

IN THE COURT OF SPECIAL JUDGE ::::::::::: BILASIPARA

Present:- Shri J. Borah, A.J.S
Special Judge,
Bilasipara.

Special (POCSO) Case No-11 of 2019

u/s 448 Indian Penal Code and section 4 of Protection of Children
from Sexual Offences Act

State of Assam

-Vs-

Abdul Baten

..... **accused person**

Date of framing charge	:-	22-05-2019
Date of recording evidence	:-	10-07-2019
		19-09-2019
		24-10-2019
		21-11-2019
		17-12-2019
		02-01-2020
		05-02-2020
Date of Argument	:-	08-06-2020
		22-06-2020
Date of Judgment	:-	26-06-2020

Advocates Appeared:

For the State of Assam	:-	Mr. T. Kr. Bhattacharya, Ld. Addl. P.P for the State of Assam.
For the defence	:-	Mr. A.M Sarkar, Ld. Advocate for the defence.

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J U D G M E N T

1. This case is under section 448 Indian Penal Code and section 4 of Protection of Children from Sexual Offences Act. So, the name of the victim is not mentioned and she is, hereinafter, referred to 'x'.

2. The prosecution case, in brief, is that Abdul Samad, the informant, lodged an ezahar with the Chapar police station on 26-02-2019 informing that the informant Abdul Samad worked at "Sagar Brick Field". He along with his wife and children were taking shelter at a house situated at Haldibari. On 25-02-2019 he and his wife were at brick field. His three children namely Saddam Hussain, Amir Hussain and 'x' were at their sheltering house Haldibari. On the very day, the accused Abdul Baten entered into the house of the informant. The accused Abdul Baten paid money to Saddam Hussain and sent him to nearby shop. The accused Abdul Baten thereafter gagged the mouth of 'x' and committed rape on her.

So, the informant prayed for taking necessary action against the accused Abdul Baten.

3. The Chapar police station received the ezahar and registered as Chapar police station case no. 61/2019 under section 448/376 Indian Penal Code read with section 4 of Protection of Children from Sexual Offences Act. The case was investigated and having found prima facie under section 448/376 Indian Penal Code and section 4 of Protection of Children from Sexual Offences Act against the accused Abdul Baten, laid the charge sheet before this court for trial.

4. The accused Abdul Baten, hereinafter called the accused, appeared in this case and he was furnished copy. Charge was framed under section 448 of Indian penal Code, I.P.C in short, and section 4 of Protection of Children from Sexual Offences Act, POCSO in short, against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

5. The prosecution, in order to bring home the charge against the accused, examined 12 (twelve) witnesses, namely-

- | | |
|-------------------|-------|
| 1. Ajiron Bibi | P.W-1 |
| 2. Abdul Samad | P.W-2 |
| 3. Saddam Hussain | P.W-3 |

4. 'x'/the victim	P.W-4
5. Samir Ali	P.W-5
6. Bahar Ali	P.W-6
7. Sobira Bibi	P.W-7
8. Piyar Ali	P.W-8
9. Abdul Hamid	P.W-9
10. Ganesh Das	P.W-10
11. Nirod Ch. Das	P.W-11
12. Dr. Aruna Saikia	P.W-12

6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence adduced by the prosecution witnesses and also declined to adduce evidence in defence.

7. Heard argument for both sides. Learned advocate Mr. Abdul Mannan Sarkar submitted written argument.

8. **POINTS FOR DETERMINATION**

- i. Whether accused on 25-02-2019 at about 02.00 P.M at village Haldhibari under Chapar police station, committed criminal trespass by entering into the house of informant with intent to commit sexual assault on 'x' and thereby committed offence u/s 448 I.P.C?
- ii. Whether accused on 25-02-2019 at about 02.00 P.M at village Haldhibari under Chapar police station, committed penetrative sexual assault on 'x', aged about 11 years old and thereby committed offence u/s 4 of POCSO Act?

