IN THE COURT OF THE SPECIAL JUDGE::::UDALGURI

Present : Sri. P. Saikia,
Special Judge,
Udalguri.

SPL (POCSO) 08(U)/2015

State of Assam -Vs-

Mukurdhar Chouhan.....Accused.

For the Prosecution: Mr. M. Khaklari, Addl. Public Prosecutor.

For the Accused: Mr. Manoj Deka, Learned Advocate.

Evidence recorded on : 18-06-15: 26-06-15: 04-07-15:

24-07-15: 30-07-15.

Argument heard on : 08-05-19. Judgment delivered on : 17-05-19.

JUDGMENT

The prosecution case in a narrow conspectus is that on 10-03-15, the informant Bal Bahadur Biswakarma lodged a written report with the Officer-in-Charge of Harisinga Police Station alleging inter-alia that on 09-03-15, his minor daughter aged about fifteen years (real name is withheld and henceforth referred to as the victim) found missing after going to market to purchase sandals at around 02.00 pm. On being enquired he came to know that she was kidnapped by the accused Mukurdhar Chouhan on her way to market.

- 2. On the basis of the written report and treating the same as the FIR, the Officer in Charge Harisinga P.S. registered a case vide Harisinga P.S. case no. 22/15 under Section 366(A) IPC and commenced the investigation of the case. On conclusion of the investigation the Investigating Officer laid the charge sheet against the accused Mukurdhar Chouhan for the offence under Section 366(A) IPC R/W Section 4 of the POCSO Act to face trial in the Court of law.
- 3. On receipt of the copies of police documents supplied under Section 173 Cr.P.C. Special POCSO case being Special POCSO case no. 08(U)/15 was registered and Court process was issued to ensure the presence of the accused. In compliance to the process of the Court the accused entered his appearance and he was supplied with the relevant copies of the documents. Whereupon scrutiny of the relevant materials in the case record my learned predecessor-in-office found a prima facie case and framed formal charges against the accused under Section 366(A) IPC R/W Section 4 of the POCSO Act, and the charges so framed were read over and explained to the accused to which he pleaded not guilty and claimed trial.
- 4. In order to bring home the charges, the prosecution has examined as many as nine(9) witnesses and also relied on some documents marked as Exhibits attached with the case record.
- 5. On close of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C. He took a plea of complete denial and pleaded his innocence. Further, no evidence was adduced on behalf of the defence.
- 6. In the light of the facts and circumstances, the points for determination are set forth hereunder:-

- (I). Whether accused on 09-03-15, at about 02 pm at Amjuli Chowk under Harisinga P.S. kidnapped the victim, a girl under eighteen years of age, with intent that she may be forced to illicit intercourse with you, and thereby committed an offence punishable under Section 366(A) IPC.?
- (II). Whether accused on the same day, time and place, committed penetrative sexual assault upon the victim, aged 15 years and thereby committed an offence punishable under Section 4 of POCSO Act.?
- 7. I have heard arguments rendered by the learned counsel for both the sides and also meticulously assess the evidences on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 8. PW1 is Bal Bahadur Biswakarma, is the brother of the victim. As per his evidence the informant is his uncle and the victim is his own sister. On the day of occurrence he alongwith his sister at about 03.00 pm went to Amjuli Chowk to buy sandals. At that time the accused dragged away his sister and took her alongwith him. The accused also told him that if he informed the informant he would be beaten. Later, he informed his uncle. The accused before taking his sister alongwith him gave him a denomination of Rs. 5/- and asked him to go home. He resisted the accused not to take his sister away and his sister could not make shout as her mouth was tied with a handkerchief.
- 9. In cross-examination he has stated that he does not remember as to whether he stated before the police that accused before taking away his sister tied her mouth by handkerchief. Accused met them in the market where there were many people present. His sister and the accused walked away together while he returned to his own home. He did not talk with any of the person present in the market.

