IN THE COURT OF SPECIAL JUDGE (FTC), SONITPUR AT TEZPUR

SPL(POCSO) CASE NO. :- 45 of 2017

(Under Section 366A/342 of IPC, r/w Section 4 of Protection of Children From Sexual Offence (POCSO) Act, Arising out

of GR Case No 3571 of 2016)

Present :- R. Baruah

Special Judge, Sonitpur, Tezpur.

Prosecutor :- State of Assam

-Vs-

Accused :- Sri Utpal Borah,

S/o Sri Kunja Borah,

Resident of Kundarbari, Bora Chuburi,

PS - Tezpur,

Dist- Sonitpur, Assam

Date of framing charge :- 08-10-2017.

Date of Recording Evidence :- 27-11-2017, 07-12-2017, 03-11-2017,

16-02-2018, 28-02-2018 & 01-8-2018.

Date of examination of accused u/s:-

313 of Cr.P.C.

13-07-2018.

Date of Argument :- 21-08-2018.

Date of Judgment :- 07-09-2018.

Date of Final Judgment :- 10-09-2018.

Counsel of the Prosecution :- Mr A Baruah & Mrs J Baruah,

Learned Addl. Public Prosecutors,

Tezpur.

Counsel for Accused :- Mrs D Singha & Mr R Baruah,

Learned Advocates.

<u>JUDGMENT</u>

- 1. The case against accused Sri Utpal Borah is put for trial for the allegation of charge under Section 366-A/342 of IPC, r/w Section 4 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act').
- 2. The prosecution case in brief is that on 22-10-2016, informant Jatin Saikia lodged an FIR before the Bebezia Police Out Post stating inter alia that the previous night at around 8 PM, his daughter while going to her aunt's house, accused restrained her and kidnapped her threatening with life. In the morning at 6 AM, on searching the girl, he could come to know that the accused kidnapped his daughter and kept her in a thatched house at Bihaguri Tumuki Bazar. The accused confined the girl and subjected her to physical and mental torture and also committed rape on her. In the morning, the accused and his parents mercilessly assaulted the girl and driven her out. Hence, this prosecution case.
- 3. On receipt of the ejahar, I/C, Bebezia Police Out Post made a GD Entry No 446 dated 22-10-2016, started investigation and forwarded the same to OC, Tezpur Police Station for registering the case. Accordingly, O/C, Tezpur Police Station registered the case vide Tezpur PS 1926/16/16 under Section 366-A/342/376/325/34 of IPC. Police, after completion of investigation, submitted charge sheet against the accused Utpal Borah for trial.
- 4. On appearance of the accused and after hearing the learned Advocate for both the sides, charge under Section 366-A/342 of the IPC, r/w Section 4 of POCSO Act framed against the accused. The above charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. To substantiate the case, prosecution has examined as many as 6(six) nos. of witnesses namely 1. Sri Jatin Saikia, 2. Sri Pallab Katoky, 3.Miss "X"(victim), 4. Dr Jharna Kakoti, 5. SI Lakhi Prasad Kachary (Investigating Officer) and 6. SI Dipak Das (Investigating Officer).

- 6. Accused was examined under section 313 Cr.P.C. The defence plea is of total denial and the defence side has examined one witness namely, Kunja Borah (DW1).
- 7. I have carefully gone through the record of the case and heard the learned Counsel for both the sides.

POINTS FOR DETERMINATION

- 8. The point for decision in this case is that
 - (1) Whether on 21-10-2016 at about 8 PM at Milonpur Saikia Chuburi, under Tezpur PS, the accused induced the victim "X" a minor girl, to go from her house to do any act or acts with the intent that said victim may be (or knowing that it is likely that said victim will be) forced (or seduced) to illicit intercourse with him?
 - (2) Whether the accused on the same date, whole night wrongfully confined the victim in an abandoned house at Bihaguri Tumuki market?
 - (3) Whether the accused on the same date, time and place (Tumuki market) committed penetrative sexual assault on a child?

