IN THE COURT OF SESSIONS JUDGE DARRANG, MANGALDAI.

PRESENT: Sri A.Bhattacharyya,A.J.S., Sessions Judge. Darrang,Mangaldai.

Spl(POCSO) No.14 of 2016

(U/S: 376 I.P.C. R/W Sec. 4 of POCSO Act).

State Versus

Saidul Islam, S/O Md.Abdul Latif Vill- Duliapara, P.S.- Dalgaon Dist-Darrang(Assam)

--Accused.

APPERANCE:

For the Prosecution: Sri P.Sarma, P.P., Mangaldai

AND

For the accused : Sri Hitesh Deka, Advocate.

Evidence recorded on: 23/12/16, 02/02/17, 16/02/17, 16/03/17,

30/03/2017 and 27/10/2017,

Argument heard on : 20/02/2018 and 05/03/18.

Judgment delivered on: 06/03/2018.

JUDGMENT:

- 1. One Miss Rahima Khatun vide an ejahar on 06/10/2016 states before the Daipam Outpost under Dhula Police Station that on 04/10/2016 at about 12.30 p.m. during absence of inmates in her house the accused named above covered her mouth and dragged her inside the house. Thereafter, the accused committed rape upon her. After committing rape the accused left her house. Later on, she raised alarm. Hearing her cries neighbours rushed to the spot and asked her about the incident. She narrated the incident to the people. Then the village headman took the responsibility of village 'bichar', but they failed to settle the matter in the village 'bichar', that is why the delay was caused to lodge the ejahar.
- 2. On the basis of the aforesaid ejahar Dhula Police Station registered a case and took up the investigation. At the Conclusion of the investigation the Dhula P.S. laid the charge sheet U/S 376(2)(i) I.P.C. read with Section 4 of POCSO Act.
- 3. On being forwarded the case record by the learned Chief Judicial Magistrate, Darrang, Mangaldai and on appearance of the accused the charge U/S 376 I.P.C. read with Section 4 of POCSO Act are framed against the accused. Charge so framed are read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 4. During trial, the prosecution side after examining as many as 9(nine) PWs closed their side. The statement of the accused U/S 313 Cr.P.C. was recorded. The accused declined to adduce evidence.
- 5. I heard the arguments of the case from both the parties.
- 6. Now the point for determination in this case will be as to:

(i) Whether the materials surfaced in the testimonies of the PWs during trial would warrant the conviction of the accused U/S 376 I.P.C. read with Section 4 of POCSO Act or not?

DECISION AND REASONS THEREOF:

- 7. To answer the aforesaid point for determination let us have a look at the evidences on record.
- 8. PW1 Saidur Rahman being the scribe of the ejahar during trial and in his examination-in-chief states as follows:
 - 'He knows Smti. Rahima Khatun. As per her diction he has written one FIR on 06/10/16. He has read over the contents of her and after she admits the same corrected he took her signature on the FIR. Ext.1 is the FIR, Ext.1(1) is the signature of Rahima Khatun and Ext.1(2) is his signature as scribe."
- 9. PW2 Rahima Khatun being the victim cum informant of the case during trial and in her examination in chief states as follows:
 - The incident occurred about two and half months ago . It was the fourth day of that month. On that day her father has gone for fishing and her mother has gone outside . At that time ,she was cleaning fish and then the accused Saidur Islam came and brought her inside their home and , he removed her cloth and committed sexual intercourse with her. He gagged her mouth with cloth. At the time of occurrence her younger sister Jinnat Tara Khatun aged about 8 years came and seen the incident and raised alarm. Thereafter, accused Saidur put on his cloth and fled away. Her mother arranged one meeting but the accused fled away. No meeting took place for which there was delay in lodging the FIR. After three days of the incident, she lodged the FIR. Ext.1 is the FIR, Ext.1(1) is her signature. Police produced her before the Magistrate, who recorded her 164 Cr.P.C. statement. Ext.2 is the 164 Cr.P.C. statement, ext.2(1) and 2(2) are her

signatures. She was also medically examined. The accused resides near their home."

