IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE ::::UDALGURI

Present : Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.

Special (POCSO) No. 14(U)/2015 Under Section 366-A R/W Section 4 of POCSO Act.

State of Assam

-Vs-

Debajit Boro.....Accused.

For the Prosecution : Mr. R. Sarmah, Addl. Public Prosecutor. For the Accused : Mr. Tarun Ch. Boro, Learned Advocate.

Date of Evidence : 22-07-15: 29-07-15: 05-08-15.

Date of Argument : 17-06-2019.

Date of Judgment : 25-07-2019.

JUDGMENT

1. The prosecution case in brief is that on 15-05-15, informant Rahan Boro lodged an FIR with the In-charge of Bhergaon Out Post alleging that on 10-05-15, at about 05 pm, the daughter of the informant went to Naukata for watching Bihu function. Thereafter, on 13-05-15, she was taken back to home by accused Debajit Boro's uncle Keshab Boro. The informant came to know from his daughter that on 10-05-15, on her way to bihu function the accused took her away with inducement of marriage. On 14-05-15, the village bichar was held in this regard where the accused refused to accept informant's daughter as his wife. On the basis of the FIR, Tangla PS Case

No. 49/15, U/S 366-A IPC, was registered. After completion of investigation Police submitted charge-sheet U/S 366-A IPC, R/W Section 4 of POCSO Act against the accused Debajit Boro.

- 2. In consideration of the submission of the learned counsel for both the parties and materials on record and having found sufficient grounds for presuming that the accused person had committed offences under Section 366-A I.P.C., R/W Section 4 of POCSO Act, learned Special Judge framed charges there under and the ingredients of charges under Section 366-A I.P.C., R/W Section 4 of POCSO Act were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 3. The learned Sessions Judge vide Order dated 20-03-19, transferred the case to this court for disposal.
- 4. The prosecution in order to prove its case examined the following 07(seven) witnesses:

PW1- Rohan Boro.

PW2- Baishagi Boro.

PW3- Lagan Ch. Boro.

PW4- Tarun Boro.

PW5- Momi Boro.

PW6- Dr. Ajanta Bordoloi.

PW7- I/O, Someswar Boro.

- 5. The statement of the accused person had been recorded U/S 313 Cr.P.C. The defence also examined four witnesses as DWs.
- 6. Situated thus, the points for determination in the instant case are set up as follows:-

- (I) Whether the accused person induced Victim-A who is a minor girl under the age of 18 years to go with him to another place with intent that she may forced or seduced to illicit intercourse with him?
- (II) Whether the accused person committed penetrative sexual assault on Victim-A?

DISCUSSION, DECISION AND REASON FOR DECISION:

- 7. I have heard learned Addl. PP Mr. R. Sarmah for the prosecution and learned defence counsel Mr. Tarun Ch. Boro.
- 8. Learned counsel for the prosecution has submitted that victim is a minor girl. The medical evidence as well as the ocular evidence of the parents of the victim would reveal that age of the victim is below eighteen years. The victim has adduced credible evidence to establish that on the date of occurrence the accused forcibly took her away and committed rape upon her. Hence, the accused is liable to be punished under the charges leveled against him. Learned counsel for the prosecution has relied on the decision reported in 2007 (1) GLJ 329 Santosh Sinha Vs. State of Tripura and submitted that testimony of minor victim divulged in natural course which inspires confidence and is sufficient to prove guilt of offence of rape.
- 9. Per contra learned defence counsel has argued that the ingredients of Section 366-A I.P.C., R/W Section 4 of POCSO Act have not been established in the present case against the accused person. Learned defence counsel has argued that there is delay in filing the FIR which has not been explained properly. The victim girl has adduced inconsistent evidence. The evidence of the victim girl is highly improbable and not worthy of credence. The facts narrated by the victim girl would clearly show that she was a consenting party to go with the accused. He has further submitted that victim is major woman and prosecution has failed to prove beyond all reasonable doubt that on the date of occurrence victim was a

minor girl. As per the medical evidence the age of the victim is 16-17 (sixteen-seventeen) years and in such a case another two years have to be added to excess age. In this regard he has relied on a decision reported in **2017 (2) GLJ 90, Nazimul Hussain Vs. State of Assam**.

- 10. With regard to the delay in filing the FIR learned defence counsel has relied on a decision reported in 2008 (3) SCC (Cri) 330, Dilawar Singh Vs. State of Delhi.
- 11. Learned defence counsel has further argued that the accused did not commit rape upon the victim girl. The medical evidence also found no injury on the private parts of the victim girl. there is also no evidence of recent sexual intercourse as opined by the PW3, Medical Officer. In such a case prosecution has miserably failed to prove the incident of rape upon the victim girl. learned defence counsel has relied on a decision reported in 2004 SCC (Cri) 185, Devinder Singh and Ors Vs State of Himachal Pradesh.
- 12. Before appreciating the arguments put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsels, I would like to discuss the evidences adduced by the prosecution.
- 13. PW1 is Rahan Boro. In his evidence PW1 had deposed that on 10-05-15, at about 7 pm, his 14 years old minor daughter victim-A went to watch bihu function. On her way on the road the accused, who was waiting there for the victim, forcibly took her away on his bike. PW1 had deposed that the victim informed that she would go to see the bihu function alongwith his niece. When the victim did not return back home in the night, initially, they did not make search of her thinking that she was in the house of her cousin. Later on, when she did not return back they make search of her and went to the house of his niece Bharati Boro. But she informed that the victim was not in their house. Later on in connection with the incident they held village

meeting but when the villagers could not decide the matter PW1 lodged the FIR. Ext.-1 is the FIR. Ext.-1 is the signature of PW1. After filing of the FIR the victim was rescued by the police. The victim informed PW1 that the accused forcibly took her away on his bike. PW1 had also deposed that in the village meeting the accused admitted that he forcibly took the victim away against her will. PW1 had heard the confession of the accused. In cross-examination PW1 had stated that he could no recollect the date of birth of his daughter. The FIR was filed lately believing that the victim had gone to the house of his niece. PW1 had admitted that he did not state before the police that he had heard the accused making confession in the village meeting. He denied the suggestion put forward by defence that the accused did not forcibly take away his daughter and did bad thing with her.

- 14. PW2 is Smti. Baishagi Boro, mother of the victim. In her evidence PW2 had deposed that on 10-05-15, at about 07/08 pm, her 14 years old minor daughter alone went from home to watch function. On her way the accused forcibly took her away on his bike. Next day accused's uncle Salva Boro came to the house of PW2 and informed that the victim was taken by the accused. The guardian of the accused person held a village bichar in this regard. PW2 was present in the village meeting. The accused confessed that he forcibly took the victim away against her will and did bad thing with her. The accused proposed to give money to PW2 for settlement of the matter but no decision arrived at in the village meeting. Therefore, husband of PW2 lodged the FIR. In cross-examination PW2 had deposed that her daughter informed her that the accused forcibly took her away and did bad thing with her. PW2 had denied the suggestion that she had deposed falsely.
- 15. PW3 is Lagan Ch. Boro. In his evidence PW3 had deposed that informant told him that while the victim was going to watch bihu function, the accused forcibly took her away. The father of the accused Mohol Boro called for a village meeting in this regard. In the village meeting the accused confessed

that he took away the victim and committed rape upon her. As in the meeting no decision could be given, the father of the victim lodged the FIR. The police had seized the birth certificate of the victim. Ext.-2 is the seizure list. Ext.-2(1) is the signature of PW3. In cross-examination, PW3 had stated that he could not say the date of birth of the victim as it was stated in the birth certificate. He had denied the suggestion put forward by the defence.

- 16. PW4 is Tarun Boro. In his evidence PW4 had deposed that while the victim went to a bihu function the accused forcibly took her away on his bike. Later on, the family members of the accused took the victim to her house and held a village meeting. In the village meeting the family member of the accused confessed the guilt of the accused and offered money. The villagers advised not to take the money and no decision arrived at in the meeting. PW4 had deposed that the birth certificate of the victim was seized by the police through Ext.-2. Ext.-2(2) is the signature of PW4. In cross-examination PW4 had revealed that he did not know the date of birth of the victim. He also stated that accused did not have love affairs with the victim.
- 17. PW5 is victim-A. In her evidence PW5 had deposed that at the time of incident she was a student of class nine. On 10-05-15, at about 07 pm she went to watch bihu function on her bicycle. She went to the house of Purnima Boro and kept the bicycle there. As Purnima Boro was busy in other works, therefore, PW5 alone proceeded to the bihu function. On her way the accused forcibly took her away on his bike. Though she put resistance the accused caught hold of her hand and forcibly took her with him. PW5 had deposed that the incident happened in a deserted place. The accused kept her in a Govt. quarter of Khairabari Water Supply. In the night he forcibly committed rape upon her. Next day the accused took her to the house of his grandfather at Mangaldai. He kept her there for one night. In the house of his grandfather also the accused committed rape upon her. The accused threatened to kill her if she divulged about the incident to

