IN THE COURT OF SPECIAL JUDGE :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

<u>Spl. (P) Case No. 04 of 2019</u> <u>u/s 366/376(3) IPC & Section 6 of POCSO Act, 2012</u> (Arising out of Bihubar PS Case No. 17/2018)

State of Assam

-Vs-

Sri Ajay Sabar Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. D.K. Gohain, Advocate

(Legal Aid Counsel)

Date of framing Charge : 12.02.2019

Dates of Evidence : 27.03.2019, 09.04.2019, 22.04.2019,

20.05.2019

Date of S/D : 03.06.2019
Date of Argument : 03.06.2019
Date of Judgment : 17.06.2019

JUDGMENT

- 1. Prosecution case in brief is that on 14.08.2018, informant Smt. Drupadi Tassa lodged an FIR with O/C, Bihubar PS alleging, inter alia, that on 10.08.2018, at about 12 noon, her 14 years old grand-daughter victim 'B' (name withheld), who is a student of class IX at Rangajan High School, while returning from her school, eloped with the accused Sri Ajay Sabar of Santak 107 No. Grant, Santak with a purpose to perform marriage.
- 2. On receipt of the FIR, Bihubar PS Case No. 17/2018 u/s 366 IPC r/w Section 4 of POCSO Act was registered and investigated. During investigation, victim was recovered from the house of accused. She was

medically examined and also got her statement recorded u/s 164 Cr.P.C. Accused Ajay Sabar was arrested and forwarded to Court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 366 IPC, read with Section 4 of POCSO Act, 2012.

- 3. On receipt of the charge sheet, cognizance of offence u/s 366/376(3) IPC read with Section 6 of POCSO Act, 2012 was taken and after furnishing copy to the accused, vide order dated 12.02.2019, charges u/s 366/376(3) IPC, read with Section 6 of POCSO Act, 2012 has been framed against the accused to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined seven witnesses including MO and IO. Accused face the trial as UTP and was provided with the services of Legal Aid Counsel.
- 4. Upon completion of the prosecution evidence, accused was examined u/s 313 Cr.P.C. After hearing both the sides u/s 232 Cr.P.C, and observing that it is not a case of no-evidence, accused was called upon to enter into defence to which he declined to adduce evidence in defence. Defence case is that the victim on her own came to the accused and thereafter they lived as wife and husband for about 2 months in a rented house at Sanpura and then for 1 month at the residence of accused till recovery by police. Accused also admitted that at the time of recovery, victim was pregnant through him.
- 5. I have heard argument of Id. Special P.P. Mr. Srimanta Gogoi and Mr. D.K. Gohain, learned Legal Aid Counsel and gone through the evidence on record. I have considered the submission of both the sides.

6. <u>POINTS FOR DETERMINATION ARE</u> -

- (i) What was the age of the victim on 10.08.2018?
- (ii) Whether on 10.08.2018, accused kidnapped/abducted the victim? If so, what was the intention of the accused behind such kidnap/abduction?
- (iii) Whether on 10.08.2018 or thereafter, accused committed aggravated penetrative sexual assault/rape on the victim?

DECISION AND REASONS THEREOF

- 7. PW-1 Sri Drupadi Tassa, grandmother of the victim, in her evidence deposed that accused Ajay Sabar is her nephew. Victim B is living with her since her childhood. Victim is presently aged about 14 years. At the time of incident, victim was a student Rangajan High School. On 10.08.2018, as victim did not return from her school at usual time, she sent her relatives to search her and during search, on the next day morning, father of the accused informed her that on the previous night, accused Ajay and victim stayed in the house of his daughter at Santak T.E Line No. 3 and today they eloped therefrom. They continued the search. On 4th day of missing, she lodged FIR at Bihubar PS. After about 3 months of elopement, on knowing that accused and victim has returned to his house, she informed the matter to police and accordingly police apprehended the accused and recovered the victim from the house of accused at Santak Hatkhola. Police took the victim for medical examination and also brought her to Court. For about a week Victim kept at safe home and again brought to Court. From Court she was given in her custody. Parents of accused refused to accept the victim. On asking, the victim informed her that accused took her with him by alluring her and used force on her. In her cross examination, PW-1 admitted that while giving statement to police, she has not mentioned that "during search, on the next day morning, father of the accused informed her that on the previous night accused Ajay and Victim stayed in the house of his daughter at Santak T.E Line No. 3 and today they eloped therefrom." She denied that while giving statement to police, she has not stated that "On asking, the victim informed her that accused took her with him by alluring her and used force on her." She denied that her claim on age of victim age 14 years and that she was a student of Rangajan High School are false.
- 8. PW-2 the victim B in her evidence deposed that accused Ajay Sabar is known to her being cousin of her mother. From child hood, she resided with her grandmother Drupadi Tassa at Nepali Khuti, Bihubar. Her parents reside at Bamunpukhuri under Bihubar PS. She is presently aged about 15

years. At the time of incident of this case, she was a student of class IX. On 09.08.2018, she went to school and after school break at about 2.00 PM, she came to Santak with accused Ajay as she had love affairs with him. He brought her to his brother's house at Santak and stayed there for the night. On the next day, Ajay brought her to Sanpura and kept her in the house of Dou. He started working in a tent house. They stayed there for 2 months. Thereafter, he brought her to his house at Santak Line No. 7 and stayed there for about one month. Thereafter, police recovered her from the house of accused and took them to police station. Police took her for medical check up and also in Court. On that, she gave her statement in Court. Exbt. 1 is her statement. Exbt. 1(i) is her signature. On that day, she deposed in similar line as deposed today. While she was taken for medical checkup, she was pregnant but after returning home, due to fall by slip, her pregnancy was aborted. She was pregnant through accused Ajay. Police interrogated her. In her cross examination, PW-2 admitted that having love affairs, she on her own eloped with the accused Ajay and stayed with him. While going with Ajay, she did not make any hue and cry nor informed any person about bringing her against her will. She denied that while giving statement to police or in Court, she has not stated that "she was pregnant but after returning home, due to fall by slip, her pregnancy was aborted. She was pregnant through accused Ajay." She denied that Ajay never co-habited with her. She denied that she was not pregnant through Ajay. At the time of incident, she was a student at Rangajan High School. She also studied at Bihubar Hiloni M. E School upto class VIII and took admission at Rangajan High Scholl in class IX. She did not read in class IX of Bihubar Hiloni High School. She denied that she has deposed falsely on her age as 14 years. She denied that her age is above 19 years.

9. On her re-examination, PW-2 Victim proved her SEBA Registration Card of class IX as Exbt. 2. In this card her date of Birth is mentioned as 15.04.2004. In her cross examination, PW-2 deposed that in Exbt. 2, the school name of Bihubar Hiloni High School is mentioned. She never read at Bihubar

Hiloni High School. She denied that Exbt. 2 is not her school registration card. Exbt. 2 was not seized by police.

- 10. PW - 3 Sri Krishan Karmakar in his evidence deposed that victim is living with her grandmother Drupadi Tassa since her childhood. At the time of incident, Victim was a student of class IX Bihubar Hiloni High School. On 10.08.2018, as Victim did not return from her school at usual time, on knowing this from Drupadi Tassa, they searched for her. During search, he came to know that school bag of Victim was kept in one shop at Bihubar. On this, he went there and brought the bag. Shopkeeper told them that victim kept the bag by saying that she is coming shortly. After 2-3 days, Drupadi lodge FIR at Bihubar PS. During search, they came to know that accused was also missing from his house and then suspected that accused has taken away the victim as he use to visit the house of Drupadi. Subsequently victim was recovered. He did not ask Victim about the incident. In his cross examination, PW-3 denied that while giving statement to police, he stated that "on 10.08.2018 at about 12 noon Victim returned from Rangajan High School; that he heard that she eloped with Ajay Sabar on her own." He denied that his evidence that Victim was a student of Bihubar Hiloni High School is false.
- 11. PW-4 Sri Prakash Panika in his evidence deposed that on 10.08.2018, as Victim did not return from her school at usual time, on knowing this from Drupadi Tassa, they searched for her. On this incident Drupadi lodge one FIR at Bihubar PS. After about a month or more, Victim was recovered by police. He heard that she was recovered from the house of accused. He did not ask Victim about the incident. In his cross examination, PW-4 deposed denied that while giving statement to police, he stated that "Victim eloped with Ajay Sabar after school break from Rangajan High School."
- 12. PW-5 Dr. Sundar Changmai the medical officer in his evidence deposed that on 13.11.2018, at 12.30 PM, on police requisition, he examined victim B of Bihubar Nepali Khuti Village, in connection with Bihubar P.S. Case No. 17/18. General history of patient is on 08.08.2018 she left home with Ajay

Sabar of Santak 107 Grant. On examination of victim, he found that (i) her age is between 12-15 years, (ii) No evidence of injury on her body & private parts, (iii) Presently around 8 weeks of pregnancy. Ext. 3 is the medical examination report and Ext. 3(1) is his signature. Ext. 3(2) is the radiological report as received online. In the radiological report, there is mention of non-united lower ulna and radius and completely developed elbow joint. He has mentioned the age as stated by the radiologist in Ext. 3(2). In his cross examination, PW-5 deposed that as per his personal opinion on the above x-ray findings, the girl should be aged below 16 years. He denied that the age mentioned in the medical report and in his report is not as per medical jurisprudence.

- 13. PW-6 Smt. Bimala Sarma in her evidence deposed that victim is living with her grandmother (Nani) since her childhood. On 10.08.2018, at about 4 PM grandmother of the victim came to her house and informed that Victim did not return from her school. Victim was reading in class IX. On this incident, Victim's Grandmother lodge one FIR. After 3-4 days, Victim's Grandmother informed her that Victim eloped with the accused. After few months she met Victim at her residence but she did not tell her about the incident. Cross examination of PW-6 was declined by defence.
- 14. PW-7 ASI Pabitra Konwar in his evidence deposed that on 14.08.2018, FIR was received from Smt. Drupadi Tassa and Bihubar PS case No. 17/18 u/s 366 IPC r/w Section 4 of Pocso Act was registered. Exbt. 4 is the FIR. On the next day, he went to the place of occurrence i.e. residence of informant at Nepali Khuti Gaon and drawn a sketch map of the PO. Exbt. 5 is the said sketch map. During investigation, he came to know that victim has eloped with Ajay Sabar. He went to the house of accused but did not find the victim and Ajay Sabar in his house. On 12.11.2018 on getting information that the victim and accused Ajay were in their house, he went to the house of accused and recovered the victim from the house of accused Ajay Sabar at 107 No. Grant, Santak under Bihubar PS. On 13.11.2018, victim was sent for medical examination and also sent to Court for recording her statement u/s 164 Cr.P.C. Accused was arrested and forwarded to Court. During investigation, he Page 6 of 16 Spl. (P) Case No. 04/2019

has collected the medical report and statement given by victim in court. On completion of investigation, he has submitted charge sheet against the accused u/s 366 IPC and section 4 of POCSO Act. Exbt. 6 is the charge sheet. In his cross examination, PW-7 deposed that as per the statement of victim given u/s 164 Cr.P.C, the victim has stated that she eloped with accused on 08.08.2018. FIR was lodged on 14.08.2018. In the FIR there was no mention of delay in lodging the FIR. He has not investigated on the cause of delay in lodging the FIR. As per the sketch map, road to Bihubar Hiloni. Several houses were shown near to the place of occurrence. He has not examined any of them. Witness Druapdi Tassa did not state before him that "On asking Victim, she informed her that accused took her with him by alluring her and used force her." Victim did not state before him that "she was pregnant but after returning home, due to fall by slip, her pregnancy was aborted and that she was pregnant through accused Ajay." In the FIR, there was mention that victim was studying Rangajan High School. He has not investigated on her age by going to school. Witness Krishan Karmakar in his statement has stated that "on 10.08.2018 at about 12 noon victim returned from Rangajan High School and he heard that she eloped with Ajay Sabar on her own." Witness Prakash Panika in his statement has stated that "Victim eloped with Ajay Sabar after school break from Rangajan High School." PW-7 denied that, he has not investigated the case properly.

- 15. Basing on the above evidence on record, let me decide the points formulated.
- 16. Point No I: So far age of the victim is concerned, on the date of evidence i.e. on 27.03.2019 the victim claimed her age as 15 years. Victim also stated that she is a student of class IX at Bihubar Hiloni High School. On her re-examination on 09.04.2019, the victim has proved SEBA Registration Card of class IX as Exbt. 2 and in the said Registration Card date of birth of the victim is mentioned as 15.04.2004. In her cross examination the victim admitted that in the said Exbt. 2 the name of the school is mentioned as Bihubar Hiloni High School, but she was a student of class IX at Rangajan High School. During

investigation, the above Exbt. 2 was not seized by police. PW 1, the informant and maternal grand-mother of the victim in her evidence stated that victim is aged about 14 years. PW 5 Dr. Sundar Changmai in his evidence while proving the medico legal report and the radiological report has deposed that the age of the victim is between 12 to 15 years. He proved his report as Exbt. 3 and report of the radiologist as Exbt. 3 (2). From the evidence of PW 7, the I.O. it appears that he has not collected any document on age of the victim. In his 313 Cr.P.C. examination though the accused claimed that age of the victim was about 18 years, but he did not produce any evidence and failed to dislodge the evidence of the prosecution witnesses as stated herein before particularly on the age of the victim. From Exbt. 2, it appears that on the day of occurrence i.e. on 10.08.2018, the victim was aged about 14 years. Even for the argument sake, it appears that due to difference of name of the school in Exbt. 2, then also the age of the victim as claimed by her which got due support from her grandmother (PW 1) and M.O. (PW 5) clearly shows that she was below the age of 15 years. Considering above, I hold that on the alleged date of incident, age of the victim was between 14 to 15 years.

17. Point No. II: So far fact of taking away of the victim is concerned, the victim in her evidence stated that on 09.08.2018 she went to school and after school break at 2 PM she came to Santak with accused Ajay and there from he took her to his brother's house at Santak where they stayed for the night. On the next she was taken to Sanpura and accused kept her in a rented house for about two months. Thereafter accused brought her to his own house at Santak where she stayed with the accused for about one month. Thereafter police recovered her from the house of accused at Santak. During her cross examination she admitted that having love affairs, she eloped with the accused on her own and stayed with him. Victim also admitted that while going with the accused she did not make any hue and cry nor informed any person about bringing her by the accused against her will. The above fact when put to the accused in his 313 Cr.P.C. examination, accused has categorically admitted that he accompanied the victim from her school and thereafter he took her to his

brother's house at Santak and then he kept her at Sanpura for about two months and thereafter they lived together at his own house at Santak for about one month till apprehended by police. This part of admission of the accused of taking away of the victim and keeping her with him for about three months is an admissible in evidence. The fact of recovery of the victim from the house of the accused after about three months was also confirmed by PW 1 Smt. Drupadi Tassa, the maternal grand-mother of the victim, the other witnesses and PW 7, the I.O. It is in the evidence of PW 7 that on 14.08.2018 the FIR was received and that on 12.11.2018, on getting information that victim and accused Ajay were in their house, he went to the house of accused, recovered the victim, apprehended the accused and brought them to Bihubar PS. In her statement u/s 164 Cr.P.C, (Exbt. 1) the victim reiterated that having love affairs with the accused Ajay for last about one year and as her grand-mother and parents did not like their relationship, on 08.08.2018, she eloped with accused Ajay willfully and stayed with him at Sanpura for about two months and then returning to the house of accused at Santak and stayed there for about one month. In her 164 Cr.P.C. statement victim also categorically admitted that accused did not kidnap her nor used force on her to go with him; rather she voluntarily went with the accused. Thus, it is clear that the victim on her own, eloped with the accused Ajay and stayed with him for about three months i.e. from 09.08.2018 to 12.11.2018.

- 18. Now the question arose for determination is whether taking away of a minor girl from the protective umbrella of her lawful guardian and accompanying such minor girl and keeping thereafter will amount to kidnap as defined u/s 361 IPC.
- 19. Hon'ble Supreme Court of India in the reported case of S. Varadarajan Vs. State of Madras [AIR 1965 SC 942] held as follows:-
 - 11. It must, however, be borne in mind that there is a distinction between "taking: and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of

- s. <u>361</u> of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.
- 12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".
- 20. In a similar facts of the case in hand, Hon'ble Gauhati High Court in the reported case of Saddam Hussain Vs. State of Assam [2018 (4) GLT 986] has followed the above ratio while setting aside the conviction of an accused u/s 366 IPC though conviction u/s 4 of Pocso was maintained.
- 21. Hon'ble Himachal Pradesh High Court in the reported case of Khyali Ram Vs. State of Himachal Pradesh [1979 Cri. L. J 620], held as follows:-
 - "In order to attract the offence of kidnapping under Section 361, I.P.C, something more had to be proved than mere joining of the accused with the girl. An active participation by the accused in the formation of the intention of the girl either immediately prior or sometime before she left her father's house, was required to be established."
- 22. Hon'ble Supreme Court of India in the reported case Shyam and another vs. State of Maharashtra [AIR 1995 SC 2169] has held that
 - "She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her

away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother."

- By keeping the above law in mind, when we look at the fact of the case in hand, as discussed earlier, it is clear that the victim, who was aged between 14 to 15 years, on her own eloped with the accused and stayed with him for about three months. Victim has categorically admitted that accused did not used force on her to go with him. Thus, it is clear that there is no incriminating material against the accused so far allegation of kidnap is concerned. In the instant case, ingredients of offence u/s 366 IPC or even any other minor offence like section 363 are totally missing.
- 24. So far allegation of rape/aggravated penetrative Point No. III: sexual assault on the victim is concerned, PW 2 the victim in her evidence stated that while she was taken for medical check-up, she was pregnant but after returning home, due to fall by slip, her pregnancy was aborted. Victim categorically stated that she was pregnant through the accused Ajay. She denied that before police she has not stated about her pregnancy and abortion. On looking at the evidence of PW 5 the medical officer, it appears that during medical examination the urine test get positive result of pregnancy and USG examination also reveals SIUP of 8.6 weeks of undetermined viability. In his evidence, the M.O. has confirmed that on the date of examination, the victim carried 8 weeks of pregnancy. The other witnesses are silent on this point. In his 313 Cr.P.C. examination when the fact of pregnancy was put to accused vide question No. 13 and question No. 19, as deposed by the victim and the findings of the M.O., the accused has categorically admitted about pregnancy of victim through him. It is in the evidence that for three months the victim resided with the accused at Sanpura for two months and at Santak for one month as wife and husband. Though during cross-examination, it was brought on record by defence that the victim did not state before police regarding her pregnancy, abortion and that she was pregnant through accused but the

medical evidence and the admission of the accused is found reliable and trustworthy and not disclosing the same before the I.O. can be treated as an omission only. This part of admission made by the accused in his examination u/s 313 Cr.P.C. though not recorded on oath, is admissible as admission of a particular fact for which no further proof is required. Law is well settled regarding admissibility of confession made by an accused during 313 Cr.P.C. examination.

- 25. Hon'ble Gauhati High Court in the case of Mithu Kalita @ Mitu Kalita. --vs-- State of Assam [2006 (1) GLT 393] has explained the law as follows:
 - "(11) Before proceeding any further, therefore, what is important to bear in mind is that though a statement, recorded under section 313 Cr.P.C., is not a statement made on oath and is not, strictly speaking, evidence, yet the statement, so made, can, indeed, be taken into consideration at the trial against the accused for the purpose of arriving at the guilt or otherwise of the accused. In no uncertain words made the apex Court clear this position of law, when it observed and held in State of Maharashtra -vs- Sukhdev Singh and another, reported in (1992) 3 SCC 700, as follows:
 - "51. That brings us to the question whether such a statement recorded under Section 313 of the code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements made by the accused will not be evidence stricto sensu. That is why subsection (3) says that the accused shall not render himself liable to punishment if he give false answer. Then comes sub-section (4) which reads: "313 (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

Thus the answers given by the accused in response to his examination under Section 313 can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, subsection (4) permits that it may be taken into consideration in the said inquiry or trial. ***"

(12) From what has been observed and laid down in Sukhdev Singh (supra), it also becomes transparent that if an accused person, in his examination under Section 313 Cr. P. C., confesses to the commission of the offence (s) charged with, the Court may, relying upon such Spl. (P) Case No. 04/2019

Page 12 of 16

confession, proceed to convict the accused and that it is only if the accused does not confess and/ or choose to explain the circumstances appearing in the evidence against him or sets up his own version of the occurrence claiming to the effect that he had committed no offence, the statement of the accused, made during the, course of examination under Section 313 Cr. P. C., can be considered in its entirety along with other pieces of evidence on record. To put it differently, there is no impediment in law for a Court to found conviction of an accused on his confession made by him during his examination under Section 313 Cr.P.C."

- 26. From close scrutiny of the evidence of the victim, as discussed earlier, it is clear that during her stay with the accused, the victim was subjected to cohabitation with the accused as husband and wife. Though there is no evidence that accused used force on her while cohabitation and her statement as given u/s 164 Cr.P.C. that she lived as wife and husband, which shows that she might be a consenting party to the physical relation with the accused during her stay with him, but her consent becomes immaterial and irrelevant in view of her age, which I have already determined as below 15 years.
- Section 375 IPC provides that a man is said to commit rape with or without consent when the girl is under 18 years of age. Thus any physical relation/co-habitation with a minor girl even with her consent amount to rape as defined u/s 375 IPC/penetrative sexual assault as defined u/s 3 of Pocso Act. Section 5 (j)(ii) of POCSO Act, 2012 provided that making the child pregnant as a consequence penetrative sexual assault, it becomes an aggravated penetrative sexual assault which is punishable u/s 6 of POCSO Act, 2012.
- 28. In this case, prosecution through the admission of the accused of making the victim pregnant and the fact that victim was below the age of 15 years, has been able to prove beyond doubt that accused has committed the offence punishable u/s 376 (3) IPC as well as same was also an offence u/s 6 of POCSO Act, 2012.
- 29. Considering all above, I hold that in this case though prosecution has failed to prove the charge u/s 366 IPC against the accused for the alleged

offence of kidnap, but prosecution has been successful in proving the case beyond reasonable doubt that accused Ajay Sabar has committed the offence of rape/penetrative sexual assault on the minor victim girl as made punishable u/s 376 (3) IPC as well as Section 6 of POCSO Act 2012. Accordingly accused Ajay Sabar is convicted for the above offences. Accused Ajay Sabar is acquitted from the charge u/s 366 IPC.

- 30. I have considered the applicability of Section 3 & 4 of Probation of Offenders Act in this case. Considering the nature of the offence proved by the prosecution and also considering that the punishment provided for the offences may extend to life imprisonment, I am not inclined to extend the benefit of the benevolent provisions of law to the accused.
- 31. Heard the convict on the point of sentence. His statement is recorded in separate sheets. I have also heard learned Advocate for both the sides. By referring to section 42 of Pocso Act, Learned Special PP has prayed for awarding maximum punishment for the accused as provided u/s 376(3) IPC. Learned Legal Aid Counsel has prayed for leniency in sentence by narrating the family background of the accused and the fact that victim was consenting party.
- 32. It may be noted here that Section 6 of POCSO Act, 2012 provides for a minimum punishment of rigorous imprisonment (RI) for 10 (ten) years, which may extend to imprisonment for life and also fine; whereas Section 376 (3) IPC provides for a minimum punishment for 20 (twenty) years, which may extend to life imprisonment till natural death and also liable to fine as stood amended w.e.f. 21.04.2018 vide Act No. 22 of 2018. In view of Section 71 of IPC and Section 42 of Pocso Act 2012, which provides that where an act or omission constitutes an offence punishable under Pocso Act as well as under the provision of Section 376 IPC then notwithstanding anything contains any law for the time being in force, the offender found guilty of such offence shall be liable for punishment whichever greater in degree.

- opinion it is not a case for awarding maximum punishment i.e. life imprisonment to the accused. The minimum punishment as provided by law will meet the ends of justice. In the case in hand, as stated above, Section 376 (3) IPC provides higher punishment than the provision of section 6 of Pocso Act, 2012 and as such by applying the power u/s 71 of IPC and section 42 of Pocso Act, 2012 convict Ajay Sabar is sentenced to undergo rigorous imprisonment (RI) for 20 (twenty) years and also for a fine of Rs. 5,000/- (Rupees five thousand) i/d further SI of 2 (two) months for committing the offence punishable u/s 376(3) IPC.
- 34. It is further provided that in the event of payment of fine by the accused, same shall go the victim u/s 357 Cr.P.C.
- 35. Apart from above the matter is referred to DLSA Sivasagar for exploring the possibility of paying compensation to the victim u/s 357A Cr.P.C from Assam Victim Compensation fund and/or any other fund provided for rehabilitation of rape victim by the State Government or by Union of India or by NALSA as per rules made there under.
- 36. Convict Sri Ajay Sabar is sent to District Jail, Sivasagar to serve out the sentence.
- 37. Convict Ajay Sabar is entitled for the benefit of Section 428 Cr.P.C. for the period already undergone during investigation and trial.
- 38. Send a copy of the judgment with all relevant papers showing identity of the victim to the Secretary DLSA Sivasagar for needful action.
- 39. Let a free of cost copy of the judgment be given to the convict Ajay Sabar immediately as per the provisions of Section 363 (1) Cr.P.C.
- 40. Convict Ajay Sabar is informed about his right of appeal against the judgment and order of conviction and sentence before Hon'ble Gauhati High Court either by appointing his own advocate or though legal aid panel advocate or by way of Jail Appeal.

- 41. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 42. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this 17th day of June, 2019 at Sivasagar.

Special Judge, Sivasagar

<u>APPENDIX</u>

- 1. Prosecution witnesses:
 - PW 1 Smt. Drupadi Rassa (Informant)
 - PW 2 Victim 'B'
 - PW 3 Sri Krishna Karmakar
 - PW 4 Sri Prakash Panika
 - PW 5 Dr. Sundar Changmai (MO)
 - PW 6 Smt. Bimala Sarma
 - PW 7 ASI Pabitra Konwar (IO)
- 2. <u>Defence witnesses</u> None
- 3. Court witnesses None
- 4. Exhibits by prosecution -
 - Exbt. 1 Statement of the victim given in Court u/s 164 Cr.P.C.
 - Exbt. 2 Registration Card of class IX of victim issued by SEBA.
 - Exbt. 3 Medical report
 - Exbt. 4 FIR
 - Exbt. 5 Sketch map
 - Exbt. 6 Charge Sheet

Special Judge Sivasagar