IN THE COURT OF SPECIAL JUDGE :: :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 13 of 2019 u/s 376(2)/366 IPC & Section 6 of POCSO Act, 2012 (Arising out of Bihubor PS Case No. 01/2019)

State of Assam

-Vs-

Sri Suraj Ghatowar @ Suresh Ghatowar

..... Accused

APPEARANCE:

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

For the accused : Mr. D. K. Gohain, Advocate

(Legal Aid Counsel)

Date of framing Charge : 12.04.2019

Dates of Evidence : 27.05.2019, 24.06.2019, 08.07.2019,

19.07.2019, 01.08.2019

Date of S/D : 16.08.2019

Date of Argument : 29.08.2019, 12.09.2019, 04.10.2019.

Date of Judgment : 21.10.2019

JUDGMENT

- 1. Prosecution case in brief is that on 10.01.2019, informant Smt. Tileswari Ghatowar lodged an FIR with O/C, Bihubor PS alleging, inter alia, that on 09.01.2019 (Wednesday), at about 9 AM, her elder daughter victim 'T' (name withheld) came out from the house for going to school for admission, but did not return from her school. Due to non-returning home till 2 PM, they searched for her but could not find out.
- 2. On receipt of the FIR, Bihubor PS Case No. 01/19 u/s 366 IPC was registered and investigated. During investigation, victim was recovered. She was medically examined and also got her statement recorded in Court u/s 164 Spl. (P) Case No. 13 of 2019

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- Cr.P.C. Accused was arrested and forwarded to Court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 366 IPC, read with Section 4 of POCSO Act, 2012.
- 3. Upon receipt of the Charge Sheet, cognizance of offence u/s 376(2)/366 IPC, read with Section 6 of POCSO Act was taken against the accused and after furnishing copy to the accused, vide order dated 12.04.2019, charges u/s 376(2)/366 IPC, read with Section 6 of POCSO Act, 2012 has been framed against the above named accused person to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined eight witnesses including MO and IO.
- 4. Upon completion of the prosecution evidence, accused was examined u/s 313 Cr.P.C. After hearing both the sides u/s 232 Cr.P.C, and observing that it was not a case of no-evidence, accused was called upon to enter into defence to which he declined to adduce evidence in defence. Defence case is of partial denial. Defence took the plea that the victim on her own came with him and they stayed at for about a week at the residence of his sister Palengi. However accused declined to have committed physical relation with the victim during his stay at his sister's house. Accused faced the trial as UTP.
- 5. I have heard argument of Id. Special P.P. Mr. Srimanta Gogoi and Mr. D.K. Gohain, 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 on 09.01.2019?
 - (ii) Whether on 09.01.2019, accused kidnapped or abducted the victim? If so, what was the intention of the accused behind such kidnap/abduction?
 - (iii) Whether on 09.01.2019 or thereafter, accused committed aggravated penetrative sexual assault/rape on the victim?

DECISION AND REASONS THEREOF:

- 7. PW-1 Smt. Tileswari Ghatowar, mother of the victim in her evidence deposed that (deposing on 27.05.219) presently victim T is aged about 18 years. She is reading in class IX of Santak High School. Victim T was born in the year 2001. On 09.01.2019, due to non-return of her daughter victim T from her school till evening hours she searched her. On the next day, she lodged the FIR. During search, she came to know that victim T was taken to Palengi and was kept in the house of sister of accused. He went to Palengi and saw her daughter in the residence of sister of accused Suraj Ghatowar and met her daughter. As she refused to return with her, she informed the matter to Bihubar PS. Subsequently police apprehended the accused and recovered victim T from Palengi area under Demow PS. Police took victim T for medical examination and also brought her to Court. From Court victim T was given in her custody. On asking victim T, she informed her that accused committed misdeed with her for three days at Palengi. She did not state as to how she reached Palengi. In her cross-examination by defence, she admitted that she lodged the FIR after three days of the incident of missing. She cannot say about the contents of the FIR. She denied the defence suggestion that while giving statement to police, she has not stated that "During search, she came to know that victim T was taken to Palengi and was kept in the house of sister of accused; that she went to Palengi and saw that her daughter was at the residence of sister of accused Suraj Ghatowar and meet her daughter." She denied that she deposed falsely on this aspect. Victim T is her eldest daughter. she was married at the age of 20 years. Victim T was born after 2 years of her marriage. She denied that victim T was aged more that 18 years at the time of alleged incident of this case. She shown the birth certificate of victim T to police, but police did not take the same. She had no knowledge if her daughter has love affairs with the accused for about 2 years and for said relation, her daughter took the accused with her. She do not want to prosecute this case further. She has no objection in acquittal of the accused from this case.
- 8. PW-2 the victim T in her evidence deposed that accused Suraj Ghatowar is known to her through mobile phone. She is aged about 17 years

