IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

SPECIAL (POCSO) CASE NO. :- <u>36 OF 2016</u>

(Under Section 4 of the POCSO Act, arising out of G.R. Case No. 3288 of

2016)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Md. Sahidul Islam

Son of Abdul Mutleb

Resident of Gudamghat Miri, Police Station – Chariduar Dist:- Sonitpur, Assam

Date of framing Charge :- 21/06/2017

Date of Recording Evidence :- 29/07/2017, 24/08/2017,

07/09/2017, 31/10/2017, 14/06/2018, 20/06/2018.

Date of examination of accused u/s :-

313 Cr.P.C

20/06/2018.

Date of Argument :- 20/06/2018

Date of Judgment :- 20/06/2018

Counsel for the Prosecution :- Mr. Munin Ch. Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. P. Sing Sethi, Advocate.

JUDGMENT

- 1. In this case accused Md. Sahidul Islam is put for trial for allegation of charge under Section 4 of the POCSO Act, 2012.
- 2. The factual matrix according to the FIR in brief is that at night 12 O' clock on 30-09-2016 accused secretly trespassed into their house, entered into the room where informant's 14 years old minor daughter was slept and committed rape upon her. Taking advantage of went out of informant's mother to attend nature's call accused fled away and out of fear she could not state to anybody. Hence, this prosecution case. The ejahar was filed by complainant Alaluddin on 01-10-2016 before the O/C Chariduar Police station.
- **3.** On receipt of the aforementioned FIR, the Officer-In-Charge of Chariduar Police Station registered a case being Chariduar P.S. Case No. 150/16 dated 01-10-2016 under section 6 of the POCSO Act. After completion of usual investigation, the O/C Chariduar Police Station filed charge sheet u/s 6 of the POCSO Act against the accused Md. Sahidul Islam.
- **4.** On being appeared the accused before this Court, after hearing both parties, framed charge u/s 4 of POCSO Act, 2012 against the accused Md. Sahidul Islam and particulars of the charge was read over, explained to the accused to which he pleaded not guilty and claimed to be tried.
- **5.** To substantiate the case, prosecution has examined six numbers of witnesses. After completion of investigation, 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. To buttress the defence, accused examined one Defence witness.
- **6.** I have heard the argument put forward by the learned counsels of both sides.

- **7.** The point for decision in this case is that -
 - (1) "Whether on 30-09-2016, at night at about 12 O' clock at NK Gudamghat, under Chariduar Police station, the accused committed penetrative sexual assault on "Miss X" (victim) and thereby committed an offence punishable under section 4 of the Protection of Child from Sexual Offences Act?

Reasons, Decisions and reason for decision.

- **8.** To arrive at a judicial decision, let me appreciate the evidence on record.
- 9. PW 1 Dr. Amarjit Kaur, stated that on 01-10-2016 he was posted as working as Sub-Divisional Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day at about 3 P.M. in the labour room complex of KCH, he examined Miss Majila Khatoon , 14 years, D/O Md. Suleman Ali of Gudamghat, PS Chariduar, in reference to Chariduar PS Case No. 150/16 under section 4 of POCSO Act, 2012, on being escorted and identified by WHG Biju Bharali, vide hospital registration No. 71193/E/16 in presence of GNM Kamala Talukdar. The victim girl was accompanied by her father and consent for examination was taken from her father prior to examination. On examination of her private parts she found the following:

Identification mark – A black spot present on the supra sternal notch. Menstrual history – regular cycle with normal fluid. LMP – 17-09-2016. History of sexual exposure on 30-09-2016.

Height, 153 cm, Weight – 35 kg, Teeth 14/14.

At the time of examination, she was well dress, neat and tidy girl. Her gait is normal. Her secondary sexual characters are well developed. Vulva vagina healthy. Hymen – absent. Vaginal smear was taken and send for laboratory examination. There is no mark of injury was seen on her body as well as in her private parts.

Investigations advised and reports-

- 1.Vaginal smear for spermatozoa No sperm seen. Done at KCH Laboratory, Lab No. 110 dated 01-10-2016.
- 2. Urine for HCG negative, done at Assam X-ray clinic & Laboratory. Patient ID No. 31542 Pathologist Dr. D. Mahanta.
- 3. X-ray of left wrist joint, elbow joint, and iliac crest (for age determination- Union of the epiphysis of the lower ends of radius and ulna are nearing completion.