- 10. During cross examination she states as follows:
 - " She called the accused as brother but he is not related to her. The house of the accused is adjacent to their home. On the northern side of her home is the house of her maternal grant father and on the southern side is the house of the accused person. In the eastern side there is no home. On the southern side of their home there house of Sandu, Kala Habi, Rusul, At the time of incident no member from the above named family came to their home. In the FIR she has not written that at the time of occurrence her father went to fishing and her mother went outside of home. In the FIR she has not written that at the time of occurrence her younger sister Jinnat Tara Begum came to the place of occurrence. In the FIR she has not written that at the time of occurrence she was cleaning the fish. Police recorded her statement. In her 161 Cr.P.C. statement she has not stated before the Police that her younger sister Jinnatara Begum came to the place of occurrence and raised alarm. Their family has boundary dispute with the accused person."
- 11. PW3 Mustt. Maimana Khatun being the mother of the victim during trial and in her examination-in-chief states as follows:
 - ,, The victim is her daughter. She knows accused Saidul. About 4 months ago at around 12.30 p.m. the incident occurred. On that day she was not at home. After returning home she found her victim daughter crying. She asked her as to why she is crying and she replied that the accused Saidul committed rape upon her. She beat her daughter and gave 'bichar' to the village people. In the village bichar it was decided that the victim would be given in marriage with accused Saidul with Maharana of Rs.100000/-(One lakh) and ornament of Rs.30,000/-(thirty thousand). One samajnama was prepared and the same is in the custody of Dewani Baharul Islam Master. Kazi was called. Thereafter the accused went to

take bath and fled away. Thereafter, they filed the case and as such there was delay in lodging the F.I.R."

12. During cross examination, she states as follows:

'The incident occurred on the 4th day of a month. She does not remember the month's name. Her husband works in the cultivation field and also works as a daily wage earner. On the day of occurrence she went to the house of Matleb. The distance between the house of Matleb and her house is about 200 metres. The houses of Isab, Aziz, Mosul, Gabi, Matin, Hannan, Mannan, Mainal, Rafique, Chand Miya etc. are situated in between their houses. On the day of occurrence the above named persons have not seen the accused coming into their home. After her return she has found her victim daughter alone at home. She does not know whether her daughter raised any alarm or not at the time of occurrence. When she reached home the neighbouring people were also not present at the place of occurrence. Police recorded her statement."

13. PW4 Mustt. Sahida Khatun during trial and in her examination-in-chief states as follows:

"She knows accused Saidul. She also knows the victim Rahima. The incident occurred about 3 months ago at around 12 noon. On that day she went to visit her mother's home at Gulandi. Her mother's name is Mohsina, wife of Matleb. The victim is her sister-in-law. On that day while her sister-in-law was crying she asked her as to why she is crying and then she replied that the accused committed rape upon her. Thereafter, one village bichar was given where it was decided that the accused would marry her and the Maharana was fixed at Rs.100000/- and ornament was fixed would be given of Rs.30,000/-. After Kazi was called the accused fled away. After 3 days of fleeing of the accused the present case was filed."

- 14. During cross examination she states as follows:
 - The distance between her parent's home and in her in-laws home is about 300 metres. Matleb Ali is her father. She went to her parent's home on the day of occurrence at around 10 a.m. She returned to her in-laws home at 12 noon. After returning home she found Rahima alone at home. Houses of Habi, Sandhu and the accused were adjoining to their home. After her return she has not found the neighbouring people in their home. She has not heard any alarm being raised by the victim at the time of occurrence. In the village meeting village people were present. Salam and Baharul were present. She does not know the others. After 3 days of the village meeting her mother-in-law lodged the FIR."
- 15. PW5 Md. Abdul Matin during trial and in his examination in chief states as follows:

 'He knows the victim girl. He also knows the accused Saidul. About 3 months ago one day at around 7 p.m. while he was proceeding to his uncle's home to bring cow on the way in the house of Rahima he has seen a village meeting going on. He entered into the meeting and came to know that the village bichar is going on regarding the relationship of accused Saidul with the victim girl. In the bichar it was decided that accused would marry the victim and Maharana was fixed at Rs.100000/- and ornament worth Rs.30,000/- was fixed to be given by the accused. In that meeting he has not seen Saidul . He has seen his father, mother and grandfather. Thereafter, he returned home. Later he came to know that no marriage took place between the accused and the victim. One Samajnama was prepared in that meeting. The said Samajnama is in the custody of Baharul."
- 16. During cross examination he states as follows:
 - " His house is at a distance of about 200 metres from the house of the victim girl. The victim is not his relative. Police recorded his statement."
- 17. PW6 Md. Nur Islam during trial and in his examination-in-chief states as follows:

