

GAHC010015122016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./102/2016

SHRI HARI NATH DAS
S/O LATE DHARMESWAR DAS, R/O VILL. PACHIM KHAGRABARI, P.O.
JALAHGHAT, P.S. SIMLA, IN THE DIST. OF BAKSA, BTAD, ASSAM

VERSUS

THE STATE OF ASSAM and ANR

2:CHIKAN DAS

S/O LT. HAHIN DAS
R/O VILL. MEDHIPARA
PASCHIM KHAGRABARI
P.O. JALAHGHAT
P.S. SIMLA
DIST. BAKSA BARPETA
PIN 78132

Advocate for the Petitioner : MR.A BORO

Advocate for the Respondent :

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR JUSTICE SONGKHUPCHUNG SERTO

JUDGMENT (CAV)

28/02/2023

(M.R. Pathak, J)

1) Heard Mr. Bahadur Ramchiary, learned counsel for the accused appellant and Ms. Shamima Jahan, learned Additional Public Prosecutor, Assam for the State. Also heard Mr. Ujjwal Kumar

Das for the respondent No.2/informant

2) The learned Special Judge, Bajali, Pathsala in Sessions Case No. 159 of 2015 by its judgment and sentence dated 07.01.2016, convicted the accused Hari Nath Das, under Section 4 of the POCSO Act, 2012 as well as under Section 448 IPC and sentenced him to Imprisonment for life with fine of Rs.25,000/-, in default of payment of fine Simple Imprisonment for three months under Section 4 of the POCSO Act and Rigorous Imprisonment for seven months with fine of Rs. 500/-, in default of payment of fine Simple Imprisonment for fifteen days under Section 448 IPC, where both the sentences to run concurrently, setting off the period of detention already undergone by the convict in the custody. In the said judgment and sentence dated 07.01.2016 passed in Sessions Case No. 159/2015, the learned Special Judge, Bajali, Pathsala also directed that fine amount if realized shall be given to the parents of the victim. Being aggrieved with the said Judgment of conviction and sentence dated 07.01.2016, noted above, the accused has preferred this appeal.

3) According to the appellant, there was no eye witness to the alleged commission of offence nor any iota of evidence for warrant of convicting him under Section 4 of the POCSO Act as well as under Section 448 IPC and therefore, the learned Special Judge committed illegality in passing the impugned judgment of conviction and sentence.

4) It is stated by the appellant that the facts and circumstances of the case as well as the evidence led by the prosecution do not disclose any offence under Section 4 of the POCSO Act and under Section 448 IPC and hence, the impugned judgment of conviction and sentence needs to be set aside and quashed.

5) The appellant further contended that the learned Special Judge totally misread the evidence on records and arrived at the erroneous findings and thereby committed illegality in convicting and sentencing him under Section 4 of the POCSO Act and Section 448 IPC. As such, the impugned judgment of conviction and sentence being not sustainable in law should be set aside and quashed.

6) On the other hand, the learned Additional Public Prosecutor, appearing for the State submits that there is sufficient evidence on record proved by the prosecution with regard to the guilt of the accused and that the learned Special Judge rightly passed conviction and sentence

against the accused appellant and therefore, the impugned judgment and order of conviction and sentence does not call for any interference.

7) Mr. U K Das, learned counsel for the respondent No. 2/informant also submits that the learned Special Judge rightly passed the impugned judgment of conviction and sentence against the appellant.

8) We have heard the submissions of the learned counsels for the parties.

9) The brief facts of the case is that the informant Chikan Das (PW.3) on 10.04.2013 around 09:00 pm lodged a written *ejhar* before the Officer-in-Charge, Simla Police Station stating that on 09.04.2013 around 09:00 am while his daughter Momita Das, aged about 14 years was preparing to go to school, their co-villager Sri Hari Nath Das taking the advantage of absence of other inmates in the house molested her after tying her hands and gagging her. It was seen by his wife Smti Atehi Das when she returned home from the village and she assaulted him with a lathi (stick) and then the accused Hari Nath Das ran away. When he reached home around 05:30 pm, his wife informed him about the incident and the matter was accordingly informed to the President of the village Sarat Medhi and the Secretary Subodh Kakati. People of the village asked him not to inform police and held an extrajudicial trial in which people imposed a fine of Rs. 30,000/- on accused Hari Nath Das. He was obliged to go by the decision of the public. On 10.04.2013 when he went out to the village to work as daily labour and his wife also went out towards the village, around 04:30 pm in the absence of the other members of the family in the house, his daughter Momita Das committed suicide by hanging herself with her wearing cloth inside the house. Entering into the house when his wife saw her she raised hue and cry and immediately with the help of neighbours she was brought down cutting the cloth with which she hung herself. On being informed a 108 ambulance arrived there and the persons of said 108 vehicle on examining his daughter declared her dead. Since the fine of Rs. 30,000/- was imposed on the accused Hari Nath Das in a public meeting on previous day, he suspects that taking advantage of his daughter staying alone at home, side accused killed her keeping the dead body hanging and he fled from the said place. As such, the informant requested the said authority concerned to take legal action against the accused.

