# IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

**SPECIAL (POCSO) CASE NO.** :- **15 OF 2016** 

( 341/376 of the IPC and Section 4 of the POCSO Act, arising out of G.R. Case

No. 2294 of 2014)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

**Tezpur** 

Prosecutor :- State of Assam

-vs-

Accused :- Md. Alia Ali @ Kalia,

Son of Late Ramjan Ali, Resident of Puthimari Police Station – Tezpur Dist:- Sonitpur, Assam.

Date of framing Charge :- 03/08/2016

Date of Recording Evidence :- 31/08/2016, 07/01/2017

& 15/03/2017

Date of examination of accused u/s

313 Cr.P.C

- 07-04-2017.

Date of Argument :- 07-04-2017

Date of Judgment :- 07-04-2017

Counsel for the Prosecution :- Mr. Hari Prasad Sedai

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr.P.K. Sarmah, Advocate.

### **JUDGMENT**

- **1.** In this case the accused Md. Alia Ali @ Kalia is put for trial 341 and 376 of the IPC and 4 of the POCSO Act.
- 2. The factual matrix of the case in brief is that on or about 12 O'clock of day of 16-09-2014, the informant's 13 years old minor sister Miss X was taken to accused's house for giving her treatment. Accordingly, in the name of treatment accused confined her and committed rape on her. As a result, informant's sister sustained grievous injuries. When the matter was informed to the family members of the accused, the accused fled away from his house. Then son of the accused took the victim to Tezpur Civil Hospital for treatment. His sister was in treatment till the filing of the ejahar. Hence this prosecution case.
- 3. The ejahar was filed by the complainant Md. Ali Ahmed before the I/C of Bihaguri police O/P, the I/C Bihaguri Police O/P by giving G.D Entry No. 276 dated 18-09-2014 forwarded the same to O/C Tezpur P.S for registering a case. On receipt the ejahar the O/C Tezpur P.S. registered the case vide Tezpur Case No. 1104/14 under Section 341, 376 of the IPC and under Section 4 of POCSO Act. On completion of investigation, the O/C of Tezpur PS sent up the case for trial against the accused under Section 341, 376 of the IPC and under Section 4 of POCSO Act.
- 4. On being appeared the accused before this Court, after hearing both parties, framed charge under section 341, 376 of the IPC and section 4 of POCSO Act, 2012 against the accused and particulars of the charge was read over, explained to the accused to which he pleads not guilty and claims to be tried.

- 5. To substantiate the case prosecution examined as many as 10 (ten) numbers of witnesses which includes the informant, victim, other witnesses and the Investigating Officer.
- 6. After completion of prosecution evidence accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for explanation where he denied the evidence and allegation and declined to give defence evidence.
- 7. I have heard the argument put forward by the learned counsels of both sides.

#### 8. The points for decision in this case are that:

- i) Whether on or about 12 O'clock of day on 16-09-2014, at village Puthimari under Tezpur Police station the accused wrongfully restrained Miss X and thereby committed an offence punishable u/s 341 of the IPC?
- ii) Whether the accused on the same date, time and place as mentioned above, committed rape on Miss X and thereby committed an offence punishable u/s 376 of the IPC?
- iii) Whether the accused on the same date, time and place as mentioned above, committed penetrative sexual assault on Miss X (victim) and thereby committed an offence punishable under Section 4 of POCSO Act?

### Reasons, Decisions and reason for decision.

- To arrive at the judicial decision, let me appreciate the evidence on record.
- 10. PW -1 Md. Ali Ahmed, the complainant of this case, has stated before the Court that he knows the accused Alia Ali, who is his neighbour. Victim is his younger sister. The occurrence took place in the year 2014. At that time, he was not at home. At about 12 O' clock he came to know about the incident

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from his mother Bhomri Begum. At that time his younger sister was crying. His mother informed him that when his younger sister went to the house of the accused for treatment (jorafuka) then the accused forcibly committed rape on her. Thereafter, he along with his mother informed about the incident to the villagers. Thereafter, the family members of the accused took his sister to the Kanaklata Civil hospital, Tezpur. On being come to know that the aforesaid case was a rape case so, the hospital authority demand police requisition, then the family members of the accused took his sister to BJ Hospital where she was treated for about 4 days. After three days of the occurrence he filed the ejahar. Ext. 1 is the ejahar and Ext. 1(1) is his signature. As the accused person threatened them to kill if they informed the matter to police therefore out of fear, it becomes delay in three days in filing the ejahar. After instituting the case police took his sister for examination and also took her to the learned Magistrate for recording her statement. Police recorded his statement.