DECISION AND REASONS THERE OF

9. In this prosecution case P.W-1 Ajiron Bibi is the wife of the informant Abdul Samad, P.W-2 Abdul Samad is the informant, P.W-3 Saddam Hussain is the son of the informant, P.W-4 'x' is victim. P.W-5 Samir Ali, P.W-6 Bahar Ali, P.W-7 Sobira Bibi, P.W-8 Piyar Ali, P.W-9 Abdul Hamid are independent

witnesses. P.W-10 Ganesh Das and P.W-11 Nirod Ch. Das are investigating officers. P.W-12 Dr. Aruna Saikia is the Medical and health Officer.

10. Since P.W-2 Abdul Samad is the informant and P.W-4 'x' is the alleged victim, so, both are the prime witnesses in this case. Now let see the evidence of this two witnesses.

11. P.W-2 Abdul Samad has stated in his evidence that he is the informant in this case. 'x' is his daughter. He works at 'Sagar Bhati' brick field. He with his family lived in a rented house near the brick field. On the day of occurrence he was working in the brick field. His wife went to the brick field to give him launch. At about 03.00 P.M, his son Saddam Hussain went to the brick field and told him that the accused had done evil deed on his daughter. He with his wife went to their residence. 'x' told them that the accused went to their house, sought water from her and when she gave him water, the accused performed voluptuous act on her. He arranged a village meeting, but the village meeting did not hold. Accordingly, he lodged the ezahar, Ext-1 is the ezahar, Ext-1(1) is his signature.

In his cross P.W-2 has stated that he does not know the content of the ezahar. His daughter did not go to school on the day of occurrence. His daughter told him about the occurrence instantly. His daughter told about the occurrence in the presence of the Manager, Sardar and Mohuri of the brick field. He denied that the accused did not gag the mouth and committed sexual intercourse on 'x'. His two sons know the accused well. He denied that he has adduced false evidence.

12. P.W-4 'x' has stated in her evidence that the informant is her father. She knows the accused. The occurrence took place at about 02.00 P.M. The occurrence took place at their house. Her parents worked at 'Sagar' brick field and on the day of occurrence her parents were in the brick field. She with her brother Saddam was at house. The accused went to their house and sought for water. Her brother Saddam Hussain was on road. When she went inside house to fetch water, the accused touched her buttock. The accused then put off her pant and committed sexual act on her. When she started crying, the accused gagged her mouth. Her brother Saddam Hussain saw the occurrence and he reported the same to their parents. The parents returned to their house. She informed her parents all about the occurrence. Her father lodged the case against the accused. She gave her statement

before the Magistrate. Ext-2 is the said statement. Ext-2(1), 2(2), 2(3), 2(4), 2(5) are her signatures. She was examined by the doctor.

In her cross P.W-4 has denied that she told in her statement given before the Magistrate that her brother went to school on the day of occurrence. None went to their house hearing her cry. She was putting on 'churidar' and pant at the time of occurrence. The said clothes were torn. She threw away the clothes. She denied that she told in her statement that her mother returned from brick field at night. She denied that the accused did not go to their house. She also denied that the accused did not commit sexual intercourse on her. She denied that her brother Saddam was not at house.

13. Thus, minute scrutiny of the evidence of P.W-2 and P.W-4 shows that P.W-2 Abdul Samad is the informant and P.W-4 'x' is the alleged victim. According to P.W-2, he lodged the ezahar Ext-1 when he heard about the occurrence from his son Saddam Hussain and his daughter 'x'. His son told him that the accused committed evil deed on 'x'. His daughter 'x' told him the accused went to their house, sought for water and thereafter he committed sexual intercourse on her. So, P.W-2 is not an eye witness. He got to know all about the occurrence from his son Saddam Hussain and his daughter 'x'. In such a situation we are to see the evidence of P.W-4 'x'.

