## IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> : <u>06 OF 2018</u>

(Under Section 376 of IPC R/w Section 4/6 of POCSO Act, arising out of G.R. Case No.

323 of 2018)

-vs-

Present : Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

**Tezpur** 

Prosecutor : State of Assam

Accused : Sri Biju Munda

Son of Sri Francis Munda,

Resident of Ghoramura Pathar, Singri,

Police Station – Dhekiajuli, Dist:- Sonitpur, Assam

Date of framing Charge : 11/04/2018

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Date of Recording Evidence : 25/04/2018, 09/05/2018 & 27/06/2018

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Date of examination of accused

u/s 313 Cr.P.C

27/06/2018

Date of Argument : 27/06/2018

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Date of Judgment : 27/06/2018.

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Counsel for the Prosecution : Mr. Munin Chandra Baruah

Special Public prosecutor

Sonitpur.

Counsel for Accused : Mrs. Doli Ojha & Anr., Ld. Advocates.

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## **JUDGMENT**

**1.** In this case accused Sri Biju Munda is put for trial for allegation of charge under Section 376 of IPC R/w Section 4/6 of POCSO Act, 2012.

- 2. The factual matrix according to the FIR in brief is that on or about 11:30 PM of 22.01.2018 both the accused persons, namely, Sri Biju Munda and Sri Suraj Bhuihar forcefully committed rape on the deaf and dumb 15 years minor daughter of the informant. Hence, this prosecution case. The FIR was filed by Smt. Pusni Kalandi before the I/C of Singri Out Post on 23.01.2018.
- 3. On receipt of the aforementioned FIR, I/C, Singri OP made an entry of GDE vide GDE No. 363 dated 23.01.2018 and forwarded the same to the O/C, Dhekiajuli PS for registering a case under proper section of law. On receiving the FIR, the Officer-In-Charge of Dhekiajuli Police Station registered a case being Dhekiajuli P.S. Case No 70/18, under section 376/34 of IPC r/w section 4/6 of POCSO Act, 2012 and endorsed A.S.I. Budhan Borah to investigate the case. After completion of usual investigation, the O/C Dhekiajuli Police Station sent up the accused for trial by filing charge sheet under section 376/34 of IPC r/w section 4/6 of POCSO Act against the accused persons, namely, Sri Biju Munda and Sri Suraj Bhuihar.
- **4.** One of the accused person, namely, Sri Suraj Bhuihar being juvenile, sent to the Principal Magistrate of Juvenile Justice Board, Tezpur. On being appeared the accused Sri Biju Munda before this Court, after hearing both parties, my learned predecessor-in-court framed charge under section 376 of IPC r/w section 4/6 of POCSO Act, 2012 against the said accused and particulars of the charge was read over and 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 **eight** numbers of witnesses and besides the aforementioned PWs, the prosecution side examined one, Sri Apurba Kalita as CW 1, who is the Asst. Teacher of Govt. Bhowri Devi Seraowgi Deaf and Dumb School. After completion of prosecution evidence, accused was 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. To buttress the defence, the accused declined to give defence evidence.
- **6.** I have heard argument put forwarded by learned advocate of both the parties.
- **7.** The point for decision in this case is that -

- (1) "Whether the accused person on 22.01.2018 at about 11:30 PM at Ghoramora Pothar under Dhekiajuli PS has committed rape on Miss "X", a physically handicapped girl and thereby committed an offence punishable under section 376 of IPC?
- (2) "Whether the accused person on the same date, time and place has committed penetrative sexual assault on the victim Miss "X" (15 years), a physically handicapped girl, who is a minor girl and thereby committed an offence punishable under section 4 of the Protection of Child from Sexual Offences Act?
- (3) "Whether the accused person on the same date, time and place has committed aggravated penetrative sexual assault on the victim Miss "X", a physically handicapped girl, who is a minor girl and thereby committed an offence punishable under section 6 of the Protection of Child from Sexual Offences Act?