others. Thereafter the accused took her to the house of his brother-in-law at Tangla and kept her there for one night. The accused committed rape upon her in the house of his brother-in-law. The accused tried to take her away to Gujarat from Tangla but his father made search of them and brought them to his house. They were produced before the villagers in a meeting. In the meeting the accused refused to marry her and wanted to settle the matter by paying money. In the village meeting the accused admitted that he committed rape upon her. Later on, her father lodged the FIR. PW5 had deposed that she was medically examined by the police and she was also produced before the Magistrate for recording her statement. Ext.-3 is her statement before the Magistrate. Ext.-3(1) is her signature. In cross-examination PW5 had stated that the place where the bihu function was held was at a distance of one mile from her home. At the time of incident there was no person on the road. There were houses at a distance of 300 meter from the place of occurrence. The accused took her to Khoirabari through the road of a village. On their way, near another function they walked for about 100 meters. At that time they met many people. The accused did not threaten her not to divulge about the incident from the time of taking her away. He also did not show any weapon to threaten her. PW5 had denied the suggestion that she stated before the police that she had love affairs with the accused for about 2/3 years and he promised to marry her on several times. PW5 had admitted that she did not state before the police that the accused took her to the quarter of Khairabari Water Supply, took her to the house of his grandfather at Mangaldai and to the house of his brother-in-law at Tangla and committed rape upon her. PW5 had stated that she was taken to Mangaldai in a small four wheeler vehicle which was driven by the friend of the accused. She was not kept confined at Mangaldai by tying her up or locking the door of the house. In the house of the brother-in-law of the accused to two children of brother-in-law were present. PW5 had talked with them. In crossexamination PW5 had revealed that her date of birth is 12-03-01.

18. PW6 is Dr. Ajanta Bordoloi. In her evidence PW6 had deposed that on 16-05-15, she examined the victim-A at Mangaldai Civil Hospital and on examination she found the following:

No evidence of recent sexual intercourse, approximate age 16-17 (sixteenseventeen) years and no injury seen on her private parts. Ext.-4 is the medical report. Ext.-4(1) is the signature of PW6.

In cross-examination, PW6 had stated that she had not found any injury upon the body of the victim. The admit of one finger in vagina cannot be stated to be a habitual.

19. PW7 is I/O, S.I. Someswar Boro. In his evidence PW7 had deposed that on 15-05-15, he was working as In-charge of Bhergaon police Out-post. On that day on receiving a written FIR from informant Rohan Boro, he recorded GD entry no. 219 dated 15-05-15. During investigation of the case he visited the place of occurrence, prepared a sketch map, recorded the statements of the witnesses and sent the victim girl for medical examination. He also produced the victim girl for recording her statement before the Magistrate under Section 164 Cr.P.C. Ext.-5 is the sketch map. Ext.-5(1) is the signature of PW7. Later on, PW7 submitted the chargesheet under Section 366-A IPC R/W Section 4 of POCSO Act against the accused. Ext.-6 is the charge-sheet. Ext.-6(1) is his signature. In crossexamination PW7 had stated that though the incident happened on 10-05-15, but the FIR was lodged on 15-05-15. The cause of delay in filing the FIR had not been explained in the FIR. On 13-05-15, the victim girl was rescued. PW7 had stated that the witnesses Rohan Boro, Baishagi Boro and Lagan Ch. Boro did not state before him that the accused confessed his guilt in the village meeting. He had also stated that the victim stated before him that she had love affairs with the accused for about 2/3 years and he promised to marry her on several times. He had stated that as per the medical report the age of the victim is 16/17 years i.e. the age of the victim as per school certificate.

