CAUSE TITLE POCSO Case No. 7/16

Informant: Sri Debaru Kishan,

S/o- Sri Prem Kishan, R/o- Napather Gaon, PS- Tingkhong, District- Dibrugarh.

Accused: Sri Nilip Baruah,

S/o- Sri Biren Baruah, R/o- Napather Gaon, PS- Tingkhong, District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor. Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor. For the Defence: Sri Uttam Routh, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 7/16 G.R. Case No. 3175/15

> > State of Assam

-Vs-

Sri Nilip Baruah

Charges: Under Section 4 of POCSO Act, read with Section 376 IPC.

Date of evidence on : 07-06-16, 08-09-16, 18-11-16, 31-05-17, 11-05-18 and

19-06-18

Date of argument : 13-07-18. Date of Judgment : 28-09-18.

JUDGMENT

- 1) The prosecution case in a narrow compass is that on 07-11-15, at about 3:30 pm, the sixteen year old victim 'X' was forcefully taken into Sri Nilip Baruah's house and thereafter, Sri Nilip Baruah (hereinafter the accused) committed rape on the victim X. When she raised alarm, Sri Lakhinath Kishan and Sri Kolia Kishan who were proceeding through the road near the accused person's house, heard her cries and rescued the victim. An ejahar regarding this incident was lodged by the victim's elder brother Sri Debaru Kishan (hereinafter the informant). A Borbam Outpost GD Entry No. 137 dtd. 08-11-15 was registered and the FIR was forwarded to Tingkhong Police Station which was registered as Tingkhong PS Case No. 130/15 under Section 376 of the Indian Penal Code (IPC for short), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short) and SI Cheniram Pagag was endorsed with the investigation.
- 2) The investigating officer (IO for short) embarked upon the investigation. He

recorded the statement of the victim and forwarded her to the Magistrate who recorded her statement. He went to the place of occurrence and prepared the Sketch-Map and seized one sweater. He also recorded the statements of the witnesses. On finding prima facie materials, he submitted Charge-Sheet against the accused.

- 3) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 376 IPC, read with Section 4 of the POCSO Act was framed and read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced the evidence of ten witnesses including the medical officer (IO for short) and the defence cross-examined all the witnesses to refute the charges.

SUBMISSIONS:

5) The learned Public Prosecutor Smti. Runumi Devi and the learned Addl. Public Prosecutor Mrs. Sahnaz Akhtar emphasized through their arguments that this is an open and shut case. The victim was rescued from the accused person's clutches. The accused deserves stringent punishment. The learned defence counsel laid stress in his argument that the victim was silent at the time of her physical relationship. She did not seek any help. No injuries were detected on physical examination by the doctor. The accused deserves a benefit of doubt. The old tear which was detected by the doctor goes beyond the time of the alleged incident.

POINTS FOR DETERMINATION:

- 6) On the backdrop of the rival contentions, the following points are apposite for proper adjudication of this case:
 - i. Whether on 07-11-15, at Napather Gaon, the accused

- committed rape on the victim 'X'?
- ii. Whether at the same time and place, the accused committed penetrative sexual assault on the minor victim 'X'?

DECISION THEREON AND THE REASONS FOR THE DECISION:

- 7) To decide the case in its right perspective, it is necessary to delve into the evidence.
- 8) Sri Debaru Kishan testified as PW-1 that the victim 'X' is his younger sister who is about 15 years of age. The incident occurred about four months ago (from 07-06-16). On the day of the occurrence, his sister was plucking tea leaves in the accused person's tea garden. Then the accused gagged his sister by her mouth and dragged her inside his house and committed rape on her. When she raised alarm, the neighbouring people heard her screaming and his sister fled away from the accused person's house towards her house. When he returned home, his sister informed him about the incident. The neighbouring people caught the accused and brought him to the police station. He along with his sister 'X' and Sri Monsai Kishan also went to the police station. He lodged the ejahar with the police in connection with this case.
- 9) In his cross-examination, he testified that he is an illiterate and he did not know what was written in the FIR. He denied that he omitted to state before the police that on the day of the incident, his sister was plucking tea leaves in the accused person's tea garden. Then the accused gagged his sister by her mouth and dragged her inside and committed rape on her and while she raised alarm, the neighbouring people heard her screams and hir sister fled away from the accused person's house towards her house and when he came

