IN THE COURT OF ADDITIONAL SESSIONS JUDGE, FTC, BISWANATH CHARIALI,

SONITPUR, ASSAM

Spl POCSO Case No. 16/2016

u/s 376 IPC/ Sec. 4 of POCSO Act, 2012

State of Assam

-vs-

Sri Kamal Orang

..... Accused person

Present:

Sri Dipankar Bora, MA, LL.M., AJS,

Special Judge,

Biswanath Chariali, Sonitpur.



Advocates Appeared:-

For the prosecution: Ms. J. Kalita, learned Addl. P.P.

For the defence

: Mr. G. Borah, learned Legal Aid Counsel

Dates of recording Evidence: 25.01.2019, 08.02.2019, 03.04.2019, 04.06.2019,

25.06.2019, 29.07.2019.

Date of Argument

: 19.08.2019.

Date of Judgment

: 02.09.2019.

JUDGMENT

- 1. The prosecution case in brief is that on 10.10.2016 the informant namely Smti Serapina Tapno lodged an 'ejahar' with the I/C Borgang Police Outpost under Behali PS stating inter alia that on the previous night at about 8.30 PM, while her 13-year-old daughter (name is withheld) was working in the kitchen, the accused Kamal Orang came and he after gagging her mouth forcibly took her to a field nearby where he committed rape on her. She stated that when the victim raised noise, the accused threatened to kill her. The accused left her at that place and fled from the place of occurrence.
- 2. Receiving the same, the police registered a case and investigated the matter. After investigation, the police submitted charge sheet against the accused, Kamal Orang u/s 4 of the POCSO Act r/w Section 376 IPC.
- 3. The accused in due course was to be produced under arrest to make him face trial. As he expressed his inability to engage a counsel of his choice to defend him, the learned Legal Aid Counsel was appointed to defend the accused at the expense of the State. The copies

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of the relevant documents were furnished to him. Upon hearing both the sides on the point of charge, taking note of the materials furnished u/s 173 CrPC, as this court found grounds for presuming that the accused had committed offences u/s 376 IPC/ Section 4 of the POCSO Act, 2012, the charges were accordingly framed against him, which on being read over and explained, the accused pleaded not guilty.

4. During trial, the prosecution examined 6 witnesses in all, including the victim as PW 5 and the Investigating Officer as PW 6 respectively. The accused was thereafter examined u/s 313 CrPC. His plea was of total denial. He refused to adduce any evidence on his behalf. The case was thereafter, argued by both the sides.

Points for determination

- i) Whether the accused on the day of the alleged occurrence committed rape on the said victim?
- ii) Whether the accused on the day of the alleged occurrence committed penetrative sexual assault on the said victim, who is below the age of 18 years?

Discussion, Decision and Reasons thereof

- 5. PW 1 is the informant, Serapina Tapno. She stated that the incident took place on 09.10.2016. At that relevant time, she was in her shop and her daughter-the victim was in the kitchen. She stated that the accused then came and he by pressing the mouth of the victim, brought her out. It was raining at that relevant time. She stated that when she came to see her daughter, she found her missing from the kitchen. As the victim did not respond, she went the house of PW2 Rajen Praja in search of her, but she could not find her there. Later, she found her coming from the backside of their house weeping and she then told her that the accused had taken her to the back side of their house to the jungle by gagging her mouth and performed 'beya kam' with her. According to her, when the victim tried to raise alarm, the accused threatened to kill her. The police then were informed. She went in search of the accused and the villagers found him sleeping in the house of Budru Orang. He was apprehended but he managed to flee after arrival of the police by untying his rope. The victim was medically examined and her statement u/s 164 CrPC was recorded. She stated that the victim was 13 years old at that relevant time. She proved her 'Ejahar' as Ext. 1.
- 6. In her cross-examination, she stated that she along with her son and the victim were present in the house at that relevant time. Her husband was in the shop which is situated in front of their house. Her son was attending tuition in the house and the victim was preparing rice in the kitchen. She stated that she returned back to the kitchen after a gap of 5-10 minutes to see her daughter but found the door of the



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kitchen open. The jungle is situated towards the east of the kitchen. The said place is a plantation ('bari') where jungles had grown up and it belongs to Sumku Mallik. When her daughter returned she found her clothes wet as it was raining. The victim was wearing a skirt. She stated that she does not remember as to what she had stated before the police after the incident. She also stated that she did not witness the said occurrence. She could not say as to when her daughter was born.

- 7. Evidence of PW1 shows that she does not know as to when the victim was born. But according to her, she was 13 years old at that relevant time. Her evidence against the accused is found to be based on what the victim had stated to her after the occurrence.
- 8. As we turn to the evidence of PW 5- the victim to find out as to what she has to say about the occurrence, we find that the PW5 has corroborated her mother- PW 1 and stated that at about 8-9 PM on the said day, while she was preparing the night's meal in their kitchen, the accused came from the shop and asked water from her. It was raining then. She was alone in the house at that relevant time as both her parents were in their grocery shop situated at the front of their house. The accused spoke to her and after she brought him water, he forcibly took her towards the jungle. There he opened her pant and told her that he would perform 'beya kam' with her. When she raised noise, the accused threatened her and stated that he would kill her. The accused then performed 'beya kam' with her by opening her pant and slept above her. He established physical relationship with her and thereafter, taking her towards the field, he left her there. She came back to their house and informed about the incident to her parents. She stated that she could not say about the duration of time that the accused performed 'beya kam' with her. Later, her parents brought the accused and kept him tied but when the police were called, the accused fled away. Later, her mother had lodged the FIR. She proved her statement recorded u/s 164 CrPC as Ext. 3.

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In her cross, she stated the incident took place when she was studying in class V. The well of their house is situated by the side of the kitchen. The jungle starts from the end of their house compound. She stated that though she raised 'hullah', her parents did not hear her due to the rain. She also stated that she did not perform any 'beya kam' with the accused earlier and he indulged in 'beya kam' for about 1-2 hours. She stated that whenever she raised 'hullah', the accused gagged her mouth. She was wearing a skirt and a sporting. She was thrown on the ground and was made to sleep. She sustained bleeding injury and no other injury mark appeared on her body. The field is situated near the jungle in the southern side of the jungle. She came back crying and found her parents in their house. The accused used to come their house earlier and had spoken to her as her elder brother. The accused was caught hold and brought by her father and he was kept tied by her father.

10. From the evidence of the PW5, it thus appears that no one had witnessed the accused coming to their kitchen except her. While she stated that her parents were in their shop, situated in front of their house, PW1 on the other hand stated that she along with her son were in the house, while her husband was in the shop at that relevant time. Her son was attending tuition inside the house. Both PW1 and PW5 testified that it was raining at that relevant time. According to the victim, her parents did not hear her noise due to the rain. But the PW6, the Investigating Officer, Md. Abdul Motalib Choudhury stated that the victim did not state before him during investigation that her parents did not hear her noise due to rain. However, the evidence of PW1 that it was raining at that relevant time was not assailed by the defence in her cross and that evidence was found to have remained intact. Moreover, PW3 Barthalung Kulu is also found to have testified that he found the victim later with wet clothes. This therefore ascertains that there was rain at that relevant time.

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 - 11. PW 2, Rajen Praja is the person to whose house PW 1 had gone in search of her daughter at the time of the said occurrence. He stated that on the said day when he returned from his work place, he could hear noise in the house of the informant. He went there and when he asked the victim about the incident, she told him that the accused came to their house and sought water from her and at the time of offering water, the accused after closing her mouth took her to a betel-nut plantation situated behind their house. He stated that the victim did not tell anything more and she was weeping at that relevant time.
 - 12. In his cross, he stated that as on that day at the time of closure of his day's work it rained, he arrived at his house about 6-6.30 p.m. and after hearing noise, he straightaway went to the house of the informant. He further stated that he was interrogated by police. He stated that he did not ask the victim about the incident but he could learn about the incident when she was describing about the incident to others.
 - p.m. to his house. On the road Bimal Tapno, the husband of the informant called him and told him that the victim was not in their house. They went in search of her. He stated that the accused Kamal Orang too was not in his house at that relevant time. The back door of the house of Bimal was open. He stated that towards the back side of their house in the bamboo and betel-nut plantation, he found the victim stood bending and weeping. On being asked, she told him that the accused had pulled and forcibly taken her and committed rape on her. After handing over the girl to Bimal, he left for his house. The clothes of the victim were wet at that relevant time. He in his cross stated that he along with Bimal and Rajen Praja went in the search of the victim. He did not find anyone along with the victim. The house of the accused is situated two houses

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away from the house of Bimal.