All epiphysis of the bone around the elbow joint have fused.

Epiphysis of the iliac crest has appeared but not fused.

Age of the person under investigation appears to be just under 18 years.

4. USG of pelvis – Normal pelvic organs and non gravid uterus.

X-ray and USG done at Assam X-ray clinic & Laboratory, Tezpur.

OPINION:

- 1. There is no signs and symptoms of recent sexual intercourse.
- 2. No marks of violence seen on her body and private parts.
- 3. Age of the victim girl appears to be just under 18 years.
- 4. No other injury seen.
- 5. The victim girl is not pregnant.

Enclosures:

- 1. Hospital registration card.
- 2. Vaginal smear report.
- 3. Urine and HCG report
- 4. X-ray plates and report.
- 5. USG pelvis films and report.

Ext. 1 is the Medical Report and Ext. 1 (1) is her signature. Ext. 2 is USG report along with films and X-ray plate and report and Ext. 2(1) is the signature of Dr. P.K. Barman, Radiologist, which is known to her of Assam X-ray clinic & Laboratory. Ext. 3 is the vaginal smear report and Ext. 3(1) is the signature of laboratory technician of KCH which she knows. Ext. 4 is

report of Urine for HCG and Ext. 4(1) is the signature of Dr. D Mahanta, Pathologist which is known to her.

10. PW 2, Allaluddin, complainant and elder brother of the victim, stated that on 30-09-2016 at about 12 PM while his victim sister intend to go outside then his mother Hazera Khatun advanced her with a "chaki" in her hand. Accused Sahidul Islam secretly entered into the room of "vonti"(victim) and entered into the mosquito net of the bed of his sister. After returning his sister from toilet while his sister went to her bed, then accused suddenly gagged her mouth and committed rape upon her 3 - 4 times. During that time, there was about 2 a.m. During that time while the cows were moose his mother went out to see the cattle in cattle shed with a chaki. Then she noticed accused tried to flee away from our house. Then accused Sahidul Islam forcefully hold the hand of his mother, put off the chaki and fled away. As the accused raped his sister for 3 times so she became such a state so she could not able to speak. In the morning time, his sister told his mother about the incident. The victim also reported him that accused gagged her mouth and committed rape on her 3-4 times. Thereafter, he filed the ejahar before the police station. Ext. 5 is the ejahar and Ext. 5(1) is his signature. Lateron police came and send the victim for medical examination and then forwarded her to the court to record her statement.

In cross-examination of PW 2, he admitted that Ext. A is an affidavit sworn on 11-11-2016 and Ext. A(1) is his signature. He also admitted that after about 20 days of the incident a village meeting was held. After the said village meeting the accused married his sister and kept her in his house as a wife for three months. Then with the help of police they have recovered his sister from the house of the accused person. Now, his sister/victim is residing at his elder brother's house at Kharopetia.

11. PW 3 Miss X, the victim of the case, stated before the court that on 30-09-2016 at about 12 O'clock at night the incident took place. At the relevant time her father was not there. She was slept alone in a room. In another room her 7/8 years old younger brother was slept with her mother.

At about 12 O' clock at night she along with her mother went out to attend nature's call, during that time accused secretly trespassed into their house. After coming from outside her mother went to her room and she went to her room. Firstly accused gagged her mouth and committed misdeed to her. She seen the accused in the little light of solar light. He committed rape on her for 2/3 times. First time as the accused has gagged her mouth so she could not raise alarm but in the second and third time though she attempted to raise alarm but could not. Her mother went out to cowshed and then came to see her. On being seen her mother accused put off the 'chaki" which was taken by her mother and ran away. As she was very weak so she could not report about the incident to her mother on the said night but in the morning time she narrated whole story to her mother and elder brother. Thereafter, her brother filed this case. Her 164 Cr.P.C statement was recorded by learned Magistrate on 06-10-2016.

In cross-examination, she admitted that she read upto class VIII. In the year 2017 she left the school. She was reading in Borpatgaon ME School. They have five brothers and sisters. Elder one is Harun Ali, second one is Alaluddin, 3rd one is she herself, 4th Akibul Islam and 5th one one Asadul Islam. Her elder brother Harun used to reside at Kharupetia. Her brother Alaluddin reside at a separate house but in the same court-yard. She along with her parents and two younger brothers reside in the same house. She has not submitted any birth certificate. Due to such act of the accused she sustained injury on her mouth, private parts and breasts. Accused grabbed her body and blood was oozing out from her private parts. She was treated at KCH, Tezpur. She has also taken treatment at Nagaon Civil Hospital. All the said medical documents submitted before the police. He admitted that after performing marriage with the accused she lived with him as husband and wife for about 5 months and the said marriage was performed by a Kaji.