10) Said written *ejhar* (Exhibit-3) was received and registered as Simla Police Station Case No. 13/2013 under Sections 448/376/302 IPC corresponding to GR Case No. 233/2013. During

investigation police visited the place of occurrence, drawn the sketch map (Exhibit-6), seized one chocolate colored undergarment of the deceased on 10.04.2013 itself in presence of witnesses by Seizure Memo Exhibit-2, made the inquest on the person of the deceased, forwarded the dead body of the deceased to the Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta for its post-mortem examination, recorded the statements of the witnesses acquainted with the incident under section 161 CrPC, seized the proceeding book of Paschim Khagrabari Medhisupa Kirtan Ghar Managing Committee on 10.04.2013 in presence of witnesses by Seizure Memo Exhibit-8, arrested the accused person, sent them to the Court, on 04.05.2013 collected blood sample of the accused Hari Nath Das from Barpeta Jail Hospital through the concerned Jai Doctor in presence of witnesses by Seizure Memo Exhibit-4, forwarded the seized undergarment of the deceased and collected blood sample of the said accused to the Forensic Laboratory of the State for their examination and DNA Test, collected the Post Modern examination Report of the deceased Exhibit-1 and the Result of the DNA Fingerprinting Analysis from the Directorate of Forensic Science, Assam, Guwahati Exhibit-5. On his prayer being allowed by the Sub-Divisional Judicial Magistrate (Mofussil), Bajali, Pathsala by order dated 13.04.2013, the Investigating Officer of the case added Section 306 IPC and Section 4 of the POCSO Act, 2012 in said Simla P S Case No. 13/2013. On completion of the investigation, the concerned I.O. submitted the Charge Sheet in said Simla P. S. Case No. 13/2013 on 28.11.2013 against the accused person Hari Nath Das under Sections 448/376 IPC read with Section 4 of the POCSO Act and against the other accused persons under Section 306 IPC.

11) On 02.06.2015, learned SDJM (M) Bajali, Pathsala committed said GR Case No. 233/2013 arising out of Simla P. S. Case No. 13/2013 to the Court of learned Sessions Judge, Barpeta. In the Court of Sessions Judge, Barpeta said G. R. Case No. 233/2013 was registered as Sessions Case No. 159/2015. By order dated 09.06.2015, learned Sessions Judge, Barpeta transferred the said Sessions Case No. 159/2015 to the Court of learned Additional Sessions Judge, Bajali, Pathsala for trial and disposal.

12) By order dated 27.07.2015, learned Additional Sessions Judge, Bajali, Pathsala framed charges under Sections 448/306 IPC and Section 4 of the POCSO Act, 2012 against the accused Hari Nath Das, that were read over and explained to him, to which the said accused pleaded not guilty and the trial of the case begun.

13) To prove the guilt of the accused, the prosecution during the trial adduced evidence by examining nine witnesses and also exhibited the relevant reports and the defence cross examined the prosecution witnesses. The learned Trial Court recorded Section 313 CrPC statement of the accused Hari Nath Das on 10.12.2015, brought to his notice about the evidence against him adduced by the prosecution witnesses and also about the result of the DNA Fingerprinting Analysis of the Directorate of Forensic Science, Assam, Guwahati Exhibit-5 to which the said accused claimed that he is innocent and denied all the allegations and acquisitions made by the prosecution witnesses against him. He also denied giving any defence evidence.

14) After conclusion of the trial of the case, learned Special Judge, Bajali, Pathsala in Sessions Case No. 159 of 2015 passed the impugned judgment and sentence dated 07.01.2016. Let us briefly examine the evidence adduced by the prosecution witnesses.

15) PW.1, Dr. Parthapratim Das, Demonstrator of Forensic Medicine at FAAMC & Hospital, Barpeta deposed before the Trial Court that he on 06.05.2013 conducted postmortem examination of the deceased Mamita Das, a female of 14 years old, daughter of Sicon Das pertaining to Simla Police Station case No. 13/2013 under Sections 448/376/302 IPC. He opined that the death of the deceased was due to asphyxia as a result of ante-mortem suicidal hanging. He proved the postmortem examination report Exhibit-1, his signature on it and also the signature of Dr. S.I. Bar Bhuyan, Professor and Head, Department of Forensic Medicine, FAAMC & Hospital, Barpeta.

During his cross-examination by defence said PW.1 stated that there was no other injury except ligature mark.

16) PW.2, Pradip Das, Village Headman of Paschim Khagrabari in his evidence deposed that he knew the informant Chikon @ Chikun Das as well as the deceased Mamita Das @ Kali and the accused person. He deposed that on the day of the incident accused Hridoy Medhi and another came to his house, informed him that daughter of Chikon Das committed suicide and getting the said information he went to the house of Chikon Das wherein he saw her dead body and from the villagers he came to know that daughter of Chikon Das committed suicide. Then he informed the Officer-in-Charge of Simla Police Station over phone about the occurrence. Said PW.2 further deposed that on the previous day of the occurrence Atehi Das, mother of the said deceased came to his house and informed him that the accused Hari Nath Das raped her daughter Momita Das @

Kali and he advised her to approach police in that regard.

During her cross-examination by the defence said PW.2 stated that said Atehi went to his house around 02:00 pm and on the next day Momita committed suicide.

17) PW.3, Chikon Das, deposed before the Trial Court that he is the informant of the case and the deceased Momita Das @ Kali was her daughter and that at the time of occurrence his daughter was about 14 years of age and was a student of Class VIII at Dadhi Ram High School, Paschim Khagrabari. He deposed that on the date of occurrence while Momita Das was alone in his house, around 09:00 am accused Hari Nath Das came there and committing rape on her and on the same day around 11:00 am his wife Atehi came to the place of his work at Thakuria Suba and inform him about the occurrence. On reaching home he requested the Secretary as well as the President of his village committee to hold a meeting (bichar) and accordingly on the same day, a Bichar was held where the accused Hari Nath Das was directed to pay an amount of Rs. 30,000/- to Momita. In the said meeting accused Hari Nath Das was present who confessed the guilt that he committed rape upon Momita and was ready to babysit amount. He named Sarat Medi and Subom Kakati President and Secretary, present in the meeting stating further that the accused person was also in the said meeting. He deposed that said meeting was held in the Bhagawati temple and in the same meeting his daughter Momita told that accused Hari Nath Das, generating upon her and in the said meeting when she was asked by said Sarat Medi said like that in the absence of other family members in her house, the accused Hari Nath Das had forceful sexual intercourse with her and thereafter, his illusion was taken in the meeting and that on the next day of the meeting his daughter committed suicide and thereafter he lodged *ejahar*.

During his cross-examination by the defence said PW.3 stated that *ejahar* was written in the police station that was not read over to him and at the time of occurrence his daughter was ready to go to the school. He further stated there are houses nearby his house and that the accused covered mouth of the victim by clothe. He also stated that accused Hari Nath Das is a co villager and the said meeting was held in the evening till 09:00 pm and signatures of the person present in the meeting were taken. He further deposed that village *bichar* used to be held on request persons through written application and that he did not give any written application. He stated that after circulation of the notice book village meeting use to be held and that he did not see any application in the Court nor saw statements of persons. He also stated that he did not inform about the rape of his daughter to police and the Village Headman but he informed the

Secretary of the village committee and it is his wife informed about the occurrence but there is no riding in that regard. He also stated that in presence of the villagers they agreed at Rs.30,000/- and that he did not have any objection regarding the said amount and since Hari Nath Das agreed to pay the said amount of Rs. 30,000/-, initially they did not file case. He also stated that they were not prevented by anybody to lodge *ejahar* and villagers helped him as he sought under he actually doesn't know the secretary of the village committee. Said PW.3 further stated that in the meeting his daughter told that she was damaged by Hari Nath Das and that every villagers were aware about the occurrence. He stated that notice was issued to the opponent after Bichaar and that notice was not issued to Hari Nath but he was called. He stated that he doesn't know about the contents written in the *ejahar* and he denied all the suggestions placed on behalf of the defence.

