

IN THE COURT OF THE SPECIAL JUDGE

CHIRANG, KAJALGAON.

Special(P) Case No. 24(D)/2018 U/S 376(1) IPC R/W Section 4 of POCSO Act.

> State of Assam Vs. Sri Kanak Wary

:::::::

.....Accused

**PRESENT:** 

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

## ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Sri K. Sarkar, Ld. Advocate

**Date of Evidence** 

: 07.06.18, 21.06.18,

10.08.18, 09.10.18

Date of Argument : 27.11.2018

Date of Judgment: 06.12.2018

#### JUDGMENT

The prosecution case in brief is that on 17.07.2017, the informant Rabindra Basumatary lodged an FIR before I/C, Bengtol Police Out Post alleging that on 29.07.17, when his daughter Miss 'X' (name is withheld), 17 years old, a student of Class-X went to Padmapur Bazaar, the accused Kanak Wary kidnapped her from the Bazaar and performed marriage with her without the consent of her parents and thereafter, the accused had committed illicit sexual intercourse with her causing permanent damage to her image in the society. It was alleged that after 15 days, the informant came to know about the condition of his daughter and recovered her from the family of the accused with the help of police.

2. After receiving the FIR, the I/C, Bengtol O.P. made Bengtol O.P. G.D. Entry No. 439 dtd. 17.08.17 forwarded the FIR to O/C of Runikhata P.S. for registering a case. Accordingly, the O/C of Runikhata P.S. registered a case being numbered as Runikhata P.S. Case No. 21/17 U/S 363/365/376 IPC R/W Section 6 of POCSO Act and ASI Chandra Kt. Boro investigated the case. Accordingly, the Investigating Officer visited the place of occurrence, drew sketch map of the P.O., recorded the statement of the witnesses, sent the victim for medical examination and got recorded her statement u/s 164 Cr.P.C. In course of investigation, concerned I.O. found that the place of occurrence fell within Dhaligaon P.S. and prayed before the learned CJM, Chirang for transferring the case to the O/C, Dhaligaon P.S. and the prayer was allowed and FIR was sent to the O/C, Dhaligaon P.S. for registering a case. Accordingly, O/C, Dhaligaon P.S. registered a case being numbered as Dhaligaon P.S. Case No. 163/17 U/S 365/376 IPC R/W Section 6 of POCSO Act and SI Chandradhar Uzir was entrusted to investigate the case. Accordingly, concerned I.O. visited the place of occurrence, seized birth certificate of the victim and collected the medical report. After completion of investigation, the investigating Officer submitted charge-sheet against the accused Kanak Wary U/S 365/376 IPC R/W 6 of POCSO Act before this court as offence under POCSO Act is triable by Special Court showing him absconder. On 26.04,2018, accused appeared and prayed for allowing him to go on bail but considering the conduct of the accused during the time of investigation and the nature of offence, he was not released on bail and remanded to judicial custody. After receiving charge sheet, this court furnished the copies of relevant documents to the accused person when he was produced from jail. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, formal charge U/S 376 (1) IPC read with Section 4 of POCSO Act was framed 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.

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In support of the case prosecution side examined as many as
 (ten) witnesses.

Following witnesses were examined:-

- (1) Informant Sri Rabindra Basumatary as PW 1
- (2) Victim Miss 'X' (name is withheld) as PW 2
- (3) Sri Rabiram Basumatary as PW 3
- (4) Smt. Nani Basumatary as PW 4
- (5) Sri Dhananjay Muchahary as PW 5
- (6) Sri Sanjay Basumatary as PW 6
- (7) Sri Parmeswar Basumatary as PW 7
- (8) Dr. Kukumoni Basumatary (M.O.) as PW 8
- (9) ASI Chandra Kanta Boro (I.O.) as PW 9
- (10) SI Chandradhar Uzir (I.O.) as PW 10
- 4. FIR was exhibited as Ext.1. Seizure list was exhibited as Ext.2. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext.3. Medical report was exhibited as Ext.4. Charge-sheet was exhibited as Ext.5. Birth certificate of the victim was exhibited as Material Ext.1.
- 5. Defence plea is of total denial. Statement of accused was recorded u/s 313 Cr.P.C. Defence adduced no evidence.
- 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.

## 7. POINTS FOR CONSIDERATION:-

# For the offence U/S 376(1) of IPC

1. Whether on 29.07.17, near Padmapur bazar on the bank of Ujani river under Sidli P.S., the accused committed sexual intercourse with the victim Miss 'X' (name is withheld), daughter of the informant without her consent?