### **REASONS, DECISIONS AND REASON FOR DECISION.**

- **8.** To arrive at the judicial decision, let me appreciate the evidence on record.
- **9. PW 1, Smt. Pusni Kalandi,** the mother of the victim girl has stated before the court that victim Miss "X" is her daughter, who is deaf and dumb. She also knows the accused Biju. The incident took place on the day of last Swaraswati Puja. She along with her daughter went to the marriage ceremony to a nearby house at about 10 PM. After having dinner at the marriage ceremony, she came to her house leaving her daughter there. Then she again went to the house of marriage to bring her daughter but she did not find her. Thereafter, she searched her everywhere and during searching she heard the calling of Suraj's mother as "where Biju and Suraj took the girl". Then her

daughter came to her house by crying and thereafter, her victim daughter reported to her that accused committed misdeed to her by tearing her clothes by gagging her mouth. She stated that she has noticed her pant was found wet. Her daughter-in-law also noticed wet pant of the victim. The victim daughter also reported to her that the accused persons took her to the paddy field. She further stated that when the accused persons came to the marriage party, her victim daughter told the public present in the marriage party that the accused persons took her to the paddy field by gagging her mouth and committed misdeed on her. Then, she informed to police station on that very night and she filed the ejahar in the police station where she put her thumb impression. The ejahar was written by one scribe of Kalisthan according to her instruction. After instituting the case police sent the victim girl for medical examination and she was also sent to learned Magistrate to record her statement.

- 10. In her cross examination, she admitted that police recorded her statement. She stated that she has filed the ejahar on that very night of the incident. On the said night only she has given entry and in the next morning she has filed the ejahar. She stated that marriage was held in the house of Loknath. The marriage of the younger sister of Loknath. There were many guests in the said marriage party. Loknath is still alive. Anita, Jogoeswar, Jogai Das, Suraj and Tinku are neighbours of said Loknath. She further stated that the field is situated at a distance of less than one km from the marriage house. She admitted that she has not seen who has taken my victim daughter.
- 11. PW 2, Smt. Sabitri Kalandi, has stated that victim Miss "X" is her sister-in-law. She is deaf and dumb. She knows the accused Biju and absentee accused Suraj. The incident took place on 22-01-2018 at about 11 PM at night. She stated that while her victim sister-in-law along with her mother went to attend a nearby marriage party, the accused Biju and Suraj took her to the field and committed rape on her sister-in-law (victim). She stated that the accused persons have also torn the clothes of her sister-in-law. After one hour she came back to their house and they saw her clothes were torn and some liquid materials on her clothes. They have also saw injury on her left shoulder. She further stated that when they enquired her, she reported that accused Suraj and Biju committed rape on the field by taking her from the marriage house. In the marriage house the victim pointed out the accused persons stating that they had committed misdeed on her.

- 12. In her cross examination, she admitted that on the day of incident, she has not been to the marriage house. She has not seen accused Biju taking the victim girl. She stated that her mother-in-law reported her that while she went to give the gift to the bride, who is the sister of Loknath, she could not found victim girl there so she came and reported to her. The marriage house is situated at a distance of 50 yards from her house. The family members of Loknath, i.e. Loknath, his two brother and his mother are still alive. They also know the incident. Anita and Suraj are their neighbours. She stated that at about 12 O' clock of night she has seen the victim on the road and then she was brought to the house. Thereafter, she along with her mother-in-law and Anita took the victim girl to the police station at about 12 O' clock at night. She narrated about the incident to police. She also showed her panty and torn clothes to the police. Police did not seize her clothes and panty. Her mother-in-law filed ejahar before police at night. Police has written the ejahar. At night police came to the house of Suraj and forcefully opened the door and took both the accused to the police station. Accused is a boy of 16/17 years. She has given statement to police at night. The house of Suraj is situated just opposite to their house. They have good relation with the parents of Suraj.
- **13. PW 3, Smt. Anita Das,** who turned hostile. Her hostile portion of evidence is such as she knows the incident took place about three month ago. She knows the victim Miss "X", who is a deaf and dumb girl. Pusni Kalandi is the mother of the victim. She stated that at the relevant time, the victim girl was about 15 years old. On the day of incident there was a marriage took place in their village. She went to attend the marriage. She also stated that the victim girl and her mother were also attend the said marriage. In the said marriage party, mother of the victim girl loudly stated that her deaf and dumb daughter was missing from the marriage house. Then, they searched the said missing deaf and dumb girl, but they could not trace out her. Again they went to marriage party. After about 1 ½ houses, the said deaf and dumb girl returned to marriage house. Then she turned hostile.
- 14. In her cross examination, she admitted that what she has deposed before the court is true statement. She knows the accused, but, she does not know his name. Accused is no way related to her. None has instructed her to depose in favour of the accused. She did not know who has taken out the victim girl from the marriage party. She stated that she does not know actually what happened.