18) PW.4, Smti Atehi Das, in her evidence deposed that informant is her husband, deceased Momita was her daughter, at the time of occurrence her daughter was 14 years old and she was a student of class VIII. She also deposed that on the day of occurrence at the school time she went to the house of one Nila, a co villager and her husband went out for work and at that time her daughter Momita was alone in their house. When she returned to her house from the house of said Nila, she saw that Hari Nath Das came out of her house over the bamboo door and while he was coming out from the said bamboo door he fell down. Seeing him coming out from the door she assaulted him with a bamboo stick and he was naked having only one cloth on his hand and ran away with that cloth on his hand. She also deposed that her son Utpal was in a shop and on her calling he tried to apprehend Hari Nath Das and there was a tussle between said Hari Nath Das and Utpal and thereafter, Hari Nath Das escaped. Said PW.4 also deposed that on entering into her room she saw her daughter Momita's hand and mouth were tied with *gaamocha* and also found her clothes torn. She deposed that on being asked Momita told her that the accused Hari Nath Das forcefully had sexual intercourse with her and that she saw blood on the vagina of Momita. She deposed that she took her daughter Momita to Jalah Government Hospital as there was bleeding from her private parts and doctors of said hospital advised her to approach Simla Police Station and that before going to hospital she informed her husband who was working at Thakuria Chuba. She further deposed that in the evening village meeting was held in the premises of Bhagabati Temple, where she, her husband, her son Utpal and her daughter were present in the meeting including the accused persons. In the meeting Hari Nath Das confessed

his guilt and requested to pardon him. Initially he agreed to pay Rs. 5,000/-as compensation but at last he agreed to pay Rs.30,000/-. On the next day after the village meeting her daughter committed suicide.

During her cross-examination by the defence, PW.4 stated that they agreed at Rs. 30,000/-and that due to poverty she did not lodge ejahar and that nobody prevented them from lodging ejahar. She stated that Hari Nath in presence of witnesses agreed to pay Rs. 30,000/-and that shop of her son Utpal is near to do house. She stated that that there are houses near their house but from the varanda of their house, other houses cannot be seen. During such cross-examination said PW.4 stated that victim was wearing a long pant and that the doctor did not record any name. She also stated that the victim did not see any other person except Hari Nath Das and that police did not record her statements. She denied the suggestions made by the defence.

19) PW.5, Pinkumani Talukdar @ Rinku, resident of Paschim Khagrabari, Medhichuba and businessmen by profession. In his evidence said PW.5 deposed that he knew the informant, deceased Momita Das and also the accused Hari Nath and that Momita committed suicide. He deposed that he came to know from the villagers that accused Hari Nath came to the house of Momita and raped her and that her mother Atehi witnessed the act of rape committed by Hari Nath and after two days of her rape Momita committed suicide. He also deposed that he was not present in the meeting that was held by the villagers in connection with rape of Momita.

During his cross examination by the defence said PW.5 stated that he was not present during the time of occurrence, did not see the occurrence, came to know about the incident from the villagers and was not present in the meeting.

20) PW.6 Arabinda Medhi, in his evidence deposed that he came to know from the villagers that two days prior to Momita committing suicide, she was raped by Hari Nath and that accused persons were present at the time of Bichar in respect of rape of Momita.

During his cross examination by defence said PW.6 stated that he neither saw the occurrence nor present in the meeting.

21) PW.7 Phulen Das, a mason by profession deposed that he knew the informant, the accused person as well as the deceased Momita. One-day while he was going to market police asked him to put his signature in a paper and accordingly, have gave his signature in a blank

paper. He also came to know that daughter of Chikan Das died, but doesn't know how she died. He proved the Seizure List, Exhibit-2 and his signature on it.

During his cross examination by the defence PW.7 stated that police made him around 05:00 pm any signature was taken in the blank paper and that he did not see any material at the time of signing said Exhibit-2 and also was not aware as to why his signature was taken.