According to P.W-4 'x', on the day of occurrence her parents went to Sagar brick field for work. She with his brother Saddam Hussain was at their house. The accused went to their house and sought for water. At that moment, Saddam Hussain was on the road. The accused then put off her pant and committed sexual intercourse on her. When she started crying, the accused gagged her mouth. Her brother Saddam Hussain saw the occurrence and informed their parents. When her parents returned to their house, she told her parents all about the occurrence.

Thus, the evidence of P.W-2 is supported by P.W-4 'x' in toto. There found no gulf in the evidence of P.W-2 and P.W-4. The evidence of P.W-2 and P.W-4 is corroborated to each other. The defence has failed to detract the evidence of P.W-2 and P.W-4 except a few suggestions. The suggestions raised by the defence cannot be accepted.

14. The evidence of P.W-2 Abdul Samad shows that his son Saddam

Hussain informed him about the occurrence. The evidence of P.W-4 'x' shows that her brother Saddam Hussain saw the occurrence. To authenticate the evidence of P.W-2 and P.W-4, let see the evidence of P.W-3 Saddam Hussain.

P.W-3 Saddam Hussain has stated in his evidence that the informant is his father and 'x' is his sister. The occurrence took place at their house. His father worked at 'Sagar' brick field. The occurrence took place 5/6 months ago (from the date of adducing evidence on 19-09-2019). On the day of occurrence his father went to work in the brick field. His mother went to the brick field to provide launch to his father. He with her sister were at house. At about 12.00/01.00 at noon, the accused went their house. He knows the accused well as he (accused) married his wife from nearby their house. The accused paid him money, asked him to bring 'Bimal Ghutka', a kind tobacco, from nearby shop. Accordingly, he went to the shop. After purchasing 'Bimal Ghutka' when he returned to their house, he saw the accused on his sister 'x'. His sister was beneath and the accused was on his sister. He immediately went to the 'Sagar' brick field and informed his parents. His parents went to house, but they did not find the accused there. His sister 'x' was without cloth. His sister 'x' told her parents that the accused committed evil deed on her.

In his cross P.W-3 has stated that he failed to remember the name of the day in which the occurrence took place. The name of the shop keeper where he went is Sanidur. He did not tell the shop keeper about the occurrence. He did not find any villagers to visit the place of occurrence. It took 10/15 minutes to reach the Sagar brick field from their house. The other people also came with his parents. He has denied that he did not see the occurrence. He has also denied that the accused did not commit sexual intercourse on 'x'.

15. Thus minute scrutiny of evidence of P.W-3 shows that he has evinced that the accused went to their house and committed sexual intercourse on his sister 'x' and he saw it. P.W-3 also makes it clear that the accused went to their house, sent him to the shop to buy some tobacco and when he returned from the shop, he saw the accused on his sister. The evidence of P.W-3 is spontaneous and free from all encumbrance. The defence too has

failed to foil this evidence of P.W-3 except giving suggestions. But the suggestions are sternly denied by P.W-3.

16. Thus, the evidence of P.W-2 and P.W-4 is supported by P.W-3 in toto. There found no gulf in evidence of P.W-3 and P.W-2, P.W-4.

17. P.W-1 Ajiron Bibi is the wife of the informant Abdul Samad. She is also the mother of 'x'. According to P.W-3, his mother went to the brick field to supply food to his father and he informed both his parents about the occurrence. So to authenticate this evidence, let see the evidence of P.W-1 Ajiron Bibi.

P.W-1 Ajiron Bibi has stated in her evidence that she is the wife of the informant. She worked in the brick field at Rangamati. The occurrence took place 4/5 months ago (from the date of adducing evidence on 10-07-2019). On the day of occurrence, she with her husband were working in the brick field. Her two children namely 'x' and Saddam Hussain were at their house. At noon, their son Saddam Hussain went to the brick field and informed them that the accused went to their house to drink water. The accused sent Saddam Hussain to a 'pan' shop and then he committed sexual intercourse on her. She with her husband went to their house. Their daughter 'x' told her about the occurrence. They, thereafter, lodged the ezahar against the accused.

