

IN THE COURT OF THE SPECIAL JUDGE :::: BONGAIGAON

Special (P) Case No. 3(BGN)/2018.

U/S 294/506/34 IPC read with section  
4 of POCSO Act.

(Arising out of Bongaigaon P.S Case No.  
855/2017)

State of Assam

Vs.

1. Saiful Islam and  
2. Sah Alom Seikh. ....Accused.

PRESENT :- Sri Binod Kumar Chetri,  
Special Judge (under POCSO Act),  
Bongaigaon.

Appearance :-

For the State : Smti R.Choudhury, Special Public  
Prosecutor.

For the accused : Sri K.Das, Advocate.

Date of Argument : 13.05.2019.

Date of Judgment : 27.05.2019.

J U D G M E N T

1. The prosecution case as per FIR (Ext 5) dated 17.11.2017 is that on the pretext of marrying the informant's daughter, aged 13 years on 3.5.2017 at around 7 P.M the accused Saiful Islam called her under bamboo grove and committed rape on her. It is alleged that not finding his daughter at the evening for some time, searched her and the informant's wife saw the accused committing rape on her daughter under the bamboo grove and raised hue and cry and the

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neighbours came and caught hold of the accused Saiful Islam. There was a 'mel' in this regard and the accused promised in writing to marry his daughter in proper time on the victim attaining the age of majority. It is alleged that recently the accused married another girl and on 1.11.2017 the informant alongwith some villagers went to the house of the accused Saiful Islam and remind him about the agreement due to which the accused Saiful Islam and Sah Alom Sheikh rebuked them in obscene language and threatened to kill his daughter.

2. On receipt of the FIR, Incharge Bidyapur Outpost made G.D entry being no. 261 dated 17.11.2017 and forwarded the same to O/C Bongaigaon police station for registering a case and himself took up the case for investigation. On receipt of the FIR, O.C Bongaigaon police station registered the case vide Bongaigaon police station Case No. 855/2017 under section 294/506/34 IPC read with section 4 of POCSO Act.

3. During course of investigation, the Investigating Officer visited the place of occurrence, examined the witnesses including the victim, sent the victim for medical examination, seized the school certificate and birth certificate of the victim, having found materials, submitted charge sheet against the accused Saiful Islam U/S 294/506/34 IPC read with section 4 of POCSO Act and U/S 294/506/34 IPC under the accused Sah Alom Sheikh.

4. On appearance of the accused persons, the copies of the statements of the witnesses and relevant documents were furnished as prescribed U/S 207 Cr. P.C. Then hearing the learned advocate of both sides and on perusal of materials on record, charge against the accused



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was framed under section 294/506/34 IPC read with section 4 of POCSO Act against the accused Saiful Islam and U/S 294/506/34 IPC against the accused Sah Alom Sheickh. The charges were read over and explained to the accused persons to which they pleaded not guilty and claimed for trial.

## 5.

Points for determination:-

- (i) Whether the accused Saiful Islam on 3.5.2017 at around 7.00 P.M at Bidyapur under Bongaigaon P.S committed penetrative sexual assault to 13 old victim girl and thereby committed an offence punishable U/S 4 of POCSO Act?
- (ii) Whether accused persons on 01.11.2017 at Bidyapur under Bongaigaon P.S in furtherance of common intention abused Ajmot and others in public place using obscene words causing annoyance to others and thereby committed an offence punishable U/S 294/34 IPC ?
- (iii) Whether accused persons on 01.11.2017 at Bidyapur under Bongaigaon P.S in furtherance of common intention committed criminal intimidation by threatening Ajmot Ali and his daughter victim with injury to their person and thereby committed an offence punishable U/S 506/34 IPC ?

## 6.

To bring home the charge against the accused, prosecution has examined altogether eleven witnesses in support of its case. The accused persons were examined U/S 313 Cr.P.C in which, they denied all the allegation. The case of the defence being that of total



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denial, no evidence was, however, adduced by the defence.

7. Heard argument of learned counsel of both sides and also have gone through the evidences on record.

8. The learned Public Prosecutor Mrs Rita Choudhury for the State in course of argument has submitted that the solitary evidence of the victim child is enough to prove the prosecution case.