22) PW.8 Md. Iman Ali, retired Sub-Inspector of Police in his evidence before the Trial Court he deposed that on 10.04.2013 he was serving as Sub-Inspector of Simla Police Station and on that day on the basis of ejahar lodged by Chikan Das (PW.3), a case was registered that was entrusted to him to investigate. He deposed that during investigation, he visited the place of occurrence, recorded the statement of witnesses, sketch map of place of occurrence, seized one proceeding book, one underwear of Momita that was sent to FSL for examination, conducted inquest on the dead body of Momita, sent her body for post-mortem examination, collected the post-mortem examination report, arrested the accused Hari Nath Das and forwarded him to the Court. He further deposed that blood sample of the accused Hari Nath Das was sent to the FSL for examination. He also deposed that after completion of the investigation he submitted the charge sheet against the accused Hari Nath Das under Sections 448/376 read with Section 4 of the POCSO Act and under Section 306 IPC. He proved Exhibit-2 seizure list, Exhibit-3 Ejahar, Exhibit-4 seizure list, Exhibit-5 Medical Report of blood sample, Exhibit-6 sketch map, Exhibit-7 Charge Sheet, Exhibit-8 seizure list of proceeding book and identified the signatures on Exhibits – 2, 3, 4, 6, 7 and 8. During trial he also identified the Material Exhibit-A underwear of deceased Momita and Material Exhibit B the proceeding book exhibited before the Court.

During his cross examination by the defence said PW.8 admitted that *Ejahar* was not written by the informant Chikaon Das (PW.3), nor the name of the writer of the *Ejahar* was mentioned on it and that the thumb impression of the informant Chikon Das was not identified. He admitted that he did not enquire about the FIR writer, statement of the informant Chikaon Das (PW.3) was not recorded nor he was sent for recording of his statement under Section 164 CrPC. He also admitted that from which place the ejahar was written nor he seized any notice or application and that there was no mention in the proceeding book is to apply for bichar. The proceeding book did not contain signature of Atehi, Momita, Chikon and Utpal, the four members differently and name of the writer of the proceeding book was also not available. He also stated that the proceeding book doesn't contain any seal and that he did not take any signature from

where he seized the proceeding book. He admitted that he did not mention the house of place of occurrence and did not seize the broken piece of the door. PW.8 admitted that Atehi PW.4 did not state before him that Hari Nath Das came out from her house and that the bamboo door of her house was fallen on the ground and that said PW.4 did not state before him that when Hari Nath came out, he was naked and there was one clothe on his hand. She also did not state before him that there was tussle between Hari Nath and Utpal.

23) PW.9 Dr. Manalisha Choudhury, Scientific Officer DNA Typing Unit Serology at Directorate of Forensic Science, Assam before the Trial Court deposed that on 06.05.2013 she was serving as a Scientific Officer in the said Directorate and on that day she received two parcels from the Superintendent of Police, Baksa, Mushalpur in connection with Simla Police station Case No. 13/2013 dated 09.05.2013, that consisted (i) exhibit enclosed with a cloth covered carton box containing an undergarment of the victim Momita Das, marked as Exhibit No. DNA 683/13 and (ii) exhibits in Thermos Flask containing ice that was sealed with the impression seal corresponding with the seal impression forwarded, containing one sealed EDTA vial with approximately two milliliters liquid blood of Hari Nath Das collected by doctors of District Jail, Barpeta with blood donor authentication card marked as Exhibit No. DNA 684/13. With regard to the result of the DNA fingerprinting analysis said PW.9 deposed that DNA from the sources of the above exhibits were isolated by organic extraction methods and subjected to multiplex PCR reaction using AmpFLSTRfiler Kit where the amplified products along with controls were run Automated DNA Sequencer and analysis was carried out using Genemapper IDV3.2 software with respect to standard ladder. She deposed that the amplified loci of Exhibit No. DNA 683/13 found matched with the amplified loci of Exhibit No. DNA 684/13. PW.9 proved her said report, Exhibit-5 and her signature on it as well as the forwarding of the said report Exhibit-9 and the signature of the Director RN Khaund on it.

During her cross-examination by the defence said PW.9 stated that she does not know on which date the sample of blood was taken for DNA test and that they received 2 ml of blood for examination and after examination remaining portion of blood was destroyed. She also stated that for the purpose of DNA test she used the software of the year 2007.

24) Section 3 of the POCSO Act, 2012 relates to Penetrative sexual assault on children and it reads 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.

