IN THE COURT OF THE SPECIAL JUDGE, UDALGURI, ASSAM

SPI. (POCSO) Case No.36/2017 (U/S :4 of POCSO Act)

State Versus Simanta Baruah S/O – Sri Khemeswar Baruah Vill- Bhalukkhowapara, PS-Mangaldai, Dist-Darrang.

PRESENT: Sri P.Saikia,A.J.S., Special Judge, Udalguri.

APPERANCE:

For the Prosecution: Sri M. Khaklary, Addl. P.P., Udalguri

AND

For the accused: Mr. D.K.Boro, Advocate.

Evidence recorded on: 7.2.18, 20.6.18, 10.9.18.

Argument heard on: 1.3.2019.

Judgment delivered on: 12.3.2019.

<u>JUDGMENT</u>

1. The run up of facts to the prosecution case in resume has brought out of a written report dated 20.11.17 lodged by the informant Pranoy Chakraborty with the Officer In-charge of Rowta PS to the effect that on the same day at around 7.30 AM his minor daughter aged around 14 years (real name is withheld, henceforth referred to as the victim) went to attend tuition class in Rowta Secret Heart School, but she was found missing on her way to the said school. Despite making search her whereabouts remained clueless.

- 2. Treating the written report as the FIRE of the case, the Officer Incharge, Rowta Police Station registered a case vide Rowta P.S. case No.140/17 U/S 365 IPC and entrusted the case for investigation to S.I. Tarun Ch. Nath. During investigation, the I.O. initially recorded the statement of the informant U/S 161 Cr.P.C. Later, the victim was recovered and recorded her statement U/S 164 Cr.P.C. before the Magistrate and sent her for medical examination. The I.O. drew up the spot map of the place of occurrence and apprehended the accused and sent him out to the custody. On completion of investigation the accused was charge-sheeted to face trial in the court of law for the offences punishable U/S 366 IPC R/W Sec.4 of POCSO appeared to have been committed by him.
- 3. On receipt of the charge sheet this Special (POCSO) case No. 36/2017 was registered and upon issuance of process of the court the accused entered his appearance. The accused was furnished with copies of documents U/S 173 Cr.P.C.
- 4. Whereupon my learned predecessor in office after evaluating the police documents alongwith the case record found a prima-facie case and adequate materials against the accused to frame the charge U/S 4 of POCSO Act. Accordingly, charge there under was framed against the accused and the same on being read over and explained to him to which the accused pleaded not guilty and claimed to be tried.
- 5. To bring home the guilt of the accused, the prosecution has examined as many as seven witnesses including the informant, victim and I.O. of the case and also exhibited some documents on record.
- 6. On closure of the prosecution evidence the statement of the accused was recorded U/S 313 Cr.P.C. The accused pleaded innocence and adduced no evidence for defence.

- 7. In the light of the factual score of the case, the point for determination in the present case is set up and framed as:
- (i)Whether the accused on 20.11.17 at about 7.30 AM near Rowta Secret Heart Hospital under Rowta PS committed penetrative sexual assault upon the victim, aged about 14 years as alleged U/S 4 of POCSO Act?
- 8. I have heard argument tendered by the learned counsel of both the sides and also assayed the evidence on record in its entirety.

DISCUSSION, DECISION AND REASONS THEREOF:

- 9. PW1, Pranoy Chakraborty is the first informant who set the criminal law in motion by lodging the FIR. It is his evidence that on 20.11.17 at about 9.30 AM his brother informed him over phone that his victim daughter did not go to school. He came to his house and asked his wife about his daughter. She did not say anything. His wife made search to trace out their daughter and in the meantime she got information that their daughter went with a boy. But his daughter did not return till 5 PM. Then he went to police station. In the mean time his brother received a phone from his daughter that she was with a boy in a place but she does not know the name of the place. Accordingly he lodged the ejahar Ext.1 before the police. Ext.1(1) is his signature. Police seized the birth certificate of his daughter. Ext.2 is the seizure list. Ext.2(1) is his signature. At the time of incident his daughter's age was 13 years 7 months.
- 10. In cross-examination she has revealed that her daughter was born in the year 2003. Police returned the original birth certificate to her. He knew about the love affairs with the accused only on the day of occurrence. Police recorded his statement on the day of lodging the FIR. After lodging the FIR he talked with his daughter over phone and asked her to come home. He has denied the suggestion that he stated to his daughter if she came back he would perform social marriage with the accused.

