IN THE COURT OF THE SPECIAL JUDGE, KARBI ANGLONG, DIPHU, ASSAM.

Present : Md. A.U. Ahmed, AJS,

Special Judge, Karbi Anglong, Diphu.

POCSO Case No. 24/2018/(Special No. 38/2018-New) corresponding to GR Case No. 803/2018 & Dokmoka Police Station Case No. 38/2018 Under Sections 363 of IPC and 4 of the

POCSO Act.

State of Assam

Versus

Shri Jailsing Baglary

Name of informant/complainant:

Shri Bishnu Daimary,

S/O Late Thekai Daimary

Village: Thekong Engti Gaon (Birupara)

PS: Dokmoka

District: Karbi Anglong.

Name of the accused person facing trial:

Shri Jailsing Baglary

S/O Shri Sukuram Baglary

Village: No.2 Amguri

PS: Dokmoka

District: Karbi Anglong.

Advocates appeared:

For the prosecution : Mr. D. Deka, Public Prosecutor

For the defence : Mr S. Boro Argument heard on : 29.07.2019

Judgment pronounced & delivered on: 07.08.2019

JUDGMENT

- 1. It is a case of kidnap and penetrative sexual assault alleged to have been committed by the accused person.
- 2. The prosecution case in brief is that on 03.08.2018, the informant-Shri Bishnu Daimary lodged an ejahar with the O/C of Dokmoka Police Station stating inter alia that on 01.08.2018 at about 4:00 AM, his first daughter-Miss Babita Daimary aged 15 years had been missing from his house. On search, his family members did not find out her trace and later they could know that his missing daughter was kidnapped by Shri Jailsing Baglary, resident of Vill-Amguri Gaon under Dokmoka PS. On receipt of the ejahar, O/C Dokmoka Police Station registered a case vide its PS case No. 38/2018 under section 363 of IPC. On completion of investigation, I.O. submitted the charge-sheet under sections 363 of IPC and 4 of the POCSO Act against the accused person. Hence the prosecution case has come
- 3. On completion of appearance of the accused person, copy was furnished to the accused person. After perusal of the case record along with case diary and hearing learned lawyers of both sides, I found sufficient grounds for presuming that the accused person committed the offences under sections 363 of IPC and 4 of the POCSO Act. Accordingly, the charges were framed against him. The particulars of the charged offences were duly read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

4. Prosecution has examined as many as 8 (eight) witnesses. Statement of the accused person was recorded under section 313 of Cr.P.C. Defence declined to adduce evidence. Plea of defence is of total denial.

5. **Points for determination are:**

- (i) Whether the accused person on 01.8.2018 at about 4:00 AM at Thekong Engti (Birupara) Gaon under Dokmoka PS kidnapped the victim aged 15 years by keeping her away of the lawful guardianship without his consent and that he thereby committed an offence punishable under section 363 of IPC?
- (ii) Whether the accused person on the same date and thereafter at Guwahati committed penetrative sexual assault on the victim aged 15 years and that he thereby committed an offence punishable under section 4 of the POCSO Act?

6. **Decisions and reasons thereof:**

I have very carefully gone through verbal arguments advanced by the learned counsels of both sides as well as evidence on record. At the very outset, the learned counsel appearing on behalf of the accused person has contended that the prosecution has miserably failed prove the case against the accused person. On the other hand, the learned Public Prosecutor, Mr. D.K. Deka refuting the aforesaid submission has submitted that the prosecution has succeeded in establishing its case against the accused person beyond all reasonable doubts. Prior to rebutting the

rival submissions, it would be appropriate to give a glance at evidence record.

- 7. PW-1 is Shri Bishnu Daimary who is the informant of this case. He has stated in his evidence that he knows the accused person and the victim, Babita Daimary is his daughter. The occurrence took place on 01.08.2018. On the day of occurrence at about 4:00 AM, he woke up from sleep and did not find his daughter in the bed. He searched her from all corners, but did not find her. On 3.08.2019 he lodged an ejahar at Dokmoka Police Station. Ext.1 is the ejahar and Ext.1(1) is his signature. On the night of 3.08.2019, his daughter rang him over phone, but she did not tell the location of her stay. He suspected that his daughter was staying with the accused person. On 06.08.2019 at 10:45 PM, police informed him that they apprehended the accused along with the victim. Then he went to Police Station and identified the victim. At the time of occurrence, the victim was 15 years old. On the next day, the victim was brought to Diphu Civil Hospital and got her statement recorded in the Court.
- 8. PW-2 is Shri Kumud Basumatary who has deposed in his testimony that he knows the informant, the accused and the victim girl. The incident occurred in the year 2018. He is the brother-in-law (Halpati) of the informant. On the day of occurrence, the informant told him that from 4:00 AM, the victim girl went missing and getting the said information, he along with the informant started searching the victim in the houses of their relatives and the friends of the victim. They did not find her anywhere. On the 3rd day of the incident, the informant lodged the ejahar at Dokmoka Police Station. On the 6th day of the incident at 10:45 PM, he went to Dokmoka

PS and saw the victim and the accused there. At the time of occurrence, the victim was 15 years old. On the next day, the victim was brought to Diphu Civil Hospital and got her statement recorded in the Court.

- 9. PW-3 is Shri Krisna Daimary who has deposed in his deposition that the informant is his brother and he knows the victim and the accused person. The occurrence took place on 01.08.2018. On that day, his informant-brother came to his house at 4:00 AM and informed that his daughter, Babita Daimary went missing from their house and asked him to search her. After two days of the occurrence, the informant lodged the ejahar at the PS. On 06.08.2018 at 10:45 PM, police of Dokmoka PS informed his brother that they apprehended a pair of boy and girl and asked him to go to the PS for identification. On the next day morning, he went to the PS and he saw the accused there. At that time, the victim was 15 years old. Police got the victim medically examined and got her statement recorded in the Court.
- 10. PW-4 is Shri Milan Basumatary who has stated that the informant, the accused and the victim girl are known to him. On 01.08.2018 he came to Dokmoka PS for his personal necessity and saw the accused there. He also met the informant there. The informant told him that on that day, the victim-daughter. accused eloped the On telephonic communication, the accused informed the informant that the victim was with him. At the time of occurrence, the victim was 14 years old. Later on, the informant told him that on 6.8.2018, the victim was recovered from the custody of the accused.

- 11. PW-5 is Dr Karik Kropi who has stated that on 07.08.2018 while she was serving at Diphu Civil Hospital, she examined Smti. Babita Daimary in connection with Dokmoka Police Station Case No. 38/2018 and found the following: Hymen was absent and she was having four days of menstruation and vagina admits more than one finger. No pain and tenderness were detected. As per X-ray report, the victim was below 18 years i.e. about 16/17 years. Spermatozoa were not detected on her vaginal swab. According to her opinion, alleged history of sexual involvement was present. Ext.2 is the medical report and Ext.2(1) is her signature.
- 12. PW-6 is Smti. Pratima Daimary who has testified that the informant is her husband, and the victim girl is her daughter. She knows the accused person. The occurrence took place on 01.08.2018. On the day of occurrence after getting up from sleep, she did not find her victim-daughter in her room. Her another daughter-Payal, who used to sleep with the victim, was sleeping alone. Then they started searching the victim-daughter in their neighbourhood, but did not find her. Thereafter, she found a SIM card belonging to the accused which was found fitted in a mobile hand set of theirs. That mobile hand set didn't have any SIM card earlier. From this, they suspected that the accused eloped her daughter. Thereafter, her husband lodged the ejahar at Dokmoka Police Station. After six days of the occurrence, police recovered the victim girl along with the accused and brought them to Dokmoka PS. Police got the victim medically examined and her statement recorded in the Court. On being asked by her, the victim told that she eloped with the accused person and stayed at Guwahati and both of them

stayed there as husband and wife. At the time of occurrence, the victim was 15 years old.

- 13. PW-7 is the victim who has stated in her testimony that the informant is her father and she knows the accused person. On the day of occurrence at about 4:00 AM, she went out of the house and met the accused on the road and he took her to Guwahati by his own car. He kept her in a hotel at Guwahati for six days. On every day during their stay at hotel, the accused made sexual intercourse with her. At the time of occurrence, she was reading in Class-IX. The accused took her to her father's house from Guwahati and from there police took them to Dokmoka Police Station. Police got her medically examined and statement recorded in the Court. Ext.3 is her statement and Ext.3(1) and 3(2) are her signatures. At present, she is staying at her father's house. At the time of occurrence, her age was 14 years. During the stay at Guwahati hotel, she was informed that he is a married person.
- 14. PW-8 is Shri J.S. Khubung who was the then O/C of Dokmoka PS. He himself took the charge of investigation of the case. During his investigation, he drew the sketch map of the place of occurrence. Ext.4 is the sketch map and Ext.4(1) is his signature. He recorded the statements of the witnesses and transmitted W.T. message relating to the case to all the police stations of Assam. On the way back of the accused to Dokmoka from Guwahati, he arrested the accused person at Dokmoka and recovered the victim girl from the custody of the accused. He got the victim medically examined and her statement recorded in the Court. On 03.8.2018 he seized the birth certificate of the victim from the possession of her mother. Ext.5 is the seizure list and

