

IN THE COURT OF THE SPECIAL JUDGE

CHIRANG, KAJALGAON.

Special(P) Case No. 16(S)/2017 U/S 366/376(2) (i) IPC R/W Section 4 of POCSO Act.

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State of Assam Vs. Sri Sudem Narzary

.....Accused Person

**PRESENT:** 

Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

## **ADVOCATES APPEARED:**

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Md. N.I. Siddique, Ld. Advocate

Date of Evidence

: 21.10.17, 16.11.17, 20.03.18, 03.07.18, 29.09.18, 14.11.18, 04.12.18, 10.01.19, 11.02.19,

20.03.19

Date of Argument : 20.04.2019

Date of Judgment : 04.05.2019

#### <u>JUDGMENT</u>

- The prosecution case as revealed during trial in brief is that on 24.05.2017, the informant Digendra Basumatary lodged an FIR before Sidli Police Station alleging that on 20.05.2017, at about 8.30 AM, while his 16 years old daughter Miss 'X' (name is withheld) was going to her school, the accused took away her from the road and confined her after performing marriage with her in a Temple.
- After receiving the FIR, the O/C of Sidli P.S. registered a case 2. being numbered as Sidli P.S. Case No.20/17 U/S 366(A) IPC and the

concerned O/C entrusted himself for investigation of the case. Accordingly, the Investigating Officer recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C, collected the medical report, drew the sketch map of the P.O and arrested the accused. After completion of investigation, he submitted Charge Sheet against the accused Sudem Narzary U/S 366(A) of IPC R/W Section 4 of POCSO Act before this court. Accused person was produced from jail before this court. After receiving charge sheet, copies of relevant documents were furnished to the accused person. On perusal of entire materials on record and hearing both sides on point of consideration of charge and after having found a prima facie case, my learned predecessor framed formal charge U/S 366/376(2)(i) IPC R/W Section 4 of POCSO Act against the accused. Charge was read over and explained to the accused to which he denied to plead guilty. Later on, accused person was released on bail during trial.

 In support of the case prosecution side examined as many as 8 (eight) witnesses including the M.O. and I.O. Two witnesses were examined as CWs.

Following witnesses were examined:-

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- (1) Victim Miss 'X' (name is withheld) as PW 1
- (2) Smt. Sunashree Basumatary as PW 2
- (3) Sri Phinal Basumatary as PW 3
- (4) Informant Sri Digendra Basumatary as PW 4
- (5) Smt. Hongle Basumatary as PW 5
- (6) Sri Rojin Basumatary as PW 6
- (7) S.I. Kaikhoseh Simte (I.O.) as PW 7
- (8) Dr. Jili Basumatary (M.O.) as PW 8
- (9) Sri Binod Kumar Narzary as CW 1
- (10) Sri Sanaram Muchahary as CW 2
- 4. Statement of the victim Miss 'X' (name is withheld) recorded U/S 164 Cr.P.C. was exhibited as Ext.1. FIR was exhibited as Ext.2. Sketch Map was exhibited as Ext.3. Charge-Sheet was exhibited as Ext.4, Medical

Report was exhibited as Ext.5, Admission Register of Soulmari Kolobari Daimalu M.E. School was exhibited as Ext.6 and Book No. 2, transfer or leaving certificates was exhibited as Ext.7. Pass Certificate or Leaving Certificate of the victim issued by Headmaster of No. 446 Kolobari L.P. School was exhibited as Material Ext.1 and Admission Register of No. 446 Kolobari L.P. School was exhibited as Material Ext. 2. Relevant entry regarding the admission of the victim was exhibited as Material Ext. 2(1).

- 5. Defence plea is of partly denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced evidence of two witnesses particularly Miss Changsari Mohilary as DW 1 and accused Shri Sudem Narzary as DW 2. In nutshell, defence version is that victim was major at the time of occurrence and she went with the accused according to her own will because there was love affair between them. Defence did not specifically deny the allegation of sexual intercourse between accused and victim. According to them victim was consenting party.
- 6. Heard argument from both sides. I have perused the entire evidence on record. I have also considered the statement of the accused recorded u/s 313 Cr.P.C. I have also gone through the supplied case law.

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## 7. POINTS FOR CONSIDERATION:-

#### For the offence U/S 366 of IPC

1. Whether on 20.05.2017, at about 8.30 A.M., at village Kolobari under Sidli P.S., the accused person kidnapped Miss 'X' (name is withheld), a woman with intent (or knowing it to be likely) that she might be compelled to marry him against her will or in order (or knowing it to be likely) that she might be forced (or seduced) to illicit intercourse with him?

#### For the offence U/S 376(2)(i) of IPC

2. Whether on 20.05.2017 and thereafter at different point of time, the accused person committed rape on Miss 'X' (name is

withheld), a woman under age of 16 years?

## For the offence U/S 4 of POCSO Act

3. Whether on 20.05.2017 and thereafter at different point of time, the accused person committed penetrative sexual assault upon Miss 'X' (name is withheld), a minor girl under the age of 18 years?

#### **DISCUSSION, DECISION AND REASONS THEREFOR:-**

- 8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned all points simultaneously for the sake of convenience.
- Victim was examined as PW 1 who deposed that about five months ago from the date of her deposition, at about 8.30 A.M., she went to her school situated at Kashikotra. She initially went to Sidli on her bicycle and kept the bicycle thereon. Then she proceeded on bus. At Kashikotra when she got down from the bus, accused met her. After that he gagged her and forcefully took her on a motorcycle. Another 4 boys were also present and they also accompanied the accused on two motorcycles. She was taken to Shamthaibari. After that she was taken in an auto rickshaw to Pagla Baba temple of Kokrajhar. In the temple, accused married her. After performing marriage, accused took the victim to the house of his maternal aunt situated at Runikhata. They stayed thereon for a period of four days. During the period of entire four days accused committed sexual intercourse. She protested but accused did not respond. After four days, both of them returned to their home and at Runikhata market, they met her brother and both of them were taken to the Police Station. When she reached police station, her parents along with other villagers were also coming to the police station and she narrated the entire incident to her parents and other villagers. After knowing the fact, her father lodged FIR. She was medically examined at Kajalgaon hospital and she also gave statement before the Magistrate. Said statement was exhibited as Ext.1. During the cross-examination, it is revealed that there was love affair between her and accused. Learned Defence Counsel, during cross-

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examination, gave suggestion that no marriage took place at Pagla Baba temple but said suggestion was denied. The victim stated that no certificate was given and they were asked to wait for two years. She further stated during cross-examination that when she was taken from Kashikotra to Shamthaibari on motorcycle, she did not make hue and cry. She gave explanation that other boys threatened her with dire consequence for which she did not make any hue and cry. Learned Defence Counsel further pointed out that she did not state before the police that accused gagged her and pulled her to his motorcycle at Kashikotra but she denied the fact. Défence also pointed out that P.W.1 falsely stated that she was staying with the accused for a period of four days but said suggestion was also denied. It is revealed from her evidence that she had no birth certificate but she had school certificate. Learned Defence Counsel suggested to this witness that she failed in two times in lower classes but same suggestion was also denied by the victim. Another suggestion given by learned Defence Counsel is that age of the victim was above 18 years but said fact was also denied by PW 1. The Learned Defence counsel suggested that accused did not forcefully commit sexual intercourse with the victim but same fact was also denied. Considering the suggestion of Learned Defence counsel I have found that they gave more emphasis regarding forceful sexual intercourse only. They did not deny the fact that there was sexual intercourse. According to defence, sexual intercourse took place according to will of the victim and at that time she was major. They only denied forceful penetration from the side of the accused without consent of the victim.

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10. PW 2 is the mother of the victim. She deposed that occurrence took place on 20.05.2017. At that time, her daughter was reading in Class-X at Urbashi Memorial Girls' High School, Kashikotra and her age was 15 ½ years. On the day of occurrence, in the morning, his said daughter came to her school but she did not return home. Thereafter, they started searching for her and later came to know that the accused person kidnapped her daughter. After two days, her daughter was handed over at the Police Station. During cross, she deposed that the school at Kashikotra was far away from their house and her daughter used to go to school by riding a bicycle. Along with her daughter, many other girls of their village used to go to the said school.

After kidnapping of her daughter, they enquired in her school also. Before handing over of her daughter at the Police Station by the parents of the accused, they did not file any FIR before police regarding the incident. She has got two children. The elder one is son and the younger is the victim but she cannot say the date of birth of her son. She also cannot say the date of birth of the victim girl.

- 11. PW 3, the uncle of the victim also stated in the same tune as stated by PW 2. He denied the suggestion that he had not stated before the police that occurrence took place on last 20.05.17 and at that time, victim was reading in Class-X at Urbashi Memorial Girls' School, Kashikotra and her age was 15 ½ years.
- 12. PW 3 is the informant of this case and father of the victim. He deposed that at the time of occurrence, his daughter was reading in Class-X in Urbashi Girls School. On 20.05.2017, at about 9 A.M., his daughter was proceeding to her school but she could not return. On that day, in the evening, when he was returning from his work, his wife reported him that his daughter was not returned. He searched different places but could not find her. On 22.05.17, his daughter informed through mobile phone that accused Sudem Narzary forcefully took her and married her in the temple. Parents of the accused produced his daughter along with the accused before Sidli P.S. and they were informed from Sidli Police Station. He along with some villagers went to the Sidli Police Station and found his daughter thereon. When he asked his daughter, she stated that accused committed sexual intercourse with her. At that time, his daughter was 16 years 6 months. His daughter was born in the year 2002 and she did not fail in any class till the date of incident. During cross, he stated that he had two children and his son was elder than daughter. His son is reading in Class-XII and presently appearing H.S. Final examination. His son was born on 31.03.2000. His daughter goes to school by bicycle or public vehicle. On the date of occurrence, victim went to her school on bicycle alone and she kept her bicycle at Sidli. After two days, he recovered the bicycle. Her daughter had no any mobile phone. In cross he stated that he had no knowledge whether there was love affair between his daughter and accused.

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- 13. PW 5 deposed that occurrence took place on 20.05.2017. On that day, she was in her home and heard from the informant that his daughter was missing. She heard that lover of the victim took her but she did not know the name of the lover. At that time, victim was reading in Class-X. She did not fail in any other class. During cross, she deposed that the informant was her adjacent neighbor.
- 14. PW 6 deposed that he knew about the incident from the victim. She reported him that when she was going to her school, on the way, accused took her to Pagla Baba Mandir situated at Kokrajhar where he married her. Age of the victim was 16 years.
- 15. PW 12 is the I.O., who deposed that after getting the FIR, he registered a case being numbered as Sidli P.S. Case No. 20/17 U/S 366(A) IPC and took the charge of investigation. Both accused and victim were produced by the villagers along with parents before the P.S. When he interrogated the victim at the police station, she told him that there was love affair between her and accused. At that time, she was reading in Class-X. He did not visit the school where the victim was reading. He recorded the statement of witnesses, sent the victim to the Court for recording her statement U/S 164 Cr.P.C and she was also sent to the JSB Civil Hospital for examination on the same day. He did not collect any certificate or registration card regarding the age of the victim. He sent the victim to Lower Assam Hospital for radiological examination but there is no report in the case diary. After that he collected the medical examination report but as there was no any radiological report, the doctor could not ascertain the age of the victim. One photo copy of the school certificate was furnished which was obtained from M.E. School and on the basis of said document doctor opined that the age of the victim was 15 years. After completion of investigation, he submitted charge-sheet against the accused person U/S 366 A IPC with added Section 4 of POCSO Act.
- 16. PW 13 is the Medical Officer, who examined the victim girl. She deposed that on 24.05.17, she was working as Medical Officer at JSB Civil Hospital, Kajalgaon. On that day, she examined the victim Miss 'X' (name is withheld) in connection with Sidli P.S. Case No. 20/17 U/S 366(A) IPC escorted by WHG Alia Khatun.

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There was history of alleged forceful marriage on 17.05.17 following which there is history of sexual intercourse.

On examination, she found the following:-

She was conscious. Well oriented.

Built – average.

Auxiliary hair - present.

Breast areola/nipple – breast moderately developed. No injury mark seen on her body.

Pulse - 80/min.

CVS - S1 S2 (+), Chest - B/L AE(+), CNS - Intact, P/A - solo.

No. of teeth 8/7, 8/7

Perineum injury marks – absent. Stain of semen – absent. Pubic hair – present. Per vaginal examination – Stain of semen – absent, mucosal tear or laceration – absent, hymen – absent. Vaginal swab smear for semen – No spermatozoa seen.

Radiological examination advised but report not produced.

According to Medical Officer, from the clinical examination her age seems to be 15 years. No injury or violent marks seen on her body or private parts. From the above, it cannot be ascertained if she has been raped.

During cross, she deposed that she ascertained the age of the victim on the basis of the school certificate but she did not know the name of the school from which certificate was issued. She did not receive the radiological test report and without radiological report, age of a person cannot be ascertained accurately on the basis of clinical examination. She denied the suggestion that at the time of examination age of the victim was above 18 years.

17. CW 1 is Sri Binod Kumar Narzary, the Headmaster of Soulmari Kolobari Daimalu M.E. School. He deposed that he joined as teacher in 1997 at Soulmari Kolobari Daimalu M.E. School and he was promoted as Headmaster in the year 2003. Victim Miss 'X' (name is withheld) was the student of his school. She was admitted in their school on 12.11.2013. As per

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L.P. School certificate issued by Head Teacher of 446 Kolobari L.P. School, her date of birth is 26.04.2002. She was admitted in Class-VI. According to Admission Register, he issued a transfer or leaving certificate on which date of birth was mentioned as 26.04.2002. The No. 446 Kolobari L.P. School is now situated near his school. At present, the name of Headmaster of said L.P. School is Sanaram Muchahary. He proved the admission register of Soulmari Kolobari Daimalu M.E. School as Ext.6 and the relevant entry regarding admission of victim as Ext. 6(1). He proved the counter foil of transfer or leaving certificate issued in the name of victim as Ext.7 (1). During cross, he deposed that in 6(1) year of birth of other students was 2000 and in Ext. 6(1), signature of the guardian of the students and signature of the headmaster or the authority was not found. He admitted that in Ext.7 (1) 'over writing' was found regarding the date of birth of victim.

- 18. Sri Sanaram Muchahary, the Headmaster of No. 446 Kolobari L.P. School was examined as CW 2. He deposed that he joined as Asstt. Teacher in No. 446 Kolobari L.P. School in the year 2001. He was promoted to Headmaster of the said school in the year 2012. On the date of his deposition he brought the Admission Register of his school w.e.f. 01.02.2001. According to Admission Register, victim was admitted in their school on 01.03.2006. On said date, age of the victim was four years. The age, name, class, village and name of the guardian of victim were inserted by the then Headmaster Someswar Gayari, who died three years ago. When he was Headmaster, victim left the school after passing Class-V. He issued pass certificate or leaving certificate of the victim. In said certificate, he mentioned the date of birth of the victim as 26.04.2002. He proved the said certificate issued by him as Material Ext.1. He proved Admission Register of his school as Material Ext.2 and the relevant entry regarding admission of the victim as Material Ext.2 (1). During cross, he deposed that no birth certificate was submitted at the time of admission of the victim. As reported by the guardian, age was mentioned in Material Ext.2 as 4 years but it was not mentioned in relevant entry. In Material Ext.2, no signature of the Headmaster was found.
- 19. Miss Changsari Mohilary was examined as DW 1. She deposed that she knew the accused because he sometimes visited their village but she

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did not about the incident. She did not know about the age of the victim as well as age of the accused. She did not know about any incident between the accused and victim.

- 20. Accused Sudem Narzary examined himself as DW 2. He deposed that he had love affair with the victim. The victim also loved him. On 19.03.2016, at about 1/2 P.M., he along with victim went to Gauranga Beel, Kokrajhar on his motorcycle. At about 3/4 P.M., they returned from Gauranga Beel and went to the house of his maternal aunt situated at Dadgiri. In the house of his maternal aunt, victim asked him to marry her but he denied. His maternal aunt after knowing the fact drove them away from their house. His parents took him and victim to Sidli P.S. The victim also went to Sidli P.S. and they lodged FIR. After that, he was arrested by police. He was languishing in jail for a period of 6 ½ months and he was released from jail during trial. According to DW 2 at present both of them are living separately in their parental homes.
- Learned P.P. during the time of argument clearly stated that in this case, prosecution proved the age of the victim as below 16 years. In this regard, certificate issued from the L.P. School was proved through the Headmaster of the school, who issued the certificate. Therefore, there is no doubt regarding age of the victim as below 16 years. According to learned P.P defence admitted the fact that accused and victim went to Runikhata and stayed thereon and sexual intercourse also took place according to consent of the victim. So, sexual intercourse in between the accused and victim was not specifically denied from the side of the defence. So, prosecution has no burden to prove it. On the other hand, prosecution proved the age of the victim as below 16 years i.e. she was minor. Therefore, consent plays no role. According to learned P.P., prosecution proved the case U/S 376(2)(i) IPC read with Section 4 of POCSO Act against the accused beyond all reasonable doubt.
- On the other hand, Learned Defence counsel gave more emphasis regarding the age of the victim only. He argued that the Headmaster of the L.P. School, who issued the certificate, stated before this Court that he gave the age of the victim in the Admission Register only on

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assumption. Another lacuna pointed out by the Learned Defence counsel is that in Admission Register, actual date of birth was not mentioned. Only age of the victim was mentioned as four years. On the other hand, in Material Ext.1, the certificate issued from the L.P. School stated the date of birth as 26.04.2002. These anomalies created doubt about the actual date of birth. As a reply of this point, learned P.P. advanced argument that if calculation was made on the basis of the age mentioned in the Admission Register, then date of birth of the victim definitely on 26.04.2002. According to learned P.P., father and mother of the victim also stated that at the time of occurrence age of the victim was in between 15 and 16 years and she was born in the year 2002. Considering all these aspects, learned P.P. pointed out that victim was minor and at the time of occurrence, she was below 16 years. According to learned P.P., when certificate issued from L.P. School was proved then the date of birth given in the said certificate is the conclusive regarding determination of the age of the victim.

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24. After going through the entire evidence on record including the medical evidence and the rival submissions from both sides, I have found that in this case, the accused in his statement recorded U/S 313 Cr.P.C and in his later evidence as DW 2, admitted that along with him victim went to Kokrajhar and they stayed in the house of his maternal aunt. I have also gone through the statement of the accused. In his statement U/S 313 Cr.P.C, when evidence given by victim was stated before him, he did not specifically denied the fact that there was physical relationship which took place in between him and victim in the house of his maternal aunt. He also gave more emphasis that victim went with him and according to her own consent physical relationship took place. Accused examined himself as DW 2. In his evidence also, he admitted their love affairs and stated that the victim asked him to marry her but he denied. He did not deny the fact that victim did not accompany him on his motorcycle. After considering all the statements given by DW 2 and his answer given U/S 313 CrPC, I have found that he did not specifically denied the sexual intercourse but he stated that victim gave consent and she went with him and according to her consent, incident was happened. He further stated in his reply U/S 313 CrPC that victim was major. Her age was above 18 years. In this respect, defence failed to adduce any reliable evidence. On the

other hand, prosecution proved the L.P. School certificate and Admission Register of M.E. School also. Both Headmasters from M.E. School and L.P. School were examined to prove the age of the victim. Her parents also supported the age given in Material Ext.1. It is now proved that date of birth of the victim was 26.04.2002. According to prosecution evidence, occurrence took place on 20.05.207. So, age of the victim on the date of occurrence was below 16 years. Her age was 15 years 24 days only. So, learned P.P. rightly pointed out that age of the victim was below 16 years for which Section 376(2)(i) IPC is attracted. On the other hand, Section 4 is also attracted because age of the victim was below 18 years. It is admitted by the defence that sexual intercourse took place in between accused and victim. They only took plea that victim gave consent. They stated that the victim falsely stated that accused forcefully committed sexual intercourse. In my view, whether accused committed sexual intercourse forcefully or not has no merit if victim is minor. On the other hand, in case of minor, consent plays not role.

The victim stated that accused married her at Pagla Baba

temple in Kokrajhar. No any person from the temple was examined in support

believe the allegation that accused married her at Pagla Baba temple. So, this fact stated by victim is not proved during trial. It is also revealed from the

cross-examination of PW 1, PW 2, PW 3 and PW 4 that victim developed

relationship with the accused and she went with him. So, taking away by the

accused is not proved in this case beyond all reasonable doubt.

of this fact. Victim stated so many things in her deposition but some of the facts were not stated by her before Investigating Officer. She stated in her cross-examination that there was love affair between her and accused. On the other hand, in her chief, she stated that the accused gagged her and pulled her forcefully to his motorcycle which is not believable. Forcefully taking by the accused as alleged by the victim is not believable. So, victim is not found as wholly reliable witness. She is the witness falling under the category of partly reliable and partly unreliable. In case of such witness, corroboration from independent witness is must. In present case at hand, such type of corroboration from any independent witness is not found during trial to

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- 26. To convict a person U/S 366 IPC, prosecution must have to prove the kidnapping defined U/S 361 IPC.
- 27. Section 361 IPC runs as follows:

#### "361. Kidnapping from lawful guardianship:

Whoever takes or entices any minor under 16 years of age if a male, under 18 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."

- 28. In present case at hand, taking of victim by the accused is not proved as mentioned earlier.
- 29. In the case of *S. VARADARAJAN VS. STATE OF MADRAS reported in AIR 1965 SC 942. The Hon'ble Apex Court* regarding section 361 IPC held as follows:
  - "9. It must, however, be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the

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formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded to the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'."

- 30. So, considering the facts narrated by the witnesses in present case and the principle laid down in cited case law, in my view, accused cannot be booked for the offence U/S 366 IPC. So, he is not found guilty under the said section of law.
- 31. Now, I come to other two sections, particularly Section 376(2)(i) IPC and Section 4 of POCSO Act. Both offences are related to minor victim. The first offence U/S 376(2)(i) IPC is related to a minor aged below 16 years. On the other hand, offence U/S 4 of POCSO Act is related to person below 18 years. In present case at hand, after considering the Material Ext.1 as true document, I have already come to the conclusion that age of the victim was about 15 years 24 days i.e. she was minor and her age was below 16 years. so, both offences are attracted against the accused because the victim in her deposition as well as her initial statement recorded U/S 164 CrPC, clearly stated that accused committed sexual intercourse for a period of 4

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days when both of them were staying in the house of maternal aunt of the accused situated at Runikhata. The defence also did not specifically deny the fact of sexual intercourse in between the accused and victim. They only denied the forceful penetration. According to Learned Defence counsel, (during the time of suggestion), victim falsely stated that accused forcefully committed sexual intercourse but it was consensual sexual intercourse. The accused also admitted the fact that what was happened, it was happened according to the consent of the victim. Defence plea is that at the time of occurrence, age of the victim was above 18 years. Unfortunately, this plea was not proved during trial. Neither at the time of cross-examination of PWs nor at the examination of DWs defence confirmed the fact that victim was major and her age was above 18 years on the date of occurrence. CW 1 and CW 2 are both Headmasters of Soulmari Kolobari Daimalu M.E. School and No. 446 Kolobari L.P. School corroborated each other and CW 2 exhibited the certificate issued by him and he was the Head Teacher of the L.P. School in which victim first attended her class.

Learned Defence Counsel also submitted a decision dated

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29.08.2018 delivered in Criminal Appeal No. (s) 2229/2011 between State of Madhya Pradesh vs. Preetam, in which the Hon'ble Supreme Court held that non-examination of the person who took the victim for admission to the school first attended itself, is not fatal to the prosecution story. In present case at hand, Learned Defence Counsel pointed out that it was revealed from the evidence of the PW 2, the mother of the victim that she (victim) was taken to the L.P. School by her father, the PW 4. In present case, father was examined. He clearly stated that victim was minor. Another plea taken by learned defence counsel is that CW 2 stated that he put the date of birth in Material Ext.1 on assumption. This is nothing but the assumption made by father of the victim. Actually on the basis of the information given by father of the victim, CW 2 put the age of victim in Admission Register and by calculation, he gave the date of birth in Material Ext.1. This discrepancy is nothing but a very minor discrepancy. On the basis of such discrepancy, prosecution story that victim was minor, cannot be thrown away. All other witnesses heard about the incident from the victim. The facts stated by the victim are also partly admitted by the accused in his

reply regarding the questions put to him U/S 313 Cr.P.C as well as in his evidence as DW 2. It is settled law that admitted fact need not to be proved. Learned P.P. rightly pointed out that as defence admitted sexual intercourse, the point remain to the prosecution is to prove the age of the victim and they proved the age by exhibiting the certificate through the Headmaster who issued it. So, there is no any lacuna regarding proving of Material Ext.1. Material Ext.2 is the Admission Register of No. 446 Kolobari L.P. School and Material Ext.2 (1) is the relevant entry regarding admission of the victim.

33. Thus considering the entire evidence on record, I come to the conclusion that accused committed sexual intercourse with the victim in the house of his maternal aunt situated at Runikhata and at that time, age of the victim was below 16 years. As victim was minor and below 16 years, the plea taken by defence that she had given consent has no merit. So, prosecution proved the ingredients of both the Sections, particularly Section 376(2)(i) IPC and Section 4 of POCSO Act. The point No. 1 is remained as not proved. On the other hand, point Nos. 2 and 3 are proved against the accused. Accused is found guilty under both points.

#### ORDER

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- Prosecution failed to prove the case U/S 366 IPC against accused Sudem Narzary. He is acquitted from said offence. On the other hand, prosecution proved the case U/S 376(2) (i) IPC R/W Section 4 of POCSO Act against accused Sudem Narzary beyond all reasonable doubt. Accused is convicted U/S 376(2) (i) IPC R/W Section 4 of POCSO Act.
- 35. Heard the accused and his engaged counsel on point of sentence. The hearing is recorded in separate sheet and kept with the case record.
- 36. Accused pleaded mercy of the court considering his tender age as well as his future academic life. He also stated that this was his first offence.

- 37. I have considered all the mitigating circumstances as mentioned by the accused and his engaged counsel. I have also found that this is the first offence committed by the accused because no previous conviction was proved by the prosecution during trial
- 38. During the time of occurrence i.e. prior to last criminal law amendment in the year 2018 according to Section 376(2)(i) IPC, the punishment runs as under:
  - ".... Whoever commits rape on a woman when she is under sixteen years of age .............. 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, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."
- 39. On the other hand, punishment under Section 4 of POCSO Act is not less than 7 years and extends to life with fine.
- 40. According to Section 42 of POCSO Act, where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.
- 41. In present case, punishment U/S 376(2) (i) IPC is greater in degree than Section 4 of POCSO Act. Considering all aspects, accused is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years and to pay fine of Rs. 5,000/- (Rupees Five Thousand), in default, 1 (one) year simple imprisonment.

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- 42. The period already undergone by the accused during investigation and trial shall be set off from the sentenced period as per provision of Section 428 Cr.P.C. Accused is committed to the prison forthwith.
- 43. Seized articles shall be disposed of according to law.
- A copy of this Judgment shall be furnished to the accused on free of cost. Another copy of this Judgment shall be given to the District Magistrate, Chirang for information.
- 45. Given under my sign and seal of this Court on this the 4<sup>th</sup> day of May, 2019, at Kajalgaon, Chirang.

(D.J. Mahanta) Special Judge,

Dictated and corrected by me,

(D.J. Mahanta) Special Judge,

chirana.

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#### APPENDIX

#### Prosecution witness:

- PW 1 Victim Miss 'X' (name is withheld)
- PW 2 Smt. Sunashree Basumatary
- PW 3 Sri Phinal Basumatary
- PW 4 Informant Sri Digendra Basumatary
- PW 5 Smt. Hongle Basumatary
- PW 6 Sri Rojin Basumatary
- PW 7 S.I. Kaikhoseh Simte (I.O.)
- PW 8 Dr. Jili Basumatary (M.O.)
- CW 1 Sri Binod Kumar Narzary
- CW 2 Sri Sanaram Muchahary

## **Exhibit (Prosecution):**

- Ext-1 Statement of victim Miss 'X' (name is withheld) recorded U/S 164 Cr.P.C
- Ext-2 FIR
- Ext-3 Sketch map
- Ext-4 Charge-sheet
- Ext-5 Medical Report
- Ext-6 Admission Register of Soulmari Kolobari Daimalu M.E. School
- Ext-7 Book No. 2, transfer or leaving certificates

# **Material Exhibit (Prosecution):**

- M.Ext-1 Pass certificate or leaving certificate of the victim issued by Headmaster of No. 446 Kolobari L.P. School
- M.Ext-2 Admission Register of No. 446 Kolobari L.P. School
- M.Ext-2(1) Relevant entry regarding the admission of the victim

#### **Defence Witness:**

DW 1 - Miss Changsari Mohilary

DW 2 - Sri Sudem Narzary (Accused)

#### **Defence Exhibit:**

Nil.

(D.J. Mahanta) Special Judge, Chirang