DISCUSSION, DECISION AND REASONS FOR THE DECISION:

- 9. Before appreciating the evidences adduced by the parties, I deem it fit to reflect the summaries of evidence of the witnesses.
- 10. PW1 stated that victim is his daughter. The age of the victim is 16 (sixteen) years. He stated that in the evening on the day of occurrence, his daughter (victim) went missing. He along with others searched for the girl, but could not trace her out. On the next morning the victim return to the house and reported him that accused had forcibly taken her away. Thereafter, he lodged the FIR. The victim informed him that accused kept her in a house of the market situated near TMCH.

In cross-examination, PW1 stated that the victim is his only daughter. He has

got a son who is elder to the victim. He stated that on the said day his wife was arrested by police on allegation of cheating and she have to remain inside the jail for 1 ½ months. At that time, his daughter, her brother and grand-mother of the victim were there. He has not informed the matter to the police in the night. When he asked his mother-in-law, he was informed that the victim may in the house. He do not know from where his daughter returned to his house. PW1 denied that he has guessed the age of his daughter as 16 years. Police came to his house for arresting his wife in the evening and many people gathered. PW1 said that the father of the accused was also present at that time and he condemned the act of his wife and hence, an altercation took place between his family and the father of the accused.

11. PW2 said that the victim is his niece in relation. The incident took place about one year ago. At the relevant time, his niece (victim) was about 15 - 16 years old. During that time she was a student of High School. He said that on the day of incident, at evening time, the father of the victim search the victim and told him that his daughter has gone missing. So, he was searching his daughter. Then he also searched the victim along with her father, but they could not find her. He stated that in the next morning the victim girl return to the house and she told him that accused had taken her. Then Jatin Saikia, the father of the victim filed the ejahar. The victim girl told him that accused took her by a cycle towards Tumuki Bazar.

In cross-examination PW2 stated that he cannot recall the date and month of the day of incident. He stated that in the evening time on the relevant day of incident, Jatin Saikia told him that his daughter went missing from the house and then he along with Jatin Saikia search the victim girl. He also stated that on the day of missing of the victim girl in the evening, mother of the victim was taken by police to the police station in connection with some illegal uploading in facebook. In the said case, mother of the victim was in jail hazot for several days. Thereafter, they came to know that victim was missing from their house. He further stated that he does not have any personal knowledge how the victim went missing. On the next day he had been to the house of victim at about 7 AM. During that time other family members of the victim was present which includes the grandmother and father of the victim. He heard that on the previous day, there was hulla in the house for arrest of the mother of the victim. When the victim told him that accused took her towards Tumuki during, at that time grandmother of the victim was also present. PW2 further stated in his cross that he does not know actually, what is the age of the victim at

the relevant time. PW2 denied that accused did not take the victim towards Tumuki. PW2 further denied that as mother of the victim was arrested under some cyber crime, so, she intentionally went somewhere hiding and he deposed falsely today for the sake of his niece.

PW3 (or "X"), the victim stated that she knows accused Utpal Bora. 12. The incident took place on 21-10-2016 at about 8.00 PM. During that time she has been to her aunt's (Borma) house. Accused came in a cycle covering his face by a black cloth in his face. He threatened her, gagged her mouth and took her in his cycle. She said that while she tried to shout, he threatened her with life. The accused took her towards weekly market near the TMCH, Tumuki. Accused took her to a house made of bamboo and thatch. She stated that there he forcefully kissed her, bite her breast, opening her clothes forcefully enters his private part in her private part. He forcefully raped her. He has continuously threatened her with life. Therefore, she does not made any attempt to jump out from the cycle. Whole night accused kept her there. He did not allow her to go from the said room. She said that the accused rang to his mother over phone and told his mother that he brought her forcefully, and then his mother advised him to take her (victim) to their home in the morning time. At about 3.00 AM in the morning the accused took her to his house by his cycle. In his home, the accused suddenly entered into his home and in the courtyard his mother assaulted her asking her why she forcibly came with his son. She (PW3) further stated that the father of accused also assaulted her. The parents of accused did not allow her to stay there. She repeatedly told them that accused forcefully brought her and then the parents of the accused dragged her out by beating her. At last she went to her home and narrated the whole story to her father. Then her father filed an ejahar. Police took her for medical examination and also sent her to the learned Magistrate for recording her statement under Section 164 CrPC. Ext.2 is her statement and Ext.2 (1), 2(2) and 2(3) are her signatures. She also stated that police collected a photocopy of her birth certificate at the time incident and in the said certificate her date of birth is mentioned as 31-10-2002.

In her cross-examination, the victim stated inter alia that in the evening at about 8 PM she went to the house of her aunt Champa Saikia, but, she could not enter the house. On the way to her aunt's house there is a Namghar (place of worship) and there is no residence just nearer to the house of her aunt. It was dark. The accused suddenly appeared before her covering his face with a black clothe

hence, she could not notice him earlier. The accused seated her on the backside carrier of his bicycle. The house of the accused is at distance of 2 KMs from her house. Prior to that occurrence, the accused never visited to her house and there were no people on the road. Initially, the accused gagged her mouth by his two hands, threatened her with life and ask her to sit on the carrier of the bicycle. She did not attempt to jump out of the carrier of the bicycle or neither raised alarm. She came across by many vehicles and pedestrians on the road towards Tumuki market. The thatched house is about 200/250 meters from the main road having one door made of bamboo. During biting by the accused, she felt the hurt, but suffered no bite injury. She was possessing a mobile phone, but, there was no balance. So, she could not message anybody regarding her kidnapping. In early morning, she came to the house of accused sitting on the carrier of the bicycle and during that time also, she did not raise any alarm. There are many residences near the house of accused. While the parents of the accused assaulted her she had not screamed. After she was driven out of the house of the accused, she left for her house and while going to her house, she met some persons on the road, but, she did not informed them regarding the incident. At around 5.30 AM, she reached home.

PW3 denied that the accused came in a cycle covering his face by a black cloth, threatened her and gagged her mouth and took her on his bicycle.

She denied that she stated before police that accused took her to a thatched house forcibly kiss her, bite her breast and raped her after undressing her.

She denied that she stated before police that accused continuously threatened her to kill her and did not allow her to go out of the room. The accused informed his mother over phone regarding her kidnapping and his mother advised him bring her (PW3) in the morning time.

PW3 denied that she did not stated before police that while returning from tuition, she met the accused, got introduced each other, exchange cell phone number and gradually develop a love affair between them.

PW3 denied that she did not state before police that accused asked her over phone to come out and accordingly she came out informing her grand-mother that she is going to her aunt's house and meet the accused at the road and from there they went to Tumuki Market in the bicycle of accused.

PW3 denied that she stated before police that there is no chance of accused marrying her. During that time her grandmother and father were in the house. Her mother was not in the house because police arrested her the previous

evening.

PW3 said that she passed HSCL in the year 2016 and denied that she stated to the magistrate that her age is 17 years. He was taken to the Magistrate for recording her statement after 3 days.

PW3 denied that as per the dictation of her family members and police she gave statement before the Magistrate in contradiction to the statement made before police. Police did not seize her wearing apparels. Her mother was arrested in connection with a cyber crime. PW3 denied that out grudge, her father lodged a concocted case against the accused.

13. PW4 the Medical Officer stated that on 23-10-16, she was posted at as S.D. M & H O at Kanaklata Civil Hospital, Tezpur. On that day, in reference to Bebezia Out Post under Tezpur Police Station vide GD Entry No 446 dated 22-10-2016 received on 23-10-2016, she has examined one patient (victim) namely Miss "X", 17 years female, identified by WHG Aloka Deka. She has examined the victim on 23-10-16 at 12.35 PM in the emergency and labour room of the complex of the Kanaklata Civil Hospital in presence of GNM Tribeni Bora vide hospital registration No 45576 and found the following:

Menstrual History: Regular cycle. LMP- 01-10-2016.

Identification mark: Scar mark at the middle of forehead.

She eloped with Utpal Bora, 19 years male on 21-10-2016 and stayed with him on 21-10-2016.

History of sexual exposure on same day i.e on 21-10-2016.

O/E:

Height – 154cm, weight – 40 kgs, Teeth – 7/7-7/7.

