PW-2, her uncle as PW-1, her daughter i.e. the alleged victim as PW-3, her two nephews as PW-4 and PW-7, her husband as PW-5, one independent witness as PW-6, one Investigating Officer as PW-8 and one Medical Officer as PW-9.

- **12.** On the other hand, the defence examined none. The plea of defence is total denial of the case.
- **13.** PW-1, the uncle of the complainant, has deposed that accused is the cousin brother of his son-in-law. About 6/7 months back, one day, the complainant told him that accused committed rape on her daughter. A village bichar was called, but the accused did not appear in the bichar. So, the complainant filed the case. In his cross examination, he has deposed that he has no personal knowledge about the incident. He could not say the date of reporting the incident to him by the complainant. The complainant did not disclose the date of incident. He could not say the date of incident.
- 14. The prosecution has examined the complainant as PW-2. Her deposition shows that the alleged victim is her daughter who is as on today 15 years old. About 8/9 months back, one day her daughter was alone at their residence. At about 2:00 p.m. accused came to their house and took her daughter to his house and committed rape on her. Thereafter, the accused by showing dao threatened her daughter not to disclose the incident to any person. On the same day, at night her daughter told her about the incident. She told the incident to Karim and Mohammad. Village Bichar was called three times, but accused did not appear in the bichar. So she filed ejahar where she put thumb impression. In her cross examination, she has deposed that she did not disclose about the incident to Samad Ali. After 15 days of the incident, the case was filed. She could not say who wrote the ejahar. She had not seen the incident. There are seven / eight persons in the family of the accused. There are houses of several persons near the house of the accused. On the day of incident, she went to the market and returned home before sunset. Her daughter did not disclose the incident to any person before disclosing the incident to her. She could not say the date of the village bichar. She forgot the date of the incident. She cannot say the date of birth of her daughter. She has denied the suggestion of the defence that there was a quarrel between them and accused for constructing a katchs latrine near the house of the accused.

- **15.** PW-3 is the alleged victim. She has deposed that about one year back, she was alone in her house. At about 2:30 P.M. the accused visited her house and called her to his house. The accused, in his house, in a room touched her breast. The accused had shown a dao to her and threatened her not to disclose the incident to anyone. Thereafter, the accused had thrown her out from his house. At the time of incident, no one was in the house of the accused. On the same day, she told the incident to her parents. A village bichar was called; but the accused did not appear in the village bichar. So, her mother filed the ejahar. She was produced before Medical Officer and Judicial Magistrate. Judicial Magistrate had recorded her statement. Ext-1 is her statement and Ext-1(1) and 1(2) are her signatures. In her cross examination, she has deposed that cannot say the date of incident. She studied up to class seven. After one month of the incident, her statement was recorded by Magistrate. There are several persons in the house of the accused. Before disclosing the incident to her mother, she did not disclose the incident to anyone. She cannot say the date of village bichar. The accused raised objection for constructing a kaccha latrine in their house near the house of the accused.
- **16.** PW-4 is the nephew of the complainant. He has deposed that he know nothing about the incident. The prosecution has declared the PW-4 as hostile and cross examined him. He was cross examined by the defence too where he has stated that he does not know about the incident. The I.O. did not record his statement. Accused is not his relative.
- 17. PW-5, the father of the alleged victim, has deposed that his daughter i.e. the alleged victim as on today 13 years old. About one year back, one day, his daughter was alone in his residence. In the meantime, the accused came to their house and had taken his daughter to his house and committed rape on her. His daughter told the incident to his wife and his wife told him the incident. He requested the village elders to call a village bichar, but it was not called. Ultimately through his wife an ejahar was lodged against the accused. In his cross examination, he has deposed that he had not seen the incident. He could not say the date, day and month of the incident. The house of the accused is near to his house. There are several houses of other persons near to his house. There are ten members in the house of the accused. He could not say the date of birth of his daughter.

- **18.** PW-6 Rahul Amin, who is the independent witness of this case, has deposed that one the day of incident he was in Guwahati and after returning from Guwahati he heard that accused committed rape on the daughter of the complainant. He heard the incident from police.
- 19. PW-7, the nephew of the complainant, has deposed that about two years back, one day, complainant told him that accused dragged the victim to his house and committed rape on her. Two times village bichar were called, but the accused did not appear in the bichar. In cross examination, he has deposed that he cannot say the date of incident. He had not seen the incident. He cannot say the date of birth of the alleged victim. He cannot say who presided over the bichar called by his aunt.
- 20. PW-8 Indra Mohan Ray is the Investigating Officer. He has deposed that on 02-06-2017, he was working as In-charge of Athani Police Outpost under Gauripur Police Station. On that day, the complainant filed a written ejahar before him stating that on 03-05-2017 at about 02:30 pm the accused called her 14 year old daughter to his house, closed the door inside the room, gagged her mouth, committed rape on her and threatened her not to disclose anything to anyone. After receiving the ejahar he sent the same to Gauripur Police Station where a case as Gauripur PS case no. 641/17 u/s 342/376 IPC, r/w section 4 of POCSO Act was registered and he was entrusted to investigate the case. On 03-06-2017, he visited the place of occurrence, inspected the same and prepared a sketch map of place of occurrence. Statements of the witnesses were recorded at the place of occurrence. He sent the victim to Dhubri Civil Hospital for medical examination and also sent her to the court for recording her statement u/s 164 Cr.P.C. He seized School certificate of the victim girl. On 15-06-2017, accused Ashan Ali was arrested and forwarded him to the court. Thereafter, he has collected medical report and submitted charge sheet against the accused u/s 342/376 IPC r/w section 4 of POCSO Act. The complainant put her thumb impression in the ejahar. He exhibited the ejahar as Ext-2, Seizure list as Ext-3, Sketch map as Ext-4 and Charge Sheet as Ext-5. He authenticated his signatures which are marked as Ext-2(1), Ext-3(1), Ext-4(1) and Ext-5(1). Witness Rahizuddin disclosed before him that accused called the victim girl to his house, gagged her mouth and committed rape on her. In cross examination, he has

- deposed that after one month of the incident ejahar was lodged. He has not collected any evidence regarding holding village bichar regarding the incident. Rahimuddin who is the neighbour of the accused was not examined by him.
- **21.** The prosecution examined the Medical Officer Dr. Rinku Ahmed (P. W. 9) who examined the victim. She has deposed that on 06-06-2017, she was posted at the Dhubri Health & Maternity Centre as Sr. Medical & Health Officer. On that day, she examined the victim girl in connection with this case. The victim told her that one month back, in absence of anyone, Ashan Ali called her to home and sexually assaulted her. On examination, she found the patient was normal. She did not find any mark of injury on her body. She also did not find spermatozoa in the vaginal smear. She did not find any evidence of recent sexual intercourse on the victim at the time of examination. She exhibited her report which is marked as Ext-6 and authenticated her signature which is marked Ext-6 (1).
- 22. Learned special public prosecutor has submitted that the prosecution examined altogether nine witnesses and the most important witness for the prosecution is the victim girl who is a minor one. She has described the whole incident. After the incident she told the incident to her mother and her mother has also disclosed the incident in the Court. There is nothing to disbelieve the prosecution witnesses. The prosecution is able to establish the charge against the accused beyond all reasonable doubt; so, has prayed to hold the accused guilty under charge sheeted sections and impose adequate punishment as per law.
- 23. Learned defence counsel, on the other hand, has deposed that the evidence adduced by the prosecution is not trustworthy as the same has failed to establish the charge against the accused beyond all reasonable doubt. There was enmity between the accused and the complainant regarding construction of katcha latrine. The complainant just to harass the accused filed a false case. The oral testimonies of the prosecution witnesses have not corroborated each other, the case was not filed immediately after the incident, there was no explanation in delay in filing the ejahar, the medical officer does not support the case of the prosecution. The prosecution has failed to establish the charge framed against the accused beyond all reasonable doubts; hence, has prayed to acquit the accused at least on benefit of doubt.

- **24.** From the case record it appears that the mother of the alleged victim lodged the ejahar on 02-06-2017 before the in-charge of Athani police out post and on the basis of that ejahar Officer-in-charge of Gauripur police station registered a case against the accused under sections 342/376 IPC read with section 4 of POCSO Act. As per contents of the ejahar (Ext. 2) on 03-05-2017 i.e. prior to one month of filing the ejahar at about 2.30 p.m. the accused taking the advantage of no one in the house of the complainant came to her house, called her 14 year old daughter to his house, bolting the door from inside of his room and gagging the mouth of the alleged victim committed rape on her. The accused showing a dao threatened the victim girl not to disclose the same to anyone. There held village bichar 4/5 times for settlement; but no result came out. So, delay caused in filing the ejahar.
- 25. The prosecution examined the complainant as P. W. 2. The complainant put her thumb impression in the ejahar; so, the investigating officer exhibited the same as Ext. 2. The complainant in her deposition has stated what exactly in the ejahar was written. From her evidence it appears that she told the incident to Karim and Mohammad. There held village bichar three times; but the accused did not appear in the village bichar. The prosecution examined Karim Sheikh as P. W. 7 who has deposed that the complainant told him that the accused committed rape on her daughter. Two times village bichar were called; but the accused did not appear in the village bichar.
- **26.** It is evident that the witness Karim Sheikh has no personal knowledge about the incident. His knowledge is based on the information received by him from the complainant. From his deposition it appears that there called village bichar two times; but the accused did not appear. The allegation of the complainant that the accused avoided village bichar has been corroborated by P. W. 7. P. W. 1 has also deposed calling a village bichar where the accused did not appear. So, the explanation of filing the case after one month is found genuine. The complainant is a rustic woman, after the incident she informed the matter to village elders and was under the impression that the villages would do justice to her, the villagers called bichar twice; but accused did not appear. Considering the

