IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE ::::UDALGURI

Present : Smti. N. Talukdar,
Addl. Sessions Judge,
Udalguri.

Special (POCSO) 25/2019 U/S 366-A IPC R/W Section 6/17 of POCSO Act

State of Assam

-Vs-

- 1. Bubul Ali
- 2. Paharulla
- 3. Bhana Ali
- 4. Ataur Rahman.....Accused persons.

For the Prosecution: Mr. R. Sarmah, Addl. Public Prosecutor.

For the Accused : Mr. M.C. Narzary & Mr. P. Lomga,

Learned Advocates.

Date of Evidence : 26-09-19: 03-10-19: 06-11-19.

Date of Argument : 25-11-2019.

Date of Judgment : 05-12-2019.

<u>JUDGMENT</u>

 The prosecution case in brief is that on 27-06-18, informant Marjina Begum lodged an FIR with the Officer-in-Charge of Tangla P.S. alleging that on that day in the morning at about 09 am accused Bubul Ali alongwith another kidnapped her daughter on her way to school while going to collect Admit card of High School Leaving Examination Certificate.

- 2. On the basis of the FIR, Tangla PS Case No. 104/18, under Section 366 IPC was registered. Later on Section 6/17 of POCSO Act was added and after completion of investigation Police submitted charge-sheet under Section 366 IPC R/W Section 6 of POCSO Act against the accused Bubul Ali, Section 366-A, R/W Section 17 of POCSO Act against Md. Ataur Rahman and Section 17 of POCSO Act against the accused persons Paharulla and Bhana Ali.
- 3. In consideration of the submission of the learned counsel for both the parties and materials on record and having found sufficient grounds for presuming that the accused persons had committed offence under Section 366-A IPC, R/W Section 6/17 of POCSO Act, Hon'ble Special Judge, Udalguri framed charge separately there under and the ingredients of charges under Section 366-A IPC, R/W Section 6 of POCSO Act, were read over and explained to the accused Babul Ali, Section 17 of POCSO Act were read over and explained to the accused persons Paharulla and Bhana Ali and Section 366-A IPC R/W Section 17 of POCSO Act were read over and explained to the accused Ataur Rahman to which all the three accused persons pleaded not guilty and claimed to be tried. The learned Special Judge vide Order dated 26-09-19, transferred the case to this court for disposal.
- 4. The prosecution in order to prove its case examined the following 07(seven) witnesses:

PW1- Victim-A.

PW2- Marjina Begum.

PW3- Dr. Arup Kr. Kalita.

PW4- Md. Altaf Hussain.

PW5- Md. Nur Hussain.

PW6- Abjun Begum.

PW7- ASI Indra Dev Goswami.

- 5. The statement of the accused persons had been recorded U/S 313 Cr.P.C. The defence plea was of total denial. Defence had declined to adduce defence evidence.
- 6. Situated thus, the points for determination in the instant case are set up as follows:-
 - (I) Whether the accused persons Babul Ali and Ataur Rahman kidnapped victim-A a girl under eighteen years of age, with intent that she might be forced to illicit intercourse with them?
 - (II) Whether the accused Babul Ali committed aggravated penetrative sexual assault upon victim-A, a girl under 16 years of age?
 - (III) Whether the accused persons Paharulla, Bhana Ali and Ataur Rahman abetted accused Babul Ali to abduct victim-A from her lawful guardian?

DISCUSSION, DECISION AND REASON FOR DECISION:

- 7. I have heard learned Addl. PP Mr. R. Sarmah for the prosecution and learned defence counsel Mr. M.C. Narzary and Mr. P. Lomga.
- 8. Learned Addl. P.P. has argued that prosecution has proved beyond all reasonable doubt that the accused Bubul Ali took away the victim girl, who is a minor, against her will and forcibly committed sexual intercourse with her. He has also argued that the accused kept the victim girl in the house of accused Bubul Ali. The other two accused persons also abetted the accused to abduct the victim girl.
- 9. Controverting the argument put forward by learned Addl. P.P., learned defence counsel Mr. M.C. Narzary has argued that prosecution has miserably failed to adduce cogent and consistent evidence to bring home the charges against the accused persons. According to him the testimony

of the victim girl is not at all reliable. She has adduced evidence before the Court resiling from her earlier statement made before the learned Magistrate under Section 164 Cr.P.C.

- 10. According to learned defence counsel the victim voluntarily went with the accused Bubul Ali. As per medical evidence the age of victim is between 17 to 18 years. Prosecution has failed to produce any other document regarding age of the victim such as her birth certificate or school certificate. Though prosecution has exhibited the seizure list of birth certificate of the victim girl but in absence of producing the birth certificate itself, the seizure list cannot be the proof of date of birth of the victim. Learned defence counsel has also argued that there is no evidence against the other three accused persons implicating them in the alleged incident. Learned defence counsel has relied on a decision reported in AIR 2003 SC 2081, Jinish Lal Sah Vs. State of Bihar.
- 11. Before appreciating the arguments put forward by learned Addl. P.P. for the State as well as the rival submission advanced by the learned defence counsel, I would like to discuss the evidence adduced by the prosecution.
- 12. PW1 is victim-A. In his evidence PW1 had deposed that at the time of occurrence she was 16 ½ years old. The occurrence took place on 27.6.2018. Prior to one month from the date of occurrence she got acquainted with the accused Babul Ali at the house of her uncle Mobarak Ali situated at Panery when marriage ceremony was held of his son. On the day of incident when she came to her school to collect her admit card at Tangla HS school she met the accused. She saw the accused waiting in front of the school gate and on seeing her he asked her to come with him. Though initially she refused to go but he told her that he would only have a chat with her for few minutes. Then she accompanied the accused and he took her to Tangla railway station and they boarded a train up to Rangia. After getting down there at Rangia the accused took her to his

sister's house situated at Mukalmowa. They reached the house of the sister of the accused at around 4 PM. After staying at the house of the sister of the accused till 12 0'clock in the night the accused took her in a motorcycle to his aunt's house. Thereafter, the accused took her to an unknown house surrounded by tanks. After keeping PW1 for three days in that place the accused took her to the house of the accused situated at Gangaur. The accused again took her to his relative's house one day after another. Thereafter, one day the accused took her to Guwahati in a hired car. After staying at Guwahati for 3 days police apprehended them. The accused kept her in Guwahati at the house of the accused Bhana Ali who is his uncle. Police after apprehending them brought her to Tangla PS and got her statement recorded before the Magistrate U/S 164 Cr.P.C. Police also sent her for medical examination. Ext.1 is the statement recorded U/S 164 Cr.P.C. Ext.1(1) is the signature of PW1. PW1 had deposed that during these periods the accused committed sexual assault on her without her consent. In cross-examination by defence for accused Babul Ali and Ataur Rahman, PW1 had stated that on the day of occurrence she went to school alongwith one girl Manisha Ekka. Accused was alone while she met him in front of Tangla HS school. Accused purchased train ticket for her. PW1 had admitted that she stated before the police that she had love affairs with the accused since 3 years before the incident. PW1 had admitted that she stated before the police that she had love affairs with the accused Babul Ali. PW1 had further admitted that she stated before the police that on her own sweet will she went alongwith the accused by train on the day of occurrence. When she was taken by the accused from Tangla HS school to various places she met many persons but she did not tell before them about her kidnapping by the accused. Accused Babul Ali solemnized her marriage with him before Kaji at Guwahati with her consent. PW1 had denied the suggestion that she had deposed falsely against the accused persons though she eloped with the accused Babul Ali on her own volition. In cross-examination by defence for accused Paharulla and Bhana Ali, PW1 had stated that she did not know as to whether police seized her birth certificate to prove her age at the time of occurrence. She stayed with the accused Babul Ali in a rented house and near the house of his uncle Bhana Ali. Accused Paharulla was a village headman of village Gangapur. She was not kept in the house of accused Paharulla. When her statement was recorded before the court none of the accused persons were present. She also did not tell before the Magistrate that she was forced to give favourable statement against the case.

13. PW2 is Marjina Begum, informant and mother of the victim girl. In her evidence PW2 had deposed that about one year ago one day her daughter came to Tangla HS school to collect her admit card, but she did not return home till late in the night. In the meantime they came to know that her daughter had been kidnapped by accused Babul Ali and therefore, she lodged an FIR on 27.6.2018 before the O/C, Tangla PS to take necessary action in this regard. Subsequently, police recovered her daughter after 21 days of the incident from Guwahati. She did not see the accused Babul Ali taking away her daughter. Ext.2 is the FIR. Ext.2(1) is the signature of PW2. In cross-examination by defence for accused Babul Ali and Ataur Rahman, PW2 had stated that her daughter did not contact her over telephone when she was staying with the accused for about 21 days at different places. She had submitted birth certificate of her daughter before the police. Still she did not know the accused Babul Ali as she had never seen him before. She did not know whether her daughter had love affairs with accused Babul Ali before the incident. PW2 had denied the suggestion that her daughter had love affairs with accused Babul Ali and on the day of occurrence she at her own volition eloped with the accused. In crossexamination by defence for accused Paharulla and Bhana Ali, PW2 had stated that after the incident she came to know from her daughter that accused Babul Ali solemnized marriage with her before the Kaji. She did not witness the incident of kidnapping of her daughter by accused Babul Ali.

14. PW3 Dr. Arup Kr. Kalita. In his evidence on 22.7.2018, he was serving as M. & H.O. at Udalguri Civil Hospital. On that day, he examined victim-A on police requisition in reference to Tangla P.S. case No.104/18 U/S 366 IPC. On examination, he found the following:-

Identification Mark:- (1) Black mole on neck.

(Physical examination:-

Height- 147 cm, weight- 40 Kg, teeth- 28 Nos., axillary hair- present, breast- developed developed, hymen- absent, vaginal injury- nil, marks of violence- nil, clothing- printed black frock, LMP- 22.7.2018.

Smear examination:- No spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray examination of the right wrist, elbow and iliac crest vide plate No.RXIC8362 dated 24.7.2018 reported by Radiologist Radhika X-Ray, Mangaldai shows radiological age 17 to 18 years.

Urine for pregnancy test on 24.7.18 reported by Rashmi Clinical Lab, Mangaldai shows negative.

Ultrasonography of abdomen on 24.7.2018 by Sinologist, Radhika X-Ray and Imaging Centre, Mangaldai reported as normal echofeature of organ imaged.

PW3 had deposed that in his opinion

- 1. Approximate age 17-18 years.
- 2. USG shows normal echofeature of organ imaged.
- 3. No marks of violence.
- 4. No spermatozoa seen vaginal smear slice.

Ext.3 is the report. Ext.3(1) is the signature of PW3.

Cross-examination of PW3 had been declined by the defence.

15. PW4 is Md. Altaf Hussain, father of the victim girl. In his evidence PW4 had deposed that the occurrence took place about one year ago. On the day of occurrence his daughter went to Tangla HS school to collect her admit card, but she did not return home till late in the night. They made search of her whereabouts and in the meantime they came to know that his

daughter had already gone to Nalbari with a boy. In this regard his wife on the next day lodged an FIR. They also went to Nalbari to trace out his daughter. But she remained traceless. After 20 days of the incident his daughter was recovered by police and arrested the accused persons. Only after arrest of the accused persons PW4 came to know that his daughter was taken away by accused Babul Ali. His daughter on being asked told before him that accused Babul Ali took her on the day of incident in train to Nalbari and thereafter, she was taken to various places till her recovery at Guwahati. He did not know as to whether his daughter had love affairs with the accused Babul Ali. In cross-examination by defence for accused Babul Ali and Ataur Rahman, PW4 had stated that he did not witness the incident of kidnapping of his daughter by the accused Babul Ali. Cross-examination by defence for accused Paharulla and Bhana Ali, had been declined.

16. PW5 is Nur Hussain. In his evidence PW5 had deposed that about one year ago, the occurrence took place. On the date of occurrence, he was at Tangla railway station with his rickshaw. At about 10.45 am, he had seen victim and accused Bubul Ali boarding a train heading to Rangia. At about 2 pm, he went to his home. He heard the family members of the victim crying for the disappearance of the victim from home. Then, he informed her father Altaf Hussain that he had seen the victim boarding the train with accused Bubul Ali. After about 12 days the Police rescued the victim girl from Guwahati. Then he went to Tangla PS to see the victim. In the PS, he had seen all the four accused persons in lockup of the Police station. In cross-examination, PW5 had stated that he had heard that the houses of the accused person are situated in Mukalmua of Nalbari District. In the railway station, while the victim was boarding the train he had not seen the other three accused persons except accused Bubul Ali. He had not seen the victim resisting the accused Bubul Ali and raising hue and cry at the time of boarding the train. He had not seen accused Bubul Ali visiting their village before the incident.

- 17. PW6 is Abjun Begum. In her evidence PW6 had deposed that her house is near the house of the informant. About one year ago, the occurrence took place. At the time of incident, the victim was a student of HS 1st year. After two days of the incident, she learnt from the parents of the victim that the victim went missing from home. She came to know from the family members of the victim that Bubul Ali, a boy residing under Mukalmua PS took away the victim. They informed her that parents of the victim had been called by the parents of Bubul Ali to their village for negotiation. Accordingly, she and parents of the victim went to the house of Bubul Ali informing the Police of Mukalmua PS. The Police of Tangla PS also accompanied them to the house of the Bubul Ali. But in his house, they did not find the victim and Bubul Ali. In the house of Bubul Ali they met accused Paharulla who is the Gaonburah of his village. The people of the village along with the family members of accused Bubul Ali scolded them and caused damage to their vehicle. The Police personnel present there controlled the situation and helped them to leave that place. After some days the Police of Tangla PS rescued the victim girl from Guwahati. She did not ask the victim anything about the incident. In cross-examination, PW6 had stated that Sirajul Hoque and an old person of their village also went to the house of Bubul Ali along with them. She did not know who had filed the FIR. She did not know who damaged the glass of their vehicle in the village of accused Bubul Ali. She did not know whether any case was filed in Mukalmua PS in connection with the incident of damage of their vehicle. She did not know whether the victim voluntarily eloped with accused Bubul Ali or whether she was forcibly taken away. PW6 had denied the suggestion that accused Paharulla was not present in the house of accused Bubul Ali and they did not meet him. She did not know whether the victim had love affairs with accused Bubul Ali.
- 18. PW7 is ASI Indra Dev Goswami. In his evidence PW7 had deposed that on 27-06-2018, he was working as In-charge of Bhergaon OP under Tangla PS. On that day, O/C Inspector Durga Kingkor Sarmah, Tangla PS

endorsed him to investigate Tangla PS case No. 104/18 U/S 366 IPC. On 28-06-2018, PW7 visited the place of occurrence the Tangla railway level crossing. He prepared the sketch map of the place of occurrence and recorded the statement of the informant and other witnesses U/S 161 Cr.P.C. On the same day he sent a WT message to all the Officers Incharge of Assam for recovery of victim. On 05-07-2018, he also recorded the statement of other witnesses U/S 161 Cr.P.C. On 22-08-2018, he arrested accused Bubul Ali, Ataur Rahman, Bhana Ali @Saiful, Md. Paharulla and forwarded them to learned Court. On the same day, victim was rescued by the Officer In-charge of Tangla PS from Mukalmua. The medical examination of the victim girl was done through the doctor of Udalguri Civil hospital. The victim was produced before the learned Magistrate and her statement was recorded by learned Magistrate U/S 164 Cr.P.C. The birth certificate of the victim girl was seized and produced before the learned Magistrate for being seen. The victim was given in custody of her mother by the learned Court. The victim refused to go to her home. Therefore she was kept in the custody of a NGO of Tangla namely "Rose". Later on, as per order of learned Magistrate she was shifted to State Home for Women, Jalukbari. He collected the medical examination report of the victim. Later on, the victim was again produced before the learned Court and she was given in custody of her father by the Court. This time she went to her home with her father. After completion of preliminary investigation, he handed over the case diary to O/C Tangla PS, Inspector Durga Kingkar Sarmah who then submitted charge-sheet U/S 366 IPC R/W section 6 of Pocso Act against accused Md. Babul Ali, U/S 366(A) IPC r/w section 17 of Pocso Act against accused Md. Ataur Rahman, U/S 17 of Posco Act against accused Md. Paharulla and accused Bhana Ali. Ext-4 is the sketch map of place of occurrence. Ext-4(1) is the signature of PW7. Ext-5 is the seizure list. Ext-5(1) is the signature of PW7. Ext-6 is the charge-sheet. Ext-6(1) is the signature of O/C Inspector Durga Kingkar Sarmah. PW7 was acquainted with his signature. In crossexamination, PW7 had stated that as per sketch map, the place of occurrence was shown as the Tangla Railway station. He was not present at the time of rescue of the victim girl. The sketch map of the place from where the victim was rescued was not prepared as he was not present. All the accused persons were arrested on the same day. The statement of the victim U/S 161 Cr.P.C was recorded by WSI Jamuna Das. The seized original birth certificate of the victim girl was given in custody of the mother of the victim.

19. On close and careful scrutiny of evidence on record it appears that in her cross-examination, PW1, the victim girl admitted that in her previous statement recorded by the police she stated that she had love affairs with the accused Bubul Ali. Ext.-1 the statement of the victim recorded under Section 164 Cr.P.C. would also revealed that the victim stated before the Magistrate that she had love affairs with accused Bubul Ali. In her statement recorded by the Magistrate under Section 164 Cr.P.C., the victim clearly stated that when her parents wanted to arrange her marriage with someone else she on her own volition eloped with the accused. The evidence of the victim girl is inconsistent and contradictory with her previous statement recorded under Section 164 Cr.P.C. Though in her statement recorded under Section 164 Cr.P.C. she made no allegation of sexual assault upon her by the accused but in her evidence before the Court she made material improvement in her statement and deposed that the accused committed sexual assault upon her without her consent. On careful scrutiny of evidence of the PW1, the victim girl deposed that her evidence is unworthy of any credibility. A careful scrutiny of evidence of the victim narrating about the entire incident would reveal that the accused Bubul Ali did not use force to take the victim with him. PW5, who had witnessed the victim and the accused boarding a train heading to Rangiya had also not divulge anything that the victim was forcibly taken away by the accused Bubul Ali.

- 20. With regard to the age of the victim except the opinion of doctor no other evidence such as birth certificate or school certificate of the victim is available in the evidence on record. It appears from the evidence of PW3 the Medical Officer that in his opinion the approximate age of the victim is seventeen-eighteen years. In case of medical opinion with regard to age the margin of error is two(2) years on either side and in such case the benefit of margin of error always goes in favour of the accused. Thus basing on opinion of doctor the age of the victim girl shall be counted as more than eighteen years.
- 21. On cumulative assessment of the evidence on record it appears that the victim being a major woman voluntarily eloped with the accused with whom she had love affairs. There is also no evidence on record that the other three accused persons abetted accused Bubul Ali to abduct the victim from her lawful guardianship.
- 22. In view of above discussion it appears that the prosecution has failed to prove the charges under Section 366-A IPC, R/W Section 6/17 of POCSO Act against the accused persons beyond all reasonable doubt.
- 23. Situated thus the points for determination are decided in the negative and against the prosecution.

ORDER

24. In the result, the accused persons Bubul Ali, Paharulla, Bhana Ali and Ataur Rahman are found not guilty under Section 366-A IPC, R/W Section 6/17 of POCSO Act and acquitted of charges under Sections 366-A IPC, R/W Section 6/17 of POCSO Act beyond all reasonable doubt and set at liberty forthwith.

25. Bail bond executed by the accused persons and the sureties shall remain in force for another six months under the purview of provision under Section 437-A Cr.P.C.

26. Judgment is signed, delivered and pronounced in the open court today the 05^{th} day of December, 2019.

Dictated and Corrected

(N.Talukdar) Addl. Sessions Judge Udalguri (N.Talukdar)
Addl. Sessions Judge
Udalguri

IN THE COURT OF ADDL. SESSIONS JUDGE:::::::UDALGURI.

Special (POCSO) 25/2019 APPENDIX

(A) Prosecution Exhibits:

Ext.-1 : Statement of the victim U/S 164 Cr.P.C.

Ext.-2 : FIR.

Ext.-3 : Medical report.

Ext.-4 : Sketch map.

Ext.-5 : Seizure list.

Ext.-6 : Charge sheet.

(B) Materials Exhibits : Nil.(C) Defence Exhibits : Nil.

(D) Exhibits produced by witness: Nil.

(E) Court Exhibits : Nil

(F) Prosecution witnesses:

PW1- Victim-A.

PW2- Marjina Begum.

PW3- Dr. Arup Kr. Kalita.

PW4- Md. Altaf Hussain.

PW5- Md. Nur Hussain.

PW6- Abjun Begum.

PW7- ASI Indra Dev Goswami.

(G) Defence witnesses : Nil.(H) Court witnesses : Nil.

(N.Talukdar) Addl. Sessions Judge. Udalguri.