IN THE COURT OF ADDL SPECIAL JUDGE (FTC)::KOKRAJHAR

Present :- Sri C. Chaturvedy, Addl. Sessions Judge (FTC), Kokrajhar.

Special Case No.46/2018

U/S.4 of Protection of Children from Sexual Offences Act, 2012 Act & 363 of IPC

STATE OF ASSAM

Vs

Sri Ananda Barman,

S/O Sri Mondal Barman Vill:- No.2 Dolgaon , P.S. Gossaigaon District :- Kokrajhar.

...... Accused person

Appearance: -

Learned Counsel for the State Mr. Monjit Ghose

Learned Counsel for the defence Mr.Madhab Prasad Upadhyay

Charge framed on 16.11.2018

Evidence recorded on 15.12.2018; 21.12.2018; 16.02.2019.

Argument heard on 27.02.2019

Judgment pronounced on 08.03.2019

<u>JUDGMENT</u>

1. The case of the prosecution is that on 27.8.2018 one xxx, the father of the victim, lodged a writen FIR at Gossaingaon Police Station alleging that on 26.8.2018 at about 6 p.m, accused Ananda Barman

induced his daughter, the victim, and took her to the vacant residence of Goriya where he committed rape on his daughter and forcibly took her to Tamarhat.

- 2. On receipt of the FIR, a case U/S 363 of Indian Penal Code read with Section 4 of the Protection of Children fom Sexual Offences Act, 2012 (POCSO Act) was registered and investigated. After completion of the investigation, a charge sheet was laid against the accused Ananda Barman for commission of offence U/S 363 IPC read with Section 4 of the POCSO Act.
- 3. The accused person was not released on bail hence his trial took place as under trial prisoner. A legal aid Counsel was also appointed for the accused due to his impoverised means to enagage a Counsel of his own choice. Later, the case was transferred to this Court for disposal.
- 4. After furnishing copies relevant under Section 207 CrPC and upon hearing both sides, charges U/S U/S 363 IPC read with Section 4 of the POCSO Act were framed against the accused to which he pleaded not guilty and claimed to be tried.
- 5. In the course of trial prosecution examined 7 witnesses. At the closure of prosecution evidence, the accused person was examined U/S 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

POINTS FOR DETERMINATION:

- (i) Whether the accused kidnapped the victim?
- (ii) Whether the accused committed sexual intercourse with the

victim, a minor girl?

DECISION AND REASONS:

- 6. PW 1 xxx is the mother of the victim. She deposed that the occurrence took place about 3 months ago. She was ill and lying in bed. During evening hours her daughter, the victim, had gone out for nature's call. At that time, accused Ananda Barman apprehended her daughter and took her to the residence of Goriya. Goriya was away from his home and his house was lying vacant. The accused kept her daughter the whole night at the residence of Goriya and on the next day he took her to Tamarhat. Pw 1 further deposed that we kept searching for our daughter but could not find her. At Tamarhat, the local boys detained the accused and the victim. Later, her husband went to Tamarhat and brought her daughter. According to pw 1, her daughter, he victim, informed her that accused committed sexual intercourse with her.
- 7. In cross-examination pw 1 deposed that her daughter is now aged about 12 years. When she searched for her daughter she had gone to the house of accused.
- 8. Pw 2 xxxx, is the victim of this case. She deposed that the occurrence took place about 3 months back. She deposed that the accused had given her a mobile phone but the phone was lost. The accused was angry as to why she lost the phone. On the date of occurrence, at about 6 p.m in the evening, while she had gone for nature's call, accused came and accosted her. Pw 2 deposed further that accused held her mouth and took her to the residence of Goriya. At

the residence of Goriya, the accused opened her wearing apparel and forcefully committed sexual intercourse with her. She was suffering in pain. At about 3 a.m in the morning, the accused took her to Gossaingaon and from there to Tamarhat at his Aunt's place. At Tamarhat, some loal boys detained the accused along-with her. Later, as deposed to by pw 2, her father went to Tamarhat and brought her to village.

9. In cross-examination, pw 2 deposed that accused was working at brick kiln at Rangia and wanted to take her to Rangia. She also deposed that the accused entered the residence of Goriya first and then she entered but she could not escape. She denied the suggestion that accused did not take her by force. She admitted that she had not created any alarm at night. She further deposed that on the following day, the accused took her to Gossaingaon railway station for Rangia but since they could not catch the train accused took her to Tamarhat. She deposed that she had not created any alarm while the accused was taking her to railway station or to bus stand. As deposed to by pw 2, at Tamarhat the accused kept her in the residence of one Ram Prasad Singha and informed Manjit Roy to tell her father that he has taken her to Tamarhat. She also deposed that she had not informed Ram Prasad Singha that accused has taken her by force. Pw 2 admitted in her crossexamination that she knows Gobinda and that Gobinda too had committed sexual intercourse with her by putting her in fear. The defence then suggested that she was sexually abused by Gobinda and not by accused but the victim denied this suggestion.

