IN THE COURT OF THE SPECIAL JUDGE AT JORHAT

Present:- Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS Special Judge, Jorhat

JUDGMENT IN SPECIAL CASE NO. 72 OF 2016 (G.R. Case No. 2338 of 2016) Teok P.S. Case No. 343 of 2016

Committing Magistrate:-

Smt. Rani Boro, Chief Judicial Magistrate, Jorhat District

State of Assam

-Versus-

Sri Krishna Bharali, Son of Late Sarupona Bharali, Resident of Bonai Baraghar Bhakat Gaon, P.S. Teok, District-Jorhat.

.... Accused

APPEARANCES:

For the State : Sri Muhidhar Dutta, Learned Special P.P.,

Jorhat.

For the Accused: Sri Ashok Ranjan Bora & Sri Gautam Saikia,

Learned Defence Counsel, Jorhat

CHARGE FRAMED UNDER SECTIONS 366 [A] OF INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 10-11-2016

Date of prosecution evidence: 23-11-2016; 06-01-2017; 23-03-

2017;

16-06-2017; 07-11-2017; 06-

12-2017

& 02-01-2018

Statement of Accused

Recorded on : 26-02-2018

Date of Argument : 15-06-2018 & 23-07-2018

Date of Judgment : 26-07-2018

J U D G M E N T

1). The prosecution story, in brief, is that **Teok P.S. Case No. 343/2016 under Section 366 [A] of IPC** was registered on the basis of a F.I.R. lodged by Smt. Archana Hazarika, mother of the victim girl **[hereinafter to be referred as [X]**.

In the aforesaid **F.I.R.** dated 11/08/2016 **[Exhibit-2]**, the informant Smt. Archana Hazarika [PW-2] who is the mother of the victim girl [X] alleged, *inter-alia*, that on 10/08/2016 at about 12.30 A.M. morning while her 13 [thirteen] year old daughter was sleeping inside the house, she went missing from the house. The family members of the informant searched for the victim but she was found untraceable. It is further alleged by the informant that at about 8.00 P.M. she came to know that accused had kidnapped her minor daughter.

On receipt of the aforesaid F.I.R. by the then Officer-incharge, Teok P.S., the same was registered as **Teok P.S. Case No. 343/2016 under Section 366 [A] of IPC**.

During the course of investigation, the victim girl was recovered from the possession of accused. The victim was sent for her medico-legal examination as well as to the court for recording her statement under Section 164 of Cr.P.C. Police, on completion of investigation, filed charge-sheet in the case against the above named accused Krishna Bharali u/S. 366 [A] of IPC vide Charge-sheet No. 196/2016 dated 31/08/2016.

- 2). The then learned Chief Judicial Magistrate, District-Jorhat after furnishing copies of the relevant documents to the accused u/S. 207 of Cr.P.C., committed the case to this Court for trial.
- **3).** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of

the accused and the prosecution in this behalf, I found ground for presuming that the accused has committed offences under Section 366 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012. Accordingly, charges were framed, read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4). During the course of trial, **13 [thirteen]** witnesses including the victim, her parent, Medical Officer and the I.O. were examined on behalf of the prosecution to prove the charge u/S. 366 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. The accused has taken the following pleas:

- He did not take the victim to the house of Sri Dadu Bora, as alleged by the victim during her evidence;
- ii. He did not take the victim in red colour vehicle, as alleged by prosecution witnesses during course of evidence;
- iii. That he did not visit the houses of Pranjal Borah [PW-7] and Anjan Borah [PW-8] as deposed by them;
- iv. That at the time of incident he met with an accident and was having treatment at his residence.
- v. The accused pleaded innocence.
- I have heard Sri Muhidhar Dutta, learned Special Public Prosecutor for the State as well as Sri Ashok Ranjan Bora being assisted by Sri Gautam Saikia, learned Defence Counsel for the accused.
- **6).** Now the points for determination before this Court are as follows:-
 - 1) Whether on or about 10/08/2016 at about 12.30 A.M. at Bonai Bareghar under Teok P.S., the accused namedabove induced the victim girl to go with him or to do any act, or acts with the intent that she may be or knowing that it is likely that she will be forced [or seduced] to

illicit intercourse with another person and thereby committed an offence punishable under Section 366 [A] of IPC?

2) Whether on the date of occurrence the accused named above committed penetrative sexual assault upon the victim girl and thereby committed an offence punishable under Section 4 of The Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF:

7). First of all, let us see what the relevant provisions of law states to which accused has been charged in this case.

Section-366 [A] - Procuration of minor girl-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Section-4 - 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.

8). To decide the above points and sections of law, let us examine, analyze and appreciate the evidence of the witnesses along with the relevant documents.

[PW-1] is the victim of the instant case. This witness during her testimony divulged that she knows accused from before as he is cousin brother of her mother. It is further version of the victim that on the date of incident she was sleeping alongwith her mother. At about 10.00 P.M. night she was having conversation with her father

who used to stay at Gujarat for his working purpose. It is further stated by the victim that she received message on her mobile from accused's side, in which, the accused asked her to come out of the house. The accused also threatened her that if she does not come out of her house then he [accused] will kill her parent. Out of fear, she came out of the house towards the road. At that time accused came near her and then gave her some medicine on her nose, for which, she became senseless. Further version of the victim is that the accused then took her to the house of one villager namely Sri Dadu Borah where the accused committed rape upon her. On the next day when she regained sense, the accused took her to his house in a Maruti car. Further version of the victim is that the accused was a married person prior to the date of incident. Her mother lodged ejahar before police. She gave statement before the learned Magistrate on being produced by police vide Exhibit-1 wherein Exhibit-1 [1] to Exhibit-1 [4] are her relevant signatures.

During cross-examination, she stated that after she came out of the house she does not know anything as she became unconscious after the accused put some medicine on her nose. She admitted that she did not state before police that accused gave her message over her mobile phone. She denied all the defence suggestions put to her during cross-examination, more particularly, that due to previous enmity with the accused her mother with her help had lodged false case against the accused.

Hence, the evidence of the victim [X] that she was kidnapped by the accused, taken to the house of one Dadu Borah and thereafter indulged in sexual relationship with the victim in the house of aforesaid Dadu Borah remained unshaked.

9). Smt. Archana Hazarika [PW-2] who is the mother of victim-cum-informant of the case, in her evidence, stated that on the date of incident her daughter [PW-1] had telephonic conversation with her father, who stays at Gujarat for his working purpose. She went to the bathroom thrice as she was having menstrual period. At about

12.00 P.M. night when she woke up from bed she did not find her daughter. Thereafter, she searched for her but could not find her whereabout. On the next day she lodged ejahar before police vide Exhibit-2 wherein Exhibit-2 [1] is her signature. It is her further version that police recovered her daughter from the house of accused. Her daughter was produced before a doctor for medico legal check-up and thereafter before the learned Magistrate who recorded statement of her daughter under Section 164 Cr.P.C. Further version of this witness is to the effect that police seized the original birth certificate of her daughter vide seizure-list [Exhibit-3] wherein Exhibit-3 [1] is her relevant signature. She also exhibited the birth certificate of her daughter as Exhibit-4 which was returned back to her by police.

During cross-examination, she stated that she came to know that her daughter [PW-1] was recovered by police from the house of accused.

10). PW-3 is **Smt. Sumitra Bharali** who is the sister-in-law of informant Smt. Archana Hazarika [PW-2] divulged during her testimony that she was reported by the informant [PW-2] regarding missing of her daughter on the previous night. They searched for the victim but could not find her whereabout. It is her further version that the accused took victim back to his house in a red colour vehicle.

This witness during cross-examination denied that she did not state before police that accused took the victim in a red coloured vehicle. Further, it is stated by this witness that accused as well as victim are maternal uncle and niece respectively.

11). The evidence of **Sri Rajen Bharali** [**PW-4**] who is the uncle of victim is to the effect that on the next day of incident the mother of victim came to his house and informed him that her daughter was missing from the house. All of them searched for the victim but she was found untraceable. This witness further stated that they came to know that the accused had taken the victim to his house.

During cross-examination, he stated that he did not witness the incident.

12). Smt. Kabita Bharali [PW-5] who is neighbour of victim deposed that on the next day of incident the victim telephoned her that the accused had taken her to his house.

This witness during cross-examination admitted that she did not state before police that victim was recovered from the possession of accused.

But the evidence tendered by this witness that victim telephoned her that accused had taken her to his house remained unshaked during cross-examination by defence side as defence did not put any question on this aspect.

13). Sri Rajani Sarmah [PW-6] who is another neighbour of victim deposed that he was present when police seized the birth certificate of the victim from her mother Smt. Archana Hazarika [PW-2] vide Exhibit-3 wherein Exhibit-3 [2] is his signature.

During cross-examination, he stated that he signed in the seizure-list as per direction of police and police did not showed him anything what they have seized vide Exhibit-3.

14). Sri Pranjal Borah [PW-7] & Sri Anjan Borah [PW-8] who are the brothers of Dadu Bora stated that on the date of incident the accused came to their house alongwith one girl and stayed for about 10/15 minutes. Thereafter, both of them sent them [accused as well as victim] back. It is further stated by this witness that the house of the victim is just adjacent to the house of accused.

The evidence of Sri Pranjal Borah [PW-7] further reveals that accused told them that he had brought one girl with him and then they sent them back.

Defence side declined to cross-examine both these two witnesses. Hence, their evidence to the effect that accused told them

that he had brought one girl with him remained unshaked during crossexamination.

15). Evidence of **Smt. Swarnali Dutta Bharali [PW-9]** who is wife of accused Sri Krishna Bharali and **Smt. Subarna Bharali [PW-10]** who is mother of accused are of no help to the prosecution as they do not know anything regarding the incident.

Defence side declined to cross-examine these two witnesses.

Sri Debojit Bharali [PW-11] who is the brother of accused Krishna Bharali stated during his evidence that at the time of incident police came and brought both the victim as well as accused. Later on, he came to know that police had taken the accused to the police station as he [accused] had brought the victim with him.

During cross-examination, he stated that he did not ask his brother as well as victim about the incident. Hence, his evidence to the effect that police brought both the victim as well as accused and later on he came to know that accused had brought the victim remained unshaked during cross-examination as no question was put to this witness on these material particulars by the defence side.

17). The evidence of **Dr. Amrita Nath [PW-12]** is to the effect that on 12/08/2016 she examined the victim on police requisition. It is stated by the doctor that at the time of examination of the victim she found the following:

Marks of identification

- (1) Mole over right forehead, 5 cm middle and 2 cm above eyebrow.
- (2) Scar mark just above left side of upper lip.

Physical Examination

Height: 155 cm Weight:- 39 kg

Chest girth:- 73 cm Abdominal girth:- 61 cm

Hairs:- Auxiliary, Scalp & Pubic- 29 cm, black in colour.

Breast & Nipple:- Well developed.

Teeth: 28 numbers.

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MENSTRUAL HISTORY

Age at menarche - One year back from the date of examination.

Cycle - Regular

Date of LMP -

GENITAL EXAMINATION

Genital organs:- Healthy.

Perineum:- Healthy.

Vulva:- Healthy.

Hymen:- Ruptured.

Vagina:- No evidence of any injury.

Cervix:- Not palpable.

Uterus:- Not palpable.

Evidence of veneral disease:- Not detected.

INJURIES ON BODY:- Not detected at the time of examination.

Mental condition at the time of examination: Stable.

Radiological report:-

- 1]. Epiphysis of proximal end of humerus has not fused.
- 2]. Epiphysis of distal end of humerus has fused.
- 3]. Epiphysis of distal end of radius and ulna have not fused.
- 4]. Epiphysis of bilateral iliac crest have not fused.
- 5]. Epiphysis of bilateral ischial tuberosity have not fused.
- 6]. USG-W/A Normal.