- 11. PW2, Prasenjit Paul has stated to the effect that on 20.11.17 the victim went out for tuition but she did not return. She did not go to the school. The principal of the school informed mother of the victim. They made search to trace her out but could not be located. Then they went to the police station where they received information that the accused took the victim. The police of Rowta PS recovered the victim on the next day. Police seized the birth certificate of the victim in his presence. Ext.2 is the seizure list. Ext.2(2) is his signature.
- 12. In cross-examination he has disclosed that he does not know with whom the victim went for tuition. When he asked the victim she told him that she had friendship with the accused. The guardian of the victim girl did not know that whether victim had a mobile phone of her own. He does not know whether the mother of the victim scolded her for having affair with the accused. At the police station it is learnt that the victim went with the accused. Though he put his signature in the seizure list at police station but he has not seen the birth certificate in the court.
- 13. PW3 is Dr. Kankan Thakuria, who examined the victim on 22.11.17 in connection with Rowta P.S. case No.140/17 U/S 365 IPC while he was working as M. & H.O.1 at Udalguri Civil Hospital. On examination, he found the following:-

Physical examination:-

Height- 170 cm, weight- 50 Kg, teeth- 28 Nos., axillary hair- present, pubic hair- present, breast- developed, hymen- absent, vaginal injury- Nil, marks of violence- nil, clothing- T-shirt & Palzo, LMP 28.10.17.

Smear examination vide Regd. No.14583/17 lab No.210 reported by Pathologist Mangaldai Civil Hospital shows no spermatozoa seen in the slide.

RADIOLOGICAL EXAMINATION:-

X-ray examination of the right wrist, elbow and iliac crest vide plate No.22117-15 dated 22.11.17 reported by Radiologist Dr. Kulendra Dutta shows radiological age between 14 to 16 years.

- (1) Right wrist joint all corpel none present ossification for radius ulna notedno union.
- (2) Right elbow joints head of radius fused (14-16 years).
- (3) Right iliac crest I.C. ossification present.

Urine for pregnancy test on 22.11.17 reported by Rashmi Clinical Lab, Mangaldai shows negative .

Ultrasonography of abdomen on 22.11.17 by Sinologist, Dr. Kulendra Das reported as Grade 1 fatty liver.

The doctor opined that no spermatozoa in vaginal swab examination. Radiological age approximate between 14-16 years. No sign/mark of violence. Ext.3 is his report and Ext.3(1) is his signature.

- 14. In cross-examination he has stated that the Radiological report alongwith the X-ray plate are not seen in the case record.
- 15. PW4 is Smti. Ratna Chakraborty. She is the mother of the victim. Her evidence demonstrates that 20.11.17 at around 7.30 AM her daughter went to attend tuition as well as class in school. After attending tuition her daughter did not go to school and it was informed by the school authority that her daughter did not attend the school class. When her daughter did not return home even after break of school they started to search about her whereabouts at all possible places but when she remained clueless her husband lodged an FIR with the police. In the evening the accused gave a telephone call to her cousin that the victim was with him at Mangaldai and the accused also gave the telephone to the victim to talk with her cousin. The victim told her cousin brother that she was with the accused in an unknown place. Then her cousin brother informed her husband regarding this incident. On the next day in the morning her husband alongwith one Uttam Chakraborty went in search of whereabouts of her daughter at Mangaldai and ultimately found both the

accused and her daughter together at his parental home. In the meanwhile police also arrived at the house of the accused and both the accused and the victim were brought to Rowta police station.

- 16. In cross-examination she has revealed that on the day of occurrence her daughter went to attend tuition. There were other students in the tuition class. She does not know the names of the students of the tuition class. When she received the information that her daughter was missing after the tuition class then she asked her classmates of the victim as to her whereabouts, but the classmates could not say anything in this regard. She does not know as to whether the accused used to talk with her daughter over phone prior to the incident. She has denied the suggestion that her daughter had lover affair with the accused prior to her voluntary elopement.
- 17. PW5 Uttam Chakraborty has stated in his evidence that the incident occurred in the last year in the month of November. At the relevant time of the incident one day the informant and the uncle of the victim came to his shop and informed him that the daughter of the informant had been taken away by one boy residing at Borthekerabari under Mangaldai PS. Then he alongwith the informant and the uncle of the victim proceeded to the said place and located the house of the accused but he returned to his own home without entering into the house of the accused.
- 18. In cross-examination he has stated that he only saw the house of the accused but did not see the accused and the victim as he left for his home before entering into the house of the accused.
- 19. PW6 is the victim. In her testification she has stated that on 20.11.17 while she was returning from tuition to her home the accused who was her friend accosted her and asked her to go with him for outing. Then she asked where the accused would go with her. Accused replied that they would go to Tezpur. Accordingly she gave her consent to go with the accused to Tezpur.

But the accused in stead of taking her to Tezpur rather took her to Arunachal Pradesh at his uncle's house. They stayed together at the uncle's house for one night. On that night she was sleeping alone. On the next day in the morning the accused went to solemonise marriage with her to which she refused. Then the uncle of the accused and his other family members had a discussion with me regarding her consent for marrying the accused. Then she said that she would not get married with the accused. Thereafter, she informed the matter to her aunt's daughter over telephone belonging to the accused. Later she alongwith the accused came to Mangaldai to his house. In the meantime police came to the house of he accused and recovered her and arrested the accused. She was brought before the Magistrate to get her statement recorded U/S 164 Cr.P.C. Ext.4 is her statement U/S 164 Cr.P.C. Ext.4(1) is her signature. She has given her statement before the Magistrate as tutored by police.

- 20. In cross-examination she has revealed that prior to the incident though she had frequent telephonic contact with the accused but she did not met him physically. She used to talk with the accused over telephone prior to seven months before the incident. When the accused first introduced with her over phone he was working in Tamilnadu. Her parents also knew that she used to talk with the accused as a friend so often but my parents did not like her talking with the accused over telephone. One day she was pulled up by her parents for keeping relation with the accused over phone. Even thereafter, she used to talk with the accused over phone. On the day of the occurrence she on her own accord went with the accused to go to Tezpur. The accused wanted to marry her but she refused to his proposal as she was still studying in school. Accused did not indulge sexual intercourse with her when she was taken to Arunachal Pradesh. She has stated her age on presumption. She has not submitted school certificate regarding her actual age.
- 21. PW7, Tarun Ch. Nath is the investigating officer of the case. His as usual investigation of the case reveals that on 20.11.17 he was posted as ASI of police at Rowta PS. On that day one Pranoy Chakraborty lodged an FIR with

the O/C Rowta PS. Accordingly, a case vide Rowta PS case No. 140/17 U/S 365 IPC was registered and endorsing his name for investigation of the case. He recorded the statement of the informant U/S 161 Cr.P.C. at the police station itself. Later on, the victim of the case was recovered and her statement was recorded. He also got the statement of the victim recorded U/S 164 Cr.P.C. before the Magistrate and sent her for medical examination and obtained her medical examination report. He drew up sketch map of the place of occurrence. The accused was also taken into custody after his arrest. On completion of the investigation of the case he found prima-facie materials against the accused and accordingly submitted the charge-sheet U/S 366 IPC R/W Sec 4 of the POCSO Act. He has proved and marked the seizure list as Ext.2. Ext.2(3) is his signature. Ext.5 is the sketch map. Ext.5 (1) is his signature. Ext.6 is the charge-sheet. Ext.6 (1) is his signature.

- 22. In cross-examination he has divulged that initially the case was registered against the accused U/S 365 IPC. He did not visit Arunachal Pradesh in course of his investigation where the victim was alleged to have been taken by the accused at his uncle's house nor did he take the statement of uncle of the victim as well as other family members of the accused. He also did not record the statement of the parents of the accused wherefrom the victim was eventually recovered.
- 23. On over all appreciation of the evidence on record, it is apparently discernable that police recovered the victim alongwith the accused at Mangaldai. Though the first informant (PW1) is not an eye witness to the incident of kidnapping of his daughter but he lodged the FIR alleging that his daughter was kidnapped by the accused which was informed to him by his brother over telephone. Likewise, PW4 the mother of the victim is also not an eye witness of the incident as to how the accused kidnapped her daughter.

- 24. Situated thus, in the present case in hand the evidence of the victim (PW6) and the evidence of M.O.(PW3) are key to the prove charged levelled against the accused.
- 25. It is in this backdrop while turning to the evidence of the victim (PW6) it transpires to the fact that on 20.11.17 while she was returning from tuition to her home the accused who was accosted her and also issued her to go with him for outing. She asked the accused as to where he would go with her. The accused replied that they would go to Tezpur. She then gave her consent to go with the accused to Tezpur. But the accused in stead of taking her to Tezpur rather took her to Arunachal Pradesh at his uncle's house where they stayed together for one night sleeping alone in a bed. On the next day in the morning the accused went to solemonise marriage with her to which she refused. In this regard the matter was discussed with the family members of the accused regarding her consent for marrying the accused. She said that she would not get married with the accused as she was studying in school. Later she alongwith the accused came to Mangaldai to his parental home and in the meantime police came there and arrested the accused. The evidence in-chief of the victim (PW6) itself reveals that she went with the accused on her own volition as when the accused proposed her to go to Tezpur she immediately accept the proposal. But her grievance is that the accused in stead of taking her to Tezpur rather brought her to his uncle's house in Arunachal Pradesh where the accused wanted to solemonised her marriage with him. When she refused a discussion was held with the family members of her uncle as regards the proposal of marriage with the accused. Then she replied that she was still studying so she is not willing to marriage with the accused. Thereafter, both of them came back from Arunachal Pradesh to the house of the accused where the accused was apprehended by the police and rescued her. But her evidence in-chief has been demolished in the cross-examination and, therefore, her basic version on the material particulars of the case as to her kidnapping by the accused has become shaky and unreliable to accept her evidence on its face value inasmuch as this witness has revealed in cross-examination that