- 10. Pw 3 xxx, is the father of the victim. He deposed that about 3 months back when he returned home he learnt that his daughter Batashi Roy is missing. He could not find her at night. On the following day, at about 9 a.m, he came to know that his daughter has been taken to Tamarhat by the accused. He then went to Tamarhat and brought his daughter. Pw 3 also deposed that he came to know from his daughter that accused committed sexual intercourse with her at the residence of Goriya. He thereafter lodged an FIR and had put thumb impression therein.
- 11. In cross-examination, pw 3 deposed that he returned home at about 6-7 p.m. While searching for his daughter he had gone to residence of Nengcha, and some other villagers. He deposed that his wife had gone to the residence of accused searching for their daughter. He also deposed that he does not know from whose residence his daughter was recovered.
- 12. Pw 4 Basanta Barman deposed that the occurrence took place about 3 months ago. At night, xxx, the father of the victim, informed him that his daughter is missing and accused has taken her. Following day he came to know that the girl is at Dingdinga Mechpara. The girl and the accused were brought to our village. There the girl informed us that accused committed sexual intercourse with her at the residence of Goriya. Later police was informed about the incident.
- 13. In cross-examination, he deposed that he came to know at morning hours that child of xxx, the father of victim, was missing. He admitted that he had not gone to bring the victim. The victim was brought at about 2 p.m at Dalgaon.

- 14. Pw 5 Bidyut Roy deposed that about 3 months back while he was at his home watching television, xxx, the mother of the victim, came to our residence and informed him that accused Ananda has taken her dauhter and she is missing. He searched various places at Dalgaon but could not find the girl. On the following day, at about 9 a.m, he learnt that the girl has been found at Kharkhari Dindinga. The girl was brought to village and in a village meeting the girl stated that she has been raped by the accused at the residence of Goriya. Later police came and took away the victim and the accused.
- 15. In cross-examination he deposed that he came to know from Kartik that accused and the girl have been detained at Kharkhari Dingdinga. He also deposed that the victim and the accused came to their village at about 3.30 p.m and that he had personally asked the child about the occurrence.
- 16. Pw 6 Dr. Sushma Brahma deposed that on 28.8.2018 deposed that she was as Senior Medical Officer, RNB Civil Hospital, Kokrajhar. On that day, on police requisition, she had examined the victim, and gave her finding in the Form of Exhibit-2 wherein Exhibit-2(1) is her signature. In her opinion after clinical examination, ossification test, vaginal smear, the the following results were noted;
 - i. The age of the girl is 13 years but below 15 years.
 - ii. No injury mark found on her body and private parts.
 - lii. She has been exposed to sexual intercourse several times before 36 hours.

- iv. She is habituated to sexual intercourse.
- 17. In cross examination PW6 stated that that the age was determined on the basis of radiological inferences. Pw6 also deposed that in her opinion, the sexual intercourse with the victim was not forceful.
- 18. PW7 Sri Rajib Lochan Das is the Investigating Officer of the case and he deposed to about the usual aspects of the investigation.
- 19. In cross-examination PW7 deposed that victim and the accused were apprehended by public and handed over to police. He admitted that he had not visited Mechpara. He also deposed that he has not examined Goria in the course of investigation. He also deposed that he had not found any blood stains in the place of occurrence and that he had also not found semen drop in the place of occurrence. He denied the suggestion that no such occurrence, as alleged, ever took place in the place of occurrence.
- 20. The evidence reproduced above, particularly, of the victim, reveals that she was lured by the accused to accompany him. The accused first induced the victim for sexual intercourse and then took her away to a different place. The age of the victim is not in dispute. The medical opinion also suggests that the victim has been exposed to sexual intercourse. The cross-examination of the prosecution witnesses has not been able to impeach the credibility of the witnesses on the point that the victim was taken away by the accused, that she was detained in Tamarhat by local boys and that she was brought from Tamarhat. The evidence is also cogent on the point that victim was

subjected to sexual intercourse by the accused. These evidence, as adduced by the prosecution, are sufficient to shift the onus on the accused to prove the contrary in view of the statutory reverse onus, as provided in view of the provisions of Section 29 of the POCSO Act.