In her cross P.W-1 has stated that they lodged the ezahar after two days from the day of occurrence. When 'x' told her about the occurrence, one Sadek, Afruza and Isma were present. P.W-1 denied that 'x' did not state that the accused committed rape on her. They called village meeting, but it did not hold. P.W-1 has denied that no such occurrence took place. 'x' did not go to school on the day of occurrence. P.W-1 has denied that she has adduced false evidence.

18. Thus, the careful scrutiny of evidence of P.W-1 shows that on the day of occurrence she was in the brick field. Her husband was also in the brick field. Towards noon, her son Saddam Hussain went to the brick field and informed them that the accused committed evil deed on 'x'. When they went to their house, 'x' also told that the accused had committed sexual intercourse on her. Thus, the evidence of P.W-2, P.W-3, P.W-4 and P.W-1 is corroborated to each other. There found no gulf in their evidence. The defence has also failed to detract the evidence of P.W-1 except a few

suggestions. But the said suggestions were sternly denied by P.W-1. The points in which their evidences are corroborated to each other are that at the time of occurrence the informant Abdul Samad, the father of the victim was in the brick field. The wife of the informant Ajiron Bibi was also in the brick field. 'x' and her brother Saddam Hussain were at house. The accused went to the house of Abdul Samad and sought for water. The accused sent Saddam Hussain to the shop. The accused then committed sexual intercourse on 'x' gagging her mouth. All the witnesses namely P.W-1 to P.W-4 have categorically adduced in the same tune. There is no such gulf in their evidence. Even the defence has failed to detract their evidence except some suggestions. But the suggestions are sternly denied by the witnesses. Moreover the witnesses are spontaneous. Their evidences are free from all encumbrances. The evidence of P.W-1 to P.W-4 is that the accused committed sexual intercourse on 'x'. Now let see whether this evidence of witnesses is supported by P.W-12 Dr. Aruna Saikia who had medical examined on 'x'.

P.W-12 Dr. Aruna Saikia has stated in her evidence that on 27-02-2019 she was at Bilasipara Civil hospital as Medical and Health Officer. On that day, she examined 'x' and found as follows:

Approximate radiological age: 14 ½ to 15 ½ years.

Laboratory investigation: no spermatozoa seen in the smear supplied.

No evidence of any recent sexual/physical assault found.

In her cross P.W-12 has stated that the hymen was ruptured. There was no bleeding on private part. No injury was found on pulvet area.

Thus, the evidence of P.W-12 shows that she had medical examination on 27-02-2019. The occurrence took place on 25-02-2019. That is after two days from the day of occurrence. She found no sign of rape on 'x'. But she found the hymen of 'x' ruptured. She did not find injury on the private part of 'x'. Thus, the evidence of P.W-12 is that there was no sexual intercourse on 'x'. Now question is whether the evidence of P.W-12 can be accepted to be authenticated.

First, P.W-12 had examined 'x' after two days from the day of incident.

Secondly, the age of 'x' was, according to P.W-12, 14 ½ to 15 ½. 'x' might not have injury on her private part. But thing is that the hymen of 'x'

was ruptured. Moreover, the injury sustained by 'x' on private part may not be traced out due to delay in examination.

The Hon'ble Apex court in Ram Swaroop -vs- State of Rajasthan observed in *para no. 8 and 9* as follows:

"8. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference."

"9. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eye witness version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post- mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."

In our case instant, 'x', the victim has categorically stated in her evidence that the accused committed sexual intercourse on her. She is spontaneous in her evidence. There found little discrepancies in her evidence. 'x' is minor girl. She had no enmity with the accused to entangle the accused to this heinous offence. The defence has also failed to point out any enmity between the parents of 'x' and the accused. In such a position, there is no reason to disbelieve the evidence of P.W-4 'x'. The evidence of a Medical and Health Officer is mere an opinion. The opinion of Medical Officer cannot rule out the evidence of victim.

19. Now let see the evidence of other independent witnesses.

P.W-5 Samir Ali has stated in his evidence that he knows both the

informant and the accused, but he knows nothing about the occurrence.

Crosse examination of P.W-5 was declined by the defence.

20. P.W-6 Bahar Ali has stated in his evidence that he knows both the informant and the accused but he knows nothing about the occurrence.

Cross examination of P.W-6 was declined by the defence.

21. P.W-7 Sobira Bibi has stated in her evidence that she knows both the informant and the accused, but she knows nothing about the occurrence.

Cross examination of P.W-7 was declined by the defence.

22. P.W-8 Piyar Ali has stated in his evidence that he knows both the informant and the accused, but he knows nothing about the occurrence.

Cross examination of P.W-8 was declined by the defence.

23. P.W-9 Abdul Hamid has stated in his evidence that he knows both the informant and the accused. P.W-9 has also stated in his evidence that his brother Abdul Samad, the informant told him that the accused committed rape on his daughter 'x'. The police seized one school certificate of 'x' and he signed the seizure list. Ext-3 is the said seizure list and Ext-3(1) is his signature.

In his cross P.W-9 has stated that the seizure list was not read over to him.

24. Thus, perusal of the evidences of P.W-7 to P.W-9 shows that P.W-7 to P.W-8 have adduced evidence not incriminating the accused. They have unequivocally stated in their evidence that they know nothing about the occurrence. So, the evidence of P.W-7 to P.W-8 is not considered. P.W-9 Abdul Hamid has stated in his evidence that the informant Abdul Samad told him that the accused committed rape on 'x'. Perusal of evidence of P.W-2 Abdul Samad shows that P.W-2 has stated nowhere in his evidence that he told Abdul Hamid about the occurrence. So, the evidence of P.W-9 cannot be considered.

25. Learned advocate Mr. A.M. Sarkar, for the defence has submitted in his written argument that the vital independent witnesses namely Sadek, Afruza, Isma, Morzina, The manager of the brick field, Mohori of the brick field, 'Sardar', Sanidur, the shop keeper, Nur Islam and two kids of Babu Seikh and Azinur were not examined by the prosecution. Non examination of the said witnesses affect the present case.

P.W-2 Abdul Samad has stated in his evidence that when 'x' told him

about the occurrence, the Manager, the Mohori and the Sardar of the brick field were present at that time. But the prosecution has not mentioned the name of the said witnesses in the witness box of the chargesheet. To prove the evidence of P.W-2 that the said persons namely the Manager, the Mohuri and sardar were present, the said persons are the important witnesses. But at the same time, if the said evidence of P.W-2 is not proved, the evidence of other witnesses namely the evidence of P.W-3 and P.W-4 cannot be discarded.

Sanidur is one shop keeper. P.W-3 Saddam Hussain has stated that the accused sent him to his shop and accordingly he went there. But Sanidur, the shop keeper was not examined by the investigating officer. The investigating officer could have examined Sanidur to authenticate the evidence of P.W-2. But non examination of Sanidur, will not affect the prosecution case as because the evidence of P.W-3 is quite spontaneous and free from doubt. P.W-3 is a minor. But his evidence is weighed. Such evidence cannot be discarded without any rhyme and reasons.

The other persons namely Afruza, Morzina, two kids of Babu Seikh are not so important person to examine as witness.

It is a case of sexual offence. P.W-4 has uttered in her evidence that the accused committed sexual intercourse on her. She has adduced in limpid. So, her evidence cannot be rejected easily.

In such a situation, the plea of learned defence advocate Mr. A.M Sarkar, with due respect, cannot be accepted.

26. Learned defence advocate has submitted that P.W-1, P.W-2, P.W-3 and P.W-4 are interested witnesses as they are of same family. There is no independent witness to support the prosecution case.

The case record shows that P.W-2 Abdul Samad, the informant is the father of the victim 'x', P.W-1 Ajiron Bibi is the mother of the victim 'x', P.W-3 Saddam Hussain is the brother of the victim 'x'. So, all the witnesses namely P.W-1 to P.W-4 are of same family. Now question arises, whether they are interested witness as because they are of same family.

The Hon'ble Apex court in State of A.P -vs- S. Rayappa (2006) 4 SCC 512 observed as follows:

"By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground

that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

The Hon'ble Apex court in State of Rajasthan -vs- Teja Ram and others AIR 1999 SC 1776 observed as follows:

"The over-insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is un-pragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen anything. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbour-hood may be replete with other residents also."

In this case instance, the defence has failed to establish how the witnesses namely P.W-1 to P.W-4 are interested to send the accused to jail for imprisonment.

Secondly, the evidence of P.W-3 and P.W-4 is so spontaneous and natural that there is little scope to disbelieve their evidence.

Thirdly, the defence has failed to establish that there is enmity between witnesses P.W-1 to P.W-4 and the accused.

In such a situation, the plea of learned defence advocate that evidence of P.W-1 to P.W-4 has got little value as because they are of same family cannot be accepted.

27. Learned defence advocate has also taken a plea that the alleged victim is a major. The prosecution has failed to prove that the alleged victim is a minor. Accordingly, the offence does not fall under section 4 of POCSO Act.

Perusal of evidence of P.W-1 and P.W-2 shows that they are the parents of the victim 'x'. But they have stated nothing regarding the age of the victim. P.W-4 'x' who is the victim has stated in her evidence that she is 11 (eleven) years old.

But the defence has put not a single question to 'x' that she is not 11 years.

Learned Additional P.P has exhibited the seizure list as Ext-3. But the material namely school certificate is not exhibited. In absence of such documentary evidence let see the evidence of P.W-12 Dr. Aruna Saikia, the Medical and Health Officer who examined the age of the victim. In her evidence P.W-12 has stated that-

Approximate radiological age: 14 ½ to 15 ½ years. Ext-6 is the medical report, Ext-6(1) is her signature.

The defence has not cross examined P.W-12 in respect of age of the victim.

Thus, the evidence of P.W-12 shows that the age of the victim on 27-02-2019 was 14 ½ to 15 ½ years. The defence has not challenged this opinion of P.W-12. In such a situation, question of discarding the evidence of P.W-12 does not arise. Though learned defence advocate has taken plea of majority of the victim, but the defence raised not a single question either to P.W-4 'x', the victim or P.W-12, the Medical and Health Officer.

Taking all into consideration, the plea of learned advocate is not accepted.

28. Learned defence advocate has also submitted in his argument that there are many contradictions and discrepancies in the prosecution evidence particularly in the evidence of P.W-4.

P.W-11 Nirod Ch. Das is the investigating officer. In his evidence P.W-11 has stated that he did not seize the wearing of the victim. So, it is lapse on the part of the investigating officer. But, it is general principle that due to lapse of the investigating officer, the accused will not get benefit.

Learned advocate has pointed out that victim became unconscious after occurrence and she did not stated it in her statement u/s 161 Cr.P.C and statement u/s 164 Cr.P.C.

Perusal of the evidence of P.W-4 and her statement u/s 161 Cr.P.C

and 164 Cr.P.C, it appears that P.W-4 stated neither in her statement u/s 161 Cr.P.C nor in 164 Cr.P.C that she became unconscious after occurrence. So question of contradiction between earlier statement and evidence before this court does not arise.

The other contradictions and discrepancies as pointed out by learned defence advocate are trifles and the same will not affect the prosecution case.

29. Learned advocate has submitted in his argument that the victim did not sustain any injury as a result of forceful sexual intercourse. This shows that there was no occurrence.

The evidence of P.W-12 Dr. Aruna Saikia shows that she did not find any injury on private part of the victim. But the hymen was ruptured.

So, the evidence of P.W-12 makes it clear that though the victim did not sustain other injury on her private part, but her hymen was torn out. Thus, the evidence of P.W-12 is not that the victim did not sustain any injury.

30. Learned defence advocate has also submitted in his argument that there is no such evidence to prove penetrative sexual intercourse on the victim. So, section 4 of POCSO Act does not attract.

P.W-4 'x' has categorically stated in her evidence that she was raped. This evidence of P.W-4 'x' remained intact. The defence put no question to P.W-4 whether the penis of the accused copulated into her private part or not. So, the plea of learned advocate cannot be considered.

31. Now, let us see the section 3 & 4 of the POCSO Act.

Section 3 read as follows:

"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 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 read as follows:

"4. Punishment for penetrative sexual assault.-Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

In this case instance, P.W-4 'x' has earnestly stated in her evidence that the accused committed sexual intercourse on her. P.W-12 Dr. Aruna Saikia has stated that the age of the victim was 14 ½ to 15 ½ years. So, all the ingredients as required u/s 4 of POCSO Act are available in this prosecution case.

32. It is also clear in the evidence of P.W-3 and P.W-4 that the accused entered into the house of the informant and committed sexual intercourse on 'x'.

33. The defence has failed to foil the prosecution case.

34. Taking above into consideration, it leads to conclusion that the prosecution has proved it's case u/s 4 of POCSO Act and section 448 I.P.C against the accused beyond all reasonable doubt.

35. Held that the accused is guilty u/s 4 of POCSO Act and section 448 I.P.C.

36. Now, let us see whether the accused is entitled to benefit u/s 4/5 of Probation of Offenders Act or section 360 of Criminal Code Procedure, in short Cr.P.C.

The case record shows that the accused perpetrated an offence against a minor girl. The felony is of voluptuous. Obviously, the offence is of heinous. If the accused is given the privilege of section 4/5 of Probation of Offenders Act or section 360 of Cr.P.C, the same may create havoc in society. The administration of justice will be severely affected.

Taking such view, such benefit is not given to the accused.

37. Heard the accused on the point of sentence u/s 235(2) of Cr.P.C.

The accused has submitted that his wife is at advance stage pregnancy. He has ailing father. So, prayed for taking lenient view.

38. Taken all into consideration, it would be justified and reasonable if the accused is given an adequate punishment.

Accordingly, the accused is convicted and sentenced to R.I for 7 (seven) years with fine Rs. 5000/- (five thousand) in default of fine he shall undergo R.I for another period for 2 (two) months u/s 4 of POCSO Act. Accused is also convicted and sentenced R.I for 2 (two) months u/s 448 I.P.C. Both sentences will run concurrently.

39. Set off the previous hazotee period, if any.

40. Since the case is of a minor girl. She must be duly compensated as per section 357(1) Cr.P.C. So, the District Legal Service Authority is informed to pay adequate compensation to the victim 'x'.

41. Let a free copy of Judgment & order be given to the accused.

The case is disposed of.

Given under my hand and seal by this court on this 26th day of June 2020 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by,

S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESS:-

P.W-1 Ajiron Bibi

P.W-2 Abdul Samad

P.W-3 Saddam Hussain

P.W-4 'x'/the victim
P.W-5 Samir Ali
P.W-6 Bahar Ali
P.W-7 Sobira Bibi
P.W-8 Piyar Ali
P.W-9 Abdul Hamid
P.W-10 Ganesh Das
P.W-11 Nirod Ch. Das
P.W-12 Dr. Aruna Saikia

PROSECUTION EXHIBIT:-

Ext-1 Ezahar,
Ext-2 Statement of 'x' recorded u/s 164 Cr.P.C.
Ext-3 Seizure list,
Ext-4 Charge sheet,
Ext-5 Sketch map &
Ext-6 Medical report.

DEFENCE WITNESS :- NIL
DEFENCE EXHIBITS :- NIL
COURT WITNESS :- NIL
COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara