# IN THE COURT OF SPECIAL JUDGE ::KOKRAJHAR

Present :- Sri C. Chaturvedy, AJS

### **SPECIAL CASE NO.35/2019**

U/S.376/366 IPC, R/W Sec.6 of POCSO Act

#### **STATE OF ASSAM**

VS

Sri Nijira Basumatary @ Nijumsa Mushahary S/O. Ranendra Basumatary village- Padmabil P.S. Serfanguri District- Kokrajhar

...... <u>Accused</u>

Appearance: -

Learned Counsel for the State Mr. Manjit Ghose, Special P.P Learned Counsel for the defence Mr. A. K. Miah, Legal Aid Counsel

Charge framed on 02.09.2019

Evidence recorded on 27.09.2019; 25.10.2019; 08.11.2019; 22.11.2019; 30.11.2019; 23.12.2019;

17.02.2020

Argument heard on 11.03.2020 Judgment pronounced on 17.03.2020

# <u>JUDGMENT</u>

- 1. The case of the prosecution is that on 24.04.2019 one Sri xxx, the father of the victim, lodged a writen FIR at Kokrajhar Police Station alleging that his minor daughter, aged about 14 years, the victim, went missing at about 8 a.m from Kokrajhar. He also alleged that the accused Nijira Basumatary has abducted his minor daughter and kept her confined.
- 2. On receipt of the FIR, a case under Section 366 IPC was

registered. After completion of the investigation, a charge sheet was laid against the accused Sri Nijira Basumatary @ Nijamsa for commission of offence U/S 366/376(3) of IPC read with Section 4 of the POCSO Act. Accused was apprehended and he remained in custody during trial.

- 3. After the production of the accused, copies of the relevant documents were furnished to him. After hearing both the sides charges U/S 376/366 IPC, R/W Sec.6 of POCSO Act was framed against the accused to which he pleaded not guilty and claimed to trial. A legal aid Counsel was appointed for the accused as he was unable to engage a Counsel of this own choice.
- 4. In the course of trial, prosecution examined 10 (ten) 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.

#### 5. **POINTS FOR DETERMINATION:**

- i) Whether the accused abducted the victim, a minor girl, for the purpose of committing sexual intercourse with her?
- ii) Whether the accused committed sexual intercourse with the victim, a minor girl?

### **DECISION AND REASONS:**

- 6. Pw1, xxx, the father of the victim, deposed that on 13.4.2019 his daughter, xxx, the victim, had come to Kokrajhar alongwith her maternal Aunt for purchasing clothes. At Kokrajhar his daughter went missing. After repeated search when he could not find his daughter he lodged an FIR at the Kokrajhar Police Station. After about one month his daughter was recovered by police from Guwahati. Police produced his daughter in the Court. He came to know from his daughter that she was abducted by the accused from Kokrajhar and taken to Guwahati. At Guwahati accused committed sexual intercourse with his daughter.
- 7. In cross examination, Pw1 deposed that at the time of occurrence his daughter was studying in Class X. He deposed that his daughter

knew the mobile phone numbers of himself and his wife. He deposed that his daughter never called him on his mobile phone number. It was Sabita who informed him that accused has abducted his daughter. Pw 1 admitted that he had not lodged the FIR immediately and that he had lodged the FIR after 10 days. Pw 1 deposed that Material Exhibit-1, the birth certificate, was obtained on 19.2.2018 for submitting in the School. Pw1 denied the suggestion that he had intentionally reduced the age of his daughter in Material Exhibit-1. Pw1 also denied the suggestion that accused had not abducted his daughter. Pw1 has also denied the suggestion that accused had not committed sexual intercourse with his daughter.

- 8. Pw2 Sri Mithuraj Basumatary @ Mintu Raj Basumatary deposed that on 13.4.2019 he came to know from the father of the victim that his daughter had gone to Kokrajhar and from there accused has abducted his daughter. They searched the daughter and accused but could not find them. Thereafter, the father of the victim lodged an FIR at Kokrajhar Police Station. After about one month police recovered the victim and the accused from Guwahati. The victim was produced in Kokrajhar Court. They came to know from the victim that she was abducted by the accused. She also told them that accused committed sexual intercourse with her and the accused also wanted to sell her at a different place.
- 9. In cross examination, Pw2 deposed that he had not gone to the Guwahati. Pw2 denied the suggestion that the victim is aged more than 18 years. Pw2 has also denied the suggestion that victim had gone to Guwahati on her own. Pw2 has also denied the suggestion that accused had not abducted the victim. Pw2 has also denied the suggestion that accused did not have sexual intercourse with her.
- 10. Pw3 xxx the victim deposed that about 6-7 months back, during Bihu, she had gone to Kokrajhar market along with her maternal Aunt. Suddenly, the accused grabbed her and took her to Kokrajhar Railway Station in a car. From Kokrajhar Railway Station, the accused took her to Guwahati in a train and kept her in a room at Guwahati. There at Guwahati, the accused threatened to kill her if she raised any alarm. She deposed that the accused committed sexual intercourse with her repeatedly. One day, she managed to request a stranger to lend his

mobile phone and using that phone she called her father and informed her about the matter. Her father then recovered her with the help of police. She was produced before the Magistrate for recording her statement under Section 164 CrPC. Ext 4 is the statement and Ext 4 (1) (2) are her signatures. She was also medically examined by the Doctors.

- 11. In cross examination, Pw3 denied the suggestion that she knew the accused from before and used to talk to her on mobile phone. Pw3 has also denied the suggestion that in her statement under Section 161 CrPC she had stated that she used to talk to the accused on mobile phone. Pw3 has deposed that on the day of occurrence she was with her maternal Aunt Sabita. She deposed that she could not raise any alarm when she was being taken to Railway Station. The train arrived soon after they reached the station. There were lot of people in the railway station. She did not raise any alarm at the railway station. There were lot of passengers in the train but she did not raise any alarm during her journey. From Guwahati railway station she was taken in a bus to the place of stay. She did not inform anyone in the bus. There were three families in the play of stay. She did not inform them about the incident. She was denied rice and other such food for 13 days. The accused used to give her biscuits and sweets. Sabita knows her parents and knows her address also. Pw3 has also denied the suggestion that she had deposed falsely that she was taken to Guwahati and that accused committed sexual intercourse with her.
- 12. Pw4 Sri Robin Basumatary deposed that on 13.4.2019 xxx, the victim had come to Kokrajhar and while she was in the market alongwith her maternal Aunt, she was abducted by the accused and taken to Guwahati. Having come to to know about the identity of the accused they visited his village Padmabil and came to know that accused is a married person and has a child and that he rarely comes home. After few days they came to know about the location of accused and the victim near Garchuk, Guwahati. They went to Guwahati alongwith the police and found the vicitm on the street. She told that she was held captive in a house by the accused. The accused was arrested from that house on that night. He also came to know from the victim that accused committed sexual intercourse with her and told her that he is unmarried.

- 13. In cross examination, Pw4 deposed that he had posted a message in the face book urging the accused to talk to him regarding marriage between victim and the accused. Accused contacted him over phone and that is how they came to know his location.
- 14. Pw5 Ms. Sabita Brahma deposed that on 13<sup>th</sup> April/2019, at about 11-30 AM, she alongwith Dalimi and victim had gone to Kokrajhar market to purchase clothes. At Kokrajhar market three of them entered into three different shops. After a while, when she searched for victim she could not find her. After extensive search when she could not find the victim, she informed her father on Mobile phone.
- 15. In cross examination, Pw5 deposed that she had not informed the police that victim is missing. Pw5 denied the suggestion that she knows Nizira Basumatary, accused, and she had talked to her. Pw5 has also denied the suggestion that she had not stated before the police that three of them were in different shops. Pw 5 admitted that at the time of marketing her Mobile phone was with victim for some time. When she took the mobile phone, she found an unknown number in the list of dialed number. She does not know if victim had prior acquaintance with the accused. She does not know if victim left with the accused on her own. Pw5 has also denied the suggestion that she had deposed falsely and she knew that the victim eloped with accused.
- 16. Pw6 Miss Dalimi Boro deposed that she alongwith Sabita Brahma and victim had gone to Kokrajhar market to purchase clothes. Each of them were shopping in three different shops. After a while victim went missing and they could not find her after extensive search. Sabita Brahma informed the father of victim.
- 17. Pw7 Sri Ranendra Basumatary deposed that accused is his son. In the month of April, the father of the victim came to his house and informed that his son has abducted his minor daughter. He had a telephonic conversation with the accused and he asked him on several occasion to return the victim to her parents. His son however told him that the victim was reluctant to go to her parents. He came to know later that the father of victim has lodged an FIR in this regard. The victim was recovered from Guwahati.

- 18. In cross examination Pw7 deposed that he had not gone to Guwahati. He personally does not know whether the victim was with the accused or not. He does not know whether the victim went with the accused on her own or not.
- 19. Pw8 Smti. Samshri Basumatary deposed that accused is her son. She heard that he has taken a girl alongwith him but she does not know anything else about the occurrence.
- 20. Pw9 Dr. Sushma Brahma deposed that on 1.5.2019 had examined the victim and on her examination she found the following;

# 21. **Findings**:-

Auxiliary hair – Scanty, Pubic hair- Well developed. Total number of teeth- 28, Breast- Developed, Vulva and Vagina :- Well developed, Vaginal Canal- Easily admits two fingers, Presence of injuries-not found, Hymen- Ruptured.

- 22. **FINAL OPINION** After all clinical examination, vaginal smear, ossification test and USG report, the following points are noted-
  - The age of the girl is 14-15 years old but below 16 years
  - 2. No injury mark found on her body and private parts
  - 3. She is not pregnant.
  - 4. She has been exposed to sexual intercourse several times before 36 hours.
- 23. In cross examination Pw9 deposed that she had not recorded the history of the victim.
- 24. Pw10 Sri Dibyajyoti Kalita, the Investigating Officer, deposed that on 25.4.2019 he was posted at Kokrajhar Police Station. On that day he was entrusted with the investigation of an FIR lodged by the father of the victim in connection with which Kokrajhar P.S. Case No.150/2019, U/S 366 IPC was registered. In the course of investigation he recorded the statement of complainant and his witnesses. He had also visited the

place of occurrence and prepared sketch map of the area. He had also visited the residence of accused but could not find him at his residence. He collected the Mobile phone number of the accused and with the help of Cyber Cell, Assam Police he could locate the presence of accused. Accordingly, himself and the other police officer visited Garchuk and apprehended the accused from a house. The victim was already rescued from Nijorapar Garchuk while she was on the road. The accused wanted to escape but he was apprehended from a rented accommodation. The victim was produced before the Special Judge, Kokrajhar. The statement of the victim was recorded U/S 164 of Cr.PC. The victim was also medically examined at RNB Civil Hospital, Kokrajhar and medical report was collected. On the other hand, the accused was arrested produced before the Special Judge, Kokrajhar. He had seized the birth certificate of the victim vide Exhibit-2, wherein Exhibit-2(2) is signature. He had seized the mobile phone of the accused vide Exhibit-3, wherein Exhibit-3(2) is his signature. Exhibit-6 is the sketch map of the place of occurrence at Kokrajhar. Having found sufficient materials against the accused for commission of offences U/S 366/376(3) IPC, R/W Section 4 of POCSO Act. He submitted charge sheet against him. Exhibit-7 is the charge sheet and Exhibit-7(1) is his signature.