At the time of examination she was well dressed, neat and tidy. Gait is normal. Secondary sexual characters are developed. Vulva vagina healthy. No injury in her body as well as on her private parts. Hymen absent.

Investigation and reports:

- Vaginal smear no sperm. Done at KCH Laboratory, Lab No 114/16 on 23-10-2016.
- 2. Urine for HCG Negative (done at Assam X-Ray Clinic and Laboratory on 24-10-2016. Patients ID No-31672. Report given by Dr D Mahanta,

Pathologist).

3. X-ray of wrist joint, elbow joint and iliac crest for determination of age —Union of the epiphysis of the lower ends of radius and ulna are not yet completed. All epiphysis of the bones around the elbow joint have fused. Epiphysis of the iliac crest has appeared but, not fused.

Impression: Age of the person under investigation appears to be below 18 years. (done at Assam X-Ray Clinic and Laboratory on 24-10-2016. Patients ID No-AXC-31. Report given by Dr PK Barman, Radiologist).

4. U/S for Pelvis: Uterus is anti-verted and is of normal in size and shape and outlines measures 8.3 x 4.0 x 2.9 cm in length breath and thickness. Both ovaries are normal in size, shape and echo-textures. Right ovary measures 23 x 20 x 17 mms and left ovary 18 x 16 x 16 mms.

Impression: Normal pelvic organs with no gravid uterus. Report given by Dr PK Barman, Ultra-sonologist, Pt ID No AXC-31, done on 24-102016 at Assam X-ray Clinic and Laboratory.

Opinion:

- 1. There is no injury on her body as well as on her private parts at the time of examination.
- 2. There is no sign and symptoms of recent sexual intercourse at the time of examination.
- 3. Age of the person under investigations appears to be below 18 years.

Enclosure:

- 1. Advice slip.
- 2. Police requisition,
- Vaginal smear report,
- 4. Urine for HCG report,
- 5. X-ray report with plates,
- 6. U/S report with film.

Ext.3 is the medical report and Ext.3 (1) and 3(2) are her signatures. Ext.4 is the advice slip of KCH, Tezpur. Ext.5 is the vaginal smear report of KCH, Tezpur and Ext.5 (1) is the signature of Laboratory Technician of KCH, Tezpur which she know on official communication. Ext.6 is the Urine for HCG report and Ext.6(1) is the signature of Pathologist Dr D Mahanta. Ext.7 is the X-ray & U/S report with film and plates of Assam X-ray Clinic and Laboratory and Ext. 7(1) is the signature of Dr. PK

Barman, Radiologist.

In cross-examination, the PW4 stated that she cannot say if the development may be changed to the person belongs to different climatic conditions. However, molar teeth may be erupted for different person is different stage. She cannot say whether the age of the victim person may be varied two years in either sides. She denied that the age determined by ossification test is not surest test but, surer test. The doctor also denied that that the victim was above 18 years at the time of examination.

14. PW5 deposed that on 10-06-2017 he was posted as SI of police at Bebezia Out Post under Tezpur PS. On that day, OC, Tezpur PS entrusted him to investigate case of Tezpur PS Case No 1926/16 under Section 366-A /342/376/325/34 of the IPC. After receipt of the case diary, upon thorough perusal it appears that the case was almost completed the investigation by the earlier IO, SI Dipak Das. On perusal of the medical report it appears to him that the victim was below 18 years, therefore, he has request and prayed to include under Section 4 of POCSO Act along with the other Sections. Thereafter, the Hon'ble Court allowed including Section 4 of POCSO Act on his prayer. Then, he filed charge sheet against the accused Sri Utpal Bora, vide CS No 532/17 dated 30-06-2017. Ext.8 is the charge sheet and Ext. 8(1) is his signature. Ext.9 is his prayer for request to include Section 4 of POCSO Act along with the other Sections. Ext.9 (1) is his signature.

PW5 denied that there was no materials for submitting the charge sheet against the accused.