- explanation it cannot be treated that delay in filing the ejahar was inordinate and without any justified ground.
- 27. Out of nine witnesses examined by the prosecution two are official witnesses. Independent witness Rahizuddin (P. W. 4) does not support the case of the prosecution whom the prosecution declared as hostile and cross-examined him. He simply denied the suggestion of the prosecution and in cross-examination of the defence has stated that his statement was not recorded by the investigating officer. Another independent witness Rahul Amin (P. W. 6) simply heard from police that the accused committed rape on the victim girl; but he has not disclosed who was the police personnel, from whom he heard about the incident. So, he is purely a hearsay witness.
- **28.** P. W. 1 who is the relative of the complainant has deposed the complainant told him that the accused committed rape on the victim girl. But he does not declare when and where the victim was committed rape. Apparently P. W. 1 is a reported witness.
- **29.** The prosecution examined the parents of the victim girl as P. W. 2 and P. W. 5 respectively and the victim girl as P. W. 3. As stated earlier the P. W. 2 who is the mother of the victim is the complainant and she was told about the incident by her daughter. P. W. 5, the father of the victim has also deposed that on the day of the incident the accused committed rape on his daughter in his house after calling his daughter to his house. His daughter told the incident to his wife and his wife told him about the incident.
- **30.** As there was no eye witness; so, the alleged victim (P. W. 3) is the vital witness for the prosecution. Her oral testimony shows that on the day of the incident at about 2.30 p.m. while she was alone, the accused visited her house and called her to his house. The accused in his house touched her breast. The accused had shown a dao to her and threatened to her not to disclose the same to anyone. Thereafter the accused had thrown her out from his house and at that time no one in the house of the accused. She told the incident to her parents. She was produced before the medical officer and in the Court where her statement was

recorded. She has exhibited her statement as Ext. 1 and authenticated her signatures thereon as Ext. 1 (1) and Ext. 1 (2).

- **31.** The alleged victim in the Court has not deposed that the accused on the day of the incident committed rape on her. According to her, the accused on the day of the incident only touched her breast. The charges under section 376 IPC and 4 of POCSO Act are very serious in nature and the law prescribes very stringent punishment for the offences under section 376 IPC and section 4 of POCSO Act. From the evidence of Medical Officer Dr. Rinku Ahmed (P. W. 9) it appears that on 06-06-2017 she examined the victim girl. The victim girl told her that about one month back, in absence of any one, Ashan Ali called her to his home and sexually assaulted her. On examination she found no injury mark on her body. She did not find any evidence of recent sexual intercourse on the victim. She has exhibited the medical report as Ext. 6 and her signature as Ext. 6 (1). As the alleged victim was examined after one month of the alleged incident; so, question of getting evidence on recent sexual intercourse on her does not arise. As per medical officer, at the time of examination the victim was a girl of 16 year 6 months. She found everything normal. But the medical officer did not examine whether the hymen was intact or torn. The medical officer may not get any evidence of recent sexual intercourse on the day of the examination; but she could have been disclosed by examining the hymen of the victim girl whether she was virgin or not. If the medical officer examined the hymen of the victim girl at least the Court could have been ascertain whether there was any sexual intercourse upon the victim girl or not. The medical officer by not examining the hymen of the victim girl committed a gross mistake and she does not perform her duty properly. After considering the medical evidence this Court has no option to hold that the evidence of medical officer does not help anyway to the prosecution.
- **32.** As there was no eye witness of the incident; so, the evidence of the victim girl is most important. But the victim girl while deposed in the Court during trial does not state that she was raped by the accused. She has simply stated that the accused touched her breast on the day of the incident.

- **33.** From the evidence of the victim girl and the medical evidence it can easily be concluded that the prosecution has failed to establish the charges framed against the accused under section 376 IPC and section 4 of POCSO Act.
- **34.** Now let us scrutinize whether the accused committed any other offences as described by the Indian Penal Code or POCSO Act or not.
- 35. As per the alleged victim, on the day of the incident she was alone in her house, then the accused called her to his home where he touched her breast. If that is true then it attracts the offence punishable under section 354 IPC and section 8 of POCSO Act. As stated earlier there is no eye witness in the case in hand. The Hon'ble Supreme Court in State of Punjab vs. Gurmeet Singh & others (1996) 2 SCC 384 has observed that:- No doubt, in an offence of sexual assault there may not be any eye witness, in as much as, such offences are usually committed in private. It is also settled position that testimony of the victim in such cases of sexual assault should not be viewed with suspicion unless there is compelling reason, Court is not required to look for any corroboration. If the sole testimony of the victim is found inspiring confidence, conviction can be based on the basis of such sole testimony of the victim.
- 36. In the case in hand the alleged incident took place at day time at about 2.30 p.m. as stated by the victim the place of occurrence was the house of the accused. The investigating officer in his sketch map (Ext. 4) shows the place of occurrence is the house of the accused. From Ext. 4 it appears that the house of the victim girl is near to the house of the accused. After the incident the victim girl told the incident to her mother and her mother told the incident to her father. The parents of the victim girl while deposed in the Court have deposed that the accused committed rape on the victim girl which the victim girl did not disclose in the Court. She has deposed that the accused touched her breast only and thereafter she was driven out from his house. The case was filed after one month with explanation and after filing the case the statement of the victim girl was recorded by Judicial Magistrate under section 164 Cr. P. C. On perusal her statement recorded by the Judicial Magistrate it appears that before the Judicial Magistrate she had disclosed that on the day of the incident she was called by

the accused, while she entered into his house, he pushed her to the floor, tied her neck with a gamocha and prevented her from shouting and them committed rape on her by disrobing her. In the statement under section 164 Cr. P. C. the victim has not stated that the accused touched her breast and thereafter she was thrown away from his house. The deposition of the alleged victim given in the Court is totally different than that of the statement given by her before Judicial Magistrate which has been recorded on oath. If the accused touched her breast and if she disclosed the same before her mother after the incident, the mother of the victim would have been disclosed the same in the Court.

- **37.** Now a question may arise as to why the victim girl gave such a serious allegation against the accused. From the evidence on record it is evident though the accused and the complainant are neighbor sharing same compound; but their relation was not good. The parents of the victim have denied the suggestion of the defence that there was quarrel with the accused for constructing a katcha latrine. But the victim girl in her cross-examination has admitted that the accused raised objection for constructing a katcha latrine in her house near the house of the accused. The accused in his statement recorded under section 313 Cr. P. C. has taken specific plea that the complainant filed a false case against him as he protested against constructing a katcha latrine near to his house. The Hon'ble Gauhati High Court in Mrinal Das vs. State of Assam and another 2018 (1) Gauhati Law Journal 79 has observed that : It is the settled principle that accused is not required to prove the defence plea by adducing evidence beyond doubt. Proof of probability of the defence plea is sufficient. In this case the plea of the accused has been supported by the victim. As there was enmity between the complainant and the accused, the possibility of impleading him falsely cannot be ruled out.
- **38.** From the evidence on record it is evident that the principal witness for the prosecution projected two allegations against the accused, one, at the time of investigation and another in the Court during trial. The allegation described in the Court during trial has not been supported by anyone. Even in the ejahar which was filed after one month of the incident has also not mentioned the same. The victim has also not disclosed the fact that she was sexually assaulted by the accused before the Judicial Magistrate. Under such circumstances it is not safe to

accept the sole testimony of the victim that the accused touched her breast on the day of the incident as her testimony is found lack of inspiring confidence.

- **39.** The Hon'ble Supreme Court in **Digambar Vaishnav and another vs. State of Chhattisgarh 2019 Cri. L. J. 1901** has opined one of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rest on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion however grave it may be. Strong suspicion, strong coincidence and grave doubt cannot take place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the accused not falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.
- **40.** In view of the above discussion and observation it is safely concluded that the prosecution has failed to establish the charges framed against the accused person beyond all reasonable doubt. Hence, the accused deserves the benefit of doubt and accordingly the accused is acquitted of the charges on benefit of doubt and he is set at liberty.
- **41.** Let the seized article be returned to the person from whom it was seized.
- **42.** The liability of the bailor will remain in force for next six months as per law.
- **43.** Given under my hand and seal of this Court this the 22nd day of July 2019.

(D. Thakuria) Special Judge, Dhubri

Dictated & corrected by me.

(D. Thakuria) Special judge, Dhubri.

APPENDIX

1. PROSECUTION WITNESSES:

- PW-1 Uncle of the complainant
- PW-2 Complainant
- PW-3 Alleged victim
- PW-4 Nephew of the complainant
- PW-5 Husband of the complainant
- PW-6 Ruhul Amin, independent witness
- PW-7 Nephew of the complainant
- PW-8 Indra Mohan Ray, Investigation Officer
- PW-9 Dr. Rinku Ahmed, Medical Officer

2. PROSECUTION EXHIBIT:

- Exhibit-1 Statement of the victim recorded u/s 164 Cr.P.C.
- Exhibit-2 Ejahar
- Exhibit-3 Seizure list
- Exhibit-4 Sketch map
- Exhibit-5 Charge sheet
- Exhbiit-6 Medical report

(D. Thakuria) Special Judge, Dhubri