Ext.5 (1) is his signature. M.Ext.1 is the birth certificate of the victim. On completion of investigation, he submitted the charge-sheet under sections 363 of IPC and 4 of the POCSO Act against the accused person. Ext.6 is the charge-sheet and Ext.6 (1) is his signature.

15. At First let us see whether at the time of the occurrence, the victim was child or not. The section 2(d) of the POCSO Act relates to definition of the child. According to the section 2(d) of the Act, a person who has not completed 18 years is considered to be a child. Ext-5 is a seizure list by which a Photostat copy of Birth Certificate of the victim was seized. M-Ext-1 is the Birth Certificate of the victim. The said photostat of the birth certificate can be taken for judicial The defence has not disputed M-Ext-1. According to M-Ext-1, the date of birth of the victim is 16.02.2004. Ext-1 is the ejahar which shows that the date of occurrence is 01.08.2018. On the basis of M-Ext-1, on calculation it appears that at the time of occurrence the victim was 14 years 05 months 15 days. It has been stated in Ext-1 that at the time of occurrence, the victim was 15 years. Parents are the best person who can say actual and reliable age of their child or children. PW-1 and PW-6 are parents of the victim who have categorically stated in their evidences that at the time of occurrence, the victim was 15 years. PW-2 and PW-3 have also stated in their evidence supporting the evidence of PW-1 and PW-6 that at the time of occurrence the victim was 15 years. According to victim and PW-4, the victim was 14 years old at the time of occurrence. The victim has also stated in her evidence that at the time of occurrence, she was reading in class- IX (nine). The defence has disputed the evidence of PW-1 to 4 and PW-6 to PW-7 as regards age of the victim at the time of occurrence, M-Ext-1 shows that it was obtained in the month of March, 2004 immediate after birth of the victim. Ext-2 is the medical report of the victim which shows that ossification test over the victim was done and that according to ossification test as on 07.08.2018 the victim was 16-17 years old. There is no dispute that at the time of the occurrence the victim was reading in class IX (nine). There is no evidence on record showing that the victim was got admitted in school late and that she detained in a class twice. Normally a student of class IX (nine) can not be more than 15 years old. Taking all aspects into consideration that it has been proved beyond all reasonable doubts that at the time of occurrence the victim was 15 years old.

16. In this case the victim is the most vital witness. There is no evidence on record showing that any person saw the accused person taking the victim away. Evidence of victim marked as PW-7 shows that on the day of occurrence at about 4:00 AM the victim came out from her paternal house and met the accused on the road and there from the accused took her to Guwahati in his vehicle wherein she was kept in a hotel for 6 (six) days. Ext-3 is the statement of the victim wherein the victim gave similar statement. Her evidence also shows that the accused her back to Dokmoka and dropped her in her parental house. In the cross examination the victim has admitted that there was a love affairs between her and the accused and she came out from the house on her sweet will to meet the accused. PW-8 is the investigating officer who has stated in his evidence that while the accused was on way to Dokmoka from Guwahati he was arrested and from his possession the victim was recovered. The defence has not disputed the fact reflected from the evidence of victim that the accused took her to

Guwahati in a vehicle and kept there in a hotel for 6 (Six) days. As I have already held that the victim was a child, her consent was immaterial.

- 17. The victim marked as PW-7 has clearly stated in her evidence that during her stay in hotel in Guwahati the accused everyday made sexual intercourse with her. It is found that the defence has also not disputed the aforesaid evidence that accused made sexual intercourse with her everyday while they were in a hotel in Guwahati. Now let us see whether medical evidence has corroborated evidence of the victim marked as PW-7 in respect of sexual intercourse. PW-5 is the medical Officer who examined the victim on 07.08.2018 in connection with Dokmoka Police Station Case No. 38/2018 and found absence of hymen. She also found that vagina admitted more than one finger. It is found that the defence has not disputed the finding of Medical Officer marked as PW-5. Absence of hymen and size of the vagina as reflected in Ext-2 indicate that the victim was subjected to sexual intercourse. Now I have come to conclusion that the evidence of the victim as regards sexual intercourse have been corroborated by medical evidence. I find nothing on record to disbelieve the evidence of victim marked as PW-7. That apart, the defence has failed to make any dent on the evidence of the victim.
- 18. The section 363 of the IPC relates to punishment for kidnapping child from lawful guardianship which reads thus:"363. Punishment for kidnapping.—Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

- 19. The section 361 of the IPC relates to kidnapping of minor child from lawful guardianship which reads thus:"361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person."
- 20. The section 3 of the POCSO Act relates to penetrative sexual assault which reads thus:- "3. Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if
 - a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
 - b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
 - c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
 - d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

- 21. The section 4 of the POCSO Act relates to punishment for causing penetrative sexual assault which reads thus:- " 4. Punishment for penetrative sexual assault.-Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."
- 22. In view of the discussion made above, I find that prosecution has in very plain way succeeded in establishing its case against the accused person beyond all reasonable doubts.

ORDER

- 23. In the result, I find the accused person Shri Jailsing Baglary guilty under sections 363 of the IPC/4 of the POCSO Act and accordingly he is convicted.
- 24. On the point of sentence, the accused person is heard and to that effect his statement is recorded. It has been submitted by the learned lawyer appearing on behalf of the accused person that there is no evidence on record showing that the accused was previously convicted by the Court of Law and as such he deserves to be punished leniently. On the other hand, the learned Public Prosecutor has submitted that the accused needs to be punished exemplary. It is found that the accused at the time of occurrence was a married person having a child age of 5 years. It is evident that the accused made flood with the victim concealing the fact that he was a married person and father of child having age of 5 years. It is observed that the child becomes easy victim of the some grown persons. Considering all aspects I

am of the opinion that the accused committed the alleged offences with cool brain.

- 25. The Division Bench of The Hon'ble Apex Court while dealing with sexual assault caused upon a child in the case of Nipun Saxena v. Union of India reported in " (2019) 2 SCC 703" has observed thus: "30. A minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracisation and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Efforts are made to hush up the crime. It is now recognised that a child needs extra protection. India is a signatory to the United Nations Convention on the Rights of Child, 1989 and Parliament thought it fit to enact Pocso in the year 2012, which specifically deals with sexual offences against all children. The Act is gender neutral and whatever we say in this part will apply to all children."
- 26. Taking all aspects into consideration I feel hesitation to extend any leniency in sentencing the accused person. Hence I do hereby order the accused Sri Jailsing Baglary to undergo RI of 6 (Six) months for the section 363 of the IPC and RI of 8 (Eight) years and to pay fine of Rs. 1000/- i/d SI of 2 (Two) months for the Section 4 of the POCSO Act. Both sentences will run concurrently. Set off earlier detention period. Let certified copies of the Judgment and order be furnished to the accused person at free of cost. Also send a copy of Judgment to the learned District Magistrate, Karbi Anglong, Diphu.

- 27. No order has been passed in regards compensation as laid down under victim compensation under section 357 A of the CrPC.
- 28. Accordingly this case is disposed of on contest.
- 29. Given under my hand and seal of the Court on this 07th August, 2019 at Diphu, Karbi Anglong.

Dictated and Corrected by me.

(Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi Anglong (Md. A.U.Ahmed, AJS) Special Judge Diphu, Karbi Anglong

APPENDIX

Prosecution Witnesses:

- PW1- Shri Bishnu Daimary
- PW2- Shri Kumud Basumatary
- PW3- Shri Krishna Daimary
- PW4- Shri Milan Basumatary
- PW5- Dr. Karik Kropi
- PW6- Shri Pratima Daimary
- PW7- Miss Kabita Daimary
- PW8- Shri J. S. Khubung

Defence Witnesses: Nil

Prosecution Exhibited:

- Ext.1- Ejahar
- Ext.2- Medical Report
- Ext.3- Statement of the Victim
- Ext.4- Sketch map of the PO
- Ext.5- Seizure List
- Ext.6- Charge Sheet

Defence Exhibited: Nil

Special Judge Diphu, Karbi Anglong, Assam