- 14. PW4-the Medical Officer, Dr. Mina Bora Biswashi stated that on 10.10.2016 she examined the victim at about 1.20 p.m. She proved the medical injury report as Ext.2. On local examination, she found ecchymosis (discolouration of the skin resulting from bleeding underneath, typically caused by bruising) over both labia and minora. Hymen absent. Slight tear (0.5 cm) of lateral vaginal wall bilaterally. She stated the radiological age of the victim was 15 years. Vaginal swabs show no spermatozoa. Her opinion was Injury mark present over private parts. In her cross, she stated that ecchymosis may be caused by rubbing. She stated that in the instant case, the vaginal tear- Hymen absentmay be caused by sexual assault. In a virgin, if sexual intercourse is committed, then the hymen will be ruptured. Hymen is a loose thing but it may not be only caused by sexual assault. In general, hymen is ruptured in a virgin girl due to first sexual intercourse and after habituation, the hymen becomes absent. She did not find any injury mark on the body of the victim except of her vaginal part. She did not find any blood stain on the victim. She also stated that radiological age varies maximum up to 2 years.
- 15. PW 6 is the Investigating Officer, Md. Abdul Matleb Choudhury proved the 'ejahar' as Ext. 1, which according to him was received by him at the Borgang Police Outpost from the informant. He proved the sketch map of the place of occurrence as Ext. 4. After conclusion of investigation, he submitted charge-sheet against the accused, which he proved as Ext. 5. In his cross, he stated that in the FIR From, the OC at first instance registered the case u/s 8 of the POCSO Act. He contradicted the PW 3 and stated that the said witness did not state before him that he found the victim crying in the betel-nut plantation and that the victim had told him then that the accused had gagged her mouth. He also contradicted PW 5 and stated that the said witness did not tell him that it was raining and her parents did not hear her noise due to rain. He also stated that the said witness did not tell him that the accused had taken her with him by pulling her hand.
- 16. From the evidence of the various witnesses as discussed above, we find that each of the witnesses examined by the prosecution have adduced evidence in support of the prosecution case. Evidence shows that none of the other witnesses have seen the accused taking away the victim forcibly from her house and indulging in sexual assault with her. However, it may be noted that had anyone seen the incident, the alleged occurrence would not have taken place. Under such circumstances, the evidence of the victim- PW5 and the PW4- the Medical Officer become vital.
- 17. During the course of arguments, the learned counsel for the defence pointed to the cross of the PW4, wherein she stated that that ecchymosis found on both the labia of

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the victim may be caused by rubbing. He stressed that the vaginal tear- Hymen absentas was found on the victim has nothing to do with the alleged incident as in a case of first forceful sexual intercourse, the hymen would have ruptured. He referred to the evidence of PW5, wherein she stated that she had not indulged in any sexual intercourse before the said incident. He pointed out that the PW4 testified that in general, hymen is ruptured in a virgin girl due to first sexual intercourse and after habituation, the hymen becomes absent. She did not find any injury mark on the body of the victim except on her vaginal part. She did not find any blood stain on the victim. The learned counsel therefore contended that as no medical evidence of penetration was found, the accused is entitled to acquittal on the offences charged.

- 18. Apart from that, the learned counsel had argued that the PW5 did not state before the police during investigation that it was raining at the relevant time and her parents did not hear her noise due to rain as she did not speak of the same to the PW6 and this has been stated by PW6. According to him, the victim did not make any noise and had there been any such incident, she would have definitely raised alarm and the other inmates would have heard her.
- 19. Sec. 375 IPC defines "Rape". It states "A man is said to commit rape, if he:
 - (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person,....

Firstly- Against her will.

Secondly- Without her consent....

Sixthly, With or without her consent, when she is under eighteen years of age.

Explanation 1- For the purposes of this Section, "vagina" shall also include labia majora.

Explanation 2......

Provided that a woman does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

- 20. Thus, we see that in order to constitute the offence of "Rape", penetration is not essential but as per Sec. 375 (c), if the accused manipulates any part of the victim so as to cause penetration into the vagina or any part of the body of the victim, same would be sufficient for conviction. Moreover, we have noticed that the consent of the victim is immaterial if she is under eighteen years of age. Again, it is noticed that the term "vagina" shall also include labia majora and therefore penetration in real sense of the term is not essential to constitute the offence.
- 21. Likewise, Sec. 3 of the POCSO Act, 2012 defines "Penetrative sexual assault" as a person is said to commit "Penetrative sexual assault" if-
 - ".....(c) manipulates any part of the body of the child so as to cause penetration into



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the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person."

- 22. When we turn back and examine the evidence of the PW4- the Medical Officer, we find her depsoing that she on local examination, found ecchymosis over both labia and minora. She stated the radiological age of the victim was 15 years. Her opinion was Injury mark present over private parts. This evidence as adduced by the PW4 is found to have remained intact in her cross. As noted above, penetration in real sense of the term is not required to convict an accused under the offence charged for "rape". The injury found on the victim, i.e., on both her labia is sufficient to point to the forceful act of manipulation made on the body of the child so as to cause penetration into the vagina by the accused. The medical evidence is supported by the ocular testimony of the victim- PW5 as we do not find anything in her cross to disbelieve her. We also find her corroborating her statement recorded u/s 164 CrPC, i.e., Ext. 3.
- 23. From the evidence on record, we do not find any reason to disbelieve the testimony of the victim. Nothing emanated from her cross as to why she would depose falsely against the accused and implicate him. Evidence of PW4 reveals that she is a child below the age of eighteen years. The argument of the defence that the victim did not make any noise as she did not state about raining at that point of time to the Investigating Officer makes no ground for extending benefit to the accused, more so when evidence of PW1, PW2 have revealed that it was raining then. They were not confronted by the defence in their cross in that respect. Further, the injuries found on the victim is enough to hold that she sustained those injuries on her person for the forceful act of the accused to cause penetration into her vagina.
- 24. Again as we scrutinise the examination of the accused u/s 313 CrPC, we find him simply denying the incriminating evidence those were brought to his notice. He denied of having gone to that place at that relevant time. He did not take the pain to establish his claim that he was elsewhere.
- 25. In <u>Shambu Nath Mehra vs. State of Ajmer, AIR 1956 SC 404</u>, Hon'ble Supreme Court observed as under:-
 - "9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre- eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a

