CAUSE TITLE POCSO Case No. 11/14

Informant: Sri Pradip Orang,

S/o- Late Sakhi Orang, R/o- Tipling Bahdhari, PS- Naharkatia, District- Dibrugarh.

Accused: Sri Kartik Murari,

S/o- Sri Ram Chandra Murari, R/o- Gethupather Dangpara,

PS- Naharkatia, District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

For the Defence: AN Hazarika, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 11/14 G.R. Case No. 1100/14

> > State of Assam

-Vs-

Sri Kartik Murari

Charges under Sections 302/366/363 IPC, read with Section 4 of the POCSO Act.

Date of evidence on : 07-04-15, 08-06-15, 03-07-15, 05-08-15, 28-08-15,

29-06-16 & 16-02-17.

Date of argument : 13-06-17. Date of Judgment : 10-07-17.

JUDGMENT

- 1) The prosecution case stems from the FIR lodged by Sri Pradip Orang that on 30-04-14, at about 7:00 am, his son Akash Murah and his daughter X were returning from a shop. At that time, Kartik Murari (hereinafter the accused) took the victim X towards the oil rig and from then onwards, the victim was missing. She did not return home. On 01-05-14, after a frantic search, the victim's body was recovered from the Dihing River at about 1:30 pm. An ejahar was lodged by Sri Pradip Orang (herein after the complainant) with the police. The ejahar was registered as Naharkatia PS Case No. 48/14 under Section 302 of the Indian Penal Code (IPC in short) and SI GK Gogoi continued with the investigation.
- 2) The investigating officer (IO in short) went to the place of occurrence and made arrangements for inquest of the dead body of X and thereafter, forwarded the body for autopsy. He prepared a Sketch-Map and recorded the statements of the witnesses. On finding prima facie materials, he submitted Charge-Sheet under Section 302 IPC, read with Section 4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter the POCSO Act).
- 3) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 4 of the POCSO Act and Section 302

- IPC was read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 4) On a later date, charge under Sections 363/366 IPC was framed and read over and explained to the accused to which he pleaded not guilty.
- 5) To substantiate the stance, the prosecution adduced the evidence of eleven witnesses including the medical officer (MO in short) and the investigating officer. The defence cross-examined the witnesses in extenso, but did not tender any evidence in defence. After closure of the prosecution evidence, the accused was examined under Section 313 of the Code of Criminal Procedure (CrPC in short) and was confronted with all incriminating materials brought on record. He however denied the same. The prosecution also exhibited several documents to augment the evidence.
- 6) On the backdrop of the rival contentions proponed at the bar, the following points are apposite to be taken up for decision.

POINTS FOR DETERMINATION:

- 1. Whether on 30-04-14, at about 7:00 am, at the rig under Naharkatia Police Station, the accused committed penetrative sexual assault on the victim X and thereafter, committed murder by intentionally causing her death?
- 2. Whether the accused kidnapped the victim from lawful guardianship?
- 3. Whether the accused kidnapped or abducted the victim by inducing her to go with him to force her to illicit intercourse?

DECISION THEREON AND THE REASONS FOR THE DECISION:

- 7) To decide the case it its right perspective, it is necessary to advert to the evidence on record.
- 8) The complainant testified as PW-1 that the accused person is known to him. His daughter died on 01-05-14. He further stated that on 30-04-14, at about 10:00 am, his daughter X went to a shop at Gethupather Chariali along with her brother Akash Orang. While they were returning home, the accused called X and thereafter, Akash returned to his house. When he (PW-1) returned home in the evening, he learnt that his daughter X did not return from the shop. They frantically searched for his daughter, but could not find her. On the following day, at about 9:00 am, while they were searching for X,

one boy named Bablu Murari informed them that a body was floating on the river Dihing. The river is near their house and they went towards the river and saw the body of their daughter floating on the water by the side of the Dihing river. One of the villagers informed the Naharkatia Police regarding the incident. The police arrived at about 1:00 pm and hauled up the body of X from the water. He identified his daughter's body. Police held inquest in his presence. Ext. 1 is the Inquest-Report. The body was forwarded to Assam Medical College & Hospital, Dibrugarh for autopsy. On the following day, he lodged an ejahar with Naharkatia Police Station. The scribe of the ejahar is Sri Rupak Deb. He further testified that he had strong suspicion against the accused Kartik Murari of having killed his daughter as she had been taken by him while she was on her way back home. The accused offered her 'pop' while she was returning home with her brother.

- 9) In his cross-examination, he testified that the accused used to visit them frequently. The remaining part of his cross-examination will be discussed at the appropriate stage.
- 10) His wife Smti. Minu Orang testified as PW-2 that the incident took place on 30-04-14. On that day, at about 6:30 am, her daughter X and her son Akash went out together to the shop at Gethupather Chariali to purchase rice, while she went to her workplace. When she returned home at about 5:00 pm, her son Akash informed her that X was missing. Akash also informed her that when he was returning along with X, the accused Kartik took X with him assuring that he would bring her back after sometime, but X did not return home. Her son Akash asked her to go to Kartik Murari's house. Accordingly, she went to the accused person's house and asked him about her daughter. The accused replied that he did not see her daughter. Then she searched for her daughter at every possible place, but could not find her. On the next day, at about 2:00 pm, Bablu informed her that a body was floating in the Dihing river. Then she went to the river and found the body of her missing daughter. They informed the police about the incident. The police arrived and hauled up the body of her daughter. She noticed injuries on her daughter's mouth and chest. The police took her daughter's body to the police station. On the same day, the accused surrendered before the police and he was present in the police station when they reached the station. The accused confessed his involvement before the police in their presence and confessed that he killed X

- by piercing her neck with a bamboo stick.
- 11) Her cross-examination is regarding her omission of certain statements before the police.
- 12) When Aksah Orang was 10 years, he gave his evidence as PW-3. Oath was not administered after several queries by my learned predecessor. He was questioned about his name, age and so on so forth. His answers were found rational and his statement was recorded without administering oath. Akash Orang stated as PW-3 that he used to address the accused as uncle. On the day of the incident, at about 7:00 am, he along with his sister X were returning home, when they met Kartik and Kartik asked him to leave his sister with him and directed him to go home. He returned to his house leaving his sister behind with the accused. The accused took his sister along with him and thereafter, his sister never returned. When his sister did not return, he set out in search for her. He went to the nearby places searching for his sister and by the time his mother returned home at 4 pm, he informed his mother about the incident. Then he and his mother went to the accused person's house and asked him about X. The accused informed them that his sister was not with him and he did not meet his sister. On the next day, his sister's body was found in the Dihing river. His cross examination is regarding omission of certain statements before the police which will be discussed at the appropriate stage.
- 13) Smti. Ritamoni Gogoi testified as PW-4 that the accused is known to her, but the complainant is not known to her. The incident took place about a year back. On the following day after the incident, she heard from the villagers that the body of a minor girl was floating on the Dihing river. She also heard that the victim was raped and her body was flung into the river.
- 14) Sri Akash Jojo testified as PW-5 that the accused person is known to him. He testified that the victim X was his younger sister. On the day of the incident, at about 6 am, Akash and X were proceeding to the nearby shop followed by him. On their way to the shop, he gave a lift to Akash on his bicycle and X was walking behind them towards the shop. While returning from the shop, they met X near a culvert and on meeting her, they alighted from the bicycle and they all started wolking towards their house. On the way back to their house, they met Kattik near Jadu Khat. Kartik stopped them and called X. They left X behind with the accused and he along with Akash returned to

their house on the bicycle and he took Akash near his house and he proceeded towards his school. On the next day, he heard that X died on the said day. In the evening, police came to his house and asked him about the incident. In his cross examination, he testified that his name is Akash Jojo and he has no other name. He admitted in his cross examination that he stated before IO that he did not know how his sister died. He also denied the suggestion that he did not state before the IO that he met the accused at Jadukhat.

- 15) Smti. Junali Bhumij testified as PW-6 that X is her elder brother's daughter. The incident took place about a year back. On the next morning, Akash Orang came to house and informed her that his sister was murdered by the accused and her body was found on the river bank of Dihing river. She went to the place of occurrence and saw the dead body of the victim. She denied when confronted by the learned defence counsel that she did not state before the police that on the following day of the incident, Akash came to her house and informed that his sister was murdered by the accused and her body was found on the bank of the river Dihing.
- 16) Sri Dilip Dey testified as PW-7 that both the accused as well the deceased are known to him. The incident took place about a year back. On the day of the incident, when he was on duty, Rabi Day informed him that X's body was found and he was called to the police station. He went to the police station and met the accused. When the OC interrogated the accused in his and Rabi Dey's presence, the accused admitted that he sent the victim to fetch chana and both of them went to the nearby jungle and ate chana and thereafter he became desirous of having sexual intercourse with the victim, but when the victim tried to escape during the ordeal, he pushed her down into the water on the field and then she died and he fled from the place of occurrence.
- 17) In his cross examination, he testified that he could not remember the date and time when he went to the police station. He stated that besides him, Rabi Dey, the accused and the police personnel, there were no other people in the police station at that time. The accused was not inside the lock-up at that time, but he was inside a room. He could not remember the time when the accused confessed before them. At that time, he was a VDP secretary and he used to frequent the police station as secretary of the VDP. When confronted by the defence, he denied that he did not state before the police

- that the accused admitted before him and Rabi that he sent the victim to fetch chana and and thereafter both of them ate chana in the nearby jungle and he became desirous of having sexual intercourse and during the ordeal when the victim tried to escape, he pushed her down into the water in the field which caused her death and he escaped from the place.
- 18) Sri Rabi Dey testified as PW-8 that the accused and the informant are known to him. X was the informant's daughter who died in the year 2014. It was around 8:00 am when X's mother came to his residence and informed him that her daughter got drowned in the Dihing river. He immediately informed the police when the police came to their village and they accompanied the police to the place of occurrence. The victim's body was lifted out from the river in the presence of the police. The victim's younger brother informed the police that in the morning, he and his sister X went to the shop and met the accused in the shop and the accused sent him home and took the victim with him towards the riverside. Thereafter, the police brought the body to the police station. On the following day, the accused surrendered before the police. Soon after that, the OC of Naharkatia Police Station called him over phone to the police station. He went to the police station and the Officer-incharge asked him to query the accused about the incident. The accused confessed before him, the Officer-in-charge Utpal Bora and Dilip Dey that he had taken the victim to the riverside and attempted to commit rape on her and when the victim screamed, he caught the victim from the back and kicked her with his knee and as a result the victim died by the impact. He was cross examined in extenso by the defence. His cross examination will be discussed at the appropriate stage.
- 19) Sri Rupak Deb testified as PW-9 that Both the accused and the victim are known to him. The Victim X died in the year 2014. On the following day of the incident, the victim's father Pradeep Orang came to his shop which is situated near the Naharkatia Police Station and informed him that his daughter X was taken away by the accused while she was returning from the nearby shop towards her house and thereafter, the accused murdered her inside the jungle after committing rape and flung her body into the Dihing River. Pradip requested him to write an ejahar and accordingly he wrote the ejahar. Ext. 2 is the ejahar where Ext. 2(1) is his signature as scribe. After writing the ejahar, he took the thumb impression of Pradip Orang and after

lodgment of the ejahar, police recorded his statement.

- 20) In his cross examination, he stated that he is a petition writer and he writes FIRs of almost all the cases which are lodged in the Naharkatia Police Station. He did not know the date of the incident or the date when he wrote the ejahar for Pradip Orang. He admitted that he did not make a note in the ejahar that he read over and explained the contents to Pradip Orang. It is also not mentioned in the ejahar that he took down Pratip's thumb impression.
- 21) Dr. Subhajyoti Deka testified as PW-10 that on 02-05-14, he performed post mortem examination on the dead body of X in connection with this case and found the following:

Injuries:-

- Contusion of 8 cm x 6 cm over right chest above the nipple with underlined contusion and fracture of ribs 2, 3, 4, 5 & 6 in the mid clavicular line, reddish in colour;
- Contusion over the left chest 6 cm x 3 cm over the breast, underlined muscle contused, ribs fractured, 3, 4, 5 & 6 in mid clavicular line, reddish in colour;
- 3. One contusion over the left tempo parietal region of 6 cm x 3 cm size, reddish in colour.

On examination of the cranium and spinal canal: Scalp-Left temporal contusion and parietal contusion of 10 cm x 8 cm. Skull- Linear fissure fracture of 8 cm in length over tempo parietal region. Vertebrae- healthy. Spinal cord not dissected. Brain and membrane are congested, oedematous with diffused bilateral subdural haemorrhage and sub arachnoid haemorrhage.

On examination of the thorax: Walls, ribs, cartilagescontused and as described. Pleurae- lacerated. Both cavity filled with liquid blood. Approximately 500 ml. larynx, trachea healthy. Both the lungs, pericardium and heart congested.

On examination of the abdomen: Walls are healthy. Peritoneum, pharynx, oesophagus, mouth are congested. Stomach and contents congested, filled with water and sand particles approximately 1 litre. Small intestine healthy, filled with food material and gases. Large intestine healthy, filled with faecal material and gases. Liver and kidney congested. Spleen healthy. Bladder is empty.

Organs of generation external and internal on examination: Vagina is lacerated posteriorly of 6 cm x 4 cm x 1 cm depth in 7 O' Clock position. Slide are examined (swab taken) from the vagina, perineum, thigh does not show presence of spermatozoa and gonococai. Injury is recent and reddish in colour.

- 22) The doctor opined that death was due to coma as a result of head injury as described. All the injuries were ante mortem and caused by blunt force impact and homicidal in nature. Evidence of forceful vaginal penetration is detected. Time since death is approximately 48-56 hours. He further testified that injury No. 3 was a fatal injury and was sufficient to cause death of a person in the ordinary course of nature.
- 23) In his cross examination, he testified that the body was at the early stage of decomposition, but it is not mentioned in the Post-mortem Report. He testified that he did not find any injury marks on the mouth and neck of the deceased. He admitted that he did not ascertain the age of the deceased. He admitted that he did not conduct any other examination except that of column 11 to ascertain rape as no such examination was either prescribed or required. He further testified that in this case, accidental vaginal rupture can be safely ruled out. The remaining part of his cross examination is not noteworthy.
- 24) The IO Sri Ghanakanta Gogoi testified as PW-11 that on 01-05-14, at about 1:35 am, the VDP secretary Sri Rabi Dey of Tipling Garden informed him over phone that the dead body of a minor girl was floating on the Buri Dihing River. The OC registered a GDE No. 5 dtd. 01-05-14 and endorsed him to investigate the case. He along with his staff proceeded to the place of occurrence along with Circle Officer. Inquest was held over the dead body which was identified by the father of the deceased Sri Pradip Orang. Ext. 4 is the Inquest Report and Ext. 4(1) is his signature. He recorded the statements of the witnesses. He also noticed injury marks on the face, neck and chest. After recording the statements of the witnesses, he set out in search of the

accused person and went to his house, but the accused person was not in his house. On the same day, at about 4 am, Sri Pradip Orang lodged an ejahar with the police which was registered as Naharkatia PS Case No. 48/14 under Section 302 IPC. He was entrusted with the investigation. Ext. 2 is the ejahar and Ext. 2(2) is the signature of the OC of Naharkatia Police Station with endorsement. He interrogated the complainant. In the evening, at about 7 am, the accused surrendered at the police station. He interrogated the accused and arrested him. On 02-05-14, the accused confessed his guilt in presence of three witnesses namely Robi Dey, Dilip Dey and Rupak Dey. HE recorded the statements of the witnesses. The dead body of the victim was forwarded for autopsy. The accused was also medically examined. He submitted a prayer before the court for recording confessional statement of the accused, but the accused did not confess his guilt before the Magistrate. On 30-05-14, he collected postmortem report of the deceased. On 31-05-14, he submitted the Charge-Sheet against the accused under Sections 302 IPC, r/w Section 4 of the POCSO Act. Ext. 5 is the Charge-Sheet and Ext. 5(1) is his signature. The cross examination of the IO will be discussed and the proper stage.

ANALYSIS OF EVIDENCE:

25) This case rests on the plank of circumstantial evidence. The circumstances against the accused in this case are the last seen theory and extra judicial confession. There are two boys named Akash who are witnesses to the last seen theory. One is Akash Orang and another is Akash Jojo. Both the witnesses are related to the victim. Akash Jojo appears to be the cousin, because he is the son of Lakhi Jojo whereas Sri Akash Orang is the son of the complainant Sri Pradip Orang. His is the star witness. He was with his sister when the accused took away his sister and he is the person who had last seen his sister with accused. Akash was only 10 years when his sister died. His evidence clearly depicts that on the day of the incident, at about 7 am, while he was returning with his sister, he met the accused on the way who demanded him to leave his sister behind with him and sent him away to his house. The accused took his sister with him while he (PW-3) returned home leaving his sister behind with the accused. When his sister did not return, he set out in search of his sister in all the nearby places and then he informed his mother who reached home at about 4:00 pm. His mother Smti. Minu Orang testified as PW-2 that when she returned home, Akash told her that X was missing and that the accused took away X with him. Both mother and son went to the accused person's house and confronted the accused about X. This had been testified by PW-2 & 3. The accused denied of having met X at all, even in the presence of PW-3. The accused lied on the face of PW-3. PW-1's evidence also clearly depicts that when he returned home in the evening, his daughter was missing. He was also informed that the accused sent back his son by retaining his daughter. Even after a frantic search, X could not be traced out and the information about a dead body floating in the Buri Dihing arrived in the morning. PW-1, 2 & 3 categorically stated that on the following day, after X's disappearance, the body of X was floating on the Burhi Dihing. PW-1 testified that Bablu Murari informed them that a body was floating on the Burhi Dihing. This person was not examined as a witness.

- 26) PW-1 & 2 further stated that when they found their daughter's body floating on the side of the Dihing River, one of the villagers informed the police, and the rest is history. The witnesses PW-4 & 6 have stated that the body of a minor girl, i.e., X was found on the Burhi Dihing and PW-6 further stated she heard that the accused killed the victim X.
- 27) Thus, it is as clear as crystal that Akash had last seen his sister X with the accused. This is one circumstance against the accused. The victim's brother Akash was confronted by the learned defence counsel that he did not state before IO that the accused ordered him to leave behind his sister with him and sent him home. This has been affirmed by the IO in his cross examination. PW-3 was also confronted that he did not state before the IO that his mother went to the accused person's house searching for the missing victim. This too was affirmed by the IO. On answer to the court, PW-3 has affirmed that when he left his sister with the accused, he saw the accused taking away his sister to a little distance. This last seen theory could not be impeached by the defence. PW-3 may have failed to admit before IO, because he was in a state of shock at the time when the body of his younger sister who was only 9 years was found floating on the river.
- 28) Moreover, PW-1 & 2 were not contradicted and confronted by the defence that Akash Orang told them that the accused demanded that he leave his sister behind with him. PW-1 & 2 were also not confronted and contradicted by the defence that after retaining his sister, the accused asked Akash Orang

to return home. Again PW-3, i.e., Akash Orang was not confronted by the learned defence counsel that he did not state before the IO that he did not inform his parents, PW-1 & 2 that the accused directed him to leave behind his sister with him and he should return home. The evidence of PW-1, 2 & 3 remained uncontradicted by the IO that the accused told Akash Orang to leave the victim with him (accused) and thereafter, after leaving the victim X with the accused, Akash was ordered by the accused to return home. This is the core of the case and this forms last seen theory.

- 29) The other eyewitness Akash Jojo who has claimed to have seen the victim with the accused for the last time, does not inspire confidence. Akiash Orang was silent regarding the presence of Akash Jojo at the time when he and his sister went to the shop at Gethupather to fetch rice and when they returned back from the shop. The parents of Akash Orang were silent regarding the presence of Akash Jojo with their children when the accused took custody of the victim. Akash Jojo was confronted by the learned defence counsel that he did not state before the IO about meeting the accused at Jadukhat when he was accompanying Akash Orang and X. This has been affirmed by the IO in his cross examination that the PW-5 Akash Jojo did not mention in his statement under section 161 CrPC that he met the accused at Jadukhat. It has to be borne in mind that except confronting the witness about meeting the accused at Jadukhat, the learned defence counsel ingeniously avoided to cross examine Akash Jojo on any other facts. He was not cross-examined about his omission to mention before the IO that the accused restraining the victim with him and directing her brother to go away. The other Akash was also not cross-examined that he failed to mention before the IO that he did not meet the accused while he was returning home along with his sister X. This implies that indeed the victim was last seen with accused by Akash Jojo and there is no doubt about it.
- 30) Culling out the evidence, it is held that PW-1 & 2 were not confronted regarding their omission to state before the IO that the accused held the victim back with him while he sent away Akash Orang to his house. The prosecution has therefore proved beyond reasonable doubt that the accused kidnapped the victim from wrongful guardianship. There is eye-witness regarding this incident. The accused had not discharged his burden u/S 106 of the Indian Evidence Act. He offered no explanation against the fact of

- having retained the victim.
- 31) It is germane to mention at this stage that the charge under Section 366/363 IPC was added and read over and explained to the accused to which the accused abjured his guilt and claimed innocence. Thereafter, on addition of charge as per Section 216 CrPC, the witnesses Akash Orang and Akash Jojo and Rabi Dey were again re-examined as per Section 311 CrPC.
- 32) Kidnapping the victim from lawful guardianship is described under Section 361 IPC which formulates that-

Kidnapping from lawful guardianship- Whoever takes or entices any minor under sixteen years of age if a male, or under 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.

- 33) In the instant case, it has been proved beyond reasonable doubt that the accused took away the minor victim out of keeping of lawful guardian without the consent of her guardian. It is germane to mention at this juncture that besides a few minor contradictions, the witnesses were not contradicted and confronted regarding their earlier statement under Section 161 CrPC before the IO.
- 34) In a case of kidnapping from the lawful guardianship, the mere removal from the custody of the guardianship is sufficient to constitute an offence. There must not only be taking or enticing, but it must be out of the custody of the lawful guardian. The motive or purpose is entirely out of question, but the evidence of intention is admissible in defence for exculpation of the crime.
- 35) The point required to be proved for kidnapping from lawful guardianship is that:
 - I. The person kidnapped was then a minor under 16 years of age, if a male, and under 18 years of age, if a female or that he was insane;
 - II. That such person was in the keeping of a lawful guardian;
 - III. That the accused took or enticed such person out of such keeping;
 - IV. that the accused took or enticed such person out of

such keeping;

- 36) In the case at hand, it has been proved beyond reasonable doubt that the victim was kidnapped from the lawful quardianship. Kidnapping from lawful quardianship, per se does not require exercise of force or enticement. Although, enticing the victim is one of the ingredient, the definition clearly formulates that whoever takes or entices and a minor under 16 years of age, if a male, or under 18 years of age, if a female...... Moreover, physical possession of the guardian is also not required to kidnap a minor. There is not even an iota of doubt that the victim X was a minor although no certificate was exhibited in this support. The evidence of Akash Jojo clearly depicts that X was younger than him. At the time when he deposed in the court, Akash Jojo was 15 years. Pradeep Orang as PW-1 categorically stated that his daughter was 9 years at the time when she died. Smti. Ritamoni Gogoi as PW-4 stated that the deceased victim was 6-7 years old at that time. The Post-mortem Report Ext. 3 contains the age of the victim girl noted down as 9 years. Inquest Report Ext. 1 also depicts that the age of the victim was 9 years. It is clear from the evidence that age of the victim was 9 years at the time of the alleged incident. Thus, it can be safely held that the prosecution could prove beyond reasonable doubt that the accused kidnapped the victim from the lawful quardianship. In this case, the last seen theory comes into play to the extent of kidnaping of the victim. The victim was last seen by her brother Akash Urang. The accused demanded Akash Urang to leave his sister with him and obeying the accused, Akash left his sister behind with the accused. This part of the evidence of Aakash Urang is supported by the evidence of PW-1, 2 & 5. PW-8 also stated that the victim was last seen with the accused and the victim's brother came to his house and informed him that X was held back by the accused. Thereafter, the victim disappeared and her body was found floating on the river. There is clinching evidence that the accused kidnapped the victim from lawful guardianship. It is also germane to mention at this juncture that Akash Jojo was not confronted by the defence regarding his statement that he saw the accused taking away the victim and the victim was last seen with accused. The last seen theory qua the kidnapping of the victim remains unimpeached.
- 37) Now, it has to be ascertained whether the prosecution could prove the remaining charges leveled against the accused. The remaining charges of

rape, abduction for the purpose of sexual exploitation and murder has to be proved on the basis of the extra judicial confession available in the evidence and the circumstantial evidence. Extra judicial confession is a part of circumstantial evidence, where circumstantial evidence is 'Genus' and extra judicial confession is the 'Specie'. The last seen theory vis a vis the place and time of occurrence is also one of the attendant circumstances in this case. The incident took place on 30-04-14 and the body was discovered on 01-05-14. PW-1 has mentioned the date and time of the incident and this corroborates the date and time of the incident mentioned in the FIR. The PW-2 also correctly mentioned the date and time of the incident. Akash Orang is a minor witness and he could mention only the time of the incident. Akash Jojo has also correctly mentioned the time of the incident and he is also a minor witness.

- 38) If we carefully scrutinize the evidence, it is evident that the accident took place on the morning of 30-04-14 at about 7 a.m. The victim was held back by the accused and Akash Orang was asked to return home. Thereafter, the victim went amiss. The victim's body was recovered on the next day, i.e., on 01-05-14 at about 1 p.m. Her body was recovered when it was noticed by the local residents floating on the Dihing river. Her family members who were frantically searching for her received the message from Bablu Murari that her body was floating on the Dihing river.
- 39) The learned counsel laid stress in his argument that the person Bablu Murari was not examined as a witness. I do not think this is a discrepancy in the evidence. There are other witnesses who have categorically stated that the victim's body was found floating in the Dihing river. PW-1, 2, 3, 4 & 6 testified that the victim's body was found floating on the Dihing river. The learned defence counsel relied on a decision of Honorable The Supreme Court in *Kanhaia Lal vs. State of Rajasthan* [(2014) 4 SCC 715] wherein it has been held that:

"The theory of last seen- the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly

when it is proved that there was cordial relationship between the accused and the deceased for a long time."

- 40) In the instant case, the time gap when the victim was last seen with the accused vis-a-vis the recovery of her body from the Dihing river is more than 12 hours. To fasten the guilt on the accused squarely on the last seen theory, the time gap has to be minimum. It has been consistently held by Honorable The Supreme Court that anything may happen in between, when the time gap is wide and the last seen theory comes into play only when the time gape is minimal. Apart from the last seen theory, this case is also supported by extra judicial confession.
- 41) Regarding extra judicial confession, the learned counsel for the accused emphatically submitted in his argument that the accused is alleged to have confessed in the police station in presence of stock witnesses. He has emphatically submitted that Dilip Dey, Rabi Dey and Rupak Orang frequents the police station. They are stock witnesses.
- 42) In my opinion, Dilip and Rabi are VDP members and Rupak Dey is a petition writer. It is true that the extra judicial confession in this case is not found reliable. The extra judicial confession is one of the circumstances against the accused. The two circumstances in the instant case, i.e., the last seen theory and extra judicial confession does not form a chain of circumstantial evidence. Apart from these two circumstances, there is no circumstance closely connected with the principal fact sought to infer from these circumstances. Moreover, PW-7 Dilip Dey and PW-8 Rabi Dey their cross examination that the accused confessed in their presence of having killed the victim after committing rape on her. But at that time, they were in the police station and the police personnel were present. They denied that they were inside the police lock up when the accused confessed his guilt. Considering their evidence, it is held that the confession of the accused in the police station in presence of PW-7 & 8 cannot be considered as extra judicial confession. It will be fatal to take this confession as one of the circumstances against the accused. In his statement under Section 313 CrPC, the accused retracted his confession. The extra judicial confession of the accused to PW-2 cannot be considered, because she is X's mother.
- 43) The testimony of PW-1 reveals that the accused lured his daughter by offering her a 'Pop' while she was returning homewards with her brother. This

enticement of the accused person is not backed by evidence of any other witness. The conduct of the accused person after the incident, has been projected by PW-2 & 3's evidence. When they went to the accused person's house and confronted him about the missing victim, the accused flatly refused that he had not seen the victim that too he lied in presence of Aakash Urang whom he ordered to return home leaving his sister behind with him. But this cannot be considered as one of the circumstances.

- 44) Regarding the injuries sustained by the victim, the defence counsel emphasized in his argument that all the witnesses described the injuries of the victim in a contradictory manner. Minu Orang testified that the accused confessed before her in presence of the police that he killed her daughter by piercing her neck with a bamboo stick. In my opinion, although this evidence is not reflected by the doctor's evidence, yet the evidence of the IO clearly depicts that when the victim was hauled up from the river, he noticed injury on her neck. Ext. 1, i.e., Inquest Report also depicts that the deceased had injuries on her neck. Moreover, the Post-mortem Report Ext. 3 clearly depicts that the dead body was swollen which indicates that the body was decomposed. This injury on the neck must have gone unnoticed by the doctor who performed the post mortem examination. Again PW-7 testified that the accused confessed before him that when he attempted to commit rape on the victim and when the victim tried to escape, he pushed her down into the water of the field and she died thereafter. This evidence regarding the injury of the victim cannot be discarded in toto. The post mortem report clearly reveals the broken ribs indicate that the victim's ribs must have broken when she was pushed into the water. The PW-2 also noticed injuries on her daughter's chest when her daughter's body was hauled up from the river.
- 45) The evidence of PW-8 also clearly depicts that the accused confessed in his presence that when the victim tried to raise alarm, he caught hold of her from her backside and kicked her and the victim died by the impact. This also cannot be discarded in toto. Although I have not relied on the extra judicial confession of the accused before PW-7 & 8, yet the victims injuries clearly depicts that she sustained grave injuries. The Post-mortem Report Ext. 3 clearly depicts that there was evidence of rape which has been testified by doctor as PW-10. There were contusion and fracture of ribs above the nipple, contusion and fracture of left chest over the breast and contusion of the left