- 15. PW 4, Sri Jugal Mandal, who also turned hostile. The un-hostile portion of his evidence is as such that he knows the accused persons present as well as the complainant and the victim of this case. He stated that at the time of missing of the victim Miss "X" from the marriage party, mother of the victim informed him about the incident and requested him to search her and accordingly, he along with the mother of the victim searched the victim girl, but, they could not find her. Thereafter, they again come to the marriage house and saw that the victim girl again went to the marriage house. Then he turned hostile.
- **16.** In cross examination by the defence, he admitted that accused is no way related to him. On that day what he has stated before this Court is his true statement. He stated that he has not stated by suppressing the material fact to save the accused. He stated that Miss "X", the deaf and dumb girl, when she again visited the marriage party after her missing, and what she stated to others, he does not know.
- 17. PW 5, Miss "X", the victim, who is a girl of deaf and dumb. As such her statement was recorded with the help of interpreter Sri Apurba Kalita, who works at Govt. Bhowri Devi Seraowgi Deaf and Dumb School, Kahilipara Guwahati and also in presence of the mother of the victim Smt. Pusni Kalandi. She stated that the incident took place at night. Two persons took her on their lap outside from the marriage party. They slap her and they injured her on her leg. They have torn her clothes. They laid her down on the ground and opened her clothes. They pressed her on her breast.
- 18. In her cross examination made to the interpreter. The interpreter what sign language he used? Then the interpreter replied he used not exactly sign language what they taught in their school. He used it the method "Total Communication System" which can be used even to the deaf and dumb person who has not studied at the Deaf and Dumb School.

In cross examination by defence to the victim, she admitted that accused persons took her from others house, not her own house. She admitted that from the act of the accused persons, she has sustained injuries on her both hands and knee. The torn cloth was shown her mother, but, not to police. On the said night, she returned to her home. I.O recorded her statement. She admitted that she has shown to I/O the injuries

sustained by her. She did not show the torn clothes to police and neither hand over the same to police.

19. PW 6, Miss. Juhi Gogoi, the Ld. Magistrate, who recorded the statement of the victim stated that on 30.01.2018 she was posted at Tezpur as Judicial Magistrate First Class, Sonitpur, Tezpur and on that day in reference to Special POCSO Case No. 06/18 under section 4/6 of POCSO Act, she has recorded the statement of the victim Miss "X", D/o Late Lale Kalandi under section 164 of CrPC. As the victim was deaf and dumb, so, one interpreter as summoned is engaged to transcribe her sign and communication language. Accordingly, the victim was examined and her statement was recorded on transcription made by the interpreter in presence of mother of the victim namely, Smt. Pusni Kalandi. After recording her statement, her statement was read over through the interpreter and on her acceptance she put her signature thereon.

Ext 1 is the statement of the victim/witness Miss "X" under section 164 of CrPC and Ext 1 (4) is her signature. Ext 2 is her order dated 24.01.2018 in connection with Special POCSO Case No. 06/18 and Ext 2(1) is her signature.

- **20.** In her cross examination, she admitted that in 164 CrPC statement of the victim no names of the accused persons are mentioned. She has recorded the statement of the victim as per version of the interpreter as she was deaf and dumb. At the time of recording the statement of the victim, the mother of the victim was also present as per rule of Section 26 of POCSO Act. The victim stated that two persons took her from house.
- **21. PW 7, Dr. Rika Engtipi**, who is the medical officer of this case has stated before this court that on 24.01.2018 he was posted as Medical & Health Officer at TMCH, Tezpur and on that day, at about 1:05 PM in reference to Dhekiajuli PS Case No. 17/18 u/s 376 of IPC r/w section 4/6 of POCSO Act, he examined Miss "X", 17 years, D/o: Late Lale Kalandi of village Ghoramara Pathar under Dhekiajuli PS, vide TMCH Registration No. TMC/FM/SC 2018, in presence of female attendant Sima Borgohain on being escorted and identified by HG Sirajul Haque. On examination, he found the following:

**Identification mark:** Black mole of pinpoint size over the right upper arm.

As the victim Miss "X" is deaf and dumb since childhood her mother Smt. Pusni Kalandi told that on 22.01.2018 there was wedding in their village and her daughter Miss "X" was missing and she searched for her. The victim later came and told her mother with sign language that she as forcefully taken to field by two persons and sexually assaulted her. Her mother then informed the police.

#### On her physical examination:

Height- 140 CM, Weight-32 KG, chest- 67 CM, Abdomen-53 CM, Teeth-temporary-nil, permanent 14/14 total-28. Space of teeth-adequate.

### **Hairs:**

Scalp- present, black colours 65 CM, Axillary-absent, pubic- present black colour and breast-well developed.

Menstrual history, Menarche-12 years, cycle-normal, last menstrual period-could not remember.

### **Genital Examination:**

Genital organs- healthy, vulva-healthy, hymen-old tears seen at 3 O'clock position, vagina and cervix-healthy, evidence of venereal disease-not detected, vaginal swabs collected.

Injury on the body not detected.

Mental condition at the time of examination-deaf and dumb nomal, cooperation and behaviour- normal, intelligence and memory and Gait-normal.

## Report of Radiological investigation:

X-ray of wrist- Epiphysis of the bones around the wrist joint has fused with parent bone.

X-ray of shoulder joint: Epiphysial fusion noted of the bones around the shoulder joint.

X-ray of elbow joint: complete epiphysial fusion noted on the bone around the elbow joint.

X-ray of pelvis- The epiphysial fusion noted of the iliac crest.

## **Result of laboratory Investigation:**

Examination for vaginal swab- No spermatozoa seen.

**OPINION:** 1) Evidence of the recent sexual intercourse not detected.

- 2) Evidence of the violence mark on her body as well as her private parts not detected.
  - 3) Her age is above 17 years and below 20 years.

Ext 3 is the Medical Report and Ext 3 (1) is his signature. In his report the victim put thumb impression. He stated that if a girl sustained minor injury then after 2/3 days it is difficult to detect the injury but in case of grievous injury it may be detected. In case of forceful sexual intercourse if the person sustained injury severely then it can be detected after 2/3 days but if it is not severe it is difficult to detect.

**22. PW 8, ASI Sri Budhan Borah,** who is the I/O of this case has stated that on 23.01.2018, he was posted as ASI of police at Singri Out Post under Dhekiajuli PS. On that day, one Pusni Kalandi lodged an ejahar against the accused Suraj Bhuihar. In the said ejahar complainant Pusni Kalandi put her thumb impression. After receipt of the ejahar, I/C of Singri OP made GD Entry 363 dated 23.01.2018 at 9:35 AM and entrusted him to preliminary investigation and forwarded the same to the O/C, Dhekiajuli PS for registering a case. On being receipt the ejahar O/C of Dhekiajuli PS registered a case being Dhekiajuli PS Case No. 70/18 under section 376/34 of IPC r/w section 4/6 of POCSO Act. Ext 4 is the ejahar and Ext 4(1) is the signature of the then O/C, Dhekiajuli PS Sri M.M. Patowary, Inspector of Police. On being receipt the ejahar, he has recorded the statement of the complainant at the police out post.

Thereafter, he visited to the place of occurrence, prepared sketch map of the place of occurrence and recorded the statement of the witnesses, Sabitri Kalandi, Anita Das and Jogesh Mandal at the place of occurrence. Ext 5 is the sketch map and Ext 5(1) is his signature. He has also recorded the statement of accused Suraj Bhuihar and Biju Munda. Thereafter, he has arrested the accused persons and forwarded them to the court. He stated that he has also recorded the statement of the victim, who was deaf

and dumb, with the help of her mother Pusni Kalandi. Thereafter, he has sent the victim for medical examination to TCCH, Tezpur and sent her to the court for recording her statement u/s 164 CrPC. The Ld. Court instructed them to produce one interpreter to record the statement of the victim as the victim was deaf and dumb girl vide order dated 24.01.2018. On 30.01.2018 he produced the interpreter along with the victim girl before the court for recording her statement u/s 164 of CrPC. After recording her statement, the victim girl was handed over to the guardian. He further stated that he has also collected the medical report from TMCH, Tezpur and after completion of the investigation finding sufficient materials against the accused persons, he has submitted charge sheet u/s 376/34 of IPC r/e section 4/6 of POCSO Act against the accused persons Biju Munda and Suraj Bhuihar. Ext 6 is the charge sheet and Ext 6(1) is his signature.

He stated that he has recorded the statement of Anita Das, who stated before him that "on 22.01.2018 at about 11:30 PM in the marriage house, Miss "X", the deaf and dumb girl of Pusni Kalandi stated that she was enticing and taken by Suraj Bhuihar and Biju Munda from the marriage house and took her to the paddy filed and committed rape on her. When the said girl was missing from the marriage house, she went out to search the missing girl along with Pusni Kalandi, but, they could not trace out her. After sometimes, the victim girl again arrived at the marriage house. Then, Suraj Bhuihar and Biju Munda had left the marriage house. Duriong that time, Miss "X" identified both the persons in presence of guest attended at the marriage house." Ext 7 is the case diary of Dhekiajuli PS Case No. 70/18 and Ext 7(1) is the relevant statement of the said witness Anita Das and Ext 7(2) is his signature.