9. On the other hand, the learned counsel appearing for the accused has submitted that long delay in filing the case without explanation coupled with contradiction in the evidence of the PWs and doubtful birth certificate, the prosecution has failed to prove its case.

#### PROSECUTION EVIDENCE

10. In order to appreciate the arguments advanced on behalf of both sides, it is considered just to outline a sketch of the evidence on record.

11. PW 1, the victim deposed that the incident took place about one year ago and on that day in the evening at 7 P.M she went to her aunty's house and the accused Saiful, her cousin, caught hold of her and dragged her under the bamboo grove, gagged her mouth undressed her cloth and raped her for five minutes. At that time her mother not finding her at home, searched her and found her and the accused Saiful together and on seeing her, the accused fled away. Neighbours held 'bichar' where the accused remained present and promised to marry her on attaining her majority and in this respect an agreement was executed. But after eight months accused Saiful got married to a mother of 3



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children and failed to abide by the terms and condition of the agreement filed the ejahar. The victim states that she was 13 years at the time of the incident and her date of birth is 10.11.20103. Police got her medically examined and her statement under section 164 Cr.P.C was recorded in the Court. Ext 1 is her statement.

During cross she stated that there was love affairs between her and the accused for 6/7 months and the family members of the accused did not accept it, but the accused intended to marry her. On the day of the incident there was talk between her and the accused then her mother had beaten her and called the villager head. The accused and his family members were present. The accused expressed his desire to marry her and in this regard an agreement between the parties was executed wherein it is mentioned that if the marriage is not held then Rs. 3,00,000.00 will have to be paid to the aggrieved party. She denied the suggestion that she did not state before police that on the day of the incident she did not go to her aunty's house, the accused did not catch hold of her hand, gagged her mouth, undressed her and raped her for five minutes. She denied the suggestion that at the time of the incident she was above 18 years and deposed falsely.

12. PW 2 (Robiya Bibi) is the mother of the victim deposed that on the day of incident at around 6/7 P.M not finding her victim daughter, her younger daughter told her that the victim went to her aunty's house. She went there and saw the accused and her victim daughter were talking in a low voice in standing position near a bamboo groove and seeing her the accused Saiful fled away. Then she asked her daughter why she has come there, her daughter told that the accused Saiful caught hold of her hand, dragged her there and raped her. She reported the incident to her father and sister and on the next day there was



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a 'bichar' in the village and accused Saiful admitted his guilt and agreed to marry the victim on attaining her majority and an agreement was executed in that regard in the Court. But the accused after eight months married a mother of three children, then again 'bichar' was held but the father of the accused refused to accept the 'bichar' for which the FIR was filed. Police seized birth certificate and school certificate of her daughter.

During cross she stated that she is mother of five children. She denied the suggestion that she did not state before police that she saw the victim under bamboo grove and on being asked the victim told her that the accused caught hold of her hand, dragged her and raped her forcefully. She denied the suggestion that the accused Saiful did not admit his guilt. She denied the suggestion that the victim was above 18 years at the time of incident and deposed falsely that the victim was 14 years old. She also denied that false allegations has been made against the accused to get Rs.3 lakhs.

13. PW 3 (Asmot Ali), the informant deposed that about one year ago in the evening at 7 P.M his victim daughter after dinner went out but not coming back her wife and his sister in law went to search her victim daughter and found the accused Saiful committing rape on the victim under the bamboo grove of Sanu Sheikh and seeing her the accused fled away. His wife rebuked the victim daughter and had beaten her and the victim told that when she was proceeding towards her aunty's house, the accused Saiful by dragging took her under the bamboo grove and raped her. He reported the incident to Sanu Sheikh, his father-in-law and the village head and asked the accused to come but neither the accused nor his father came. He deposed that regarding the incident a 'mel' was held on next day wherein the accused Saiful admitted his guilt, promised to marry the victim on her attaining the age of majority and in

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this respect an agreement was executed between the parties and in terms of agreement if any party denies to marry, the party will have to pay Rs. 3,00,000.00 to the aggrieved party. He deposed that the accused married a mother of three children and there was a 'mel' in this regard and the accused was asked to pay Rs. 1,30,000.00 but he refused. He filed the ejahar. The victim was medically examined and her statement was got recorded in the Court and police seized birth certificate and school certificate of his daughter. Ext 2 is the said agreement.