- 20. In the instant case the accused has examined four witnesses in his defence. DW1 Smti. Sansri Dewri, the cousin of the accused. In her evidence DW1 had deposed that about three months back the victim went to her home alongwith accused. On being asked the accused and the victim girl had informed that they loved each other. The victim told that therefore she left home. They stayed in the house of DW1 for one day and next day they left. In cross-examination DW1 had denied the suggestion that she had deposed falsely.
- 21. DW2 is Joypati Sarmah, the grandmother of the accused. In her evidence DW2 had deposed that about three months back one day the accused and the victim went to her home. On being asked the victim girl informed that she had love affairs with the accused. When DW2 asked them whether their family members know that they had come to her home, they told her that their family members did not know anything. Then DW2 informed to the family members of the accused. The uncle of the accused came to the house of the DW2 and he informed that marriage of the accused would be solemnized with the victim. DW2 had deposed that the victim girl was reluctant to go with them. In cross-examination DW2 had denied the suggestion that the accused forcibly took away the victim girl.
- 22. DW3 Keshab Ch. Boro, the uncle of the accused. In his evidence DW3 had deposed that as the elder brother of the victim scolded her therefore during bihu function she fled away with the accused. The victim had love affairs with the accused. DW3 went to the house of the grandfather of the house of the accused at Mangaldai to take back the accused and the victim but the victim was reluctant to go with them apprehending that she would be assaulted at her home. In cross-examination DW3 had denied the suggestion that he had deposed falsely for the sake of the nephew.
- 23. DW4 is Hareswar Boro. In his evidence DW4 had deposed that in the month of Bohag during bihu function the victim voluntarily left with the accused.

DW4 went to Tangla to take the victim back home, but she refused to come apprehending that she would be assaulted by her father and brothers. DW4 took the victim girl to the house of her uncle and handed her over to him. In cross-examination, DW4 had revealed that he, the father, the uncle of the accused and one Boro had gone to Tangla to bring the accused and the victim back but the victim girl refused to come. The victim had a mobile phone with her. The victim refused to go to the house of the accused. DW4 had denied the suggestion that he had deposed falsely.

- 24. In the instant case except the victim girl, PW5 all other prosecution witnesses are reported witnesses. None of them had seen the accused forcibly taking away the victim girl or the subsequent incident happened thereafter. PW1 and PW2 were informed about the incident by their daughter victim girl. The evidence of PW3 and PW4 is to the effect that in the village meeting the accused confessed that he took away the victim and committed rape upon her. So the most vital witness in the instant case is PW5, the victim girl.
- 25. I have carefully scrutinized the evidence of PW5. During investigation of the case, the statement of the victim had been recorded by the Magistrate which is exhibited as Ext.-3. In her statement given under Section 164 Cr.P.C., the victim girl stated that while she and her elder sister were going to see function, the accused alongwith six other boys forcibly took her away on a bike. But in her testimony before the Court the victim had deposed that she alone proceeded to the bihu function and on her way the accused forcibly took her away on his bike. Thus the victim PW5 had contradicted on material points with her previous statement given before the Magistrate. According to PW5 the accused took her to a Govt. Quarter at Khairabari Water Supply, kept her for one night and committed rape upon her. Next day he took her to the house of his grandfather at Mangaldai and thereafter he took her to the house of his brother-in-law and kept her there for one night. According to PW5 the accused committed rape upon her in each

night while they were in the house of the relatives of the accused. In cross-examination, the victim admitted that she did not state before the police that the accused took her to Khairabari Water Supply Quarter, to the house of his grandfather at Mangaldai and to the house of his brother-in-law at Tangla and committed rape upon her. Thus, it appears that immediately after the incident during examination by the police she did not make any allegation of rape upon her by the accused but later on before the Magistrate she gave statement alleging that the accused committed rape upon her. In this case the contents of the FIR also do not disclose any allegation of commission of rape upon the victim by the accused. It has been specifically stated in the FIR that the FIR was lodged as in the village meeting the accused has refused to marry the victim girl. Therefore, the facts and circumstances of the case do not rule out that the allegation of rape against the accused might be the result of afterthought.

26. On careful scrutiny of the evidence of victim girl is also found that the accused took her on his bike through the village road. She was not tied up by the accused. At the time of taking her away the accused did not threaten her not to divulge about the incident to others. On their way they passed through another function and they had to walk a distance of about hundred meters. At that time they met many people but surprisingly the victim did not make any attempt to escape from the clutches of the accused nor she sought any help from the people whom she met on the road. It is also highly improbable to forcibly take away a person on a bike who was neither tied up nor threatened with injury to her person. So the conduct of the victim raises reasonable suspicion about the allegation made by her that the accused forcibly took her away. Moreover, the inconsistent and contradictory statements made by the victim in her statement under Section 164 Cr.P.C. and in her deposition before the Court with regard to the presence of the persons alongwith the accused at the time of incident has shaken the credibility of her testimony.

