IN THE COURT OF THE SESSIONS JUDGE, MORIGAON

Sessions (Spl.) Case No.27/2016
U/S 366 A/376 IPC, R/W Section 4 of POCSO Act

Present: Mr. Dhrupad Kashyap Das

Sessions Judge, Morigaon (Assam).

State of Assam

Vs.

Sri Gajendra Borhagohain Accused

Date of Charge :-05.08.2016.

Date of recording evidence :- 05.09.2016, 19.09.2016, 04.10.2016 &

20.02.2017.

Date of Argument :- 12.03.2018,06.04.2018, 20.04.2018 &

04.05.2018.

Date of Judgment :- 18.05.2018.

Appearance for the Parties

Advocate for the State :- Mr. A. Kalam, Ld. P.P.

Advocate for the accused :- Mr. U. C. Roy, Ld. Advocate,

JUDGMENT

1. Prosecution case in brief is that on 13.05.2016 at around 9.00 A.M., the accused Gajendra Borhagohain, son of Late Puspendra Borhagohain of village Gohaingaon kidnapped the daughter of the informant Miss – X (the real name of the victim kept concealed to save her from infamy), aged about 16 years from the PWD road while she was coming to attend her tuition class at Sankardevnagar of Morigaon. Thereafter, the above-named accused send message to the Mobile No.9613988161 & 9613351936 that the daughter of the informant was with him.

On the very day of occurrence of the incident, the informant went to Morigaon (Sadar) P.S. and lodged an F.I.R. On receipt of the F.I.R., the then O/C Morigaon (Sadar) P.S. registered a case vide Morigaon P.S. Case No.148/16, U/s 366 (A) IPC.

2. The investigation was set in motion. During the course of investigation, the I.O. visited the place of occurrence. The I.O drew up the sketch map of the P.O. Thereafter, the I.O. recorded the statement of the victim as well as other material witnesses and also got the victim medically examined and got her statement recorded U/s 164 Cr.P.C. The I.O. during investigation arrested the accused and produced him before the learned Court, wherefrom he was remanded to judicial custody. Thereafter, the I.O. collected the medical report and upon completion of investigation, the I.O. submitted the charge-sheet against the above-named accused with allegation of offence punishable U/s 366 (A) of IPC. Thereafter, the Ld. Court below on production of the accused person furnished copies of relevant documents as mandated U/s 207 Cr.P.C. Thereafter, the learned Court Below committed the case to this Court by finding it to be exclusively triable by this Court. On production of the accused person before this Court, my learned predecessor having heard Ld. Counsel of both sides and basing upon materials on record framed charges U/s 366 (A)/376 of IPC, read with Section 4 of POCSO Act against the accused person, which were read over and explained to him to which he pleaded innocence and claimed to be tried. Subsequently, this Court enlarged the accused on bail. Hence, the trial.

3. Point for determination:

- (i) Whether the accused on the eventful day i.e. on 13.05.2016 at around 9.00 A.M. at Sankardevnagar under Morigaon P.S. in the district of Morigaon, induced the victim (a minor girl) while she came out from her house to attend tuition class with intent that she might be or knowing that she is likely to be forced or seduced to illicit intercourse with him?
- (ii) Whether the accused after kidnapping the said minor girl committed rape of her?

- (iii) Whether the accused after kidnapping the said minor girl committed penetrative sexual assault on her?
- 4. In this case prosecution has examined as many as 5 (five) PWs including the most material witnesses of this case. After completion of recording the evidence of the PWs, the accused was subjected examined U/s 313 Cr.P.C. with respect to the incriminating materials that surfaced against him in the evidence on record. The accused declined to adduce defence evidence.
- **5.** I have heard argument so advanced by Ld. Counsel of both sides. Considering the evidence- on- record, I have come to the following decisions.

DISCUSSION, DECISION AND REASONS THEREOF

In this case, it is alleged by the prosecution that on the eventful day the above-named accused kidnapped the daughter of the informant (i.e. the victim, a minor girl) from the PWD road, while she came out from her house to attend tuition class and thereafter, he committed sexual assault upon the victim girl without her consent.

PW-1 (Jugal Bordoloi), the informant stated in his evidence that the victim Miss - X is his daughter. He knows the accused person. The occurrence of the incident took place about 3 (three) months back in the morning hour, while his daughter (victim girl) went to attend tuition class. PW-1 stated that as his daughter (victim) did not returned back on time, so, he started searching for her. He went to the house of the accused Gajendra Burhagohain, as his daughter used to visit the house of accused Gajendra Burhagohin, but he did not meet the accused there. However, he met the brother of the accused there who told him that he was not involved in this incident. PW-1 stated that as dusk was approaching; so, he failed to find out his daughter. Thereafter, he went to Morigaon P.S. and filed an ejahar. PW-1 stated that while they were at the police station, accused forwarded a massage to his sister's mobile informing that his daughter was with him. They showed the message to the Police officer. PW-1 stated that after two days of the incident, the brother of the accused brought

his daughter to his house. Then, he immediately informed Police and brought his daughter to the police station and then Police interrogated her. She was taken to Hospital for medical examination. She was also brought to the court and her statement was recorded. PW-1 stated that he asked his daughter regarding the incident. Then, she told him that while she was returning back from tuition class, accused met her on village road and asked her to accompany him. Then, she believing on good faith, accompanied him. She told him (PW-1) that she was taken to Domal village and kept there in a house of a person. She further informed him that the accused committed rape with her against her will. PW-1 stated that at the time of incident she was a student of class X. PW-1 proved Ext. 1 is the FIR, whereupon Ext. 1(1) is his signature.

During cross- examination PW-1 stated that the Ejahar was written by him at the police station on the very day of occurrence of the incident. PW-1 stated that he did not see the occurrence of taking away of his daughter. PW-1 along with his wife, his younger sister and one Babul Medhi went to the police station. PW-1 stated that he did not know the person who took tuition of his daughter. However, he knew that his daughter attend tuition at Pachatia. He stated that there were other houses around his house. Police questioned his daughter at the P.S. and at the time of interrogation they were not allowed to enter in that room. PW-1 stated that residential house of Atul Deka, Rama Pator, Suken Deka were situated in the vicinity of his house. There were about 7-8 houses around his house. PW-1 stated that his daughter was a student of Pachim Morigaon Gohinbarua L.P. School. He forgot whether he had submitted any age proof document of his daughter to Police. He had also no knowledge if Police collected any age proof document from school authority. PW-1 denied all the necessary suggestions put to him by the defence.

(b) PW-2 (the victim Miss - X) in her evidence has stated that the informant was her father. She knew the accused and the accused had visiting terms with their house. According to PW-2, the occurrence of the incident took place in the month of May. PW-2 stated that on the eventful day, she was coming back from Pachatia to her house after attending tuition classes. Then, on the way she met the accused who requested her to board on his bicycle to go for an outing. Believing in good faith, she boarded on the said bicycle. PW-2 stated that the accused took her to Domalgaon and kept her overnight in the

house of one of his friends. PW-2 stated that on that night, the accused raped her against her will. On the following day, he (the accused) took her to Na-bheti and kept her overnight in the house of an unknown person. On that night also he (the accused) again raped her in similar manner. She stated that when she was staying there, the brother of the accused went to that house and he brought her to her house. PW-2 stated that Police questioned her. She was also taken to Hospital for medical examination. Her statement was also recorded U/S 164 of Cr.P.C. PW-2 proved Ext. 2 is her statement U/s 164 Cr. P.C., whereupon Ext. 2(1), 2(2) and 2(3) are her signatures.

During cross-examination, PW-2 stated that she took tuition from a tutor named Amar Jyoti Bordoloi. They were three members in the tuition group. One is Podma Bordoloi of her school and another one is Bidyut Burhagohin, brother of the accused. PW-2 stated that she does not raise any hue and cry when the accused took her on his bicycle. She stated that there were other family members including female members in the house where she was kept first. PW-2 stated that the house, where she was first kept, was a single house and that family consists of 4 (four) members i.e. husband and wife and two children. There were also family members in the house where she was kept for the second night. She was kept in a separate room. PW-2 stated that on the following day, she saw some persons, but she did not state anything to them. PW-2 stated that she studied from Class -VI to Class - VIII at Nabheti M E School and she completed her elementary school at Na-bheti Gohinbarua L.P. School. PW-2 denied all the necessary suggestions put to her by the defence.

(c) PW-3 (Julemai Bordoloi) stated in her evidence that the informant is her husband. Victim is her daughter. She knows the accused who has visiting terms with her house. According to PW-3, the occurrence of the incident took place on 13th of May 2016. PW-3 stated that in the month of February, 2016, her daughter (victim) attained the age of 16 years. Her daughter (victim) is a student of Class – X of Morigaon Girl's H.S. School. PW-3 stated that usually her daughter (victim) goes for her tuition class in the morning and she returns back at around 9 A.M. and thereafter, she prepares herself for school and goes to school. She stated that on that particular day her daughter left for tuition as usual in the morning. Her daughter (victim) took tuition at Pachatia. PW-3 stated that she does not ever visit the house of the tutor of her daughter nor she

knows the name of the tutor. On the eventful day when her daughter did not return back in time; they became worried. Then, PW-3 thought that her daughter might have gone to the house of her sister-in-law. So, she made phone call to her sister-in-law and guarried about her daughter, but she got negative reply. Thereafter, PW-3 went to the house of the class-mate of her daughter and searched for her. PW-3 also made phone call to the accused to ask him to search of her daughter. But all the time the accused disconnected the phone. In this way they searched for her daughter here and there till 4.00 P.M., but failed. Thereafter, they went to Morigaon P.S. and her husband filed an ejahar. However, while they were at the P.S., her sister received a text message from the accused that her daughter was with him. Then, they displayed the message to Police. PW-3 stated that when her sister-in-law made a phone call to the accused; the accused threatened her. PW-3 stated that on the following day of the occurrence of the incident, her daughter (the victim) was found near Morakolong near the road side and one Shivasankar brought her to her house. PW-3 further stated that she asked her daughter about the incident and then she (victim) told her that she was taken by the accused for an outing and she was taken to some unknown place. She also told before PW-3 that she was taken to Domal village where she was kept in the house of unknown person. Thereafter, the victim was taken to P.S. and in the P.S. she told before Police personnel that at Domal village she was sexually assaulted by the accused against her will.

During cross-examination, PW-3 stated that the accused Gajendra resides around ½ Km. away from her house. He was a frequent visitor to her house. She did not see the actual occurrence. She did not go to village Domal to see the place where her daughter was kept. She did not submit any age proof related document of her daughter to the I.O. PW-3 further stated that her daughter (victim) used to go to her tuition class alone. PW-3 denied all the necessary suggestions put to her by the defence.

(d) PW-4 (Dr. Rekha Bhuyan) in her evidence stated that on 16th May, 2016, at about 12.00 noon, she was at the Morigaon Civil Hospital officiating as S.D.M.O. On that day she examined Miss. Sani Rekha Bordoloi, D/o Jugal Bordoloi resident of Sankardev Nagar, Morigaon in connection with Morigaon P.S. Case No. 148/16. She (the victim) was escorted by Mrs. Hareswari Das and

PW-4 examined her in presence of Mrs. Saleha Begum of Morigaon Civil Hospital. PW-4 stated that there was a history of kidnap by Gajendra Buragohain on 13th May, 2016 of the same place. On examination, PW-4 found a black mole on the back of right thigh. The breast was found normal. Vaginal hymen was also ruptured. There was no external injury on her body. On microscopic examination, no spermatozoa seen. X-ray was taken for age determination vide X-Ray No. 2847/2848 dated 16.05.2016 which was reported by Dr. N. Ahmed. The X-Ray report shows that her (the victim) age was between 16 and 18 yrs. From clinical laboratory examination her present age was between 16 to 18 years without injury in her private parts. PW-4 proved Ext 4 is the medical report, whereupon Ext 4 (1) is her signature.

During cross-examination, PW-4 stated that when the victim was examined for the injuries and while preparing the medical report the victim did not claim to be raped. The lower teeth and upper teeth may be 14/15 even after the age of above 18 years. The Spermatozoa may have legitimacy for 48 hours. The Hymen may get rapture because of menstrual.

(e) PW-5 (Smti. Manju Gogoi), the I.O. stated in her evidence that on 13.05.2016, she was posted at Morigaon Police Station as SI. On that day, a police case being Morigaon P.S. Case no.148/2016 was registered U/s 366A I.P.C. which was endorsed to her by the Officer-in-Charge of the Morigaon PS for investigation. PW-5 stated that the informant lodged an ejahar stating that his minor daughter, aged about 16 years, was kidnapped by the accused person. Accordingly, PW-5 went to the house of the informant and drew up the sketch map of the Place of Occurrence. PW-5 proved Ext. 4 is the sketch map, whereupon Ext. 4(1) is her signature. PW-5 recorded the statements of the informant and the mother of the victim girl. PW-5 stated that according to the informant and the mother of the victim, the accused person stated over phone that their daughter was with him. PW-5 collected the phone number of the accused and called him up. PW-5 stated that after two days of the occurrence of the incident, the accused left the victim girl on an abundant place, and ultimately, she was recovered by her family members. Thereafter, the family members produced the victim girl before the Police Station but the accused was absconding. PW-5 stated that during investigation, she arrested the accused

person. The victim girl was medically examined and produced the victim before the Magistrate for recording her statement. During investigation, the victim girl told before her that the accused forcefully took her on the date of occurrence of the incident. PW-5 stated that after recording the statement of witnesses and making necessary investigation, she found materials against the accused and filed charge sheet against the accused person U/s 366 A IPC. PW-5 proved Ext. 5 is the charge-sheet, whereupon Ext. 5(1) is her signature on the same.

During cross-examination, PW-5 stated that she went to the Place of occurrence just after registering the case. She recorded the statements of parents of the victim girl on the date of occurrence of the incident. She also recorded the statement of Anita Bordoloi, aunt of the victim girl. PW-5 stated that in the sketch map, she has shown two houses belonging to Roma Pator and Sukhen Das who are the neighbors of the informant. But, she did not record their statements as they were absent at the Place of occurrence when she went there, and later on, they declined to make statement. PW-5 further stated that the victim girl told before her during investigation that, accused kept her at a place called Domal, but she does not go there to investigate the matter. PW-5 stated that the victim girl was recovered on 15.05.2016.

6. In this case prosecution examined only 5 (five) PWs out of total six numbers of witnesses listed in the charge-sheet. Prosecution did not feel it necessary to examine PW- Anita Bordoloi. According to Prosecution, the truth of the case absolutely rests on the testimony of the victim girl, who was below 16 years of age at the time of occurrence of the incident. The learned P.P. appeared on behalf of the prosecution has submitted that to implicate an accused for an offence of rape U/s 376 I.P.C., consent of a minor girl under 16 years of age is immaterial. The learned P.P. has emphatically submitted that the evidence rendered by the victim girl is completely convincing which is corroborated by her previous statements made before police as well as before Magistrate. Therefore, the learned P.P. has submitted that prosecution has established its case beyond all reasonable doubts. On the contrary, the learned defence Counsel has taken a reverse view with the learned P.P. and has submitted that prosecution has failed to establish its case beyond all reasonable doubts, in as much as, the version of the victim lacks corroborative evidence.

7. While analyzing the testimony of the victim, it appears that on the eventful day, she met the accused person while coming back from tuition class. The accused was having visiting terms with the family members of the victim girl, which means that the accused used to visit the house of the victim sometimes. Therefore, when the victim girl met the accused person on road, she was asked by the accused to board on his bicycle to go for an outing, as the accused known to the victim girl very well. So, she believing the accused on good faith boarded on his bicycle but she did not know the inner intention of the accused. The victim girl never thought that there may be some bad intention of the accused when he asked her to board his bicycle. Moreover, she was a teenager and an immature girl who cannot think that the accused who was a frequent visitor to her house may take her away to fulfill his lust. Then, when the victim girl boarded his bicycle, the accused took her to the house of one of his friends at Domalgaon and spent the night in that house. The accused committed rape on her on that very night against her will. Thereafter, on the next day, the accused took her to another place and also spent a night in the house of a person where the victim girl was raped again. In this way, the accused committed rape of the victim girl for two nights. The victim girl could not raise any complain to anyone in these two nights because she did not know anyone except the accused. It was either due to her intimidation or scariness; she perhaps closed her mouth by not raising any voice to anyone against the accused. After recovery of the victim girl, she completely disclosed about the incident to her parents i.e. PW-1 and PW-3. The parents of the victim girl (PW-1 and PW-3) stated during their evidence that they started searching for their daughter when she went missing. The father of the victim girl even went to the house of the accused person to search for his daughter but the accused was absent in his house. PW-1 and PW-3 (the parents of the victim girl) revealed in their evidence that when they were present in the police station for lodging the complain of missing of their daughter, they received a text message from the accused person in the mobile of their sister, who also accompanied them to the police station. The text message of the accused disclosed that the victim girl was taken by him and the said text message was also shown to the police. But when they called up in the phone number wherefrom the text message was received, the accused threatened them. The M.O. (PW-4) of the case, who examined the victim girl found that vaginal hymen was ruptured though there was no external injury of her body.

- 8. During assessment of evidence of PWs, the Court has relied upon many judgments of Hon'ble Apex Court. In the instant case, the victim girl who was below 16 years old at the time of incident is the injured witness, who suffered irreparable loss as her sanctity and virginity were impaired by the accused person. If the victim girl considered as solitary or sole witness, then also there is no bar for making the accused guilt for commission of the offences, in as much as, the evidence of the victim girl is found to be trustworthy and convincing. In **Madho Ram Vs. State of U.P. (1973) 1 SCC 533**, the Hon'ble Supreme Court of India held that conviction on a charge of rape on the basis of uncorroborated testimony of prosecutrix is legal. Even if, the M.O. who examined the victim girl does not find sign of rape on her body, it is no ground to disbelieve the testimony of the victim girl.
- **9.** Under the aforesaid facts and circumstances and upon hearing both sides and also considering the entire materials on record, this Court has found the accused guilty for offenses punishable U/s 366 A/376 (2) (i) IPC, read with Section 4 of POCSO Act. It appears to this Court that the prosecution has established the case beyond all reasonable doubts.
- **10.** After the accused being found guilty, I have heard the accused person on the point of sentence U/s 235 (2) Cr. P.C. The sentence and punishment of the aforesaid Sections of law are explained to the accused person, who pleaded that he may be given lesser punishment and also prayed for mercy.

SENTENCE

11. After finding the accused guilty and hearing the accused on the point of sentence, the accused is convicted and sentenced to undergo – (a) R.I. for a term of 7 (seven) years and also liable to pay fine of Rs.10,000/-, in default thereof, he shall undergo S. I. for another 3 (three) months, U/s 366 A of IPC, (b) R.I. for 7 (seven) years and shall also be liable to pay fine of

Rs.10,000/-, in default thereof, he shall further undergo S.I. for 3 (three) months, U/s 376 (2) (i) of IPC, (c) R.I. for 7 (seven) years and shall also be liable to pay fine of Rs.10,000/-, in default thereof, he shall further undergo S.I. for 3 (three) months, U/s 4 of POCSO Act. All the sentences shall run concurrently.

It is also directed that the period of sentenced, if any, served by the accused person (convict) during investigation and trial shall be set off with the substantive sentence. The fine amount, if realized from the convict shall be deposited to the Government Exchequer in due course.

12. In this case, the victim girl, who has lost her sanctity because of the illegal act of the accused, deserves victim compensation under the victim compensation scheme as defined U/s 357-A Cr. P.C. The DLSA, Morigaon shall determine the compensation amount towards the victim in this regard and shall do the needful.

A copy of this judgment and order along with any other materials shall be forwarded to the Secretary, DLSA, Morigaon, for necessary action.

A copy of the judgment and order shall also be furnished to D.M. Morigaon.

Let a free copy of the Judgment and order shall be furnished to the convict.

Judgment is delivered and pronounced in the open Court on this 18th day of May, 2018 under my hand and seal.

Dictated & corrected by me

Sessions Judge Morigaon.

APPENDIX

A. Prosecution witness

- 1. PW-1 :- Jugal Bordoloi,
- 2. PW-2: Sunny Rekha Bordoloi,
- 3. PW-3 :- Julemai Bordoloi,
- 4. PW-4:- Dr. Rekha Bhuyan,
- 5. PW-5: Smti. Manju Gogoi,
- B. <u>Defence witness: Nil.</u>
- C. Prosecution Exhibit:
- 1. Ext.1: the ejahar.
- 2. Ext.2 :- the statement U/s 164 Cr. P.C. of the victim.
- 3. Ext.3 :- Nil.
- 4. Ext.4: the sketch map & Medical report.
- 5. Ext.5:- the charge-sheet.
- D. Defence exhibits :- Nil.

Sessions Judge, Morigaon.