HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 14/2015
UNDER SECTION: 376 IPC
READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM VS. ASTULLAH SHEIKH

PRESENT:- DIPAK THAKURIA,
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE. R. H. AHMED, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 01-08-2016, 28-03-2018, 20-04-2018, 04-05-2018, 01-06-2018, 05-09-2018.

DATE OF ARGUMENT:- 29-10-2018.

DATE OF JUDGMENT :- 12-11-2018.

J U D G E M E N T

- **1.** Accused Astullah Sheikh stands trial for the offences punishable under sectionm376 IPC read with section 4 of the POCSO Act.
- **2.** The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 24-04-2014 at about 7.30 p.m. while minor daughter of the complainant was returning home from the house of her relative then the accused, on road, gagged her mouth,

- dragged her to nearby field and committed rape on her.
- **3.** On 27-04-2014 the complainant lodged a written ejahar before the in-charge of Chagolia police outpost. In-charge of Chagolia police outpost after receiving the ejahar forwarded the same to Golokganj police station where a case as Golokganj P. S. Case No. 336/2014 under section 376 IPC read with section 4 of the POCSO Act was registered.
- **4.** During investigation the accused was granted protection of pre-arrest bail by the Hon'ble Gauhati High Court.
- 5. The investigating officer recorded the statements of witnesses under section 161 Cr. P. C. and statement of the victim girl was also recorded under section 164 Cr. P. C., medically examined her. By completing the investigation I. O. has submitted charge sheet against the accused person to prosecute him under section 376 IPC read with section 4 of POCSO Act.
- **6.** Cognizance of the case was taken in charge sheeted sections. In the event of appearance of the accused he was released on bail. Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under section 376 IPC read with section 4 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **7.** During trial the accused was defaulted. The Court was compelled to issue NBW/A and P/A against him. Ultimately the accused surrendered and he was taken in judicial custody.
- **8.** The prosecution examined eight witnesses including medical and investigating officers and closed the evidence.
- **9.** After completion of the prosecution evidence, the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.

10. Heard learned counsels appearing for the parties and perused the evidence on record.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 24-04-2014 at about 7.30 p.m. at village Pokalagi under Golokganj police station committed rape on the minor daughter of the complainant and thereby accused is liable to be punished under section 376 IPC?

Whether the accused on the same day time and place committed penetrative sexual assault to the minor daughter of the complainant and thereby accused is liable to be punished under section 4 of the POCSO Act?

DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

- **11.**In order to establish the charges against the accused, the prosecution has examined eight witnesses. Among them P. W. 4 is the complainant and the father of the victim girl. P. W. 6 is the victim girl, P. W. 5 is the brother of the complainant, P. W. 1 Anowar Hussein and P. W. 2 Pradip Kr. Ray are independent witnesses. P. W. 3 Dr. Rinku Ahmed is the medical officer who examined the victim girl after the incident. P. W. 7 Nilkamal Sutradhar and P. W. 8 Lakshmi Narayan Baishya are the investigating officer.
- **12.** The prosecution exhibited medical report as Ext. 1, Ejahar as Ext. 2, the statement of the victim girl as Ext. 3 and the charge sheet as Ext. 4.
- **13.** The defence examined none. Plea of the defence is total denial of the case.
- 14. Learned Special Public Prosecutor has submitted that the allegations leveled against the accused were very serious in nature. To establish the charges framed against the accused evidence of the victim girl is sufficient. The victim girl has categorically depicted how she was ravished by the accused and her deposition has been corroborated by all the prosecution witnesses. So, there is nothing to disbelieve the evidence of the prosecution. The prosecution is able to establish the charges against the accused beyond all reasonable doubt. So, has prayed to hold the accused guilty under framed charges and impose adequate punishment to him.