During cross he stated that the accused told that he will marry the victim. He denied the suggestion that he did not tell before police that after taking dinner at 7.30 P.M her daughter came out but did not return back, then her mother and his sister-in-law went to search her and during search found the accused Saiful committing rape on the victim under the bamboo grove of Sanu Sheik and seeing his wife the accused fled away from there. He denied the suggestion that he did not state before police that the accused promise to marry the victim. He denied the suggestion that the victim had love affairs with the accused, that he did not rape her and that he deposed falsely.

14. PW 4 ( Md Sanu Seikh) deposed that on 3.5.2017 at around 7 P.M the informant with his wife and the victim came to his house and reported that the accused committed rape on the victim under his bamboo grove. He deposed that on being asked the accused, the accused promised to marry the victim on attaining her majority and there was a 'bichar' in regard to the incident on the next day and in the 'bichar' the accused admitted his guilt and an agreement was executed between the parties in the Court. But after 5/6 months the accused was caught having illicit relation with Hajera Biwi, a married woman, for which the accused was imposed fine of Rs. 80,000.00 and Hajera Biwi was handed

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over to the accused. Again 'bichar' was held where the accused was asked to pay Rs 1,60,000.00 out of Rs.3,00,000 as per the agreement but the father of the accused refused to pay the money for which 'marpit' took place. Hence, FIR was lodged. He further deposed that at the time of incident the victim girl was below 14 years.

During cross he stated that the accused and the victim are his grand son and grand daughter and he did not remember their date of birth. He denied the suggestion that there was love affairs between the accused and the victim. He stated that before people Saiful told that he loves the victim girl and will marry her. He heard that the accused married the woman. He denied the suggestion that the accused did not admit his guilt before the public and he did no tell the incident to the police. He denied the suggestion that he deposed falsely against the accused persons.



15. PW 5 (Md Haidar Ali), gaonbura deposed that in the month of May, 2017 on the day of incident at around 9.00 P.M the informant, his wife and the victim informed him that the accused committed rape on the victim and requested him to go to the Police Station and accordingly they went to the Police Station and returned back as the incident occurred between the relatives. He deposed that he alongwith Nurul Sheikh went to the house of the accused and the accused admitted his guilt and promised to marry the victim. He deposed that as the victim did not attain the age of majority hence 'bichar' was held on the next day and it was decided to execute an agreement between the parties and as per agreement, if any party denies to marry he or she would have to pay Rs. 3,00,000.00 to the aggrieved party. He deposed that after 6 months the accused married a married woman for which another 'bichar' was held in the village and the informant filed the case.

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During cross he denied the suggestion that he did not state the fact before Police which he has deposed in the Court. He denied the suggestion that the accused did not rape the victim; that the accused admitted his guilt and on the very night he went to the Police Station and after returning from Police station went to the house of the accused. He stated that he stated the age of the victim girl as 14 years, as told to him by her parents. He stated that in this next vichar the accused was asked to pay Rs.1,30,000 to the victim girl but accused refused to pay. He denied the suggestion that he deposed falsely.

16. PW 6 (Ayub Ali), the uncle of the informant, deposed that he heard that the accused had love affair with the victim and that a 'bichar' was held for allegation of committing rape to the victim, aged 14 years by the accused. He heard that there was an agreement between the accused and the victim in regard to marriage on condition that the accused would marry the victim on her attaining the age of majority but the accused married a woman by violating the terms of the agreement. He stated that Police seized the school certificate i.e. M.Ext 2 and birth certificate i.e. M.Ext 1 of the victim vide seizure list Ext 3 and Ext-3(1) is his signature.

During cross he deposed that he did not see the married wife of the accused. He denied the fact that he did not state before Police that the victim was 14 years old. He denied the suggestion that he did not hear that the accused raped the victim and at the time recording of the statement of the victim he was present



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17. PW 7 (Jahirul Islam) deposed that he knows the accused persons and the victim and the incident took place about 6 months ago and in connection with the incident a 'bichar' was held regarding illicit relation between the accused and the victim and an

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agreement was executed between the parties in Court. Again 'bichar' was held regarding payment of Rs. 3,00,00.00 to the victim and it was settled to pay Rs. 1,60,000.00 but on the request of Sha Alom the president asked to pay Rs. 1,30,000.00 but the father of the accused did not pay the money.

During cross he denied the suggestion that he did not state before Police that on the request of Sha Alom the president asked to pay Rs. 1,30,000.00 instead of Rs. 1,60,000.00

18. PW 8 (Dr. Priyanka Roy), the Medical Officer, examined the victim on 28.11.2017 at around 1.12. P.M and found the hymen intact, admits one finger and as per x-ray report her age is above 17 years and below 20 years. No injury mark seen over any body parts. Ext 4 is the medical report.

During cross she stated that the report was prepared on the basis of medico legal register.

19. PW 9 ( Tamser Ali Ahmed), deposed that about six months ago Police from Bidyapur Out post came to his school and asked whether the victim was reading in his school and showed her school certificate and on verifying the certificate he confirmed that the victim was reading in class VI in his school and her date of birth is 10.11.2003. M.Ext 1 is the said school certificate.

During cross he stated that police did not seize any register from him and they put the date of birth on the basis of the L.P. school certificate in the admission register.

20. PW 10 (Moniruddin Seikh), deposed that he heard that the accused committed rape to the daughter of the informant and in

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connection with the incident 'bichar' was held and the last 'bichar' was presided by him.

During cross he stated that he heard that the accused married another woman. He denied the fact that the accused did not rape the victim.

21. PW 11 (Ajoy Kumar Saha), the Investigating Officer deposed that on 17.11.2017 he received an ejahar (Ext 5) from the informant alleging that on 3.5.2017 the accused Saiful Islam committed rape to the victim, aged 13 years, he took up the investigation, visited the place of occurrence, prepared the sketch map of the place of occurrence (Ext 6), recorded the statement of the witnesses, sent the victim for medical examination, seized the school certificate (M.Ext 2) and birth certificate (M.Ext 1) of the victim ( Ext 3), got recorded the statement of the victim U/S 164 Cr.P.C and having found sufficient materials against the accused Saiful Islam submitted charge sheet (Ext 7) U/S 294/506/34 IPC read with section 4 of POCSO Act and also submitted charge sheet against the accused Sah Alom Sheikh U/S 294/506/34 IPC.

During cross he stated that the victim did not state before him that the accused dragged her, gagged her mouth, undressed her and raped her for five minutes. He stated that in connection with the incident there was quarrel between the parties and Bongaigaon P.S. 835/2017 and 836/2017 were filed and he registered these two case on 11.11.2017. He denied the fact of knowing the age of the victim to be above 17 years and less than 20 years as per medical report, he submitted the charge sheet under POCSO Act.

22. The defence plea in their statement u/s 313 Cr.P.C is of total denial. The accused Sah Alom stated that he was in love with the

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victim girl for which he entered into an agreement but denied of raping her or marrying any other woman.

**Discussion, decision and reasons there of:-**

23. The allegation is of accused Saiful Islam committing rape on the informant's (PW 3) daughter age about 13 years on 03-05-2017 under a bamboo groove and on being caught, a bichar was held, wherein an agreement was reached between the parties that the accused Saiful Islam will marry the victim girl on her attaining the age of majority and in violation of the condition by any of the party, the party violating the agreement will pay an amount of Rs.3,00,000/- to the aggrieved party. Subsequently, the accused married another girl and a bichar was held, wherein the accused was asked to pay Rs.1,30,000/- to the victim girl, but did not make a payment. Hence, this case.

24. The alleged incident is of 03-05-2017 and the FIR is lodged after six months on 17-11-2017 i.e. after more than six months. Had the accused made the payment, there would have been no any such case.