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murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor A.I.R. 1936 P.C. 169 and Seneviratne v. R. [1936] 3 All E.R. 36, 49....".

26. In <u>Trimukh Maroti Kirkan vs. State of Maharashtra (2006) 10 SCC 681</u>, the Hon'ble Supreme Court again has observed as hereunder:

"14. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab v. Karnail Singh 2003 Cri LJ 3892). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

- 27. The credible, consistent and inspiring evidence available on record leave no doubt in my mind to finally hold the accused guilty of the offences charged against him u/s 376 IPC and Sec. 4 of the POCSO Act, 2012 beyond all reasonable doubt. In the result, the prosecution has been held to have succeeded in establishing the charges against the accused on both points for determination and the same are therefore, answered in the positive. The accused Kamal Orang, in consequence, is convicted u/s 376 IPC and Sec. 4 of the POCSO Act, 2012.
- 28. I have heard the convict on the question of sentence to be passed against him, which is recorded in a separate sheet. He stated that he has his mother, wife and a daughter aged about two years at his home. He used to earn by plucking tea leaves at a private tea garden and maintained his family from his earnings. In his absence, his family has been under distress. He therefore has prayed for leniency.
 - 29. I have heard the learned Addl. P.P. appearing for the State on the matter, if there is any record of previous conviction of the convict. But the learned counsel did not come forward with any such submission. Moreover, the case record does not reveal of his any previous conviction.



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SENTENCE

30. Upon considering the materials on record and hearing the convict on the question of sentence and also taking note of the punishment provided u/s 376 IPC and Sec. 4 of the POCSO Act, 2012, I sentence the convict, Kamal Orang to undergo of Rigorous Imprisonment for a period of 10 (Ten) years and to pay fine of Rs. 10,000/- (Rs. Ten thousand), in default, to undergo further Rigorous Imprisonment for 6 (Six) months on both the counts respectively. Both the sentences shall run concurrently. The fine, if paid, shall be given to the victim as compensation.

ORDER

- 31. i) The accused, Sri Kamal Orang on being convicted u/s 376 IPC and Sec. 4 of the POCSO Act, 2012, sentenced to undergo of Rigorous Imprisonment for a period of 10 (Ten) years and to pay fine of Rs. 10,000/- (Rs. Ten thousand), in default, to undergo further Rigorous Imprisonment for 6 (Six) months on both the counts respectively. Both the sentences shall run concurrently. The period of detention already undergone by the convict shall be set off. The fine, if realized, be given to the victim as compensation.
 - ii) The convict be taken into custody and sent to the District Jail, Biswanath Chariali for serving out the sentence.
 - iii) A copy of the judgment be furnished to the convict free of cost forthwith.
 - iv) Let a copy of the judgment be sent to the District Legal Services Authority, Biswanath with a recommendation u/s 357-A (2) CrPC for adequate compensation to the victim.
 - v) A copy of the judgment be forwarded to the District Magistrate, Sonitpur in compliance with the sec. 365 Cr.P.C.
 - vi) Inform the Jail authority. The case is disposed of.

 Given under my hand and seal of this court on this the 2nd day of September, 2019.

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Additional Sessions Judge, FTC, Biswanath Chariali, Sonitpur, Assam.

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ANNEXURE

Witnesses examined by the Prosecution:

PW1- Smti Serapina Tapno

PW2- Sri Rajen Praja

PW3- Sri Barthalung Kulu

PW4- Dr. Mina Borah Biswashi (M.O.)

PW5- Victim

PW6- Md. Abdul Motalib Choudhury (I.O.)

Exhibits proved by the prosecution witnesses:

Exhibit-1: Ejahar

*Exhibit-2: Medical Injury Report

Exhibit-3: Statement of the victim u/s 164 CrPC

Exhibit-4: Charge sheet

Witnesses examined by the Defence:

None.

Documents exhibited by the Defence:

None.

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