- to his house, his sister informed him about the incident.
- 10) This statement of PW-1 remained uncontradicted by the IO SI Cheniram Pagag who testified as PW-9. The IO has affirmed a part of the statement of Sri Debaru Kishan that he did not state under Section 161 CrPC that when his sister raised alarm, the neighbours heard her screams. The remaining part of the cross-examination and the evidence of Sri Debaru Kishan as PW-1 remained uncontradicted and uncontroverted.
- 11) The accused person's father Sri Biren Baruah testified as PW-2 that the victim is known to him. The incident occurred on 08-11-15. At that time, he was in his own house. His son Sri Nilip Baruah's house is situated in the same area in a separate enclosure. He is the VDP Secretary of Napather Gaon. In the morning of the day of the incident, several people came to his residence and informed him that his son misbehaved with the victim while she was plucking tea leaves in the tea garden of his son on the previous day. He asked the villagers to maintain order and assured that he will inform the police and accordingly, he informed the police about the incident. The evidence of PW-1 is supported by the evidence of PW-2. The accused person's father heard about the incident and being the Gaonburah, he informed the police.
- 12) The evidence of PW-1 is corroborated by the evidence of Sri Kolia Kishan who testified as PW-3 that the victim is his elder brother's daughter. The incident occurred about eight months ago (from 08-09-16). On the day of the incident, at about 3:00 pm, he along with Sri Lakhinath Kishan were returning to their house from work. At that time, he heard his sister crying for help. Then they arrived near the accused person's house and noticed that 'X' was running out of the accused person's house. She was unclothed and unclad. Then they went to the victim's house and informed her brother about the

- incident. The villagers were also informed. On the next morning, the villagers caught the accused and handed him over to the Borbam Outpost.
- 13) The evidence of this witness remained uncontradicted on the crossexamination of this witness and also on the cross-examination of the IO.
- 14) The evidence of PWs-1 and 3 is also corroborated by the evidence of Sri Lakhinath Kishan who testified as PW-4 that the victim 'X' is his distant relative. The incident took place about three months ago. On the day of the incident, at about 3:00 pm, he along with Sri Kolia Kishan were proceeding to their house. When they reached the gate of the accused person's house, they noticed that the victim 'X' was running out from the accused person's house and she was unclad and she was crying and stating that she was raped by the accused person. Then they asked the victim to go to their house and they went to their house. They informed the matter to the villagers. The villagers caught the accused and took him to Borbam Outpost.
- 15) The evidence of PWs-3 and 4 clearly depicts that while they were returning home, they noticed the victim escaping in unclad condition from the accused person's house. The victim also informed PW-4 that the accused committed rape on her. This witness was cross-examined regarding his omission to make certain statement under Section 161 CrPC, but his evidence-in-chief remained uncontradicted and uncontroverted. However, it is taken note of that his friend who was also with him, did not testify that 'X' stated that the accused raped her. Both were returning home at the same time and both PWs-3 and 4 met the unclad victim 'X' while running out of the accused person's house, but PW-3 did not state that the victim informed him that the accused raped him.
- 16) I have carefully perused the cross-examination of PW-4. It is held that the

evidence of PW-4 remained uncontradicted on the cross-examination of the IO.

- 17) PWs-1, 3 and 4's evidence is also corroborated by the evidence of PW-5 Smti.

 Monika Baruah. She testified that the accused is his younger brother-in-law.

 The incident took place about eight months ago. The victim is known to her.

 On the day of the occurrence, the victim was plucking tea leaves in their garden, owned by her father-in-law Sri Biren Baruah. On the next morning, she learnt that the victim 'X' was sexually assaulted by the accused on the previous day. The accused was taken by the villagers to the Borbam Outpost.
- 18) In her cross-examination, she testified that the accused resides with his wife and two children in his house and there are two houses adjacent to the accused person's house.
- 19) It is pertinent to mention at this juncture that if the accused person's family resides with him, when and how the accused committed rape on the victim.

