IN THE COURT OF SPECIAL JUDGE :::: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 30 of 2015, U/S 4 of POCSO Act 2012 (Arising out of Kakotibari P.S. Case No. 59/2015)

State of Assam

-Vs-

Sri Paresh Baruah Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P.

For the accused : Mr. Ravi Dutta, Advocate

Date of framing Charge : 06.02.2016

Dates of Evidence : 17.04.2017, 11.07.2017, 30.10.2017,

16.12.2017

 Date of S/D
 :
 18.01.2018

 Date of Argument
 :
 09.05.2018

 Date of Judgment
 :
 23.05.2018

JUDGMENT

- 1. Prosecution case, in brief, is that on 03.09.2015, Sri Jadav Gogoi lodged an FIR with O/C, Kakotibari P.S. alleging, inter alia, that on that day, at about 8 AM his sister victim 'B' (name withheld), aged about 17 years went to Mahmora College for her exams but did not return home in time. At about 4.00 p.m. he called Paresh Baruah (accused) over phone and came to know that said Paresh Baruah has taken away the victim with him and presently they are at Jorhat.
- 2. On receipt of the FIR, Kakotibari P.S. Case No.59/2015, U/S 366

- (A) IPC was registered and started investigation. During investigation, victim was recovered from Margherita and sent for medical examination, but she refused to undergo medical examination. Victim was also sent to Court for recording her statement U/S 164 Cr.P.C. Accused was arrested and produced before the court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the above named accused U/S 366-A/343 IPC read with Section 4 of POCSO Act, 2012. On receipt of the charge sheet, accused was allowed to go on bail.
- 3. Subsequently, after furnishing copies of relevant papers, vide order dated 16.02.2016, my learned predecessor in office has framed the charge U/S 4 of POCSO Act, 2012 against accused Paresh Baruah to which he pleaded not guilty and claimed to stand trial. During trial, prosecution has examined eight witnesses including victim and two I.Os. Defence cross-examined the said P.Ws but adduced no evidence.
- 4. Upon completion of the prosecution evidence, accused was examined U/S 313 Cr.P.C. Defence case is of total denial and false implication. Accused declined to adduce evidence when he was called upon to enter into defence.
- 5. I have heard argument of learned Special P.P. Mr. Srimanta Gogoi and Mr. Ravi Dutta, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE

- 6. (I) What was the age of the victim 'B' on the date of incident?
 - (II) Whether victim 'B' was subjected to penetrative sexual assault by the accused?

DECISION AND REASONS THEREOF

7. PW 1 in her evidence deposed that on 03.09.2015, she was a student of

HS first year class of Mahmora Jr. College and was aged about 16 years. On that day, while she came out of her college at tiffin time, accused came to her and forcibly took her in a truck initially to Rajgarh and kept her at the residence of his sister for one night. On the next day he took her to Margherita in Train. At Margherita he kept her at the residence of his sister for about 15 -16 days. On getting her location, her family members recovered her with the help of police and brought back to Kakotibari PS. She resisted the accused in keeping her with him but he did not allow her to come back. Accused also performed physical relationship with her against her will. Accused is known to her having visiting relation with their family. He also used to follow her while she go to college. Accused also put vermilion on her head, the day on which police recovered her. Police took her for medical examination and me to court. She has given statement at Sonari Court. Exbt. 1 is her statement in court. Exbt. 1(i) is her signature. She did not give consent for medical examination by doctor. Exbt. 2 is the paper in which she refused to give consent for medical examination. Exbt. 2(i) is her signature. Police seized her age certificate. Her date of Birth of Birth is 03.04.1999. However in school certificate her age was mentioned as 03.10.1998. In her cross-examination PW 1 admitted that accused is known to her since her childhood but she denied that she has love affairs with the accused. She also admitted that while giving statement to police, she has stated that she had love affairs with the accused and while giving statement in court, she stated that she eloped with the accused due to their love affairs. On the date of incident, she came out from school on finish of unit exam. Several other girl students also come out of school. After coming of about 100 feet, she saw that the accused was standing on the road. She was on her bi-cycle. Several other people/students were also using the road. On her arrival accused asked her to go with him. At that time her friend Parash Moni Barua was with her. On her denial accused used force and she cried but none come forward. By that time one truck arrived there and accused got the truck stooped; put her cycle in the residence of one road side house and accused

took her in the truck. At that time two other persons were present apart from the driver. I have cried even after boarding the truck but none come forward to help her. While she was at Rajgarh, she made hue and cry but none come to help her. From Rajgarh accused took her to Margherita by train. They went to station and met several peoples at station and in train. She did not inform any person met at station or in the train. She did not make any hue and cry for help. She did not even cry at Margherita station. Several peoples have their residence near the place of stay at Margherita. At Margherita, she has her cousin. She came to know about her presence at Margherita before 5 days of her recovery and informed her parents. She denied that she has suppressed her actual age and she was above 18 years of age. She also denied that while giving statement in Court, she has not stated that accused made physical relation with her without consent. She further denied the defence suggestion that due to love affairs, she eloped with the accused and that accused neither forcibly took her, nor kept her confined and did not made any cohabitation.

8. PW 2 Sri Gobin Gogoi, father of the victim in his evidence deposed on 03.09.2015, victim was a student of HS Second Year class of Mahmora Jr. College and was aged about 16-17 years. On that day, as the victim did not return from school, he searched for her and from her friend; he came to know that she went with accused Paresh Barua. After about 21 days police recovered her from Margherita. After her recovery on being asked, victim told him that by keeping her cycle in one house, accused took her with him. Police seized school certificate of daughter. Exbt. 3 is seizure list. Accused is a married man having one son. In his cross-examination, PW 2 admitted that one of his friend's daughter resides at Margherita. She did not inform them anything prior to recovery of his daughter by police. After recovery, he did not inquire from his daughter nor she reported him anything about her stay at Margherita. He denied that at the time of incident, his daughter was above 18 years of age and she eloped with the accused on her own.

- 9. PW-3 Sri Jadav Gogoi, brother of the victim and informant of this case, in his evidence deposed On 03.09.2015, she was a student of HS first Year class of Mahmora Jr. College and was aged about 16 years. On that day, as his sister did not return from school, he searched for her and from her friend, he came to know that she went with accused Paresh Barua and performed marriage with accused. Paresh told him over phone that he brought his sister. On this incident, he lodged the FIR at Kakotibari PS. Exbt. 4 is the FIR. After about 21 days police recovered his sister from Margherita. After her recovery on being asked, victim told him that by keeping her cycle in one house, accused took her with him. She also told that she made cry but none helped her. She did not tell him anything about any physical relation by the accused. Police seized school certificate of his sister. Exbt. 3 is seizure list. In his cross-examination, in the FIR, he has mentioned that at 4 pm he called Paresh Barua over phone but even than police did not take any action on this aspect. In the FIR, he did not mention that accused has forcibly taken away his sister. Victim was about 5 years younger than him in age. In between he has another sister. He denied that at the time of incident, his sister was above 18 years of age and she eloped with the accused on her own for her love affairs with the accused.
- 10. PW-4 Sri Brajen Chetia on 03.09.2015, on hearing that Victim has eloped with one boy, he went to her house and from her family members, he came to know that accused Paresh Barua kidnapped her. Subsequently Kakotibari PS recovered them. He did not ask Victim about the incident. All the family members of Victim told him about the incident. He has no personal knowledge of taking Victim by the accused.
- 11. PW-5 Sri Lakhinath Baruah, brother-in-law of the victim, in his evidence deposed that on 03.09.2015, on hearing that Victim was missing, he also searched her. During search, he came to know accused Paresh Barua has kidnapped her. After about 17-19 day police recovered them from Margherita.

On asking Victim about the incident, she told me that accused has forcibly taken her and kept at Margherita at the residence of sister by the accused. In his cross-examination, he deposed that before police he has not stated that on asking Victim about the incident, she told him that accused has forcibly taken her and kept at Margherita at the residence of sister by the accused.

- 12. PW-6 Sri Bipul Gogoi in his evidence deposed that on 03.09.2015, from villagers, I came to know accused Paresh Barua has kidnapped Victim Gogoi. he did not ask Victim about the incident. In his cross-examination, he denied that before police he has not stated that hearing of the incident of kidnap from villagers.
- 13. PW-7 SI Amrit Kalita, (one of the I/O) in his evidence deposed on 03.09.2015, on receipt of one written FIR from Sri Jadav Gogoi, Kakotibari PS case No. 59/15 u/s 366 IPC was registered and he investigated the matter. During investigation, he went to the place of occurrence i.e. road side near Mahmora Junior College and drawn a sketch map of the PO (Exbt. 5), searched the residence of accused but found him absent at his house.
- 14. PW-8 SI Rajib Das in his evidence deposed that on 10.09.2015, after taking charge of further investigation of Kakotibari PS case No. 59/15 u/s 366 IPC, on 20.09.2015, following source information, he apprehended the accused Paresh Baruah from his native place. Upon his interrogation, it revealed that victim was kept at his sister's residence at Makumtilla, Margherita. Accordingly, victim was recovered from Margherita Area from the residence of Thanu Konwar and Bihuti Konwar, sister of accused and brought them to Kakotibari PS. During investigation, he seized the HSCLS certificate of the victim. As per the said certificate, date of birth of the victim is 03.10.1998. Exbt. 3 is the seizure list. As shown by the victim, he has drawn a sketch map of the place of occurrence i.e. where from she was kidnapped. Exbt. 6 is the sketch Map. As shown by the victim, the place of occurrence of kidnap was at Mahmora Borbil Road infront of Siloniting L P School. Victim was sent for

medical examination where she refused to give consent. Exbt. 2 is the medical report showing refusal of the victim to undergo medical examination. He also sent the victim to Court for recording statement u/s 164 Cr.P.C. On competition of investigation he has submitted charge sheet against the accused Sri Paresh Barua u/s 366A/343 IPC r/w section 4 of Pocso Act. Exbt. 7 is the charge sheet. In his cross-examination, he admitted that FIR was received at the PS on 03.09.2015 at 7.30 PM. Mahmora College is at a distance of about 2 KM from Siloniting L P School. As per FIR, place of occurrence is near Mahmora College and as per victim place of occurrence is near Siloniting L P School. Near the PO, there was no residence of peoples. Victim in her statement stated before him that she had love affairs with the accused.

15. Point No.I: So far age of the victim is concerned, from the evidence on record it appears that in her evidence the victim (PW 1) has claimed that on the date of incident she was aged about 16 years. She further stated that police seized her age certificate. She also stated that in the birth certificate her date of birth was mentioned as 03.04.1999. However in school certificate her date of birth was mentioned as 03.10.1998. P.W.2, father of the victim and P.W.3, the informant as well as brother of the victim in their evidence claimed that at the time of incident victim was aged about 16-17 years. In their cross PW 1 to P.W.3 denied that at the time of incident victim was above 18 years of age. P.W. 3 in his cross examination stated that the victim was five years younger than him. Learned Advocate for the accused has argued that while adducing evidence on 17.04.2017, the P.W.3 has claimed his age as 25 years and admittedly the victim is five years younger than him. As such on the day of incident the victim should be treated as aged above 18 years as the incident took place on 03.09.2015. I have considered the materials on record. Admittedly, the victim has two date of birth as claimed by her – one is 03.04.199 and another is 03.10.1998 as found by the I.O. (P.W. 8) from the School certificate seized by him. Victim also mentioned that in school document her date was birth was shown as 03.10.1998. This date appears to be more convincing that on assumptive evidence of PW 3. The other aspect that victim was a student of Higher Secondary 1st year at the time of incident it can safely be held that date of Birth of the victim as 03.10.1998. As the incident took place on 03.09.2015, as such I hold that on the date of alleged incident the victim was aged about 17 years only.

- 16. Point No. II: It may be noted her that in this case though I/O has submitted charge sheet for the offence u/s 366A IPC and section 4 of Pocso Act, but charge were framed only for section 4 of Pocso Act. However from the trend of evidence, it appears that much stress was given by the witness on the aspect of kidnap of the victim but said part of evidence is not relevant for determination except the circumstance on the point of consent of the victim. However, I have already held that victim was minor on the date of alleged incident, question of consent or no consent is immaterial.
- 17. It may be noted here that on looking at the evidence on record, the major part relates to taking away of the victim and keeping her confined, but no charge was framed for the offence of kidnap and wrongful confinement, most probably due to the statement of the victim U/S 164 Cr.P.C. of self elopement. Otherwise also on looking at the nature of the evidence, it appears that while victim came out from her college at Tiffin time, accused came to her and took her in a truck initially to Rajgarh and on the next day she was taken to Margherita in train where she was kept for about 15-16 days at the residence of the sister of the accused. Though she alleged the fact of forcible taking away, but from her cross examination it appears that at that time several other students were also present, particularly one Parash Moni Baruah was with her. She also admitted that while going in the train she did not make any hue and cry and did not even make cry at Margherita Railway Station. She further admitted that, at Margherita she has her cousin and she came to know about her presence at Margherita before five days of her recovery. Prosecution has

not examined any eye witness.

- 18. As mentioned earlier, in her 164 Cr.P.C. statement victim has given a different version about elopement on her own having love affairs with the accused. Even P.W. 2, the father of the victim stated that he came to know that his daughter victim 'B' went with accused Paresh Baruah and his daughter did not report him about her kidnap by accused. P.W. 4 also stated about elopement of the victim with the accused. From the evidence of I/O it appears that there was gulf of difference about the place of kidnap as shown to I/O and as narrated in FIR and deposed in evidence. Victim shown the place of occurrence as near Siloniting L P School which is at a distance of about 2 KM from Mahmora Jr. College. Thus it appears that there is no reliable evidence regarding the allegation of kidnap of the victim against her will by the accused and as such charges were not framed afresh at the stage of recording evidence or even after conclusion of trial or at the stage of argument hearing or before delivery of judgment.
- 19. So far allegation of penetrative sexual assault on victim 'B' is concerned, in the course of argument hearing, learned Special P.P. has submitted that in her statement the victim clearly mentioned that after taking her with him, accused kept her confined and did not allow her to come back and accused also performed physical relationship with her against her will. As such by drawing presumption as provided U/S 29 of POCSO Act 2012, the court should hold that prosecution has been able to prove the ingredients of offence punishable U/S 4 of POCSO Act 2012. On the other hand, learned Advocate Mr. Ravi Dutta appearing for the accused has submitted that though the victim in her evidence stated about physical relation with her without her consent, but by referring to the statement of the victim as recorded U/S 164 Cr.P.C. (Exbt.1) he argued that the victim was totally silent regarding any sort of physical relation with her. It is also argued that as per the statement of the victim given U/S 164 Cr.P.C. it depicts that on the day of incident i.e. on 03.09.2015 she eloped with

the accused on her own, performed marriage and thereafter she was recovered by police from Margherita. It is further argued that Section 29 of POCSO Act 2012 cannot be applied in this case as the attending circumstances as brought out during the evidence of the witnesses and their cross examination clearly shows that the presumption on the version of prosecution case appears to be stands rebutted due to non-support by the other witnesses. I have considered the submission of both the sides.

20. Now coming on the allegation of penetrative sexual assault, from the evidence of P.W. 1 it appears that though accused performed physical relationship with her against her will, but P.W. 2, father of the victim, P.W. 3, brother of the victim and P.W. 5, brother-in-law of the victim in their evidence in court has admitted that after recovery of the victim, she did not state them regarding physical relation by the accused with her against her will. These witnesses simply stated that victim stated to them regarding keeping kidnap and keeping her confined at Margherita. In her 164 Cr.P.C. statement (Exbt. 1), as stated earlier, the victim was totally silent about co-habitation by the accused. The other vital aspect is regarding refusal of the victim to undergo medical examination by doctors. Victim has admitted that while she was produced before the Doctor by police she refused to undergo medical examination by the Doctors. I found force on the argument of the learned defence counsel that it should be treated as an adverse inference against the victim regarding the allegation of penetrative sexual assault by the accused against her will. Except one line statement of the victim on this aspect is found untrustworthy and not reliable in view of non-disclosure of the fact of physical relation by the accused soon after her recovery to her close relatives. Except this one-line statement of the victim, there is nothing on record to show that victim was subjected to penetrative sexual assault by the accused against her will during the period of her stay with the accused at Margherita. Both the circumstances, where the victim is silent about rape on her at the earliest

opportunity i.e. either in court or before her relatives, lead me to conclude that presumptions as available u/s 29 Pocso Act cannot be invoked in this case being stand rebutted. Considering all above, I am of the considered opinion that prosecution has failed to prove the allegation of penetrative sexual assault by the accused beyond all reasonable doubt.

- 21. As such, accused Paresh Baruah is acquitted from the charge U/S 4 of POCSO Act, 2012 and set at liberty forthwith.
- 22. Bail bond executed by the accused and his surety are extended for another six months from today U/S 437-A Cr.P.C.
- 23. Considering the nature of the case, I am of the opinion that it is not a fit case for referring the matter to DLSA for granting compensation U/S 357-A Cr.P.C.
- 24. Send a copy of the judgment to learned District Magistrate, Charaideo at Sonari U/S 365 Cr.P.C.
- 25. Seized certificate is allowed to remain with the victim. Zimma bond is canceled.
- 26. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 23rd day of May 2018 Sivasagar.

Special Judge,

<u>Sivasagar</u>:

<u>APPENDIX</u>

1. Prosecution witnesses:

- P.W.1 (Victim 'B')
- P.W.2 Sri Gobin Gogoi
- P.W.3 Sri Jadav Gogoi (Informant)
- P.W.4 Sri Brajen Chetia P.W.5 Sri Lakhinath Baruah
- P.W.6 Sri Bipul Gogoi
- P.W.7 SI Amrit Kalita (I.O.)
- P.W.8 SI Rajib Das (I.O.)
- 2. Defence witnesses None
- 3. <u>Court witnesses</u> None
- 4. Exhibits by prosecution -
 - Exbt.1 164 Cr.P.C. statement of the victim
 - Exbt.2 Medical report
 - Exbt.3 Seizure list
 - Exbt.4 FIR
 - Exbt.5 Sketch map
 - Exbt.6 Sketch map
 - Exbt.7 Charge-Sheet

Special Judge, Sivasagar: