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

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

Kokrajhar.

SPECIAL CASE NO.9/2018

U/S.363 I.P.C read with Section 4 of the POCSO Act, 2012.

STATE OF ASSAM

Vs

Sri Munshi Murmu, S/o Sri Alma Murmu Vill:- Patharbari, P.S. Kachugaon. **District:- Kokrajhar**

...... Accused person.

Appearance: -

Learned Counsel for the State Sri Manjit Ghosh, Special P.P. Learned Counsel for the defence Sri Shyam Tudu, Advocate

Charge framed on 10.5.2018

11.7.2018, 26.9.2018, 17.11.2018. Evidence recorded on

30.11.2018

14.12.2018 Argument heard on Judgment pronounced on 19.12.2018

JUDGMENT

- 1. The case of the prosecution is that on 16.02.2018 one Sri xxxxx, the father of the victim, lodged a written FIR at Gurufella Police out-post alleging that on 4.2.2018, while his daughter, the victim child, was returning home from the house of her maternal uncle Sri xxxx, accused Munshi Murmu kidnapped her. The informant also alleged that he has inquired from the accused Alma Murmu, father of accused Munshi Murmu, about his daughter but the latter has been dilly-dallying and has not produced the victim girl despite repeated requests.
- 2. On receipt of the FIR, it was sent to Kachugaon Police station for

registration of a case and accordingly a case under Section 363 IPC was registered and investigated. In the course of investigation, the statement of victim child was recorded and thereafter, on the prayer of the Investigating Officer, Section 4 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act) was added. After completion of the investigation, a charge sheet was laid against the accused Munshi Murmu for commission of offence under Section 363 IPC read with Section 4 of POCSO Act. Accused Alma Murmu was however, not sent up for trial.

- 3. The accused person was in custody. On his production, copies of the relevant documents were furnished to him and after hearing both the side charges under Section 363 IPC read with Section 4 of POCSO Act were framed against him to which he pleaded not guilty and claimed trial. During the pendency of trial, the case was transferred to this Court for disposal.
- 4. In the course of trial, prosecution examined 10 (ten) witnesses including the Investigating Officer and the Medical Officer. At the closure of prosecution evidence, accused was examined under Section 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

POINTS FOR DETERMINATION:

- i. Whether the accused kidnapped the victim?
- ii. Whether the accused committed sexual intercourse with the victim, a child?

SUMMARY OF EVIDENCE

- 5. Pw 1 is the victim child and she deposed that he incident took place on 4.2.2016 at about 3 p.m. She said that she was returning from the home of her maternal Uncle and at that time the accused met her on the road and forcibly took her to Udalguri. She also deposed that accused took her to the house of one of his relative and committed rape on her. She further deposed that she stayed at Udalguri, with the accused, for about three weeks, as husband and wife and thereafter, the father of the accused brought her to Gurufella. She exhibited her birth certificate, seized by Police as Ext 2.
- 6. In her cross examination she denied having any love affairs with the accused. She deposed that after her kidnapping, she came to Madhyanagar bus stand on foot. She also stated that accused did not tell him where was he taking her nor did she inquire from the accused. According to pw 1, she, along-with accused, reached Udalguri at night. The relatives of the accused, at Udalguri, inquired about her relationship with the accused to which she replied that accused had brought her to Udalguri but she does not love the accused. She also stated that she had given her statement to the Magistrate and prior to that, accused had told her to state before the Magistrate that she had love affair with the accused. She admitted in her cross examination about making a statement to Police that she loves the accused for the last 2 years.
- 7. Pw 2, Sri xxxxx, is the father of the victim and he deposed that accused kidnapped his daughter, the victim, at Pathorbari, while

she was returning from the residence of her maternal Uncle. He deposed that he inquired with the father of accused and also searched several places but could not find his daughter. Later, when the police prevailed upon the father of the accused, the latter brought back the victim. Pw 2 also deposed that on his inquiry with his daughter, he learnt that accused had taken her to Udalguri and there she stayed with the accused as husband and wife.

