In the court of Special Judge, Karbi Anglong, Diphu, Assam

Present : Md. A.U.Ahmed, AJS

Special Judge, Karbi Anglong, Diphu

Special (POCSO) Case No. 16 of 2017 corresponding to GR Case No. 231 of 2017 Diphu P.S case No. 49/17 Under Section 4 of

the POCSO Act

State of Assam

Versus

Bijay Chakraborty.

Name of informant/complainant:

Smti. Buli Borah

W/o Shri Bupa Ram Borah Village: Baghmari, Ward No. 4

P.S: Diphu

District: Karbi Anglong.

State: Assam

Name of the accused person facing trial:

Shri Bijoy Chakraborty.

S/o Shri Amol Chakraborty

Village: Baghmari

Ward No. 4

P.S: Diphu

District: Karbi Anglong.

Assam

Advocates appeared:

For the prosecution: Mr. D. Deka, Public Prosecutor

For the defence : Mrs. Nipa Das

Date(s) fixed for Evidence: 09-07-2018,16-07-2018,24-07-2018,

Date(s) fixed for Argument: 08-08-201 Date(s) fixed for Judgment: 16-08-2018

JUDGMENT

- 1. It is a case of kidnapping of minor female having age of 14 years and "aggravated penetrative sexual assault" on her by the kidnapper as a result she became mother of his child.
- 2. The prosecution case in brief is that on 02--04-2017, the informant named above lodged a written ejahar with Diphu Police Station stating inter alia that on 01-04-2017 at 4 am her victim daughter went out from the house for going to school like other days but she did not come home back till next day and in-spite of best effort her where about could not be traced out. On receipt of the ejahar, the O/C, Diphu Police Station registered a criminal case vides Diphu Police Station Case No.49-2017 under section 363 of the IPC and started investigation. On recovery of the victim after almost 1 ½ years, the section 4 of the POCSO Act was got added. On completion of investigation charge sheet was submitted under section 363 of the IPC/ 4 of the POCSO Act against the accused person. Hence the prosecution has come up.
- 3. The accused person has been facing trial from jail hajot. Copy was furnished to him. Having very carefully gone through submissions of both sides as well as case diary I found there was ground for presuming that the accused person committed the offence under sections 363 of the IPC/ 6 of the POCSO Act and accordingly the charges were framed. The particular of the offences charged was duly read over and explained to him to which he pleaded not guilty and claimed to be tried.

4. During trial the prosecution has examined as many as 5 (five) prosecution witness in support of its case. The accused person has been examined under section 313 of the CrPC. The defence has examined none. Plea of defence is that the victim fled away with the accused person on her sweet will out of love and that the accused was not aware of age of the victim.

5. <u>Points for determination:</u>

- a. Whether 01-04-2017 at 4 am at Baghmari under Diphu Police Station the accused person kidnapped the victim child having age of 14 years out of lawful guardianship without his/her consent?
- b. Whether 01-04-17 or after at Baghmari or any other place the accused person committed aggravated penetrative sexual assault upon the victim child?

6. <u>Decisions and reasons there of:</u>

I have very carefully gone through verbal marathon arguments advanced by the learned counsel of both sides as well as evidence on record. In the very outset, the learned counsel appearing on behalf of the accused person has contended that the prosecution has miserably failed to prove its case against the accused person beyond all reasonable doubts. On the other hand, the learned Public Prosecutor, Mr.D.K.Deka refuting the aforesaid submission has submitted that the prosecution has succeeded in establishing its case against the accused person beyond all reasonable doubts. Prior to rebutting the rival submissions, it would be appropriate to give a glance at evidence record.

Appreciation of evidence on record

- 7. PW-1 is Smt. Buli Bora who has stated in her evidence that she is the informant of this case. She knows the accused person. At the time of occurrence the victim girl was 14 years old. The occurrence took place about $1 \frac{1}{2}$ years ago. On the day of occurrence her victim daughter went out for going to school early in the morning but she did not return home back. Thereafter she started searching her victim daughter but she couldn't find her where about. Next day she lodged a written ejahar with the Police Station. Ext-1 is her ejahar and Ext-1(1) is her signature. After 1 ½ years of the occurrence the accused along with her victim daughter came to the house of his uncle who brought them to the police station. After getting the information she came to the police station and found her victim daughter there, then she came to know that her victim daughter was the mother of 3 months old child. Police got her victim daughter medically examined and recorded her stated in the court. Court handed over the custody of the victim daughter to her. Now the victim daughter is with her. Police seized one birth certificate of the victim daughter from her. Ext-2 is the seizure list. Ext-2(1) is my signature. She has seen the seized birth certificate along with Case Record.
- 8. PW-2 is the victim who has stated in her evidence that the informant is her mother. The occurrence took place about 1 ½ years back. At the time of occurrence she was 15 years. She knows the accused person. On the day of occurrence she fled away with the accused person to Guwahati. Taking her to Guwahati the accused kept her in a rent house. She was having a love affair with the accused person. In Guwahati she was staying with the accused as husband and wife. She has a female child having age of 6 months from the side of accused. After 1 ½ years the accused took her to the house of his uncle situated at Bagmari. There after the accused took her to the police station. Police got

her medically examined and recorded her statement in the court. Ext-3 is the statement. At present she is staying with the child in her parental house.

- 9. PW-3 is Shri Samal Kumar Das who has stated in his evidence that he knows the accused, the victim and the informant of this case. The occurrence took place about 1 ½ years ago. At the time of occurrence the age of the victim daughter was 14 years. On the next day of the occurrence the informant informed him that on previous day her victim daughter went out for going to school but did not return back home. After lodging ejahar to the police station he came to know that the accused eloped away her victim daughter. After 1 ½ years the accused came to the police station along with the victim daughter. Now the victim girl is staying with her mother. She have a female child of 5 months from the accused side.
- evidence that the informant is her sister. She knows the accused. At the time of occurrence the victim girl was 14 years old. After 1 ½ years of the occurrence the accused along with the victim girl came to the police station. At that time the victim girl was having a child from the side of accused. At present the victim girl is staying with her mother.
- evidence that on-20-3-2018 was working as Officer-in-charge of Diphu Police Station and on that he took case of Diphu Police Station Case No. 49-2017 in his file. Thereafter on persistent effort given on investigation on 03-05-2018 he managed to bring the accused to police station and to recover the victim child from the possession of the accused person. The victim child being a mother of a child from the accused side did not agree for getting her

medically examined. He got the statement of the victim child recorded in the court. Earlier SI Laba Kalita seized a birth certificate of the victim child. Ext-2 is the said seizure list. M-Ext-1 is the seized birth certificate. On completion of investigation, he submitted charge sheet under sections 363 of the IPC/4 of the POCSO Act against the accused person.

12. First of all let us see whether the victim was a child in terms of the 2(d) of the POCSO Act or not. The victim herself has stated in her testimony that at the time of occurrence she was 15 years old. Ext-3 is the statement of the victim which shows that at the time of occurrence she was reading in class VIII. The informant who is the mother of the victim is the best person who can say as to what was the actual age of the victim at the time of occurrence. According to her, at the time of the occurrence, the victim 14 years and her evidence finds support from the evidence of PW-3 and PW-4. M-Ext-1 shows that the victim was born on 03-02-2003. On calculation basing on date of birth of the victim given on M-Ext-1, it appears that at the time of occurrence, she was 14 years 1 month 28 days. M-Ext-1 shows that at the time of occurrence the victim just completed 14 years. During the cross-examination of PW-1, PW-3 and PW-4, the defence has not disputed their evidence in respect of age of the victim. The accused has stated in his statement recorded under section 313 CrPC that he was not aware of the age of the victim. Defence has not led any evidence to substantiate that at the time of the occurrence the victim was above 18 years. Taking all aspects into consideration I am compelled to hold that at the time of occurrence, the victim was below 15 years. Hence, the victim can be said to be child in the terms of the section 2(d) of POCSO Act.

- **13**. In such a case evidence of the victim child plays very vital role and prosecution case lies on her evidence. Ext-1 is the FIR which shows that after lodging the same the informant who is the mother of the victim child. Came to know that accused kidnapped he victim child who was (fourteen) 14 years old. The victim girl marked as PW-2 has stated that on the day of occurrence she fled away with the accused person to Guwahati wherein he kept her in a rented house. She was staying in the said rented house with the accused person as husband and wife and became mother of a female child who is at present 6 months old. Her evidence also shows that after 1 ½ year from the date of occurrence the accused took her to the house of his uncle situated at Baghmari and there from the accused took her to Police station. PW-5 is the investigating officer who has stated in his testimony that on persistent effort he managed to recover the victim child from the possession of the accused person. The defence has not disputed the fact that the accused kept the victim child in a rented house at Guwahati wherein she was staying with him as husband and wife as a result of which she became mother of a female child.
- 14. The learned advocate appearing on behalf of the accused person has submitted that in fact no offence punishable under section 363 IPC or under section 6 of the POCSO Act was constituted as she fled away with the accused person on her sweet will and started living as husband and wife after solemnization of marriage. The victim child marked as PW-2 has stated in her cross examination that she fled away with the accused person out of love and after fleeing away they entered into wedlock. She has further stated that she has been living peaceful and cordial conjugal life with the accused person and that on misunderstanding her mother lodged this case. There is no evidence on record showing that any sort

of marriage between the accused and the victim child was taken place. They were living together as husband and wife without obtaining any endorsement. For constitution of any offence under the provisions of POCSO Act consent of the victim child is totally immaterial. Cross examination of informant marked as PW-1 who is the mother of the victim shows that at present she is not interested to proceed with the case and that she does not desire the accused to be punished.

- Act, 2012 defines a 'child' to mean 'any person below the age of eighteen years' and raised the age of consent from 16 years under the Indian Penal Code (IPC) to 18 years. The Act provides for a wide range of sexual offences including penetrative sexual assault, non-penetrative sexual assault (kissing, fondling), and non-contact based sexual acts such as sexual harassment. Unlike the IPC, which treats sexual intercourse by a man with his wife above the age of 15 years as an exception to rape, the POCSO Act does not permit any exception. In fact, penetrative sexual assault and non-penetrative sexual assault by a person who is related to a child through marriage constitutes an aggravated offence.
- 16. The Hon'ble Apex Court has discussed about the consent of the victim child in the case of *Independent Thought v. Union of India* reported " (2017) 10 SCC 800" and observed thus:-
 - **"53.** It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as

from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the Pocso Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these "child-friendly statutes" are essential for the wellbeing of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These childfriendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both."

17. Regarding object of the POCSO Act, the Hon'ble Apex has observed in case of *Eera v. State (NCT of* Delhi) reported in "(2017) **15** SCC thus :-"20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the Pocso Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by

every person by all means and through all stages of a judicial process involving the child. Best interest and wellbeing are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing childfriendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the Pocso Act.".

- The purpose of the Pocso Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well-being of the children at every stage of judicial proceeding. It provides for a child-friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the Pocso Act, it is clear to us that it is gender neutral
- 19. Aggravated penetrative sexual assault is defined in the section 5 of the POCSO Act which reads thus:-" Aggravated penetrative sexual assault.a. Whoever, being a police officer, commits penetrative

sexual assault on a child i. within the limits of the police station or premises at which he is appointed; in the premises of any station house, whether or or ii. not situated in the police station, to which he is appointed; in the course of his duties or otherwise; or where he is known as, or identified as, a police iv. or whoever being a member of the armed forces or security forces commits penetrative sexual within the limits of the area to assault on a child- i. which the person is deployed; o ii. in any areas under the command of the forces or armed forces: o iii. in the course of his duties or otherwise; or iv. said person is known or identified as a member of the security or armed forces; or c. whoever being a public servant commits penetrative sexual assault on a child; or whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or whoever commits gang penetrative sexual assault on a child. Explanation.- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or h. whoever commits

penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or j. whoever commits penetrative sexual assault on child. physically incapacitates the child or causes whichthe child to become mentally ill as defined under clause (I) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; ii. in the case of female child, makes the child or of pregnant consequence sexual iii. inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or k. whoever. taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or whoever commits penetrative sexual assault on the child more than once or repeatedly; or m. whoever commits penetrative sexual assault on a child below whoever being a relative of the child twelve years; or n. through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or o. whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or p. whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or q. whoever commits penetrative sexual assault on a child knowing the child is pregnant;

orr. whoever commits penetrative sexual assault on a child and attempts to murder the child; or s. whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or t. whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or u. whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault

- 20. The section 6 is related to punishment for the section 5 of the POCSO Act which reads thus:-"6. Punishment for aggravated penetrative sexual assault.- Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."
- can draw presumption that the accused person was involved in the occurrence in question if the defence fails to prove contrary to the fact where upon the prosecution relies. The said section reads thus:-"29. Presumption as to certain offences.-Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved." In the instant case the defence has only taken plea that the accused was not aware about the age of the victim. It is

the established principle that no benefit is given on ground of ignorance of law. In the instant case the defence the defence has failed to bring the contrary to the prosecution version.

