

Present: Shri C. Das

Judge, Special Court Baksa, Mushalpur

# JUDGMENT IN SPECIAL POCSO CASE NO.3/2018(OLD NO.8/17)

u/s 4 of POCSO Act r/w Section 366(A) IPC.

State

-versus-

Sri Jaikhlong Brahma

.... Accused

#### Appearance:

For the State: Mr. R. Chetry, Public Prosecutor, Baksa

For the accused: Mr. G. C. Nath, Advocate

Date of evidence: 6.10.18, 4.2.19, 16.3.19, 12.7.19

Date of argument: 9.8.19
Date of judgment: 22.8.19

#### **JUDGMENT**

1. The case of the prosecution briefly, is that on 20.3.16, the complainant Sri Gudiram Boro lodged the FIR before the Officer-in-charge of Barama police station, alleging inter-alias that on 17.3.16, at about 10 am., the accused person kidnapped his daughter/victim girl(name is withheld) from Barama chowk. Hence, he could not trace out his daughter.

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2. Accordingly, the police registered the Barama PS. Case No.48/16 and started to investigate the case. During the investigation, I/O came to know that on the fateful day at about 9am., while the victim girl came to Barama chowk to send her brother to go to Guwahati by bus. After departure of her brother by bus, the victim while returning to home, on her mid way, the accused induced her and kidnapped her from Barama chowk and kept her at a secret place. Further, I/O

visited the place of occurrence and drew up its sketch map. I/O examined the witnesses. After recovery, I/O sent the victim girl for medical examination and came to know that she was below 18 years of age and she was pregnant for about 8 weeks. From the birth certificate of the victim girl, I/O came to know that the victim girl was 17 years and 3 months old. At the end of investigation, I/O having found a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

- 3. The accused when appeared in the court, he was furnished with the relevant copy of the case immediately. After hearing of the parties and on perusal of material on record, the charge u/s 4 of POCSO Act r/w section 366-A IPC was framed against the accused. The charge was read over to the accused who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, 9 (nine) witnesses including M/O and I/O to support its case. Thereafter, in the statement recorded u/s 313 CrPC., the accused denied the all accusations appeared against him in the evidence on record. The accused however, declined to adduce any evidence in defence. The argument of the parties was heard at length and the evidence on record was perused.

#### **POINTS FOR DETERMINATION:**

- 5. Whether on 17.3.16 at about 10 am., at Barama Chowk, under Barama police station, the accused induced the victim girl a minor girl under 18 years to go from her home with the intent that or knowing that she may be seduced or forced to illicit intercourse with another person;
- 6. Whether on same day, time and place as above, the accused committed penetrative sexual assault upon the victim girl;

#### **DECISION AND REASON THEREFORE:**

7. Learned Public Prosecutor at the outset of argument of the case, submitted that in this case, a minor girl is involved. He submitted that the evidence of the prosecution witnesses including the victim girl clearly disclosed that she was kidnapped by the accused on the fateful day from the lawful guardianship of the complainant who is the natural father of the victim. The medical evidence of the

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doctor disclosed that the victim was pregnant after medical examination which indicated that after kidnapping the accused committed sexual assault upon the victim girl which therefore, attracted the offence u/s 4 of POCSO Act in addition to offence u/s 366-A IPC. He submitted that all the prosecution witnesses proved the facts of the case and had able to bring home the charge against the accused and as such, the accused is liable to be punished under the law.

- 8. Per contra, learned counsel for the accused submitted that the prosecution is duty bound to prove its case against the accused beyond all reasonable doubt in the light of section 30(2) of POCSO Act. But the witnesses of the prosecution could not prove the facts of the case to bring home the charge against the accused. He submitted that it is clear case of love affairs between the victim girl and the accused she went with the accused on her own will and at her own instance. It is not correct to say that the victim was below 18 years at the time of occurrence but she was at marriageable age, considering the age determined by doctor. Further, he argued that if the victim was sexually assaulted by the accused, there is no circumstance placed by the prosecution to believe that she was actually assaulted within the meaning of section 351 IPC. In other words, the conduct of the victim girl is very doubtful which can be safely be held that she was consenting party to the entire episode of her deliberate missing from her home. Hence, the accused is entitled to get benefit of doubt, he maintained.
- 9. In so far as applicability of the provisions of Pocso Act is concerned, it must be kept in mind that the victim should be a child within the meaning u/s 2(d) of Pocso Act. This means that the victim must come under 18 years old at the time of occurrence. Hence, at first instance, it is necessary to find out the correct age of the victim girl for the relevant time of occurrence on the basis of evidence of the prosecution side.
- 10. Learned counsel for the accused placed reliance on the decision reported in Varadarjan vs. State of Madras, 1965 (2) CRI.L.J. 33(Vol.71, C.N. 7) wherein the law on kidnapping was explained that the fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the

accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference can be drawn that the accused is guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany

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him. There is distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same tiling for the purposes of Section 361. Where the minor leaves her father's protection knowing d having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him. In the formation of the intention of the minor to leave the house of the guardian.

- 11. The evidence of PW1 Sri Gaudiram Boro who is the informant of the case as well as, natural father of the victim girl discloses that the victim was 17 years old at the time of occurrence. Similarly, PW2, the victim girl deposed that she was 17 years old at the time of occurrence. PW3 stated that she produced the birth certificate of the victim girl which was seized vide Ext.3. she proved the seizure of the birth certificate of the victim girl vide MRExt.1. as per birth certificate of the victim, her date of birth is shown as 21.2.1999. Like PW3, other witnesses, such as PW7 prove Ext.3 to support I/O. PW4 stated that the age of the victim was 18 years at the time of occurrence but his evidence is not reliable since without any basis PW4 stated the such age of victim. Apparently, the birth certificate of the victim girl vide MRExt.1 is the best document to rely upon to ascertain the correct age of the victim girl. Since the occurrence took place on 17.3.16, the age of the victim was below 18 years. The medical evidence of PW8 is more or less corroborated the same fact. Hence, it is found that the victim girl PW2 was a child at the time of occurrence within the meaning u/s 2(d) of POCSO Act. Therefore, the provisions of POCSO Act is applicable to this case against the accused.
- am., the victim girl(PW2) came out on a sccoty vehicle to Barama bus stand to drop her brother who will go to Guwahati. Thereafter, the victim did not return to home. Hence, he searched for the girl but could not trace her out. He informed the brother of the victim girl. On next day, the victim sent a message over phone that she was taken by the accused. So he filed the ejahar. After 45 days, the police recovered the victim girl. After recovery, the police sent the victim for medical examination and for recording statement in the court. On his inquiry, the victim told him that she had no sense about the occurrence.

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- The evidence of the PW2 who is the sole victim girl of the occurrence (her name is withheld due to bar of law) is that she had love affairs with the accused prior to the occurrence which was not known to her parents. She stated further that on the fateful day, at about 9 am., she went to Barama to drop her brother Nijam Boro. Her brother went to Guwahati. As per her previous information, the accused met her at Barama and she went to the house of the accused person. Her parents did not know that she was stayed at the house of the accused. Hence, they started searching for her and as she was untraced, the case was filed. She spent one night at the house of the accused and on next day, she was taken to a temple where the accused married her. Thereafter, both of them went to Shillong where she spent more then one month with the accused. When she returned to home, the police apprehended her at Nalbari. The police sent her for medical examination vide Ext.1 and to record her statement in the court. Ext.2 is her statement with her signatures. She stated further that she was 17 years old at the time of occurrence. Her mother produced her birth certificate vide MRExt.1. during her stay with the accused, she had physical relation with him.
- 14. In the cross-examination, PW2 admitted that she went with the accused on her own will since her parents did not like her love affairs and relation with the accused.
- 15. PW3 Smti. Pratima Boro is the mother of PW2. She supported the version of PW1 and 2. It is the evidence of PW3 that on the fateful day, at about 9 am., PW2 was taken away from Barama without her knowledge. Her son Nijam Boro reported her that the accused kidnapped PW2. She searched for PW2 but could not trace her out. So, the FIR was lodged before the police. After one and half months, the police recovered PW2. She went to the police station and saw PW2. She brought back PW2 to home. PW2 was sent for medical examination and for recording her statement in the court. She produced the birth certificate of PW2 which was seized vide Ext.3 with her signature. MRExt.1 is the copy of the said birth certificate of PW2. After one year, she married off PW2 to another boy.
- Judge Spi Court 16. In the cross-examination, PW3 stated that she did not inquire about Baksa Mushalcurthe incident from PW2 after the recovery.
  - 17. PW4 Sri Nijam Boro is the brother of PW2. He deposed inter-alias that on the fateful day, at about 9/10 am., PW2 brought him to Barama to go to Guwahati. Accordingly, he went to Guwahati. After two days, he received phone

essage from PW2, stating that she was taken away by the accused. Immediately, he reported it to his father. His father filed the FIR. After knowing the fact, he again returned to home from Guwahati. After 40 days, the police recovered PW2 and informed him. He saw the victim (PW2) at the police station. At present, the victim was married to another person.

- 18. In the cross-examination, PW4 stated that he did not produce the telephonic message sent by PW2. He had no knowledge about the love affairs between the accused and PW2.
- 19. PW5 Sri Bijay Kr. Boro stated that he is related to PW1. According to him, on the fateful day, PW2 brought PW4 to Barama to drop him to go to Guwahati. On next day, he came to know that PW4 reached Guwahati while PW2 did not return to home. He searched for PW2 but could not trace her out. Later on, he came to know from PW4 that the accused took away PW2. Accordingly, police was informed. The police recovered PW2 after 40 days and informed him. Hence, he along with PW1 went to police station and saw PW2. On his inquiry, PW2 told him that she was taken to Shillong. Thus, PW5 corroborated the version of PW1.
- 20. Further, PW6 Lambudhar Boro deposed that he heard that the accused took away PW2. Hence, PW1 filed the case. After 40 days, the police recovered PW2.
- 21. Likewise, the evidence of PW7 Napul Boro is that on the fateful day, PW2 brought PW4 to Barama on a sccoty since PW4 was going to Guwahati. He came to know that PW2 went with the accused person. After one month, PW2 was recovered by police. The police seized the birth certificate of PW2 vide Ext.3 with his signature. MRExt.1 is the said birth certificate of PW2.
- 22. PW8 Dr. Bandana Deka stated that on 27.4.16 at SMK Civil Hospital, Nalbari, she examined PW2 in connection with Barama PS Case No.48/16 and found the following as; on examination, no injury was seen. She was wearing fresh cloth Judge Spr Court healthy and admitted two fingers easily. Ante-verted 8 weeks size- pregnancy found. Vaginal swabs was taken for examination. not consistent with recent sexual intercourse or assault. The skeletal age from radiological evidence is estimated below 18 years. Ultrasound lower abdomen shows normal early intra-uterine pregnancy of 8 weeks of gestational age dated

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24.4.16 according to PW8.

- 23. Thus, PW8 submitted and proved the medical report of PW2 vide Ext.1 with the signatures with x-ray report vide Ext.4. There is no dispute that PW8 examined PW2 after her recovery. Apparently, the evidence of PW8 does not lend support to the prosecution case. But it is true that PW2 had physical relation as she was found pregnant for 8 weeks period by medical testimony.
- The evidence of I/O; PW9 is that after receipt of FIR vide Ext.2, he investigated the case and prepared the sketch map of place of occurrence after visit vide Ext.5. on 27.4.16, he came to know that PW2 was loitering at Nalbari. Accordingly, he went to Nalbari and found her walking on the road towards Barkura. He brought PW2 to the police station and examined her. He sent PW2 for medical examination and for recording her statement u/s 164 CrPC. He collected the medical report of PW2 and seized her admit card vide Ext.3 with his signature. MRExt.1 is the birth certificate of PW2. After completion of investigation, the charge-sheet was filed against the accused vide Ext.6.
- 25. After going through the evidence of the prosecution witnesses, it appears that there is no denial of the fact that PW2 was missing from Barama since the fateful day after dropping her brother PW4 to go to Guwahati. The evidence of PW1 narrated the missing of PW2 on the fateful day and he is corroborated by PW3, 4, 5, 6 and 7 on the material points. It is also, admitted fact that PW2 was recovered after more then one month from the date of her missing. No doubt that PW2 was a minor girl at the time of occurrence. In that case it appears that PW2 was nearer to 18 years and she had love affairs with the accused since prior to the occurrence. If the evidence of PW2 is examined carefully, it would show that her intention to go with the accused was pre-planned. She also, admitted in her crossexamination that she went with the accuse on her own will and spent more then one month in Shillong after marrying with the accused at a temple. Thus, the evidence of PW2 itself shows that she was a consenting party to the occurrence. Her evidence discloses that with the desire to marry the accused out of love affairs, PW2 went with the accused since her relationship with the accused was not approved by PW1 and 3. in that case, the accused cannot be implicated for taking away PW2 from the keeping of lawful guardian like her parents. Thus, the principle law down in Varadarjan case (supra) is applicable to this case. There was no evidence on record that the accused applied some deceitful means to induce PW2 to go with him. Rather, it was PW2 who planned to go with the accused without

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was kidnapped or taken away by the accused from her lawful guardian. Further, it is not disputed that PW2 was found pregnant at the time medical examination. This implies that she was sexual intercourse with a man. So far as the evidence of PW2 is concerned, it appears that she remained only with the accused during her missing period. PW2 also, stated that she had physical relation with the accused. Thus, it is more clear that it was the accused at his behest, PW2 became pregnant. But no other person involved to get physical relation with PW2 as required under the law. Therefore, the offence u/s 366-A IPC is not made out against the accused.

- 26. Apart from above, the prosecution alleged that the accused committed penetrative sexual assault upon PW2 who is a child under POCSO Act and thus, the offence is attracted against the accused. So far as the evidence of PW2 is concerned, it appears that all along the period of 40 days of her missing she never raised any complaint against the accused. If there is assault or criminal force used by the accused on PW2 for sexual assault, there would have evidence from PW2. But she simply stated about her physical relation. As such, the penetrative sexual intercourse was taken place without any force or coercion or exploitation, or with criminal force between the accused and PW2. It can be held in the fact and circumstances of the case that the consent of PW2 for such sexual act of the accused was not obtained by any deceitful means or any unlawful purpose by the accused. So there is doubt if the accused committed penetrative sexual assault upon PW2 within the meaning of law. Hence, the offence as laid down u/s 3 of POCSO Act which is punishable u/s 4 of the said Act is not attracted against the accused.
- 27. Under the above facts and circumstances of the case, the prosecution has not been able to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s 366-A IPC r/w Section 4 of POCSO Act. The accused is thus, acquitted and set at liberty. The bail bond of the accused however, shall remain in force u/s 437-A CrPC for another 6 months. The seized article shall be returned to the owner as claimed in due course of time. Forward a copy of judgment to the District Magistrate, Baksa, Mushalpur compensation to the victim of offence under Assam Victim Compensation Scheme by DLSA, Baksa district. Inform the DLSA, Baksa for necessary action accordingly.

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August 2019.

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Typed by:

P. Deka, Com. Typist



### List of prosecution witness:

PW1 ... Sri Gaudiram Boro ... informant

PW2 ... victim girl ( name withheld)

PW3 ... Smti. Pratima Boro

PW4 ... Sri Nijam Boro

PW5 ... Sri Bijay Kr. Boro

PW6 ... Sri Lambudhar Boro

PW7 ... Sri Napul Boro

PW8 ... Dr. Banadana Deka ... m/o

PW9 ... Lalchand Ali ... I/o

## List of defence witness:

Nil

# List of documents exhibited:

Ext.1 ... medical report

Ext.2 ... FIR

Ext.3 ... seizure list '

Ext.4 ... x-ray report

Ext.5 ... sketch map

Ext.6 ... charge-sheet

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