 If the victim raised alarm, then why the two neighbours did not rescue the victim 'X'.
- 20) The evidence of PWs-1, 2, 3, 4 and 5 is supported by the evidence of Sri Monsai Kishan who testified as PW-7 that the victim and the accused are known to him. The incident took place about a year ago. On the following morning of the incident, Sri Kolia Kishan went to his house and informed him that the accused committed rape on the victim. Then he went to the accused person's house and found several people gathered near his house. After a while, the police arrived and took the accused to the Borbam Outpost.
- 21) The evidence of PW-6 is perfectly corroborated by the evidence of PWs-1, 3 and 4. Her evidence is also supported by the evidence of PWs-1, 2, 3, 4 and

22) The victim 'X' testified as PW-6 that the accused person is known to her. The incident occurred about a year ago (from 18-11-16). On the day of the incident, she went to the private tea garden of the accused person's brother, as asked by the wife of Sri Dilip Baruah. She was plucking tea leaves in the garden of the accused person and at about 3:00 pm, she finished her work and went to collect firewood near the garden. When she was tying together the firewood, the accused person caught her from behind, gagged her by her mouth and dragged her into his house which is near the garden. He tied her mouth with a gamusa and laid her down on the bed and committed rape on her. While he was sexually assaulting her, she heard the voice of 'Dodai' whose name is Kolia and who came to the accused person's house to collect money and then she managed to shout. Then the accused threatened her with a kotari (kitchen knife). She somehow managed to remove the gamusa from her mouth and she again shouted and ran towards the door, but the door was latched and the top latch of the door was locked. She pushed the door and managed to open it and ran out. While running out, she was naked. Then she met Sri Dilip Baruah's wife in front of the gate and she gave her some clothes. She also asked her what had happened and she narrated the incident to her. Then she suggested her to immediately go home. She took the clothes from her and ran towards her house. Then she narrated the incident to her father. Her mother had expired. Her father did not pay attention what she had stated, because he usually remains inebriated. In the evening, when her elder brother returned from work, she informed him about the incident. On the next morning, she also informed about the incident to her uncle Kolia. On the next morning, her elder brother along with the villagers went to the accused person's house. The police came and took the

accused from the house on the next day. When the police took the accused, she along with her brother and the villagers went to Borbam Outpost ad her brother Debartu lodged an ejahar against him. In the outpost, the police recorded her statement and she was taken to the Assam Medical College & Hospital at Dibrugarh for medical examination. She also came to the Court for recording her statement before the Magistrate. During investigation, she showed the sweater which was kept in the fencing of the accused person's premises and the police seized the sweater.

- 23) This evidence of PW-6 is contradictory to the evidence of PWs-3, 4 and 5 testified that while they were together returning from work, they met the victim 'X' who was naked. The victim came running out from the accused person's house and she was absolutely naked. PW-4 further added that the victim informed him that the accused committed rape on her. This is a major contradiction and the accused has to be given the benefit of doubt. The victim testified that when she came out, she met Sri Dilip Baruah'a wife while other two witnesses PWs-3 and 4 testified that when the victim came running, she was undressed and they saw her coming out of the accused person's house.
- 24) The victim testified as PW-6 that when she came running out of the accused person's house, she met Sri Dilip Baruah's wife in the front gate and Dilip Baruah's wife gave her some clothes to cover up her body. She also narrated her about the incident and she suggested her to go home immediately. PW-5 is the Dilip Baruah's wife and she kept mum about any such incident. She did not testify that she saw the naked victim running out of the accused person's house. She did not testify that she offered any clothes for covering up her body. On the contrary, PW-s-3 and 4 testified that they saw PW-6 running out

of the accused person's house and she was naked at that time. Either PW-6 absolutely forgot the sequel of events or she is lying, because she testified that when she came running out of the accused person's house after the assault, she met PWs-3 and 4. PW-4 went a step ahead further and he testified that PW-6 narrated the incident immediately at the time when they met her in a naked condition, while PW-6 testified that on the next morning, she informed PW-4 about the incident.