prior to seven months of the incident she maintained love relation with the accused with whom she acquainted by telephone call and after her acquaintance she used to talk with the accused as a friend every so often but my parents did not like her talking with the accused over phone. One day she was pulled up by her parents for keeping relation with the accused over phone and even thereafter she used to talk with the accused over phone. On the day of the occurrence she on her own accord went with the accused to Tezpur but in stead taking her to Arunachal Pradesh to his uncle's house and stayed there for one night and the accused did not indulge any sexual intercourse with her as she was sleeping for the night alone. She has further stated that her age was 14 years at the time of occurrence is only on presumption. At this juncture assuming that if the accused had kidnapped the victim she would have definitely tried to escape from the clutches of the accused when the accused in stead of taking her to Tezpur as per consent to Arunachal Pradesh. It is also spoken by the victim (PW6) in her evidence that there were family members of the uncle of the accused in Arunachal Pradesh where she stayed for the night. She became aggrieved only when the accused proposed to solemonise her marriage which was later forsaken by the accused himself at the interference of the family members of his uncle when she disclosed that she was still studying at school. When the victim has herself disclosed patently that she eloped with the accused voluntarily without informing her parents and when she did not make a whisper about the incident before any one including the family members of the uncle of the accused where she stayed for the night till her recovery by the people after returning to house at Mangaldai and she indicates that the victim left with the company to Arunachal Pradesh on her own accord. Moreover, she has also revealed that when she stayed in Arunachal Pradesh she stayed in the house of the uncle of the accused separately for the night. Therefore, it can be inferred safely that the victim on her own volition after her returning from tuition to go away with the accused without informing her parents.

- 26. Now coming to the question of the age of the victim, it appears that the medical officer (PW3) who examined her opined that victim was in between 14 to 16 years as per X-ray report at the time of occurrence. In the instant case, the age of the victim is most relevant factor. From the oral testimony of the victim (PW6) it appears that she was 13 years old at the time of occurrence which is not acceptable as she has stated her age on presumption coupled with the fact that though informant (PW1) has exhibited the seizure list, Ext.2 whereby it appears to have been seen that a birth certificate was seized by the I.O. But the original birth certificate or even photocopy thereof is not available in the case record. The evidence of I.O. (PW7) is quite silent in this regard. That being the position mere exhibiting the seizure list in absence of the birth certificate in no way establishes that the victim was 13 years 7 months old as stated by her father (PW1).
- 27. On the other hand, as per the ossification test conducted by the doctor (PW3), the age of the victim is in between 14 to 16 years. It is also apposite to point out that elopement of the victim PW6 with the accused was a voluntary one.
- 28. In the case of Jayamala v. Home Secretary, Govt. of J & K, AIR 1982 SC 1297, the Apex Court held that ossification test is no doubt a secure test but the margin of error of two years either on either side. Hence, this being a case of voluntary elopement with the accused, I am considered opinion that the accused is entitled to the benefit of margin of two years from the age of 16 years to hold that the victim was a major girl at the time of occurrence and, therefore, no case of kidnapping or rape is made out and, therefore, the accused is entitled to get the benefit of doubt.
- 29. In the result, the accused is held not guilty U/S 4 of the POCSO Act. Therefore, he is acquitted thereunder on benefit of doubt and set him at liberty forthwith.

30. Bail bond executed by the accused and the surety shall remain in force for another six months under the purview of Section 437(A) Cr.P.C.

Given under my hand and seal of this Court this 12^{th} day of March,2019.

Dictated and corrected by me and each page bears my signatures.

(P.Saikia) Special Judge, Udalguri.

Special Judge, Udalguri.

APPENDIX:

A)Prosecution witnesses:

i) PW1 Pranoy Chakraborty

ii)PW2 Pranjit Paul

iii)PW3 Dr. Kankan Thakuria iv)PW4 Smti. Ratna Chakraborty v)PW5 Uttam Chakraborty

vi)PW6 Miss Payel Chakraborty

vii) PW7 Tarun Ch. Nath

B)Defence witness: Nil.

C)Exhibits:

i) Ext.1 FIR

ii) Ext.2 Seizure list iii) Ext.3 Medical report

iv) Ext.4 statement of victim U/S 164 Cr.P.C.

v) Ext.5 Sketch map vi) Ext.6 Charge-sheet.

Dictated and corrected by me.

Sessions Judge, Udalguri