25) Section 4 of the POCSO Act, 2012 relates to Punishment for penetrative sexual assault and it stipulates as follows:

4. Punishment for penetrative sexual assault.

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

26) Section 29 of the POCSO Act relates to Presumption as to certain offences and it provides as follows:

29. Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

27) Sections 30 of the POCSO Act, 2012 speaks about Presumption as to certain offences and

it specifies as follows:

30. Presumption of culpable mental state.

(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.

Explanation.— In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

28) Section 442 of the IPC relates to House Trespass and reads follows:

442. House trespass

Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

29) Section 448 of the IPC stipulates Punishment for house-trespass as follows:

448. Punishment for house-trespass

Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or which may extend to one thousand rupees, or with both.

30) From the reading of evidence of PW.4 Atehi, mother of the deceased, it can be seen that she deposed that when she returned to her house from the house of Nila, a co-villager she saw the accused Hari Nath Das coming out from her house over the bamboo door and he fell down while coming out from the said door. At that time she assaulted him with a bamboo stick and that the accused was naked having a cloth on his hand, ran away from design place. See called her son Utpal who tried to apprehend the accused, there was a tussle between her son Utpal and accused but the accused escaped.

31) However, the Investigating Officer of the case, PW.8 in his cross-examination by the

defence stated that said PW.4 Atehi, mother of the deceased did not state before him that the accused Hari Nath Das came out from her house by the bamboo door and during that process he fell down in the ground, nor she stated before him that when the accused Hari Nath came out he was naked and had only one cloth on his hand. Said PW.8 in his cross-examination by the defence also stated that said PW.4 Atehi did not state before him that there was a tussle between her son Utpal and the accused Hari Nath.

32) Again from the evidence of PW.4 Atehi, mother of the deceased it is seen that she deposed that when she entered her house she found that hand of her daughter was tied and she was also gagged, witnessed blood in the vagina of Momita and as there was bleeding from her private parts, she took her daughter to Jalah Government Hospital, she was advised to approach Simla Police Station. In her cross examination said PW.4 stated that doctor did not record any name. But from the Post Mortem Examination Report of the deceased, Exhibit-1 it is seen that post-mortem examination was done on 12.04.2013 and except an oblique non-continuous ligature Mark of size 28cm X 3 cm high up around the neck above the level of thyroid cartilage, where there was presence of non continuity below the left ear, there was no other injury on the body of the said deceased. As per said Post Mortem Examination Report, Exhibit-1, there was no sign of any spermatozoa and gonococci during microscopic examination of vaginal smear. Further said PM report under the heading "Organs of generation, external and internal" discloses that those were externally healthy, there was no recent hymeneal tear and internally, uterus and adnexa were found healthy. As such the evidence of PW.4 Atehi, regarding injury on the private parts of her daughter was not corroborated by any independent evidence.

33) We have also seen that the Exhibit-2 (Material Exhibit No. 10/13) Seizer Memo of one chocolate color undergarment of the deceased seized on 10.04.2013 itself in presence of witnesses, that was forwarded to the Directorate of Forensic Science (DFS), Assam, Guwahati for its DNA Fingerprinting Analysis and on examination of the said undergarment with the blood sample of the accused, the DFS, Assam, Guwahati gave its report Exhibit-5, but the prosecution failed to prove such seizure of the undergarment of the deceased by adducing proper evidence. Out of the three Seizure Witnesses of said Exhibit-2, the prosecution adduced evidence of only one seizure witness, namely, Phulen Das, PW.7 who clearly deposed that police took his signature in a blank page while he was going to the market and during his cross examination by the defence he stated that he did not see any material at the time of signing said Exhibit-2, and also

did not know why his signature was taken (by police). Therefore, such seizure of the undergarment of the accused that was forwarded for DNA Testing to DFS, Assam, Guwahati, could not be proved by the prosecution.

34) Further, the prosecution did not prove Exhibit-4 regarding collection of blood sample of the accused Hari Nath Das from Barpeta Jail by adducing evidence of any of the three seizure witnesses in that regard so as to corroborate the same.

35) Regarding presence of the accused Hari Nath Das in the village meeting on the night of 9th of April, 2013, where before public the said accused made an agreement before public to pay Rs. 30,000/- as compensation on committing the crime of rape on the minor daughter of the informant Sri Chikan Das, PW.3 and Smti. Atehi Das, mother of the deceased, PW.4 could not be proved by the prosecution adducing independent evidence. Though, prosecution examined independent witnesses PWs. 5 and 6 but from the evidence adduced by them we have seen that they were hearsay witnesses and were not present in the said public meeting. That part of the evidence of PWs. 3 and 4 were not corroborated by any evidence of independent witnesses.