"He knows accused Saidul Rahman. He is present in the dock today. The victim Rahima Khatun is his daughter. She is aged about 14 years. The incident occurred about 4 months ago at about 12.30 p.m. At that time he was in the field. His wife went to visit the house of Matleb. He returned to home at about 12.30 p.m. and seen his daughter crying. On being asked her daughter stated to him that while she was cleaning fish the accused Saidul came , raped her from back side, lifted her and took her inside the home and committed rape upon her. He has given one village 'mel 'on the night of the occurrence. The accused was also present . In the meeting it was decided that the accused would marry the victim girl and Rs.100000/(one lakh)- was fixed to be paid by the accused person and Rs.30,000/- worth of ornament were fixed to be given by the accused in the marriage. Thereafter the Kazi was called for. When the Kazi arrived the accused fled away. The document was prepared regarding the proceeding of the meeting which is lying in the hand of Baharul. In the meeting the accused confessed his quilt. After 3 days of the incident this case was lodged by his daughter."

18. During cross examination he state as followes:

- ' He is the father of the victim. The accused person is not his relative, but he was treated as a nephew by him. He has not furnished birth certificate of his victim daughter. He was told about the incident by his younger daughter Jinnat Tara Begum. Jinnat Tara Begum is aged about 7/8 years. Jinnat Tara stated to him that she has seen the incident. FIR was lodged after 3 days of the incident. He also went to the Police Station at the time of lodging the FIR. Police recorded his statement. He does not know whether he has mentioned in the FIR the reasons of delay of 3 days in lodging the same.
- 19. PW7 Dr. Mrs Pranita Das during trial and in her examination-in-chief states as follows:
 - " On 7/10/16 she was working at Kharupetia CHC hospital as Senior Medical and Health Officer. On that day she examined Rahima Khatun, D/o Md. Nur Islam,

village Duliapara in connection with Daipam Out Post GD entry No.99 dated 6/10/16, escorted by WPC Jumuna Boro, the girl was examined in presence of Maimana Khatun, mother of the victim and on examination found the following:

Identification mark: One black mole on the middle of both eye brows, history of assault on 4/10/16 at around 12.30 p.m. history of attainment of monarchy about one year back. History of menstruation about 25 days back.

Physical examination: Height: 4 ft. 10 inches, weight: 35 KGs, teeth: 14/15, hair: black, normal, auxiliary hair: present, pubic hair: present, breast: developed, hymen absent, Vulva normal, uterus clinically not palpable. Vagina: normal, labia, mazora, minora: normal.

Any injury mark in her private part: No. Mental condition: co-operative, fully conscious. Vaginal swab examination for spermatozoa: No spermatozoa seen., report No.181. X-ray for age determination: Approximate age 16 to 17 years. USG report reveals normal echo feature of organs imaged. During of pregnancy: Not found.

Remarks:

- 1)No evidence of recent coitus found;
- 2)No injury or violence marks found on her private parts;
- 3)Age of the victim is approximately 16 to 17 years.

Ext.3 is the Medical Report, Ext.3(1) isher signature. Generally spermatozoa loses all its importance after 24 hours of sexual intercourse.

- 20. During cross examination she states as follows:
 - " The history of assault was narrated by the victim. During medical examination she has not found any evidence of assault on the victim."
- 21. PW8 Md. Habibur Rahman was declared hostile. During trial and in his examination in chief he states as follows:

"He knows the accused Saidul Rahman. Nur Islam has five daughters and he knows them. He does not know anything about the incident as he went to the market on that day."

22. PW9 Nur Zaman Hazarika being the I.O. during trial and in his examination-inchief states follows:

"On 06/10/2016, he was working as I/C at Daipam Outpost under Dalgaon P.S. On that day complainant Rahima Khatun lodged an FIR before Daipam O.P. and on receipt of the same he recorded GD entry No.99 dated 06/10/2016 and forwarded the same to the O/C, Dalgaon P.S. for registration of the case under proper Section of law. In the meantime, he took up the investigation of the case. After having receipt of the FIR the O/C, Dalgaon P.S. registered a case vide Dalgaon P.S. case No.749/16 U/S 376(2)(1) IPC, read with Section 4 of POCSO Act and he was entrusted for investigation of the case. During investigation, he recorded the statements of the witnesses U/S 161 Cr.P.C. including the victim and then he visited the place of occurrence, prepared a sketch map of the place of occurrence. He had arrested the accused and sent the victim for medical examination and procured her medical examination and sent the victim for medical examination report. He also got the statement of the victim recorded U/S 164 Cr.P.C. by a Magistrate. On completion of investigation, he laid the charge sheet against the accused Saidul Islam U/S 376(2)(1) IPC, read with Section 4 of POCSO Act. Ext.1 is the FIR, Ext.1(3) is his signature with note and Ext.1(4) is the signature of Haricharan Pathak, the O/C, Dalgaon P.S. which is known to him. Ext.4 is the sketch map, Ext.4(1) is his signature. Ext.5 is the charge sheet, Ext.5(1) is his signature.