- 25. In cross examination, Pw 10 deposed that the birth certificate was issued on 19.2.2018 and date of birth is 6.2.2004. He had not recorded the statement of authorities issuing the birth certificate on what document the birth certificate was issued. He had not prepared the sketch map at Guwahati from where the victim and accused were recovered. He had not recorded the statement of the owner of the house and other persons near the house from where the accused was arrested.
- 26. On the evdence so tendered on record, learned defence Counsel argued that the M.Ext 1, birth certificate cannot be relied upon to ascertain the age of the victim and that the victim was a major at the time of occurrence. He pointed out that the birth certificate was issued on 19.2.2018 whereas the the victim was reportedly born on 6.8.2004.
- 27. I have considered the submission in the light of the other attending facts on record. According to FIR, the alleged abduction took

place on 13.4.2019 and the birth certificate was obtained on 19.2.2018 which is more than a year before the alleged abduction. In this regard, pw 1 was cross-examined by the defence and he deposed that he had obtained the certificate for submitting in School. Pw 1 further deposed that at the time of occurrence, his daughter was studying in class-X. The medical report also suggests that the age of victim was less 16 years at the time of examination. Thus, even though there is a delay in obtaining the birth certificate but there appears no circumstance to raise any suspicion about the date of birth of age of the victim. It is therefore held that the victim had not attained the age of 16 years at the time of commission of offence.

- 28. Learned defence Counsel further argued that the victim was not abducted by the accused rather; she went with the accused on her own. It has been further argued that the had the victim been abducted, she had several opportunities to raise alarm but she did not raise any alarm and even at the time of recovery of the victim, she was found on the street and not with the accused. All these circumstances indicate that the victim went with the accused on her own.
- 29. The defence arguments have been taken note of well but these arguments cannot be absolving factor for, the victim has ben found to be a minor at the time of occurrence and hence any consent on her part would be of no significance to the defence case.
- 30. In *State of Haryana* vs *Rajaram* (1973) 1 SCC 544, the Hon'ble Supreme Court considered the meaning and scope of Section 361 IPC and held that the object of this section seems as much to protect the minor children from being seduced for improper purpose as to protect the rights and privileges to guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words 'takes or entices any minor ... out of the keeping of the lawful guardian of such minor' in Section 361, are significant. The use of the word 'keeping' in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and

movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud, persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.

- 31. In *Rajaram* (supra), the Hon'ble Supreme Court also approved the ratio of certain English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force of a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary.
- 32. The Hon'ble Supreme Court in Rajaram (supra), held that the principles of English law same seems to be the position under Indian law. The expression used in Section 361 IPC is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361 IPC are intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely

uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case.

- 33. In view of what has been laid down in the case of Rajaram (supra), even if it is assumed that the victim went with the accused on her own volition, the accused can be said to have laid the foundation for such elopement of the victim because the accused is aged about 28 years whereas the victim is aged about 15 years. The evidence of pw 3, the victim, removes all doubt that it was accused who took her to Guwahati by train and kept her in a room. Thus, the basic ingredients of abduction have been established by the prosecution.
- 34. Coming now to the charge under Section 376 IPC and Section 6 of the POCSO Act, I would like to point that Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting 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.
- 35. Along-side, Section 29 is the provision of Section 30 of the Act which provides for reverse burden enabling the Court to presume the existence of culpable mental state.
- 36. In Noor Aga v. State of Punjab, (2008) 16 SCC 417 it was

held by the Hon'ble Supreme Court that the provision for reverse burden is not only provided for under the special Acts but also under the general statutes like the Penal Code. The Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Sections 113-A and 113-B thereof. It further held that enforcement of law, on the one hand, and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens. The court must assess the importance of the right being limited to our society and this must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right.