25. Before proceeding further it is to be mentioned the relationship between the parties. The mother of the accused Saiful Islam is the sister of the mother of the victim girl. Prosecution witnesses are as follows :-

PW1 – victim

PW2 – mother of the victim

PW3 – informant and father of the victim

PW4 – grandfather of both victim and accused

PW5 – Gaonbara



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PW6 – relative of PW3

PW7 – Member of bichar

PW8 – Doctor

PW9 – Head Master of Bidyapur High School

PW10 – President of the bichar

PW11 – I.O

26. The defence plea of accused Saiful Islam is that he was in love with the victim girl for which he entered into an agreement but he denied committing rape on her.

27. PW 1, the victim deposed that on that day in the evening her cousin Saiful Islam caught hold of her hand from her aunt's house, dragged her under the bamboo groove, gagged her mouth, undressed her cloth and raped her for 5 minutes. At that time her mother arrived there and the accused fled away. Her statement u/s 164 Cr.P.C is that on that evening at around 7:00 PM she finished her cooking and had gone to the tube well to bring water. At that time her cousin accused Saiful held her mouth, pulled her by her hand to the nearby jungle, where the accused pulled out her churidar and her underwear garments. The accused also opened his pant by holding her mouth with his hands and forcefully did sexual intercourse with her.

28. Let us pause here and visualise the scenario. The accused caught the mouth of PW 1 with his hand and at the same time pulled her to nearby jungle, held her mouth with his hand, he opened her cloth and his cloth also and raped her. The first question that comes to mind is, is it simply possible to restrain the girl, hold her mouth, undress her himself and at that same time rape her. Did she not got any moment

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release her mouth and shout. The situation as explained by her do provide her an opportunity but she did not shout. That means she was a consenting party to the sexual act.

Her evidence before the Court is different because she deposed that she was taken from her aunt's house to the nearby bamboo groove and at that time her mother arrived there. She did not make any hue and cry but her mother reached there searching her. Her mother PW 2 deposed that not finding her daughter she went in search of her and saw her standing and talking in low voice with the accused Saiful Islam and seeing her the accused fled away from there.

29. PW1 says that while the accused was committing rape, her mother arrived there and the accused fled away from there. But her mother found her standing and talking in low voice with the accused and seeing her the accused fled away. Being so her mother has not supported her version.

On being caught a bichar was held, where it was agreed that the accused Saiful Islam will marry her on her attaining majority but the accused married another woman for which there was again a bichar and in that bichar the accused was asked to make payment of Rs.1,30,000/- but on being not paid the case has been filed. So the grievance revolves around monetary compensation.

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30. From the evidence and record it is clear that there was a love affair between the victim and the accused Saiful and victim was with the accused under the bamboo groove on her own consent. She deposed that Saiful committed sexual intercourse with her by inserting his private part on her private part, as stated in her evidence u/s 164 Cr.P.C and in deposition as PW 1 she has simply stated of being raped.

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Surprisingly the medical evidence is otherwise as because the finding of Doctor (PW8) is that during examination she found the hymen of PW 1 to be intact. Had there have been penetrative sexual intercourse the hymen would have been ruptured.

31. The medical evidence also indicates that the victim was not a minor aged about 14 years at the time of incident.

PW 8 deposed that during medical examination and from radiological report the victim's age was assessed to be above 17 years and below 20 years. Ext-4 is the medical report and the radiological report is enclosed with it.

32. Prosecution has produced the birth certificate and the school certificate of the victim girl, which was seized vide Ext-3 (seizure list) and as per these certificates the date of birth of the victim girl is shown to be 10-11-2003. If we go by this date of birth, the age of victim girl would be 13 years, 5 months and 23 days as on 03-05-2017.

33. PW 9 is the Head Master of Bidyapur, High School, where the victim studied. The evidence of PW 9 is that the Police Officer came to inquire as to whether the school certificate was in fact issued by the him or not and he verified from the record to be correct. He has recorded the said date of birth on the basis of date of birth mentioned in the LP School certificate.