- 25) Several contradictions could be elicited through the evidence-in-chief of PWs-6, 3, 4 and 5. The evidence is not synchronized. The evidence is not cohesive and coherent. Moreover, the maroon coloured sweater was seized from the possession of PW-6 in her house.
- 26) Another contradiction which could be detected while analyzing the evidence is that PW-6 testified that while she was being sexually assaulted, she heard the voice of 'Dodai' whose name is Kolia and who came to the accused person's house to collect money and then she managed to shout. On the contrary, Kolia did not testify that at the time of the sexual assault, he went to the accused person's house to collect money. He testified as PW-3 that he met the witness immediately after the assault. The contradictions apparent on the evidence-in-chief of the witnesses are too many. When there are contradictions between the testimonies of PW-6 with the testimony of other witnesses, the evidence of the prosecutrix does not inspire confidence. Moreover, the victim also testified as PW-6 that the accused resides with his wife and two sons and his brother Sri Dilip Baruah's house is adjacent to the accused person's house. There are many houses near the place of occurrence. The accused person's family members were present in his house.
- 27) If the accused person's family members were present in his house, then how

- can it be possible for the accused person to commit rape on the victim? There are other contradictions also which could be elicited by the cross-examination of the victim and the cross-examination of the IO SI Cheniram Pagag.
- 28) The IO testified as PW-9 in his cross-examination that the victim did not state under Section 161 CrPC that the accused attacked her after she completed her work in the tea garden and was tying up the bundle of firewood. She also did not state before him that the accused came from behind and then he put her on the bed. She also did not state that the accused threatened her with a knife and demanded that she should not scream and then she ran towards the door, but the door latch was locked. She also did not state under Section 161 CrPC that Kolia Kishan came to Dilip Baruah's house to ask the money which he borrowed from him.
- 29) After scrutinizing the evidence of the victim and the evidence of the IO, it is held that the victim has exaggerated her evidence. Her evidence is full of embellishments. Her statement under Section 161 CrPC is not at all similar to her testimony before the IO. Her statement under Section 164 CrPC also projects contradictions, because she stated under Section 164 CrPC that the accused person's family members were not present in his house at the time of the incident, while she testified in her cross-examination that the accused person's family members were present in his house. In her statement under Section 164 CrPC, she stated that the accused person tied her hands and feet with a gamusa and then he tied her to the bed with the gamusa. She did not state under Section 164 CrPC that when she tried to scream on hearing Kolia's voice, the accused threatened her with a knife, but on the contrary, she stated under Section 164 CrPC that when she tried to scream, the accused slapped her. The statement of the victim was exhibited as Ext. 1 by

the Magistrate.

- 30) Smti. Priyanka Hazarika Nair testified as PW-8 that on 16-11-15, she recorded the statement of the victim under Section 164 CrPC in connection with this case. Ext. 1 is the statement of the victim and Ext. 1(1) is her signature.
- 31) The veracity of the victim's evidence is under cloud, because there are too many contradictions writ at large. Her conduct also does not inspire confidence. When she appeared before this Court as PW-6, she did not give her age, but when she appeared before the Magistrate for recording her statement under Section 164 CrPC, she mentioned her age as 15 years, while the MO detected that the victim was above 18 years of age on physical examination.
- 32) The MO Dr. Mohsina Ahmed testified as PW-10 that on 09-11-15, while working as GDMO in the Department of Forensic Medicine, Assam Medical College & Hospital at Dibrugarh, she examined the victim on police requisition and found the following:

On genital examination: Genital organs were healthy. Vulva is healthy. Hymen: Three old tears at 3 O clock, 7 O clock and 9 O clock position. Vagina and cervix is healthy. Uterus not palpable clinically. Vaginal smears were taken from posterior fornix in and around the cervix result of which does not show any spermatozoa. Radiological finding:

- X-ray elbow joint (AP view)- Epiphyseal union are completed;
- ii. X-ray wrist joint (AP view)- Epiphyseal union are completed;
- iii. X-ray of shoulder joint (AP view)- Epiphyseal union are completed;
- iv. X-ray of pelvis (AP view) Iliac crest not united.
- 33) The MO on the basis of Physical examination, Radiological & Laboratory Investigation done on the victim 'X', gave the opinion as follows:

- There is no evidence of recent sexual intercourse on her person;
- ii. There is no recent injury on her body or private parts;
- iii. Her actual age is above 18 years.
- Ext. 4 is the Medico-legal Report wherein Ext. 4(1) to Ext. 4(3) are the signatures of the MO.
- 34) The learned defence counsel laid stress in his argument that according the MO, old tear on the hymen denotes more than 72 hours. It is submitted that the victim was a consenting party and she was accustomed with sexual intercourse. The alleged incident took place on 07-11-15 and the victim was examined on the next day on 09-11-15 and an old tear which was more than 72 hours was detected. It is submitted by the learned defence counsel that old tear was not a result of the incident, because the old tear was older than 72 hours and the incident occurred between 72 hours from the time of the incident qua the examination of the victim by the MO PW-10.
- 35) After scrutinizing the evidence of all the witnesses, it is held that the evidence of the victim does not inspire confidence. It is also held that the victim is not a minor. Thereby, the accused is not held guilty of the offence under Section 4 of POCSO Act. The accused is also not held guilty of Section 376 IPC due to major contradictions apparent on the face of the record.
- 36) The IO conducted the investigation and he is a formal witness. SI Cheniram Pagag testified as PW-9 that on 08-11-15, he was at Borbam Outpost. On that day, at about 7:45 am, he received telephonic information from the VDP Secretary Sri Biren Baruah (the accused person's father) and he registered a GE Entry No. 128 dtd. 08-11-15 and proceeded to the place of occurrence. The accused person's house was gheraoed (surrounded) by the villagers and he tried to control the situation. He recorded the statements of the witnesses

and seized one black and red sweater from the courtyard as identified by the

victim. Ext. 1 is the Seizure-List and Ext. 1(1) is his signature. Then he went

to the outpost along with the accused and the victim. He received an FIR

from Sri Debaru Kishan and registered a Borbam Outpost GD Entry No. 134

dtd. 08-11-15a d forwarded the same to the OC of Tingkhong Police Station

and registered a Tingkhong PS Case No. 130/15 under Section 376 IPC, read

with Section 4 of POCSO Act and endorsed him with the investigation. Ext. 3

is the FIR and Ext. 3(1) is the signature of the OC of Tingkhong Police

Station. He recorded the statement of the informant and forwarded her for

medical examination and to the Court for recording her statement. On finding

prima facie materials, he submitted Charge-Sheet against the accused. Ext. 6

is the Charge-Sheet and Ext. 6(1) is his signature.

37) I have carefully scrutinized the entire evidence and it has already been held

in my foregoing discussions that the testimony of the victim does not inspire

confidence. It is held that the prosecution failed to prove beyond reasonable

doubt that the accused committed rape on the victim. The victim is not held

to be reliable. The accused Sri Nilip Baruah is thereby acquitted from the

charges under Section 376 IPC, read with Section 4 of POCSO Act.

Judgment is signed, sealed and delivered in the open Court on the 28th day of

September, 2018.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

APPENDIX POCSO Case No. 7/16

List of witnesses for prosecution:

- 1. PW-1 Sri Debaru Kishan;
- 2. PW-2 Sri Biren Baruah;
- 3. PW-3 Sri Kolia Kishan;
- 4. PW-4 Sri Lakhinath Kishan;
- 5. PW-5 Smti. Monika Baruah;
- 6. PW-6 The victim 'X';
- 7. PW-7 Sri Monsai Kishan;
- 8. PW-8 Smti. Priyanka Hazarika Nair;
- 9. PW-9 SI Cheniram Pagag; and
- 10. PW-10 Dr. Mohsina Ahmed.

List of exhibits for prosecution:

- 1. Ext. 1 Seizure-List;
- 2. Ext. 2 Statement of the victim recorded under Section 164 CrPC;
- 3. Ext. 3 Ejahar;
- 4. Ext. 4 Medico-legal Report;
- 5. Ext. 5 Sketch-Map; and
- 6. Ext. 6 Charge-Sheet.

List of material exhibits for prosecution: Nil.

List of witnesses for defence: Nil.

List of exhibits for defence: Nil.

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.