- 37. The Hon'ble Supreme Court in **Noor Aga** (supra), added that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused.
- 38. In this regard, pw 3, the victim, has categorically deposed that the accused committed sexual intercourse with her repeatedly. The medical report also suggests that the victim has been exposed to sexual intercourse several times before 36 hours. These evidence are sufficient to shift the onus on the accused to prove otherwise. The cross-examination of victim and other material witnesses are only directed towards consent of the victim in her journey with the accused and denial of the charge of sexual intercourse. It is apparent that the cross-examination has not been able to impeach the testimony of the victim that not only she was taken to Guwahati but she was repeatedly raped by the accused. Thus, the materials on record sufficiently establish the charge under Section 5(I) punishable under Section 6 of the POCSO Act

as well as under Section 376 IPC.

- 39. Thus, it is found on assessment of evidence that prosecution has been able to establish the charges under Section 366 IPC and also under Section 6 of the POCSO Act. The offence took place prior to the Amendments to POCSO Act (16.8.2019) and at that time the punishment for the offence under Section 376 IPC and under Section 6 of the POCSO Act were the same and hence conviction on either of the charge would suffice.
- 40. I have heard the accused on the point of sentence and he pleaded that he had not taken the victim to Guwahati and that he had not committed any sexual intercourse with the victim. He pleaded innocence and prayed for mercy.
- 41. The punishment for the offence under Section 366 IPC extends to 10 years of imprisonment and for the offence under Section 6 of the POCSO Act, the punishment may extend to imprisonment for life.
- 42. The victim was merely aged 15 years at the time of occurrence and subjecting her to repeated sexual assault shows total disregard for the human values. The accused by his acts defiled the chastity of the victim and acts of this nature needs to be deterred by severe punishment. Considering the acts of abduction and repeated sexual assault on the victim, I believe there are hardly any mitigating circumstanc which favours the accused for a lesser sentence.
- 43. Considering all aspects, the accused is sentenced to rigorous imprisonment for 7 years for the offence under Section 366 IPC and further the accused is sentenced to imprisonment for life for the offence under Section 6 of the POCSO Act.

Contd...

#### **ORDER**

Accused Nijira Basumatary @ Nijumsa Mushahary is convicted for the offences under Section 366 of IPC and for the offence under Section 6 of the POCSO Act.

For his conviction for the offence under Section 366 IPC accused shall suffer rigorous imprisonment for 7 years with fine of Rs 50,000 in default to suffer further imprisonment of 1 year.

For his conviction for the offence under Section 6 of the POCSO Act, the accused is sentenced to imprisonment for life with payment of fine of Rs 1,00,000 in default to suffer further imprisonment for 5 years (computed with the aid of Section 57 IPC).

A recommendation is made to the District Legal Services Authority, Kokrajhar, for payment of adequate compensation to the victim.

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

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

Convict has been informed of his right to prefer appeal against this judgment either in person or through Jail before the Hon'ble Gauhati High Court within 30 days from the date of this judgment.

Mr. A.K. Miah, Legal Aid Counsel shall be entitled to his remuneration as Legal Aid Counsel.

Given under the hand and seal of this Court on this 17<sup>th</sup> day of March,2020.

Dictated by

Special Judge Kokrajhar Special Judge Kokrajhar

# <u>Appendix</u>

### 1. Prosecution Exhibits:-

Exhibit-1 FIR

Exhibit-2 Seizure list Exhibit-3 Seizure list

Exhibit-4 Statement u/s 164 CrPC

Exhibit-5 Medical report
Exhibit-6 Sketch map
Exhibit-7 Charge sheet

Material Ext 1 Birth Certificate (Proved in

original)

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

### 3. Prosecution Witness

P.W.1 Victim's father

P.W.2 Sri Mithuraj Basumatary

@ Mintu Raj Basumatary

P.W.3 Victim

P.W.4 Sri Robin Basumatary
P.W.5 Ms. Sabita Brahma
P.W.6 Miss Dalimi Boro

P.W.7 Sri Ranendra Basumatary
P.W.8 Smti. Samshri Basumatary

P.W.9 Dr. Sushma Brahma

P.W.10 Sri Dibyajyoti Kalita

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

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

Special Judge Kokrajhar