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# For the offence U/S 4 of POCSO Act

2. Whether on same date, time and place, the accused committed penetrative sexual assault upon Miss 'X' (name is withheld), minor daughter of the informant?

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

- 8. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned both points simultaneously for the sake of convenience.
- 9. In this case, allegation was made against the accused that he kidnapped the victim from Padmapur Bazar and took her on a motorcycle to the bank of Ujani River, committed sexual intercourse upon her thereon and thereafter, he married the victim at Bongaigaon Bagheswari Temple without her consent.
- 10. PW 1 is the informant as well as father of the victim. He deposed that the victim had passed the HSLC examination and her age was about 17 years. She failed in Class-X. On the date of occurrence, his daughter went to Padmapur bazaar at about 5/6 p.m. but she did not return till 8 p.m. As she was not returned, they searched different places within the village and Padmapur market but could not find her. On next day, at about 10 a.m., he knew from one Jwngblao of Dangaigaon village that his daughter was kept in his village by accused Kanak Wary. Then they proceeded to the house of accused but could not find his daughter and accused there. On next day, they again visited the house of the accused and found both the accused and his daughter. They informed police and police recovered them and brought them to police station. His daughter reported him that accused had forcefully took her on his motor cycle and kept her in his home. She further told him that on the way to his home, the accused committed sexual intercourse with her near the river Ujani. They informed the police verbally on the next day of missing. After few days, he lodged the FIR. Both accused and his daughter were reading in same class.

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During cross-examination, he stated that he did not see the occurrence and he did not know if there was love affection between the accused and his daughter. He cannot say the date of birth of his daughter. In previous year, his daughter went to the house of another boy namely Solomon of village Urao Basti. On that occasion, he took his daughter from Bhirangaon ABSU office.

11. PW 2 is the material witness, the victim. She deposed that at the time of incident her age was 17 years. She failed the test examination of HSLC examination. On the date of occurrence i.e. on 29.07.17, she was proceeding to Padmapur market at about 4 PM. Then accused met her. After that accused took her on his motorcycle with a promise to leave her in front of her home but he took her in another direction and stopped the motorcycle on the bank of river Ujani. She further deposed that another boy was also riding on the motorcycle along with her. When accused stopped the motorcycle near Ujani River, the said boy was standing on a different place. After that accused took her to nearby jungle and put off her wearing apparels. He also put off his half pant and committed sexual intercourse with her. After that she again took seat on the motorcycle along with the other boy. She further deposed that when they were engaged in sexual act other boy was standing to a distant place. After the incident, they went to the house of the accused. Other boy also went to the house of the accused. She stayed thereon. After three days, she was taken to Bagheswari temple, Bongaigaon and marriage was performed. After the marriage she returned to the house of the accused. She took shelter in a house at Bengtol and after that they were living together as husband and wife in the house of the accused. They also visited Bijni and performed some rituals in the house of the maternal uncle of the accused. She further deposed that she stayed in the house of maternal uncle and other relatives of the accused as newly wedded daughter-in-law. She was taken in a Magic vehicle by the accused. After that she became pregnant. She was suffering from illness but accused did not take any care. Then only she informed the matter to her mother. After that her family members came to the house of the accused but she did not return with them. She clearly stated that she stayed along with the accused for a period of 8 days. After visiting of the house of the accused by police and her parents, she came with them and

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then she stated before the Magistrate about the incident which was exhibited as Ext.3. She further deposed that prior to this incident; she fled with another boy, namely Soleman. She stayed with him for one day. Then members of ABSU recovered her. In this regard, no case was filed.

During the cross-examination, she clearly stated that she did not make any hue and cry when she was taken by accused on the motorcycle. She had a mobile phone but she did not use the same. She stated that said mobile phone was broken by the accused. No any other evidence was found in this regard. When she was taken to the bank of Ujani River and accused tried to commit sexual intercourse, she did not make any hue and cry or did not inform to anybody else who was residing near the place of occurrence. When she went to the house of the accused, she made hue and cry but neighbours did not come. She did not state anything to the priest of the temple when she was taken to Bagheswari temple for marriage. Learned defence counsel pointed out that this witness stated before the temple authority that her age was about 19 years but this fact was denied by the PW 2. 'Pratigya Patra' issued by Bagheswari temple authority was exhibited by learned defence counsel through PW 2 as Ext. A. I have gone through the Ext. A. It is found that in said document, age of the victim was written as 19 years.

- 12. PW 3 deposed that occurrence took place on 29.07.17. He heard that his niece was missing. He searched different places but did not find her. At that time, he did not know who took his niece, the victim. After that one person from the Dangaigaon village reported that victim was staying in the house of the accused. When he along with others went to the house of the accused but at that time, both accused and victim fled away. After 20 days, victim returned the matter through mobile phone. Then matter was informed to police. He knew that marriage took place at Bagheswari temple between accused and victim. According to PW 3, at the time of occurrence, age of the victim was about 17 years.
- 13. PW 4 is the mother of the victim. She stated that on the date of occurrence, her daughter was going to Padmapur market but she did not return. They searched different places but did not find her. After that one

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person from Dangaigaon informed them that her daughter was staying in the house of the accused. After two days, she went to the house of the accused to return back her daughter. They visited two times but could not return her daughter. After one week, victim informed over phone. Then they again visited the house of the accused along with the police. According to PW 4, age of the victim was 16/17 years. She also heard from the victim that marriage took place in between the accused and victim. She stated that her marriage took place in the year 2000 but she failed to reveal the month of marriage. She failed to state the actual date of birth of the victim. It is found from the evidence of the PW 4 that there was some communications which took place between the family members of the accused and the family members of the victim. They also agreed to return the victim but she was not found initially. After that she wanted to return back then only she reported the matter to her mother over phone. This witness also stated that two years prior to this incident, victim fled with another boy.

14. PW 5 deposed that occurrence took place in the year 2017. At that time, the age of the victim was about 16/17 years. After three days from the incident, parents of the victim called him to their home. He visited their home and then they stated that their daughter was missing and asked him to search her. He along with villagers searched different places and ultimately found the victim in the house of the accused but he did not interrogate the victim.

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15. PW 6 Sanjay Basumatary is the maternal uncle of the victim. He deposed that occurrence took place about one year ago. Parents of the victim called him to their home and asked him to search their daughter. They searched different places but could not find her. After 3/4 days he heard that accused took the victim from road. He along with other villagers visited the house of the accused but they did not meet the accused and victim there. They told the parents of the accused that victim would be returned to her parental home. He visited the house of the accused two times but did not find the victim and accused. In second time, they meet the victim and she wanted to come with them but accused obstructed. After recovery of the victim, he did not meet her and make any conversation.

- 16. PW 7 is Parmeswar Basumatary. He deposed that his house is adjacent to the house of the accused. He saw that victim came to the house of the accused. She was coming alone on foot. He knew the name of the victim after she came to the house of the accused. He interrogated the victim. She told him that she had love affairs with the accused for which she came to the house of the accused. The victim was kept in the house of another person till their marriage. Marriage was performed at Bagheswari Temple at Bongaigaon. He was present at that time. After the marriage, both of them were living together as husband and wife for period of 16/17 days. Prior to the marriage, family members of the victim along with some villagers came to the accused and met the victim. They wanted to return the victim but she denied. He was present at that time.
- 17. PW 8 is the Medical Officer. The Medical Officer did not perform radiological test of the victim. She deposed as follows:

On 16.08.17, she was working as Medical & Health Officer-1 at JSB Civil Hospital, Kajalgaon. On that day, she examined Miss 'X' (name is withheld) in connection with Bengtol O.P. GD Entry No. 409 escorted by UBC/117 Akan Talukdar and Smt. Nani Basumatary, mother of the victim.

There was history of sexual assault on 31.07.17 at village Dangaigaon.

On examination, she found the following:-

She was conscious, well oriented. Built – average. Auxiliary hair – Present. Breast areola nipple – Developed. No injury marks on her body. Pulse – CVS - S1, S2 – Positive. Chest – bilaterally clear. CNS – conscious oriented. P/A soft – PS – Positive. Number of teeth – 7/7, 7/7. Perineum injury marks – absent. Stain of semen – absent. Pubic hair – present. Per vaginal examination – Stain of semen – absent, Mucosal tear or laceration – absent, hymen – ruptured. Vaginal swab examination – Spermatozoa not seen.

In her opinion, doctor stated that according to the birth certificate, date of birth is 30.11.2000 (17 years). From the above points, it

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could not be ascertained whether she was raped or not. During cross examination P.W8 stated that from the number of teeth the victim reached age of 18 years.