As per opinion of doctor, the age of victim is above 14 years and below 16 years; evidence of recent sexual intercourse is not detected on her person; evidence of injury or violence not detected on her person and she was not pregnant as per clinical/radiological report. She exhibited her report as Exhibit-5 and her signatures thereon as Exhibit-5 [1] to Exhibit-5 [3].

Defence side declined to cross-examine this witness.

18). The evidence of **Sri Atul Sarmah [PW-7]** who is the I.O. of the case is to the effect that on 11/08/2016 he was working as Attached Officer at Teok P.S. On that day the then Officer-in-charge, Teok P.S. received ejahar from the informant which was registered as

Teok P.S. Case No. 343/2016 under Section 366-A IPC. Thereafter, he was entrusted with the charge of investigation.

During investigation, he examined the informant at the police station itself, visited the place of occurrence, examined witnesses who were acquainted with the fact & circumstance of the case. He drew Sketch Map of the place of occurrence with index vide Exhibit-6 wherein Exhibit-6 [1] is his signature. The I.O. further stated that he recovered the victim from the house of accused located at Bareghar Bhokot Gaon. Accordingly, he took both of them to the O.P. and recorded statement of the victim. Victim was sent before a doctor for medico legal check-up. Thereafter, she was produced before the learned Magistrate who recorded statement of the victim under Section 164 Cr.P.C. Accused was arrested in connection with the case on 11/08/2018. It is further version of the I.O. that on completion of investigation, he submitted charge-sheet against the accused vide C.S. No. 196/2016. He exhibited the charge-sheet as Exhibit-7 wherein Exhibit-7 [1] is his signature.

During cross-examination by defence, he categorically stated that witness Smt. Sushmita Bharali [PW-3] stated before him under Section 161 Cr.P.C. regarding the time of incident but she did not state that victim was taken in red colour vehicle. He denied defence suggestion that he did not record statement of witnesses residing near the house of victim as well as accused.

- 19). Sri Ashok Ranjan Bora, learned counsel for accused has strenuously submitted that the victim at the time of incident was above 18 years and considering the fact and circumstance of the case, the victim was a consenting party. Furthermore, the prosecution has failed to prove the charges, brought against the accused, beyond all reasonable doubt and as such, the accused is liable to be acquitted in the instant case.
- **20).** Controverting the said argument, advanced by the learned counsel for the accused, Sri Muhidhar Dutta, learned Special

Judge, Jorhat, has submitted that the evidence, given by the victim herself, her mother [PW-2], near relatives [PW-3, PW-4 & PW-5] and independent witnesses [PW-7] & PW-8] clearly indicates that the victim, at the time of occurrence was only fourteen years and as such, the accused is liable to be convicted under Section 366-A IPC as well as under Section 4 of the POCSO Act. 2012.

21). Having heard the learned counsel, appearing for both the parties, I have carefully perused the evidence on record, more particularly, the statement of the victim [PW-1], who is the star witness of the instant case, that on the date of incident she was sleeping alongwith her mother. At about 10.00 P.M. night she was having conversation with her father who used to stay at Gujarat for his working purpose. It is further stated by the victim that she received message on her mobile from accused's side, in which, the accused asked her to come out of the house. The accused also threatened her that if she does not come out of her house then he [accused] will kill her parent. Out of fear, she came out of the house towards the road. At that time accused came near her and then gave her some medicine on her nose, for which, she became senseless. Further version of the victim is that the accused then took her to the house of Sri Dadu Borah where the accused committed rape upon her. On the next day when she regained sense, the accused took her to his house in a Maruti car. Further version of the victim is that the accused was a married person prior to the date of incident. Her mother lodged ejahar before police. She gave statement before the learned Magistrate on being produced by police vide Exhibit-1 wherein Exhibit-1 [1] to Exhibit-1 [4] are her relevant signatures.

During cross-examination, she stated that after she came out of the house she does not know anything as she became unconscious after the accused put some medicine on her nose. She admitted that she did not state before police that accused gave her message over her mobile phone. She denied all the defence suggestions put to her during cross-examination, more particularly, that due to previous

enmity with the accused her mother with her help had lodged false case against the accused.

- On perusal of the evidence of record it is seen that mother of the victim [PW-2] has corroborated the version of her daughter, i.e., the victim [PW-1] in all material particulars which has been supported by the evidence of Smt. Sumitra Bharali [PW-3] and Sri Rajen Bharali [PW-4] who are respectively aunt and uncle of victim.
- **23).** Further version of victim is well corroborated by Smt. Kabita Bharali [PW-5] who is relative of victim. This witness during her testimony divulged that on the next day of incident the victim telephoned her that the accused had taken her to his house.

This witness during cross-examination admitted that she did not state before police that victim was recovered from the possession of accused.

But the evidence tendered by this witness that victim telephoned her that accused had taken her to his house remained unshaked during cross-examination by defence side as defence did not put any question on this aspect.

24). Evidence of independent witnesses namely Sri Pranjal Borah [PW-7] & Sri Anjan Borah [PW-8] who are the brothers of Dadu Bora stated that on the date of incident the accused came to their house alongwith one girl and stayed for about 10/15 minutes. Thereafter, both of them sent them [accused as well as victim] back. It is further stated by this witness that the house of the victim is just adjacent to the house of accused.

The evidence of Sri Pranjal Borah [PW-7] further reveals that accused told them that he had brought one girl with him and then they sent them back.

Defence side declined to cross-examine both these two witnesses. Hence, their evidence to the effect that accused told them

that he had brought one girl with him remained unshaked during crossexamination.

25). Sri Debojit Bharali [PW-11] who is the own brother of accused Krishna Bharali deposed that at the time of incident police came and brought both the victim as well as accused. Later on, he came to know that police had taken the accused to the police station as he [accused] had brought the victim with him.

During cross-examination, he stated that he did not ask his brother as well as victim about the incident. Hence, his evidence to the effect that police recovered and brought both the victim as well as accused and later on he came to know that accused had brought the victim remained unshaked during cross-examination as no question was put to this witness on these material particulars.

- **26).** The accused during his statement under Section 313 Cr.P.C. remained completely silent as to the version of the victim [PW-1]. He disclosed that he had been falsely implicated in the instant case by the victim as well as informant. Further, the accused had taken the pleas which are as follows:
 - He did not take the victim to the house of Sri Dadu Bora, as alleged by the victim during her evidence;
 - ii. He did not take the victim in red colour vehicle, as alleged by prosecution witnesses during course of evidence;
- iii. That he did not visit the houses of Pranjal Borah [PW-7] and Anjan Borah [PW-8] as deposed by them;
- iv. That at the time of incident he met with an accident and was having treatment at his residence.

The pleas taken by the accused is not going to affect the prosecution case as defence side has not disputed the fact that accused took the victim to the house of Dadu Borah which remained unshaked through the evidence of Sri Pranjal Borah [PW-7] & Sri Anjan Borah [PW-8] who are the brother of aforesaid Dadu Borah. It is further stated by the victim during cross-examination that accused committed bad work with her in the house of Dadu Bora.

- The accused in his statement under Section 313 Cr.P.C. has taken plea that at the time of incident he met with an accident and was having treatment at his residence. But from a close perusal of case diary which is available with the case record it is seen that when accused was arrested by police in connection with the case on 11/08/2016 at 10.00 P.M., the accused was examined by Dr. Uma Subba, Medical & Health Officer No-1, Teok First Referral Unit, Jorhat, who had opined that "no abnormality detected". The doctor or nurse who gave treatment to the accused at the time of incident have not been examined by the accused to substantiate his above plea. Hence, in view of the above, the plea taken by the accused does not hold any water to strengthen his case.
- 28). In the present case, birth certificate of the victim was seized by the I.O. [PW-13] as is revealed from the evidence tendered by the I.O. The prosecution has also relied upon Exhibit-5, the report of doctor Amrita Nath [PW-12], according to which, the age of the victim was above fourteen years but below sixteen years at the relevant time. Moreover, the victim in her statement under Section 164 Cr.P.C. also stated her age to be 13 [thirteen] years, which she made before learned Magistrate on 18/08/2016, after her recovery from the company of accused. Keeping the consistency of the victim while deposing before this court as PW-1 on 23/11/2016 also stated her age as 13 [thirteen] years. So, there is consistency in the evidence of witnesses including victim that she was aged 13/14 [thirteen/fourteen] years at the time of incident and she was a child. There is nothing on record to create a doubt about the bone/medical age of the victim child as determined by the Medical Officer as she was not cross-examined by the defence on this aspect. Moreover, the date of birth of victim as revealed from the Exhibit-4 is 12/12/2003, i.e., she was about 14 [fourteen] years at the time of incident could not be shaked by defence through the evidence of doctor as well as other independent witnesses of the instant case.

Hence, the victim is found to be below 18 [eighteen] years of age at the time of incident.

29). It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of Datttu Ramrao Sakhare-versus-State of Maharashtra, reported in [1997] 5 SCC 341, the Hon'ble Apex Court has held that - "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

- 30). In another case, i.e., Pancchi -versus- State of Uttar Pradesh, AIR 1998 SC 2726, the Hon'ble Apex Court has held that "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it is found reliable, The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this child witness is easy prey to tutoring".
- **31).** The ratio as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility

that it attached to the statement of any other witness if the testimony is consistent.

In the present case, the victim has been consistent on the material particulars with regard to the incident which is supported by her mother [PW-2], her aunt and uncle [PW-3 & PW-4] together with independent witnesses [PW-5], PW-7, PW-8 and more specifically the own brother of accused [PW-11].

32). In the case of **Parshotam Lal-versus-State of Punjab**, **(2010) 1 SCC 65**, it has been held by Hon'ble Apex Court in its judgment as follows

"That if the girl kidnapped is below 18 years, consent is immaterial for the offence to be made out. It is just more than a technical offence".

- 33). On appreciation of the evidence on record as well as other facts and circumstances of the case, it is found that there is allegation of kidnapping of the victim girl by the accused. The mother of the victim-cum-informant of the case [PW-2] divulged that on the date of incident her daughter was sleeping in the house and thereafter she went on missing from the house. Similarly, the victim girl has narrated the facts in detail. Victim in her evidence-in-chief clearly stated that accused gave message over her mobile phone and threatened her with dire consequence that if she does not come out of her house then her parent will be killed by the accused, which clearly amounts to enticement of a minor under 18 [eighteen] years of age.
- **34).** From the facts and evidence of witnesses it appears that prosecution side has been able to prove the case against the accused under Section 363 of IPC instead of case under Section 366-A of IPC.
- **35).** The essential ingredients of the offence under Section 361 are as follows:

- 1) The accused took or enticed away a minor or a person of unsound mind;
- 2) Such minor, if male, must be under 10 years of age and, if female, under 18 years of age;
- 3) The act must be one of taking or enticing out of the keeping of the lawful guardian of such minor or person of unsound mind;
- 4) The act of taking or enticing away must be done without consent of the lawful guardian.
- 36). In the case of *State-versus-Rajaram*, *AIR* 1973 SC 819, it has been held by Hon'ble Apex Court that "the object of Section 361 IPC is to protect the minor children from being seduced for illicit intercourse and also to protect the rights and privileges of guardians having lawful custody of their wards".

In another case, i.e., *Parkash-versus-State, AIR 2004 SC 227*, it has been held by Hon'ble Supreme Court that "the gravamen of the offence under Section 361 lies in the taking or enticing of a minor under the ages specified in the section, out of the keeping of the lawful guardian without the consent of such guardian".

The Hon'ble Apex Court in the case of **State of Haryana- versus-Rajaram**, **AIR 1973 SC 819**, has held that "kidnapping within the meaning of this section is affected not only by taking or enticing away a person but also by alluring such person to go away from the protection of the guardian".

37). In view of the above discussion, I am of the considered view that prosecution has considerably been able to prove the case of kidnapping against accused Sri Krishna Bharali which is punishable under Section 363 of IPC. Hence the accused is **convicted** there under.

It may be mentioned herein that accused was charged under Section 366-A of IPC which is a graver charge than under Sections 361/363 of IPC. Hence, in my considered opinion, the

conviction of accused under Section 363 IPC is not going to prejudice the accused in any way, in defending himself, in this case.

However, on scrutinizing the evidence on record it is seen that no case has been made out against accused Sri Krishna Bharali under Section 4 of The Protection of Children From Sexual Offences Act, 2012, as victim only stated that accused once indulge in sexual intercourse with her. Moreover, Medical Officer [PW-12] also did not find any evidence of recent sexual intercourse on the person of victim or evidence of injury or violence mark on her person as per medical examination report [Exhibit-5]. Victim did not specifically narrate as to the manner in which rape was committed on her person and there is no evidence at all whether the rape, she means, was in-fact, a penetrating sexual intercourse or not. Prosecution has not been able to make out a case against the accused Sri Krishna Bharali under the aforesaid section of law beyond reasonable doubt, for which, I am of the opinion that the accused is entitled to acquittal under benefit of doubt which I accordingly do more so when victim has stated nothing in her statement before police under Section 161 Cr.P.C. that accused had any physical relation with her after kidnapping her.

- **38).** Accused Sri Krishna Bharali is heard on the point of sentence. The accused has submitted that he resides with his mother, his wife and minor son and there is none to look after them in his absence. He further submitted that if he is sent to jail hajot, then his family will be destroyed. Hence, the accused prayed for leniency. There is no other criminal case pending against me.
- **39).** I have heard Sri Ashok Ranjan Bora, learned Defence Counsel for the accused as well as Sri Muhidhar Dutta, learned Special Public Prosecutor, Jorhat. It is true that victim knew that accused is a married person prior to the incident and accused took the victim with him by enticing her.

Hence, considering all aspects, accused **Sri Krishna Bharali** is sentenced to undergo **RIGOROUS IMPRISONMENT** for **04**

[four] years and also to pay a fine of Rs. 20,000/- [Rupees Twenty Thousand], in-default of payment of fine, to suffer RIGOROUS IMPRISONMENT for 06 [six] months under Section 363 of IPC.

The period of detention already undergone by the accused during investigation and trial shall be set off from the period of imprisonment imposed on him under Section 428 Cr.P.C.

The accused is acquitted from the charge under Section 4 of The Protection of Children from Sexual Offences Act, 2012, as said, hereinbefore, under benefit of doubt.

Accused Sri Krishna Bharali is on bail. His bail bond stands cancelled. The accused is committed to prison to serve out the sentence imposed upon him.

- **40).** Free copy of the judgment be furnished to the accused immediately.
- **41).** Given under my hand and seal of this Court on this **26th** day of **July 2018**.

Special Judge, Jorhat.

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ANNEXURES:-

PROSECUTION WITNESSES:-

PW-1	Victim.
PW-2	Smt. Archana Hazarika, mother of victim-
	cum-informant of the case.
PW-3	Smt. Sumitra Bharali, aunt of victim.
PW-4	Sri Rajen Bharali, uncle of victim.
PW-5	Smt. Kabita Bharali, another aunt of victim.
PW-6	Sri Rajani Sarmah, dependent.
PW-7	Sri Pranjal Borah, pandal worker.
PW-8	Sri Anjan Borah, mason.
PW-9	Smt. Swarnali Dutta Bharali, wife of accused.
PW-10	Smt. Subarna Bharali, mother of accused.
PW-11	Sri Debojit Bharali, brother of accused.
PW-12	Dr. Amrita Nath who examined the victim.
PW-13	Sri Atul Sarmah, I.O. of the case.

COURT WITNESS:- NIL

EXHIBITS FOR THE PROSECUTION:-

Exhibit-1	Statement of victim recorded by the
	Magistrate under Section 164 Cr.P.C.
Exhibit-2	Ejahar
Exhibit-3	Seizure-list
Exhibit-4	Photocopy of birth certificate of victim.
Exhibit-5	Medico legal report of victim
Exhibit-6	Sketch Map of the site of occurrence with
	index
Exhibit-7	Charge-sheet

DEFENCE WITNESSES:- NIL

Special Judge, Jorhat.

Typed & transcribed by:

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)