IN THE COURT OF ADDITIONAL SPECIAL JUDGE...... BIJNI.

Present: N.U. Ahmed,

Additional Special Judge,

Bijni.

Special (P) Case No. 30 (P)/2018

(Arising out of GR Case No. 31/2018)

U/S 363 of the IPC R/W Section 17 of the POCSO Act.

THE STATE OF ASSAM

-VS -

Md. Mojibar Ali.....Accused.

APPEARANCE :

Advocate for the prosecution

: Mr. P. Dev Ray, learned Addl. P.P.

Advocate for the defence

: Mr. N.K. Ghose, learned Advocate

Date of framing of Charge

: 25.09.2018

Date of recording Evidence

: 4.01.2019, 21.1.2019, 4.02.2019, 22.02.2019

and 2.03.2019

Date of Argument

: 18.04.2019 & 29-04-19.

Date of Judgment

: 4.05.2019

JUDGMENT

1. The prosecution case, in brief, is that on 15.01.2018, informant Musstt. Joba Bibi lodged an FIR with the O. C. Panbari P. S. alleging that on 31.12.2017 at about 7 pm while she was preparing food then her 13 years old daughter "X" (name withheld here in after known as victim "X") was missing. The informant and her family members search her daughter and at about 2 AM of the same night one Abdul Hussain residence of village-No. 3 Goraimari informed her that accused Rahim Ali and her daughter are in his house and called them to take over them. Thereafter, informant brought Rahim Ali @ Babu and her daughter to her house and on interrogation accused Rahim Ali @ Babu reported that he made a conspiracy with accused Majibur Ali and in the bike (motor cycle) took her

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daughter near No. 3 Goraimai LP School and tried to commit rape on her, but she raised alarm and Abdul Hussain recovered her daughter and he taken her daughter and Rahim Ali @ Babu in his house. Hence, his present case.

- 2. On receipt of the FIR, O/C Panbari P.S registered the same as Panbari P.S Case No. 8/2018, U/S 363/376/511 of the IPC and started investigation. After completion of usual investigation I.O submitted charge sheet against the accused Rahim Ali and Majbar Ali, u/s 363 IPC read with Section 8 of the POSCO Act, showing accused Rahim Ali as absconder
- 3. Since the offence u/s 8 of POSCO Act, triable by Special Judge and as such learned Judicial Magistrate, First Class, Bijni forwarded the case to this court. On receipt of the case record cognizance was taken against accused Rahim Ali and Majbur Ali, u/s 363 IPC read with Section 8 of the POSCO Act and register a Special (P) Case No. 30 (P)/ 2018 and issues summons to the accused persons. During pendency of the case Rahim Ali @ Babu appear and has taken a plea of juvenility and vide order dated 8.08.2018, this court declared Rahim Ali @ Babu has juvenile in conflict with law and his case is split up and sent to the Juvenile Justice Board, Chirang for inquiry.
- 4. Copies of the relevant documents were furnished to the accused Majbar Ali as per provision of section 207 of the Cr. P. C. After hearing both the sides learned Advocate and on perusal of the case diary charge was framed u/s 363 of the IPC, R/W section 17 of the POCSO Act against accused Majibur Ali and contents of charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 5. During trial prosecution side examined as many as eight witnesses including informant and victim. Accused was examined u/s 313 of the Cr. P. C and recorded his statement in separate sheets attached to the case record. The defence case was of complete denial and the defence side has not adduced any defence evidence.
- 6. I have heard argument put forwarded by learned advocate of both sides. I have gone through the case record as well as evidence on record.

POINT FOR DETERMINATION

7. (i) what is the age of the victim "X"?

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- (ii) Whether accused Majibur Ali on 31.12.2017 at about 7 p.m. at village No. 2 Monakosha under Panbari P.S kidnapped victim "X" a minor girl aged 13 years from the lawful guardianship of Musstt. Joba Bibi and thereby committed an offence punishable u/s 363 of the IPC.
- (iii) Whether on the aforesaid date time and place accused Majibar Ali abated Rahim Ali @ Babu, to commit an offence punishable u/s 8 of the POSCO act and thereby committed an offence punishable u/s 17 of the POSCO Act, 2012.