15. PW6 who is the investigating officer (IO) of this case. He stated that on 22-10-2016 he was posted as I/C Bebezia Out Post under Tezpur PS. On that day, one Sri Jatin Saikia filed an ejahar before him. After receipt of the ejahar, he has sent the said ejahar to OC, Tezpur PS for registration of the case after making entry as Bebezia OP GD Entry No 446 dated 22-10-2016. After registration of the case, the OC, Tezpur PS entrusted him to investigate the case. Accordingly, on 23-10-2016 he visited to the place of occurrence and prepared the sketch map of the place of occurrence. Ext.9 is the sketch map and Ext. 9(1) is his signature. He has recorded the statement of the witnesses and also recovered the victim aged about 17 years,. He sent the victim girl for her medical examination and also sent her before the learned Magistrate for recording her statement under Section 164 CrPC. Thereafter,

arrested the accused person namely Utpal Bora, and forwarded him to the judicial custody. He has also seized one Nokia Mobile Handset vide SIM No 7578052471 on being produced by the victim. Ext.10 is the seizure list and Ext. 10(1) is his signature. The seized mobile handset was given in zimma vide zimma No. 193/17. The victim also produced before him one photocopy of her Birth Certificate where her date of birth is mentioned as 31-10-2002.

In cross examination the PW6 said inter alia that he has not recorded the statement of the scribe, who wrote the FIR. On 22/10/16 the informant produced the victim before her and thereafter the informant lodged the FIR. Before filing the FIR, the informant informed him verbally about the incident.

PW6 said that he had not visited the Tumuki Daily Market during the course of investigation and also has not made endeavor to visit Tumuki Daily Market. He said that the place of occurrence is the house of the victim. He has not mentioned the names of the neighboring people of the place of the occurrence in the sketch map.

He has not searched the call list of the phone which he seized. He himself handed over the Sim card of the mobile to the owner.

PW6 said that the victim(PW3) did not stated before him that the accused took her to a house made of bamboo and thatch, there he forcibly kiss her, bite her breast, opening her clothes, forcibly entered his private part to her private part and forcibly rape her, that the accused has continuously threatened her to kill, did not allowed her to go from the said room, he rang his mother over phone and told his mother that he took her forcefully and then his mother advise him to take her to their home in the morning time, not she reported the matter to her father.

The PW6 said that the PW3 stated before him that while she returned from her tuition, she met accused and introduced each other, exchange cell phone number and gradually develop love affair between them. PW3 also stated before him that accused asked her over phone to come out from her home to meet him and accordingly, she told her grandmother that she is going to her aunt's house and met Utpal at the road and from there they went to Tumuki Market by the bicycle of Utpal and stated that there is no any chance of marry her by the accused.

PW6 denied that he tutored the victim to give statement before the leaned Magistrate.

Saikia) of informant uploading photograph of another girl of the village maintained relationship with one boy titled 'Nath'. Mamoni Saikia gave the photo of the daughter of Bitupan Saikia as her photo in face-book. On 21-10-2016, the said boy titled 'Nath' came to the house of informant and the boy came to know that Mamoni is a married woman and not a girl and identities are different. The said 'Nath' came on that day to propose for marrying that girl Mamoni. Noticing that the girl is a married woman, the boy raised hue and cry. People of the village gathered in the house of Jatin Saikia. He and other villagers gone through the phone of the said boy and could see that the photograph is of daughter of Bitupan. The daughter of Bitupan also came to know about her photograph and started crying as she do not know the said boy. Some of the villagers slapped and kicked Jatin Saikia and his wife. Then the daughter of the informant was also present. He also commented that they (Jatin and wife) have committed a bad thing. Then Jatin and his wife threatened him. Bitupan Saikia lodged FIR against the wife of Jatin. On 21/10/2016 police arrested Mamoni and brought her to the police station. Mamoni Saikia was inside the jail for 1 ½ month. After some days police started searching his son i.e the accused. He could presume that as he took some leading role on the day when 'Nath' visited the home of Jatin, for that reason Jatin kept grudge against him. On 21/10/2016 his son (accused) never committed the offence of kidnapping the daughter of Jatin Saikia.

In cross the DW1 denied that the present case is not related to the incident of arrest of Morami. This case is regarding his son kidnapping a girl.

- 17. The learned Addl. PPs has argued that the offence against the accused has been proved beyond all reasonable doubt. Hence, the accused be convicted under the charges framed against him.
- 18. On the other hand, learned advocate for the accused has argued that the statement of the victim cannot be accepted as she made contradictory statement. In her statement under Section 164 CrPC, she stated that accused proposed her and later on said that accused committed raped on her. The PW1 did not know anything about the accused. The evidence of PW1 cannot be believed, because how a father remained silent the whole night without informing the matter to police. PW1 also admitted that an altercation took place between him and the father of the accused prior to the said incident. The statement of the victim cannot

be accepted as she admitted that she went by sitting on the carrier of the bicycle and also return by the said bicycle sitting on the carrier. PW3 came across many people while going at night towards Tumuki, but, she raised no alarm. This also caused suspicion on the conduct of the victim. Further, there is no injury detected by the doctor on the person of the victim, which shows that no sexual offence committed upon her. The victim gave her statement after three days of incident before the Magistrate. Further, prosecution has not submitted GD Entry and no explanation placed for not submitting the same. The IO has not visited the place of occurrence i.e. the Tumuki Market, did not seize the bicycle, and whether the bicycle has a carrier or not. The call records of the phone were also not collected by the IO during investigation.

The defence has adduced evidence showing that there was an enmity between the father of the accused and the family of victim and hence, the accused was implicated falsely. Hence, the learned Counsel for the accused prays for acquittal of the accused.

- 19. At the outset I deem it necessary to make this statement that the investigation of the case is conducted in a lackadaisical manner. The mobile phone of the victim seized but returned without keeping the call records. The victim gave the phone number of the accused (she said that she exchanged phone numbers with the accused) but I O did not deem it necessary to seize the same. There was reason before the I O to go through these (phones). The place of occurrence is not visited by the I O. The victim maintained that she stayed the whole night with the accused in a thatched house at Tumuki, near Tezpur Medical College Hospital and the same is 200 to 250 meters away from the main road. The I O did not seize the clothes of the victim. No neighbors of the accused examined by the I O, though the victim said that in the morning the accused took her to his house and she was assaulted. The I O sent the victim to the doctor for examination on the next day of returning of the victim. Many such lapses may follow.
- 20. In *Brajalal Deb and ors. --vs-- State of Tripura* and ors (reported in 2011 (4) GLT 103) the hon'ble Gauhati High Court observed as follows;
- " (17) In so far as the specific deficiencies pointed out by Mr. Kar Bhowmik, on the earliest information received by the police not being the starting point of the

criminal process or where the pond from where the injured witnesses rushed to the P. O., not being reflected in the I. O's. sketch map, these undoubtedly are deficiencies in ths criminal investigation. But the important question is, whether the accused will have to be acquitted on that score. in my opinion the answer has to be in the negative since, truthfulness of the prosecution case has to be judged on the basis of the evidence available. The only rider in such cases is that, the Court is required to be cautions, while evaluating the evidence. Defective investigation need not necessarily lead to rejection of the prosecution case when the incident is otherwise proved. This approach finds support from the decision in Visveswaran Vs. State Rep. by S. D. M., of the Supreme Court reported in (2003) 6 SCC 73."

The age of the victim as per medical report is less than 18 years. The victim said that her age is 16 years. Moreover, she was a student of Class-X at the time of occurrence. The FIR also mentioned that the victim was aged about 16 years. Though the prosecution has suggested to PW1 that he has guessed the age of the victim to be 16 years, the same cannot be accepted as the father of the victim is an appropriate person to know the age of his ward. Moreover, his statement is supported by the medical evidence and the document gathered by the police during the investigation. In view of the above, it is held that at the time of occurrence, the age of the victim was less than 18 years.

From the evidence of PW3 (victim) it is brought out by the defence that victim ride on the bicycle of the accused for around 2 kms by Highway and there is no any fact of raising alarm by the victim while accompanying the accused to Tumuki Bazar. The matter of missing of the victim in the night of 21-10-2016, cannot be disbelieved, in view of the evidence given by the PW1 and the PW3 (victim). PW3 specifically stated that she was not aware regarding gathering of public in her house after the arrest of her mother. As per the birth certificate of the PW3 and the opinion of the doctor it is proved that on the day of incident her age was less than 18 (eighteen) years.

22. The defence has argued that as the version of the PW3 before the investigating officer and the court is contradictory, her statement cannot be at all relied upon. The PW3(victim) said in her cross that she went with the accused sitting on the back carrier of the bicycle and travelled quite a distance and on the way came

across many pedestrian but never raised alarm. Also while returning to the house of the accused she did not raised any alarm. To these arguments of the defence, it can be concluded that the suggestion to the PW3 also proves that the PW3 has narrated in detail her route to the thatched house. PW3 has not tried to conceal any facts regarding the road through which she went with the accused.

By cross examining the PW6 the defence has reflected the portion of the statement given by the PW3 before the police. The PW6 said that the victim said before him regarding love affair between her and the accused and they also exchanged phone numbers. The PW6 also said that the victim said before him that there is no chance of the accused marrying her.

The PW3 has clearly mentioned that in the night she stayed in a thatched house at Tumuki Bazar. The defence has not led any evidence to show that the accused did not know the victim from earlier. There is nothing in the record to disbelieve this version of the PW3. Since the version of the PW3 regarding going to a house at Tumuki Bazar is proved, not visiting the said place by the investigating officer during investigation is not of much relevancy.

In **AYUB ALI** @ **ZAMADAR** (**MD. VS-STATE OF ASSAM** (reported in 2014 (5) GLT 36) the Hon'ble Gauhati High Court observed;,

"(10) The learned counsel, for the appellants, has submitted that the victim girl had developed love affairs with Mr. Ayub Ali and that she at her own will had eloped with the appellants for entering into marriage with Mr. Ayub Ali. The victim's evidence that she was forcefully taken by the appellants negates the said contention. That apart, the victim being a minor her consent, even if it was there, cannot help the appellants".

All these also prove that the victim knew the accused from earlier and may consented to go with the accused. The consent of the PW3 is to be understood from the evidences of record. Since the accused is also charged under POCSO Act, the consent of the victim of no value. However, the reason for moving of the victim from her lawful guardianship is to be discussed. Before the PW6 the PW3 (victim) said that there is no chance of accused marrying her. The defence has not examined any witness to show that in the morning the accused and the victim never come to the house of the accused next morning. The PW3 said that during night the accused made phone calls to his mother and his mother advised him to bring her (victim) in the morning. Whenever a mother advise her son to bring a girl to the house, an

accompanying minor girl will naturally come to some conclusion that she will be accepted as the daughter-in-law. The driving out of the victim from the courtyard of the accused has shattered the impression that accused will marry her and this may be the reason that victim stated before the PW6 that there is no chance of accused marrying her. The accused has not clarified as to whether he was in the house in the night. If the PW3 was not with the accused in the night, how would she know that the accused made phone calls to his mother during the night? If the accused was really in the house that night, why he made phone calls to his mother? The defence could not dislodge these incriminating evidences pointing towards his criminality.

23. Section 29 of the POCSO Act speaks as follows;

"Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

- 24. Here one of the charges is under POCSO Act. The presumption will be on the accused to rebut this presumption. By not clarifying the fact of his station in the night of occurrence and not explaining the matters of calling his mother over phone at the night, and the other details given by the victim, it is held that the accused failed to rebut the presumption against him.
- 25. The PW3 has maintained that she was subjected to sexual penetration. The defence has failed to demolish her version regarding the same. She has narrated the manner in which she has been subjected to sexual penetration in her evidence. Since the PW3 is examined by the doctor after two days, it cannot be expected that doctor would be able to detect that victim faced sexual penetration. Moreover, the investigating officer has not seized the clothes of the PW3 in spite of PW3 returned to the home immediately and regarding the matter FIR is lodged.
- 26. Regarding the defence plea that it cannot be believed that a father would not inform the police whole night regarding missing of only daughter, the facts are to be considered. In the evening the wife of the informant taken away by the police and thereafter the girl went missing.

