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

Present: N.U. Ahmed, Additional Special Judge, Bijni.

Special (P) Case No. 36 (P)/2018 U/S 366/376(2)(i)/366(A)/370(2)/34 of the I.P.C. R/W Section 4 of POCSO Act.

THE STATE OF ASSAM

-VS -

- 1. Md. Din Islam
- 2. Musstt. Farida Begum
- Md. Ali HussainAccused persons.

APPEARANCE:

Advocate for the prosecution

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

Advocate for the defence

: Mr. Rakhal Das,

Mrs. Swahida Khatoon, Ld. Advocates.

Date of Charge

: 22-06-2018.

Date of Evidence

: 05-07-18, 30-07-18, 01-08-2018, 14-08-18, 27-08-

18 & 18-09-2018.

Date of Argument

: 10-01-19 & 22-01-2019.

Date of Judgment

: 01-02-2019

<u>JUDGMENT</u>

- The prosecution case in brief is that on 10-05-18, informant Aminur Islam lodged an FIR with the O. C. Panbari P. S. alleging inter alia that since 07-05-18 at about 7 pm his 16 years old sister "X" (name withheld here in after known as "X") was missing and he searched his sister in all probable places but could not able to trace out her. Hence, the present case.
- On receipt of the FIR, O/C Panbari P.S registered the same as Panbari P.S Case 2. O'\\ $Juds^2$ investigating officer recovered the victim girl from Chalanibari O. P. in the District of Addl. Special $Juds^2$ investigating officer recovered the victim girl from Chalanibari O. P. in the District of

Sonitpur, arrested the accused persons, visited the place of occurrence, recorded the statement of witnesses, drew the sketch map of the place of occurrence, recorded the statement of victim u/s 164 Cr. P. C by a Magistrate, medically examined the victim girl, collected the medical report of the victim girl and after completion of investigation I.O. submitted charge sheet against the accused Ali Hussain u/s 366(A)/370(2)/376 IPC R/W section 4 of the Protection of Children from Sexual Offences, Act, 2012 (here in after known as POCSO Act) and against accused Md. Din Islam and Musstt. Farida Begum u/s 366(A)/370(2) of the IPC.

On receipt of the report u/s 173 of the Cr. P. C. cognizance was taken against accused 4. Ali Hussain u/s 366(A)/370(2)/376 of the IPC R/W section 4 of the POCSO Act and against accused Md. Din Islam and Musstt. Farida Begum u/s 366(A)/370(2) of the IPC and started a Special (P) case against the accused persons.

- 5. On production of the accused persons, copies of the relevant documents were furnished to the accused persons 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 366/376(2)(i) of the IPC R/W section 4 of the POCSO Act against accused Ali Hussain and u/s 366(A)/370(2)/34 of the IPC against accused Md. Din Islam and Musstt. Farida Begum and the contents of charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.
- 6. During trial prosecution side examined as many as eight witnesses including informant and victim. Accused were examined u/s 313 of Cr. P. C and recorded their 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.
- 7. I have heard argument put forwarded by learned advocates of both sides. Learned defence counsel has filed written argument and copy of the same received by prosecution side. I have gone through the case record as well as evidence on record.

POINT FOR DETERMINATION

- 7. (i) What was the age of victim "X" at the time of occurrence?
- (ii) Whether accused Ali Hussain on 07-05-18 at 7 pm at Damugoan under Panbari P.S, Kidnapped "X" sister of informant with intent that she might be forced to marry the accused ddl. Special JudgAli Hussain against her will or she might be forced to illicit intercourse with the accused Ali

Hussain and thereby accused committed the offence punishable u/s 366 IPC?

- (iii) Whether accused Ali Hussain on 07-05-2018 at Ahatguri under Tezpur P. S. committed rape on "X" a woman under the age of 16 years and thereby committed an offence punishable u/s 376 (2) (i) of the IPC ?
- (iv) Whether accused Ali Hussain on 07-05-18 at Ahatguri under Tezpur P. S. committed penetrative sexual assault on "X" a minor girl under the age of 16 years and thereby committed an offence punishable u/s 4 of the POCSO Act?
- (v) Whether accused Din Islam and Farida Begum on 07-05-2018 at about 7 PM at Damugoan under Panbari P. S. in furtherance of common intention kidnapped victim "X" with intent that she may be compelled to marry against her own will or she will be forced or seduced to illicit intercourse with another person?
- Damugoan under Panbari P. S. in furtherance of common intention committed the offence of trafficking of victim "X" by kidnapping her with an intention to sexual exploitation by threatening?

:DISCUSSION, DECISION AND REASON THEREOF:

- 8. To bring home the charges the prosecution examined eight witnesses including the informant and victim. Let me scrutinize the evidence on record to decide the points.
- 9. After closure of the evidence of prosecution listed witnesses in the charge sheet learned Addl. P. P. has filed an application for re-examination of PW3 to prove the school certificate of victim girl to ascertain the age of victim girl and accordingly for just decision of the case he was re-examined.
- 10. 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, PW3 and PW4 in their evidence clearly stated that at the time of occurrence the age of the victim girl was below 18 years. Learned Addl. P. P. further submitted that the school certificate of the victim was proved by PW3 and according to school certificate the date of birth of victim girl is 23-07-2003 and the occurrence took place on 07-05-2018 and as such at the time of occurrence the age of the victim girl was below 18 years.
- 11. On the contrary, learned advocate for the accused submitted that the prosecution failed prove the actual age of the victim girl at the time of occurrence and as per medical evidence

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the age of the victim girl was above 17 years and below 20 years and as such it can be presumed that the age of the victim girl at the time of occurrence was above 18 years and she was major. Learned counsel further submitted that the prosecution has not produced the admission registered of the victim girl and the school certificate was not dully proved and the school certificate is doubtful. Learned advocate further submitted that the prosecution has not examined the Head Master of the concern school and the prosecution has not produced any document from the first attended school and as such prosecution failed to prove the actual age of the victim girl beyond all reasonable doubt. Learned advocate also submitted that as per report of the radiologist the age of the victim girl is above 17 years and below 20 years and as such it can be safely hold that the age of victim girl was above 18 years at the time of occurrence.

- 12. Ongoing through the evidence on record it reveals that PW1 is the victim of the case and PW3 and PW4 are her brothers. PW3 and PW4 in their evidence stated that they stated the age of victim girl on presumption. So, they have no idea about actual age of the victim girl. Moreover they in their evidence has not mentioned the date of birth of the victim girl. So, next we should see whether school certificate of the victim girl can be accepted to ascertain the age of victim girl.
- 13. Regarding admissibility of admission register and school certificate Hon'ble Supreme Court in a decision reported in AIR 2004 SC 230, Sushil Kumar Vs Rakesh Kumar has held as follows:
- "33. Under section 35 of the Indian Evidence Act, a register maintain in terms of a statute or by a statutory authority in regular course of business would be relevant fact. Had such a vital evidence been produced, it would have clinched the issue. The respondent did not choose to do so.
- 34. In the aforementioned backdrop the evidence brought on record are required to be considered. The admission registered or a Transfer certificate issued by a primary school do not satisfy the requirement of section 35 of the Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any responsible person."
- 14. Hon'ble Supreme Court in another judgment reported in AIR 1988 SC 1796, Birad Mal Singhvi Vs Anand Purohit has held that- to render a document admissible under section 35 of the Evidence Act, three condition must be satisfied –firstly, the entry that is relied on must be done in public or other official work, register or record, secondly, it must be an entry stating the fact in issue or relevant fact and thirdly, it must be made by any public servant in discharge

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of his official duty or any other person in performance of a duty specially enjoyed by the law. An entry relating to the date of birth made in the school register is relevant and admissible under section 35 of the Act, but the entry regarding age of a person in school register is not of much evidentiary value to prove the age of the person in absence of material on which the age was recorded.

- 15. The prosecution has not produced the admission registered of the first attended school of the victim girl. Exhibit-8 is the school certificate of victim girl issued by Head Master, Bangnamari M. E. Madrassa. Ongoing through the exhibit-8 it reveals that victim girl was admitted in the school on 06-01-15 and she left the school on 23-06-2015. So, it appears that victim girl left the school in the middle of the year of the same year of admission. Head Master in the certificate has not mentioned the reason for issuance of the exhibit-8. Moreover, the prosecution has not examined the Head Master of the said school to prove exhibit-8. Admission registered was also not produced to show on what basis the date of birth of victim girl was recorded in the admission register. Hence, I have nothing to hesitate to hold that exhibit- 8 was not dully proved and it cannot be admitted in evidence to ascertain the age of the victim girl.
- 16. PW3 and PW4 in their evidence stated that they stated the age of the victim girl on assumption. PW1 in her evidence nowhere stated how she come to know her age. She could not able to say her date of birth. So, their evidence regarding age of the victim girl is not reliable.
- 17. The next we should see whether the medical evidence of victim as regard her age is reliable or not. During investigation the Investigating Officer examined the victim by a doctor and radiologist. It is settled law that medical evidence is not conclusive evidence to determine the age and there is possibilities of marginal error of two years on either side. PW2 Doctor in her evidence stated that as per radiological examination report the age of PW2 shows above 17 years and below 20 years. She also proved the report of radiologist as exhibit-3. Regarding medical evidence to ascertain the age of victim girl our Hon'ble Gauhati High Court in a judgment reported in 2007 Cri LJ 1615, Md. Jakir Hussain Vs The State of Assam has held as follows:-
 - "7. In the opinion of the doctor (PW 4), age of the girl (AB) was above 18 years with 20 weeks of single viable intra-uterine pregnancy.
 - 8. The evidence given by PW 1 has remained completely unchallenged by the prosecution as well as the defence and his evidence clearly shows that according

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to the radiological examination of AB, her age was above 18 years at the time, when she was medically examined. Though the medical opinion with regard to age may vary by two years on either side, the fact remains that when the evidence could have been adduced, but has not been adduced by the prosecution by producing necessary materials from the school, where AB had studied, to show her age, the medical evidence on record, which goes in favour of the accused, cannot be ignored. Situated thus, one has no option, but to proceed on the premises that AB was above 18 years of age at the time, when she allegedly had sexual intercourse with the accused."

- 18. It is also settled law that if there is two set of evidence and one is goes in favour of the accused and another goes in favour of the prosecution then the evidence which goes in favour of the accused should be considered. From the evidence of PW2 it reveals that at the time of occurrence the age of the victim girl was above 17 years and below 20 years. The medical evidence as regard age may vary two years on either side. So, if we see on upper side of the age of the victim girl then her age was 19 years by adding two years on upper side from lower side. As there is no other reliable evidence as regard age of the victim girl, so, there is no other option then to rely on the medical evidence. Therefore, I am compelled to hold that at the time of occurrence the age of the victim girl was above 18 years. Accordingly this point is decided.
- 19. 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 4 of the POCSO Act.
- 20. Next we to see whether the prosecution able to prove the offence u/s366/376(2)(i)/366 (A)/370(2) of the IPC against the accused persons. Learned defence counsel submitted that it is admitted fact that the victim girl was recovered from Tezpur from the possession of accused persons. Learned Advocate also submitted that the victim girl by force went with accused Ali Hussain from Panbari to Tezpur in a bus but she did not raise any alarm or objection and she did not try to flee from the possession of the accused though she met several passengers in the bus. Learned Advocate also submitted that the victim girl went with accused Ali Hussain from Panbari to Barpeta in a bike but she did not raise any alarm. According to Learned Advocate, the conduct of the victim girl shows that she is consenting and she was not kidnapped by the accused persons.

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- 21. On the contrary learned Additional P.P submitted that the accused persons by threatening kidnapped the victim girl and as such, even though she accompanied with the accused persons and she did not raised alarm and for this reason it cannot be held that the victim is a willing party and she is consenting party.
- I have dully considered the submission of both the sides learned advocate. From the evidence on record, it reveals that PW1 is the victim, PW2 is the M.O., PW3 is the informant as well as brother of the victim girl, PW4 is another brother of victim girl, PW5 is a woman constable, PW6 is the brother-in-law of the victim girl, PW7 is the neighbour of the victim girl and PW8 is the I.O. of this case. From the evidence, it reveals that PW3, PW4, PW5, PW6, PW7 and PW8 were went to Tezpur and brought the victim girl to Panbari Police Station from Chalonibari Out Post. So, they are not eye witnesses of the incident. So, in this case, the evidence of PW1 i.e. victim is vital. It is settled law that on the basis of sole testimony of the rape victim conviction can be sustained if the evidence of victim is believable and her evidence free from embellishment. So, we should scrutinize the evidence of PW1.
- 23. PW1 in her evidence stated that on the day of occurrence at about 6 PM while she was going to discharge her nature call, then accused Din Islam gagged her mouth with clothes and she became unconscious and she got her sense at Tezpur and after regained her sense he asked accused Farida where she is and who brought her to there? Then Farida told her that she was brought by Ali Hussain in a bus and the name of the place is Tezpur Mission Chariali. From her evidence, it reveals that she stayed with the accused persons for about 5 days. She in her evidence also reveals that accused Ali Hussain committed sexual intercourse with her by force and accused Din Islam also committed sexual intercourse with her. One day while they were came out from the rented house of the accused person, then some boy saw them and caught them and brought them to Chalonibari Police Station and Police telephoned her father and thereafter her family members and Police from Panbari P.S. went to Chalonibari and brought her to Panbari Police Station. She in her evidence also revealed that during investigation she was examined by doctor and her statement was recorded in the court. She proved her statement u/s 164 Cr. P. C. as exhibit-1 and exhibit-1(1) is her signature. During crossexamination defence side put some suggestion to her that she did not state before police that she was unconscious and accused Din Islam committed sexual intercourse with her

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which she denied.

The other facts almost admitted. In this case the statement of "X" recorded u/s 24. 164 Cr. P. C. is very much important as because the statement of the victim girl was recorded after she was recovered from the possession of accused persons. PW1 in her statement u/s 164 Cr. P.C. stated that on 07-05-2018 at about 6 PM, Din Islam and Ali Hussain came to their house and forcibly took her along with them in their motor cycle. They took her to Barpeta and she along with Ali Hussain were asked to board in a bus and Ali Hussain took her to Tezpur. They stayed for 8 days at the rented house of Din Islam at Tezpur. She further stated that Ali Hussain committed forceful sexual intercourse with her. Din Islam and Farida became used to threaten her father over phone and her father lodged the F.I.R. PW1 in her statement u/s 164 Cr. P. C. nowhere stated that accused Din Islam gagged her mouth with clothes and she became senseless and she regained her sense at Tezpur. PW1 also in her statement u/s 164 Cr.P.C. nowhere stated that accused Din Islam also committed sexual intercourse with her. She clearly in her statement u/s 164 Cr. P. C. stated that accused Din Islam and Ali Hussain took her to Barpeta on a motor cycle and from Barpeta, she was board in a bus along with Ali Hussain and Ali Hussain took her at Tezpur. She also stated accused Din Islam and Farida Begum threatened her father. PW1 also in her statement before police nowhere stated that she was unconscious and she got sense at Tezpur and accused Din Islam committed intercourse with her by force. So, from the evidence of PW1, it reveals that there is no consistency in her evidence and she exaggerated her evidence during trial in the court. The evidence of PW1 is not corroborated with the statement u/s 164 Cr.P.C and u/s 161 of the Cr. P. C. So, I find that the uncorroborated and exaggerated evidence of PW1 belies the prosecution story of kidnapping. From the evidence of PW1 it reveals that 1st she went with accused on a motorcycle from Panbari to Barpeta. Obviously victim girl on the way from Panbari to Barpeta she met several persons on road as they crossed several villages but she did not raised any hue and cry. From Barpeta she boarded in a bus and went to Tezpur. The distance from Barpeta to Tezpur is about 250 kilometer and journey on road required at least 6 hours. Obviously PW1 met several persons in the bus but she did not reported the incident to anybody and raised any alarm. There is no evidence to show that all the way accused put her under threat. Rather she during evidence tried to establish that she was unconscious and got sense at Tezpur. If she was boarded in the bus in Judunconscious condition and journey, then also it would come to notice of the copassengers. So, considering the conduct of the victim girl, it reveals that she is consenting

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and she her own will went with accused persons and stayed 8(eight) days in the rented house of Din Islam. After recovery of the victim girl she was immediately brought before doctor and examined her. PW2 is the medical officer who examined the victim girl. From the evidence of PW2 it reveals that she has not found any sign of intercourse during physical examination of the victim girl. So, it appears that there is no corroboration between the evidence of PW1 with the medical evidence. Hence, I find that evidence of PW1 is not believable. There is no evidence to show that the accused persons ever tried to hand over the victim girl to anybody for the purpose of sexual intercourse. Therefore, I have nothing to hesitate to hold that the prosecution failed to prove the charges levelled against the accused persons 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 Ali Hussain, Din Islam and Farida Begum are found not guilty u/s366/366(A)/370(2)/376(2)(i)/34 of the IPC, R/W section 4 of the POCSO Act and they are acquitted from the charge of offence u/s 366/366(A)/370(2)/376(2)(i)/34 of the IPC, R/W section 4 of the POCSO Act and set them free at their liberty forthwith.
- 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.
- 29. The seized school certificate be returned to the informant Aminur Islam in due course of time.

Given under my hand & seal of this court the 1st day of February, 2019.

Typed by myself

Additional Special Judge,

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(N. U. Ahmed)

Additional Special Judge,

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APPENDIX

(A) Prosecution witnesses:

PW1- Victim "X"

PW2- Dr. Mina Hazarika

PW3- Md Aminur Islam

PW4- Nur Alam Sheikh

PW5- Smti Harimoti Choudhury

PW6- Md. Haidur Islam

PW7- Md. Hafizur Rahman

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, Report of the radiologist.

Exhibit-4, FIR.

Exhibit-5, Sketch map.

Exhibit-6, seizer list.

Exhibit-7, Charge sheet.

Exhibit-8, School certificate.

(D) Defence witnesses: Nil.

(E) Defence exhibits: Nil.

(F) Court Witnesses:Nil.

(G) Court exhibits: Nil.

Additional Special Judge

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