12. PW 4 Md. Ahijul Islam stated that he knows the accused. The incident took place about one year ago. The brother of the victim, Allaluddin called him over phone on one Saturday to the police station.

Accordingly, he went to Chariduar Police station where he saw victim and brother of the victim. The brother of the victim asked him to enquire about the incident to the victim. The victim reported him that accused Sahidul entered into their house at about 12 O'clock in the night and committed rape on her. After about 1/2 hours, while accused came out, the mother of the victim came to know about the visit of somebody so she raised alarm. Then accused ran away by pushing victim's mother and that is why they came to police station to lodge the FIR. The incident was taken place in the previous night.

In cross-examination, he admitted that he has read upto class IV standard. The victim's entire family member earlier used to reside at Kharupetia. Around 10 years back the family of victim came from Kharupetia and settled at Gudamghat, Chariduar. When the victim family came from Kharupetia they all stayed at his residence for about 6 months and the victim's brother Allaluddin working with him as tailoring. There is a frequent going to the victim's family member by him as they are well conversant with him. His house is 1 km away from the house of victim. On the date of incident, he did not came to the house of victim, neither the victim nor her family members rang him over telephone informing about the said incident. He has given his statement before the police for once only. He knows how to read and write Assamese.

13. PW 5 Hedayatulla deposed that he knows the accused Sahidul. He also know the victim Majila @ Manjila Khatoon. Both are from his village. The incident took place about one year ago. Next day of the incident, he heard from the mother of the victim and villagers that one thief came to the house of informant.

In cross-examination, he admitted that Police recorded his statement.

He has stated before the police that on the date of the incident who was the thief he cannot say. He stated before the police that the informant with conspiracy filed a false case against the accused and accused Sahidul is not a man of bad character. He knows that marriage took place between the accused Sahidul and Majila @ Manjila Khatoon. Now, they are living together as husband and wife. Today he has seen the alleged victim girl came to the court with the accused together. He knows that accused is a law student. Mother of the victim had not stated before him that who was the thief to have been to their house.

14. PW 6 Sri Jitu M. Deka stated that on 01-10-2016 he was posted as O/C of Chariduar Police station. On that day, he has received a written ejahar from one Alaluddin. On receipt the ejahar he has registered a case vide Charduar PS Case No. 150/16 u/s 6 of pOCSO Act and he himself took up the charge of investigation. He has recorded the statement of complainant, visited the place of occurrence and prepared the sketch map vide Ext. 7 and Ext. 7(1) is his signature. Then he sent the victim for medical examination. He has also recorded her statement and also sent her to the learned Magistrate for recording her statement u/s 164 Cr.P.C. He has arrested the accused. After completion of usual investigation and after collecting the medical report and finding sufficient materials he has filed charge-sheet against the accused u/s 6 of POCSO Act. Ext. 8 is the charge-sheet and Ext. 8(1) is his signature. Ext. 5(2) is his signature in Ext. 5.

In cross-examination he admitted that when he visited the place of occurrence, it was found that on the date of incident, the mother, elder brother, two younger brothers were present in their house. He has not examined mother, father as well as the younger brother of the victim who were residing with the victim. The wearing apparels of the victim as well as the bed sheet which were there on the date of incident were not seized by him and sent for FSL examination. The accused was also not sent for medical examination and the wearing apparels of the accused were not seized by him and sent for FSL examination. There was no electricity connection in the house of the victim. He has not seized any "chaki" or lantern or any bulb from the house of the victim. There was no any solar electricity connection in the house of the victim. He has not examined the neighbouring witnesses, Ahmed Ali, Mursida Begum, Mubarak Hussain, Ajit Ali Anowar, Soleman Ali and gaonburah Abal. He has examined three

independent witnesses, Andadul Islam, Hadayatulla and Ahidul Islam.

Witness Hadayatulla stated before him that "last night in the house of Md. Allaluddin some their have entered which I came to know but I cannot say what are the articles stolen away by the thief and who has stolen the articles and who was the thief. The informant by themselves by their own had falsely implicated the accused Sahidul by conspiring and had a filed a false case against the accused. The accused Sahidul is of a good character."

Witness Ahidul stated before him that the accused Sahidul belongs to our village and he bears good moral character our village and he is a social worker. Last night in the house of Allaluddin there was a hue and cry which I heard, for entering a thief into the house but know but I cannot say what are the articles stolen away by the thief."

Witnesses, Ahidul and Hadayatulla did not implicate the accused in the alleged offence.

Witness Allaluddin did not state to him that "during that time while the cows were moose my mother went out to see the cows with chaki then she noticed the accused tried to flee away from our house. Then accused forcefully hold the hands of my mother, put off the chaki and fled away. As the accused raped my sister three times so such a state she could not be able to speak and in the morning my sister told my mother about the alleged incident and the victim also reported me that the accused gagged her mouth and committed rape on her."

During investigation he did not find that the victim girl has not taken any treatment with Nagaon Annath Ashram Hospital. He has sent the victim for recording her statement u/s 164 Cr.P.C. to the court on 06-10-2016. The victim girl Musstt Majila Khatoon did not state before me that —

- (i) "I have seen accused in the solar light."
- (ii) "The accused committed rape upon me for three times."
- (iii) "On 01-10-2016 at about 6 p.m. the accused through the

- window of our house had asked me whether my father had returned back or not and thereafter he left the place."
- (iv) "From my bed room to the cattle shed it is around 45 to 50 fts away"
- **15.** These much is the evidence of the prosecution case. Accused pleads total denial while his statement was recorded u/s 313 Cr.P.C.
- **16**. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt firstly, the victim herself admitted in cross-examination that after performing marriage with the accused she lived with him as husband and wife for five months and the marriage was performed in presence of Kaji. Therefore, the allegation made against the accused is totally false. Secondly, even at the time of filing bail petition, the complainant and victim filed a petition being No. 1684/16 followed by two affidavits. The complainant in the said affidavit, stated that he along with his other family members have accepted Md. Sahidul Islam as their son-ion-law as well as brother-in-law and when the victim Miss Mojila Khatun will atain the age of majority, marriage will be performed and he has got no objection if the court has allowed the accused to go on bail. Similarly, the victim stated that she accepted Md. Sahidul Islam as her husband and the social marriage between them will be performed as soon as she attained the age of majority and she has got no objection if the Hon'ble court has granted bail to the accused. Thirdly, after examination of all the non-official witnesses i.e. on 14-06-2018 the victim filed a petition being No. 1245/18 followed by an affidavit stating inter-alia that she got married with the accused as per Shariat law and lived together as husband and wife at her in-law's house for a period of 6 months. Her elder brother filed the case against the accused due to some misunderstanding which has crept up between the parties here and thereafter the petitioner was taken away by the said elder brother of the alleged victim to her parental house. On 27-05-2018 the petitioner Manjila Khatun had returned to her in-law's house and since thereafter both the petitioner and accused residing as husband and wife under one roof and as such the petitioner does not want to proceed with the case against her

husband/accused. The aforesaid petition is followed by an affidavit and a resident certificate issued by Govt. Goanburah. Fifthly, the doctor opined that there is no sign and symptoms of recent sexual intercourse, No marks of violence seen on her body and private parts, Age of the victim girl appears to be just under 18 years, No other injury seen and the victim girl is not pregnant. But according to the victim in such act of the accused she sustained injury on her body including her private parts and breast and she was bleeding but doctor did not find any injury not only on her private parts but also on her body. Had there been a forceful intercourse a victim must sustain injury but here in this case, the doctor found no injury neither found any trace of recent sexual intercourse.

- **17.** On the other hand, learned Public Prosecutor, vehemently submitted that the prosecution has ably proved the case against the accused beyond any reasonable doubt. Hence, convicted the accused according to the charged section.
- **18.** Keeping in mind the rival submissions advanced by learned counsel of both sides, I am going to dispose of the case as follows.
- 19. In the instant case, the charge against the accused is penetrative sexual assault i.e. u/s 4 of POCSO Act. The doctor opined that the age of the victim is just below 18 years. The report of the doctor is nothing but a medical evidence. It has been held in Jai Mala Vs. Home Secretary, Govt. of Jammu and Kashmir and others AIR 1982 SC 1297 wherein it has been observed by Hon'ble Supreme Court that margin of error in age ascertained by radiological examination two years on either side.

