IN THE COURT OF THE SPECIAL JUDGE ::::: BONGAIGAON

Special (P) Case No. 6(BGN)/2017.

U/S 120B/366A IPC and section 6 of POCSO Act (Arising out of G.R. Case No. 1050 of 2016)

State of Assam

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- 1. Bani Kanta Ray.
- 2. Bipul Ray and
- 3. Phanidhar Ray ... Accused.

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PRESENT: Smti I. Barman, Special Judge, Bongaigaon.

ADVOCATES APPEARED:

For the State: Smti R. Choudhury, Special Public

Prosecutor

For the accused Bani Kanta Ray: Sri M. Biswas,

Sri G.Chetri.

For the accused Bipul Ray: Sri T. Das,

For the accused Phanidhar Ray: Sri K.Raja,...Advocates

Date of Argument : 10.4.2018, 24.04.2018 and 8.5.2018.

Date of Judgment : 09.05.2018.



JUDGMENT AND ORDER

1. The criminal law was set in motion by the victim's father (PW 1) with lodgement of an F.I.R (Ext 1) contending inter alia that on 21.10.2016 at around 8.30 A.M his victim daughter 'X' (PW 2) aged about 17 years was proceeding towards Birjhora girls college but

did not return and on the night of 21.10.2016 at about 11.30 P.M some person from an unknown phone no. 8402904572 informed him that he had taken his daughter but had not stated where she was taken.

The FIR being lodged by the father of the victim, the Officer in-charge of Bongaigaon Police station registered a case being Bongaigaon Police Station Case No.666/2016 U/S 366(A) IPC and commenced investigation. The Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, seized the birth certificate and admit card of the victim, recovered the victim from Chandigarh, sent her for medical examination, got recorded her statement U/S 164 Cr.P.C and at the close of investigation submitted charge sheet against the accused persons Bani Kanta Ray, Bipul Ray and Phanidhar Ray U/S 366A IPC and section 4 of POCSO Act.

3. On production of the accused person Bani Kanta Ray and on appearance of the accused persons Bipul Ray and Phanidhar Ray, the case being committed by the learned Chief Judicial Magistrate, Bongaigaon vide order dated 28.02.2017, charge was framed against the accused Bani Kanta Ray U/S 366A IPC and section 4 of POCSO Act and against the accused Bipul Ray and Phanidhar Ray U/S 120B/366A IPC. Later on charge U/S 4 of POCSO Act is altered to section 6 of POCSO Act against accused Bani Kanta Ray. The accused persons pleaded innocence while charge was read over and explained to them and therefore, the trial commenced.

4. <u>POINTS FOR DETERMINATION:</u>

i)Whether accused Bani Kanta Ray on 21.10.2016

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at 8.30 A.M under Bongaigaon Police Station induced the victim under the age of 18 years to go with him with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with others and thereby committed an offence punishable U/S 366 A IPC?

- ii) Whether on 21.10.2016 and thereafter at Rangiya, Guwahati and Chandigarh accused BaniKanta Ray committed aggravated penetrative sexual assault on the victim girl below the age of 18 years more than once and thereby committed an offence punishable U/S 6 of POCSO Act?
- iii) Whether the accused Bipul Ray and Phanidhar on 21.10.2016 at 8.30 A.M under Bongaigaon Police Station committed conspiracy to induce the victim under the age of 18 years to go with accused Bani Kanta Ray with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with others andthereby committed an offence punishable U/S 120B/366 A IPC?

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During the trial, to bring home the charge against the accused persons, prosecution side examined as many as 10 witnesses. In statement U/S 313 Cr.P.C, accused persons denied the accusations made against them and also declined to lead evidence. Accused Bani Kanta Ray also pleaded that the victim is a major one and she on her own

went with him. He denied of committing any sexual assault on her. I have heard argument of both sides and also gone through meticulously the evidence of the witnesses on record.

DISCUSSION, DECISION AND REASONS THEREOF:

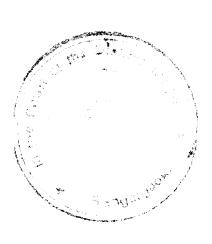
Prosecutor for the State submits that the evidence on record is clear and consistent and established the ingredients of alleged offence.

Special Public Prosecutor, the learned counsel Mr M. Biswas appearing for the accused Bani Kanta Ray, taking me through the evidence particularly the evidence of the victim (PW 2) and her parents, submits that the charge U/S 366A IPC and 6 of POCSO Act has not been established. According to him, the victim girl voluntarily went with the accused and she was not kidnapped or abducted by the accused for any of the purpose mentioned in the section. The learned counsel of accused Bipul Ray and Phanidhar Ray also submit that the available evidence of the witnesses has not established the involvement of accused Bipul Ray and Phanidhar Ray in the alleged offence of kidnapping the victim by accused Bani Kanta Ray.

