## IN THE COURT OF SPECIAL JUDGE, NAGAON.

# Special (POCSO) case No-77/2018.

U/S- 366 IPC R/W-S-4 of the POCSO Act.

Parties -

State of Assam

-VS-

Ritu Bora @ Jaan

S/O Bhaba Bora

Village- Jamuguri , Joypur

PS- Jamuguri , District- Sonitpur.

Date of charge-7-9-2018

Dates of recording evidence- 15-10-18, 29-10-18, 18-

1-2019

20-2-2019, 14-3-19, 2-7-2019, 5-8-

2019

Date of argument- 8-8-2019.

Date of judgment - 9-8-2019.

Present- A. Rahman, LL.M, AJS.

Appearance -7-9-2018

For the prosecution- Mr.M. J. Neog , learned Special

prosecutor.

For the defence - Mr. A.M. Hazarika, learned Advocate.

## <u>JUDGEMENT</u>

The instant case arose out of the Nagaon PS case No-1194/2018 registered under

U/S-366(A) IPC.

The prosecution case , unfolded during trial , in precise is as follows- on 7-4-2018, at about 6-30 PM , accused out of love affairs eloped away victim Malobika (actual name withheld to conceal her identity) from nearby her house in village Darrangial to his paternal aunt's house at Uria-gaon. During the intervening night of 7<sup>th</sup> and 8<sup>th</sup> April 2018, the accused committed sexual intercourse with her. Her parents having found her missing from their residence started searching in the village but could not get her. On the next morning , her father (PW-1) , name withheld , on being inquired came to know that accused Jaan Bora who was residing at the house of Prodip Bora of the same village having induced kidnapped her. So he lodged Ext-1 FIR at Nanoi, police petrol post.

The in charge of the said PP upon receipt of the FIR made GDE No- 165 dated 8-4-2018 and forwarded the same to the officer in charge of Nagaon police station for registering a case. Accordingly, aforesaid Nagaon PS case was registered. SI Jasawanta Nath, being the Officer in charge of the said PP took up investigation of the case.

During investigation, the victim was recovered. She was medically examined at Nagaon B.P. Civil hospital. The IO got recorded her statement U/S-164 CrPC. During the investigation IO visited the PO and recorded the statement of the witnesses. The accused was arrested and forwarded to the court with a prayer for sending him to jail custody.

At the conclusion of investigation, charge sheet U/S-366(A) IPC was laid against the accused person. The case exclusively triable by the court of Sessions was committed by learned CJM, Nagaon to the court of honourable Sessions Judge. The case was, initially transferred to the court of Asstt. Sessions Judge. After considering the statement of the victim girl, the said court opined the case falls within scope of the POCSO Act. So the case was returned to the court of Honourable Sessions Judge.

Accordingly, the instant POCSO case was registered and the record was transferred to this Special court for trial.

Upon hearing both sides and considering the material on record , charge U/S- 4 of the POCSO Act was framed against the accused to which he pleaded not guilty and claimed to be tried. Additional Charge U/S-366 IPC. He denied the additional charge.

During the trial held in camera, prosecution adduced evidence of six witnesses including the MO who examined the victim girl and the investigating police officer. At the conclusion of the examination of the prosecution witnesses, the accused was examined U/S-313crpc. He denied the allegation of the prosecution but pleaded that out of love affairs, she voluntarily eloped with him to his paternal uncles' house at Uriagaon. He adduced defence evidence by examining himself as DW-1.

I have heard Mr. M. J. Neog learned Special prosecutor and Mr. A. M. Hazarika, learned Advocate for the defence. I have also thoroughly and meticulously gone through the evidence and material on record.

The points for determination are as follows-

- (a) Whether the accused having induced the victim kidnapped her from her house in Darrangial village on 7-4-2018 at about 6-30 PM with an intention or knowing that she would be seduced or forced to illicit intercourse with him and thereby committed offence punishable U/S-366 IPC?
- (b) Whether the accused, on the intervening night of 7<sup>th</sup> and 8<sup>th</sup> April 2018, at village Uriagaon committed penetrative sexual intercourse with the victim and as such liable to punished U/S-4 of the POCSO Act?

### **DISCUSSION, DECISION & REASONS THEREOF -**

All the two points being discussed together for the sake of convenience and brevity as well the offences were allegedly committed during the same course of event.

