IN THE COURT OF SPECIAL JUDGE, SONITPUR AT TEZPUR

<u>SPECIAL (POCSO) CASE NO.</u> :- <u>11 OF 2017</u>

(Under Section 366(A) IPC read with section u/s 4 of the POCSO Act, arising

out of G.R. Case No. 6002/16)

Present :- Sri Ashok Kumar Borah, AJS

Special Judge, Sonitpur

Tezpur

Prosecutor :- State of Assam

-vs-

Accused :- Sri Bikash Mahatoo @ Babu

Son of Late Jakri Mahatoo

Resident of Baliati

Police Station – Jamuguri Dist:- Sonitpur, Assam

Date of framing Charge :- 04/07/2017

Date of Recording Evidence :- 10/08/2017, 11/08/2017,

14/08/2017 & 06/09/2017.

Date of examination of accused u/s

313 Cr.P.C.

- 06/09/2017

Date of Argument :- 06/09/2017

Date of Judgment :- 06/09/2017

Counsel for the Prosecution :- Mr. Munin Chandra Baruah

Public prosecutor

Sonitpur.

Counsel for Accused :- Mr. S. Borah , Advocate.

JUDGMENT

1. In this case accused Sri Bikash Mahatoo @ Babu is p is put for trial for allegation of charge under Section 366(A) of the IPC read with section 4 of the POCSO Act, 2012.

- 2. The prosecution case according to the FIR in brief is that on or about 8 p.m. of 22-12-2016 accused Bikash Mahatoo kidnapped his minor daughter Miss X on the pretext of love her and kept her in a secret place. Despite that in that kidnapping his younger brother Udan Mahatoo also involved. Hence, this prosecution case.
- 3. The ejahar was filed by the informant Sri Prabin Yom before the O/C of Jamuguri Police station. On receipt the same, Officer-In-Charge of Jamuguri Police Station registered the case vide Jamuguri P.S. Case No. 160/16 u/s 368 of IPC vide GDE No. 539 dated 23-12-2016. After completion of usual investigation, the O/C Jamuguri Police Station filed charge sheet u/s 366(A) of IPC r/w section 4 of the POCSO Act against the accused Sri Bikash Mahatoo @ Babu.
- **4.** On being appeared the accused before this Court, after hearing both parties, I framed charge u/s 366(A) of IPC r/w section 4 of the POCSO Act 2012 against the accused Sri Bikash Mahatoo @ Babu and particulars of the charge was read over, explained to the accused to which he pleads not quilty and claims to be tried.
- **5.** To substantiate the case, prosecution has examined as many as 8 numbers of witnesses. The case is remained for examination of the I.O. After completion of said 8 numbers of witnesses, learned counsel for the accused submitted to close the evidence on the ground that the complainant and victim no way supported the prosecution case. Besides, the statement of the victim recorded u/s 164 Cr.P.C. reveals that the victim has eloped with the accused at her own will, therefore, it would be futile to examine the I.O. Even if examined the I.O. prosecution case would not develop.
- **6.** I have heard the learned Public Prosecutor, Sonitpur, Tezpur.
- **7.** On perusal of the statement of the aforesaid witnesses recorded so far and the materials on the record, I think that prosecution case would not develop even if examined the other witnesses. Speedy trial is the right of the accused person. Considering all these aspects,

prosecution evidence is closed. Accused is examined u/s 313 Cr.P.C. All the allegations made against the accused and evidence appears against the accused are put before him for his explanation where he denied the allegations and declined to adduce defence evidence.

- **8.** I have heard the argument put forward by the learned counsels of both sides.
- **9.** The points for decision in this case is that
 - (1) "Whether the accused on or about 8 p.m. of 22-12-2016 at Hatinga Rampur under Jamuguri P.S., induced Miss X, a minor girl under the age of 18 years, to go from her house or to do any act or acts with the intent that said Miss X may be (or knowing that it is likely that said Miss X will be) forced (or seduced) to illicit intercourse with you and thereby committed an offence punishable <u>U/S</u> 366(A) of the Indian Penal Code?
 - (2) "Whether on the same date, time and place, the accused committed penetrative sexual assault on "Miss X" (victim) and thereby committed an offence punishable under section 4 of the Protection of Child from Sexual Offences Act?

Reasons, Decisions and reason for decision.

- **10.** To arrive at the judicial decision, let me appreciate the evidence on record.
- PW 1 Sri Probin Yom who is the father and complainant of this case, stated that he knows accused Bikash Mahatoo. He filed the ejahar Ext.1 and Ext. 1(1) is his signature. At the time of incident, her age was only 15 years. The incident took place before the examination of HSLC, 2016. The victim was preparing for her HSLC examination. At the relevant time, he was in outside. His wife informed him over phone that his daughter/victim was missing from his home. He immediately came back home. They searched her vigorously throughout night, but could not find her. Accused during that time was doing mason works in his

home. Therefore, they suspected him for kidnapping of his daughter. Thereafter, on the next date, he filed the ejahar before police station. After three days the police informed that the victim was found with the accused. So, both are recovered and took to the police Station. In the next day, police took the victim for medical examination and then took her to the Court for recording her statement. After recording her statement, the victim was handed over to them. The victim told that accused threatened her and took her forcefully with him.

In cross-examination, he admitted that he came to know about the incident only after informing by his wife. The house of the accused is at a distance of 1 $\frac{1}{2}$ km from his house. He cannot recall the exact date of incident. The ejahar was written by one scribe Gitali Haloi. The scribe has read over the FIR to him. Police recorded his statement.

12. PW 2, Smt. Queen Yom, mother of the victim, stated that she knows accused Bikash Mahatoo. At the time of incident, her daguther's/victim's age was only 15 years. The incident took place on 22-12-2016. They have two daughters i.e. the victim and another one. At the relevant time, she was taking some rest. When she went to kitchen, she finds in the kitchen the veg was in cooking, but, no one is there. Accordingly, she searched her daughters. She asked her younger daughter Kaberi about the victim, but, she told that she went to meet nature's call. Thereafter, she ring her victim daughter, but, she did not find her and then she informed the matter to her husband over phone. They have vigorously searched her throughout the night but, could not find her. So, her husband filed this case in the next day of the incident. Thereafter police recovered her daughter from Khonamukh along with the accused after about three days of the incident. Then she went to police station. She met her daughter in the police station and when she asked her she told that accused threatened her to kill and forcibly kidnapped her. Her daughter also told that he will also kill them. Accused also threatened her that he will publish her photo in face book. Thereafter, police took her daughter for medical examination and also

to the Court for recording her statement through Magistrate. After recording her statement, victim girl was given custody to them.

In cross-examination she admitted that after the birth of her victim daughter they prepared her "Janmakusti". She has not submitted the said "Janmakusti" to IO. Police recorded her statement. At the time of incident, in her home she herself, her elder sister, her younger daughter Nisita and Kaberi was there. At the surrounding of her home our families are there. At the time of incident she was taking rest at about 7/7.30 PM and during that time no other persons were visited in their home. Before recovery of her daughter, she did not know where her daughter has been gone. She does not know had any love affairs in between the accused and her daughter. Accused resides at Bali-ati village. She knows that her daughter was recovered from a village Khonamukh, but, she did not know from whose house her daughter was recovered by police. She does not know during that time where her daughter was staying.

13. PW 3 Sri Polin Yom stated that he knows accused Bikash Mahatoo who is doing as a mason. Complainant is his uncle. The victim is his cousin. The incident took place on 22-12-2016. On that day in the evening time, complainant/uncle informed him that his daughter/victim was missing. They vigorously searched her throughout the night, but, they could not find her. Then in the next morning, his uncle lodged the ejahar. After about three days, police recovered his cousin along with the accused. When police informed about the said recovery, they went to the police station and saw the victim as well as the accused in the police station. Thereafter, police took the victim for medical examination and then to the Court for recording her statement. After recording her statement through Magistrate, the victim girl was given custody to her mother. While he asked his uncle/complainant he told him that his daughter informed him that accused has forcefully kidnapped her. Police recorded his statement.

In cross-examination he stated that his house is situated at a distance of 200/300 meter from the house of complainant. Prasanta Yom resides just adjacent to the house of complainant and the next plot owned by Ranjit Yom and on the other sides of the road there are paddy field. At first he came to know the incident from his uncle and thereafter, the victim informed him that accused forcefully took her with him. The victim stated before him about the incident at the police station, immediately after her recovery.

14. PW 4, the victim Miss X stated before the court that on or about 8 p.m. of 22-12-2016 her mother was taken rest after thrashing paddy. She and her younger sister Mili were preparing meal. She went out for bath room. She could not think that accused was standing near the bath room and he caught her and took her to Tupia. The accused threatened her if she raised alarm she would be killed and even threat to defame her by publishing false story. In the earlier occasion also accused disturbed her while she went to tuition. As she was afraid so she did not attempt to flee away from the motor cycle. Accused took her to a house belongs to Missing Community at Khanamukh. He forcefully asked her to marry him. Accused made physical relation with her forcefully. She was kept in the said house for three days in a room with him. Police recovered her. Thereafter she was examined medically and her statement was also recorded u/s 164 Cr.P.C. Ext. 2 is her statement and Ext. 2(1) to 2(3) are her signatures. After her recovery she reported about the whole story to her parents, police and Magistrate.

In cross-examination, she admitted that she is a student of first year of Higher Secondary school. Her house was surrounded by wall. Though there was electricity connection but during that time there was no current. She was not aware that accused was standing near the bath room.

15. PW 5 Mrs Jyotishmita Sarmah deposed that on 28-12-2016 she was posted at Tezpur as Judicial Magistrate, 1st class, Tezpur. On that day, in reference to Jamuguri Police station case No. 160/16 under

Section 366(A) of the IPC., she has examined one witness i.e. the victim namely, Miss X, D/O Sri Prabin Yom, wife of Bikash Mahatoo, resident of village Hatinga, Rampur under Jamuguri PS, a student of class-X. She has recorded her statement u/s 164 Cr.P.C at her court chamber. At the time of recording her statement, other than her, none was present. The victim made statement voluntarily and after recording her statement, she read over the contents of the statement and on satisfaction, she put signature thereon. Ext. 2 is the statement of the victim and Ext. 2(1) to 2(3) are the signatures of victim and Ext. 2(4) is her signature.

16. PW 6 Dr. Jharna Kakoti stated that on 29-12-2016 she was working as Sub-Divisional Medical & Health Officer in the Kanaklata Civil Hospital, Tezpur and on that day she was on duty in the hospital and at about 1.30 p.m., she examined Miss X, 15 years, female D/O Sri Prabin Yom of village Hatinga Rampur PS –Jamuguri, Dist. Sonitpur, in reference to Jamuguri PS Case NO. 160/16 u/s 368 of IPC, on being escorted and identified by WPC 699 Dipti Chetry, on the examination room of labour room complex of KCH, vide Hospital registration No. 28371/16, in presence of GNM Manika Dutta of KCH and found the following:

Identification mark – mole on left upper part of back of chest. Consent for examination taken from the girl as well as from mother Queen Yom. Menstrual history – LMP – 17/12/2016 regular. History of sexual exposure on 23-12-2016 and 24-12-2016. Height – 150.3 cm, Weight – 40 Kg, Teeth – 14/14.At the time of examination she was well dressed, neat and tidy. Gait normal. Built average. Her secondary sexual characters developed. Vulva, vagina healthy, hymen absent. There was no injury marks of violence on her body as well as on her body as well as on her private parts. Vaginal smear for spermatozoa was taken. Investigations advised and reports-

Vaginal smear for spermatozoa- No sperm (done at KCH Lab No. 136/16.

- 2. Urine for HCG negative. (done at Assam X-ray Clinic & Lab, Tezpur on 29-12-2016. ID NO. 31206 by Dr. D. Mahanta, Pathologist.
- 3. X-ray of wrist joint, elbow joint and iliac crest for age determination. (i) Union of the epiphysis of the lower ends of radius and ulna are complete. iii) All Epiphysis of the bones around the elbow joints have fused. iv) Epiphysis of the iliac crest has appeared but not fused. (done at Assam X-ray Clinic & Lab, Tezpur on 29-12-2016. Patient ID NO. AXC 32 by Dr. P.K. Barman, Radiologist.

Impression: Age of the person under investigation is appears to be over 18 years.

4. Ultra Sonography of pelvis – Normal uterus in size, shape and outlines. Measures 9.3 x 5.1 x 3.8 cms in length, breadth and thickness. The myometrium and andemetrium are normal. Thickness of endometrium 7.4 mm. Both ovaries are normal in size, shape and echotexures - Normal pelvic organs with non gravid uterus. (done at Assam X-ray Clinic & Lab, Tezpur on 29-12-2016. Patient ID NO. AXC 32 by Dr. P.K. Barman, Sonologist.

OPINION:

- 1. Age of the person under investigation appears to be over 18 years.
- 2. There is no sign and symptoms of recent sexual intercourse at the time of examination.
- 3. There is no injury or marks of violence on her body as well as on her private parts.
- 4. She is not pregnant at the time of examination.

Ext. 3 is the Medical report and Ext. 3(1) and 3(2) are her signatures. Ext. 4 is the X-ray and USG reports with film and Ext. 4(1) is the signature of Dr. P.K. Barman, Radiologist which she knows. Ext. 5 is the report of Urine for HCG and Ext. 5(1) is the signature of Dr. D. Mahanta, Pathologist, which she knows. Ext. 6 is the vaginal smear report of KCH and Ext. 6(1) is the signature of laboratory technician of KCH, Tezpur. Ext. 7 is the advice slip and Ext. 7(1) is her signature.

17. PW 7 Smt. Namita Baruah, stated that she knows the accused Bikash Mahato. She also knows the complainant Prabin Yom. The victim is her niece. The incident took place in the month of December, 2016. On the day of incident, after coming from the paddy field she become exhausted so she went to the kitchen and found that her niece was not there. In the next day, the complainant filed this case before the police station. Police recovered the girl. She came to know that she was recovered with the boy present in the dock. Thereafter she came to know that the boy who was doing works in the house of the complainant took the victim girl.

In cross-examination she admitted that at the relevant time in the house of complainant four persons were present which including herself, victim, sister of the victim and mother of the victim. At the time of cooking victim's younger sister was also present with her. When she entered into the kitchen she found only the sister of Nilakhi. She does not know where the victim went. She does not know from which place or which possession the victim was recovered by police.

18. PW 8 Sri Apurba Yom stated that he knows the accused Bikash Mahato. Complainant is his brother. The victim is his niece. The incident took place in the last Christmas time. On the day of incident his brother Prabin Yom called him and informed him that his victim daughter was missing. They searched vigorously her but did not find her. Thereafter, his brother filed this case. Next day, police recovered his niece along with the accused Bikash Mahato. Then he came to know that the accused had taken away his niece. Accused Bikash Mahato was doing works in the house of the complainant as mason.

In cross-examination, he admitted that he has no personal knowledge about the incident. He does not know from which place or which possession the victim was recovered by police.

19. These much is the evidence of the prosecution case.

- **20.** While the statement of the accused was recorded he denied all the allegations and evidence made against him.
- **21.** Learned counsel for the accused submitted that the statement made by the victim before this court is totally contradicted as she stated u/s 161 Cr.P.C. and also u/s 164 Cr,.P.C.
- 22. On close scrutiny of the statement of the victim recorded u/s 164 Cr.P.C it appears that she stated to learned Magistrate that at the time of recording her statement she was 15 years 11 months. She knows the accused for last six months as he was doing carpenter in their house. Accused gave proposal that he loved her. He also threatened that he will defame her name before her friends and therefore she given yes to his proposal. She never think that she was sit in marriage with the accused but she stated 'yes" to the accused. On being came to know about here relation with the accused, her parents assaulted her and asked her to leave the accused. Then out of fear she herself eloped with the accused. Accused took her from the site of bathroom. Initially, she was taken to a house of Adibasi at Tupia on 22-12-2016. In the next day she was taken to Khanamukh in a house of a person belong to Missing community where she performed marriage with the accused. They remained there for 2/3 days as a husband and wife and consummated. Then police recovered her. She against stated that Bikash has taken her. Other than Bikash she has not contacted any physical relation with any person. She has also stated that she admitted her mistake and wants to reform It is interesting to note that while learned Magistrate recorded her statement she stated that she is the wife of Bikash Mahtoo. Besides, in her statement she clearly stated that she performed marriage with the accused and thereafter cohabits with the accused as husband and wife. Now, the question comes if the accused forcibly taken her without her willingness she must have raised alarm while she was alleged to be taken by the accused from her house to the road. But she did not raise any alarm not protest. Secondly while she was taken in the motor cycle to Tupia she raised no alarm though in