- The defence case that on the day of occurrence an incident involving the mother of the victim took place and during that time the father of the accused took a lead role and hence the present case is lodged falsely against the son is not believable. It is proved that the accused and the victim knew each other from earlier. The defence suggested that an altercation took place between him and the DW1, but the DW1 said in his evidence that people assaulted the PW1 and his wife. Further, why a father will cook up a case and involve his minor daughter to be a victim of sexual offence.
- 28. The above discussions and reasons proves that the accused had induced the victim "X" on the day of occurrence to move from her village and stay with him whole night. The victim (minor girl) is subjected to illicit relation with the kidnapper (accused). The confinement is proved by the fact that the minor girl is to remain in an unknown place and room with the accused.
- 29. In view of the above discussion and reasons, it is held that the prosecution has proved the guilt of the accused Utpal Borah u/s 366A/342 of IPC and u/s 4 of POCSO Act.
- 30. Since the offence is committed against a minor girl, the accused is not considered under Probation of Offenders Act.
- 31. Heard the accused on the sentence under Section 235(2) of CrPC.

ORDER

32. Considering the offences committed by the accused, the accused is sentenced to undergo Rigorous Imprisonment for 7(seven) years and to pay a fine of Rs.2000/-(rupees two thousand) under Section 4 of POCSO Act, in default of payment of fine to Simple Imprisonment for two months. Further, the accused is sentenced to Rigorous Imprisonment for a period of 3(three) years and to pay a fine of Rs.2000/-(rupees two thousand) for the offence under Section 366-A of the IPC, in default of payment of fine to undergo Simple Imprisonment for two months. Accused is sentenced to undergo Rigorous Imprisonment for 3(three) months and to pay a fine of Rs. 500/-(rupees five hundred) for the offence under Section 342 of IPC, in default of payment of fine to undergo Simple Imprisonment for one month. All the sentences shall run concurrently.

33. The period of detention of accused person, during investigation, enquiry or trial, if any, be set off against the substantive sentence of imprisonment under Section 428 of the CrPC.

34. As per provision of Section 357-A of the CrPC, victim's compensation is permissible in law. After going through the statement of witnesses on record, I think that victim is entitled to get the compensation. Accordingly, an amount of Rs.20,000/- is awarded as compensation to the victim.

35. The bailor is discharged and the bail bond stand cancelled.

36. Free copy of judgment be furnished to the convict.

37. Learned Secretary, District Legal Service Authority, Sonitpur, Tezpur is to give the compensation to the victim after necessary formalities.

35. Another copy of judgment be sent to the learned District Magistrate, Sonitpur, Tezpur as per provision of Section 365 of CrPC.

Given under my Hand and Seal of this Court on this the 10^{th} day of **September, 2018**.

(R Baruah) Special Judge Sonitpur,Tezpur.

Dictated and corrected by me.

(R Baruah) Special Judge, Sonitpur, Tezpur

Dictation taken and transcribed by me:

Smt. Pori Das, Steno.

ANNEXURE

Witnesses examined by the prosecution:

- 1.PW1 Sri Jatin Saikia,
- 2.PW2 Sri Pallab Kotoky
- 3.PW3 Miss "X" (victim),
- 4.PW4 Dr Jharna Kakoti,
- 5.PW5 SI Lakhi Prasad Kachary &
- 6.PW6 SI Dipak Das (IO).

Witnesses examined by the Defence:

1.DW1 – Sri Kunja Borah.

<u>Documents exhibited by the prosecution:</u>

- 1. Ext. 1 : Ejahar,
- 2. Ext. 2: Statement of victim under Section 164 CrPC,
- 3. Ext. 3: Medical Report,
- 4. Ext. 4: Advice slip,
- 5. Ext. 5: Vaginal smear report of victim,
- 6. Ext. 6: Urine for HCG report of victim,
- 7. Ext. 7: X-ray & USG report of victim,
- 8. Ext. 8: Charge sheet,
- 9. Ext. 9: Sketch map.

(R Baruah) Special Judge, Sonitpur,Tezpur.