IN THE COURT OF SPECIAL JUDGE NAGAON. Present- A. Rahman, LL.M, AJS

Special (POCSO) case No- 88(N) / 2018.

U/S- 366 IPC r/w section 6 of the POCSO Act.

Parties -

-----State -----

-Vs-

Raj Nath @ Raju Nath

Charge framed on - 12-10-2018.

Evidence recorded on - 17/11/2018, 26/11/2018, 01/12/2018, 07/01/2019, 02/07/2019, 16/10/2019, 30/10/2019

Argument heard on – 05-11-2019 Judgment delivered on – 19-11-2019

Appearance -

For the prosecution- $\,$ Mr. M.J. Neog , learned special prosecutor.

For the defence – Mrs. S. Khanam, learned legal aid counsel

JUDGMENT

Prosecution case in precise is that, one Miss X (Actual name is withheld), the minor daughter of complainant PW-1 missing from his house at village Deuri Silabandha under Koliabor PS on 24/05/2018 at about 9.30 AM. The informant, relatives and neighbours were searching her but did not get any clue. On the same day accused Raj Nath @ Raju Nath, who is the brother in law (Wife's younger brother) of PW-1 had also gone out from his house with a view to visiting his work-place. Subsequently police recovered the victim girl from the rented house of accused at Naharlagun, Arunachal Pradesh. The accused and victim were brought to Koliabor PS.

On the basis of Ext-1 Ejahar lodged by the complainant, Koliabor PS case no 62/2018 U/S 366 IPC was registered. ASI Raju Kumar Nath was entrusted to take up preliminary investigation of the case. During the investigation the statement of the victim and other witnesses were recorded U/S 161 CrPC. The victim was sent to Nagaon BPCH for her medical examination. She was also produced before the learned Magistrate and her statement was recorded U/S-164 crpc. IO also seized HSLC admit card of the victim issued by S.E.B.A. The accused was forwarded to court for judicial custody. After completing the investigation police submitted charge sheet against accused Raj Nath @ Raju Nath U/S 366 IPC r/w section 8 of the POCSO Act.

Thereafter, the instant Special case was registered. The case record was transferred to this special court for trial. On the basis of the oral prayer of the accused for legal aid who was in the jail custody, Smt. S. Khanam, legal aid empanelled advocate of DLSA, Nagaon was appointed to defend the accused during the trial.

Considering the materials on record, charges under section 366 IPC r/w section 6 of the POCSO Act were framed, read over and explained to the accused to which he has pleaded not guilty and claim to be tried.

The prosecution side, in order to prove the case against the accused, examined all together seven witnesses and also exhibited FIR, HSLC admit card and medical examination report of the victim girl.

The accused denied the allegations of the prosecution while he was examined U/S 313 CrPC. The defence plea is that the alleged victim voluntarily went to Harmoti of Lakhimpur district and met him there. He has admitted that, she was staying with him at a rented house in Naharlogun but there was no sharing of

physical relation between them. The accused also adduced his evidence as DW-1.

I have heard Mr. M.J Neog, learned special prosecutor as well as Smt. S. Khanam, learned legal aid counsel for the accused. I have also meticulously gone through the evidence. Now the point for determination are as follows.

- 1. Whether accused kidnapped the victim, the minor daughter of the complainant from his house on 24/05/2018 at village Deuri Silabandha to Naharlogun, Arunachal Pradesh intending and or knowing that she would be forced/seduced to illicit intercourse with him and thereby committed offence punishable U/S 366 IPC.
- Whether the accused having kidnapped the said minor committed aggravated penetrative sexual assault upon the said minor victim in his rented house at Naharlogun, Arunachal Pradesh and thereby committed offence punishable U/S 6 of the POCSO Act.

DECISION & REASONS THEREOF-

1. Considering the charges framed against the accused, the facts and circumstances of the case and also for the sake of convenience, both the said two points are being discussed together.

Before entering upon analysis and appreciation of evidence, it is necessary to take a glimpse of the relevant evidence of the witnesses.

Victim Miss-X was examined as PW-3.

PW-1 and PW-4 (name withheld) are father and mother of PW-3 respectively.

2. PW-3 deposed that the occurrence took place about six months back (her evidence was recorded on 1-12-2018). Accused is her own maternal uncle. She has stated that she had appeared her HSLC Examination in 2018 and the next day was the result -day of her HSLC examination. On the relevant day of occurrence, her maternal uncle went from their house to catch vehicle for travelling to Arunachal. When she came out from her house to Kuwaritol to purchase chips and to hand over a bag to her aunt, he stated to her that she should accompany him to Arunachal other wise her father would severally beat her if she becomes unsuccessful in her examination. Accordingly, her uncle by a traveller-bus took her to Harmoti and kept her for in the house of his relative for one week. 3. Thereafter, he took her to Naharlagun of Arunachal and kept her in a rented house for about twenty days as his wife. He put vermilion on her head and committed sexual intercourse with her during night in drunken state despite her objection. She has further stated that her uncle did not allow her to use his mobile phone to communicate with her family. She could not report the occurrence to the local people as she does not know their local language.

- 4. She has further stated that her father with the help of Koliabor police, rescued her from the rented house of the accused and brought her along with him to Koliabor police station. She was medically examined at Nagaon Civil Hospital. She has also confirmed that Ext-3 is her statement before the Magistrate and Ext-3(1) to Ext-3(4) are her signatures. She has further stated that her date of birth is 11-9-2-2001.
- 5. During her cross examination, she replied that she did not object when her maternal uncle (accused) pursuaded her to go with him and she accompanied him.

She has denied all the relevant suggestions.

6. PW-1 inter-alia that the occurrence took place about five months back from the date of his evidence before the court. The accused being his younger brother in law (wife's younger brother) had been staying at his house for about one month immediately prior to the occurrence. On the relevant morning, he dropped the accused at Noltoli so as to catch a bus for going to Arunachal Pradesh where he was working as driver of Little Flower School. When he returned home, he found his daughter (PW-3) was missing from his house and till evening, she did not return home. Although he accompanied by his neighbour was searching for his daughter but she could not be found. So he informed Koliabor police about missing of his daughter. After one week of the occurrence, he came to know that PW-3 was staying with the accused at Naharlagun, so he lodged Ext-1 FIR at Koliabor police station. He has confirmed that Ext-1(1) is his signature. After one month of the occurrence, with the help of Koliabor police and also police personnel of Naharlagun police station, his victim daughter was recovered from the rented house of the accused. After recovery, his daughter disclosed to her that the accused had done bad work (sexual inter course) with her. His daughter was born on 11-9-2001. He has also submitted -Ext-2 (proved in original), HSLC Examination admit card of her daughter.

In cross examination, he denied the suggestion that he has falsely deposed that the accused committed bad work with his daughter.

7. PW-2 Hema Kanta Bora is the neighbour of PW-1. He is not an eye witness to the occurrence. He has deposed that the occurrence took place about six months prior to his deposition

before the court. PW-1 reported to him that his daughter (PW-3) had been taken away by her maternal uncle.

- 8. PW-4 is the mother of PW-3 as well as the elder sister of the accused. She has inter alia deposed that about two months prior to the occurrence, his younger brother (accused) along with his three years old son had been staying at her house. On the relevant day of occurrence, her husband had dropped her brother at Noltoli for catching a bus as he wanted to visit Arunachal Pradesh. Her daughter (PW-3) also went out to bring a chips and to deliver a bag to her aunt. But she did not return home till evening. She disclosed the fact to her husband (PW-1) who was searching her in the neighbourhood. But she could not be found. After 10/11 days of lodging ejehar, her husband with the help of police rescued PW-3 from Arunachal.
- 8. Her accused brother was also brought from Arunachal Pradesh. On being asked, her daughter (PW-3) disclosed that she had gone with her maternal uncle on the apprehension that her father might assault her as she might fail in the mathematics paper. She (PW-3) also stated that at Arunachal, her uncle was dealing with her as his wife after putting vermilion on her head.
- 9. In cross examination, she denied the suggestion that the accused neither kept her daughter as his wife at Arunachal Pradesh nor he did bad work (sexual intercourse) with her.
- 10. PW-5 Ratna Kanta Saikia, is the Sarkari gaon burah of Deori Sialndha -village. He is a reported witness. According to him, the occurrence took place about seven months back. PW-1 reported him that on the day of occurrence, the accused had gone to Noltoli and after two hours, his daughter(PW-3) also became missing. After two /three days of occurrence, PW-1 again reported to him that he had got information his daughter was staying in Arunachal Pradesh. He has confirmed that Ext-4 is the seizure list and Ext-4(1) is his signature.
- 11. Dr. Bhaswati Sarmah (PW-6) , M &HO-I, Nagaon B.P.Civil Hospital examined PW-3 on 24 -06-2018 at about 2 pm in connection with Koiliabor PS case No- 62/18 U/S-366(A) IPC. The victim was escorted an identified by WPC/448 Pompi Terongpi. On examination of the victim , PW-6 found the followings-

Identification mark- one mole on each of the right side and left side of the nose:

12. Height 150 cm, weight- 40kg , Teeth -15/16.

Breast developed and no injury; Auxiliary hair present; pubic hair present;

Hymen -no recent tear , vaginal injury -none.

Marks of violence none.

Clothing leggings and top; LMP -24-6-2018

Vaginal smear examination vide- Regd No- 13476 reported by pathologist Dr.J. Hussain shows -no spermatozoa

13. Opinions- there is no sign of any recent sexual intercourse, there is no sign of violence on her private parts.

She has confirmed that Ext-5 is the medical report and Ext-5(1) is her signature. She has also made it clear that " no recent tear means -old tear)

Defence side declined cross examination of PW-6.

14. ASI Raju Kr. Nath (PW-7) has deposed that on 2-06-2018, he was working as ASI at Koliabor police station, the officer in charge, Inspector Dinabandhu Bhuyan registered the case and endorsed him to investigate. He has confirmed that Ext-1 is the FIR and Ext-1(2) is the signature of Dinabandhu Bhuyan. He has testified that during the investigation, he visited the place of occurrence drew Ext-6 sketch map and recorded the statement of witnesses. He also seized the HSLC admit card of the victim from the possession of the complainant vide Ext-4 seizure list. Ext-4(2) is his signature. After keeping Xerox-copy, he gave zimma of the original to him. On 206-2018, he came to know that accused Raju Nath @ Raj Nath , who is the maternal uncle of the victim was keeping her at Naharlagun, Arunachal Pradesh.

15. On 23-6-2018, he accompanied by a section of battalion party and the complainant went to Naharlagun. With the help of Nagarlagun police, he apprehended the accused from nearby campus of Little Star school. Thereafter, on being led by the accused, the victim was recovered from his rented house. The victim and the accused were brought to Koliabor police station. The victim was sent to Nagaon B.P. Civil hospital for her medical examination. She was produced before the court and her statement was recorded U/S-164 crpc. He also arrested the accused. After collecting the medial examination report of the victim he handed over the case diary to the officer in charge of the police station. He has

- also testified that SI Mir Sikander Ali submitted charge sheet u/s-366(A)IPC read with S- 8 of the POCSO Act. Ext-7 is the charge sheet and Ext-7(1) is his signature SI Mir Sikander Ali.
- 16. In his cross examination, he has made it clear that the victim in her previous statement before him did not state that she could not inform Arunachali people as she does not know their local language. She also did not state that despite her strong objection, the accused committed physical intercourse with her.
- 17. Smt. S. khanam, learned counsel for the defence contended that the prosecution failed to prove PW-3 was below 18 years on the relevant date of alleged occurrence. Prosecution did not produce her birth certificate. Moreover, during investigation stage also her age through ossification test was not ascertained. On the other hand, her conduct proves that she was maior and voluntarily accompanied with her maternal uncle -accused to Harmoti and then Naharlagun. Therefore, learned defence counsel submitted that prosecution has failed to prove the alleged offence against the accused and he is entitled to acquittal from the aforesaid charges on benefit of doubt. Further contention raised by learned defence counsel was that Ext-2 is merely an Admit card of HSLC examination enabling PW-3 to sit in the examination. So it can not be treated at par with a certificate.
- 18. On the other hand refuting the above submissions, Mr. M.J. Neog , learned Special prosecutor argued Ext-2proves that PW-3 was born on 11-9-2001. So she was below 18 years on 24-5-2018. Learned Special prosecutor further submitted that production birth certificate is not always essential for age proof.
- 19. Ext-2 although is not the certificate but the HSLC Examination Admit Card for the year 2018 issued by SEBA [Board of Secondary Education, Assam] on 16th February 2018. The authority recorded the date of birth of PW-3 to be on 11-09-2001 on the basis of the relevant/entry and record supplied by Madhya Kaliabor High School where PW-3 was schooling.
- 20. PW-1, father of PW-3 submitted the original of Ext-2 at the time of his evidence before the court. So it appears that he has stated that she was born on 11-9-2001 probably on the basis of the said document. At any rate, the said

statement of PW-1 goes unchallenged during cross examination.

- 21. PW-4 was silent as to the age of her daughter. PW-3 stated that she was 17 years (her evidence was recorded on 1-12-2018) and her date of birth is 11-9-2018. Defence side did not cross examine her said testimony.
- 22. In the case of <u>Mahdeo -vs- State of Maharashtra and</u> <u>Others</u> [2013] 11 SCC 637, has held that Rule 12(3)(b) of the Juvenile Justice (Care and Protection) Rules 2007 can be rightly followed by the courts for the purpose of ascertaining the age of victim as well.

Therefore, in view of the clear ruling of the Hon'ble Supreme court, we can rightly and safely rely on Ext-2 for the purpose of ascertaining the age of PW-3.

23. As per Ext-2, PW-3 was born on 11-9-2001. Therefore, on 24-5-2018, being the date of occurrence, she was 16 years 8 months and 13 days.

So it is proved that PW-3 was a child as defined U/S- 2(d) of the POCSO Act on the date of occurrence.

- 24. PW-3 in her statement (Ext-2) recorded U/S-164 crpc has clearly stated that on 24-05-2018 , her maternal uncle (accused) in the morning went out from their house. She also went out and met him at Kunwaritol as per previous plan. Then they went to Harmoti.
- 25. After she had been recovered, she stated to her mother (PW-4) that she went away with her maternal uncle apprehending that she would be thrashed and scolded by her father if she fails in mathematics.

Considering the above evidence, it appears that PW-3, on 24-5-2018 voluntarily eloped with the accused. So prosecution has failed to prove that the accused has committed the offence U/S-366 IPC.

26. It is established from the evidence of PW-3 that the accused took her to Naharlagun and kept her in a rented house. The accused also admitted in his statement U/S-313crpc that he along with PW-3 were staying in his rented house at Naharlagun. It reveals from her evidence that the accused put vermilion and committed sexual intercourse at his rented house and behaved with her as his wife. He used to commit sexual intercourse her on every night. In Ext-2 statement, she simply stated that physical relation happened between her and the accused. After recovery ,she stated before her mother (PW-4) the accused put vermilion and behaved with her as wife. Thus, it is proved from the evidence of PW-3 that the accused indulged in sexual

intercourse with her, as his wife, more than once. The accused is the own maternal uncle of PW-3. There is no reason why she would falsely implicate him in sexual intercourse with her. As per her evidence, it becomes crystal clear that the accused committed sexual intercourse with her for more than once.

