IN THE COURT OF THE SPECIAL JUDGE, KARBI ANGLONG, DIPHU, ASSAM.

Present : Md. A.U.Ahmed, AJS

Special Judge, Karbi Anglong, Diphu.

POCSO Case No. 03/2017 (POCSO Case

No. 111/2018- New) corresponding to GR Case No. 308/2017 & Bokajan Police

Station Case No. 74/2017

Under Sections 363/376 IPC/ R/W 4 of the

POCSO Act.

State of Assam

Versus

Shri Utpal Debnath

Name of informant/complainant:

Shri Haren Rajbongshi

S/O Shri Abhiram Rajbongshi

Village: Sariahjan, Guwahatia Gaon

PS: Bokajan

District: Karbi Anglong, Assam

Name of the accused person facing trial:

Shri Utpal Debnath

S/O Shri Ashim Debnath

Village: Morakordoiguri Gaon

P.S: Bokajan

District: Karbi Anglong, Assam.

Advocates appeared:

For the prosecution : Mr. D. Deka, Public Prosecutor

For the defence : Smti Radha Dhar

Date fixed for Argument : 01.06.2019

Judgment pronounced & delivered on: 11.06.2019

JUDGMENT

- It is a case of Kidnapping of a minor girl and penetrative sexual assault on her alleged to have been committed by the accused person.
- 2. The prosecution case in brief is that on 01.05.2017 the informant named above lodged a written ejahar with Bokajan Police Station stating inter alia that on the same at 8 AM the accused person forcible took his victim daughter having age of 16 into an auto-rickshaw from the road and went away years was going to shop the accused took away her forcibly and kept her somewhere concealed. On receipt of written ejahar, Bokajan Police Station registered a criminal case under section 363 IPC and started investigation. On completion of investigation, the charge sheet was submitted under sections 363/376 IPC/4 of the POCSO Act against the accused person. Hence the prosecution has come up.
- 3. On completion of appearance of the present accused person before the Court, copy was supplied to the accused person. Having very carefully gone through submissions of learned lawyers of both sides as well as case diary I found that there was ground for presuming that that the accused person committed the offenses under sections 363 of the IPC/ 6 of the POCSO Act and accordingly, the charges were framed. The particular of the offence charged was duly read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

 During trial, Prosecution has examined as many as 11 (eleven) witness. The accused person under section 313 CrPC has been questioned. The defence has examined none. Plea of defence is of total denial.

5. **Points for determination**

- (i) Whether the present accused person on 01.05.2017 at about 8:00 AM at Sariahjan, Guwahatia Gaon under Bokajan Police Station kidnapped victim from the possession of the informant who was legal guardian?
 - (ii) Whether the accused on or after 01.05.2017 at about 07:30 PM at Sariahjan, Guwahatia Gaon or any other place under Bokajan Police Station or in any other Police Station made penetrative sexual assault upon the victim?

Decisions and reasons thereof:

- 6. I have very carefully gone through verbal arguments advanced by the learned counsels of both sides as well as evidence on record.
- 7. For attracting section 363 of IPC and 6 of the POCSO Act, the victim needs to be below 18 years. PW-1 is the father of the victim who has clearly

stated in his evidence that at the time of occurrence she was 16 years. PW-3 is co-villager. According to her, at the time of occurrence, victim was 15-16 years old. PW-4 is the mother of the victim who has clearly stated in her evidence that at the time of occurrence, the victim was 16 years. Parents are best persons who know the actual date of birth of their child. Both parents and the victim marked as PW-7 categorically have stated in their evidence that at the time of occurrence she was 16 years.

8. During investigation police seized a Birth certificate of the victim vide Ext-2. According to Ext-2, the date of birth of the victim is 10.09.20001. PW-9 is the medical officer who examined the victim. Ext-4 is the medical report. The defence has declined to cross-examine the medical officer as such her evidence remains uncontroverted. Her evidence clearly shows that as per Radiologist report the victim was found to be below 18 years (16 to 17). I find no way to discard the evidence of the victim, her parents and contents of Ext-2 that at the time of occurrence, the victim was 16 years. The defence stand as revealed from the crossexamination of the victim is that the victim was born on 10-6-1998 but to substantiate the said stand no evidence was led. Hence I feel hesitation to agree with the defence stand so far date of birth of the victim is concerned. The main ingredient for attracting any provision of the POCSO Act, the victim must be a child which is defined under section 2(d) of the POCSO Act that a person who is below 18 years is called a child. Taking all aspects into consideration, I am convinced that at the time of occurrence the victim completed 18 years.

- 9. From the evidence of PW-1 shows that after 8 months from the date of occurrence, on getting information from the victim that the accused kept in a place 52 K.Ms away from Agartola, he along with the father of the accused went there and apprehended both of them and also brought both of them to Bokajan. He has further stated that he produced the victim before Bokajan Police Station and that Bokajan Police Station got the victim medically examined and her statement recorded in the court. Similarly evidence of PW-4 who is the mother of the victim has stated in her testimony that the victim was recovered from the possession of the accused person in Tripura.
- 10. In a case of kidnap or sexual assault, the evidence of the victim is most vital and material. Even court can convict a person on the basis of evidence of the victim if her evidence inspires confidence of the court. Evidence of the victim shows that on the day of occurrence at 7:30 Am while she was going towards the house of neighbourer for getting mobile phone charged, someone picked her to an auto-rickshaw and proceeded and after 20 minutes she was taken to another auto-rickshaw where she found the accused. There after she was taken to a house situated in Tea Estate where she was kept 2 days. During stay in the house, the accused made sexual intercourse with her twice forcibly. There after again

the accused took her to another house situated in Tea Estate and kept her for 4/5 days. There after the accused took her to Tripura by train and kept her there for 8/9 months wherein the accused person forcibly made sexual intercourse forcibly. Her father along with the father of the accused recovered her from the possession of the accused person in Tripura.

- 11. Ext-3 is the statement of the victim recorded under section 164 of the CrPC after her recovery which gives a different story. Ext-3 is silent that the victim was first taken to some houses situated in Tea Estate where she was kept about a week. But on material points there is discrepancy. Both Ext-3 and her evidence clearly shows that the victim was taken to Agartola (Tripura) wherein she was kept till December, 2017, that during stay the accused made sexual intercourse with her and that her father recovered her from the possession of the accused person in Tripura. During examination of the victim, the defence has not disputed her evidence to the effect that the accused took her to Tripura wherein he made sexual intercourse with her.
- 12. PW-9 is the medical officer who examined the victim. Ext-4 is medical report which shows that at the time of examination of the victim her hymen was found absence and her vagina accommodating two fingers. That apart, I find no way to discard the evidence of victim that the accused kidnapped her from her legal guardian and made sexual

intercourse with her for several times. In view of the aforesaid discussion and evidence of the victim it can be held that the victim was subjected to sexual intercourse for several times.

- 13. The section 363 of the IPC relates to punishment for kidnapping of minor children from the Lawful guardian which reads thus:-"363. Punishment for kidnapping.—Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."
- 14. The section 361 of the IPC relates to kidnapping of minor form the Lawful guardian which reads thus:-"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 minor or person from kidnap such 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."
- 15. Aggravated penetrative sexual assault is defined in the section 5 of the POCSO Act. As per section 5, penetrative sexual assault committed on the child more than once or repeatedly falls in the category

of aggravated penetrative sexual assault. It is evident that the victim was with the accused person for about 8 (eight) months. Apart, from evidence of victim the fact of the case itself indicates that the accused made sexual intercourse with the victim for more than once. It is the established principle that minor consent is no consent and as such on the ground of the consent given by the victim the court will not get any benefit.

- 16. The section 6 of the POCSO Act relates to punishment for committing of aggravated sexual assault which reads thus:-"6. Punishment for aggravated penetrative sexual assault.- Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."
- 17. In the view of the discussion made above I find that the prosecution has succeeded in establishing its case under sections 363 of the IPC/6 of the POCSO Act.

<u>ORDER</u>

18. In the result, I find the accused person Shri Utpal Debnath guilty under section 363 of the IPC/6 of the POCSO Act and accordingly he is convicted.

- 19. On the point of sentence, the accused person is heard and to that effect his statement is recorded. It has been submitted by the learned appearing on behalf of the accused person that there is a no evidence on record showing that the accused was previously convicted by the Court of Law and as such he deserve to be punished leniently. On the other hand, the learned Public Prosecutor has submitted that the accused needs to be punished exemplary. Taking all aspects into consideration I do hereby order the accused Sri Utpal Debnath to undergo RI of 6 (Six) months for the section 363 IPC and RI of 10 (Ten) years and to pay fine of Rs. 1000/- i/d SI of 2 (Two) months for the Section 6 of POCSO Act. Both sentences will the run concurrently. Set off earlier detention period. Let a certified copy of the Judgment be furnished to the accused person at free of cost. Also send a copy of Judgment to the learned District Magistrate, Karbi Anglong, Diphu.
- 20. No order has been passed in the light of section 357 A of the CrPC.
- 21. Accordingly this case is disposed of on contest.
- 22. Given under my hand and seal of the Court on this 11th June, 2019 at Diphu, Karbi Anglong.

Dictated and Corrected by me.

(Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi Anglong Anglong (Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi

APPENDIX

Prosecution Witnesses:

PW1- Sri Haren Rajbongshi

PW2- Smti Manju Singh

PW3- Smti Niva Dutta

PW4- Smti Mina Rajbongshi

PW5- Smti Hunti Dutta

PW6- Smti Numali Medhi

PW7- Miss Rashmita Rajbongshi

PW8- Smti Anima Dutta

PW9- Dr. Atreyee Goswami

PW10- Sri Raju Das

PW11- Sri Moyurjit Gogoi

Defence Witnesses: Nil

Prosecution Exhibited:

Ext.1- Ejahar

Ext.2- Seizure List

Ext.3- Statement of the Victim

Ext.4- Medical Examination Report

Ext.5- Charge Sheet

Defence Exhibited: Nil

Special Judge Diphu, Karbi Anglong, Assam