In cross-examination, he admitted that before the incident took place there was some quarrel took place between the accused and them. Ejahar was written by one scribe as per his dictation. He cannot say in the ejahar it is mentioned that his sister was treated at Civil Hospital. Police Out Post is situated near their house. Though they have been used to go market by crossing the Police out Post but they have not informed the matter to police during that time. At present he is 22 years old. The victim is just younger to him. There is one house in between the house of the accused and his house. Bhutuba resides in a house adjacent to the house of the accused. They have informed the matter to Noor Mohmmad, Sahid Ali and Eye specialist (village doctor) and village Gaonburha before filing the ejahar.

11. PW-2 Bhomri Begum, the mother of the victim, stated that he knows the accused Alia Ali, who is her neighbour. The complainant is her son. The occurrence took place about two years ago. At that time while her daughter went to bring the cattle she has suffering from some illness. At that time, they took her daughter to the house of the accused to give her native treatment (jorafuka). Accused asked her to bring her daughter to next Tuesday to give

her proper treatment (jorafuka). Accordingly she took her daughter to the house of the accused at about 12 O' clock. Then accused asked her to go out from the room stating that she should not be present in the room where he performed treatment (jorafuka). After half an hour she came out from the room. When they arrived at home, her another daughter Afsana Begum told that victim reported to her to call her brother as she was suffering from serious ailment so victim asked him to took her to hospital. Then they went to the house of the accused and reported them that her victim daughter informed that the accused have committed rape on her daughter. Then accused arranged a Magic to take her victim daughter to the Civil hospital. As the case was a rape case so, the hospital authority demand police requisition, then the family members of the accused took her daughter to BJ Hospital where she was treated for about 4 days. After three days of the occurrence her son filed the ejahar. As the accused person threatened them to kill if they informed the matter to police therefore out of fear, it becomes delay in three days in filing the ejahar. After instituting the case police took her daughter for medical examination and also took her to the learned Magistrate for recording her statement.

In cross-examination, she admitted that her marriage consummated about 30 years ago. After about one year of marriage, her first male child was born. Then after about 2 years another boy was born but he was died. After about two years Ali Ahmed was born. Then she became pregnant but it was aborted at about five months. After about two years Rohima Begum was born. At the time of treatment ((jorafuka), there were 4/5 numbers of persons at the outside of the house of the accused. After treatment (jorafuka) her victim daughter came out by crying. At home, her victim daughter informed her sister Afsana about the incident. Thereafter, she told her about the incident. They informed the matter to the local public including the village headman. But some of the villagers asked them not to file the case before the police as the accused person requested them. Noor Mohmad told him not to inform the matter to police. Near the house of the accused, there are houses of five persons but she

cannot recall the name of anyone of them at present. Police recorded her statement and also recorded the statement of her victim daughter.

- **12.** PW- 3 Smt. Dharmeswari Boro, who turned hostile, stated that she knows the accused Alia Ali, who is her neighbour. She also know the Victim and the complainant. The occurrence took place about two years ago. After the incident the mother of the victim reported her that her daughter/victim took the house of the accused for giving her native treatment (jorafuka), there the accused administered the victim some treated water.
- **13.** PW- 4 Smt. Nayanmoni Boro has stated that she does not know the accused. She has been doing service of Nurse at BJ Hospital for last  $3\frac{1}{2}$  years. Sometimes patient were come willingly and sometimes taken by police. She does not know about the incident.
- **14.** PW- 5 Sri Arun Sah stated nothing against the accused.
- **15.** PW-6 Khairun Begum, stated that the accused is her husband. She also knows the victim and the complainant. About two years ago, one night at about 10 p.m. the victim was brought by her mother told them that her daughter was crying as she was suffering from some unknown ailments. Then her husband treated her native treatment (jorafuka). The victim was again called to come on 12 O' clock on the next day. Accordingly, the victim came. Her husband treated the victim and gave her some treated water. They were seated at the outside of the room where her husband treated the victim. At about 7/8 p.m. the mother of the victim informed her that victim was suffering from bleeding as a result of administering treated water. Thereafter, as the advice of villagers they took the victim to the civil hospital.

In cross-examination, she admitted that there was a previous enmity in between them.