PW8 Habibur Rahman has stated in the statement recorded U/S 161 Cr.P.C. that 'on 04/10/16 he returned from Bechimari in the evening and after returning he came to know from the wife of Nur Islam that on that day at around 12.30 p.m. Saidul Islam in absence o0f the family members of Nur Islam committed rape upon Rahima Khatun by gagging her mouth. In this regard, Nur

Islam has given bichar before the village people, but the decision of the bichar was not accepted by Saidul Islam and his family members."

23. During cross examination he states as follows:

'As per the FIR the incident occurred at around 12.30 p.m. on 04/10/2016. The FIR was received on 06/10/2016 at 3.00 p.m. The distance between the place of occurrence and the Daipam Outpost is 5 KMs. He recorded the statement of the nearby persons of the place of occurrence namely Maimana Khatun, Habibur Rahman, Abdul Matin, Sahida Khatun. As per the sketch map in the north of the place of occurrence there is the house of Habibur Rahman, in the south there is the house of the accused, in the east there is the house of Habibur Rahman and vacant land of the father of the victim. In the west there is betel nut orchard . He did not seize any material in connection with this case. he did not seize any letter or any resolution of samajnama as regards to the decision of the village mel held in connection with this incident. No one produced such documents before him at the time of incident of investigation. On 07/10/2016 he sent the victim for medical examination. He has not recorded any explanation in the CD as to why there was delay in sending the victim for her medical examination. The statement of the victim recorded U/S 164 Cr.P.C. was recorded on 14/10/16 who was at that time kept in the State Home. There was no explanation of delay in sending the victim girl for recording her 164 Cr.P.C. statement though she appeared before him on 08/10/2016. He did not collect any birth certificate of the victim to determine her actual age nor the victim or her family members produced such documents before him.

PW2 Rahima Khatun did not state before him U/S 161 Cr.P.C. statement that her younger sister Jinnat Ara Begum came to the place of occurrence and raised alarm.

PW2 Rahima Khatun did not state in her statement U/S 161 Cr.P.C. that the accused tied her with churni.

PW3 Maimana Khatun did not state in her statement recorded U/S 161 Cr.P.C. that one samajnama was prepared and that it was decided in the meeting that the accused would marry with Moharana of Rs.100000(One lakh) and ornaments worth Rs.30,000/-.

PW4 Shahida Khatun had not stated in her statement U/S 161 Cr.P.C. that marriage was fixed between the victim and the accused in the village meeting with Maharana Rs.100000/-(one lakh) and ornament worth Rs.30,000.00.

PW5 Abdul Matin had not stated in his statement U/S 161 Cr.P.C. that he entered into a meeting and came to know that a village bichar was going on regarding the relationship of the accused Saidul with the victim girl and in that meeting it was decided that the accused would marry the victim and Moharana was fixed at Rs.1 lakh and ornaments worth Rs.30,000.00 to be given by the accused.

PW6 Nur Islam had not stated in his statement U/S 161 Cr.P.C. that in the village meeting it was decided that the accused would marry the victim girl and Rs.1 lakh was fixed by the accused and ornament worth Rs.30,000.00 had to be given by the accused at the time of marriage and that at that time kazi was also present."

- 24. So these are all about the evidences on record. Here in this case, the accused is facing trial U/S 376 I.P.C. read with Section 4 of POCSO Act. The ingredients of Section 376 I.P.C. are narrated herein below:
 - "Section 376 IPC deals with the punishment for committing rape and the rape has been defined U/S 375 I.P.C. which is reproduced for consideration:
 - **'S.375**. A man is said to commit 'rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.-Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exceptions.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age , is not rape.

- 25. Section 4 of POCSO Act prescribes punishment for penetrative sexual assault and the definition of penetrative sexual assault is narrated U/S 3 of POCSO Act. The Section 3 of penetrative sexual assault is taken as follows:
 - "3. Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if-
 - (a)he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."
- 26. Now, it is to be ascertained as to whether the evidences on record would generate the ingredients as stated herein before or not.
- 27. On a minute perusal, it is revealed that here in this case the victim(PW2) is the informant. The victim in the FIR and in her statement recorded U/S 164 Cr.P.C. stated that at the time of incident she was alone in the house. But during trial she stated that at the time of incident her younger sister Jinnat Tara Khatun aged 8 (eight) years came and had seen the incident and also raised alarm. The evidence of I.O.(PW9) shows that PW2 did not state before the I.O. U/S 161 Cr.P.C. statement that her younger sister Jinnat Ara Begum came to the place of occurrence and raised alarm. Further, she did not state before the I.O. that the accused tied her with 'Surni'. Considering the aforesaid facts and circumstances the younger sister Jinnat Ara was one of the vital witnesses, but the prosecution did not examine her. Since the prosecutrix makes some improvement of the prosecution story during trial as regards the seeing of the incident by her younger sister, so the same amounts to contradiction. This apart, the victim of the incident stated her age as 14 years, but the prosecution did not submit and exhibit any authentic document as to her age. On the other hand, doctor on examination found that the age of the victim was approximately between 16 to 17 years. Also the Doctor did not find any injury or mark of violence on her private parts. The PWs in their respective testimonies floted the story of village 'bichar' to settle the dispute but the said story also turned to be afterthought as revealed from the testimony of the I.O. before whom they did not state about the village 'bichar'. Further, the victim(PW2) in her testimony clearly admitted that her family had boundary dispute with the accused person. This apart, there is delay of 2 days in

lodging the ejahar. The informant, who happens to be victim stated that the incident was brought to the "village bichar" and for the same the said delay was caused. Her (PW2's) aforesaid depositions were supported by her mother(PW3), her sister-in-law(PW4) and PW5, PW6. But the story of "village Bichar" was turned out to be afterthought. As a result of which the causes of delay in lodging the ejahar has not been satisfactorily explained.

- 28. Therefore, considering the facts and circumstances as narrated above, the prosecution story can be summarised in the following manner:
 - (1) There is delay of 2 days in the lodging the ejahar. But the causes of delay have not been explained by the prosecution satisfactorily.
 - (2) According to the prosecutrix, her sister Jinnat Ara Tara Khatoon had seen the incident and also raised alarm. She was vital witness. But she was not examined by the prosecution.
 - (3) As per version of the prosecution, her house is surrounded by a nos. of persons namely Sandu, Kala Habi, Rusul. Had she on her(victim) sister Jinnat Tara Khatoon raised alarm the inmates of the house of aforesaid persons would have heard her cries and would have come to place of occurrence. Thus it is clear that neither the victim nor her sister did raise alarm.
 - (4)The Medical Officer, who examined the victim did not find evidence of recent coitus nor found mark of injury or violence on her private parts. Also the Medical Officer found that the age of victim was in between 16 to 17 years. Thus the victim was a grown up girl.
 - (5) The victim had admitted during trial that her family had boundary dispute with the family of accused. From the said reason false implication of the accused cannot be ruled out.

- 29. For the reasons stated above, it cannot be concluded that the materials so far surfaced during trial have generated sufficient and cogent grounds to record the conviction of the accused under the offences alleged of. Therefore, due to insufficient evidences the accused is entitled to get the benefit of doubts.
- 30. Accordingly, the accused Saidul Islam is acquitted on benefit of doubt and set at liberty forthwith. His bail bond shall be discharged in due course of law.

Judgment is delivered in the open Court.

Given under my hand and seal of this court today on this 6th day of march,2018.

Dictated and corrected by me and each page bears my signatures.

(A.Bhattacharyya) Sessions Judge, Darrang,Mangaldai.

Sessions Judge, Darrang, Mangaldai.

APPENDIX:

A)Prosecution witnesses:

i)PW1 Md.Saidur Rahman

ii)PW2Rahima Khatun

iii)PW3 Mustt. Maimana Khatun

iv)PW4 Mustt. Sahida Khatun

v)PW5 Md. Abdul Matin

vi)PW6 Md. Nur Islam

vii)PW7 Dr.Mrs. Pranita Das

viii)PW8 Md. Habibur Rahman

ix)PW9 Nur Zaman Hazarika

B) <u>Defence witnesses</u>: Nil.

C)Exhibits:

i)Ext.1 FIR

ii)Ext.2 statement.

iii)Ext.3, medical report

iv)Ext.4 Sketch map

v)Ext.5 charge sheet

Sessions Judge, Darrang, Mangaldai.