:DISCUSSION, DECISION AND REASON THEREOF:

The prosecution to bring home the charges examined all together eight witnesses including informant and victim. Let me scrutinize the evidence on record to decide the points.

PW 1 Musstt. Juba Bibi is the informant of the case. PW 1 in her deposition has deposed that victim "X" is her daughter and she did not know the accused person present in the dock. She further stated that she knows Rahim Ali. In her evidence she further stated that about 1 year ago, one day afternoon while she was preparing food then her son Gafur Ali reported her that her daughter "X" is missing. Thereafter, she search her daughter but did not found. In the night at about 9/10 p.m. one Saheb Ali and Abul Hussain came to their house and told that her daughter and one boy were standing on the road and were talking and Abul Hussain brought them to his house and kept there. Thereafter, she, her daughter Najma Khatun, one Eyar Ali and Mafidul were went to the house of Abul Hussain and brought her daughter and the boy to their house. She asked her daughter about the incident and she reported to her that Rahim Ali brought her from the road on foot and Majbur was standing with a bike. They abroad on the motor cycle and went to the backside of one school house. Rahim Ali tried to bring her backside the school and she objected and some men arrived and Majibar left the place of occurrence along with bike. From Nalbari Police Came and taken Rahim Ali. Along with police, Majibur was came to their house. She further stated that at the time of occurrence age of her daughter was 13 years and police recorded her statement. During cross examination she stated that she could not say the date of occurrence. She lodged the FIR after 15 days of the occurrence, but she did not explain the reason of delay in the FIR. She did not know the contents of the ejahar. Her daughter acquainted with Rahim Ali in a brick industry. Rahim stay in their house for 4 days and thereafter police came and taken him. She heard the incident from her daughter. She

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further stated that she did not know the date of birth of her daughter. Defence side put suggestion to her that Majibar Ali did not bring her daughter in a motorcycle which she denied.

10. PW 2, is the victim "X". PW 2, in her deposition has deposed that she know Rahim Ali, but she did not know another accused. She further stated that about 1 year ago in the first day of January, Rahim came to their house and called her on the road. From road they went to their school on foot. There Majibar was waiting with a motor cycle. She and Rahim broad on the motorcycle of Majibar and went to Goraimari on the backside of school. In the backside of school Rahim and Majibar tried to commit misdeed with her and then she raised alarm and the villagers came there along with Abul Hussain and thereafter they brought her and Rahim to the house of Abul Hussain and Majibar fled away from the place of occurrence with motorcycle. Thereafter, Saheb Ali and Abul informed her mother and her mother and sister brought her to the house. Babu @ Rahim Ali telephoned his father and his father came to their house along with police and take Rahim Ali. Thereafter, her mother filed this case. She further stated that after filing the case, she was brought before doctor for her physical examination and she was also produced before Magistrate for recording her statement. She proved her statement as Exhibit 1 and Exhibit 1 (1) and Exhibit 1(2) are her signatures. During cross-examination she stated that she did not know her date of birth. She further stated that Eyar Ali, Najma Khatun and Mafidul took her to the house of Abul Hussain from Goraimai LP School. Defence side put suggestion to her that before Magistrate, she did not state that accused Majibar Ali take her to Goraimari LP School on his motorcycle which she denied. She further stated that Rahim Ali stay in their house for 4 days. She also stated that in the vehicle of police Majbar also came to their house. Defence side also put suggestion to her that before police she did not state that in the backside of Goraimari LP School, Rahim Ali and Majbar Ali tried to commit sexual assault on her which she denied. She also stated that she did not know Majbur Ali earlier. Rahim Ali told him that Majbar Rahman is his brother-in-law. While she was walking on the road, she did not raise any alarm. Defence side put suggestion to her that Majibar Ali did not try to commit misdeed with her which she denied. Defence side also put suggestion to her that at the time of occurrence her age was above 18 years which she denied. Defence side put suggestion to her that Majibar did not taken her in his motorcycle and she deposed falsely which she denied.

11 PW 3, Md. Shaheb Ali in his deposition has deposed that about 1 year ago one day at night Abul Hussain called him to the house of Nalu and there he came to know that daughter of Nalu was kept in the house of Abul Hussain. He did not go to the house of Abul Hussain. During cross-examination he stated that he did not know who caught the girl and boy.

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- 12. PW 4, Md. Mofidul Hussain in his deposition has deposed that he did not know the accused person and he know the informant and the victim girl. He further deposed that about 1 year ago while he was sleeping in the house of Safiur Rahman, then Nalu called him and took him to the house of Abul Hussain from where Nalu bring one boy and his daughter. He along with them went to the house of Nalu and thereafter left the place of occurrence. During cross-examination he stated that he did not know the boy and he did not know how the boy and girl came to the house of Abul Hussain.
- 13. PW 5.Md. Nalu Sheikh is the father of the victim girl and husband of the informant. PW 5 in his deposition has deposed that about 1 year ago, one day evening about 7/7:30 PM, he was at market and at that time his wife informed him that his daughter "X' is missing from the house. Thereafter he came to his house and searched his daughter in different places but could not found. Thereafter, Abul Hussain and Saheb Ali came to his house and reported him that Babu and his daughter are kept in his house. Out of anger he has not went to the house of Abul Hussain to bring his daughter. His wife, one daughter, one Mofidul and his son-in-law went to the house of Abul Hussain and bring Babu and victim "X" to their house. On being asked them they told him that Majibar also along with them. Thereafter, his wife filed this case. During cross examination he stated that he did not know wherefrom his daughter went there. Thereafter, from Nalbai police came and taken away Babu from their house.
- 14. PW6 Md. Anser Ali, in his deposition has deposed that he knows the informant and did not know the accused person. He further deposed that, about 1 years ago one day morning Nalu Sheikh called him to his house. In the afternoon he went to the house of Nalu Sheikh and saw Rahim Ali in the house of Nalu Sheikh. Nalu Sheikh reported him that on the last night his daughter and Rahim Ali went to Goraimari LP School and people caught them and brought them in the house of Abul Hussain. The boy told that he would marry daughter of Nalu. But age of the boy and girl are below 18 years. They informed in the house of Rahim Ali over phone. The boy told him that his brother-in-law Majibar also along with them. During cross-examination he stated that he has no direct knowledge about the incident.
- 15. PW 7, Dr. Mina Hazarika is the Medical Officer of this case. PW 7 in her deposition has deposed that on 16.1.2018, she examined the victim "X" in connection with Panbari P.S. Case 8/18 and after examination he opined that according to school certificate her dated of birth is 10.2.2006. She proved her medical certificate as Exhibit 2 and Exhibit 2 (1) his her signature.

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16. PW 8, Sri Putul Chandra Karmakar, SI of Police is the investigating Officer of this case. PW 8 in his deposition has deposed that on 15.1.2018 he was working at Panbari Police Station. On that day O.C Panbari P.S. entrusted him to investigate the Panbari P.S. Case No. 08/18. After taking the charge of investigation he went to the place of occurrence, recorded the statement of witnesses, sent the victim girl to hospital for her physical examination, and her statement was recorded in the court by Judicial Magistrate u/s 164 Cr. P. C. He prepared the rough sketch map of the place of occurrence, seized one school certificate of the victim girl by preparing seizure list. He proved the seizure list as Exhibit 4 and Exhibit 4 (1) is his signature. He also proved the sketch map as Exhibit 3 and Exhibit 3 (1) is her signature. He further stated that he arrested accused Majibar Ali and sent him to court. Rahim Ali was absconder. After completion of investigation he submitted charge sheet against accused persons u/s 8 of PCSCO Act and u/s 363/376/511 of the IPC. He proved the charge sheet as Exhibit 5 and Exhibit 5 (1) is his signature. During cross-examination he stated that as per FIR the date of occurrence is 31.72.2017. In the FIR there is no mention of reason of delay in lodging the FIR. On the same night the mother of the victim girl recovered the victim girl from their relative's house. He further stated that he has not seen the school certificate which was seized by him. Defence side, put suggestion to him that he has not duly investigated the case which he denied.

17. In this case first of all we should decide the point No.7 (i) i. e the age of the victim girl. In this regard learned Addl. P. P. submitted that PW1 is the informant as well as mother of the victim in her evidence stated that at the time of occurrence age of her daughter was 13 years. PW2 is the victim of the case and she also in her evidence stated that her age is 14 years. PW1 and PW2 in their evidence clearly stated that at the time of occurrence the age of the victim girl was below 18 years. So, the prosecution able to prove the age of the victim girl beyond all reasonable doubt and therefore there is no doubt that the age of the victim girl was below 18 years at the time of occurrence and such she was child as per POCSO Act.

18. On the contrary, learned advocate for the accused submitted that the prosecution failed to prove the actual age of the victim girl at the time of occurrence. Learned advocate also submitted that though the victim girl was medically examined but the doctor in her report stated that as per school certificate the date of birth of the victim girl is 10-02-2006. The I. O. during investigation seized one school certificate of the victim girl but the prosecution has not school going girl and as such the prosecution withheld the best evidence as regard age of the victim girl. The defence side challenge the age of the victim girl. Though PW1 in her evidence

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stated that the age of the victim girl was 13 years at the time of occurrence but she during cross examination could not able to say the date or year of birth of her daughter i. e. victim girl. PW2 also failed to say her date of birth or year. So, they in their evidence stated the age of PW2 on assumption and as such their evidence is not reliable and the prosecution failed to prove that at the time of occurrence age of the victim girl was below 18 years. As the prosecution withheld the best evidence so an adverse inference would go against the prosecution that if the prosecution produce the best evidence then it would go against the prosecution and it would prove that age of the victim girl was above 18 years at the time of occurrence.

19. I have duly considered the submission of both the sides learned advocate. Ongoing through the evidence on record it reveals that during investigation the I. O. seized one school certificate of the victim girl. But during evidence prosecution side neither produced the school certificate nor called any witnesses from the school of the victim girl to prove her age. The ง์ใช้เm girl was medically examined but the doctor to ascertain the age of the victim girl has not conducted the radiologist test or ossification test and doctor in her report stated that as per school certificate date of birth of the victim girl is 10-02-2006. PW1 in her evidence simply stated that at the time of occurrence age of her daughter was 13 years. But during crossexamination she could not say the date of birth of the victim girl even the year of birth. Then what basis she stated the age of the victim girl. Though parent is the best person to say the age of the child but there must be some basis. So, I find that her evidence regarding age of the victim girl is not believable. PW2 victim girl in her evidence stated her age 14 years but she could not say her date of birth or year of birth. Then she on what basis stated her age. Therefore, I find that her evidence regarding her age also not believable. The prosecution failed to produce any other evidence regarding age of the victim girl. Hence, I find that prosecution failed to prove that at the time of occurrence age of the victim girl was below 18 years. It is settled law that in a criminal proceeding if two view can be taken and one is goes in favour of the accused and another goes against the accused then which evidence goes in favour of the accused should be accepted. In this case two view can be taken i. e. the age of victim may be above 18 years or may be below 18 years. The view that the age of victim girl may be above 18 years would go in favour of the accused and may be below 18 years would go against the accused. So, in this case there is no other option but to hold that at the time of occurrence age رُولِيَّ of the victim girl was above 18 years.

20. To attract the provision of offence under the POCSO Act, the victim must be a child. A

child is defined u/s 2(d) of the POCSO Act. From the definition of child, it appears that a child means any person below the age of 18 years. From the discussion made above, it appears that the age of victim girl was above 18 years and as such the provision of the POCSO Act is not applicable in this case and accused is not found guilty u/s 17 of the POCSO Act.

21. Next we should see whether the prosecution able to prove the offence u/s363 of the IPC against the accused person. The offence of kidnapping is punishable u/s 363 of the IPC. The offence of kidnap is define u/s 361 of the IPC as follows:-

361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception) —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

- 22. On plain reading of the definition of kidnap it reveals that to constitute an offence of kidnap, the age of the victim is vital. In case of male he should not be above 16 years and in case of female she should not be above 18 years. Here, in this case the age of the victim girl is revealed above 18 years. So, in this case the ingredient of offence u/s 363 of the IPC is lacking.
- 23. Next we should see whether accused Majibar Ali committed any offence or not. 1st of all we should see how far the prosecution case is believable. As per allegation the incident took place on 31-12-2017 at night and on the same night the victim girl was recovered along with a boy Rahim Ali. From the evidence on record it reveals that the informant kept Rahim Ali in her house for four days and thereafter father of Rahim Ali came to the house of informant along with police ant taken Rahim Ali to his house. From the evidence on record it also reveals that while father of Rahim Ali came to the house of informant along with police then accused Majibar Ali also came with the police. The informant filed the FIR on 15-01-2018 i. e. after 15 days of the incident. The informant neither in her FIR nor in her evidence stated reason of delay in lodging the FIR. While accused Majibar Ali came to the house of informant along with police then also informant has not reported the incident to the police. Though it is settled law

dal. Special du Bijni that delay always not fatal to the prosecution case but in ordinary and unexplained delay is fatal to the prosecution case. The informant kept the boy Rahim Ali in her house for four days without informing the police. After four days father of the boy and accused Majibar Ali came to the house of informant along with police and taken away Rahim Ali but the informant then also has not informant the matter to police. After 15 days of the incident she woke up and decided to lodge an FIR. She has not given any explanation of the delay. So, I find that the FIR of the informant is after thought and delay in this case is fatal to the prosecution case. Hence, I find that the delay in lodging the FIR is create doubt on the prosecution case.

24. From the evidence of PW1 and the FIR it reveals that the incident took place on the night of 31-12-2017. On the other hand PW2 in her evidence and statement u/s 164 of the Cr. P. C. stated that the incident took place on the night of 01-01-2018. So, it appears that there is no corroboration regarding date of occurrence. To consider the evidence of PW2 victim, her statement u/s 164 of the Cr. P. C. is very much important. PW2 in her statement u/s 164 of the Cr. P. C. stated that on 01-01-2018 at about 7 PM Rahim Ali called her at mobile phone and asked her to accompany him. After some time Rahim Ali came to her house and she went with bim in his motorcycle to Goraimari L. P. School. There, one Majibar Rahman, who is brother-inlaw of Rahim Ali took the motorcycle and left the place of occurrence. Thereafter, one Abul met them and took both of them to his house. On the other hand PW2 in her evidence stated that on the 1^{st} day of January in the evening Rahim Ali asked her to come to road and she according came to road and they walk up to the School of their village where they met Majibar and accused Majibar took them to Garaimari school on his motor cycle and Majibar and Rahim tried to take her back side the school to commit misdeed and then she raised alarm and villager came their and Abul Hussain took her and Rahim to his house and Majibar left the place of occurrence along with motorcycle. So, it appears that there is no consistency in the evidence of PW2 which also cast doubt on her evidence. Hence, I find that the evidence of PW1 and PW2 are not reliable and trustworthy. Other witnesses had not seen the incident. Hence, I have nothing to hesitate to hold that prosecution failed to bring home the charges against the accused person beyond all reasonable doubt.

25. From the discussion made above, I find that the prosecution side miserably failed to prove the charges against the accused beyond all reasonable doubt. Hence, accused Majibar Ali is found not guilty u/s363 of the IPC, R/W section 17 of the POCSO Act and he is acquitted from the charge of offence u/s 363 of the IPC, R/W section 17 of the POCSO Act and set him free at his liberty forthwith.

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- 26. Send a copy of the judgment to the District Magistrate, Chirang as per provision of Section 365 of the Cr.P.C.
- 27. Considering the facts and circumstances of the case I find that this is not a fit case to refer the matter to DLSA, Chirang for victim compensation.
- 28. Bail bonds furnished by the accused persons shall remain in force till next six months from today as per provision of section 437-A of the Cr. P. C.

The seized school certificate be returned to the informant in due course of time.

Given under my hand & seal of this court on this the 4th day of May, 2019.

Typed by myselfc

Additional Special Judge,

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Additional Special Judge,

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APPENDIX

(A) Prosecution witnesses:

PW1- Musstt. Juba Bibi

PW2-Victim "X"

PW3- Md. Shaheb Ali

PW4- Md. Mofidul Hussain

PW5- Md. Nalu Sheikh

PW6- Md. Anser Ali

PW7- Dr. Mina Hazarika

PW8- Sri Putul Ch. Karmakar

(B) Defence witnesses: Nil.

(C) Prosecution exhibits:

Exhibit-1, Statement of victim u/s 164 of the Cr. P. C.

Exhibit-2, Medical report.

Exhibit-3, Sketch map.

Exhibit-4, seizer list.

Exhibit-5, Charge sheet.

(D) Defence witnesses: Nil.

(E) Defence exhibits: Nil.

(F) Court Witnesses:Nil.

(G) Court exhibits: Nil.

Additional special dudge Judge

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