Before entering in to analysis and appreciation of evidence, it is plausible to take a glimpse of the relevant statement of the witnesses.

PW-1 & PW-3 are the father and mother of victim (PW-1) respectively. Their names are withheld to conceal the identity of the victim girl.

PW-4 Dr Mrs. Pallavi Kakoti , M& HO-I , Nagaon B.P. Civil hospital , has testified that on 9-4-2018 , at 1-30 pm , she examined the victim (PW-2) being escorted by WPC /1294 Runumoni Kalita with reference to Nagaon PS case No- 1194/18 U/S-366(A) IPC.

On examination, she found the followings-

Identification mark -one black mole near right external auditory meatus in the right side of the face - Height -132cm , weight -40 kg ; teeth - 14/14, breast not fully developed. Auxiliary hair present. Pubic hair -present.

Hymen -absent. No active bleeding. Vaginal injury -absent.

Marks of violence -absent.

Clothing- NAD.

LMP- patient could not tell the exact date.

Smear examination report - Regd. No-130 reported by pathologist -Dr J. Hazarika shows no spermatozoa seen in the vaginal smear.

X-ray examination of the right wrist, elbow and iliac Crest-RY+RY+RY dated -9-4-2018 reported by Radiologist Dr. M. Kalita shows radiological age appears to be 16-17 years.

Right wrist joint, epiphysis -have not fused completely with chaft.

Right iliac -crest -epiphysis has not fused with the crest.

Urine for pregnancy -test -BHCG -test on 9-4-2018 reported by pathologist Dr. J. Hussain shows -negative.

Opinion-

PW-4 has opined that -the age of the victim appears to be between 16 & 17 years as per radiologist report.

There is no evidence of recent sexual intercourse. No marks of injury on her body and private parts.

PW-1 has deposed inter alia that on 7-4-2018 at about 6/6-30 pm, he had gone to the fair price shop of his village to bring rice at controlled price. When he returned home, his wife (PW-3) reported him that their daughter (PW-2) had gone missing. Accordingly, they were searching her but could not trace her. On

the next morning, he raised suspicion that the accused might kidnap PW-2 as he was also missing from the house of Prodip Bora of his village. Accordingly, he lodged Ext-1 FIR at Nanoi police patrol post. He has confirmed that Ext-1(1) is his signature. In the evening, on being asked by police, he came to the said police patrol post and found his daughter (PW-2) had been recovered. On being asked, she stated to him that the accused had taken her to pump-house at Uria gaon and committed bad work with her. He has further testified that police sent his daughter for her medical examination. She was also produced before the Magistrate for recording her statement. PW-1 has specifically stated that PW-2 was 17 years old at the relevant time of occurrence. Her date of birth is 25-5-2000.

During cross examination, he has replied that he does not know if there was love affairs between PW-2 and the accused. He did not prepare horoscope of his daughter.

However, he denied the suggestion that his daughter was above 18 years at the time of alleged occurrence and the case against the accused is false.

PW- 3 has testified that knows the accused person as he was living in the same village. The occurrence took place in the month of April last year (she deposed on 18th January 2019). On the relevant evening at about 6-30 PM, her daughter (PW-2) became missing as such she informed the fact to her family, relatives and neighbour. When her husband (PW-2) returned home at about 8 PM, she informed about the said fact of missing their daughter (PW-2). She has further testified that although they were searching her daughter but could not trace her. On the next day, she accompanied by her husband visited the house of said Prodip Bora and came to know that accused had also gone missing from home. Her husband (PW-2) lodged the FIR. On the same in the evening, at about 8 PM, police recovered her daughter along with the accused from a pump-house situated in the midst of a paddy field at Uriagaon. Police got her daughter (PW-2) medically examined and produced her before the Magistrate for recording her statement. After obtaining custody of PW-2, on being asked, she disclosed that the accused having induced her with a plea to visit a little ahead took away her to Uriagaon. She also disclosed that the accused had done bad work (sexual intercourse) with her inside the paam -house situated in the paddy field. The date of birth of her daughter (PW-2) is 25-5-2000 and she was 17 years at the relevant time of occurrence.

During cross examination, she stated that she has forgotten the birth of her elder daughter. But she has made it clear that after the birth of her elder daughter, her son (now aged 21 years) was born and three years later, PW-2 was born. She has denied the suggestion that PW-2 was eighteen years at the relevant time of occurrence.

PW-2 is the victim and the most crucial witness of the prosecution. Her evidence was recorded in camera on 29th October 2018. On the date she claimed to be 18 years old. She has testified that on 7-4-2018 at about 6-30pm on being called by Jaan (accused) over telephone, she immediately went to the Shiv-temple nearby their house. Thereafter, he asked her to board in the vehicle (tem-poo) brought by him. Accordingly, she accompanied Jaan to his uncle's house in Urai-gaon. Then he took her to a paam-house. She has further testified that when she wanted to come back, he stated to her that he would marry her. At night he slept with her on the same bed, removed her cloth and committed bad work with her. She has clearly said the accused inserted his urine passing organ (penis) into her sexual organ. Although, she opposed but he did not listen to her. She has stated that she narrated the details of the occurrence to her elder sister-Ankita. Her date of birth is 25-5-2000 and she passed out HSLC at the first instance. She has confirmed that Ext-2 is her statement U/S-164CRPC. Ext- 2(1) & Ext-2(2) are her signatures. She has also produced her original HSLC passed certificate. Ext-3 (proved in original) is the said certificate.

During her cross-examination, she stated that she came into acquaintance with Jaan about one month prior to the occurrence and they fell in love. She did not disclose to her parents about her love affairs with the accused. She did not raise objection while boarded in to the tempo brought by the accused. She denied the suggestion that at the time of occurrence, she was above 18 years and her parents reduced her actual age at the time of her admission.

PW-5 Shri Kumud Bora has deposed to the effect that on the relevant evening of occurrence, informant (PW-1) went to his house in search of his daughter. They were searching PW-2 but could not trace her. On the next morning, he along with PW-1 visited the house of Prdip Bora and asked about Jaan Bora. He replied that Jaan Bora had left his house on the previous day. He has further testified that police recovered PW-2 and the accused from a paam (farm) house after PW-1 had lodged the case with Nanoi police. After recovery of PW-2 by police from a farm house (paam-house), he visited police patrol post. She disclosed to him

that the accused had taken her on the plea of marrying her and he committed bad work with her.

In cross examination, he replied that PW-2 is his niece and she was 17 years at the relevant time of occurrence.

PW-6 Josowanta Nath being the investigating police officer has testified that on 8-4-2018 being officer in charge of Nanoi PP. on the basis of Ext-1 ejehar (FIR) lodged by PW-1 , he made GDE No- 165 dated 8-4-18 (wrongly typed as 6-4-18) and forwarded the same to the officer in charge of Nagaon PS for registering the case. He has affirmed that Ext-1(2) is her signature. He himself took up investigation of the case. During the investigation, he recorded the statement of the complainant (PW-1), PW-3 and visited the place of occurrence and drew Ext-6 sketch map wherein Ext-6(1) is his signature. He has also stated that on 8-4-18, at about 7pm, victim (PW-2) and the accused were found in a paam (farm) house near a paddy field at Uriagaon Bye-pass. Accordingly, they were brought to Nagaon Sadar Police station. He sent the victim to Nagaon B.P. Hospital for her medical examination. Then she was produced before the Magistrate for recording her statement U/S-164 CrPC after she had been sent to Nagaon State, Home for reflection. On 10-4-2018, her statement was recorded by Magistrate. During investigation, he formally arrested the accused and forwarded him to the court for his judicial custody. Having collected the medical examination report of the victim, he submitted Ext-7 charge sheet against the accused person U/S-366(A) IPC.

In cross examination, PW-6 has replied that he did not collect any school certificate of the victim but complainant supplied him Xerox-copy of HSLC admit card. During investigation, it was revealed that there was love affairs between the victim and the accused.

Now, considering the prosecution allegation and the nature of charges framed against the accused person, the age of the victim, at the relevant time of occurrence is very crucial and requires determination at the very outset. The occurrence took place on 7-4-2018.

According to the oral testimony of PW-1& PW-3, the date of birth of their daughter (PW-2) was 25-5-2000. PW-2 at the time of her evidence before this court submitted her Ext-3 HSLC certificate. There was no objection from the defence side when Ext-3 was introduced in evidence. Mr. A. M. Hazarika, learned counsel for the defence argued that Ext-3 could not be appreciated in evidence and should not be relied on for age determination of

PW-2. Because, according to the learned counsel, the investigating police officer during the time of examination did not collect the same and as such, during the trial, it cannot be accepted. Otherwise, it would cause serious prejudice to the defence. On the other hand, Mr. M. J. Neog, learned Special prosecutor submitted that as per S-91 of CrPC, the prosecution can very well adduce the documentary evidence during trial even if the document was not seized during investigation. The defence side got enough scope to cross examine PW-2 with regard to Ext-3 document which is a public document. So in fact, no prejudice was caused to the defence.

Learned counsel for the defence has argued that as per radiological examination report, the age of the alleged victim girl is 16 to 17 years. So as per decision of the Hon'ble Supreme court in <code>Jaya Mala -vs- Home Secy J&K</code> [ AIR 1982SC 1297], the ossification is the surely a surer test but there is an error of two years on either side. So, the alleged victim girl (PW-2) would be above 18 years on the date of alleged occurrence. Thus, she being a major girl having attained the age of discretion, on account of love affairs with the accused voluntarily eloped with him. She also with her own consent and wilfully participated in physical intercourse with the accused. Therefore, learned counsel has submitted that the accused being an innocent young boy may be acquitted at least on benefit of doubt.

I have given my deep thought to the aforesaid submission of the learned counsel of both sides.

Ext-3 is the HSLC examination pass certificate of PW-2 issued by Board of Secondary Education Assam. This is a public document issued much prior to the date of occurrence. It cannot be presumed that Ext-3 was manufactured for the purpose of the case. So, in my considered view, Ext-3 can be very well appreciated in evidence for the purpose of determining age of PW-2. Now question remains whether Ext-3 should be given preference over the radiological determination of the age of PW-2 at the relevant time of occurrence. In this regard, we may be well guided by the decision of the Hon'ble Supreme court in the case of *Mahadeo S/O Kebra Maske -vs- State of Maharashtra & Another* [MANU/SC/0753/2013] (2013) 14 SCC 637]. The Hon'ble Appex court has held that the Rule 12(3) of the Juvenile Justice (care and Protection of Children) Rules 2007 is applicable in determining the age of the victim of rape.

Now turning to the said Rule 12(3), we find as follows- In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or board

or as the case may be, the committee by seeking evidence by obtaining

- (a) (i) the matriculation or equivalent certificate , if available , and in the absence
  - (ii) The date of birth certificate from the school (other than play school) first attended and in the absence whereof:
  - (iii) The certificate given by a corporation or a municipal authority or a panchayat;
- (b)Only in the absence of either (i) (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Board which will declare the age of the juvenile or child.

The court in para 12 of the said Judgment has held as under:

Under Rule 12(3) (b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3) (a) (i) to (iii), the medical opinion can be sought for. In the light of such statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of the victim as well.

In view the said ruling of the Supreme Court, there remains no iota of doubt that Ext-3 can be safely relied on for age determination of PW-2.

Therefore, relying upon Ext-3, it is found that PW-2 was 17 (seventeen) years 10 (ten months) and 12(twelve) days on 7-4-2018 being the date of occurrence. That being so, PW-2 being below 18 years was a child as defined U/S-2(d) of the POCSO Act 2012 at the relevant time of occurrence.

PW-2 in her evidence as well as her statement U/S-164 CrPC [Ext-2] stated the on the night of 7-4-2018, she was sleeping with the accused at Uria-gaon and physical relation (sexual intercourse) happened between them. She has very specifically said the accused having removed her wearing apparel inserted her penis in to her vagina. Medical evidence PW-4 and Ext-4 prove that although there was no active bleeding on the private parts of PW-2 but her hymen was found absent. And there was no sign of forceful sexual intercourse.

The accused, in his statement U/S-313 CRPC, has admitted that with their mutual consent, they slept together on the relevant night as they were in love with each other. Furthermore, he also admitted that physical intercourse happened with her consent. DW-1 Ritu Bora while deposing before the court during his cross

examination clearly said because of their love affairs, they

shared physical relation and during the relevant night at Uriagaon also, physical intercourse between them happened.

Therefore, the oral evidence of PW-2 regarding sexual intercourse committed upon her by the accused on the relevant night of occurrence is also corroborated by the admission of DW-1 in his evidence as well as his in-culpatory statement U/S-313 crpc.

As per S-3(a) of the POCSO Act, a person is said to commit "penetrative <u>sexual assault</u>" if he penetrates his penis, to any extent into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.

Accordingly, it is proved beyond all reasonable doubt that the accused committed penetrative sexual assault upon the child PW-2.