**16.** PW-7 the victim Miss X stated that the incident took place on 13-09-2014. At about 12 O' clock while she went to tether her cattle she fell down after dizziness. They suspected that some unseen spirit has attacked her. In the

morning at about 9 a.m. accused treated her by "jarafuka". At about 12 O'clock she again went to the house of the accused, accused gave her some treated water to drink. She was asked to open her "paijama" and inserted his fingers into her private parts. She was also asked to take some tablet and she became senseless. After half an hour she regained her senses and noticed blood was oozing from her private parts. While she asked the accused about the oozing of blood accused hold her mouth and threatened her not to disclose to anybody. If she disclosed she and her family members would be killed. Out of fear, initially, she did not inform the matter to her mother but informed about the incident to her sister Afsana. Lateron Afsana informed the matter to her mother. Then she also reported the matter to her mother and brother. She also informed the whole matter to the wife of the accused but wife of the accused told her that her husband never committed any misdeed. Then she was taken to Civil hospital. While authority of Civil Hospital asked them about police reference then she was removed to BJ hospital where she stayed for about 6 days. Thereafter, her brother filed this case. After the incident she was examined by the doctor. Her statement u/s 164 Cr.P.C. was also recorded through the Magistrate. Ext. 2 is her 164 Cr.P.C. statement and Ext. 2(1) to 2(6) are her signatures.

In cross-examination, she admitted that while she was taken by accused to his room at about 12 O'clock, there was no person seated in the verandah. Her mother etc. were standing under the Bamboo grooves. There were even no any family members of the accused near the room where she was alleged to be treated.

PW-8, Sri Uttam Tamang, one of the Investigating Officer of this case, has stated before the Court that on 25-07-2015 he was posted as Incharge of Bihaguri Police Out Post. On that day, the then O/C Tezpur PS entrusted him to complete the remaining part of the investigation of Tezpur PS Case No. 1104/14 u/s 341/376 of the IPC. On examination of the case diary, he came to know that his predecessor I.O. SI Subleswar Deka has almost completed the investigation. Therefore, after examination of the case diary, he filed charge sheet against the accused u/s 341/376 of the IPC and u/s 8 of the POCSO Act.

- **18.** PW 9 Sri Subleswar Deka, stated that on 19-09-2014 he was posted as Incharge of Bihaguri Police Out Post. On receipt of an ejahar submitted by Ali Ahmed after giving GD Entry No. 276 dated 18-09-2014 sent the same to O/C Tezpur Police station for registering a case. Ext. 1 is the ejahar and Ext. 1(2) is my signature with note. Ext. 1(3) is the signature of Inspector of Police Sri Harin Chandra Deka. He registered the case vide Tezpur PS Case No.1104/14 u/s 341/376 of the IPC. He recorded the statement of the witnesses. He has also sent the victim for medical examination. He prepared the sketch map vide Ext.4 and sent the victim to the court for recording her statement u/s 164 Cr.P.C. When the investigation of the case was almost completed, on being transferred he handed over the case diary to the then O/C of Tezpur Police station. The witness Dharmeswari Boro stated before him that the accused in the name of treatment (jarafuka) inserted his finger into the vagina of the victim.
- **19.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 Cr.P.C.
- 20. Learned counsel for accused submitted that it is true that in this type of cases only one is sufficient i.e. the victim if her statement is trust-worthy, without ambiguous and believable to convict the accused but here in the present case there is many ambiguity in the statement of the victim. Firstly, other than victim the parents, i.e. the PW 1 and 2, who admitted that they have a quarrel and as such bitter enmity with the accused person. Secondly, in the statement of the victim, the victim stated that the incident took place on 13-09-2014 whereas in her statement made before the learned Magistrate she stated that the incident took place on 26-09-2014. In the ejahar, the informant stated that the incident took place on 16-09-2014. Again in her statement made before the police u/s 161 Cr.P.C. she stated that the incident took place on 16-09-2014. Thirdly, the I.O. stated that the victim did not state to him as a result of administering tablet she became unconscious, after half an hour she regained her senses and she noticed blood was oozing from her private parts. Fourthly, the I.O. has failed to procure the birth certificate or age certificate or

any school certificate or any certificate from the local Panchayat to show the age of the victim. That apart, the Doctor's report stated that the age mentioned in the report is not based on ossification test. Therefore, the age of the victim is also doubtful. Under such circumstances, prosecution has ably failed to prove the charge against the accused beyond any reasonable doubt. Hence, prayed to acquit the accused.