- 27. In the decision reported in 2016(2) GLT 1016, Md. Abdul Matin Pradhani & 2 Ors Vs. The State of Assam, the Hon'ble Gauhati High Court has stated that "The conduct of "X", the alleged victim, that is to say, walking with Salil in crowded areas and travelling with fellow passengers belies the claim that there was any kind of pressure or coercion upon her or that she was abducted or kidnapped or allured or induced to travel with the accused persons. In the Ejahar, it was mentioned that "X" had gone missing from her bed at around 12-30 O'clock at night. In the Ejahar it was also stated that she had gone out to attend to a call of nature when the accused persons had caught hold of her. However, the subsequent conduct of PW3 in freely mixing up with the accused persons put a dent in the prosecution case and it appears to the Court that she had volunteered to go out with the accused persons on the night of the occurrence. In the Section 164 CrPC statement, she had stated that she was taken to Guwahati in a Line Bus, which is totally different from a train journey undertaken by her, as deposed by her in the evidence".
- 28. In the aforementioned decision, the Hon'ble Gauhati High Court refused to accept that the age of the victim was below 18 (eighteen) years in view of the fact that the prosecution did not produce the school certificate or birth certificate of the victim which is the best evidence as regards age and that there is a margin of error of two years on either side while determining the age basing on the radiological report.
- 29. Similarly in the instant case, the medical evidence reveal that on the basis of radiological report the doctor found the approximate age of the victim 16-17 (sixteen-seventeen) years. Though the prosecution adduced evidence to the effect that the birth certificate of the victim was seized by the police but the said certificate was neither produced before the Court nor exhibited in evidence by the prosecution. So basing on the evidence of doctor it cannot be determined conclusively that on the date of occurrence the age of the victim was below 18(eighteen) years. The medical evidence also does

not support the prosecution case. It is found from the evidence of PW6, Doctor that on examination of the victim girl she did not find evidence of recent sexual intercourse and injury on private parts of the victim girl. Moreover, the evidence of the victim with regard to alleged kidnapping and rape by the accused does not inspire confidence and as such her evidence is not worthy of credence as the testimony of the victim girl is not consistent and trustworthy. Therefore, it is unsafe to rely on the evidence of other prosecution witnesses that the accused confessed his guilt in the village meeting inasmuch as the minutes of the meeting not being produced during prosecution evidence and neither the President nor the Secretary of the meeting has been examined by the prosecution.

- 30. In view of above discussion it appears that the prosecution has failed to establish the charges under Section 366-A I.P.C., R/W Section 4 of POCSO Act against the accused person beyond all reasonable doubt.
- 31. Situated thus the points for determination are decided in the negative and against the prosecution.

<u>ORDER</u>

- 32. In the result, the accused person Debajit Boro is found not guilty under Section 366-A I.P.C., R/W Section 4 of POCSO Act and acquitted of charges under Section 366-A I.P.C., R/W Section 4 of POCSO Act and set with liberty forthwith.
- 33. Bail bond executed by the accused Debajit Boro and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.

34. Judgment is signed, delivered and pronounced in the open court today the 25^{th} day of July, 2019.

Dictated and Corrected

(N.Talukdar) Addl. Sessions Judge Udalguri (N.Talukdar)
Addl. Sessions Judge
Udalguri

IN THE COURT OF ADDL. SESSIONS JUDGE::::::::::::UDALGURI. Special (POCSO) 14(U)/2015 APPENDIX

(A) Prosecution Exhibits:

Ext.-1: FIR.

Ext.-2: Seizure list.

Ext.-3: Statement of the victim-A U/S 164 Cr.P.C.

Ext.-4: Medical report.

Ext.-5: Sketch map.

Ext.-6: Charge-sheet.

(B) Materials Exhibits : Nil.

(C) Defence Exhibits : Nil.

(D) Exhibits produced by witness: Nil.

(E) Court Exhibits : Nil

(F) Prosecution witnesses:

PW1- Rohan Boro.

PW2- Baishagi Boro.

PW3- Lagan Ch. Boro.

PW4- Tarun Boro.

PW5- Momi Boro.

PW6- Dr. Ajanta Bordoloi.

PW7- I/O, Someswar Boro.

(G) Defence witnesses

DW1- Smti. Sansri Dewri.

DW2- Joypati Sarmah.

DW3- Keshab Ch. Boro.

DW4- Hareswar Boro.

(H) Court witnesses : Nil.

(N.Talukdar)

Addl. Sessions Judge.

Udalguri.