He further stated that he has also recorded the statement of the witness Jugesh Mandal, who stated before him that "on 22.01.2018 at about 11:30 PM in the marriage house, Miss "X", the deaf and dumb girl of Pusni Kalandi stated that she was enticing and taken by Suraj Bhuihar and Biju Munda from the marriage house and took her to the paddy filed and committed rape on her. When the said girl was missing from the marriage house, she went out to search the missing girl along with Pusni Kalandi, but, they could not trace out her. After sometimes, the victim girl again arrived at the marriage house. Then, Suraj Bhuihar and Biju Munda had left the marriage house. Duriong that time, Miss "X" identified both the persons in presence of guest attended at

the marriage house." Ext 7(3) is the relevant statement of the said witness Jugesh Mandal and Ext 7(4) is his signature.

- 23. In his cross examination, he admitted that police station is away about 2 KM from the place of occurrence. He has not mentioned in the sketch map about the place of occurrence i.e. the marriage house from where the victim girl was missing. He has not recorded the statement of the family members of the marriage house. He has also recorded the statement of the victim at the police out post. He has not called any expert to record the statement of the deaf and dumb victim girl. He has recorded the statement of the victim in presence of her mother. He has recorded the statement as shown by sign/gesture of deaf and dumb girl and also interpretation of the mother of the victim. He has not recorded the statement of the deaf and dumb victim as per provisions of POCSO Act and he has also not tried to record the statement of the victim by a woman police officer. He has not seized any semen stains wearing apparels of the victim. No witnesses stated about the torn clothes of the victim. He could not re-call whether he has seen any injury on the body of the victim. He has recorded the statement of the victim by putting his official uniform.
- 24. CW 1, Sri Apurba Kalita, is the Asst. Teacher of Govt. Bhowri Devi Seraowgi Deaf and Dumb School, Kahilipara-19, Guwahati, who interpret the statement of the victim acquired through the "Total Communication System" stated as follows: on 30-01-2018, he was posted as an Assistant Teacher at Govt. Bhowri Devi Seraowgi Deaf and Dumb School, Kahilipara, Guwahati. On that day as per requisition of the I/O of Special (POCSO) Case No 06/18, he has come to Tezpur to interpret the language of one deaf and dumb girl namely Miss "X", D/o Late Lale Kalandi of Ghoramora Pothar, Dhekiajuli who was aged about 17 years at that time. Accordingly, he has trained her for about ½ an hour on Total Communication System and thereafter he is satisfied that the said witness able to show total communication about the incident. Therefore, in presence of learned Magistrate, she made Total Communication as to the incident. Accordingly, learned Magistrate recorded her statement on their Total Communication. He has conveyed to the learned Magistrate as sign of total communication shown by the victim girl before the learned Magistrate and accordingly, learned Magistrate transcribed the communication into English Language and made statement. After writing the statement, learned Magistrate read over the contents of the statement and immediately,

He transcribed the victim through total communication and accept her signal to accept the statement. He accordingly, convey the matter to the learned Magistrate. Ext.1 is the said statement of victim under Section 164 CrPC and Ext. 1(1) to Ext. 1(3) are his signatures thereon as an interpreter.

Though, he was asking through Total Communication to the victim about her age, but, she could not able to give correct answer. However, during that time, mother of the victim was present. Her mother told that she was 17 years and according her age was written as 17 years.

- 25. In his cross examination, he admitted that he met the victim and her mother before about 1 ½ hours of taking statement under Section 164 CrPC. He could not recall exactly, during that time where the victim and her mother was seated. He has also talked with the mother of the victim in the said 1 ½ hours. At the time of recording of statement, mother of the victim being guardian was present in the chamber of the learned Magistrate. He stated that in the Ext.1, the victim did not mention the name of any of the person who has committed the said incident.
- **26.** These much is the evidence of the prosecution case. Defence plea is total denial while his statement was recorded u/s 313 of Cr.P.C.
- **27.** I have also heard the arguments put forwarded by Learned Counsel of both the sides.
- 28. Learned counsel for the accused submitted that the prosecution has failed to prove the case beyond any reasonable doubt. *Firstly,* FIR does not reveal even about the gist of the incident. *Secondly and most importantly,* the statement of the victim could not identify the accused person that it is this accused who has committed sexual assault on her as alleged. *Thirdly,* her statement is nowhere corroborated by any of the statement of the other witnesses. *Fourthly,* according to the I/O the statement of the victim is recorded with his official uniform which is violation of Section 24(2) of Special POCSO Act. *Fifthly,* there are many contradictions appear in the statement of the witnesses. Besides that the statement of the victim is nowhere stated that she has been sexually assaulted by these accused. *Sixthly,* even in her statement made before the Ld. Magistrate u/s 164 of CrPC she failed to identify the accused. *Seventhly,* there was no "*TEST IDENTIFICATION PARADE*" held inspite of there is a dispute as to the