36) In the case in hand we have noticed that prosecution failed to prove the seizure of the undergarment of the deceased Exhibit-2 as well as about the collection of blood sample of the accused from Barpeta jail, Exhibit-4, while matching DNA analysis with the blood of the accused in the undergarment of the deceased.

37) Moreover from the record we have seen that alleged incident of rape was of 09.04.2013, the victim committed suicide on 10.04.2013, blood sample of the accused was allegedly collected on 04.05.2013, sent for FSL Examination on 06.05.2013, but no vaginal swab or vaginal smear of the deceased was collected for such FSL Examination.

38) The Hon'ble Supreme Court in the case of *Rajeev Singh -Vs- State of Bihar* reported in (2015) 16 SCC 369 have disbelieved the DNA report for the reasons that *due care and caution was not exercised while handling the samples and due procedure was not followed while forwarding the samples to FSL laboratory.*

39) In the case of *Anil @ Anthony Arik Swamy Joseph -Vs- State of Maharashtra* reported in (2014) 4 SCC 69 the Hon'ble Apex Court have observed that - *Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be*

obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with the DNA profile of the suspect, it can generally be concluded that both the samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.

40) What we have notice here is that the prosecution did not examine some of the important witnesses and also did not record the statement of witnesses acquainted with the incident of the crime. It is settled that non-examination of the crucial and important witnesses weakens the case of the prosecution. *Relying upon doubtful and suspicious nature of evidence to substantiate the circumstances in the case themselves suffer from serious infirmities and lack of legal credibility to merit acceptance in the hands of the Court of law. Prosecution cannot rope in an accused merely on assumptions, surmises and conjectures, where such assumptions are not well founded, not corroborated by any reliable evidence. The conclusion of the Courts must be based on legally acceptable evidence [Sham Singh v. State of Haryana, (2018) 18 SCC 34].*

41) We have noticed serious lapses on the part of the prosecution and it is settled that - *lapses on the part of the prosecution should not lead to unmerited acquittals, which is subject to the rider that in such a situation the evidence on record must be clinching so that the lapses of the prosecution could be condoned [Hem Raj v. State of Haryana, (2014) 2 SCC 395].* But in the case in hand evidence in record is not so clinching that the lapses of the prosecution could be condoned.

42) From the above, we found that the Forensic and Medical evidence does not support the case of the prosecution relating to the offence of Penetrative sexual assault under POCSO Act, 2012 committed by the accused appellant.

43) We found that the Trial Court convicted the accused merely on conjectures and surmises, where such surmises were not well founded since those assumptions were not corroborated by any reliable evidence and that the impugned conviction was not on legally acceptable evidence.

44) From the above we have also found that the prosecution has failed to prove beyond reasonable doubt about the offence of House Trespass committed by the accused Hari Nath Das under Section 442 IPC, so as to punish him under Section 448 IPC, i.e., punishment for house-

trespass.

45) The accused appellant was in Barpeta Jail since his conviction dated 07.01.2016 and a coordinate Bench of this Court in an Interlocutory Application being I.A.(Crl.) No. 473 of 2016 in this Criminal Appeal by order dated 16.12.2016 while granting bail to said accused Hari Nath Das, suspended the execution of sentence passed against him by the learned Special Judge, Bajali, Pathsala in Sessions Case No. 159/2015 by its judgment dated 07.01.2016. During the said period the accused appellant Hari Nath Das has already served out the sentence imposed upon him under Section 448 IPC.

46) For the reasons aforementioned, the offence of Penetrative sexual assault under Section 3 of the POCSO Act as does not stand proved against the accused appellant Hari Nath Das and therefore, the said appellant deserves to be acquitted by allowing this appeal.

47) Accordingly, the impugned judgment of conviction and sentence dated 07.01.2016 passed by learned Special Judge, Bajali, Pathsala in Sessions Case No. 159 of 2015 convicting the accused Hari Nath Das, under Section 4 of the POCSO Act, 2012 and under Section 448 IPC is hereby set aside and quashed.

48) As a result this appeal is allowed. The appellant Hari Nath Das is acquitted of the charges leveled against him.

49) Registry shall return the records to the Special Court concerned along with a copy of this order. Bail Bond stands discharged.

JUDGE

JUDGE

Comparing Assistant