court she has stated that as the accused threatened her so she did not raise protest. However, it also appears that there is no evidence that in the house of Adibasi person where she was kept for the first day she raised no alarm neither informed about the alleged kidnapping to any family members of the person of Adibashi. There is no any evidence that after Tupia she was taken to a village Khanamukh and kept her in a house of one person belongs to Missing community. There is no any evidence that she raised alarm neither reported or complained anything to any member of the said family of Missing Community. Besides, there is no any evidence that she has been continuously kept in a locked room neither at a gun point so that she cannot fled away from the house of said person of Missing Community. Rather there is a clear evidence that she did not make any attempt to flee away from the clutches of the accused person. On the other hand, she clearly stated that she consummated marriage with the accused at Khanamukh and thereafter lived with the accused as husband and wife for two days. Even it is a fact that while her statement was recorded by learned Magistrate the victim stated to the learned magistrate that she is the wife of the accused Bikash Mahatoo. Under such circumstances, the alleged forceful kidnapping of the victim has not been proved.

about the age of the victim at the relevant point of time. According to the statement of the victim recorded u/s 164 Cr.P.C. she was 15 years of age at the relevant point o time and according to her deposition made before this cour on 11-08-2017 she was 16 years of age. According to Dr. J. Kakoti, PW 6, the age of the victim appears to be over 18 years and it was argued by the learned counsel for the accused while relying upon the Judgment of Hon'ble Supreme Court titled as Jai Mala Vs. Home Secretary, Govt. of Jammu and Kashmir and others AIR 1982 SC 1297 wherein it has been observed by Hon'ble Supreme Court that margin of error in age ascertained by radiological examination two years on either side. Relying on the said Judgment learned counsel for the accused argued that if the margin of + 2 years

is taken in case of prosecutrix, certainly it cannot be said that she was minor on the date of the alleged incident. In the instant case according to the doctor, the victim was over 18 years

- **24.** Another point is to be considered in the present case is that the doctor opined that there is no sign and symptoms of recent sexual intercourse at the time of examination and there is no injury or marks of violence on her body as well as on her private parts.
- **25.** It is a fact that a forceful rape upon a teenage girl she might have receives injury atleast on her private parts but here in this case neither the victim nor the doctor stated that due to said forceful intercourse by the accused, she sustained injury on her private parts.
- **26.** In view of the aforesaid reasons, the solitary evidence of the victim even to be not cogent, reliable to convict the accused in any of the charged section. As such, I do not have any hesitation to acquit the accused on benefit of doubt and set him at liberty.
- **27.** Liabilities of the bailor is also hereby discharged.
- **28.** Send back the LCR.

Given under my Hand and Seal of this Court on this the 6^{th} day of September, 2017.

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR: TEZPUR

Dictated and corrected by me

(Ashok Kumar Borah) SPECIAL JUDGE, SONITPUR :: TEZPUR

Dictation taken and transcribed by me:

Smt. R. Hazarika, Steno

APPENDIX

Prosecution Witness

1. Prosecution Witness No.1 :- Sri Probin Yom, Complainant

Prosecution Witness No.2 :- Smt. Queen Yom
 Prosecution Witness No.3 :- Sri Polin Yom

4. Prosecution Witness No.4 :- Victim

5. Prosecution Witness No.5 :- Mrs. J. Sarmah, SDJM(S), Jorhat.

6. Prosecution Witness No.6 :- Dr. J. Kakoti, M.O.
7. Prosecution Witness No.7 :- Smt. Namita Baruah
8. Prosecution Witness No.8 :- Sri Apurba Yom.

Exhibits.

Exhibit 1 : Ejahar

Exhibit 2 : 164 Cr.P.C. statement of the victim.

Exhibit 3,4,5,6 : Medical report, X-ray and USG report,

Urine report and Vaginal smear report.

Exhibit 7 : Advice slip

(Ashok Kumar Borah)
SPECIAL JUDGE
SONITPUR: TEZPUR

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