- 10. PW2, Bal Bahadur Biswakarma is the first informant of the case. It is his evidence that the victim is his own daughter and she was around 15 years old at the time of incident. At the material point of time one day his daughter went to market alongwith his nephew Bal Bahadur Biswakarma to purchase sandals. Later he was informed by his nephew that his daughter had been kidnapped by the accused from Amjuli Chowk. Then he lodged an FIR with the Harisinga Police Station. Later, the victim was recovered by the police. On recovery, his daughter informed him that accused kept her concealing in his house at Udalguri. He has proved and marked the FIR lodged by him as Ext.-1 wherein Ext.-1(1) is his signature.
- 11. In cross-examination he has stated that he found his daughter at Harisinga Police Station, but he does not know whether the accused and his daughter voluntarily surrendered before the Harisinga Police Station. His nephew informed him about the incident on the same day of the incident at about 05.30 pm. At the time of the incident his daughter passed HSLC examination. He does not remember the date of birth of his daughter.
- 12. PW3, Zingira Devi is the mother of the victim. She has deposed to the effect that on the day of the incident her daughter was kidnapped by the accused when she had gone to purchase sandals for her. When they could not locate their daughter her husband lodged the FIR with the police and eventually victim was recovered by police. After recovery the victim said that accused committed bad works with her.
- 13. In cross-examination she has revealed that she does not know the date of birth of her daughter. She has admitted that she did not state before the police that "her daughter told her that accused committed bad works with her".

- 14. PW4 is the victim herself. She has stated in her evidence that on 09-03-15, she went to Amjuli Chowk to purchase sandals for her alongwith her brother Bal Bahadur Biswakarma. When they were proceeding to the market, the accused seeing her and her brother called her brother near him. Thereafter, the accused threatened her brother to return home and out of fear her brother left for home. Thereafter, the accused forcefully took her in a bicycle in the carrier and brought to the house of one unknown person. In that house accused provided her tea and snacks. After having tea the accused again took her to a distance of about 05 kms in an unknown place and in the meantime it became dark. Then the accused took her into a house of his relatives but she came to know later that the house belonged to the accused. Accused kept her there for 4/5 days. The accused allowed to had her meals in that house alongwith his family members and the accused committed rape on her in the night. She has again stated that she was kept in the house of the accused for one day and thereafter she was again taken by the accused to his sister house and committed sexual intercourse with her. Subsequently, one day the accused and she came to the police station. Her statement was got recorded before the Magistrate. Ext.-2 is her statement. Ext.-2(1) and 2(2) are her signatures. She was also medically examined by the Doctor. She was born on 07-09-1999.
- 15. In cross-examination, she has disclosed that she has not produced her birth certificate before the Court. She also does not know who issued her birth certificate. When her father lodged an FIR with the police then accused and his family members brought her to the police station. She has stated that at the time of recording her statement before the Magistrate under Section 164 Cr.P.C. She revealed that she had love affairs with the accused for about one year prior to the incident. She came to the market with his brother in his bicycle. The accused also came in the bicycle. She was taken in the carrier of the bicycle of the accused. She does not remember the name of the person in whose house the accused first took

her and where she had snacks and tea. She did not state anything before that person as regards the incident. When she was alone with the accused in several houses of his relatives she was not confined by the accused and she moved freely and also mixed up with the family members of those persons. On 14-03-15, she was at Harisinga P.S. and she was produced before the Magistrate to record her statement after two days. During the gap of these two days she was in the police station. She has denied the suggestion that she did not state before the police that she was raped by the accused. She has denied the defence suggestion that accused did not commit rape on her.

- 16. PW5, Golap Chouhan. He is not an eye witness to the incident. as per his evidence he knows both the accused and the victim. The incident occurred on 10-03-15. Few days before the incident, the accused told him that he had love affairs with the victim and the victim also reciprocated his love affairs. The accused also told him that he wanted to take away the victim due to having love affairs and asked him to provide his vehicle on hire to accomplish his desire. At first he agreed, but later on, he refused to hire his vehicle.
- 17. In cross-examination he stated that victim was around 17-18 years at the time of occurrence whom he knows since his childhood.
- 18. PW6, Obang Mize is the Munsif-cum-Judicial Magistrate First Class, Udalguri, who recorded the statement of the victim. According to his evidence he recorded the statement of the victim under Section 164 Cr.P.C. and the victim made his statement voluntarily. After recording the statement he had read over the same to her to which she accepted as correct and put her signature. Ext.-2 is the statement of the victim. Ext.-2(3) is his signature. In cross-examination by defence he has stated that victim did not state before him that she was not allowed to go outside for 4/5 days.

19. PW7, Dr. Pritirekha Saikia is the medical officer who examined the victim in connection with this case on 15-03-15 and her opinion are as follows:

No comment could be given regarding sexual intercourse, pregnancy test negative, no injury mark on her private parts and approximate age 17-18 years. Ext.-3 is her report and Ext.-3(1) is her signature.

Her cross-examination was declined by the defence.

- 20. PW8, Nripen Tamuli is one of the Investigating Officers of the case. his evidence reveals that on 10-03-15, he was posted as ASI of police at Harisinga P.S. On that day Officer-in-Charge Harisinga Police Station received one FIR from Bal Bahadur Biswakarma. On the basis of the FIR, the Officer-in-Charge registered a case and entrusted him for investigation of the case. in course of investigation he visited the place of occurrence and prepared a sketch map thereof vide Ext.-3 wherein Ext.-3(1) is his signature. The victim and the accused voluntarily surrendered before the police. He got the statement of the victim recorded under Section 164 Cr.P.C. before the Magistrate and sent her for medical examination. He kept the birth certificate of the victim in the record which was submitted by the informant.
- 21. In cross-examination he has stated that the age certificate of the victim is not seen in the case record. The Xerox copy of the birth certificate is attached with case record. He has confirmed that victim did not state before him that accused committed rape on her. She had only stated that accused committed bad works with her. He has further confirmed that victim did not state before him that at the taking of her with the accused she was not misbehaved by the accused nor forced her to go with him. he has also confirmed that PW1 Bal Bahadur Biswakarma did not state before him that accused tied the mouth of the victim by a handkerchief. The victim voluntarily appeared before the Harisinga P.S. on 14-03-15.

- 22. PW9, Soneswar Borah is the other Investigating Officer of the case. He has stated that on 02-04-15, he was acting as Officer-in-Charge of Harisinga P.S. On that day on receipt of an FIR from informant Bal Bahadur Biswakarma, he registered a case and entrusted S.I. Nripen Ch. Tamuli to conduct the preliminary investigation of the case. After completion of the preliminary investigation of the case ASI Nripen Ch. Tamuli submitted the case diary before him. On perusal of the case diary he found a prima facie case against the accused and laid the charge-sheet under Section 366-A IPC read with Section 4 of POCSO Act against the accused Mukurdhan Chouhan. Ext.-4 is the charge-sheet. Ext.-4(1) is his signature.
- 23. In cross-examination he has denied that after considering the statement of the victim and medical record he ought not to have submitted the charge sheet.
- 24. From close scrutiny of the above witnesses the following pictures emerge:
 - (i) Though the victim has stated in her evidence that she was kidnapped by the accused while she was proceeding to market alongwith her brother is not tenable inasmuch as after the incident the victim stayed with the accused for about five days in the house of the relatives of the accused and thereafter she alongwith the accused voluntarily appeared before the police station when she came to know that her father lodged an FIR. If she had been kidnapped by the accused against her will and consent she would have shouted for help to save her from the clutch of the accused. When she admittedly stated that she was kidnapped from the market where there were many people. Moreover, the victim has admitted that she was having love affairs with the accused since before the incident and as such her voluntary elopement with the accused cannot be ruled out in the face of the evidence that she

and the accused after coming to know about the lodgment of the FIR voluntarily appeared before the police.

- (ii) Though the victim in her statement before the Court has stated that the accused after kidnapping her committed rape on her is not believable as she has improved her version before the Court which is not compatible with her statement under Section 164 Cr.P.C. It is the evidence of the victim that she was raped by the accused, but on perusal of her statement (Ext.-2) reveals that she stated before the police that the accused had committed bad works with her without explaining specifically in that regard.
- (iii) Further, I/O (PW8) has confirmed the contradiction in the testimony of the victim (PW5) disclosing that she did not state before him that the accused had committed rape on her in her statement recorded under Section 161 Cr.P.C. As a result of such flagrant contradictions the testimony of the victim PW5 has eroded her credibility in support of the material particulars of the case.
- (iv) As per the evidence of the Doctor (PW7) and her medical report, there was no sign of recent sexual intercourse and no injury mark on her private parts was seen. The age of the victim as per medical report of radiological examination was in between 17-18 years and as per the evidence of the victim (PW4) and her father (PW2) was fifteen years.
- 25. From the evidence of the victim (PW5) it appears that she was a consenting party. She did not raise alarm when she was taken by the accused. On the contrary, she accompanied the accused and stayed in his relative's house without any protest. She was not confined in a particular place while she was staying in the house of the accused. Though she has stated that accused had sexual intercourse against her will and consent but

she did not say so in her statement Ext.-2 recorded before the Magistrate except disclosing that the accused did bad acts with her without elaboration what was the bad things the accused alleged to have done against her.

- 26. Section 366 IPC defines that whoever kidnaps or abducts any woman 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 in order that she may be forced or seduced to illicit intercourse.
- 27. Under Section 275 IPC the sexual intercourse with a woman with or without her consent, when she is under the age of sixteen years is 'Rape'.
- 28. In the case of Uday Vs State of Karnataka, (2003) 4 SCC 46; Vijayan Pillai, (1989) 2 KeralaLJ 234, it was held that:

"Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. Every consent to act involves submission, but is by no means follows that a mere submission involves consent".

- 29. Here in this case, as discussed earlier, the victim no doubt is a consenting party as she alongwith the accused voluntarily appeared before the police after lodgment of an FIR by her father PW2. The only thing is that whether she was below the age of sixteen years.
- 30. In the case of Ram Murti Vs. State of Haryana 1990 SCC [Cri] 371, it was observed that :

- "the age should be more closely clarified when according to the medical evidence the victim was found to have been used to sexual intercourse and hymen was absent".
- 31. In the present case as per the radiological examination report victim was about 17-18 years and therefore, the victim was obviously a major girl when no birth certificate of the victim has been produced from the competent authority to establish that victim was minor at the time of occurrence. Mere oral evidence is not satisfactory. Father (PW2) and mother (PW3) also could not give the exact date of her birth.
- 32. In this case, the evidence of Doctor, parents of the victim and the victim herself are inconsistent as regards to age. School certificate is not exhibited and as per the Investigating Officer (PW8), the original birth certificate is not seen in the record. The Investigating Officer has not collected the birth certificate from school. The admission register from the school was not seized, produced or have exhibited. The prosecution has failed to prove that the victim was below the age of 16-18 years. The victim was a consenting party.
- 33. Situated thus, though in principle the evidence of victim of rape, conviction can be safely recorded without any corroboration from other source provided her evidence is cogent, consistent and above reproach and strikes the judicial mind as a truthful one, but in the instant case the evidence of the victim is found to be full of exaggeration and infirmities and, therefore, her evidence suffers from basic infirmities and the probabilities factor renders it unworthy of credence. There is no other evidence including the medical evidence which gets corroboration to the testimony of the victim.

- 34. On the final analysis, I am of the considered opinion that prosecution has failed to prove its case beyond reasonable doubt and therefore the accused is at least entitled to get benefit of doubt.
- 35. Accordingly the accused Mukurdhar Chouhan is held not guilty under Section 366-A IPC R/W Section 4 of POCSO Act. He is acquitted thereunder. Set him at liberty forthwith.
- 36. Bail bond executed by the accused person and the surety shall remain in force for another six months under the purview of provision under section 437-A Cr.P.C.
- 37. Judgment signed, delivered and pronounced in the open court today the 17th day of May, 2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia)(P.Saikia)Sessions Judge,Sessions Judge,

Udalguri. Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Bal Bahadur Biswakarma.

ii)PW2 Bal Bahadur Biswakarma.

iii)PW3 Zingira Devi.

iv)PW4 Victim.

v)PW5 Golap Chouhan.

vi)PW6 Obang Mize, Judicial Magistrate.

vii)PW7 Dr. Pritirekha Saikia

viii) ASI Nripen Tamuli.

ix) SI Soneswar Borah.

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 FIR.

ii) Ext.2 Statement of the victim u/S 164 Cr.P.C.

iii) Ext.-3 Medical report.

iv)Ext.3 Sketch Map.

v) Ext.4 Charge-sheet.

Dictated and corrected by me.

Sessions Judge,

Udalguri.