- **21.** On the other hand, learned Public Prosecutor submitted that prosecution has ably proved the alleged charge levelled against the accused, as such, accused is required to be convicted.
- **22.** Keeping in mind the respective submissions advanced by learned counsel for both parties, I am going to dispose of the case as follows.
- **23.** A close scrutiny of the record, it appears that here there is only one eye witness i.e. the PW 7 who is the victim in this case.
- 24. The law is settled that the main evidence in all such cases is that of the victim herself. In practice a conviction for rape almost entirely depends on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. It is not necessary that there should be independent corroboration of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant is true and that is reasonable safe to act upon. The evidence, no doubt, should not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with the crime. Corroboration may be by facts and circumstances.
- **25.** Now, the question comes how far the evidence of the victim is reliable and convincible to convict the accused.

According to the victim, as stated in evidence before this court that the incident took place on 13-09-2014. At about 12 O' clock while she went to tether her cattle she fell down after dizziness. They suspected that some unseen spirit has attacked her. In the morning at about 9 a.m. accused treated her by "jarafuka". At about 12 O'clock she again went to the house of the accused, accused gave her some treated water to drink. She was asked to open her "paijama" and inserted his fingers into her private parts. She was also asked to take some tablet and she became senseless. After half an hour she regained her senses and noticed blood was oozing from her private parts. While she asked the accused about the oozing of blood accused hold her mouth and threatened her not to disclose to anybody. If she disclosed she and her family members would be killed. Out of fear, initially, she did not inform the matter to her mother but informed about the incident to her sister Afsana. Lateron Afsana informed the matter to her mother. Then she also reported the matter to her mother and brother. She also informed the whole matter to the wife of the accused but wife of the accused told her that her husband never committed any misdeed. Then she was taken to Civil hospital. While authority of Civil Hospital asked them about police reference then she was removed to BJ hospital where she stayed for about 6 days. Thereafter, her brother filed this case. After the incident she was examined by the doctor. Her statement u/s 164 Cr.P.C. was also recorded through the Magistrate.

**26.** As pointed out by learned counsel for the accused that in court the victim stated that the incident took place on 13-09-2014 on the other hand, in her statement recorded by Magistrate u/s 164 Cr.P.C. she clearly stated that the incident took place on 26-09-2014 . Similarly, she/victim stated before the police that the incident took place on 16-09-2014. Again, in the ejahar, lodged by her elder brother it is mentioned that the incident took place on 16-09-2014. In fact the ejahar was filed by the complainant on 18-09-2014 whereas she made statement before the learned Magistrate that the incident took place on on 26-09-2014 and before the Police that the incident took place on 16-09-2014. Therefore, the very date of the alleged incident is contradictory.

# 27. In Boya Gangaram Vs. State of Andhra Pradesh reported in AIR 1976 SC 1541, it has been held that -

"minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnesses by another though both are present at the scene of offence."

But wrong mentioning of date in different stages by the victim cannot be stated to be a minor contradiction as this is a case under section POCSO Act. As such, due to wrong mentioning of date, in different stages by the victim discredit the statement of the victim.

28. The another point raised by the learned counsel for the accused is that the charge under this type of section is one which is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence. Besides, that of the victim herself, or is corroborated by her conduct and surrounding circumstances and is consistent with the ordinary probabilities. As discussed herein before, the solitary evidence of the prosecutrix did not appear to be cogent or reliable. Therefore, the accused is entitled to get the benefit of doubt.

It also appears that the victim did not state before the police that after administering black tablet by the accused she became senseless and after half an hour she regained her senses and she noticed that she was undressed and profuse bleeding come out from her private parts. Therefore this is also a vital contradiction.

**29.** While peeping through the record particularly, the statement of the prosecution witnesses, it appears that the complainant (PW 1) admitted in his evidence that before the incident took place there was some quarrel took place

in between the accused and them. That apart, PW 6 Khairun Begum, the wife of the accused has also admitted that there was a previous enmity in between them.

It has been held in **Suresh Rai Vs. State of Bihar reported in AIR 2000 SC 20207** that — "enmity undoubtedly is a double edged weapon; it may be a motive for commission of the crime, it may also be a motive for false implication."