- 29. Accused Raj Nath (DW-1) in his cross examination clearly stated that she along with her niece (PW-3) were staying at his rented house for about one week and there was none with them.
- 30. Aforesaid medical evidence of PW-6 and Ext-5 reveal that there was no recent tear on her hymen and no injury on her private parts was seen at the time of examination. PW-3 was recovered on 23-6-2018 from Naharlagun and brought to Koliabor. She was examined by PW-6 only on 24-6-2019 more than 12 hours from the night of 23 -6-2018. Therefore, absence of injury on her private parts is quite possible.
- 31. Now coming to S-29 of the POCSO Act , we find that it is the statutory presumption that when the accused is prosecuted for the offence under sections 3, 5, 7 and Section 9 of the Act, the Special court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be. The evidence of PW-3 coupled with the statutory presumption proves that the accused has committed the offence U/S-5 of the Act. The defence side has failed to rebut the presumption.
- 32. The above analytical discussion of evidence and observation, it is found that the prosecution has been able to prove beyond all reasonable doubt that the accused has committed the offence punishable U/S 6 of the POCSO Act. So he is convicted accordingly. However, he is acquitted from the charge under S-366IPC.

33. *Hearing on sentence;*

Heard accused on point of sentence. It is submitted that he is innocent. He has one minor daughter and one minor son. There is none to look after them. Because his wife eloped away with another boy about two years back. So he has prayed for exoneration.

- 34. It is well settled that the quantum of sentence must be proportional to the nature and gravity of the offence. The court while imposing punishment has to consider the aggravated and mitigating circumstances of the case.
- 35. The sentence prescribed U/S-6 of the POCSO Act shall be rigorous imprisonment which shall not be less than ten years but

which extend to imprisonment for life and shall also be liable to fine.

36. Considering the entire facts and circumstances of the case , the accused is leniently dealt with in the sentencing sphere. He is sentence to ten years RI and fine of RS -1000/only in default further RI for one month. The period of detention of the accused in jail as UTP in connection with this case shall be set off from the quantum of substantive sentence.

This quantum of sentence, in my considered view would meet the ends of justice.

A certified copy of this judgment be furnished forthwith to the accused.

37. Before parting with this judgment, I appreciate the valuable assistance rendered by Smt. S. Khanom, learned legal aid counsel. She is entitled to her remuneration as per rule which shall be paid by secretary DLSA, Nagaon within least possible time. A copy of this judgement be sent to secretary DLSA, Nagaon for information and necessary action.

Judgement declared and delivered in the open court under my hand and seal this 19th Day of November 2019.

(A. Rahman, AJS)
Special Judge , Nagaon

Judgment prepared & Corrected by me.

(A. Rahman, AJS)
Special Judge, Nagaon.

Prosecution witness-

PW-1 Father of the victim.

PW-2 Shri Hema Kt Bora.

PW-3 Victim

PW-4 Mother of the victim

PW-5 Ratna Kt Saikia.

PW-6 Dr. Bhasawti Sarmah.

PW-7 Raju Kr. Nath (IO)

Exhibits-

Ext-1 FIR

Ext-2 HSLC Admit Card.

Ext-3 Statement of the victim.

Ext-4 seizure list.

Ext- 5 medical report.

Ext-6 Sketch map.

Ext-7 charge sheet.

Defence witness-

DW-1 Raj Nath alias Raju Nath.

Exhibit- Nil.

(A. Rahman, AJS) Special Judge , Nagaon

APENDIX

Prosecution Witnesses

PW-1 Sita.

PW-2 Miss - X (Victim Child)

PW-3 Smti. Sunita Basfor.

PW-4 Smti. Hema Basfor.

PW-5 Sri Santosh Basfor.

PW-6 Dr. Julina Hussain.

PW-7 Smti Purnima Buragohain.

Court Witnesses

CW-1 Sri Sarat Tamuly.

CW-2 Smti. Aleya Sultana

CW-3 Smti. Bibharani Saikia Nath

CW-4 Smti. F.Y Loi

Prosecution Exhibits

Ext-1 ejehar

Ext-2 is the medial report

Ext-3 seizure list

Ext-4 charge sheet

Ext-5 School admission register

Ext-6 is the statement of Smti. F.Y Loi

Defence Witness and Exhibits

NIL

(A Rahman, AJS) Special Judge , Nagaon