identification of the accused. *Lastly*, according to the doctor, who examined the victim, the age of the victim is above 17 years and below 20 years. Law is well settled that 2 years of allowances may be given to the victim in either side in that count the victim was a major at the relevant time. Hence, praying for acquit the accused.

- **29.** On the other hand, learned Special Public Prosecutor submitted that the prosecution has ably proved the case beyond any doubt against the accused, as such, the accused is required to be convicted under the charged section.
- **30.** Keeping in mind, the rival submissions advanced by the learned counsels of both the parties, I am going to dispose of the case as follows.
- **31.** As stated above to substantiate the case prosecution examined as many as **eight** numbers of witnesses and besides the aforementioned PWs, the prosecution side also examined one court witness. Out of the said eight witnesses, three witnesses are official witnesses and CW is also an official witness. Therefore, there remains five numbers of witnesses are non-official witness. Out of five numbers of non-official witnesses, PW 3 and PW 4 turned hostile. Thereafter, there remains three numbers of non-official witnesses. Other than the victim no one is eye witness of the occurrence.
- 32. Let's discussed the evidence of the aforesaid non-official witnesses. First the informant PW 1, Smt. Pusni Kalandi, the mother of the victim girl who stated at the time of the incident, she along with her daughter went to the marriage ceremony to a nearby house at about 10 PM. After having dinner at the marriage ceremony, she came to her house leaving her daughter there. Then she again went to the house of marriage to bring her daughter but she did not find her. Thereafter, she searched her everywhere and during searching she heard the calling of Suraj's mother as "where Biju and Suraj took the girl". Then her daughter came to her house by crying and thereafter, her victim daughter reported to her that accused committed misdeed to her by tearing her clothes by gagging her mouth. She has noticed her pant was found wet. Her daughter-in-law also noticed wet pant of the victim. The victim daughter also reported to her that the accused persons took her to the paddy field. She further stated that when the accused persons came to the marriage party, her victim daughter told the public present in the marriage party that the accused persons took her to the paddy field by gagging her mouth and committed misdeed on her. Then, she filed the ejahar in the police station

where she put her thumb impression. The ejahar was written by one scribe of Kalisthan according to her instruction.

On her statement "The incident took place on the day of last Swaraswati Puja. I along with my daughter went to the marriage ceremony to a nearby house at about 10 PM. After having dinner at the marriage ceremony, I came to her house leaving my daughter there. Then I again went to the house of marriage to bring my daughter but I did not find her. I searched her everywhere and during searching I heard the calling of Suraj's mother as "where Biju and Suraj took the girl". Then my daughter came to her house by crying and thereafter, my victim daughter reported to me that accused committed misdeed to her by tearing her clothes by gagging her mouth. I have noticed her pant was found wet. My daughter-in-law also noticed wet pant of the victim. The victim daughter also reported to me that the accused persons took her to the paddy field. When the accused persons came to the marriage party, my victim daughter told the public present in the marriage party that the accused persons took her to the paddy field by gagging her mouth and committed misdeed on her. That portion of the statement is not stated to the I/O while her statement was recorded u/s 161 of CrPC. Therefore, these are the most vital statement which is contradictory as she did not make such statement before the I/O.

Next, PW 2 Smt. Sabitri Kalandi, who stated that while the victim sister-in-law along with her mother went to attend a nearby marriage party, the accused Biju and Suraj took her to the field and committed rape on her sister-in-law (victim). She stated that the accused persons have also torn the clothes of her sister-in-law. After one hour she came back to their house and they saw her clothes were torn and some liquid materials on her clothes. They have also saw injury on her left shoulder. On being enquired her, she reported that accused Suraj and Biju committed rape on the field by taking her from the marriage house. In the marriage house the victim pointed out the accused persons stating that they had committed misdeed on her.

It appears that her statement that "while my victim sister-in-law along with her mother went to attend a nearby marriage party, the accused Biju and Suraj took her to the field and committed rape on my sister-in-law (victim). The accused persons have also torn the clothes of my sister-in-law. After one hour she came back to our house and we saw her clothes were torn and some liquid materials on her clothes. We have also

saw injury on her left shoulder. When we enquired her, she reported that accused Suraj and Biju committed rape on the field by taking her from the marriage house. In the marriage house the victim pointed out the accused persons stating that they had committed misdeed on her. The victim pointed the accused persons stating that they had committed misdeeds on her." That statement is not appear in her statement u/s 161 of CrPC. Infact, these are the most vital statement which is contradictory. Therefore, that statement is cannot believable.

- **33.** Before come to the statement of the victim, we must see that "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 independents corroboration of every materials circumstance in the sense that the independents 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 it is reasonably safe to act upon it. 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."
- **34.** Here in the present case, as details discussed herein before, the victim stated that the incident took place at night. Two persons took her on their lap outside from the marriage party. They slap her and they injured her on her leg. They have torn her clothes. They laid her down on the ground and opened her clothes. They pressed her on her breast.

It is interesting to note that she did not specifically identify the accused. That apart even if first statement is believes there is no any evidence of penetrative sexual assault by anybody. Again it may also be mentioned that in her statement made before the Ld. Magistrate u/s 164 of CrPC she also did not implicate these accused in committing the alleged offence. Besides that it appears from the initial stage of the investigation that the victim could not identify the accused but the I/O failed to hold TIP (TEST IDENTIFICATION PARADE) to identify the accused properly. This is an allegation of penetrative sexual assault against these accused.

**35.** Law is well settled that 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 consenting party to coitus.

In the instant case, the doctor PW 7, who examined the victim opined that the (i) Evidence of the recent sexual intercourse not detected, (ii) Evidence of the violence mark on her body as well as her private parts not detected, and (iii) besides her age is above 17 years and below 20 years. Regarding the injury, the statement of the victim is totally silent. However, PW 2 stated that they have also saw injuries on her left shoulder but the doctor found no any injury on her private parts and her body. Besides the doctor admitting that the 3 O'clock appears on the private parts may not be cause for sexual assault. Therefore, the doctor has also not supported the prosecution case.

- **36.** As submitted by the learned Counsel for the accused that the I/O has admitted that while recording the statement of the victim u/s 161 of CrPC he was in official uniform but u/s 24(2) of Special POCSO Act which shows that "the police officer while recording the statement of the child shall not be in uniform". Therefore, the I/O has vitiated the aforesaid direction of the Special POCSO Act during investigation.
- **37.** On the other hand, it has already stated that PW 3 and PW 4 turned hostile. Let's see how his hostile portion of statement can be used by prosecution in their favour.
- **38.** It has been held in *State of Rajasthan Vs. Bhawani (2003) 7 SCC 291,* where the Hon'ble Supreme Court held that –

"The fact that the witness was declared hostile by the court at the request of the prosecution counsel and he was allowed to cross examine the witnesses, no doubt furnishes no justification for rejecting en block the evidence of the witnesses. But the court has at least to be aware that prima facie, a witness who makes different statements at different times, has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The court should be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. The High Court has accepted the testimony of the hostile witnesses as gospel truth for throwing overboard the

prosecution case which had been fully established by the testimony of several eye witnesses, which was unimpeachable character. The approach of the High Court in dealing with the case, to say the least, is wholly fallacious."

# 39. In another case i.e. *State of Bihar Vs. Laloo Prasad Yadav, reported in 2004 (Cr.) 499,* it has been held that –

"Normally, when the Public Prosecutor requested for permission to put cross-question to a witness called by him, the court used to grant it. Here if the public prosecutor had sought permission at the end of the chief examination itself, the trial court would have no good reason for declining the permission sought for. But the Public Prosecutor is not do so at that stage. Be that as it may, if the Public Prosecutor is not prepared to own the testimony of the witness examined by him, he can give expression of it in different forms. One of such forms is the one envisaged in S. 154 of the Evidence Act. They very fact that he sought permission of the court soon after the end of the cross-examination, was enough to indicate his resolve not to own all what the witness said in his evidence. It is again open to the Public Prosecutor to tell the court during final consideration that he is not inclined to own the evidence of any particular witness in spite of the fact the said witness was examined on his side. When such option is available to a public prosecutor, it is not a useful exercise for the Supreme Court to consider whether the witness shall again be called back for the purpose of putting crossquestion to him."