Defence counsel questioned the validity of the birth certificate, which was issued by Registrar of Birth and Death, Chapor, PHC in the District of Dhubri whereas she was born at Bidyapur. Ld. defence counsel submitted that the birth certificate do not reflect the exact date of birth as because it was subsequently prepared at Dhubri instead of

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the same being obtained from the Registrar of Birth and Death, Bongaigaon. Ld. defence counsel also submitted that the age mentioned in the School certificate is not correct as because the date of birth as mentioned in the school certificate issued by the Bidyapur High School was based on date of birth mentioned in the LP School certificate. No such birth certificate was submitted before the LP School as because in the cross examination PW 3 (father of the victim girl) stated that he do not know about the date of birth of his daughter and that he has not taken his daughter for her admission in the LP School. His daughter herself went to the school with her friend and took the admission and studied there.

34. PW 2 (mother of the victim girl) also do not remember the date of birth of any of her children. She also did not went to the school for admission of her daughter and her daughter herself went to the school and took admission. So the very basis of recording the date of birth in the school certificate has appeared doubtful and being so the age as per medical examination report seems to be the probable age of the victim girl. The age as per medical report is that she was above 17 years and below 20 years, while she was examined on 20-11-2017 i.e. about six months of the alleged date of incident 03-05-2017.

35. The version of PW 1 is also doubtful because, as stated above and that while giving her statement u/s 164 Cr.P.C she stated that her accused cousin Saiful proposed her of love, which she refused but reluctantly out of fear of threat by the accused she relented to the proposal. Whereas, in her cross examination she stated that she was in love with the accused since 6 / 7 months prior to the incident but there relation was not accepted by the family members of Saiful. Saiful wanted

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to marry her and on that evening on being caught with Saiful, she was beaten up by her mother and thereafter the matter was placed before the village people. In the bichar the accused Saiful told that he will marry her and for that he entered into the agreement.

Had the accused not married another woman or paid money to the victim no such case would have been registered. The accused Saiful was subsequently caught having illicit relationship with a married woman named Hajira Bibi for which there was a bichar and the accused Saiful was asked to keep Hajira Bibi as his wife. This led to another bichar for payment of compensation to the victim, as agreed upon earlier and for failure to pay the modified amount of Rs.1,40,000/- the father of the victim lodged the FIR against the accused. Accused Sah Alom Sk. is the father of the accused Saiful Islam and from the evidence on record the only offence lodged against him is refusal to make the payment as decided in the bichar. The evidence of PW 4 speaks of marpit between the parties on the refusal of Shah Alom to pay the money. Moreso, the agreement (Ext-2) was between accused Saiful Islam and Asmat Ai (PW3) and accused Shah Alom has nothing to do with it. There is no evidence of either of the accused using any obscene works in public causing annoyance to the victim or her parents. Saiful Islam is a major person aged about 29 years as seen from Ext-2.

36. Defence Counsel in his argument in respect to the date of birth of the victim girl mentioned in the School certificate (Ext -2 ) referred to the judgment of High Court of Sikkim in Criminal Appeal No. 35 of 2017 wherein the judgment of the Hon'ble Supreme Court in the case of *Madanmohan Singh and others Vs. Rajnikant and another* was referred with respect to the distinction between the admissibility of a document and its probative value. The Hon'ble Supreme court has hold

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that a document may be admissible but as to whether the entry contained there in has any probative value may still be required to be examined in the facts and circumstances of a particular case. In that judgment Hon'ble Supreme Court referred to other judgments of the Hon'ble Supreme Court wherein it has been held that even if the entry was made in an official record by the official concern in the discharge of his official duty, it may have weighed but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. Another judgment with respect to the date of birth referred by the defence counsel is the case of *Biradmal Singhvi Vs. Anand Purohit* reported in **1988 (supp 1) SCC 604** where Hon'ble Supreme Court has held that an entry relating to date of birth in the School Register is admissible under section 35 of the Act (Representation of the Peoples' Act 1951). The entry regarding the age in a School register is of not much evidentiary value to prove the age of a person in the absence of the material on which the age was recorded.

