IN THE COURT OF ADDITIONAL SPECIAL JUDGE..... BIJNI.

Present: N.U. Ahmed,

Addl. Special Judge,

Bijni.

Special(P) case No.41(P)/2018 U/S 366/376 of the IPC, R/W section 6 of the POCSO Act.

THE STATE OF ASSAM

-VS -

Md. Aminul Islam..... Accused.

APPEARANCE:

Advocate for the prosecution

: Mr. P. Dev Ray, learned Addl. P.P.

Advocate for the defence

: Mr. H. R. Talukdar, learned Advocate.

Date of charge

: 11-12-18

Date of evidence

: 03.01.19, 1.08.19, 21.08.19, 26.09.19, 03.10.19

Date of Argument

: 04.11.19

Date of Judgment

: 16.11.19

JUDGMENT

The prosecution case, in brief, is that on 14-08-18, informant Md. Abdul Mannan 1. Ali lodged an FIR with the O. C. Panbari P. S. alleging inter alia that some days back from the filling of the FIR accused Aminul Islam eloped his 16 years old daughter (name withheld here in after known as victim "X") and the villagers asked the accused to return the daughter of the informant and accused returned his daughter and Elias Ali the father of accused Aminul Islam assured that accused Aminul Islam would not kidnapped his daughter "X", in spite of that on 13.08.18 at about 6.30 P.M. accused Aminul Islam eloped his Sessions his daughter and bidden have his daughter and hidden her in some unknown place. Hence, the present case.

- 2. On receipt of the FIR, O. C. Panbari P. S. registered the same as Panbari P.S Case No. 81/18, U/S 363 of the IPC, R/w Sec. 8 of the POCSO Act and started investigation. During investigation I. O. visited the place of occurrence, recorded the statement of witnesses, recorded the statement of victim under section 164 of the Cr. P. C. by Judicial Magistrate and after completion of investigation I.O. submitted charge sheet against the accused Aminul Islam u/s 363 of the IPC R/W section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short here in after called as POCSO Act)
- 3. After receiving the charge sheet cognizance was taken u/s 366/376 of the IPC, R/W section 6 of the Protection of Children from Sexual Offences Act, 2012, against the accused Aminul Islam and started a Special (P) case. Copies of the relevant documents were furnished to the accused person as per provision of section 207 of the Cr. P. C. After hearing both the sides learned Advocate and on perusal of case record charge was framed u/s 366/376 of the IPC, R/W section 6 of the POCSO, Act, 2012 and the contents of charge was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During trial prosecution side examined as many as eight witnesses including informant and the victim. Accused was examined u/s 313 of Cr. P. C. and recorded his statement in separate sheets. The defence case was of complete denial and the defence side has not adduced any defence evidence.
- 5. I have heard argument put forwarded by learned advocate of both sides. I have gone through the case record as well as evidence on record.

POINT FOT DETERMINATION

- 6. (i) What was the age of victim "X" at the time of occurrence?
 - (ii) Whether the accused person on 13-08-18 morning kidnapped victim "X" with intent that she may be compelled to marry against her will or she may be force or seduce to illicit intercourse with accused?
 - (iii) Whether the accused person committed rape on the victim on 13-08-18 at Guwahati?
 - (iv) Whether the accused on 13-08-18 at Guwahati committed aggravated penetrative sexual assault on victim?

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:DISCUSSION, DECISION AND REASON THEREOF:

7. To bring home the charges the prosecution examined eight witnesses including the informant, M.O and victim. Let me scrutinize the evidence on record to decide the points.

8. P.W.1, "X", is the victim in this case. PW1 in her deposition has deposed that informant is her father and she knows the accused person. Her present age is 16 years 6 months. About 8/9 months ago, she had love affairs with the accused person. About 4 months ago, she eloped with the accused person to Guwahati. Thereafter, her father searched her but could not find out her and thereafter, her father lodged this case. After lodging the FIR police apprehended them. They resided 18 days in Guwahati from the date of elopement. Thereafter, they went to Besimari from Guwahati and they stayed in the house of accused brother. Police sent her to Hospital for medical examination. Thereafter, Police brought her in the Court and Magistrate recorded her statement. She proved her statement as Ext.1 and Ext. 1(1) and Ext. 1(2) are her signature. she also stated that her date of birth is on 17-06-2002. Police seized her birth certificate.

During her cross-examination, she stated that Aminul did not kidnap her. She had not physical relationship with the accused person. Defence side put suggestion to her that at the time of elopement her age was above 18 years, which she denied.

9. P.W. 2, Abdul Mannan Ali, is the informant of this case. PW2 in his deposition has deposed that he knows the accused Aminul Islam. At the time of occurrence the age of his daughter "X" was 16 years and 6 months. About 7 months ago one day accused took his daughter from his house to Dolgaon. After 15-16 days police of Panbari police station recovered his daughter from Kharupetia. Thereafter, he lodged the FIR.

During his cross-examination, he stated that a settlement was held in the village meeting that after attaining 18 years his daughter would be given married to the accused and the accused would be married his daughter. He did not know the date of birth of his daughter. He stated the age of his daughter on presumption. His daughter has love affair with the accused and she eloped with the accused.

10. P.W.3, Mojida Biwi, is the wife of the informant and mother of victim"X". PW3 in her deposition has deposed that she know the accused Aminul Islam. About 8-9 months ago, accused took her daughter. Thereafter, her husband filed this case. Police recovered her daughter and her husband filed this case. At the time of occurrence the age of her

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daughter was 16 years and 6 months.

During her cross-examination, she stated the age of her daughter on the basis of idea. She did not know the date of birth of her daughter. Her daughter stated before her that she has love affair with the accused Aminul Islam and she eloped with him.

11. P.W.4, Rafiqul Islam Sk, in his deposition has deposed that he knows the informant Abdul Mannan Ali and the accused Aminul Islam. He also know the daughter of informant. About 1 year ago, one day informant called him to his house and reported him that accused Aminul Islam taken away his daughter "X". Thereafter, after 15 days he heard that daughter of informant was recovered. He cannot say the age of the daughter of informant. Police took his signature in a paper. Ext.2 is the said paper and Ext.2(1) is his signature.

During his cross-examination, he stated that he cannot say the contents of the ext.2. He cannot say why police took his signature in Ext.2.

P.W.5, Md. Shajamal Sk, in his deposition has deposed that he know the informant modul Mannan Ali and the accused Aminul Islam. About 1 year ago, one day informant met him at market and asked him to go to police station along with him for giving witness about missing of his daughter. In the police station Police took his signature in a paper. He further stated that Ext.2 is the said paper and Ext.2 (2) is his signature. Thereafter, he heard that daughter of informant was recovered. The age of the daughter of Abdul Mannan was about 15/16 years at the time of occurrence. He cannot say the exact age of the daughter of the informant.

During his cross-examination, he stated that, he had not read the paper on which police took his signature. He cannot say the contents of the ext.2. He cannot say why police took his signature in Ext.2.

13. P.W.6, Shah Alom Sk, in his deposition has deposed that he know the informant Abdul Mannal Ali and the accused Aminul Islam. He also know the daughter of informant. About 2 years ago, informant called him to his house and reported him that accused Aminul Islam taken away his daughter "X". At that time age of the daughter of informant was about 15 years. Thereafter, informant filed this case. After 15/20 days of the incident, the daughter of the informant was recovered. Police went to the house of informant and took his signature in a paper. He further stated that Ext.2 is the said paper and Ext. 2(3) is his signature.

During his cross-examination, he stated that he forgot the date of taking his signature by police. Police took his signature for the purpose that the daughter of informant

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was missing and she was recovered. The Ext.2 is written in English and as such he could not say what was written in Ext.2 as because he did not know the English language. He cannot say present whereabouts of victim "X".

14. P.W. 7, Dr. (Ms) Junmoni Rabha, is the M.O of this case. PW7 in her deposition has deposed that on 01.09.18, she was working at JSB Civil Hospital, as M.O and MBBS. On 01.09.18 at about 11.30 am, she had examined victim "X", aged: 16 years, Vill: No.1 Bogidora, P.S.-Panbari, Dist-Chirang, Assam in connection with Panbari P.S. case No. 81/18, u/s 363 of IPC, R/w Sec. 8 of POCSO Act. The victim "X" was escorted by WHG Ruhima Khatoon.

On examination she found the followings:-

1) History of Sexual Assault on 21.08.18 near Simonmati, Dist- Chirang. She cloped with her partner (Aminul Islam, 20 years) on 14.08.19 at around 5 p.m.

Physical examination.

Height. 150 C.M.

Weight, 48 K.G.

Chest Girth......78 cm.

Abdomen girth. 85 cm.

Teeth. 7/7 /7/7

- 2) Hairs:
 - a) Scalp hairs- Normal
 - b) Axillary hairs- Normal
 - c) Pubic hairs- Normal.
- 3) Beards, moustaches and body hairs absent.
- 4) Breast well- developed.
- 5) History of puberty
 - a) Menarche- 12 years back.
 - b) Menstrual cycle regular.
 - c) Last menstrual period 23.08.18.
- 6) Genital Examination:
 - a) Genital organs- No external injury seen.
 - b) Vulva- No external injury seen.
 - c) Hymen- No external injury seen.
 - d) Vagina- No external injury seen.
 - e) Cervix- No external injury seen.

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- f) Uterus- No external injury seen.
- g) Evidence of injury on her body or private parts- No external injury seen.
- h) Vaginal smears taken on glass slides for laboratory investigation- No spermatozoa are seen in vagina smear.
- 7) Wearing Clothes.
 - a) Evidence of Struggles (tears/loss of buttons etc- absent.
 - b) Evidence of stains(blood/semen/saliva etc.)- absent.
- 8) General Mental condition- Alert, conscious, co-operative, oriented to time, place, person.
 - a) Co-operation and behaviour- Normal
 - b) Intelligence and memory-Normal.
 - c) Gait- Normal.
- 9. Result of Laboratory investigation- Urine pregnancy test is negative. Opinion.

Her urine pregnancy test is negative. Vaginal swabs for sperms is not seen. No external injury seen on her private parts. She is not pregnant, her LMP is 23.08.18. There so no evidence of sexual intercourse. Ext.3 is the medical report and Ext.3(1) is his signature.

During her cross-examination, she stated that the victim produced the birth certificate and on the basis of birth certificate she mentioned age victim is 16 years. No clinical examination was done to ascertain the age of the victim girl.

15. P.W. 8, Sri Kishak Das, is the I.O of this case. PW8 in his deposition has deposed that on 14.08.18, he was working at Panbari Police station as ASI of Police. On that day O.C Panbari P.S entrusted him to investigate Panbari P.S case No. 81/18, u/s 363 of IPC, R/w Sec. 8 of the POCSO Act. He visited the place of occurrence; recorded the statement of witnesses and the informant. Due to dark on that day he could not prepare the sketch map of the place of occurrence. He seized birth certificate of the victim girl from the informant vide Ext.2 and Ext.2 (4) is his signature. On the next day, again he visited the place of occurrence and drew the sketch map of the place of occurrence. he also stated that Ext.4 is the sketch map and Ext.4 (1) is his signature. Thereafter, he returned to Police Station and informed all the police station of Assam by W.T message regarding missing of the victim girl . On 30.08.18, O.C Dalgaon P.S secretly informed him that under Dalgaon PS in the village Chikunmati the victim girl and accused Aminul Islam were taking shelter in a house. On getting the aforesaid information he informed the same to the Bijni P.S, SDPO Bijni and S.P Chirang. Thereafter, along with staffs they proceed to Dalgaon

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police station. With the help of Dalgaon Police station they recovered the victim girl from the house of Samar Ali along with accused Aminul Islam. Thereafter, he took the accused person and the victim girl to the Panbari police station. He sent the victim girl to the court for recording her statement u/s 164 Cr. P. C. and also sent the victim girl to JSB Civil Hospital for medical examination. After completion of his preliminary investigation he handed over the case diary to the O.C Panbari P.S on 25.09.2018.

During his cross-examination, he stated that in the FIR there is no mentioned about place of occurrence. In this case he seized only the Birth Certificate of the victim girl. He had not verified the birth certificate by sending it to the issuing authority.

- Learned Advocate for the accused submitted that this is a case under provision of 16. POCSO Act but the prosecution failed to prove that the age of the victim girl was below 18 years at the time of occurrence and as such POCSO Act is not attracted in this case. Learned Advocate further submitted that the age of the victim girl was above 18 years and she in her evidence clearly stated that no physical relationship establish between her and the accused person and she voluntarily eloped with the accused person as because she was in deep love with the accused person and as such the provision of section 366 of the IPC also not attracted and this is a fit case to acquit the accused person.
- To consider the submission of learned Advocate let me scrutinize the evidence on 17. record.
- First of all we should decide the age of the victim girl. In the FIR informant stated 18. the age of his daughter is 16 years. Informant examined as PW2 and in his evidence he stated the age of his daughter is 16 years 6 months. During cross-examination he stated that a settlement was held in the village meeting that after attaining his daughter 18 years she would be given marriage to the accused person. He further stated that he did not know the date of birth of her daughter and he stated the age of his daughter on presumption. He also stated that his daughter has love affair with the accused and she eloped with the accused person. PW3 Mojida Bibi is the mother of the victim girl. PW3 also in her examination in chief stated the age of the victim girl 16 years 6 months but during her cross-examination she stated the age of her daughter on the basis of idea and she did not know the date of birth of her daughter. She also stated that her daughter has love affair with the accused and she eloped with him. PW1 is the victim girl and she in Addl. Sessions Judgeher evidence stated that her age is 16 years 6 months. She also stated that her date of birth is 27-06-2002. But in support of her evidence of

certificate. Though, she stated that her birth certificate was seized by the I/O during investigation. From the case record, it also reveals that the birth certificate of the victim girl was seized by the I/O during investigation. But the prosecution has not produced the birth certificate and proved the same during evidence of the case. No reason given by the prosecution regarding withheld of the birth certificate. As birth certificate of the victim girl is available but the prosecution withheld the same which is materials evidence, a presumption would go against the prosecution that if the prosecution would produce the birth certificate then it would prove the age of victim girl otherwise. PW2 and PW3 who are the father and mother of the victm "X" could not able to state the date of birth of the victim girl. Then how the victim girl come to know her date of birth. She in her evidence nowhere stated from whom she come to know about her date of birth. The defence side challenge the age of the victim girl. So, it is the duty of the prosecution to prove the age of victim girl beyond all reasonable doubt. But from the evidence on record, it reveals that The prosecution failed to prove the age of the victim girl and failed to prove that the age of victim girl was below 18 years at the time of occurrence. The prosecution also has not examined the victim girl by radiologist to ascertain her age. So, considered all this aspect I find that the prosecution failed to prove the age of the victim girl. It is settle law that if two view can be drawn from the evidence on record and one view goes in-favor of the accused and another view goes against the accused then which evidence goes in-favor of the accused should be accepted. In this case two view cane be drawn i.e., the age of the victim girl may be above 18 years may be below 18 years. So, the view or evidence which goes in-favor of the accused should be accepted. Therefore, with this principle, I have nothing to hesitate to hold that the age of the victim girl was above 18 years at the time of occurrence.

