### IN THE COURT OF SESSIONS JUDGE DARRANG, MANGALDAI.

## Spl.(POCSO) Case No.15 of 2016

(U/S:376(2)(i) I.P.C. R/W Sec.4 of POCSO Act).

(Committed by Chief Judicial Magistrate, Mangaldai in G.R.case No.1628/2015).

State Versus Habijuddin @ Habej Ali S/O: Sayed Ali Vill-No,1 Mazgaon PS-Dalgaon,Dist-Darrang.

-Accused.

PRESENT: Sri P.Saikia, A.J.S., Sessions Judge. Darrang, Mangaldai.

#### **APPERANCE:**

For the Prosecution: Sri P. Sarma, P.P., Mangaldai

AND

For the accused : Hitesh Deka, Advocate.

Evidence recorded on :20/01/17,30/03/17, 03/02/17, 02/03/17,

30/03/17, 12/04/17, 18/05/17, 11/07/17

Argument heard on :13/11/2017

Judgment delivered on: 11/12/2017.

### JUDGMENT.

- 1. Briefly stated the prosecution case is that on 08/04/2016 the informant Suruj Ali lodged a written report with the I/C, Daipam Police Outpost under Dalgaon Police Station alleging inter alia that on 07/04/2016 at around 1 p.m. while his minor daughter (real name is withheld herein after referred to as victim girl) was going to the field from her house where her mother was doing cultivation at that time the accused intercepted her on the way and gagged her and after gagging her mouth dragged her towards the nearby paddy field and forcefully brought her down on the ground and tried to sexually ravish her. But one person who was standing nearby after having seen the incident came forward and in the meantime the accused fled away.
- 2. On the basis of the written report the I/C, Daipam Police Outpost recorded GD entry No.139 dated 08/04/16 and forwarded the same to O/C, Dalgaon Police Station for registering a case under proper section of law. Wheanwhile the I/C, Daipam Outpost has taken up the investigation of the case. On receipt of the written report and treating the same as an FIR the Officer-in-charge, Dalgaon P.S. registered the case vide Dalgaon PS case No.241/16 dated 08/04/16 U/S 376 IPC read with Section 4 of POCSO Act and endorsed the case for investigation I/C , Daipam Police Outpost who has already commenced the investigation of the case. In course of investigation the I.O. visited the place of occurrence, prepared a sketch map thereof and recorded the statement of the available witnesses U/S 161 Cr.P.C. I.O. has also got the statement of the victim recorded U/S 164 Cr.P.C.and nabbed the accused. The victim was also sent for medical examination and collected her medical examination report. After completion of the investigation the I.O. having found a prima-

facie case laid the charge sheet for the offence U/S 376(i) IPC read with Section 4 of the POCSO Act for trial of the accused.

- 3. On receipt of the charge sheet, Special(POCSO) case No.15/16 was registered and ensured the presence of the accused for trial in obedience to the process of the court.
- 4. In consideration of framing charge my learned predecessor-in-Office having found a prima-facie case and sufficient ground for presuming that the accused had committed the offence U/S 376(2)(i) IPC read with Section 4 of POCSO Act drew up a formal charges under the said section of law against the accused and the charge so framed on being read over and explained to the accused to which he pleaded not guilty and claimed to stand trial.
- 5. In order to sustaine the charge, the prosecution has examined in all 7(seven) witnesses including one court witness and also relied on some documents marked as exhibits appended with the case record.
- 6. On closure of the prosecution evidence the accused was examined U/S 313 Cr.P.C.. The accused has taken a plea of complete denial and led no evidence for his defence.
- 7. In the light of the above facts and circumstances of the case, formal charge was framed against the accused as reproduced herein below: (i)Whether the accused on 07/04/2016 at No.1 Majgaon at 1 p.m. under Dalgaon forcefully committed rape on Miss Sujeda Khatun daughter of complainant Suruj Ali who is six years of Age while she going tyo field, as alleged U/S 376(2)(i) IPC read with Section 4 of POCSO Act?

8. I have heard argument placed by the learned counsel of both the sides and also carefully gone through the entire evidence on record and material inducted therewith to arrive at my finding in the case.

#### **DISCUSSION, DECISOON AND REASONS THEREOF:**

- 9. PW1 is Suruj Ali. He is the first informant of the case. According to his evidence about 6/7 months ago he along with his wife were working in the field. Their 8 years old victim daughter was supposed to go to the field with them, but she remained in the house. After returning from the field on being asked their daughter stated to them that the accused Habej had committed sexual intercourse with her daughter in the maize field on the way to their working field. Thereafter, on the same day he had lodged one FIR at Daipam Outpost and he has marked the FIR as Exhibit 1 and exhibit 1(1) is his signature. The scribe of the FIR read over the contents of the FIR to him and after finding the same as correct he put his signature.
- 10.In cross examination, he has disclosed that he knows that in the FIR it is written that the accused by gagging her mouth of his daughter(victim) tried to commit rape on her and when one person approached the accused fled away. But he had not seen the occurrence. He has denied the defence suggestion that his victim daughter has not stated about the occurrence to him.
- 11.In further cross examination, this witness has revealed that he lodged the FIR as per the words of his victim daughter. On the day of occurrence he was working in the field which was situated at a distance of more than one furlong from his home. The place of occurrence was situated in between their home and the field where he was working along with his wife. In the evening they returned from the field. While they were in the field no one had informed him about

the incident. However, while they were returning from the field on the way one Barkat Ali informed about the incident, but he had not named the accused. In the FIR it is written that the accused attempted to commit rape upon his victim daughter. But in the FIR he has not mentioned that when one neighbouring people approached the accused then he fled away. He had not talked with Asma regarding the incident which had occurred in the land belonging to Barkat Ali. His daughter had not suffered any injury on the other part of the body. Regarding the incident he had given 'bichar' to his village people Shahid. The 'bichar' did not take place as Swahid stated that it was matter between the congress and AIUDF. His victim daughter narrated about the incident to him. About 3/4 years prior to the present incident one FIR was lodged against one Kamaruddin for committing rape upon his same victim daughter. The said case was compromised between them and in the instant case also he had filed one Aposnama(compromise petition) in the form of affidavit. He has denied the defence suggestion that he had also mentioned in the compromise petition that the present case was lodged against the accused due to previous enmity at the instigation of other. No ' bichar' took place in the village.

- 12.PW2 is Sujeda Khatun. Her age was disclosed as 9 years at the time of recording her evidence. Being a minor witness some questions were put on her as to her capacity of understanding and having found this witness well oriented besides capable of understanding her evidence was recorded without swearing oath to her.
- 13.It is her evidence that the accused is known to her and the incident occurred on 7<sup>th</sup> day of the month. Today he does not remember the month of the incident. On the day of incident her parents was working in the field. She was proceeding to her parents from her home alone and on the way Hebej called her and took her to the

maize field. There he removed her pent and penetrated his penis into her private part as a result she sustained injury on her private part. She cried due to the incident. Hebej then told her that he would give 'biscuit and Rs.20/- to her. Thereafter, she returned to her home. After return of her parents she narrated the fact before them. Her statement was recorded by the Magistrate. She has proved and marked her statement recorded U/S 164 Cr.P.C. as ext.2, ext.2(1) is her signature. She was also medically examined.

- 14.In cross examination, it is her evidence that the distance from their home to the maize field is not much. She has denied the defence suggestion that she has not stated in her statement U/S 161 Cr.P.C. that Habej Ali has not removed her pent and has not penetrated his penis into her private part. She has denied defence suggestion that in her statement U/S 164 that she had given her statement before the Magistrate on being tutored. After return of her parents from the cultivation field in the evening she narrated the fact to them. After returning from the maize field till the arrival of her parents she stayed with her grandmother and her younger sister, But she has not disclosed the fact to her grant mother. She has also denied defence suggestion that the accused has not stated to her that he would give biscuit and Rs.20/- to her and that she was tutured to say statement for making a case against the accused. She has also denied the defence suggestion that she had not cried when the accused removed her pent and committed penetration by using force.
- 15.PW3 Meherun Nessa. Her evidence does not contain any incriminating material at all in support of the case. She has only disclosed in her evidence that both the victim and accused are known to her and she heard only that the father of the victim filed one case against the accused. Burt she has not knowledge about the case. Her cross examination is declined by the defence.

- 16.PW4 is Md.Barkat Ali. It is his evidence that both the accused and the victim reside in the same village with him. About one year ago Suruj Ali, the father of the victim stated to him that the accused had committed rape upon his daughter at maize filed situated on the western side of his house. The victim was aged about 7/8 years at that time.
- 17.In cross examination, he has stated that he has for the first time come to court along with the informant. The place of occurrence from their house is situated at a distance of 100 meters and he did not visit the place of occurrence. On the next day of occurrence the informant Suruj, narrated the fact of the incident to him. At the time of narrating the facts to him by the informant Suruj there were 8/10 numbers of village people with him. He has admitted that he stated before the Police in 161 Cr.P.C. statement that he had heard about the fact from Suruj Ali. He also heard that on earlier occasion the informant Suruj instituted one such case upon Kamoruddin.
- 18.PW5 Saharun Begum is the victim's mother. Her evidence goes to displace that about one year ago on the day of occurrence she along with her husband was working in the field. At that time her victim daughter who was studying in class <a href="Ill">Ill</a> after returning from School was going to the field where they had been working. While proceeding to the field the accused asked her daughter to go through the maize field. Though her daughter initially refused to go through the maize field the accused stated that he would take her to the field. But her daughter did not reach their field. After being returned from the field they were told by their daughter that the accused removed her pent and did sexual intercourse with her and when she raised alarm the accused offered her to give biscuit and money to her and asked her not to disclose the fact to anyone. She enquired the private part of her victim daughter and noticed reddishness on her private part. Her

husband gave village 'bichar' but the village people stated that it is your daughter and you know what to do and thereafter my husband lodged the FIR. The place of occurrence situated at maize field.

19.In cross examination, she has stated that the distance between the maize field and the field where they were working is about 500 meters. Generally the School of the victim closes at 2 p.m. but on that day due to some meeting the School closed at 11 a.m. On the day of occurrence the victim after informing her grandmother Saleha Bewa was proceeding towards the field where they were working. But no one had seen the accused Habej taking the victim towards the maize field. Barkat Ali had heard the shouting of her daughter and Barkat Ali stated to them that he had heard her daughter's shouting and that her daughter was with one man with the same age group of Barkat. She has denied that she had not stated in her statement U/S 161 Cr.P.C. that the accused had asked her daughter to go through the maize field, removed her half pent and asked her not to state the fact to any one and offered her biscuit and money and that she had seen reddishness in her private part. Though the cloth of her daughter was shown to the police but the police had not seized the same. At the time of showing the cloth the same was dry. After returning from the maize field her victim daughter at first visited the house their adopted daughter Asma but she had not asked Asmat anything about the incident. Asma herself stated to her that after seeing the mud in the cloth of the victim she asked her to go for bath. While they were in the field no one informed them about the incident. When she visited the place of occurrence on the day of occurrence itself in the evening along with her husband and the victim daughter she had seen several maizes broken at the place of occurrence and it was wet due to raining. Police recorded her statement after about one week of the incident. Her husband had submitted paper at the Police station to compromise the case after being approached by the family members

of the accused. About several years ago another same case was filed against another person involving the same victim. The wife of the accused approached them for compromise but the accused refused to compromise though they had given one village bichar before the village people, but the same did not take place. They have filed one document before the Police duly signed by her husband Suruj Alki(informant) as well the accused stating that they have compromise case. She has denied the defence suggestion that they had lodged a false case against the accused and that her victim daughter had not stated about the fact to her.