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- 8. In order to appreciate the arguments advanced by the learned Special Public Prosecutor for the State and the learned defence counsels, it would be apposite to cull out the evidence on record.
- 9. Informant PW 1 is the father of the victim. He deposed that on 21.10.2016 at around 8.30 A.M his victim daughter

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proceeded towards Bongaigaon Girls College where she studied in Higher Secondary Ist Year, but till 6 P.M she did not return. Hence, they searched her in family members' as well as neighbours' house, but did not find her and at about 11.50 P.M one person from an unknown number over phone informed that he had taken his daughter. On the basis of the said phone number, he on next day informed the matter to the principal of the college and filed the FIR. Later, on 23.11.2016 police recovered the victim from Manimazra, Chandigarh alongwith the accused Bani Kanta Ray and one another girl (PW 7). He also accompanied the police to Chandigarh and in his presence, the victim was recovered. He further stated that after recovery, the victim reported her mother that accused Bani Kanta Ray by giving false identification, had taken her to Rangiya by train and after one day, she was taken to Guwahati. After two days by a bus she was taken to Barpeta wherefrom by train the accused took her to Chandigarh. As per his evidence, the victim also reported that Bani Kanta Ray committed sexual intercourse with the victim at Rangiya, Guwahati and Chandigarh. He stated that at the time of incident, the victim was 17 years old. Police also seized the birth certificate and admit card of the victim vide seizure list Ext 2 and zimma of the same was given to him. He stated that as per admit card and birth certificate, the date of birth of the victim is 10.07.2000. He produced the original admit card and birth certificate during deposition and proved the admit card as M. Ext 1 and birth certificate as M. Ext 2 (M. Ext 1 and 2 are compared with original). During cross he stated that he did not inform police about receiving a call from an unknown number. He admitted that the fact of taking the victim to Rangiya by enticing her and then to Guwahati, Barpeta and Chandigarh and the fact of committing sexual intercourse on her was not reported to police.

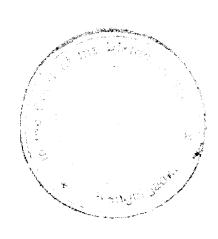


10. Describing the occurrence, PW 2 the victim deposed that on 28.10.2015 one person in her cell phone made a call and talked with her and her mother. Thereafter the said person sent a message that his name is Parag Barman, resident of Dolaigaon, Bhatipara and is an Army personnel. Thereafter said Parag Barman used to call her and also sent a mobile handset for her through courier service. Then she obtained a sim card in her father's name and used to talk with said Parag Barman in 'Whatsapp'. She stated that on 21.10.2016 she proceeded to Birjhora Girls College for attending class of Higher Secondary Ist Year and after college hours at around 3.30 P.M Parag Barman over phone called her to ASTC bus stand. Accordingly, in school uniform she went to ASTC bus stand wherein she met a person coming from Bongaigaon station by covering his face with 'gamocha' and with spectacle in eyes. He had taken her towards station. Thereafter he asked her to board in the train and also asked to change her dress. Accordingly she changed her dress and put on a jeans and a top. At Rangiya they got down from the train and had taken her to a hotel. In hotel Parag Barman introduced her as his daughter and at night he did have sexual intercourse on her forcefully. When she tried to resist, the accused had beaten her. On next day he had taken her to Guwahati by bus. When she refused to go to Guwahati the accused threatened to kill her. In Guwahati, he had kept her in a hotel near Apsara Cinema Hall for 2 days where he introduced herself as his daughter. On those 2 days also, the accused did have sexual intercourse forcefully and had assaulted her. From Guwahati she was taken to Barpeta by bus and proceeded to Barpeta Railway station. In the station, they met another girl. From Barpeta alongwith the said unknown girl, she was again taken to Rangiya train station and from

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Rangiya, she was taken to Chandigarh. She stated that in the journey by train to Chandigarh, Parag Barman and the said unknown girl talked between them inaudible to her. She could only hear that for next six months she would not be allowed to use mobile or sim card to prevent her to contact with her family. Those discussions were told to her by the said unknown girl. In Chandigarh Parag Barman kept both of them at Monimazra in a rented house. Parag Barman introduced the said unknown girl as his maid. After 2/3 days, she was sent to the terrace of a building saying that owner of the quarter would come. Parag Barman asked her as to with how many persons she would be able to do bad act in a day. Then on being enquired with whom, he replied that he just said this. On 23.11.2016 Assam police, Chandigarh police, women police alongwith her father and one man came there and had taken her to the Police Station at Chandigarh, produced her before Magistrate and thereafter she returned with her father to Assam. In a question to Court, she stated that the person who had taken her to Chandigarh raped her in Chandigarh also and later on she came to know that the actual name of the person who had taken her is Bani Kanta Ray. She proved her statement U/S 164 Cr.P.C as Ext 3. During cross, she stated that she talked with the accused Bani Kanta Ray for about one month and they developed love. Police seized the cell phone which was given to her by accused Bani Kanta Ray. She stated that the ASTC bus stand is a crowded area and after boarding into the train, when the accused asked her to change dress, she voluntarily changed her dress. But she informed neither any passenger of the train nor TT that she was taken forcefully. Even in Rangiya and Guwahati, she informed none that she was committed rape because the accused prevented her from disclosing the



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matter. While she travelled by bus and train, she informed none that she was taken away forcefully or was raped. She denied the suggestion that out of love she accompanied the accused with intent to marry him and did have physical relation with him voluntarily.