and reading in class IX at Santak High School. Her date of birth is 01.07.2001. On 09.01.2019, at morning hours she came out of her house for going to school but without going to school, she came to Simaluguri Tiniali as requested by the accused over phone. At about 12 noon, Suraj Ghatowar came there and met her. From Simaluguri they came to Disang Rajabari in public vehicle on her own desire and went to the house of sister of accused. They stayed there for about 8 days. She slept with the accused on 3 nights. He did not use force on her. However they have physical on her consent. Though her mother came to that house, yet she refused to go back to home with her. Subsequently, police came there and apprehended the accused and bring her to Bihubar PS. Police took her for medical check up and also in Court. She gave her statement in Court. Exbt. 1 is her statement in Court. On that day, she deposed on similar lines as deposed today. From Court, she went with her mother and informed that she slept with the accused on 3 occasions. In her cross-examination by defence, she admitted that while giving statement in Nazira Court, she stated that she eloped with Suresh wilfully on 08.01.2019 and that she returned with her mother. She denied that police did not recover her from the house of sister of accused. She also denied that at the time of incident, she was aged above 18 years. She did not bring her birth certificate which is at her residence. Same was not given to police. She has not stated before the medical officer that accused made physical relation with her on 3 occasions. She had love affairs with the accused for about 1 month. As she failed in class IX exams, out of fear, she eloped with the accused. She denied that, she deposed falsely about making physical relation with the accused while staying with the accused.

9. PW - 3 Sri Ramesh Ghatowar, maternal uncle of the victim T in is evidence deposed that victim T is reading in class IX of Santak High School. She was born in the year 2001. He proved the age certificate issued by Santak T E Hospital. As per this certificate date of birth of victim is 02.07.2001. Exbt. 2 (proved-in-original) is the age certificate. After three days of the incident of non-return of victim T from her school till evening hours, he came to know that victim T was taken by the accused to Palengi. On knowing this, after 8 days, his

sister Tileswari went to Palengi to bring back victim T Ghatowar but she refused to return with her. On this Tileswari informed the matter to Bihubar PS. Subsequently Bihubar police recovered victim T from Palengi area under Demow PS. He did not ask her about the incident. In his cross-examination by defence, he denied that while giving statement to police, he has not stated regarding taking of victim T by the accused to his sister's house and her recovery by police. He brought the Exbt. 2 certificate on being handed over to him by Tileswari Ghatowar. In the school certificate shown to me from the case record, the date of Birth of victim T was mentioned as 25.07.2001. Exbt. A is the age proof certificate issued by Santak High School. He denied that Exbt. 2 is not the age certificate of victim T. Apparently, in Exbt. 2, there is over writings on the name of the father of the victim. He further denied that he deposed falsely on the age of the victim.

- 10. PW 4 Sri Kajal Bawri in his evidence deposed that on the same night of the incident, when he went to the house of his cousin Tileswar Ghatowar, he came to know that victim T did not return from her school till evening hours. They searched for her. After 8 days, Bihubar police recovered victim T from Palengi area from the custody of the accused. He also came to know that on these 8 days victim T stayed with the accused Suraj. He did not ask her about the incident. In his cross-examination by defence, PW 4 denied that before police he has stated as deposed in court.
- 11. PW 5 Smt. Satni Ghatowar in her evidence deposed that on the date of incident, due to fail in exams, mother of victim T scolded her daughter. On this victim T left her house and as she did not return till evening hours, they searched for her. Subsequently on being rang by accused, they came to know that victim T was Disang Rajabari. Matter was informed to police. After 8 days, Bihubar police recovered victim T from Disang Rajabari area from the custody of the accused. Victim T told me that she on her own went with the accused. In her cross-examination she denied that while giving statement to police, she has not stated that on being rang by accused, they came to know that victim T was Disang Rajabari."

- 12. PW 6 Sri Chandreswar Rajput in his evidence deposed that he heard that victim T eloped from her house and after about 8 days, she was brought back to her house by police. Except this, I have no knowledge of this case.
- 13. PW 7 Dr. Sundar Changmai, the medical officer, in his evidence deposed that on 18.01.2019, at 01.30 PM, on police requisition, he examined victim T in connection with Bihubor P.S. Case No. 01/19 and upon examination, he found her hymen- Absent. As per radiological examination (done on 18.01.2019), her age is between 17-18 years. Ext. 3 is the Medical report and Ext. 3(1) is his signature and Ext. 3(2) is the radiological examination report. In his cross-examination he admitted that as per report of radiologist, the age of the victim is above 18 years as there is completely developed elbow joint.
- 14. PW 8 SI (P) Banikanta Pegu in his evidence deposed that on 10.01.2019, the then O/C Bihubar PS has received one written FIR from Smt. Tileswari Gahtowar and registered Bihubar PS case No. 1/19 u/s 366 IPC and entrusted me to investigate the case. Exbt. 4 is the FIR. During investigation, he went to residence of informant at Santak Bagan Line No. 3 and drawn a sketch map of the PO. Exbt. 5 is the said sketch map. During investigation, I came to know that one Suraj Ghatowar has kidnapped the victim T and collecting phone number of the accused, through his source, he came to know that accused has kept the victim at Rajabari Palengi under Demow PS. After informing the matter to O/C Demow PS, on 17.01.2019, he went to Palengi and recovered to the victim from the possession of accused while they were moving on road. He took them to Demow PS and then brought them to Bihubar PS. Accused was apprehended. On the next day, i.e. on 18.01.2019, victim T was sent for medical examination and also sent to Nazira Court for recording her statement u/s 164 Cr.P.C. During investigation, he collected the medical report and statement given by victim in court. During investigation, he collected one school certificate showing age of the victim from Santak High School. Exbt. A is the school certificate issued by Santak High School in which date of birth of victim T is mentioned as 25.07.2001. On completion of investigation, he

submitted charge sheet against the accused u/s 366 IPC and section 4 of POCSO Act. Exbt. 6 is the charge sheet. In his cross-examination by defence, he admitted that he has not collected any G D Entry from Demow PS showing his visit to said PS. He denied that he did not recover victim with the assistance of Demow PS and hence failed to prove any G D Entry. He recovered the victim from Road at Palengi with the accused. There is no mention in the CD regarding collection Exbt. A from Santak High School. He has not recorded statement of school authority in respect of the school certificate. He denied that he procured one false certificate of age of the victim and without observing legal formalities attached with CD. He confirmed the exaggerations made by witnesses in their evidence from their previous statements.

- 15. From the above evidence on record, let me decide the points formulated for just decision of this case.
- 16. So far age of the victim is concerned, from the Point No. I: evidence of PW 1, mother of the victim by deposing on 27.05.19 stated that her daughter victim 'T' is aged about 18 years and she is reading in class IX of Santak High School and she was born in the year 2001. In her cross she denied that at the time of alleged incident her daughter victim 'T' was more than 18 years of age. The victim 'T' in her evidence (deposing on 27.05.19) claimed her age as 17 years and a student of class IX at Santak High School and stated her date of birth is 01.07.2001. She also denied that she is aged above 18 year of age. PW 3, the maternal uncle of the victim proved one certificate (Exbt. 1) issued by Santak Tea Estate Hospital in which the date of birth of the victim was mentioned as 02.07.2001. In his cross he admitted that said certificate was handed over to him by the mother of the victim. He admitted that in the school certificate (Exbt. 2) shown to him from the case record, the date of birth of the victim was mentioned as 25.07.2001. PW 3 further admitted that in Exbt. 2, there was over writing on the name of the father of the victim. PW 7 Dr. Sundar Changmai, the M.O. in his evidence deposed that on 18.01.2019, he examined the victim and as per the radiological report he determined the age of the victim between 17 to 18 years. However in his cross-examination he

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admitted that as per report of radiologist, the age of the victim is above 18 years as there is completely developed elbow joint. PW 8 SI (P) Banikanta Pegu, the I.O. of this case in his evidence deposed that during investigation he has collected one certificate issued by Santak High School in which date of birth of the victim was mentioned as 25.07.2001. But in his cross-examination he admitted that he has not examined school authority in respect of age.

- 17. From the above evidence on age, it appears that there are two certificates on record on the date of birth of the victim, i.e. 02.07.2001 as per hospital record (Exbt. 1) and 25.07.2001 as per Santak High School (Exbt. 2). Birth certificate was not brought on record though same was available. The M/O in his cross-examination admitted that as per report of radiologist, the age of the victim is above 18 years as there is completely developed elbow joint. Thus there are three views on the age of the victim T. When the above aspect on age of the victim was put to the accused in his 313 Cr.P.C. examination, he simply stated his ignorance on age and he did not take any other plea on the age of the victim. During cross-examination the defence suggested that the victim was above 18 years of age. Under above facts and circumstances, on close look, it appears that as the 2 certificates give different dates, none of them should be relied upon for determining the age of the victim. On this, the medical evidence is found more reliable. Considering x-ray reports of complete fusion of elbow joint, I hold that on the alleged date of incident the victim was above 18 years of age.
- 18. Point No. II: From the evidence of the PW 2 the victim, it appears that on 09.01.2019, at morning hours, after coming out from her house for going to school she came to Simaluguri Tiniali as requested by the accused over phone and therefrom she went to Desang Rajabari with the accused in a public vehicle on her own will and stayed at the residence of the sister of the accused for about eight days. The victim further deposed that while giving to the custody of her mother after her recovery, she informed her mother that she slept with the accused on three occasions. PW 1, mother of the victim in her

evidence stated that on knowing the fact that her daughter victim 'T' was kept at Palengi in the house of the sister of the accused, she went there and met her daughter but her daughter refused to return with her. Subsequently with the help of police she has to recover the victim. This part of evidence was supported by PW 3. PW 4 and PW 5 have supported the fact of recovery of the victim by Bihubor PS from Desang Rajabari area. PW 8 the I.O. in his evidence has corroborated this fact that on 17.01.2019 he went to Palengi and recovered the victim from the possession of the accused. This fact was admitted by the accused in his 313 Cr.P.C. statement. As such, it is clear that on the date of incident victim went with the accused and after staying with him for about eight days at the residence of the sister of the accused, victim was recovered along with the accused from Palengi area.

- 19. Now the guestion arose for determination is whether accompanying a major girl who left her house and stayed without consent of the guardian can be treated as an offence of abduction as defined u/s 362 IPC. In this case, as discussed earlier, there is clear evidence that the victim on her own went with the accused. She did not allege of any inducement or use of force on her. In the instant case, ingredients of offence u/s 366 IPC or even any other minor offence like section 366-A, 363 IPC are totally missing. As such, I am of the considered opinion that no case is made out so far the offence u/s 363, 366, 366-A IPC is concerned.
- 20. <u>Point No. III:</u> So far the charge of penetrative sexual assault/rape on the victim is concerned, from the evidence of PW 2 it appears that she slept with the accused for three night during her stay of eight days at the residence of the sister of the accused at Palengi. Victim further deposed that they have established physical relation on her consent. In her cross the victim admitted that before M.O. she did not state that accused made physical relation with her on three occasions, she has love affairs with the accused for one month. Victim denied that she deposed falsely regarding physical relation by the accused. PW 1, mother of the victim in her evidence deposed that after recovery of the victim she was brought to Court and from Court the victim was

given to her custody. On asking, the victim informed her that accused committed misdeed with her for three days at Palengi. On looking at the medical evidence which was done on 18.01.2019, i.e. after nine days of her elopement, it appears that hymen of the victim was found absent but no injury was found on her private parts. M.O. also did not find any evidence of recent sexual intercourse. The other witnesses are totally silent regarding physical relation between the accused and the victim. Accused in his 313 Cr.P.C. statement however denied the allegation of having physical relation with the victim as stated by PW 1 and PW 2 and claimed his innocence by stating that he did not commit any physical relation with the victim. On looking at the statement of the victim given u/s 164 Cr.P.C., it appears that soon after her recovery she has stated that she stayed with the accused for eight days and without solemnizing marriage she had sexual intercourse on five occasions during her stay with the accused on her consent. She specifically admitted that accused did not use any force. Considering the above materials, and the fact that the victim is aged above 18 years, the physical relation with consent cannot be treated as offence under Pocso Act or under section 376 IPC.

- 21. In view of the above discussions, I hold that prosecution has failed to prove the ingredients of the offence punishable u/s 366, 376(2) IPC and section 6 of POCSO Act, 2012 or any other minor offence against the accused Suraj @ Suresh Ghatowar.
- 22. Considering all above, accused Suraj @ Suresh Ghatowar is acquitted from the charge u/s 366, 376(2) IPC and section 6 of POCSO Act, 2012.
- In view of the provisions of section 437A Cr.P.C and considering the fact that accused faced the trial as UTP with the help of legal aid counsel, and also by following the case law of Abdul Malek @ Malek Ali –vs- State of Assam 2018 (5) GLT 272, I am of the considered opinion that it will be just and proper to direct that accused Suraj @ Suresh Ghatowar be released forthwith from Jail custody on execution of P.R bond of Rs. 2,000/- with a validity of 6 months with a condition that he shall appear before the appellate

court, if so required.

- 24. 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.
- 25. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 26. Judgment is pronounced in open court. Case is disposed on contest.

Given under my hand & Seal of this Court on this the, 21st day of October, 2019 at Sivasagar.

Special Judge Sivasagar

APPENDIX

- 1. Prosecution witnesses:
 - PW 1 Smt. Tileswari Ghatowar (Informant)
 - PW 2 Victim 'T'
 - PW 3 Sri Ramesh Ghatowar
 - PW 4 Sri Kajal Bawri
 - PW 5 Smt. Satni Ghatowar
 - PW 6 Sri Chandreswar Rajput
 - PW 7 Dr. Sundar Changmai (MO)
 - PW 8 SI (P) Banikanta Pegu (IO)
- 2. <u>Defence witnesses</u> None
- 3. <u>Court witnesses</u> None
- 4. Exhibits by prosecution -
 - Exbt. 1 Statement of the victim given in Court u/s 164 Cr.P.C.
 - Exbt. 2 Age certificate of the victim issued by Santak Tea Estate Hospital
 - Exbt. 3 Medical report
 - Exbt. 4 FIR
 - Exbt. 5 Sketch map
 - Exbt. 6 Charge Sheet
 - Exbt. A School certificate issued by Santak High School

Special Judge Sivasagar