- 20.PW6 is Dr. Pratirekha Saikia and she examined the victim on 08/04/16 in connection with this case and on examination she found as follows: "Height: 60 cm, teeth: 12/12, hair- normal, auxiliary, pubic hair: absent, breast: undeveloped, PV examination cannot be done as hymen is intact. No injury seen in her private part. Vaginal swab not done. Approximate age: 7 to 8 years according to radiologist report. Remark:
  - 1) No comment could be given regarding sexual intercourse;
  - 2)Approximate age 7 to 8 years.
  - 3)No injury seen in her private part.

After 24 hours of sexual intercourse sigma loses all importance. Ext.3 is the medical report, ext.3(1) is her signature.

- 21.In cross examination, she has stated that at the time of examination she found the mental and physical condition of the victim O.K. In case of minor girl of 7 to 8 years if there was forceful secual intercourse there must be tears and swelling. In this case she has not found tears and swelling.
- 22.PW7 Nur Zaman Hazarika being the I.O. of the case has testified to the fact that on 08/04/16 while he was acting as I/C, Daipam Outpost

on that day the informant Suruj Ali lodged an FIR alleging that on 07/04/16 his minor daughter while proceeding to the field where they were working for cultivation the accused took her to the nearby maize field and attempted to commit rape on her and when she raised alarm nearby people came and in the meantime the accused fled away. He had made GD entry on the basis of the FIR vide GD entry No.139 dated 08/04/16 and forwarded the same to Dalgaon P.S. On receipt of the FIR O/C, Dalgaon P.S. registered Dalgaon PS case No.241/16 U/S 376(1) IPC read with Section 4 of POCSO Act and he was entrusted with the investigation of the case. He visited the place of occurrence, prepared sketch map thereof and recorded the statement of the victim and other witnesses U/S 161 Cr.P.C.. He also sent the victim girl for medical examination and got her statement recorded U/S 164 Cr.P.C. before the Magistrate. Then he collected the examination report of the victim and also arrested the accused. After completion of investigation he laid charge sheet U/S 376(1) IPC read with Section 4 of POCSO Act. He has marked the sketch map as ext.4 and ext.4(1) is his signature. Ext.5 is the charge sheet and exct.5(1) is his signature.

23.In cross examination, he has revealed that in the FIR there is no mention in committing rape. Except mentioning of attempt to outrage her modesty. On the approach of Barkat Ali the accused fled away from the place of occurrence. He had examined Barkat Ali. The distance between the Police Outpost and the place of occurrence is about 3 K.M. As per the FIR the incident occurred on 07/04/16 at around 1 p.m. and the FIR was received on 08/04/16 at 8.30 a.m. The delay in lodging the FIR has not mentioned. He has confirmed that PW1 Suruj Ali stated to him that Asma Khatun after return of the victim found the mud in her genji and her half pent and changed the same and washed her body. He has further confirmed the contradiction in the testimony of PW5 by disclosing that PW5 Saharun

Begum had not stated before him that the accused had taken her daughter through the maize field, removed her half pent and committed bad work with her and she had seen reddishness in her private part. He had not seized the wearing apparel of the witness(PW5). Saharun came to know about the incident from Asma Khatun. He had not seen grass inside the maize field in a depressed condition, but he had not found the maize in broken condition.

- 24.CW1 Asma Khaun. It is her evidence on oath that she stated that one respected person namely Suruj Ali resides near her house who had a daughter aged about 7 years. Police did not ask her anything in connection with this case. Her cross examination was declined.
- 25.On cumulative consideration of the afore discussed evidence on record, it appears that there is a vital contradiction in the testimony of the informant(PW1) to the FIR, Ext.2 which has poluted the veracity of the prosecution case beyond refinement to support the charge levelled against the accused. The informant(PW1) in his evidence has brought the allegation of rape of his minor daughter(PW2), but Ext.1 the FIR discloses that the same was lodged on the allegation that on the day of occurrence the accused attempted to commit rape on his daughter. In contradiction to the FIR- Ext.1, PW1 has stated that the accused Habijuddin @ Habej Ali committed sexual intercourse with his daughter in the maize field and on the same day he lodged an FIR at Daipam Out Post, but the FIR Exhibit 1 reveals a different story, wherein it has been alleged that on the date of the occurrence the accused tried to molest his minor daughter(PW2) aged around 7 years by gagging her mouth by dragging her the nearby paddy field and after bringing her down on the ground tried to sexually ravish her. But one person who was standing nearby after having seen the incident came forward and in the meantime the accused fled away. Thus, it is abundantly seen that the testimony of the informant(PW1)

is totally in variance with his testimony where he has improved his version by speaking a case of rape on his victim daughter(PW2). His evidence has been completely demolished in cross examination which has affected the credibility of this witness.

- 26.In cross examination, he has admitted that as a result of the incident his victim daughter(PW2) had not suffered any injury on her body.
- 27.At this juncture, if the evidence of the victim(PW2) is perused, it would appear that as per her version when the alleged incident occured she was 7 years old. According to her evidence on the day of occurrence her parents were working in the field. She was proceeding to her parents from her home alone and on the way the accused Habijuddin @ Habej Ali called her and took her to the maize field. He removed her pent and penetrated his penis into her private part. As a result, she sustained injury on her private part. She cried due to the incident and when her parents returned from field she she narrated the fact. Her statement U/S 164 Cr.P.C. recorded before the Magistrate vide Ext.2 also corroborates her own version.
- 28. Now moot question arises as to whether the minor victim(PW2) was subjected to rape on the day of occurrence. On the day of occurrence when the FIR, ext.1 lodged by her own father(PW1) depicts a different story alleging that on the day of the occurrence the accused tried to molest her, but one man who was waiting there came forward the accused immediately fled away.
- 29.It is already seen that PW2 was around 7 years is a child witness when the alleged offence taken place. So far as the evidence of child witness is concerned it is settled principle of law that Section 118 of the Evidence Act does not preclude a child from being a witness inasmuch as all persons shall be competent to testify unless the

court thinks otherwise. However, as regards the competency and credibility of child witness the Hon'ble Apex Court in Gala Gobinda VS State of A.P. 2008 SC 1842 (para 9) it has been held that "the child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that the child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is no impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

30.It is in this back drop, if we further scrutinise her evidence closely, it would appear that her evidence is bereft of truthfulness and therefore, her evidence is not fully reliable. It is the testimony of PW2 in her cross examination that she narrated before her parents about the incident when they returned from their work in the evening. She has also disclosed in cross examination that after returning from the maize field where the accused committed rape on her till the arrival of her parents she stayed with her grand mother and her younger sister. Even if it is hypothecally assumed but not admitting that the victim about who was 7 years old at the time of incident she would have definitely suffered serious injury on her private part at the time of commission of forceful rape by the accused who is an adult male person of aged about 35 years. That apart, if the victim(PW2) had been committed rape forcefully she being a minor girl of tender age of 7 years would not have been able to come to her house without assistance of any other person. It is also hard to believe that if the victim(PW2) had been raped by the accused forcefully she would have narrated about the incident before her grand mother and her younger sister who was staying at their house immediately and she would not have waited without any visible reaction till return of her parents from the field to narrate about the incident. That apart, if the victim sustained bodiliy injury on her private part that would have also noticed by her grandmother and younger sister whom she met after commission of rape by the accused. Thus, in my considered view, I do not find any impression of truth in the testimony of the victim(PW1). The evidence of PW2 is apparently found to be lack of intrinsic reliability and not wholly trustworthy in the face of the discrepant, incoherent and infirm evidence on record. That apart, the testimony of informant (PW1) that his daughter had not suffered any injury on the part of her body in his cross examination has rendered the prosecution case more doubtful as regards sexual ravishment of the victim(PW2). In the back drop of admitted enmity between the informant(PW1) and the accused since before the incident due to political rivalry in addition to the incredible evidence on record, it is beyond understanding as to why the informant(PW1) placed the matter beforte the village 'bichar' without lodging the FIR promptly before the Police when the victim daughter(PW2) had sustained injury on her private part as a result of rape committed upon her by the accused. Thus, it can be inferred that due to previous enmity the informant(PW1) has lodged the FIR against the accused to feed fat his grudge against the accused.

31. The evidence of PW1 has also suffered from serious contradiction as confirmed through the I.O.(PW7) on the material particulars of the case and therefore, the evidence of PW1(informant) which is contradictory to the FIR lodged by him depicting a different story appears to be tainted one. The evidence of PW5, mother of the victim though appears to be not an eye witness to the incident yet her evidence has been throroughly contradicted and, therefore, the story spoken by her is also disbelieved that on the date of the occurrence the accused committed forceful rape on her daughter(PW2).

- 32.It also transpires from the evidence of Medical Officer(PW6) that she has ruled out commission of rape on the victim who was examined on the next day of the incident i.e. on 08/04/16. As per the evidence of Medical Officer(PW6) she found no injury on the private part of the victim(PW2) who was 7 to 8 years old. In cross examination, she has further reiterated that at the time of medical examination she found mental and physical condition of the victim in proper state and in case of minor girl of 7 to 8 years if there was forceful sexual intercourse there must be tears and swelling. But this case she had not found tears and swelling.
- 33. From the evidence of Medical Officer(PW6) it is seen that at the time of examination of the victim(PW2) was tender child of 7 to 8 years but the story spoken by the victim(PW2) does not inspire any confidence in the facts and circumstances of the case which also does not get support from the medical evidence of PW6. If the victim(PW2) had been forcefully sexually assaulted by the accused who is an adult person there must have been tears and swelling and if the victim had suffered such injury on her private part that would have been easily noticeable to her grandmother and her elder sister after returning from the field and even to her parents(PW1 and PW5) who returned in the afternoon from the field. Surprisingly for the reason best known to the informant(PW1) he placed the matter before the village 'bichar' instead of lodging an FIR promptly with the Police Station and also would have taken his victim daughter(PW2) for medical treatment. But the informant(PW1) lodged the FIR only when no village bichar took place. The filing of an Aposenama( compromise deed) to compromise the with the accused relating to this incident by the informant(PW1) during the investigation of the case has created a cloud of suspicion as to the authenticity of the prosecution case. The informant(PW1), father of the victim(PW2) lodged the FIR belatedly before the Police. As a result of belated lodging of the FIR in the facts

and circumstances of the case and due to lack of cogent and unimpeachable evidence on record it can be safely inferred that the value of the FIR has lost the advantage of spontaneity due to exaggerated account and concocted story as a result of large number of consultation and deliberations.

- 34. More over, CW1 who alleged to have witnessed the incident has simply thrown aside the prosecution case by disclosing that she does not know anything in connection with this case.
- 35. Above being the position, I am of the considered opinion that the prosecution has failed to prove its case beyond reasonable doubt. Hence, the accused is entitled to acquittal.
- 36.In the result, I am constrained to hold that the accused Habijuddin alias Habej Ali is not guilty U/S 376(2)(i) IPC reasd with Section 4 of the POCSO Act.
- 37.Bail bond executed by the accused Habijuddin @ Habej Ali and the surety shall remain in force for another six months in compliance with the provision U/S 437(A) Cr.P.C.

Given under my hand and seal of this Court this 11<sup>th</sup> day of December,2017.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Sessions Judge, Darrang,Mangaldai

Sessions Judge, Darrang, Mangaldai.

## **APPENDIX**

## A)Prosecution witnesses:

i)PW1 Suruj Ali ii)PW2 Sujeda Khatun iii)PW3 Mustt. Meherun Nessa iv)PW4 Barkat Ali v)PW5 Saharun Begum vi)PW6 Dr.Mrs. Pretirekha Saikia vii)PW7 Nur Zaman Hazarika

## B) CW:

i)CW1 Asma Khatun

C(Defence witness: Nil.

# D)Exhibits:

i)Ext.1 FIR ii)Ext.2 statement of the victim iii)Ext.3 Medical report iv)Ext.4 sketch map v)Ext.5 charge sheet.

> Sessions Judge, Darrang, Mangaldai.