- 21. In this regard, the learned defence Counsel argued that medical opinion as well as the cross-examination of the victim reveals that she also had sexual relationship with the one Gobinda and hence the sexual intercourse, if any, was done by Gobinda and not the present accused. Learned defence Counsel also argued with reference to the conduct of the victim that she had sufficient opportunity to raise alarm while she was being taken away by the accused, to various places, but she did not raise any alarm suggesting that she wanted to go with the accused on her own volition.
- 22. While appreciating the defence arguments, what needs to be seen is not whether the victim was sexually abused by any other person, not facing trial in the instant case, but what needs to be seen is whether she has alleged sexual abuse at the hands of the accused. The evidence on record leaves no room for doubt that the victim is found believeable when she states that accused committed sexual intercourse with her. Hence, the fact that someone else too, committed sexual intercourse with her does not belie the evidence of the victim vis-a-vis the accused.
- 23. Coming now to the conduct of the victim in not raising alarm, it does not assist the defence in asbolving the accused from penal liability for the reason that victim is admittedly a minor that too of a very tender age of 13 years. Even if it is assumed that she consented to

sexual intercourse and also her taking away by the accused, it would not be a material aspect to determine the guilt or otherwise of the accused. The law attaches more responsibility on the accused, who has sufficient maturity of understanding in view of his age, to avoid inducing a minor girl and to take undue advantage of her tender age.

- 24. It will be, therefore, seen that onus placed on the accused, in view of the provisions of Section 29 of the POCSO Act, stands not discharged. The inescapable conclusion is that the prosecution has been able to establish the following facts;
 - (i) That the accused took away the victim, a minor girl of 13 years, to the vacant residence of one Goriya
 - (ii) That the accused committed sexual intercourse with the victim at the residence of Goriya
 - (iii) That the accused further took away the victim to Tamarhat
- 25. The aforesaid facts establish the charge under Section 363 IPC and also under Section 4 of the POCSO Act.
- 26. The points for determination are answered in affirmative.
- 27. In view of the nature of offence estbalished, this is not a fit case to release the accused on probation. Hence, the benefit of probation is not extended to accused.
- 28. I have heard the accused on the point of sentence. He submits that he is father to three children and all of them are minors. He being the only bread earner for the family, earns his livelihood by petty labour

works. His detention in imprisonment will throw his entire family to vagrancy and hence he prays for mercy and leniency.

- 29. I have considered the submissions of the accused. The aggravating factor appearing against the accused is that he lured a minor girl of 13 years of age and exposed her to sexual intercourse. The accsued took advantage of the tender age of the victim and exploited her.
- 30. The mitigating circumstances appearing in favour of the accused is that he is a father to three minor children and hence his detention in imprisonment, shall in all probability, cause severe inconvenience to his family who should not be made to suffer much for the acts of the accused.
- 31. The punishment for the offence under Section 363 IPC extends to 7 years in imprisonment whereas the punishment for the offence under Section 4 of the POCSO Act extends to imprisonment for life with the minimum being 7 years.
- 32. Balancing the aggravting factors with the mitigating factors, I believe a sentence of 2 years of rigorous imprisonment for the offence under Section 363 IPC and a sentence of 7 years of rigorous imprisonment for offence under Section 4 of the POCSO Act will be a proper sentence in the facts of this case. Both the sentences shall run concurrently.

Contd....

ORDER

Accused Ananda Barman is convicted for the offences under Section 363 IPC and Section 4 of the POCSO Act.

For his conviction under Section 363 IPC, the accused is sentenced to rigorous imprisonment for a period of 2 (Two) years with fine of Rs 1,000 and in default of payment of fine to undergo further imprisonment for 2 months.

For his conviction under Section Section 4 of the POCSO Act, the accused is sentenced to rigorous imprisonment for a period of 7 (Seven) years with fine of Rs 1,000 and in default of payment of fine to undergo further imprisonment for 2 months.

The sentences shall run concurrently.

A recommendation is also made to the District Legal Services Authority, Kokrajhar, for payment of adequate compensation to the victim under Section 357A CrPC.

A free copy of the judgment be also given to the convict.

A copy of the judgment be also furnished to Sri Madhab Upadhyay, Legal Aid Counsel. He will be entitled to his remuneration.

A copy of this judgment be sent to District Magistrate, Kokrajhar

Given under the hand and seal of this Court on this 8^{th} day of March, 2019

Dictated by: -

Addl. Special Judge

Addl. Special Judge

Kokrajhar

Kokrajhar

<u>Appendix</u>

1	Prosecution	Fyhihits	٠_
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Exhibit-1 Statement of Victim

Exhibit-2 Medical report
Exhibit-3 Charge sheet

Exhibit-4 Ejahar

2. <u>Defence Exhibit</u> Nil

3. Prosecution Witness

P.W.1 xxx, Mother of victim

P.W.2 xxx, Victim

P.W.3 xxx, father of the victim

P.W.4 Sri Basanta Barman

P.W.5 Sri Bidyut Roy

P.W6 Dr. Sushma Brahma
P.W.7 Sri Rajib Lochan Das

4. <u>Defence Witness</u> Nil

5. <u>Court witness</u> Nil

Addl. Special Judge(FTC), Kokrajhar