In the light of the above discussion and findings, aforesaid point No-(b) answered in the affirmative.

From the evidence (cross examination) of PW-2, it is proved that she fell in love with the accused about one month prior to the occurrence. She has clearly stated that on the relevant time of occurrence, when she boarded in the tempo-vehicle, she did not raise any objection. In her statement recorded U/S-164 crpc [Ext-2], she distinctly stated having love affairs for one month with the accused, on 7-4-2018, she eloped with Jaan to Uriagaon. Although, PW-2 at the relevant time of occurrence has not completed 18 which fell short of around one month but she with her own will and free consent.

Voluntarily eloped with the accused. There was no any inducement, threat, force or enticement upon her by the accused when she accompanied him to Uriagaon.

DW-1 has produced two love letters- Ext-Ka & Ext-Kha written by PW-2 to him. When he was going by a tempo- vehicle , on 7-4-2018 , towards his paternal uncle's house in Uriagaon, PW-2 forced him to take and she stated that he had come out from her house and if she return , her father would slash her. Accordingly, in front of the house of one Rupali, she boarded in to his vehicle. Having perused Ext-Ka & Ext-Kha, it is found that PW-2 being in deep love with the accused, out of emotion was planning to elope with him.

Considering the above evidence, I find that the accused did not take away her from the keeping of her lawful guardianship. So, Section-361 IPC, as far as her elopement with the accused to his paternal uncle's house is concerned, has not been made out.

Consequently, S-366 IPC has not been made out against the accused.

Accordingly, aforesaid point No-(a) stands answered in the negative.

The offshoot of the foregoing discussions and findings is that the accused stands convicted U/S-4 of the POCSO Act. He stands acquitted from the charge U/S-366 IPC.

Now a bare perusal of S-4 of the said Act clearly shows that the punishment for committing penetrative sexual assault is of either description for a term not less than seven years but it may extend to imprisonment for life and compulsory fine.

S-4(1) of the Probation of Offenders Act confers a discretionary power upon the court to release a person convicted of any offence not punishable with death or imprisonment for life, having regard to the facts and circumstances of the case. Accordingly, S-4 of the Probation of Offenders Act cannot be applied to give some respite to the accused.

### **VICTIM COMPENSATION**

The victim as a result of the offence mentally and physically suffered. She has also lost her chastity. Therefore this court under rule 7 of the protection for children from sexual offences rules 2012 recommends that DLSA, Nagaon shall make inquiry and pay compensation to the victim from victim's compensation fund provided by the state government.

### **SENTENCE HEARING:** -

Heard the accused on the point of sentence. It is stated that he is the only son of his poor parents. Besides he is also the sole bread earner of his family. His father is bed ridden following road traffic accident.

It has been already held that following love affairs and emotion, PW-2 who was almost nearing her majority falling short of one month twelve days, voluntarily eloped with the accused. The case arose purely due to love affairs. The accused is a young person of 24 years old only. He appears to be very simple and straight forward for which, he frankly stated the physical relation happened with her consent and due to love affairs.

So, I am of the judicious view that the accused deserves to be leniently dealt with. Accordingly , he is imposed the minimum sentence of seven years RI and fine of Rs-1000/only in default one month SI for committing offence U/S-4 of the POCSO Act. The period which the accused has undergone in jail custody in connection with this case shall be set off from quantum of sentence.

Judgement is declared and delivered in the open court under my hand and seal of this court this 9<sup>th</sup> day of August 2019.

Sent a copy of this order to DLSA, Nagaon.

(A. Rahman, AJS )
Additional Sessions judge,

Nagaon.

Judgement prepared & corrected by me.

(A. Rahman, AJS)

Additional Sessions Judge, Nagaon.

### **APPENDIX**

**Prosecution Witness** 

PW-1 Father of the victim

PW-2 Victim

PW-3 Mother of the Victim

PW-4 Dr Mrs. Pallavi Kakoti

PW-5 Shri Kumud Bora

PW-6 Josowanta Nath (IO)

**Defence Witness** 

DW-1 Ritu Bora

**Exhibits** 

Ext-1 FIR

Ext-2 Statement U/S-164CRPC

Ext-3 HSLC passed certificate

Ext-4 Medical Examination Report

Defence Exhibits- NIL

(A. Rahman, AJS)

Additional Sessions Judge, Nagaon