- 8. In cross-examination, he deposed that house of the accused is opposite to their house. He also stated that there was no love affair between the accused and his daughter. He denied the suggestion that because he scolded his daughter she was compelled to leave his residence.
- 9. Pw 3, Smt xxxxxxx, is the mother of the victim child. She deposed that accused, after having kidnapped and forcibly taking the victim to Udalguri, committed rape on her and stayed with her as husband and wife. She learnt about this from her daughter.
- 10.In cross-examination, she stated that there was no love affair between the accused and the victim child. She denied the suggestion that accused took the victim child only because the child insisted.
- 11.Pw 4, Gita Tirkey, deposed that she heard that accused has kidnapped the victim child. She deposed that the parents of the victim could not trace her despite frantic search but after some days accused Munshi brought the victim to the house of village headman and thereafter, the accused was handed over to police.

- 12.In cross-examination she deposed that she has personally not seen the accused kidnapping the victim. She also denied having any knowledge of love affair between the accused and the victim.
- 13.Pw 5 Suniram Hembrom s/o Dendra Hembrom, deposed that he had heard that accused had kidnapped his niece. He also deposed that he searched various places but could not find the victim. Later, the father of the victim approached the police and after few days, the victim was produced by the accused.
- 14.In cross-examination he denied having any knowledge of love affair between the accused and the victim.
- 15.Pw 6, xxxxx, is the maternal Uncle of the victim. He deposed that he had requested the victim to take care of his wife on post-natal issues. The victim was staying in their residence. On 4.2.2018 pw 6, along with his wife, had gone to see a Doctor for their new born child and in their absence, accused Munshi Murmu came to their house and took away the victim. Thereafter the accused was search at various places but could not be found. The victim was recovered after 10-15 days. Pw 6 also deposed that the victim told his wife that accused had sexual intercourse with the victim.
- 16.In cross-examination pw 6 denied the defence suggestion that he had not stated before the Police that the victim told his wife that accused had sexual intercourse with the victim. Pw 6 also denied having any knowledge of love affair between the accused and the victim. He also denied the suggestion that the victim had voluntarily gone to the accused because she had love affair with the accused.

- 17.Pw 7 Matal Baskey and pw 8 Shyamal Hasda deposed that accused had taken away the victim from the house of Hakim Tudu (pw 6) and in this regard there was a village meeting and an FIR was lodged against the accused. After few days, the victim was recovered.
- 18. The cross-examination of pw 7 and pw 8 was declined.
- 19.Pw 9, Sri Mantu Ram Barman, is the Investigating Officer of the case. He deposed about the usual course of investigation conducted by him on receipt of the FIR.
- 20.In his cross-examination he stated that victim did not make any statement to him regarding her whereabouts in between the date of her kidnapping and recovery. He stated that victim in her statement under Section 161 CrPC stated that she had voluntarily left with the residence of her father because her father used to rebuke her.
- 21.Pw 10, Dr. Manisha Boro Phukan is the Investigating Officer of the case and she deposed that the victim was sent for medical examination but she refused hence her medical examination was not done.

DECISION ON POINT (i) WITH REASONS:

22. Learned defence Counsel argued that trend of the cross examination of pw 1 would show that she had visited various places along with the accused and hence, if she wanted to raise an alarm, about her kidnapping, there was no dearth of opportunities. Pointing out at the statement of the victim, recorded under Section 164 of CrPC, learned defence Counsel submits that the victim has

clearly stated that she had love affair with the accused and that is why she eloped with the accused. Thus, learned defence Counsel argues that ingredients of kidnapping are missing in this case and the accused deserves to be acquitted.

- 23.Learned Special Public Prosecutor, on the other hand, argued that the victim being a child, her consent is irrelevant hence the accused be convicted in this case.
- 24. Now, Ext 2, the birth certificate of the victim child, establishes beyond doubt that victim is below 18 years of age, her date of birth being 15.04.2004. In-fact defence has not even disputed the age of the victim. In view of the fact that victim is below 18 years of age her taking away by any person, even it be with the consent of the victim, would attract the penal provisions of Section 363 of IPC because the essence of the offence lies in depriving a person of his right to lawful guardianship of his minor children.
- 25.In *State of Haryana v. 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.

- 26.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.
- 27. 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.

- 28.In the present case, since the learned Counsel for the defence has argued that it was the voluntary act of the victim that she went with the accused, I have examined the statement of the victim made under Section 164 CrPC. In her statement under Section 164 CrPC, the victim stated that she is in love with the accused which her parents did not like. She left for Udalguri with the accused and married him as per their rituals. She lived with the accused as his wife and had sexual intercourse with him.
- 29.If the statement under Section 164 CrPC is taken in its entirety what surfaces is that the initial act of elopement of the girl from her residence may be considered to be voluntary and therefore, the elements of taking or enticing may be missing, but the subsequent conduct of the accused, in taking the victim to Udalguri, at a distances of about 300 kilometers, cannot be without the active participation of the accused. The act of elopement, thus, cannot be without a previous love affair with the accused. The accused being a major, there is more responsibility cast on him regarding the consequences of having an affair with a minor girl. Hence, his act of taking away the victim to Udalguri does amount to *taking away* within the meaning of Section 361 IPC, made punishable under Section 363 IPC.
- 30. The evidence of the victim has established that she was along with

the accused for about 10-15 days. The examination-in-chief of the victim establishes the fact that victim was taken to Udalguri, by the accused, without the consent of the parents of pw 1. A reading of cross examination would further reveal that its trend is more on the fact that victim had consented to her *taking away* by the accused but the *taking away* of the victim to Udalguri is not disputed by the defence.

- 31. Coupled with the evidence of pw 1, the victim, are the evidence of pw 2, xxxxx and pw 3 xxxxx, the parents of the victim. Both these witnesses have deposed to in categorical terms that accused had taken away their daughter, pw 1. None of these witnesses have been cross-examined on the point that victim was never found in Udalguri.
- 32.In the attending facts of this case, the conduct of the accused in taking away the victim to Udalguri, away from her parents and without their consent, does make out an offence under Section 363 IPC.
- 33. The point No. (i) is decided in affirmative.

Decision on point No. (ii) with reasons: -

34.Coming now to the charge under Section 4 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 the present case, a reading of the evidence of pw 1, reproduced above, would clearly show that she had sexual intercourse with the accused. It may be added that even though pw 1 has deposed in a tenor that accused committed sexual intercourse without her consent, the evidence of pw 1, when seen from the perspective of her statement under Section 164 CrPC, as also from the cross examination, indicates she did not resist the sexual intercourse with the accused.
- 39. The cross-examination has not been able to impeach the testimony of pw 1 that willingly or unwillingly, accused did have sexual intercourse with the victim. The essence of offence under Section 3, punishable under Section 4 of the POCSO Act, does not lie in non-consensual acts, but sexual intercourse with a child, be it with consent or without consent. Section 3 of the POCSO Act is reproduced below;
 - **3. Penetrative sexual assault**.—A person is said to commit "penetrative sexual assault" if—
 - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
- 40. Thus, in view of Section 3 of the POCSO, if sexual intercourse is established it would be entirely the onus of the accused to probabilise by convincing evidence that he never had any sexual intercourse with the victim.
- 41. Not only the victim was categorical in her deposition before the Court that she lived with the accused as husband and wife, she equally deposed that accused had sexual intercourse with her. This deposition is sufficient, in view of Section 29 of the Act, to shift the onus on the accused to establish, at least by preponderance of probabilities, that he had no occasion to have sex with the victim.
- 42. The perusal of cross examination shows that onus placed on the accused under Section 29 of the POCSO was never even attempted to be discharged.
- 43. There is one aspect which needs a mention at this juncture. Pw 10, the Medical Officer, deposed that victim refused medical examination when so requisitioned by the Investigating Officer. A medical examination of the victim could have afforded some reasonable inferences about any of the facts-in-issue involved in the case. However, the fact remains that medical evidence is after all opinion evidence--it can never substitute direct oral evidence. A direct oral evidence, subject to its credibility, always stands on a

higher footing than an opinion evidence. In the present case, the direct oral evidence convincingly establishes, without adequate rebuttal from the defence, that accused had sexual intercourse with the victim during their stay at Udalguri. A reading of Section 3 of the POCSO Act would reveal that consent is absolutely irrelevant ingredient so far as the evidence under Section 3, made punishable under Section 4 of the POCSO Act, is concerned.

44.In view of the above discussion, the charge under Section 4 also succeeds. The point No. (ii) is answered in affirmative.

Probation: -

45. Probation cannot be considered in this case since the offence under Section 4 of POCSO Act attracts a maximum penalty of imprisonment for life.

Hearing on sentence: -

- 46.I have heard the accused on the point of sentence. The accused submits that he is only 20 years of age and had no understanding of the law. The victim sincerely loved her and he never meant any wrong for the victim. He pleads mercy.
- 47.I have considered the submissions. The offence under Section 363 IPC attracts a penalty of maximum of seven years of imprisonment. On the other hand, offence under Section 4 of the POCSO Act attracts a maximum penalty of imprisonment for life with a minimum of 7 years of imprisonment.
- 48.I am taking into account the peculiar facts of this case. There remains no doubt that the victim and the accused were emotionally attached to each other and the evidence on record

establishes this fact. The issue arising herein is that with respect to applicability of the law, the emotional quotient as well as consensual acts is rendered irrelevant when it comes to a case of a girl child below 18 years of age.

- 49.In the present case, what is missing is criminal intent to defile the victim for lust. The offence on the part of the accused is borne more out of emotional aspects than a deliberate criminal act in an organized manner.
- 50.I believe this is a fit case for awarding minimum permissible sentences on both counts be it under Section 4 of the POCSO Act or under Section 363 of the IPC.

Contd.....

ORDER

Accused Munshi Murmu is convicted for the offences under Section 363 IPC and Section 4 of the POCSO Act. For his conviction under Section 363 of IPC the accused is sentenced to a rigorous imprisonment of 3 years with fine of Rs 1000 in default to simple imprisonment for 2 months.

For his conviction under Section 4 of POCSO Act the accused is sentenced to a rigorous imprisonment of 7 years with fine of Rs 1000 in default to simple imprisonment for 2 months.

Both the sentences shall run concurrently. The detention undergone during trial shall be set-off from the substantive sentence.

A free copy of the judgment be furnished to the accused Given under the hand and seal of this Court

Dictated by

Addl Sessions Judge (FTC) Kokrajhar Addl Sessions Judge (FTC) Kokrajhar

APPENDIX

PROSECUTION WITNESSES

- PW 1 Victim
- Pw 2 Father of the victim
- Pw 3 Mother of the victim
- Pw 4 Smt Gita Tirkey
- Pw 5 Sri Suniram Hembrom
- Pw 6 Maternal uncle of the victim
- Pw 7 Sri Matal Baskey
- Pw 8 Sri Shyamal Hasda
- Pw 9 S.I Mantu Ram Barman, Investigating Officer
- Pw 10 Dr. Manisha Boro Phukan

PROSECUTION EXHIBIT: -

- Ext 1 Statement under Section 164 CrPC
- Ext 2 Birth Certificate
- Ext 3 Chargesheet
- Ext 4 Sketch-map

DEFENCE EVIDENCE

Nil

COURT EVIDENCE

Nil

Addl Sessions Judge (FTC) Kokrajhar