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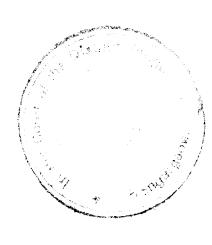
11. Mother of the victim deposing as PW 3 stated that on 21.10.2016 her 17 years old victim daughter went to Birjhora girls college in uniform but till 4 P.M she did not return. She stated that the victim told her that she fell in love with one Parag Barman, resident of Dolaigaon who was serving in Army. Said Parag Baman had gifted a cell phone to the victim. She stated that on that day i.e on 21.10.2016 at at around 11.50 P.M Parag Barman over phone informed her that he had taken the victim and then disconnected the line. On the basis of said phone call, the FIR was lodged by her husband and later on police recovered the victim from Punjab alongwith another girl and also arrested the accused Bani Kanta Ray. After return, the victim told her that after college hour, the accused had taken her away. She further reported that the accused Bani Kanta Ray committed her rape and also had assaulted her. During cross she stated that since one year prior to the incident, the victim had love with the accused Bani Kanta Ray. She stated that her statement was recorded before recovery of the victim and hence the fact of committing rape by the accused and assaulting the victim was not stated before police.

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12. PW 4, uncle of the victim deposed that on 21.10.2016 his niece/victim at around 8.30 A.M went to Bongaigaon Girls College but till evening she did not return and then the father of the victim filed the F.I.R. Later on, police recovered the victim from

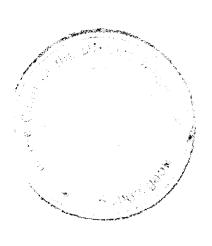
Chandigarh and then he heard that accused Bani Kanta Ray had taken away the victim.

13. PW 5 another girl "Y" deposed that she met one person namely Parag Barman in her uncle Jaleswar Ray's house and thereafter Parag Barman used to visit her house. She stated that her uncle introduced her with accused Parag Barman saying that he is searching a girl for marriage. She stated that in the year 2005 Parag Barman called her to Bongaigaon saying that his elder sister wanted to see her. Accordingly, she came to Bongaigaon bus stand and met him. Then Parag Barman saying that his elder sister was at Kokrajhar, had taken her to Kokrajhar by train. But after reaching Kokrajhar again saying that his elder sister resided at Fakiragram, had taken her to Fakiragram wherefrom by the same train she was taken to Delhi. She stated that from Bongaigaon via Kokrajhar and Fakiragram, she was taken to Delhi by the same train. She stated that though she raised alarm but nobody came forward for help. Later on, she was fed something in the train after which she became senseless. From Delhi accused Bani Kanta Ray took her to Chandigarh by bus and kept her there in a rented house wherein Parag Barman did have physical relation with her forcefully for about one month and when she resisted, the accused had assaulted her. After one month, Parag Barman made her have sexual relation with other persons and whenever she was going to protest, he had assaulted her. At that time she was 14 years old. Thus, she passed 5 years with Parag Barman during which period he employed her for She stated that during that period, she learned Hindi prostitution. language. She alleged that whenever Parag Barman used to go out from



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the rented house, or when he went to his own house, he kept her under lock and key from outside supplying all the essential articles inside the room and whenever she wanted to return home, she was assaulted. After 5 years she had brought her back home but he had not married her. She further deposed that Parag Barman earned money by engaging other girls for purpose of prostitution like her. In the year 2010, he in the pretext of taking her home, he left her upon road and after some days with the help of some AAKRSU boys, she called the accused and handed over him to police. But during pendency of the said case, he was enlarged on bail and again fled away by taking another girl. She stated that after 3 years of staying at Chandigarh, she came to know that the actual name of Parag Barman is Bani Kanta Ray, resident of Ghoramari, Sorbhog and he has wife and one son. But Bani Kanta Ray told her that he had divorced his wife. She stated that when accused Bani Kanta Ray had taken her, he was 40/45 years old. Later on, seeing Bani Kanta Ray on T.V in the present case, she contacted with police so that the victim of this case would get justice and no other girl would be victimized by him. She in the Court identified the accused Bani Kanta Ray. She proved her statement U/S 164 Cr.P.C recorded in this case vide Ext 4. During cross she stated that police had not recorded her statement in connection with this case. She admitted that since she was taken by the accused in the year 2010, her family members did not file any case. She stated that while she was taken to Chandigarh from Delhi by bus, she did not raise any alarm as she did not know Hindi at that time. She admitted that she had not seen any weapon like dagger in the hand of accused Bani Kanta Ray and she did not lodge any FIR at Chandigarh. She stated that when she learned Hindi language, she lost everything and out of defame, she

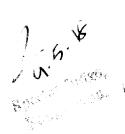




could not come home. She stated that she had no other elder family members except mother and hence no FIR was filed after she was taken away. She denied the suggestion that the accused did have sexual intercourse with her on her own will. She stated that because of this, she and her sister could not get married. She further stated that at Chandigarh she did not raise any hulla because she was afraid that in that case, she would not be able to return home.

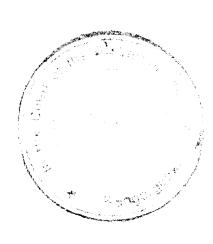


PW 6, cousin brother of the victim, deposed that on 21.10.2016 at around 8.30 A.M the victim in uniform proceeded to Bongaigaon Girls college but till afternoon she did not return and thereafter someone introducing himself as Parag Barman, informed the victim's mother that he had taken the victim away. Then on being asked to return, Parag Barman replied that he would marry the victim and after about 1 ½ months police recovered the victim from Chandigarh. He stated that later on he came to know that the actual name of Parag Barman is Bani Kanta Ray.



15. PW 7, 'Z' another girl claimed that accused Bani Kanta Ray married her by exchanging garlands. During deposition this witness identifying the accused Bani Kanta Ray in the dock told that in the year 2011 he got introduced with her in the name of Bubul Ray and became well acquainted with her at the residence of her paternal uncle. Thereafter they developed love for about two months and during that period, accused Bani Kanta Ray gave her a cell phone. He further stated that after one month of developing love, accused Bani Kanta Ray came to her house at Khagarpur and had taken her to Rangiya. After keeping one night in a hotel at Rangiya, he had taken her to Bongaigaon and kept

her in a hotel there for one night and thereafter he took her to Guwahati wherefrom he took her to Chandigarh. She stated that at Chandigarh, accused Bani Kanta Ray married her at 'Manosa Devi temple' by exchanging garlands and since then she resided with him as husband and wife. At Chandigarh he kept her in a rented house near Samadhi gate, for about 2 years. From Samadhi gate, she was kept in 'Laal Killa' in a rented house and thereafter he kept her in another rented house at Monimazra. She stated that when accused Bani Kanta Ray had taken her, she was 16 years old and in Chandigarh she came to know that the name of Bubul Ray is Gautam Mandal. From Monimazra rented house, she was recovered by police from whom she came to know that Bubul Ray's actual name is Bani Kanta Ray. Thereafter, on 15.10.16 they boarded a train at Chandigarh and reached Rangiya station on 18.10.2016 wherefrom she was received by her family members and after she had been residing with her family for four days from 18.10.2016, accused Bani Kanta Ray over phone called her to Barpeta Railway station and then her father and brother took her to Barpeta Railway station to see off where she met the victim (X) of this case. Then she alongwith the accused and the victim boarded into the train and came to Rangiya. She stated that seeing the victim when she enquired the accused Bani Kanta Ray about the identity of the victim, he replied that she will work with her and would be her company. They, the three persons went to rented house at Monimazra where the victim stayed for one month and thereafter police brought all of them. She stated that when police came to recover the victim, then only she knew that the name of Gautam Mandal is Bani Kanta Ray. She stated that accused Bani Kanta Ray told her that he is working in Supply Department.



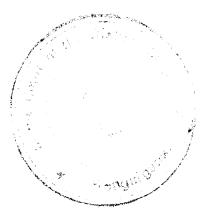
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During cross, she stated that at Chandigarh she resided with the accused for five years and at that time she was 18 years old. She further stated that she stayed with the victim as usual state and during those period, the victim reported her nothing. She further stated that the victim went with them willfully.

Officer. He deposed that on being entrusted to investigate the case, he

visited the house of the complainant, drew the sketch map of the place

PW 8, Hargobinda Pathak is the Investigating



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occurrence vide Ext 5 and recorded the statement of the witnesses. He stated that knowing the name of the accused as Parag Barman S/O Ananta Barman, a retired railway person, resident of Dolaigaon, he went to Dolaigaon in search of the accused but found nobody with that name. Then finding two mobile phone number used in the occurrence, being and 8196092603 and the victim's phone number 8402904572 (9859515201), he collected the CDR from which he came to know that the owner of the mobile number 8402904572 is Bipul Ray of Khagarpur. Then he went to Khagarpur and though found Bipul Ray but his father's name did not match. He also found that said Bipul Ray was not the owner of the said phone and hence released him. On 25.10.2016 at 5.30 Superintendent of Police informed him that the phone number P.M 8402904572 is located at Paltan Bazar area and asked him to go there. Accordingly, he with staff proceeded to Paltan Bazar Police station and found that the location of the phone number is at Manipuri Basti, Paltan Bazar and also came to know that the consumer of the phone number

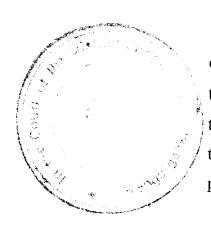
8721092717 is Phanidhar Ray S/O Dinesh Ray, a resident of Rehabari,

Guwahati. As it was 10.30 P.M, at that time, hence on next day, i.e on

27.10.2016 at 9.30 A.M with staff of Paltan Bazar Police station, he brought Phanidhar Ray to the police station and came to know that the said phone number belonged to one Bani Kanta Ray S/O Akhanta Ray, resident of Duramari, Police station Sorbhog. Then though they went to the house of Bani Kanta Ray but did not find him there and on 28.10.2016 after recording the statement of Phanidhar Ray, arrested him. On 28.10.2016 they came to know that the name of the consumer of phone number 8402904572 is Bipul Ray who during interrogation admitted that the said phone number is belonged to him and knew well Bani Kanta Ray who deceitfully took his sim card for temporary use. Then he arrested accused Bipul Ray for helping Bani Kanta Ray by giving sim card which he used in criminal activities. On 13.11.2016 from CDR of mobile no. 8402904572 and 8196092603 finding its location at Chandigarh, he proceeded to Chandigarh with staff and father of the victim and with the help of Police at Manimazra, Chandigarh, on 23.11.2016 found the victim in front of a room of a two storied building at Manimazra and on being identified by the informant, recovered the victim, arrested the accused Bani Kanta Ray @ Parag Barman @ Gautam Mandal @ Babul and also found PW 7 with them. The victim girl was examined by doctor and got recorded her statement U/S 164 Cr.P.C. He also handed over PW 7 to her father. Thereafter, on 30.11.2016, knowing about the instant incident in the newspaper, PW 5 came to thana and accordingly, her statement was recorded U/S 164 Cr.P.C. During cross he stated that he did not seize the CDR and Sim card of accused Bani Kanta Ray through which sim he talked with other accused persons. He admitted that the informant (PW 1) did not tell him that he from his wife came to know that accused Bani Kanta Ray by enticing had taken away

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his daughter to Rangiya, Guwahati, Barpeta and then Chandigarh and that the victim was sexually assaulted in those places. He neither investigated in connection with the subscriber of phone number 9859515201 nor seized any document regarding subscriber of phone no. 8721092717 and 8402904572. He also had not seized any mobile phone/sim card from accused Bani Kanta Ray.



17. PW 9, Khirod Dey, another Investigating Officer deposed that on being entrusted to investigate the case, he had gone through the case diary and seized the admit card and birth certificate of the victim vide Ext 2, collected the medical report and on completion of the investigation, submitted charge sheet vide Ext 7 against the accused persons U/S 366A IPC and section 4 of POCSO Act.

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18. PW 10, Dr Oli Roy Chakraborty, the medical officer deposed that on 26.11.2016 Dr Nita Moni Khandait examined the victim. As Dr Nita Moni Khandait resigned from her service and her whereabout was not known, hence PW 10 who knew the handing writing of doctor was examined to prove the medical report. She deposed that on examination of victim, found hymen torn but it could not opined whether the victim was raped or not and the age of the victim was above 18 years and below 25 years. There was no injury mark on her private part or body. She proved the medical report as Ext 8, vaginal smear examination report as Ext 9, age determination report as Ext 10, urine examination report as Ext 11 and register for sexual offence as Ext 12.

19. In this case, the parents of the victim 'X' (PW 1 and

PW 3) stated that at the time of incident victim was 17 years old and was reading in class XI. Regarding age, PW 9 one of the Investigating Officer seized the birth certificate (M. Ext 2) and admit card of H.S.L.C examination (M. Ext 1) of the victim (M. Ext 1 and 2 are proved with original). As per the birth certificate the date of birth of the victim is 10.7.2000. The date of registration of the birth certificate is 10.8.2000 and it was issued on 10.10.2002. So the birth was registered within one month from birth as per rule and as such there is no scope for doubt regarding authenticity of the document. The admit card (M. Ext 2) issued by Board of Secondary Education which is an authentic document also tallies with the birth certificate. Thus the birth certificate as well as the admit card reflects that on the day of alleged incident i.e on 21.10.2016, the victim was 16 years 3 months 11 days old. documentary evidence is also corroborated by her parents who are the best persons to say the age of their child. Though as per radiological report (Ext 10), the age of the victim is above 18 years and below 25 years but it is well settled that it is only an expert opinion, not amounting to conclusive proof. The victim also deposed that at the relevant time of occurrence she was reading in H.S. Ist Year. Generally a student appeared in class X examination at the age of 16 years. In absence of evidence of gap in any class for whatever reason, she was in between 16 to 17 years in class XI. When birth certificate and admit card are found to be authenticated and not challenged by defence, I hold that the victim was below 18 years of age at the time of incident and was a child as defined in section 2(d) of POCSO Act.



20. Bearing in mind the above findings as regard the age of the victim, let me, turn to the question of alleged offence of abduction

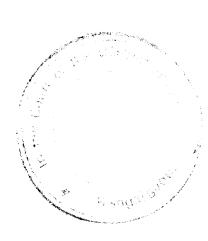
and aggravated penetrative sexual assault. While considering this, it is worth noticing that it is the victim (PW 2) around whose evidence revolves the entire case of the prosecution. As such her evidence is most credential.

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21. Victim's testimony with regard to charge U/S 366 A IPC, the accused Bani Kanta Ray got introduced himself with her over phone as Parag Barman, resident of Dolaigaon Bhatipara, an army personnel and thereafter he used to talk with her over phone. He also sent a mobile hand set for the victim which shows that he induced the victim and thus he developed intimacy with her. On the day of incident, i.e on 21.10.2016 at 3.30 P.M after college hour, the accused called her to ASTC bus stand and accordingly when she reached there, he met her by covering his face with 'gamocha' and spectacle in his eyes. Before that, she never met the accused in person. Thereafter, he had taken her to Rangiya by train and as per his direction she changed her dress in train by wearing jeans pant and top. Her further evidence is that at Rangiya he kept her in a hotel wherein he introduced her as his daughter and at night he committed penetrative sexual assault on her forcefully. On next day, she was taken to Guwahati and when she refused to go, the accused threatened her. In Guwahati, in a hotel near Apsara cinema hall, he committed penetrative sexual assault on her for 2 days and also had assaulted her. The evidence of the victim shows that in Rangiya and in Guwahati the accused did have sexual intercourse with her forcefully and on being resisted, she was assaulted and threatened. As per evidence of the victim, she was taken to Rangiya, Guwahati and then to Barpeta and from Barpeta she was taken to Rangiya alongwith another girl (PW 7)

wherefrom she was taken by train to Chandigarh and in this long journey by bus and train though she could raise alarm or resist the accused which she did not but her evidence shows that by enticing her giving cell phone and talking with her on several times over phone as well as in whatsapp, he got introduced with her and in the name of love she perhaps accompanied the accused to Chandigarh. The evidence of PW 7 shows that in the year 2011 accused Bani Kanta Ray introducing himself as Bubul Ray used to visit her house and after that he developed love with her for about 2 months and during that period he gifted her a cell phone. Thereafter he had taken her to Rangiya fromwhere she was taken to Guwahati and then to Chandigarh. At that time she was 16 years old. At Chandigarh she came to know that the name of Bubul Ray is Gautam Mandal. Later on from Chandigarh Monimazra, police had brought her to Bongaigaon alongwith the victim of this case. Her evidence also shows that at Chandigarh accused Bani Kanta Ray married her at Manasha temple by exchanging garlands and since then she resided with him as husband and wife. She resided with accused Bani Kanta Ray for about 5 years. She met the victim of this case at Barpeta Road Railway station and seeing her when she enquired the accused about her identity, he replied that she would be help and company to her. The evidence of PW 7 indicates that when since the year 2011, the accused resided with her as husband and wife why, he again developed intimacy with the victim and had taken her to Chandigarh. This clearly shows the ill intention of the accused in taking her away. Moreover, another victim girl PW 5 testified that she got introduced with accused Bani Kanta Ray in the name of Parag Barman in the year 2005 who had taken her to Delhi and from Delhi she was taken to Chandigarh wherein she was kept

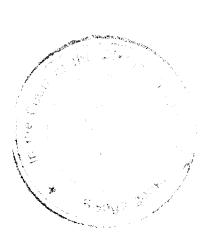


in a rented house for about one month and in those days inspite of being resisted, he did have sexual intercourse with her forcefully and whenever she resisted him, the accused had assaulted her. At that time she was 14 years old. She further deposed that after one month of taking her, Bani Kanta Ray employing her for the prostitution with some other persons earned money and whenever she resisted him she was assaulted and thus she spent five years. After five years in the year 2010 she was taken back and left on road. Thereafter, she with the help of some AAKRASU boys called the accused and handed over him to police. She lodged an FIR with regard to that case and after being enlarged on bail in that case, he fled away and warrant was issued in the said case. She also deposed that after residing for three years at Chandigarh, she came to know that the name of Parag Barman is Bani Kanta Ray and he has wife and son and the accused told her that he has divorced his wife. Later on, seeing the accused Bani Kanta Ray in T.V in the present case, she contacted with police so that no other girl would be victimized by the accused Bani Kanta Ray. From a combined reading of the evidence of the victim, PW 5 and PW 7 what distinctly transpires is that at different periods, the accused Bani Kanta Ray being a man of 40/45 years in different names got introduced with them the teenagers and somehow developing intimacy with those minors under the age of 18 years, on the pretext of love, had taken them to Chandigarh and did have physical relation with them.



22. Though the learned defence counsel vehemently argued that during the period the victim was kept in hotel at Rangiya and Guwahati and in the journey by bus and train to Chandigarh, she could

raise alarm or inform anybody which she did not, but it is quite natural being a teenager girl who was under the influence of love with accused, would not raise any alarm or inform anybody and even changed dress in train voluntarily. At that time she has only the intention to go with him and to lead a married life. Evidence of PW 2, PW 5 and PW 7 shows that in the year 2005, accused Bani Kanta Ray had taken PW 5 and left her in the year 2010 and in the year 2011, he had taken PW 7. evidence of PW 7, if Bani Kanta Ray married her and while residing with her as husband and wife why he had again taken the victim. Further evidence of the victim is that whenever she resisted the accused in having sexual relation, he used to assault her and perhaps thereafter out of fear she could not report anybody about abduction and sexual assault. In an unknown place in Chandigarh, she became helpless and under dominion or control of the accused. The victim also deposed that accused identified PW 7 as his maid whereas PW 7 resided with him as husband and wife. The evidence of the victim shows that at Chandigarh the accused asked her as to with how many persons she would be able to do bad act in one day which evidence remains unrebutted during cross examination. This part of the evidence of the victim shows that if police did not recover her, she would be engaged for sexual act with others. The evidence discussed above shows that the accused Bani Kanta Ray allured the victim to go under misconception of love and under fear and assault and had taken her to Chandigarh with intent to have sexual intercourse with him and possibility of using her for illicit intercourse with others in future cannot be ruled out. The accused Bani Kanta Ray in statement recorded under section 313 Cr.P.C only took the plea that the victim voluntarily accompanied him and denied any sexual relation with



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her. But the victim being a minor, it is immaterial whether she had gone voluntarily or otherwise. The victim under the age of 18 years, her consent is no consent at all, if such consent, even if given, is immaterial for the purpose of penetrative sexual assault. Had the victim came to him on her own, why he did not take back her home when he stayed with PW 7 as married couple. Rather he kept her in hotel at Rangiya, Guwahati and again took her to Chandigarh. The Apex Court in the case of State of H.P. Vs Shree Kant Shekari (2004) 8 SCC 153 held as follows

act is an unlawful intrusion on the right of privacy and sanctity of a

female. It is a serious blow to her supreme honour and offends her self-

" Sexual violence apart from being a dehumanizing

esteem and dignity- it degrades and humiliates the victim and where the victim is helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of woman, i.e her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely the right to life contained in Article 21. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better statutory armour in

cases of crime against women than long clauses of penal provisions.

containing complex exceptions and provisos. In the present case, the

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accused who was a teacher gratified his animated passions and sexual pleasures by having carnal knowledge of his student, a girl of tender age. Such offenders are a menace to civilized society."

23. The learned counsel of accused Bani Kanta Ray also submitted that the victim was a consenting party and no injury was found by the doctor as per medical evidence and as such, the offence of penetrative sexual assault is not established. In the case, the victim was recovered on 23.11.2016 and she was examined by doctor on 26.11.2016 i.e after three days of recovery and as such it is not possible to find any injury on her private part, but doctor found her hymen torn which lends assurance to the version of the victim. In Gurbachan Singh Vs State of Haryana (1972) 2 SCC 749 the Apex Court held that:

"... the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violence resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape."

That being the legal position, I feel it not necessary to attribute much weight in the submission of the learned counsel for accused Bani Kanta Ray. I find nothing why should a virgin depose falsely against the accused regarding sexual assault. To disbelieve her evidence would be tantamount to adding insult to physical and mental injuries already inflicted on her. The evidence of the victim is convincing

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as it carries quality and adequate reliability. Mr Biswas, the learned counsel of accused Bani Kanta Ray, strenuously argued that the Investigating Officer examined none from where the victim was recovered to know how and in what position the victim stayed there and as such it is serious deficiency in the name of investigation. But in a case of offence of rape, for any loopholes in investigation, the accused can not get benefit solely on that ground when it is otherwise proved and if an accused person is acquitted on such ground it would be adding insult to the injuries of the victim girl.

25. The Apex Court in (2003) 6 SCC 73 (Visveswaran Vs State Rep. by SDM) has given a guided line regarding approach and duty of Courts while appreciating evidence in the Court of offences under sections 376, 346 and 366 IPC and has indicated that any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.

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26. From a scrupulous reading of the facts and evidence on record, I am of the view that the prosecution established that accused Bani Kanta Ray had taken the victim from Bongaigaon to Rangiya, Guwahati and Barpeta and again to Rangiya and then to Chandigarh in which places, he did have penetrative sexual assault on her. Since he had taken her to have illicit intercourse with himself and while illicit intercourse with others has not been alleged by the victim herself, the offence U/S 366 IPC is well established against him from the facts and circumstances as discussed above. Thus the prosecution has been able to establish the charge under section 366 IPC instead of section 366(A) IPC by establishing the basic ingredients which are:



- (i) Kidnapping or abduction any woman;
- (ii) Such kidnapping or abduction must be -
- (a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or
- (b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

Accordingly accused Bani Kanta Ray is convicted for the offence punishable U/S 366 IPC.

- 27. In the case, it is found that the victim is a child being below the age of 17 years. The evidence on record cry loud and clear that accused Bani Kanta Ray committed penetrative sexual assault on the victim in hotel at Rangiya and Guwahati and then in Chandigarh i.e on several occasions and presumption in terms of section 30 of the Act can be raised regarding culpable mental state on the part of the accused. The offence committed by the accused Bani Kanta Ray falls within the ambit of section 5(l) of the Act i.e committing penetrative sexual assault more than once punishable U/S 6 of the Act. Accordingly, accused Bani Kanta Ray is convicted U/S 6 of POCSO Act.
- 28. As regard the complicity of accused Phanidhar Ray and Bipul Ray in the charged offence, I find no any iota of evidence against them except the evidence of the Investigating Officer

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that accused Bani Kanta Ray used the phone number of Bipul Ray being 8402904572 which Bipul Ray claimed to be deceitfully taking the sim from him for temporary use. In statement U/S 313 Cr.P.C accused Bipul Ray admitted to be the subscriber of the said sim and stated that on 21.11.2016 accused Bani Kanta Ray in the name of making a call, took his cell phone but later on did not return it. From CDR, the Investigating Officer found that calls were made between 8402904572 and the phone number 8721092717 and between 8402904572 and 8196092603 and arrested accused Phanidhar Ray, the consumer of phone number 8721092717. From Phanidhar Ray the Investigating Officer came to know that phone number 8402904572 and 8196092603 were used by his brother-in-law, accused Bani Kanta Ray, and accordingly arrested him. But nowhere any of the witnesses whispered regarding involvement of the accused Bipul Ray and Phanidhar Ray from any corner at any point of time. Though accused Bani Kanta Ray in his statement U/S 313 Cr.P.C stated that accused Bipul Ray and Phanidhar Ray gave him the whatsapp number of the victim to make friendship with her, but there is no evidence that the victim knew them or that she even went to their house with accused Bani Kanta Ray. The statement of the co-accused can be used not as substantive evidence, but only for the purpose of corroboration. In the above, accused Bipul Ray and Phanidhar Ray cannot be held guilty U/S 120(B)/366 A IPC. Accordingly, accused Bipul Ray and Phanidhar Ray are acquitted and be set them at liberty. Their bail bonds shall remain in force till next six months.



25.5. 8

29. Accused Bani Kanta Ray is convicted for the offence

punishable U/S 366 IPC and 6 of POCSO Act. Heard the convict Bani Kanta Ray on point of sentence as per provision of section 235(2) Cr.P.C. He prayed that he may be dealt with leniency.

- The learned Special Public Prosecutor has submitted that the accused is a habitual offender and one another case in similar nature being no. Sessions 64(B)/2018 (Bijni police station case no. 333/2010) U/S 366A/372 IPC is pending in the Court of the learned Additional Sessions Judge, Bijni, Chirang and therefore no leniency can be shown to him whereas the defence counsel for the convict submitted that the accused deserves leniency.
- 31. On the facts and circumstances on record following aggravating as well as mitigating factors are discernible:

Aggravation factor:

- 1. The victim was 16 years 3 months old at the relevant time.
- 2. The accused identifying himself as an Army personnel got introduced with her over phone, developed intimacy with her and also gifted a cell phone and then make her attracted towards him and thus induced her to go with him in the name of love.
- 3. He committed penetrative sexual on her in several places more than once by threat and assault.



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- 4. Accused is a matured man of 41/45 years and prior to taking the victim, he never appeared before her and committed the offfence in a pre planned manner.
- (5) He has the antecedent of committing similar offence against teenager girls in the past.

Mitigating factors:

- 1. He is a man of 43 years.
- 2. He claimed that the victim went with him willingly and pleaded innocence.
- I gave my anxious consideration on the aspect of quantum of sentence. Sentencing for any offence has a social goal. Sentence is to be imposed in respect of the offence and the manner in which the offence has been committed. The purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. Now let us see what the Apex Court observed in such cases. In the case of Jameel V. State of Uttar Pradesh (2010) 12 SCC 532, the Apex Court speaking about the concept of sentence, has laid down that " it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

32.

33. In Shaliesh Jasvantbhai and Anr. V. State of Gujrat and Ors. (2006) 2 SCC 359, the Apext Court has observed thus:

"Friedman in his Law in changing society stated that: "State of criminal law continues to be as it should be a decisive reflection of social consciousness of society. Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

34. In Gopal Singh V State of Uttarakhand 2013 (2) SCALE 533, while dealing with the philosophy of just punishment which is the collective cry of the society, the Apex Court has started that "just punishment would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehension should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant facts."

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35. From the above observation of the Apex Court it

reveals that while dealing with sentencing various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasized upon in the said cases. In the case at hand, rape committed on a girl of below 18 years. The victim was both physically and psychologically vulnerable. In any kind of sexual assault, the offender should be dealt with seriously and sensitively.

36. In State of Andhra Pradesh V. Bodem Sundra Rao AIR 1996 SC 530, the Apex Court observed that "crimes against women are on the rise and such crimes are affront to the human dignity of the society and, therefore, imposition of inadequate sentence is injustice to the victim of the crime in particular and the society in general.

......The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's crime for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering the imposition of the appropriate punishment."

34.6.18

37. In State of Karnataka V. Krishnappa (2000) 4 SCC 75, the Apex Court opined that "the Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years and respond by imposition of proper sentence. Pubic abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. It was further observed

that to show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced."

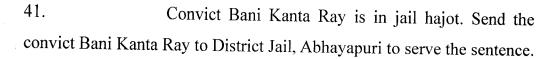
38. In Madan Gopal Kakkad V. Naval Dubey and Anr. (1992) 3 SCC 204, it has been observed as follows:

aggravating circumstances to determine the quantum of sentence, I find that the aggravating factors outweighed the mitigating factors in this case. In a case of aggravated penetrative sexual assault punishable U/S 6 of POCSO Act, the legislature while prescribing a minimum sentence for a term which shall not be less than ten years, has also prescribed that the sentence may be extended upto life. In the instant case the young girl victim with efflux of time, would grow with traumatic experience and unforgettable shame. It is a crime against the whole body of a woman and the soul of the society. Not only that, he committed the offence with the victim while on bail in a similar offence instead of facing trial. He committed a serious offence against a girl child and therefore in my

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considered view, he does not deserve a lenient consideration.

Considering all aspects, I sentenced the convict Bani Kanta Ray to undergo Rigorous imprisonment for 7 (seven) years with fine of Rs. 1000/- (One thousand) in default simple imprisonment for 1 (one) month for the offence punishable U/S 366 IPC and he is also sentenced to undergo Rigorous imprisonment for life with fine of Rs.5000/- (Rupees five thousand) in default rigorous imprisonment for another two months for the offence punishable U/S 6 of POCSO Act. Both the sentences will run concurrently.



In view of the factual backdrop of the case particularly trauma caused to the victim perpetrated upon her, she requires compensation. The case is recommended to the District Legal Services Authority, Bongaigaon for compensation to the victim 'X' as per provision of section 357A Cr.P.C.

Return the seized documents from whom the same were seized to whom zimma was already given.

43. Let a free copy of the judgment be furnished to the convict. Send a copy of the judgment to the District Legal Services Authority, Bongaigaon. Also send a copy of judgment to the District Magistrate, Bongaigaon.

44. Given under my hand and the seal of this Court on

the 9th day of May, 2018.

(I. Barman) Special Judge, Bongaigaon.

Dictated and corrected by me

(I. Barman)
Special Judge,
Ronggiggon

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Prosecution witness:

- PW 1 Father of the victim.
- PW 2 'X' Victim of the case.
- PW 3 Mother of the victim.
- PW 4 Uncle of the victim.
- PW 5 Victim 'Y' of another incident.
- PW 6 Cousin brother of the victim.
- PW 7 'Z' alleged to be married by the accused Bani Kanta Ray.
- PW 8 Hargobinda Pathak, I.O.
- PW 9 Khirod Dey, Another I.O.
- PW 10 Dr Oli Roy Chakraborty.

Defence Witness:

Nil.

Documents exhibited by Prosecution:

- Ext-1- F.I.R
- Ext-2 Seizure list.
- Ext-3 Statement U/S 164 Cr.P.C..
- Ext-4 -Statement U/S 164 Cr.P.C.
- Ext 5-Sketch map of the P.O.
- Ext 6 -CDR.
- Ext 7 Charge sheet.
- Ext 8 medical report.
- Ext 9-vaginal smear examination report.
- Ext 10 age determination report.
- Ext 11-urine examination report.
- Ext 12- Register for sexual offence.

Materials exhibited by Prosecution:

- M. Ext 1 HSLC admit card.
- M. Ext 2 Birth certificate.

Defence Exhibit:

Nil

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(I. Barman) Special Judge, <u>Bongaigaon</u>