IN THE COURT OF DISTRICT & SESSIONS JUDGE: CACHAR; SILCHAR

SPL. POCSO CASE NO .37 of 2016

(U/S 366 IPC.& U.S. 4 of POCSO Act. 2012)

Present:-Shri K. Choudhury, LL.M., Special Judge, Cachar, Silchar.

State of AssamComplainant.
-Versus-
Baharul Islam Barbhuiya @ Laskar S/O Late Jalal Uddin Barbhuiya @ Laskar, Vill – Dhanahari Part II, P.S. Sonai, Cachar
Charge framed on:01.12.16
P.Ws. examined on:21.12.16; 05.01.17; 06.02.17; 03.06.17; C.Ws examined on:07.08.17; 24.08.17
Statement of accused recorded under section 313 Cr.P.C :24.08.17.
Argument heard on:
Judgment pronounced and delivered on:
For the State:

JUDGMENT

1. In the instant case, the FIR was lodged on 12.09.2016 to the effect that on 10.09.16 at about 7 p.m. in the absence of the informant in the house, the accused kidnapped the

minor daughter of the complainant, herein below referred as the victim. Search was made but the victim could not be traced out. Thereafter, FIR was lodged and the same was registered as Sonai P.S. Case No. 269/16, U/S 366 (A) I.P.C.

- 2. During investigation, victim was recovered and she was medically examined. Doctor opined her age as above 16 and below 18 years. She gave statement before the Magistrate where she disclosed her age as 14 years and also stated that at that time she was a student of class IX and on the date of occurrence, at about 5 p.m. while her mother was in the bathroom and she was in the kitchen, the accused from her back side pressed her mouth and forcibly took her. She was then made to sit on a motorcycle in between accused and one other. She was then taken to *Sadhinbazar* in the house of one relative of the accused. There she was raped. On her raising alarm, two female arrived there and at that time, the accused went away. She was recovered by police.
- 3. On completion of investigation, I.O. submitted charge sheet against the accused U/S 366(A) I.P.C. Learned Judicial Magistrate 1st Class, after procuring the attendance of the accused and after furnishing copy of necessary police papers committed the case. This Court after hearing both sides and perusing the materials on the record framed formal charges U/S 366 I.P.C. and U/S 4 of Protection of Children from Sexual Offences (POCSO) Act 2012. The charges were

read over and explained, to which the accused pleaded not guilty. Hence trial began.

- 4. To prove the case, prosecution examined as many as seven P.W.s. Two more witnesses being teachers were examined as C.W. on the prayer of the defence. Defence pleas are that at the material time the victim was a major and she was not kidnapped and raped by the accused. Defence also took the plea in the cross examination of the victim that she at her own will went with the accused by a bike. The accused in his statement recorded U/S 313 Cr.P.C. stated that he had been falsely implicated and thus pleaded as innocent.
- 5. Now, under the facts and circumstances of this case, question before this Court for determination are whether at the material time the victim was of consenting age and whether she was kidnapped by the accused and whether the accused committed any penetrative sexual assault on her.
- 6. To decide the above points I have heard learned counsel of both sides at length and perused the entire evidence on the record. Findings and decisions with reasons thereof are given below:
- 7. P.W.-1: the father of the victim deposed that on the date of occurrence he along with his wife went to their uncle's

house keeping the victim and her younger sister in the house. They returned home at about 10 p.m. and did not find the victim in the house. The younger daughter was found crying. On query, it was reported that one of their neighbour came to the house and took away the victim wrapping eyes with a piece of cloth. During search, it could be learnt that the accused was seen to have taken away the victim, who was then aged about 14 years and a student of class VIII. On the following morning, he lodged the FIR. Victim was then recovered from the house of the accused by police. On query, the victim reported that the accused fastening her eyes forcibly took her. On further query, it was reported that the accused did bad works .i.e. *balatkar*with her. He disclosed that the age of his younger daughter was 6 years. After the incident, out of fear the victim stopped going to school. He works as a helper of mason and there is no male member in his family. The accused was a married person having two wives and five children.

8. P.W.-2 Habibur Rahman Barbhuiya deposed that about three months prior to his evidence and on the following day of the missing of the victim the complainant told him that the victim fled away with the accused. He along with three others on request went to the P.S. along with the complainant. After lodging of the FIR, police accompanied them to the house of the accused who were found absent in the house. The victim was however found in the house. Mother of the accused handed over the victim to the police. The victim was examined by the police at the place of recovery. During that period, the accused was found on the northern side of their homestead concealing himself behind the graveyard. Accused was then apprehended. He was declared

hostile by the prosecution and he denied that he gave statement to the I.O. that father of the victim told him that the accused forcibly took away the victim.

- 9. P.W.3, mother of the victim deposed that out of her two daughters, the victim is the eldest and the youngest one was aged about five years and the victim was aged about 17 years. At the material time, at one evening, she went out keeping her daughters in the house. On return, she found the younger daughter as crying and the victim was missing. On query, the younger daughter reported that one person gagging mouth of the victim took away. Father of the victim returned home at about 10 p.m. Search was made to trace out the victim. On the following day, it could be learnt that the accused took away the victim. She then visited the house of the accused and made request to return the victim but the accused threatened her with a dao. After that her husband lodged FIR. At that time, the victim was a school student. After the alleged incident, the victim discontinued her studies out of fear of the accused.
- 10. P.W.4, the victim of this case deposed that about four months prior to her evidence and three days prior to the Bakri Eid at one evening at about 7 p.m. while she was in the kitchen, the accused came there and forcibly took her and with a motorcycle took her to one of his relative's house following a lonely road. There she was kept for three days. During that period on two nights the accused used force on her and committed penetrative sexual assault on her. After

filing of the FIR, when the accused wanted to take her to his house with a bike police caught them and it was happened at 8 p.m. Exhibit-2 is her statement recorded by Magistrate. She also disclosed everything to the doctor.

11. P.W-5 Dr. Mrs. Monalisa Dev deposed that on 13.09.2016 on police requisition she examined the victim Parvina Begum Mazumder, who gave history to the effect that on 10.09.2016 when the victim was standing outside her house at about 5 p.m. a boy named Baharul Islam Barbhuiya of her village came there and forcefully took her to an unknown place and kept her in his relative's house for two days and had forceful intercourse with her. After that on 12.09.2016 he brought her back to his house at around 10 a.m. and police went there and brought her back. It is further deposed that no bodily injury was detected. There was hymnal tear at 5 'O' clock position. X-ray of wrist joint showed epiphysis of lower radius and ulna appeared and found partially fused with parent bones; elbow joint showed epiphysis appeared and fused with parent bones; in the shoulder joint humeral head epiphysis found appeared and almost completely fused with parent bone; in pelvis iliac crest epiphysis found as appeared and was in the early process of fusion with parent bone. It is also deposed that the report was prepared by Dr. Bhaskar Jyoti Pegu, Registrar Radiology S.M.C.H. She on the basis of physical including dental examination, laboratory and radiological investigation opined that the age of the victim as above 16 years and below 18 years. Exhibit-3 is her medical report with her signature. The same report was concurred

and forwarded by Dr.Gunajit Das, Head of the Forensic Medicine, SMCH.

During cross examination, she stated that x-ray plate bears name of the patient with number. The age report of ossification test varies two years of error on either side and the report includes the error of two years. She further stated that it is not always necessary that a minor victim of sexual harassment shall receive some injuries on genital organs even in case of first incident. Similarly it is not necessary that in case of first incident of sexual assault on a minor girl there must be oozing of blood from the genital. Injuries over the person of the minor victim would vary upon the facts and circumstances of its case and also depend upon the nature of resistance made on the part of the victim. She denied the suggestion that her findings with regard to the age of the victim was not correct and at that time the victim was a major and the victim did not narrate any incident.

12. P.W.6 Dr. Gunajit Das deposed that on 13.09.2016 Dr. (Mrs.) Monalisa Dev working as G.D.M.O in the Department of Forensic Medicine, S.M.C.H., carried out the examination of Parvina Begum Mazumder, i.e. the victim and submitted report the Exhibit-3. Before submitting the report, he had a consultation and set together to discuss the findings and framed opinion and thereafter the final report was forwarded to the I.O.

In the cross examination, he stated that as per standard protocol in the department, there must be some discussion before forwarding any

report or concurring any opinion as the concerned department is an academic department.

13. P.W.7, the I.O. of this case deposed that in the course of investigation, he visited the P.O., .i.e. house of the complainant and recorded statement of the witnesses. On 12.09.2016, he recovered the victim from the house of the accused situated in the same village of the complainant. He further deposed that while he was returning, it was reported that the villagers could apprehend the accused from near the Kabarstan where the accused was hiding himself. Instantly, he went there and apprehended the accused. Exhibit-4 is the sketch map of the P.O. On completion of investigation, he submitted charge-sheet. During investigation, the complainant handed over one photocopy of school certificate in the name of the victim and as per the same date of birth is 20.10.2002. He confirmed the statement that was brought in the cross examination of P.W. 2 about the report of forceful taking away of the victim by the accused. The I.O. was cross examined at very length. During cross examination it has brought out that cause of delay is mentioned in the FIR, distance between the P.O. and the P.S. is around 7 kilometers and he could not visit the P.O. of Sadhin Bazar as the victim could not exactly disclose the exact place of occurrence as Sadhin Bazar. The victim was recovered at 01.25 p.m. from the house of the accused. The defence side confirmed some omissions which are considered as not material omissions under the facts and circumstances and also in view of some admissions by the accused.

- 14. On the prayer of the learned defence counsel two witnesses being teachers of the concerned L.P. School, where the victim deposed to have studied, were examined as C.Ws. According to the C.W.1 the head teacher of 463 Dhanhari L.P. School, in the Admission Register for the year 2007 and counterfoil of Certificate Book against the name of Parvin Begum Mazumder D/O Asraf Uddin Mazumder, Date of Birth is mentioned as 20.10.2002. On 04.04.2012 the then head teacher, .i.e. the C.W.-2 issued the certificate in the name of said Parvin Begum Mazumder showing the date of birth as 20.10.2002. Exhibit- C is the Admission Register. Exhibit- C(1-a) is the relevant entry, Exhibit (C-2) is the certificate book. C.W.-2 also deposed that he knew one Parvin Begum Mazumder who studied in their said school. He also deposed that he knew her father. He issued the certificate. Date of Birth in the Admission Register against the name of Parvin Begum Mazumder is 20.10.2002. The defence although tried to shake out their evidence by way of detailed cross examination but in no way succeeded in as much as it appears that both the C.Ws knew both the victim and her father and they confirmed the title of the victim as Mazumder written in short form as "Mong" and also asserted that Parvin Begum Barbhuiya and Parvin Begum Mazumder is the same person. In the relevant Admission Register, no other Parvin Begum is found.
- 15. In view of the above evidence, the learned P.P. has submitted that there is no material contradiction and there is no reason as to why the evidence of the victim substantially corroborated by the testimony of other material witnesses cannot be relied upon. It is further contended that medical evidence regarding age of the victim is

corroborated not only by other ocular evidence but also by documentary evidence. On the contrary, learned defence counsel strongly contended that there are some material discrepancies and infirmities to discredit the testimony of the victim and her parents. Further, age of the victim is not cogently proved to show that she was below 18 years of age and margin of error of 2 years shall be added in the maximum age of the victim opined in the medical report the Exhibit-3.

- 16. In support of the contentions, the learned defence counsel cited the following decisions:
 - i. (2003) 1 GLR 569 ", Failure to examined the radiologist held to be serious omission on the part of the trial Court."
 - ii. 2008 (SUPPL.) GLT 138, "Ossification test indicating the age of the victim as above 16 years and below 17 years with variation of 2 years on either side held benefit must go to the accused- victim, held aged 18 years on the date of occurrence.'
 - iii. 2016 (4) GLT 1108, "
 - iv. 2012 7 Supreme Court Cases 171
 - v. (2006) 9 Supreme Court Cases 713
 - vi. (2011) Supreme Court Cases 130
 - 17. Perused the above decisions. Facts and circumstances of the above cited cases are found to be different with that of the case in hand. In the instant case, the prosecution examined 2 doctors and according to them margin of errors of 2 years is inclusive and they asserted that age of the victim shown in the

medical report, the Exhibit-3 is true. According to father of the victim the P.W. 1, the victim was aged about 14 years and was a student of class VIII. The victim herself stated her age as 14 years. Ossification test of iliac crest also suggests that the victim was aged below 18 years age, in as much as it was in the initial stage of fusion. Further as per the evidence of two C.Ws who were called at the instance of the defence side cogently proved the date of birth of the victim as 20.10.2002. That being so, age of the victim on the date of the alleged incident was just above 14 years. Therefore, it can rightly be arrived at that at the material time, the victim was undoubtedly a minor. In the cross examination of P.W. 3, the defence took the plea by way of putting suggestion that the accused and the victim had love affairs and accused did not take the victim forcibly which was denied by the P.W. 3. In the cross examination the victim asserted that accused gagging her mouth pulled her and she tried to get rid of him but failed. At the time of getting rid of she sustained pain injury in the abdomen and hand. Prior to the alleged incident, she had no sexual relation with any other person and it was the first time to have the experience of sexual intercourse. The accused forcibly had sexual intercourse with her. She tried to resist him but failed. She did not sustain any injury except pain. The defence suggestions are of mere denial and according to the defence, she being tutored by her parents gave statement before the Magistrate. She also denied the suggestion that she had love affairs with the accused and on the date of occurrence in the evening seeing the absence of her parents in the house she made a ring and asked the accused to come and on his visit she at her own will went with him by his bike. That being the nature of plea, the defence virtually admitted the allegation of taking away with a bike. That being the virtual admission, age of the victim is more relevant. The age of the victim is found to be established by the prosecution through cogent evidence as alluded earlier. Findings of the doctor regarding old hymnal tear is also suggestive to the fact of penetrative sexual assault and the same is asserted by the victim both in her examination in chief and also in her cross examination. No contradiction or material omission could be brought in the entire evidence on the record to impeach the evidence of any of the material witnesses. The conduct of the accused at the time of his apprehension, .i.e. evidence of his hiding behind the graveyard at the time of recovery of the victim also indicates his guilty state of mind.some discrepancies are found here and there in the evidence on the record which can be overlooked especially in view of the plea taken by the accused as stated earlier and also for the fact that same do not materially affect the substance of the prosecution case. No reason is found to disbelieve the testimony of the material witnesses including the victim. The evidence of the victim can also relied upon in its face value mainly on the ground that no minor victim would generally adduce anything touching her chastity and jeopardizing her future and family reputation.

In view of the above discussion, findings and consideration of the entire evidence on the record in its entirety, it is held that prosecution has able to prove its case beyond all reasonable doubts U/S 366 I.P.C. and Section 4 of POCSO Act. Accordingly he is held guilty and convicted.

- 19. Heard the accused on the question of sentence. His statement are also record in the separate sheet and tagged with the case record. He has submitted for leniency on the ground that he is having widow mother, wife and four children whom he is to maintain. Having due regard to the above and provisions of the Law, I convict and sentence the accused U/S 366 I.P.C. to suffer Rigourous Imprisonment (R/I) for a period of 3 (three) years along with fine of Rs. 1,000/- and in default he shall further undergo R/I for a period of 1 (one) month. The accused is also convicted and sentenced U/S 4 of POCSO Act to undergo R/I for a period of 7 (seven) years along with fine of 3,000/- and in default he shall further undergo R/I for a period 3 (three) months. Both the sentences will run concurrently. Period of custody shall be set of from the above sentence.
- 20. With regard to the compensation to the victim an amount of Rs. 50,000/- is awarded as interim compensation mainly on the ground that the victim had to discontinue her further study as a result of the aforesaid act of the accused. Further compensation if any shall be decided by the Secretary D.L.S.A after due enquiry. The compensation so awarded be handed over to the victim or her father.
- 21. Free copy of the Judgment be furnished to the accused as per as per the Provision of Section 363 of Cr.P.C. and a copy also be forwarded to the District Magistrate as per section 365 of Cr.P.C. Copy of the Judgment shall also be forwarded to the S.P., Cachar, Silchar. Copy of the Judgment be forwarded to Secretary DLSA.

22. Bail bond stands discharged.

Judgment is pronounced and delivered in the open court under my signature and seal of this court on this $31^{\rm st}$ October 2017

Dictated & Corrected by me

(Shri K. Choudhury), Special Judge. Cachar, Silchar. (Shri K. Choudhury), Special Judge, Cachar, Silchar.

Transcribed by D. Paul, Stenographer -III

IN THE COURT OF SESSIONS JUDGE, CACHAR, SILCHAR SPL POCSO Case No. 37 of 2016 _APPENDIX

(A) PROSECUTION WITNESSES: -

P.W. 1-Asraf Uddin Mazumder.

P.W. 2-Hobibur Rahman Barbhuiya

P.W. 3 – Rangi Begum

P.W. 4 – Parveen Begum Mazumder

P.W. 5– Dr. (Mrs) Monalisa Dev.

P.W. 6- Dr. Gunojit Das.

P.W. 7– Apon Ch. Paul.

(B) <u>DEFENCE WITNESSES</u>: - NIL

(C) COURT WITNESSES:-

C.W. 1— Noor Ahmed Laskar.

C.W. 2- Mufiz Uddin Barlaskar

(C) PROSECUTION EXHIBITS: -

Ext.1 – FIR

Ext.1(1) – Signature of P.W.-1

Ext.1(2) – Signature of the then O/C

Ext. 2 – Statement of P.W.-4.

Ex. 2(1) to 2(4) — Signature of P.W.-4

Ext.3 – Medical Report

Ext. 3(1) – Signature of P.W.-5

Ext. 3(2) – History recorded by P.W.-5

Ext. 3(3) & 3(4) - Signature of P.W.-5

Ext. 3(5) – Signature of Dr. G. Das

Ext. 4 – Sketch map

Ext. 4(1) – Signature of P.W.-7

Ext. 5 – Arrest memo.

Ext. 5(1) – Signature of O.C.

Ext. 6 – Charge-sheet

Ext. 6(1) – Signature of P.W.-7.

(E) <u>DEFENCE EXHIBITS</u>: - NIL

(F) COURT EXHIBITS: -

Ext. C – Admission Register

Ext. C(1-A) – Relevant entry

Ext. C(1-B) – Initial of the headmaster.

Ext. C(2) – Certificate Book

Ext. C(2-A) – Relevant entry

Ext. C(2-B) — Signature of the then headmaster M.U. Barlaskar

(G) EXHIBITS PRODUCED BY WITNESSES: - NIL.

(Shri K. Choudhury), Special Judge, Cachar, Silchar.