18. PW 9 is the I.O. He deposed that on 16.08.17, he was working as ASI of Police at Bengtol O.P. On that day, one Rabindra Basumatary verbally informed that accused wrongfully confined his minor daughter. After that he made Bengtol O.P. GD Entry No. 409 dtd. 16.08.17 and proceeded to the P.O. i.e. the house of the accused. He found the victim in the house of the accused in normal condition along with her mother-in-law and father-in-law. He interrogated the victim and took her along with him. At that time, no marriage took place between the accused and victim. He called the parents of the victim and handed over her to them. On next day, I recorded the statement of the victim and her parents. On 17.08.17, father of the victim lodged FIR and same was sent to the Runikhata P.S. for registration. He sent the victim to hospital for medical examination and also sent her to the Court for recording her statement U/S 164 CrPC. He recorded the statement of the victim and her parents according to Bengtol O.P. GD Entry No. 409 dtd. 16.08.17.

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- 19. PW 10 is another I.O., who investigated the matter after preliminary investigation conducted by PW 9. He deposed that on 26.08.17, he was serving as S.I. of Police at Dhaligaon P.S. On that day, O/C, Dhaligaon P.S. entrusted him for investigation in connection with Dhaligaon P.S. Case No. 163/17 U/S 365/376 IPC R/W Section 6 of POCSO Act. After getting the charge of investigation, he collected the birth certificate of the victim from her parents and seized the same. He recorded the statement of seizure witnesses. He searched the accused but could not find him for which he could not arrest him. He collected the medical report and after completion of investigation, he submitted charge-sheet against the accused U/S 365/376 IPC R/W Section 6 of POCSO Act as directed by concerned O/C.
- 20. After going through the entire evidence on record, it is found that victim fled away along with the accused according to her own will. It is also found that she earlier fled away with another body. The family members

of the victim tried to settle the matter for which they visited the house of the accused two times. It is also found from the evidence on record that at first victim fled away along with the accused for which they were not found. Considering the entire conduct of the victim, I have found that she was consenting party. The story narrated by victim that one boy was near the bank of Ujani river and accused committed sexual intercourse with her and the said boy witnessed the occurrence itself is not believable story. She also did not make any hue and cry at that time. It is also found from her evidence that she visited the house of the relatives of the accused at Bijni and performed some rituals for newly wedded bride. Considering all these aspects, I have found that victim, according to her own will, eloped with the accused at the time of occurrence and she entered the marriage with accused at Bagheswari temple and at that time, she stated her age as 19 years which is revealed from Ext. A. According to prosecution evidence, particularly mother and maternal uncle of the victim, her age was about 17 years. So, at that time, if she fled away with the accused then also accused can be booked for the offence U/S 4 of POCSO Act because age of the victim was below 18 years. In this regard, prosecution exhibited the Birth Certificate of the victim as Material Ext.1. According to learned P.P., considering the Material Ext.1, age of the victim was below 18 years. Therefore, consent does not play any role. If there was consent on the part of the victim then also accused will be liable for the offence under POCSO Act because age of the victim was below 18 years as revealed from the birth certificate the Material Ext.1.

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21. On the other hand, learned defence counsel pointed out that in this case it is crystal clear that victim was a consenting party. According to learned defence counsel, the question is nothing but to determination of age of the victim only. If age of the victim was below 18 years, then consent does not play any role but this must be proved beyond all reasonable doubt. According to learned defence counsel, in Ext A ,age of the victim was written as 19 years. On the other hand, in Material Ext.1, the date of birth was shown as 17 years. If counted from the said date, it was below 18 years. So, there is conflict between these two documents. According to learned defence counsel, prosecution must have to prove the document beyond all reasonable doubt by examining issuing authority. Interestingly, in this case, prosecution failed to

examine the issuing authority to prove the contents of the Material Ext.1, the birth certificate. The birth certificate was exhibited by the father of the victim but the person who exhibited the document is not proper authority to prove it. The proper authority is the issuing authority, which can prove the contents of the certificate. It is also required to be proved by the prosecution from which source date of birth of was inserted in the concerned document by the issuing authority. These facts were not proved in this case.

- 22. In support of his argument, learned defence counsel submitted following case laws:
  - (i) Criminal Appeal No. 35 of 2017 (Anish Rai Vs.

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- (ii) Criminal Appeal No. 763 of 2008 (Satpal Singh Vs. State of Haryana)
- (iii) Civil Appeal No. 893 of 2007 (LIC of India & Anr. Vs. Ram Pal Singh Bishen)
- (iv) Criminal Appeal No. 04(AP) 2008 (Sanjiv Baidya Vs. The State of Arunachal Pradesh),
- According to learned P.P., as birth certificate was exhibited, it can be presumed that birth certificate was prepared properly by the proper authority. So, on the basis of said birth certificate, date of birth of the victim can be ascertained without adducing any other evidence.
- After considering the rival submissions from both sides, I have found that in this case, though prosecution exhibited the birth certificate but same was not proved. On the other hand, defence side exhibited Pratigya Patra as Ext. A but same was also not proved.
- 24. In the case of **Anish Rai Vs. State of Sikkim (Criminal Appeal No. 35 of 2017)** submitted by learned defence counsel, Hon'ble Sikkim High Court, held as follows:

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- "8. We may now turn our attention to the decision of the Hon'ble Supreme Court in *Jarnail Singh* (Supra). While considering the procedure for determining the minor's age reference was made to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, and held as follows:
  - "22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinafter reads as under:

# 12. Procedure to be followed in determination of Age.-

- (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
- (2) The court or the Board or as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
- (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

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- (a)(i) the matriculation or equivalent certificates, if available, and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the Clauses (a) (i), (ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in Sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

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- (5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in Subrule (3) of this Rule.
- (6) The provisions contained in this rule shall also apply to those disposes off cases, where the status of juvenility has not been determined in accordance with the provisions contained in Sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.
- 23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in Sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option In case, the said certificate is available, no other evidence can be

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relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a Panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

24. ...... In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause.

9. In Mahadeo S/O Kerba Maske vs. State of Maharashtra and Another, the Hon'ble Supreme Court would hold that;

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It may of course be clarified here that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is now incorporated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

10. On the edifice of these observations, while examining whether the law was complied with in the instant matter, it becomes apparent that the victim had read upto class 5 only, hence the question of obtaining a matriculation certificate does not arise. In the absence of matriculation or an equivalent certificate, the Rule provides that the date of birth certificate from the school (other than a play school) first attended be obtained. This is what the I.O. appears to have resorted to by seizing Exhibit-31, showing the victim's date of birth as 01.12.2001, contrary to date of birth mentioned by the victim herself viz; 13.01.2000. What is lacking in the exercise of the I.O. is the absence of seizure of the Admission Register coupled with the fact that the Principal was not examined. It needs no reiteration that the definition of "evidence" and "proved" elucidated in Section 3 of the Indian Evidence Act, 1872, must be read along with Section 67 of the same statute which requires that the signature purporting to be that of a particular person must be established by specific evidence. Hence, Exhibit-31 remained unproved. Exhibit-31 was stated to be issued on the requisition of the I.O., which however is unavailable in the records. Even assuming that as Exhibit-31 remained unassailed at the time of evidence, it ought to be taken into consideration by this Court, the victim herself has given evidence contrary to the document by stating, ".....My date of birth is 13.01.2000." While her father, PW-2, would depose that, "I do not know the exact date of birth of my daughter it was (sic 'is') possible that she was above eighteen years of age during September-November 2015." On this point relevant reference can be made to the ratiocination in Vishnu vs. State of Maharashtra, wherein the Hon'ble Supreme Court held as follows:-

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"24. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the

present case, the father and the mother - PW 1 and PW 13 categorically stated that PW - 4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated....."

25. In Criminal Appeal No. 763 of 2008 (Satpal Singh Vs. State of Haryana), it was held by Hon'ble Supreme Court as follows:

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"20. A document is admissible under Section 35 of the Indian Evidence Act, 1872 (hereinafter called as 'Evidence Act') being a public document if prepared by a government official in the exercise of his official duty. However, the question does arise as what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.

21. In State of Bihar & Ors. Vs. Radha Krishna Singh & Ors. AIR 1983 SC 684, this Court dealt with a similar contention and held as under:

"Admissibility of a document is one thing and its probative value quite another – these two aspects

cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil....... Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavor in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

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22. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti V. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases."

In Civil Appeal No. 893 of 2007 (LIC of India & Anr. Vs. Ram Pal Singh Bishen), it was held by Hon'ble Apex Court as follows:

"26. We are of the firm opinion that mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. As has been mentioned herein above, despite perusal of the record, we have not been able to come to know as to under what circumstances respondent plaintiff had admitted those documents. Even otherwise, his admission of those documents cannot carry the case of the appellants any further and much to the prejudice of the respondent.

31. Under the Law of Evidence also, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a court."

# In Criminal Appeal No. 04(AP) 2008 (Sanjiv Baidya Vs.

In Criminal Appeal No. 04(AP) 2008 (Sanjiv Baidya Vs

The State of Arunachal Pradesh), our Hon'ble High Court held as follows:

"5. I have perused the said birth

Addl Part" I have perused the said birth certificate shown by the learned Addl. Public Prosecutor. It is seen that it is merely a photocopy of the Birth certificate issued by the Registrar of Death & Birth, Govt. of Arunachal Pradesh, Namsai Circle, Lohit Circle, without being accompanied by the original one. It is further seen that the said certificate was not proved by the prosecution before the learned trial court inasmuch as the same has not been marked as an Exhibit. In my considered view, such a document without being proved and/or exhibited before the trial court, cannot be treated as a valid piece of evidence and no finding, whatsoever, on the basis of such a document, can be recorded by the trial court, as regards the age of the victim girl.

Even if the original document of the aforesaid birth certificate was produced before the trial court, the same should have been proved by the Officer concerned who issued the said certificate. Further, even if the issuing Officer has been produced as a witness, he must also produce the relevant Register/record maintained by his office and the same should be proved and exhibited before he concerned trial court. No such procedure in proving the aforesaid document/certificate has been followed/adopted by the prosecution. As per the evidence of P.W. - 7, I.O. of the case, the said photo copy of the birth certificate was seized by him. If the prosecution wanted to prove the same, it could have made an application before the learned trial court for production of the original birth certificate and the learned trial court could have also summoned the issuing authority to prove the certificate, in question. The prosecution did not do so although it was incumbent upon them to do so for proving its case."

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26. After going through the entire evidence on record and settled case laws, I have found that in this case, the age of the victim was not proved beyond all reasonable doubt by the prosecution because issuing authority of the birth certificate was not examined. It is settled law that prove of document and exhibition of it are two different aspects. In present case at hand, prosecution only exhibited the document which is admissible according to Evidence Act but contents of the document were not proved by proper person. Therefore, date of birth given in Material Ext.1 the birth certificate is not proved beyond all reasonable doubt. On the other hand, considering the medical evidence, age of the victim could be reached 18 years because medical officer stated during cross-examination that from the number of teeth, the victim reached age of 18 years. So, victim was not minor or below 18 years as required to book the accused U/S 4 of POCSO Act. On the other hand, to attract Section 376(1) IPC, prosecution must have to prove the case that accused committed sexual intercourse without the consent of the victim. In present case at hand, considering the conduct of the victim, it is found that she was a consenting party. So, Section 376(1) IPC is also not attracted against the accused. As a result, both points mentioned above are remained as not proved. Accused is not found guilty.

#### ORDER

- 26. Prosecution failed to prove the case U/S 376(1) IPC R/W Section 4 of POCSO Act against accused Kanak Wary beyond all reasonable doubt. Accused is acquitted on benefit of doubt and set at liberty. He is directed to furnish bail bond of Rs. 10,000/- with one suitable surety of the like amount for a period of six months as required U/S 437(A) Cr.P.C. Till then, he is allowed to remain in previous bail.
- 27. A copy of the Judgment shall be given to the District Magistrate, Chirang for information.
- 28. The seized birth certificate of the victim shall be returned to the parents of the victim.
- 29. Given under my sign and seal of this Court on this the 6<sup>th</sup> day of December, 2018, at Kajalgaon, Chirang.

(D.J. Mahanta)

Special Judge,

Chir <u>Chirang</u> gaon

Dictated and corrected by me,

(D.J. Mahanta)
Special Judge,
Chirang

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#### APPENDIX

# **Prosecution witness:**

- PW 1 Informant Sri Rabindra Basumatary
- PW 2 Victim Miss 'X' (name is withheld)
- PW 3 Sri Rabiram Basumatary
- PW 4 Smt. Nani Basumatary
- PW 5 Sri Dhananjay Muchahary
- PW 6 Sri Sanjay Basumatary
- PW 7 Sri Parmeswar Basumatary
- PW 8 Dr. Kukumoni Basumatary (M.O.)
- PW 9 ASI Chandra Kanta Boro (I.O.)
- PW 10 SI Chandradhar Uzir (I.O.)

#### **Exhibit (Prosecution):**

- Ext-1 FIR
- Ext-2 Seizure list
- Ext-3 Statement of the victim U/S 164 Cr.P.C.
- Ext-4 Medical report
- Ext-5 Charge-sheet

## **Material Exhibit (Prosecution):**

Material Ext-1 Birth certificate of the victim

## **Defence Witness:**

Nil.

#### **Defence Exhibit:**

Ext-A Pratigya Patra issued by Bagheswari Temple.

(D.J. Mahanta)

Special Judge,

Chir Chirang. gaon