Here in this case according to the doctor the victim is just below 18 years therefore, her age may be just below 20 years or just above 16 years, if I give allowance of 2 years on either side. That apart, it is interesting to note that the I.O. has failed to collect any birth certificate or school certificate of the victim. Therefore, the age of the victim remained confirm.

20. Another aspect is to be considered in the present case is that in this type of cases the onus is always on the prosecution to prove affirmatively

each ingredient of the offence it seeks to establish and such onus never shifts. The law is well 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.

Here in this case, according to the prosecution story other than victim none has stated about the alleged penetrative sexual assault. As stated above doctor opined that there is no sign and symptoms of recent sexual intercourse, No marks of violence seen on her body and private parts, Age of the victim girl appears to be just under 18 years, No other injury seen and the victim girl is not pregnant. On the other hand the statement of the victim reveals that when the victim and her mother went out to attend nature's call accused secretly entered into her room. She has seen the accused in the light of solar light but I.O. stated that there is no any electricity neither any solar light in the house of the victim as such no such solar light or solar bulb was seized. Besides that according to her statement accused committed rape on her for 2/3 times but said statement is not made before the I.O. Therefore, the said statement is contradictory. Besides that, though she stated that in first committing of rape, though she attempted to raise alarm but accused gagged her mouth but could not raise alarm. But in second and third time when accused committed rape she tried to raise alarm but could not. That apart, according to her statement in the room adjacent to her room her mother and brother were sleeping, if she raised alarm they could have heard. Neither in the second

and third attempt she could have avoided by forcefully leaving the bed but she did not do so.

Another aspect is to be looked into, the statement of the victim that according to her on being came to know that someone has come her mother has gone out to the cowshed with a chaki in her hand. Thereafter, her mother came to her room to see her but accused on being seen her mother put off the chaki and fled away but the I.O. failed to record the statement of her mother, therefore that portion of statement of victim is remained doubtful.

Another aspect is to be considered in this case is that according to her as she became very weak so she did not informed the matter to her mother in the said night but she informed the matter to her mother in the next morning. Non-informing about such a serious allegation against the accused on that very night to her mother cannot be ruled out her consent in the said alleged sexual act.

Despite that victim herself admitted in cross-examination that after performing marriage she lived with the accused as husband and wife for 5 months where their marriage was performed by Kaji. Her statement can be stated to be a corroborated with Ext. A and B. i.e. Affidavits filed by complainant Md. Allaluddin and victim Miss Majila Khatoon respectively at the time of application for bail of the accused at the initial stage. Besides that has also been corroborated with the application filed by the victim followed by an affidavit vide petition No. 1245/18 wherein the victim herself stated that she married the accused as per Chariat law and lived together as husband and wife for a long period of last 6 months. She further stated that her brother Allaluddin has filed this case due to misunderstanding and on 27-05-2018 she returned to her in-law's house and since then they are residing together as husband and wife under one roof and as such the petitioner does not want to proceed with the case against her husband/accused

Law is well settled that an accused can be convicted on the proof of allegation beyond any reasonable doubt. But here as discussed herein

before, the statement of victim is not at all convincing and reliable to convict the accused in the alleged section.

- **21.** Under such circumstances, I am bound to hold that the prosecution has categorically failed to prove the case beyond any reasonable doubt, as such, accused Md. Sahidul Islam is acquitted on benefit of doubt and set him at liberty.
- **22.** The liability of the bailor is hereby discharged.
- **23.** Send back the LCR.

Given under my Hand and Seal of this Court on this the 20^{th} day of June, 2018.

(Ashok Kumar Borah)
SPECIAL JUDGE,
SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

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APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- M.O. Dr. A. Kaur

2. Prosecution Witness No.2 :- Allaluddin, complainant

3. Prosecution Witness No.3 :- Victim

4. Prosecution Witness No.4 :- Md. Ahijul Islam 5. Prosecution Witness No.5 :- Hedayatulla

6. Prosecution Witness No.6 :- Sri Jitu M. Deka, I.O.

Exhibits

Ext. 1,2,3 & 4 : Medical reports.

Ext. 5 : Ejahar

Ext. 6 : statement of the victim u/s 164 Cr.P.C.

Ext. 7 : Sketch map

Ext. 8 : Chargesheet.

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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