# **40.** It has been held in **Bhagaban Singh Vs. State of Hariyana, reported in 1976 SCR (2) 921** that –

"There is no legal bar passed on the testimony of the hostile witness if corroborated by other reliable evidence."

41. Again, it has been held in *Koli Lakhmanbhai Chanabhai Vs. State of Gujram*, reported in *AIR 2000 SC 210:200 Cr.L.J. 408: 2001 Cr.L.R (SC) 111* that—

"Evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed

off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood group "A". Further, the bush-shirt and baniyan which were put on by the accused at the time of incident were having extensive blood stains which were also found containing human blood group "A".

Accused was having injury on the thigh as per the evidence of the Doctor. As per the medical evidence, the injuries caused to the accused mere minor and that because of such injuries, there would not be extensive blood-stains on the bush-shirt and baniyan put on by the accused."

- **42.** Herein the present case as stated above PW 3 and PW 4 who are most independent witnesses turned hostile. They have suppressing the material facts. They made their statement u/s 161 of CrPC one thing on the other hand, they had resiled from the said statement before this court. Besides that their hostile portion of statement is nowhere corroborated with other witnesses. Therefore, the hostile portion of statement cannot be used by the prosecution in their favour.
- 43. To sum up as discussed herein above, *firstly*, the most important witness i.e. the victim did not specifically implicate the accused in commission of the alleged offence. *Secondly*, her statement does not reveal any materials of penetrative sexual assault against the accused. The doctor is nowhere supported the allegation of penetrative sexual assault. The most independent witnesses PW 4 and PW 5 are turned hostile. Their statements are nowhere corroborated with the statement of the other witnesses. That apart the prosecution has failed to examine the other person present in the marriage ceremony.
- 44. The onus of proving the facts essential to the establishment of the charge against an accused lies upon the prosecution, and the evidence must be such as to exclude every reasonable doubt about the guilt of the accused. An accused cannot be convicted of an offence on the basis of conjectures or suspicion. Here in this case as discussed above a reasonable doubt arisen in my mind, after taking into consideration, the entire material before it regarding the complicity of the accused, so benefit of doubt given to the accused person.

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**45.** In view of the aforesaid discussion, I am bound to hold that the prosecution

has categorically failed to prove the charge levelled against the accused beyond any

reasonable doubt. As such, the accused is entitled to get the benefit of doubt. Hence,

accused is acquitted and set him at liberty forthwith.

**46.** The liability of the bailor is hereby discharged.

**47.** Let the G.R Case No. 323/2018 be sent to Ld. committal Court along with a

copy of Judgment.

Given under my Hand and Seal of this Court on this the 27th 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:

(Sri Janmoni Deka), Steno

#### A-N-N-E-X-U-R-E

### 1. PRESECUTION WITNESSES

PW 1 :- Smt. Pusni Kalandi, the informant

PW 2 :- Smt. Sabitri Kalandi PW 3 :- Smt. Anita Das

PW 4 :- Sri Jugesh Mandal PW 5 :- Miss "X", the victim

PW 6 :- Miss. Juhi Gogoi, Judicial Magistrate First Class

PW 7 :- Sri Rika Engtipi, the M.O

PW 8 :- ASI Sri Budhan Borah, the I.O

### 2. WITNESSES FOR DEFENCE :- NIL

## 3. PROSECUTION EXHIBITS:

Exhibit 1 :- Statement of Miss "X" u/s 164 of CrPC

Exhibit 1 (1-3):- Signature of the interpreter in the statement of victim u/s 164

of CrPC.

Exhibit 2 :- Order passed by PW 6 dated 24.01.2018 i/c with Special

POCSO Case No. 06/18

Exhibit 2(1) :- Signature of PW 6 Exhibit 3 :- Medico Legal Report

Exhibit 4 :- FIR

Exhibit 5 :- Sketch Map Exhibit 6 :- Charge Sheet

Exhibit 7 :- Case Diary of Dhekiajuli PS Case No. 70/18.

Exhibit 7(1) :- Statement of Anita Das

Exhibit 7(3) :- Statement of Jugesh Mandal

### 4. **DEFENCE EXHIBITS:** NIL

# 5. COURT WITNESSES:

CW 1 :- Sri. Apurba Kalita, Asst. Teacher, Govt. Bhowri Devi

Seraowgi Deaf and Dumb School, Kahilipara-19, Guwahati

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