- tempo parietal region were detected on autopsy by PW-10. It is unfortunate that the little girl was thrashed in such a brutal manner by the author of the crime.
- 46) Considering that the wide time gap when the victim was last seen with the accused vis a vis the recovery of her dead body, the accused cannot be held guilty of the offence of murder. It is true that there is no explanation by the accused as warranted u/S 106 of the Indian Evidence Act, 1872, but the accused denied the victim's presence with him on the previous day.
- 47) Culling out the evidence, it is held that there is a strong suspicion on the accused. There is extra judicial confession made by the accused in the presence of PW-7 & 8 and also the accused confessed before the victims mother of having pierced her neck with a stick, yet the manner in which the confession was made, cannot be taken into account as circumstances arising against accused. No inference can be drawn from such extra judicial confession to saddle the accused with the crime.
- 48) Recapitulating the entire evidence, it is held that the accused is not found guilty of offence under section 366/376/302 IPC. The prosecution failed to prove beyond a reasonable doubt that the accused took away or enticed the minor, out of the keeping of the lawful guardian, in order that the minor would be forced or seduced to illicit intercourse or knowing it to be likely that she would be so forced or seduced.
- 49) The chain of the circumstance snaps at the stage when the time gap widens between the time when the victim was last seen with the accused vis a vis the time when her body was discovered by the local public. Similarly, the prosecution failed to prove beyond reasonable doubt that the accused is the author of the crime who committed rape on the victim although there is glaring evidence that the victim was brutally raped and thereafter killed. Similarly, the prosecution also failed to prove beyond reasonable doubt that the accused committed murder by causing the death of the victim with the intention of causing such bodily injury as is likely to cause her death.
- 50) The victim was brutally killed. The perpetrator of the crime caused her murder by intentionally causing her death. Her injuries depict

relentless assault by the author of the crime. There are injuries of sexual assault. The *corpus delecti* is evident. The body of the victim depicts tell tale signs. Yet, the accused cannot be condemned, because the circumstances does not form a complete chain to fasten the guilt on the accused. The accused gets the benefit of doubt. He is also not held guilty of committing penetrative sexual assault on the victim. The accused is thereby acquitted from the charges u/S 302/366 IPC r/w Section 4 of the POCSO Act on benefit of foubt.

- 51) The accused has been held guilty of the offence under Section 363 IPC. There is not even an iota of doubt that the victim was raped brutally and also she was attacked brutally by the perpetrator of the crime. After she was raped, she was assaulted relentlessly in an inhuman manner. Thereafter, to conceal the evidence, the victim was flung into the river. The accused who had retained the victim with him and took her out of the keeping of her lawful guardian, had the responsibility to return the minor victim to the custody of her lawful guardian. His failure to return the victim to her guardian resulted in such a gruesome crime of diabolical nature. Whether the accused had a hand in this crime or not, is engulfed by doubts. I believe he deserves a sentence to full term of the imprisonment formulated under Section 363 IPC.
- 52) I have heard the accused on the question of sentence and he has prayed for leniency. He submitted that he is the father of two minor children and his confinement will make the life of his children and family members miserable as he is sole bread winner of the family.
- 53) I have considered the facts and circumstances of this heart rending case. I believe a sentence to RI (rigorous imprisonment) for 7 (seven) years will meet the ends of justice.

SENTENCE:

- 54) The accused Sri Kartik Murari is convicted under Section 363 IPC and is sentenced to undergo RI (rigorous imprisonment) for 7 (seven) years and pay a fine of Rs. 10,000/- (Rupees Ten Thousand) only and in default of payment of fine, to undergo RI for 2 (two) months. The period of detention already undergone by the accused during investigation, and trial is set off with his custodial sentence.
- 55) The victim's parents deserve compensation and so this case is referred to the

DLSA, Dibrugarh for assessment of the compensation under the Victim Compensation Scheme.

56) Furnish free copies of judgment to the accused and to the District Magistrate. Judgment is signed, sealed and delivered in the open Court on the 10^{th} day of July, 2017.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

APPENDIX

List of witnesses:

- 1. PW-1 Sri Pradip Orang;
- 2. PW-2 Smti. Minu Orang;
- 3. PW-3 Sri Akash Orang;
- 4. PW-4 Smti. Ritamoni Gogoi;
- 5. PW-5 Sri Akash Jojo;
- 6. PW-6 Smti. Junali Bhumij;
- 7. PW-7 Sri Dilip Dey;
- 8. PW-8 Sri Rabi Dey;
- 9. PW-9 Sri Rupak Deb;
- 10. PW-10 Dr. Subhajyoti Deka; and
- 11. PW-11 SI Ghanakanta Gogoi.

List of Exhibits:

- 1. Ext. 1 Inquest-Report;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Post-mortem Report;
- 4. Ext. 4 Sketch-Map; and
- 5. Ext. 5 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.