- **30.** Here in the present case, the complainant who is the brother of the victim himself admitted that before the incident took place there was some quarrel took place in between them. Besides, PW 6 wife of the accused also admitted that there was a previous enmity in between them. Therefore, enmity due to quarrel between the complainant and the accused cannot be ruled out. Therefore, it may also be a motive for false implication.
- 31. Another point as raised by the learned counsel for the accused is to be discussed in the present case is that this is a case u/s 341/376 of IPC r/w section 4 of POCSO Act. According to the complainant, the victim was only 13 years of minor at the relevant point of time. According to victim, she was 16 years of age on the date of deposition but it is interesting to note that the I.O. has failed to collect any age certificate of the victim from the competent authority. PW 10 Dr. J. Borkakoti, who examined the victim on 17-09-2014 stated that no vaginal or vulvel injury on bleeding P/V seen. He also admitted that the age mentioned is not based on ossification test, therefore, the age of the victim is remained to prove. The offence of POCSO act is attracted if the victim is below 18 years of age but here in the present case, the age of the victim is remained dark.
- **32.** Another point as raised by the learned counsel for the accused is that ordinarily if a minor girl is forcibly raped she might have sustained injury not only in her private parts but also in any other parts of the body. But in the instant case, according to victim PW 7 in the incident she sustained injury on

her private parts from where blood was oozing. According to her she had been admitted at BJ Hospital for 6 days. But, the doctor of BJ hospital stated nothing about the period of hospitalization nor any injury found in any parts of body or in private parts. That apart, the doctor stated nothing about the commission of rape.

**33.** The law is well settled if the victim is unwilling to yield to sexual intercourse she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix generally gives rise to an inference that she was a consenting party to coitus. Where the prosecutrix had received multiple injuries on various parts of the body it indicates that she offered resistance when she was subjected to sexual intercourse.

Here in the present case, though according to the victim she sustained injury and even blood was oozing from her private parts but doctor nowhere stated that he found any injury on her body or on her private parts.

- **34.** Another point is to be discussed in the present case is that the I.O. has failed to seize the wearing apparels of the victim which was wearing by the victim at the relevant point of time. If the I.O. has collected the wearing apparels of the victim, it would be more stronger but the I.O. has failed to do so.
- **35.** In view of the aforesaid reasons, the only statement of the victim cannot be stated to be an unambiguous, reliable, convincing or sufficient to convict the accused.
- **36.** As discussed herein before, the solitary evidence of the prosecutrix did not appear to be cogent and reliable, therefore, the accused is entitled to get the benefit of doubt.
- **37.** On careful perusal of the whole case record and as details discussed hereinbefore, I am bound to hold that the prosecution has categorically failed to

prove the alleged cahrge against the accused beyond any reasonable doubt. Hence, the accused Md. Alia Ali @ Kalia is acquitted on benefit of doubt and set him at liberty forthwith.

- **38.** The liabilities of the bailor is hereby discharged.
- 39. Regarding compensation to the victim, the Hon'ble Supreme Court in the case of Laxmi Kant Pandey – Vs- Union of India, (1984) 2 SCC 244 held that the child is a soul with a bearing, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breath, depth and height of its emotional intellectual and spiritual being, otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realization in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balance view of life with full appreciation and realization of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. To compensate the trauma faced by the victim in this case, I think an amount of Rs. 30,000/- is allowed as a victim compensation to the victim of this case. I hereby direct learned Secretary, District Legal Aid Services Authority, Sonitpur, Tezpur, to grant compensation to the tune of Rs. 30,000/- (Rupees Thirty thousand) only to the victim. The said amount shall be used for her welfare and rehabilitation, under the supervision of Social Welfare.

- **40.** Let the G.R Case No. 2294/14 be sent to Ld. committal Court along with a copy of Judgment.
- **41.** Given under my Hand and Seal of this Court on this the 7<sup>th</sup> day of April, 2017.

(A.K. Borah)
SPECIAL JUDGE,
SONITPUR: TEZPUR

Dictated and corrected by me

(A.K. Borah)
SPECIAL JUDGE,
SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

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# **APPENDIX**

# **Prosecution Witness**

Md. Ali Ahmed, informant

Prosecution Witness No.2 Bhomri Begum, 2. 3. Prosecution Witness No.3 Smt. Dharmeswari Boro Prosecution Witness No.4 4. Smt. Nayanmoni Bora 5. Prosecution Witness No.5 Sri Arun Sah Prosecution Witness No.6 Khairun Begum, 6.

7. Prosecution Witness No.7 victim

Prosecution Witness No.1

1.

8. **Prosecution Witness No.8** Sri Uttam Tamang, I.O. 9. Prosecution Witness No.9 Sri Subleswar Deka, I.O. 10. Prosecution Witness No.10 Dr. J. Borkakoti, M.O.

## **EXHIBITS**

Exhibit 1 Ejahar

Exhibit 2 164 Cr.P.C. statement of the victim

Exhibit 3 Charge sheet.

Exhibit 4 sketch map

Exhibit 5 Medical report.

> (Ashok Kumar Borah) SPECIAL JUDGE **SONITPUR: TEZPUR**

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