22. In view of discussions made above and the observations made in the case laws cited above, I have come to conclusion that the prosecution has succeeded in establishing its case that the accused person kidnapped the victim child who was below 15 years out of lawful guardianship and committed aggravated penetrative sexual assault upon her as a result she became mother of a female child.

ORDER

- 23. In the result, I find the accused person guilty under sections 363 of the IPC/ 6 of the POCSO Act and accordingly he is convicted.
- 24. On the Point of Sentence the accused person is heard and to that effects. It is found that the accused person is only earning member of his family consisting of his wife one child and himself. The accused has prayed for leniency in sentencing him. There is no evidence on record showing that the accused was earlier convicted by the court of law. It has been submitted by the learned defence counsel that it is a fit case where the court may extend benefit laid down in the provisions of the Probation Offenders Act. She has further submitted that if the accused person is sentenced with imprisonment, his new conjugal life will be jeopardized and his baby will be deprived of his affection and care. Anatomically a female child having age of 15 years is not totally fit for leading conjugal life. It is a special legislation being brought in order to curving out the menace arising out of practice of

child marriage prevailing in our society. The accused is a boy of 22 years whom can be considered to be sufficiently matured. It is the established principle that plea of ignorance of the law is not acceptable. It is the pious duty of every citizen should abstain of doing anything which is not allowed by the law of the land. Taking object of the act into consideration the accused Bijoy Chakraborty is ordered to suffer RI of 2 years and to pay fine of Rs. 500/i/d SI of 1 month for the section 363 IPC. He is further ordered to suffer RI of 10 years and to pay fine of Rs. 1000/- i/d SI of 2 months for the section 6 of the POCSO Act. Both the sentences will run concurrently. Set off earlier detention period. Let a copy of the Judgment and order be supplied to the accused person at free of cost. Let a copy of this Judgment be sent to District Magistrate, Karbi Anglong in terms of section 365 of the CrPC.

25. It is evident that at present victim child with her 6 month old child is staying in her parental house. Though there is no direct evidence on record showing financial condition of the parents of the victim child but it is evident that the financial condition of the accused is not at all sound. There is also doubt the parents of the accused will come forward to provide maintenance to the victim child for herself and her child. Under aforesaid premises I am of the opinion that the victim child needs adequate financial assistance for her rehabilitation. Hence I recommend adequate compensation to be paid to the victim child and her 6 months old child under scheme of Victim Compensation laid down under section 357 A of the CrPC. DLSA, Diphu, Karbi Anglong shall take necessary steps in this regard. In the mean time the victim child is awarded with interim compensation of Rs. 25000/- . DLSA, Diphu Karbi Anglong is asked to make the interim compensation to the victim child as stated above. Let a copy of the order be sent to DLSA for information and necessary action.

- **26.** Let Judgment be uploaded in the official website. Accordingly this case is disposed of on contest.
- **27.** Given under my hand and seal of the Court on this 16th August, 2018 at Diphu, Karbi Anglong.

Dictated and Corrected by me

(Md. A.U.Ahmed, AJS)
Special Judge
Diphu, Karbi Anglong, Assam
Assam

(Md. A.U.Ahmed, AJS)
Special Judge
Diphu, Karbi Anglong,

The prosecution examined:-

- 1. PW-1 is Smt. Buli Bora
- 2. PW-2 is Smt. Babli Chakraborty
- 3. PW-3 is Shri Samal Kumar Das
- 4. PW-4 is Smt. Sabitri Das
- 5. PW-5 is Sri Dipen Das

The prosecution exhibited:

- 1. Ext-1 is ejahar
- 2. Ext-2 is seizure list.
- 3. Ext-3 is statement.
- 4. M-Ext-1 is Birth Certificate.

Defence examined & exhibited: Nil.

Special Judge Diphu, Karbi Anglong,

Assam