19. Next, we should decide whether the accused committed the offence u/s 366 of the IPC. From the above discussion, it reveals that the age of the victim girl was above 18 years at the time of occurrence. PW1 is the victim girl. PW1 in her evidence clearly stated that she has love affair with the accused and she voluntarily eloped with the accused and stay at Guwahati for 18 days but no physical relationship establish between him and the accused person. She in her cross-examination further stated that the accused person did not force her to go with him. So, it is crystal clear that the victim girl had love affair with the accused and out of deep love she eloped with the accused and stay at Guwahati for based and stay at Guwahati for laws days. As the age of the victim girl is above 18 years at the time of occurrence so she has right to go with the accused person. The victim girl voluntarily went with the accused. There is no evidence of inducement or force. So, I find that there is no ingredient of

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offence u/s 366 of the IPC against the accused person. Hence, I have nothing to hesitate to hold that prosecution failed to prove the offence u/s 366 of the IPC against the accused person beyond all reasonable doubt.

20. Next question arises whether the accused person committed rape on the victim girl. Though the victim girl in her statement u/s 164 Cr.PC. stated that accused committed penetrative sexual assault with her but during her evidence she clearly stated that she had no physical relationship with the accused person and the accused person has not committed any sexual intercourse with her. So, there is no corroboration between the statement u/s 164 Cr. P. C. and the evidence of PW1. Statement u/s 164 Cr. P. C. is not substantive evidence as the victim girl during trial in her evidence clearly stated that accused has not committed any sexual intercourse with her. So, I have nothing to hesitate to hold that the prosecution failed to prove the offence u/s 376 of the IPC against the accused beyond all reasonable doubt.

Next question arises, whether the accused committed aggravated penetrative sexual assault on the victim girl or not. The punishment of aggravated penetrative sexual assault is u/s 6 of the POCSO Act. To attract the provision of POCSO Act the victim must be a child. Child is define u/s 2(d) of the POCSO Act. As per definition of child the person must be below 18 years age. Here in this case the age of the victim girl was above 18 years at the time of occurrence. Hence, I find that the provision of POCSO Act is not attracted in this case. Moreover, the victim girl in her evidence clearly stated that accused has not committed sexual intercourse with her. Hence, I have nothing to hesitate to hold that prosecution failed to prove the offence u/s 6 of the POCSO Act beyond all reasonable doubt.

- 22. From the discussion made above, I find that the prosecution failed to prove the charges leveled against the accused beyond all reasonable doubt. Hence, accused Md. Aminur Islam is found not guilty u/s 366/376 of the IPC R/W Sec. 6 of the POCSO Act and he is acquitted from the charges and set him free at his liberty forthwith.
- 23. Send a copy of the judgment and order to the District Magistrate, Chirang as per provision of section 365 of the Cr. P. C.
- 24. Considering the fact and circumstance of the case, I find that this is not a fit case to recommend the DLSA, Chirang for victim compensation u/s 357-A Cr. P. C.

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25. Bail bond furnished by the accused person shall remain in force till next six months from today as per provision of section 437-A of the Cr. P. C.

Given under my hand & seal of this court on this the 16th day of November, 2019.

Dictated and corrected by me,

Additional Special Judge, Addi. Sessions Judg

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Type by;

Proshanta Dev Roy,

Stenographer Gr.III

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Additional Special Judge,

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APPENDIX

(A) Prosecution witnesses:

PW1- Victim "X".

PW2- Abdul Mannan Ali.

PW3- Mojida Biwi.

PW4- Rafiqul Islam Sk.

PW5- Md. Shajamal Sk.

PW6- Shah Alom Sk.

PW7- Dr. (Ms) Junmoni Rabha.

PW8- Sri Kishak Das.

(B) Prosecution exhibit-

Ext.1- Statement of the victim u/s 164 of the Cr. P. C.

Ext.2- Seizure List.

Ext.3- Medical Report.

Ext.4- Sketch Map.

(C) Defence witnesses- Nil.

(D) Defence exhibit- Nil.

Additional Special Judge

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