37. To the evidentiary value of Ext-1 the defence counsel has relied upon the judgment of the Hon'ble Gauhati High Court in Criminal Appeal no. 04 (AP 2008) (*Sanjeeb Baidya Vs. Arunachal Pradesh*) wherein the birth certificate was not proved by the prosecution. This certificate should have been proved by the officer concerned who issued the said certificate. Further, even if the issuing officer has been produced as a witness, he must also produce the relevant register date record mentioned of his office and the same should be proved and exhibited before the trial Court. In the instant case prosecution has failed to prove the birth certificate (Ext-1). Moreso, the authenticity of the said

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certificate has been raised by the defence counsel as because the victim girl was born at Bidyapur in the District of Bongaigaon where as the said birth certificate was issued by the authority from the District of Dhubri.

38. The Hon'ble Supreme Court in Criminal Appeal no.**2066-67 of 2009** in the case of *Narender Vs State (NCT of Delhi)* reported in **(2012) 7 SCC 171**, in para 16 discussed about the settled legal proposition that if the statement of the prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix no corroboration would be required unless there are compelling reason which necessitate the Court for corroboration of her statement. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lends assurance to her testimony

39. In para 17 of the judgment in the case of *Narender Kumar (supra)*, the Hon'ble Supreme Court held that -

“ even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defense to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defense. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and



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the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (*Vide: Tukaram & Anr. v. The State of Maharashtra, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639.*)"

40. One of the cardinal principle which is always be kept in view in the system of administration of justice in criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden to prove the guilt of the accused is upon prosecution and unless it relieves itself of that burden, the Court cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumption arise regarding guilt of the accused, but the burden even in those cases is upon prosecution to prove the existence of facts which have to be present before the presumption can be drawn. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. Another golden thread which runs through the wave of the administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. Reference in this regard is made to the judgment of the Hon'ble Supreme Court in the case of *Shivaji Shaheb Rao Bobade and another Vs State of Maharashtra* reported in **(1973) 2 SCC 793.**

41. The Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the

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broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

42. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defense. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

43. It is felt pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of *Raju Vs State of M.P* reported in **(2008) 15 SCC 133** and para 8 of the said judgment are quoted below :

" The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the

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accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

44. The evidence as discussed above, appears to be doubtful going by the story as depicted by the prosecutrix and contradictions in the evidence of other PWs. The evidence as such bristles with contradictions and improbabilities.

45. For the reasons aforesaid, the offence of rape does not stand proved and as such the prosecution charge U/S 294/506/34 IPC read with section 4 of POCSO Act fails. Hence, the accused Saiful Islam, charged with section 294/506/34 IPC r/w section 4 of the POCSO Act and accused Sah Alom Seikh charged with section 294/506/34 IPC are acquitted of the said charge and set at liberty forthwith.

46. Given under my hand and the seal of this Court on this 27<sup>th</sup> day of May, 2019.



*(Binod Kr Chetri)*  
Special Judge,  
Bongaigaon

*Dictated and corrected by me,*

*(Binod Kr Chetri)*  
Special Judge  
Bongaigaon

A P P E N D I XProsecution witness:

PW 1 – Victim.  
 PW 2 – Robiya Bibi.  
 PW 3 – Asmot Ali.  
 PW 4 – Md Somu Sheikh.  
 PW 5 – Md Haidar Ali.  
 PW 6 – Ayub Ali.  
 PW 7 – Jahirul Islam.  
 PW 8 – Dr Priyanka Roy.  
 PW 9 – Tamser Ali Ahmed.  
 PW 10 -Moniruddin Sheikh.  
 PW 11- Ajoy Kr Saha, I.O.

Defence Witness:

Nil.

Documents Exhibited by Prosecution:

Ext-1 Statement of the victim u/s 164 CrPC.  
 Ext-2  
 Ext 3- Seizure list.  
 Ext 4 Medical report.  
 Ext-5-Ejahar.  
 Ext-6-Sketch map of the place of occurrence.  
 Ext-7-Charge sheet.

Defence Exhibit:

Nil

Material Exhibit

M.Ext 1- School certificate  
 M.Ext 2- Birth certificate.



  
 23-5-19  
 (Binod Kr Chetri )  
 Sessions Judge,  
 Special Judge,  
 Bongaigaon.  
 Bongaigaon.