- 15. On the other hand learned counsel appearing for the defence has submitted that the allegations raised against the accused were very serious and under such circumstances it is very much necessary to be cautious while appreciating the oral testimonies of the prosecution witnesses. The prosecution has failed to show the actual age of the victim. The medical officer detected no sign of rape on the alleged victim. Statement of the alleged victim given before the medical officer is totally different than that of statement given in the Court. The so called witnesses examined by the prosecution are simply reported witnesses and on the basis of reported evidence one innocent cannot be held guilty. The prosecution has not examined material witnesses i.e. the person in whose house the alleged victim was. The prosecution has failed to establish the charges against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.
- **16.** From the contents of the ejahar (Ext. 2) filed by the father of the complainant (P. W. 4) after three days of the alleged incident it appears that on 24-04-2014 at about 7.30 p.m. his minor daughter visited the house of one of his relatives with a view to bring salt and while she returned home then the accused, by force, dragged his daughter to nearby field by gagging her mouth and committed rape on her. He has given an explanation regarding delay in filing the ejahar that he was busy in the treatment of his daughter; so, delay occurred in filing the ejahar. The complainant (P. W. 4) while deposed in the Court has corroborated the contents of the ejahar. From the oral evidence of the complainant it appears that on 24-04-2014 at about 7 p.m. he went to the market and his wife and his daughter (victim girl) were at home. His wife was preparing food. As there was no salt in the kitchen then she asked his daughter to bring some salt from the house of his uncle. His daughter went to the house of his uncle with a view to bring salt; but she was not returned home. While he returned home, his wife told him about the incident and he searched his daughter. But could not trace her out. On 27-04-2014 one mason informed him that he saw his daughter at Tamarhat. Then he visited village Tamarhat and found his daughter in the house of one person named Debnath. On being asked his daughter told him that while she was returning home after taking salt, then the accused gagged her mouth and dragged her and committed rape on her. Thereafter she was loitering like a mad girl. He filed ejahar at Chagolia police outpost. On 25-04-2014 he informed the matter of missing of his daughter to Chagolia police outpost. He has authenticated his signature in the ejahar which has been marked as Ext. 2 (1).

- 17. Undoubtedly the alleged victim whom the prosecution has been examined as P. W. 6 is the vital witness for the prosecution. By corroborating the deposition of her father she has also deposed that on the night of the incident as per desire of her mother she visited the house of one of her relatives to bring salt and while she returned home the accused, gagged her mouth, dragged her to nearby field and committed rape on her. Thereafter the accused returned to his house and she confined herself near the house of her uncle. Next day, out of shame, she left her village. At Tamarhat market she met a person who asked her name and address and took her to his house. The matter was informed to her parents. Her father visited the house of that person and recovered her. She told the incident to her father and others. She was produced before the medical officer and before the Judicial Magistrate who recorded her statement. Ext. 3 is her statement and Ext. 3 (1) is her signature.
- **18.** The prosecution witnesses Anowar Hussein (P. W. 1), Pradip Kr. Ray (P. W. 2) and P. W. 5, near relative of the complainant, have deposed that the daughter of the complainant was missing and she was recovered from the house of one person from Tamarhat and the victim girl told them that the accused dragged her to a nearby field and committed rape on her.
- **19.**After careful scanning the oral testimonies of the above mentioned non-official prosecution witnesses it appears that on the day of the alleged incident i.e. 24-04-2014 the victim was dragged by the accused to nearby field and committed rape on her and after three days i.e. on 27-04-2014 the victim was recovered from the house of one person from Tamarhat.
- 20. To constitute an offence punishable under the provisions of POCSO Act the prosecution has to establishe that the victim at the time of the incident was a child as defined under section 2 (d) of POCSO Act. According to said provision any person below the age of 18 years is a child. In the ejahar the complainant who is the father of the victim girl simply stated that his minor daughter was ravished by the accused. The complainant has not mentioned the age of the victim girl in his ejahar. The complainant while deposed in the Court on 4th May 2018 has deposed that on that day his daughter completed 18 years. In cross-examination the complainant has denied the suggestion of the defence that at the time of incident his daughter was 20 years old. But has disclosed that last year his daughter solemnized marriage with another boy. From the evidence of the complainant and the alleged victim it transpires that the alleged victim studied up to class VII. The

investigating officer Nilkamal Sutradhar (P. W. 7) though sent the victim girl to the hospital for medical examination; but the medical officer did not conduct ossification test of the victim. The investigating officer in his cross-examination has deposed that to ascertain the age of the victim he did not collect any document and ossification test was also not done.

- **21.**As the victim girl studied up to class VII the investigating officer could have been collected her age from the school. The complainant and her father did not disclose the name of the school where the victim girl studied. As the investigating officer did not conduct the ossification test of the victim girl to ascertain her age apparently it was a serious lapse on the part of the investigation. Another investigating officer Lakhi Narayan Baishya (P. W. 8) has simply submitted charge sheet against the accused vide Ext. 4.
- 22.P. W. 3 Dr. Rinku Ahmed examined the victim girl and submitted her report which has been exhibited as Ext. 1. In the Ext. 1 the medical officer mentioned the age of the victim as 16 years. But that was not on the basis of any scientific examination. While she filled up the medical report she simply mentioned the age. Definitely she put the age in the Ext. 1 either asking the victim or the person escorted the victim to her. The Hon'ble Gauhati High Court in Ranjit Kalita vs. State of Assam (2017) Gauhati Law **Reports 113** has observed that there is a margin of error is always 2/3 years on either side. The medical officer mentioned the age of the victim as 16 though it was not on the basis of any scientific examination. The father of the victim on the day of his examination stated that on that day his daughter completed 18 years and last year marriage of his daughter was solemnized with another boy. If the opinion of medical officer is accepted and presumed that she was 16 years old then with addition of 2/3 years she would be a major girl as per observation of the Hon'ble Gauhati High Court in the case of Ranjit Kalita's case (Supra). As the prosecution has failed to produce any cogent evidence regarding the age of the victim and the allegation against the accused is very serious; so, it will not be safe to hold that at the time of the alleged incident the victim was a child as defined in POCSO Act.
- **23.**Section 4 of the POCSO Act relates to the punishment of penetrative sexual assault to a child. As the prosecution has failed to show that the alleged victim was a child as defined under section 2 (d) of POCSO Act; so, the charge under section 4 of the POCSO Act has not established.

- **24.** Now let us scrutinize whether the prosecution is able to establish the charge against the accused framed under section 376 IPC or not. After proper scrutiny of the prosecution evidence it transpires that there was no eye witness of the incident. The credibility of the prosecution case is purely based on the evidence of the victim girl and other circumstantial evidence led by the prosecution. From the evidence of the complainant it appears that at the time of the incident he was not at his residence. While he returned home his wife told him that his daughter was missing. He searched her and on the next day he filed a missing entry at Chagolia police outpost. But the investigating officer Nilkamal Sutradhar (P. W. 7) in his cross-examination has deposed that regarding the occurrence of the incident, no information was received before filing the ejahar. The complainant and the investigating officer were standing on two opposite poles regarding information of the incident to the police. The complainant in his ejahar has stated that as he was busy in the treatment of his daughter; so, delay occurred in filing the ejahar. He has stated nothing in his ejahar regarding filing of missing entry. The investigating officer produced the victim before doctor for her examination and treatment on 28-04-2014 and the doctor detected no injury on her person. The complainant has failed to produce any document in support of his claim that he produced his daughter to any other doctor for her treatment. So, the claim of the complainant that delays in filing the ejahar was occurred as he was busy in treatment is not correct.
- 25. The victim girl in her deposition has deposed that the accused dragged her from road to nearby field by gagging her mouth and committed rape on her. Thereafter the accused returned his home and she confined herself in the house of her uncle. Next day morning she left her village. From the evidence on record it can be presumed that the victim was virgin girl. After her recovery the medical officer examined her; but detected no injuries on her person. The clinical opinion of the medical officer is not consistent with recent sexual intercourse/assault. The medical officer found external genitalia like labia majora, labia minora etc are normal. After examining vagina and cervix the medical officer found it normal. Hyman was not examined. The reason of non examination of hyman by doctor is not known. After considering the report (Ext. 1) of medical officer it is clear that the case of the prosecution has not corroborated by the medical officer.
- **26.**Except the alleged victim all the non-official witnesses are reported witnesses. They heard about the incident from the victim girl. P. W. 1 Anowar Hussein has deposed that the victim girl told him that the accused kidnapped her and she had been kept confined.

- P. W. 1 has stated nothing that the victim girl disclosed before him that she was raped by the accused. The victim girl told the incident to the medical officer while she was examined; but before the medical officer she has depicted a different story. As per medical officer the victim girl told her that when she was alone at her room and her mother was in kitchen, two boys came, gagged her mouth and took her to nearby paddy field and sexually assaulted her.
- 27. From the evidence on record it appears that on the next day of the alleged incident the victim girl went to Tamarhat where she was given shelter by a person. As the victim after the alleged incident met that person and was in his house definitely she told him the incident. But the investigating officer did not examine that person. The prosecution witnesses could not disclose the name and address of that person. So, that person could not be examined as Court witness. The Hon'ble Gauhati High Court in Rofiqul Islam vs. State of Assam 2011 Legal Eagle (Gau) 127 has opined that non-recording of statement of important witness affects the prosecution case adversely. Without any hesitation it can be concluded that the person in whose house the alleged victim took shelter and from where she was recovered is an important witness and non-examining him by the prosecution adversely affects the case of the prosecution.
- **28.** In cross-examination the victim girl has deposed that she was at the place of occurrence for about half an hour and she did not raise alarm. Next day morning at about 5 a.m. she left the village; but she does not know the rout. To reach Tamarhat, a river has to be crossed. She crossed the road by boat. She did not disclose about the incident to any person in the boat. From the evidence of the victim girl it appears that the place of occurrence is behind the house of her uncle. From her deposition it is revealed that after the incident she confined herself near the house of her uncle. But the victim in her cross-examination she has deposed that on previous night she was loitering on the road. The allegation of rape is serious in nature and on the basis of the statement of the victim conviction can be recorded against the accused; but the evidence of the victim must be reliable. In Chandan Muhuri and another vs. State of Tripura 2010 Cri. L. J, 4566 the Hon'ble Gauhati High Court has opined that if the evidence of the prosecutrix not inspiring confidence nor corroborated with medical evidence it creates doubt in the prosecution story. In the case in hand the medical evidence does not support the prosecution case and the evidence of the alleged victim is also not consistent. If a young girl dragged to the nearby field of her uncle and they were in that place for about half an hour and the victim girl did not raise any alarm creates doubt.

- **29.**In a criminal case burden of proof of the case always lies on the prosecution. The Hon'ble Gauhati High Court in **Abdul Sufan and others vs. State of Tripura 2009 Legal Eagle 620** has opined that:
 - " 11. In a criminal jurisprudence, the case of the prosecution should rest on its own strength and not in the absence of explanation plausible defence by the accused. While dealing with serious question of guilt or innocence of persons charged with crime, the following general rules have been laid down for the guidance of courts:- (i) The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecution; (2) The evidence must be such as to exclude to moral certainty every reasonable doubt of the guilt of the accused; (iii) In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person suffer; (iv) There must be a clear and unequivocal proof of the corpus delecti. (v) The hypothesis of guilt should be consistent with all the facts proved. With due respect, we may add that it is not the duty of courts to make up the loopholes of the prosecution howsoever suspicious the involvement of the accused in the crime. In other words, this Court cannot take over the duty of the prosecution. We understand that a reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based reason and common sense. In the case at hand, a fair doubt is created in the case of the prosecution the appellants are entitled to the benefit of doubt. In our anxiety to punish persons accused of murder, we must not overlook the cardinal principles of criminal law that the accused is presumed to be innocent until his guilt is established by the prosecution. Until and unless Parliament amends the Evidence Act, 1872 changing the law of burden of proof, it is not expected of criminal courts, in our anxiety to increase the number of convictions, to dilute the standard of proof required in a criminal trial or give different complexion, covertly or otherwise, to the concept of fair trial according to law. In the instant case, even if it can be said in favour of the prosecution that the evidence is equally balanced, which appears to be a correct view, conviction of the appellants cannot be upheld. In a criminal case, if there can be two possible views on the evidence adduced by the prosecution, the accused is entitled to acquittal on the benefit of doubt. In the instant case, a fair or reasonable, not

imaginary, possible or trivial, doubt looms large in the case of the prosecution to bring home the charges against the appellants, and they are, therefore, entitled to the benefit of doubt in the view that we have taken, it is difficult to uphold the impugned judgment of conviction and sentences."

- **30.** In view of the above discussion and observation it is concluded that the prosecution has failed to establish the charges framed against the accused beyond all reasonable doubts. So, the accused deserves benefit of doubt. Accordingly the accused is acquitted of the charges on benefit of doubt and he is set at liberty.
- **31.** The accused is in judicial custody. So, the accused is allowed to go on bail of Rs. 10,000/ with a surety of like amount in default the accused will remain in jail for next 6 months as per section 437-A Cr. P. C.
- **32.** Given under my hand and seal of this Court this the 12th day of November 2018

(D. Thakuria) Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 14/2015

UNDER SECTION 376 IPC READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM VS. ASTULLAH SHEIKH

				<u>A P P E N D I X</u>	
A.	Prosecu	Prosecution exhibits:			
	Ext. 1		:	Medical report.	
	Ext. 2		:	Ejahar.	
	Ext. 3		:	Statement of the victim.	
	Ext. 4		:	Charge sheet.	
В.	Defence	e Exhibits	:	Nil.	
C.	Court E	xhibits	:	Nil.	
D. Prosecution Witnesses:					
P. W. 1: Anowar Hussein, P. W.2: Pradip Kr. Ray,					
		•	• •		
P	. W.3 :	Dr. Rinkı	ı Ahme	d,	
P	. W.4 :	Complair	nant,		
Р	P. W.5: Relative of the complainant,				
P	. W.6 :	Victim,			
Р	. W.7 :	Nilkamal	Sutrad	har &	
Р	. W.8 :	Lakshi N	arayan	Baishya.	
E. I	Defence	Witness:		Nil.	

(D. Thakuria)

Special Judge, Dhubri.

Nil.

F. Court Witness: