

GAHC010046482022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./41/2022

JITU ROY
S/O DHARMESWAR ROY
RESIDENT OF VILLAGE BICHANDOI. GOLAKGANJ, DIST DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:SRI NARESH BASUMATARY
S/O LATE BALURAM BASUMOTARY
VILLAGE JOYMAGURI
PS GOSSAIGAON
DIST KOKRAJHAR
ASSA

Advocate for the Petitioner : MR. K BHATTACHARJEE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 26-04-2023

Heard Mr. K. Bhattacharjee, learned counsel for the accused-appellant. Also heard Mr. P.S. Lahkar, learned Additional Public Prosecutor for the State/respondent.

2. This is an appeal filed under Section 374(2) Cr.P.C. 1973, challenging the judgment and order dated 19.01.2022 passed by the learned Special Judge(POCSO), Kokrajhar in Special Case No. 50/2018, whereby the accused/appellant has been convicted under Section 366 of IPC and sentenced to undergo rigorous imprisonment for 3(three) years and to pay a fine of Rs.10,000/- in default of payment of fine, to suffer imprisonment for 3(three) months. The accused/appellant was also convicted under Section 4 of POCSO Act and sentenced to undergo rigorous imprisonment for 7(seven) years and to pay a fine of RS.25,000/- in default stipulation.

3. The brief facts of the case is that the informant Naresh Basumatary who is the father of the victim had lodged an FIR before the O/C, Gossaigoan police station stating *inter alia* that on 16.02.2018 when his minor daughter was returning home after appearing in the examination at Bhowraguri High School, she was kidnapped from Binnayakhata. Though the family members were in search of his daughter but she could not be traced out. Subsequently, they came to know that the accused/appellant had kept his daughter at Golakganj Bisondai village. It is also alleged that the accused had done injustice towards his daughter by doing such bad acts.

4. On receipt of the complaint, a case was registered vide Gossaigaon P.S. Case No. 58/2018 under Section 120B/363 IPC and the investigation had been started. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses and seized one school certificate of the victim and the victim was sent for medical examination and after completion of investigation, charge-sheet was submitted against the accused/appellant under Section 363 IPC read with Section 4 of POCSO Act.

5. During trial, the accused/appellant had appeared before the court of Special Judge(POCSO), Kokrajhar and the learned trial court on considering the materials available in the case, had framed charges against the accused/appellant under Section 366 IPC R/W Section 4 of POCSO Act which was read over and explained to the accused/appellant to which he pleaded not guilty and claimed to be tried.

6. To substantiate the case of the prosecution 12(twelve) witnesses were examined and exhibited six documents. After completion of trial, statement of the accused/appellant was recorded under Section 313 Cr.P.C wherein he denied the incriminating circumstances appearing against him and he neither examined any witness nor got marked any documents in his defence. After hearing argument advanced by the learned trial counsel for the parties, the learned trial court has convicted the accused/appellant as aforesaid.

7. Being highly aggrieved and dissatisfied with the judgment and order, the accused/appellant had preferred this appeal before this Court.

8. Mr. Bhattacharjee, learned counsel for the accused/appellant has submitted that the accused has been falsely implicated in this case and he has not committed any offence in any manner. It is also submitted that the prosecution has failed to prove the age of the victim during trial by producing any document. According to the learned counsel for the appellant, the victim was around 18 years of age when the incident took place. She was consenting party to be eloped with the appellant. Under the facts and circumstances of the case, the conviction of the appellant relying upon the school registrar is not tenable in the eye of law.

9. The learned counsel for the appellant further contended that there are lots of contradictions in the statement of the victim while deposed before the court as well as in her statement recorded by the learned Magistrate under Section 164 Cr.P.C. as such the evidence adduced by the alleged victim cannot be considered for finding the fact for conviction of the accused/appellant. Hence, finding of the learned trial court is perverse.

10. It is also submitted by the learned counsel for the appellant that while the victim was travelling along with the appellant in a bus, she did not shout either in the bus or in any moment till reaching the house of the accused/appellant at Golakganj which transpires that she was a consenting party to be eloped with the accused/appellant.

11. It is also the submission of the learned counsel for the appellant that the victim had

mobile phone along with her when she was in the captivity of the appellant. While the father of the victim stated that she did not receive any phone call from his daughter but the victim had stated that she had contacted with her father over mobile phone. Under such contradictory statements of the father and the victim, it can be presumed that a false case was initiated against the accused/appellant and the conviction against the appellant is liable to be set aside.

12. In support of his submissions, the learned counsel for the appellant has relied on the following case laws-

(i) 1994 STPL 1196 Rajasthan, Balbir Singh vs State of Rajasthan..

(ii) MANU/MG/0241/2022 Anwar Hussain Sheikh vs State of Meghalaya.

(iii) Guda Mahender vs State of Telangana (Criminal Appeal No. 219 of 2021).

13. On the other hand, Mr. Lahkar, learned Additional Public Prosecutor for the State/respondent No.1 has vehemently opposed the submission of learned counsel for the appellant contending that the victim was a minor at the relevant time of incident and there is no value of consent given by her to be eloped or to have sexual intercourse with the appellant. The age of the victim has been proved by exhibiting school certificate and when the document was exhibited before the court, the defence side did not raise any objection. Under such backdrop, the subsequent objection regarding the document cannot be taken into account.

14. The learned Additional Public Prosecutor has further submitted that the presumption under Section 29 of the POCSO Act can very much be raised against the accused/appellant. Since, in this case, the said presumption has not been rebutted by the accused/appellant, the conviction cannot be interfered with.

15. It is also submitted by the learned Additional Public Prosecutor that as per Section 30 of the POCSO Act, the culpable mental state of the accused/appellant should be presumed. The accused/appellant has not rebutted the said presumption as required in Section 30(1) of the POCSO Act.

16. The learned Additional Public Prosecutor further submits that from the evidence of the victim, it has been clearly established that the accused/appellant had culpable mental state to have sexual intercourse with the victim and with that culpable mental state, he had taken the victim at Golakganj in his house and got married to her. So far as the age of the victim is concerned, the learned Additional Public Prosecutor would submit that if any question arises in any proceedings before the Special Court, whether a person is a child or not, such question shall be determined by the Special Court and it shall record in writing the reasons for such determination.

17. The learned Additional Public Prosecutor would further submits that once such record is made by the Special Court, it shall not be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it, shall not be correct age of such person. Here, in this case, according to the learned Public Prosecutor, the age of the victim was determined by the Special Court and the same was not challenged and thus, the same has become final. Thus, according to the learned Additional Public Prosecutor, the conviction and sentence imposed by the learned trial court does not warrant any interference at the hands of this Court.

18. I have considered the submissions made by the learned counsel for the parties and I have also perused the judgment and documents available in the record.

19. Admittedly, except PW-1 i.e. victim, there is no eye witness to the incident. P.W.2 is the informant who is the father of the victim and P.W.3 is the mother of the victim. P.W.5 i.e. the Headmaster of No.2 Anthaibari LP School, wherein the victim was studying proved the admission register. The other witnesses i.e. P.W.4, P.W.6, P.W.7, P.W.8 and P.W.10 did not say

anything about the incident. P.W.11 is the teacher of 783 Binnakhata LP school, who was present when the admission register was seized from the school.

20. P.W.1 is the victim. From her deposition, it reveals that on 16.02.2018, she had gone to appear in the HSLC examination. At the time of returning, the accused/appellant accosted her and took her to Golakganj in a passenger vehicle and the accused kept her in his house and marriage was solemnized with her without her consent. The accused had also committed sexual intercourse with her on three occasions. Later, police came and recovered her from the house of the accused and her medical examination was done by the Doctor, Civil Hospital, Kokrajhar. She was also produced before the Magistrate for recording her statement.

21. In her cross-examination, P.W.1 replied that she got married to another person on 20.09.2019. She was born on 07.06.2002. she came to know the accused about 2/3 days prior to the incident. The accused was working as a construction worker on a public bridge. She did not remember in which place she boarded in the bus. She was sitting in the bus during the journey. The accused did not inform her where she was taken. She did not shout inside the bus. From the first point at Anthaibari till arrival to the residence of the accused, she never shouted for help.

22. P.W.2, Naresh Basumatary, who is the father of the victim. He deposed in his evidence that on the date of occurrence, his daughter aged about 16 years had gone for her HSLC examination. When his daughter did not return back home, he went out in search of his daughter. Subsequently, he came to know from her friends that his daughter had been taken away by a boy. Later, he came to know that the accused/appellant Jitu had taken his daughter to his native village at Golakganj. Then he lodged the FIR. Thereafter, police recovered his daughter from Golakganj and brought her Gossaigaon police station. He met his daughter in Gossaigaon police station on the next morning. On being asked, she disclosed that the accused forcefully took her away to Golakganj and solemnized marriage with her.

23. In his cross-examination, P.W.2 replied that his daughter had married to another boy

and it was a love marriage. He did not know if his daughter had love affair with Jitu. The accused used to come in the house of their neighbours. His daughter had a mobile phone with her. His daughter did not call him when she was at Golakganj.

24. P.W.3 is the mother of the victim who deposed in her evidence that on the day of the incident her daughter had gone to school for her school examination but she was abducted by a boy. The boy also married her daughter and committed sexual intercourse with her. Her daughter was recovered at the instance of police and she told her about the incident.

25. In her cross-examination, P.W.3 replied that she did not remember the date of birth or year of her daughter. Her daughter has got married to another boy. She did not know how her daughter was abducted.

26. After going through the evidence of P.W.1, P.W.2 and P.W.3, it reveals that there are some contradictions in the evidence of P.W.1 and P.W.2. According to P.W.1, she had a mobile phone and she had contacted with her father when she was in Golakganj in the house of the accused/appellant and she had narrated the incident to her father and her neighbours also but P.W.2, the father of the victim stated that though his daughter was carrying a mobile phone at the relevant time but she did not inform anything over phone when she was at Golakganj. It also appears from the evidence of P.W.1 that while she was travelling in a bus along with accused, she did not raise any hue and cry. All these facts would clearly go to show that P.W.1 went along with the accused/appellant on her own volition and with consent.

27. Now, the question comes whether the act of the accused in taking P.W1 will amount to kidnapping. And whether the victim attains the age of 16 years and above 18 years can be considered a child for the purpose of Act, 2012 and whether the act of making physical relation her consent does not fall under the category of offence committed under the POCSO Act.

28. One of the essential ingredients of the offence of kidnapping is that the victim should

not have attained the age of 18 years. Similarly, in order to attract any offence under the provisions of the POCSO Act, it should be proved by the prosecution that as on the date of the commission of the crime, she was a child. The term 'child' has been defined in [Section 2\(d\)](#) of the POCSO Act, which states that child means, any person below the age of 18 years. Thus, for the purpose of the offence of kidnapping as well as for any offence under the POCSO Act, the age of the victim should be proved to be below 18 years on the relevant date of incident.

29. As far as the question with respect of age and consent part is concerned, the basic object of enacting the POCSO Act, 2012 is required to be seen. The prime object of enactment of POCSO Act, is to protect a child from all aspects so that he or she feels comfortable, protected and free from fear or horrible experiences and he or she experiences were child friendly atmosphere. The data collected by National Crime Records Bureau shows that there are increasing in number of cases of sexual abuse offences against children in India which is duly corroborated by the study of child abuse India 2007 which was conducted by the Ministry of Women and Child Development. Therefore, need for a new Act specifically for the protection of the child from sexual offences was felt by the legislature and the protection of children from POCSO Act, 2012 was framed. The POCSO Act is a comprehensive Act and provides as lawful protection of children from sexual assault, abuse, harassment or pornography etc. while safeguarding the interest over a child at every stage of case of judicial process and cooperating the child friendly mechanism for recording of evidence investigation and speedy trial of offence through designated special court.

30. It is the contention of the learned counsel for the accused/appellant that the prosecution has failed to prove that P.W.1 was below the age of 18 years as on the date of occurrence. But according to the learned Additional Public Prosecutor that P.W.1 was below the age of 18 years as on the date of the commission of the offence, which is evident from Ext.3, the school certificate which was proved by examining the Headmaster of No.2 Anthaibari LP School who issued the said document. According to Ext.3, the date of birth of the victim is 07.06.2002 and the incident occurred on 16.02.2018 which transpires that P.W1 had not completed the age of 18 years on the date of incident.

31. The contention of the learned counsel for the accused/appellant is that in the absence of the examination of the person, who gave such information to the school, where P.W.1 was admitted in respect of her date of birth and in the absence of birth certificate, the date of birth of P.W.1 shall not be taken to be proved as on 07.06.2022. It is true that the primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in the absence of the birth certificate, the date of birth cannot be proved. It can be proved by other means. However, when the age of the individual is not disputed before the learned trial court while the document was exhibited, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact, or any fact relevant to the issue, which is disputed by the adverse party alone needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact.

32. In the instant case, P.W.1 i.e. the victim has stated her date of birth was 07.06.2002 during her cross-examination. The school certificate which was issued by P.W.5 has exhibited the admission register vide Ext.3 which reveals that the date of birth of the victim was 07.06.2002. The admission register was seized by the investigating officer during investigation. The accused/appellant has failed to produce any better document to prove that the victim was about 18 years of age at the relevant time of incident. Thus, the evidence of P.W.1 and P.W.5 in respect of the age of P.W.1 remains unchallenged. The certificate i.e. Ext.3 is a public document, which contains the date of birth of P.W.1. Assuming that the document (Ext.3) does not have substantive value for want of examination of the person, who gave the information regarding the date of birth to the school authority at the time when P.W.1 was admitted, even then, the document (Ext.3) will not lose its value, at least, as corroborative piece of evidence and the document would duly corroborate the evidence of P.W.-1 to prove her date of birth. Apart from that P.W.2 also stated that at the relevant time of incident, his daughter was around 16 years of age which was not denied by the accused/appellant. Thus, the evidence of P.W.2 also clearly goes to support the prosecution to prove the age of P.W.1.

33. In the case of *Ms. Eera Through Dr. Manjula Krippendorf Vs. State (Govt. Of Nct Of*

Delhi) reported in (2017) 15 SCC 133, wherein the pivotal issue in the Appeal before the Hon'ble Supreme Court pertains to interpretation of [Section 2 \(1\)\(d\)](#) of POCSO Act, 2012, where a "child" defines to mean a person below the age of 18 years, should engulf and embrace, in its connotative expanse, the "mental age" of a person or the age determined by the prevalent science pertaining to psychiatry, so that mentally retarded persons or an extremely intellectually challenged persons who even have crossed the biological age of 18 years can be included in the holistic conception of the term "child". The demand of such interpretation was morally supported in view of the Nirbhaya's Case [*Mukesh and Anrs. Vs NCT Delhi* reported in (2017) 6 SCC 1] and the requirement of enactment in defining the age of a child was felt by the legislature.

34. In the instant case, the case laws which have been relied upon by the learned counsel for the accused/appellant regarding the age of the victim, the said judgments do not show any consideration with respect to the object and intention of the legislature. As the age of the victim was proved by school certificate, there is no need to further proof the age of the victim by medical examination as per Section 12 of the JJB Rules, 2007, which says how the age of a person considered to be a child is to be determined under Rule 12 Juvenile Justice Care and Protection Rule, 2007. The procedure is to be followed when there is nothing on record to indicate the actual age of the victim either by medical or documentary evidence. But here in this case as the age of the victim was proved by exhibiting a document i.e. school certificate, the question of following the Rule 12 of JJB rules does not arise at all.

35. The fact remains that in terms of the definition of [Section 2 \(d\)](#) of POCSO Act, 2012, the victim here in this case was a 'child' because she was below the age of 18 years. Any person below 18 years of age under the POCSO Act, 2012 has to be considered as a child and the consent of a child is having no value as has been held by the Hon'ble Supreme Court in large number of cases. The victim under the age of 18 years if develops physical relations with her own will out of love and affection cannot be said to have given the consent for doing the same. Thus, it is apparently clear that the child has to be considered any victim below the age of 18 years in terms of [Section 2 \(d\)](#) of POCSO Act because the POCSO Act, 2012 being a

special enactment.

36. In the case in hand, the accused/appellant after taking the victim away from her lawful guardianship, got her married and had made physical relationship with her who was below 18 years at the relevant time of the incident and the accused has knowledge about the fact that she was minor. Therefore, the provisions of POCSO Act is clearly attracted.

37. In the case of *Prahlad Vs. State of Haryana* reported in (2015) 8 SCC 688, *Dileep Vs. State of M.P.* reported in (2013) 14 SCC 331; wherein, the Hon'ble Supreme Court has gone to the extent that the issue of consent is no more *res-integra* even in case where the prosecutrix was about 16 years of age. As far as the victim under the POCSO Act, 2012 is concerned, there cannot be a consent given by the victim, who is below 18 years of age because POCSO Act, 2012 is a special enactment and definition of a child under [Section 2 \(d\)](#) of the Act, 2012 is required to be taken into consideration while dealing with the case. Thus, a child below 18 years of age is not in a position to give consent for having sexual intercourse with her own will in terms of love and affection.

38. Regarding culpable mental state of the appellant as it appears that after kidnapping the victim while she was returning from school, the accused/appellant took her in his house at Golakganj. The victim was compelled to marry to have physical relation with her. In this regard, I may refer Section 30 of POCSO Act which reads as follows-

"30. Presumption of culpable mental state.- (i) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(ii) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its

existence is established by a preponderance of probability.”

39. In the instant case, in view of the other proved facts that the accused took P.W.1 to Golakganj, got her married and had sexual intercourse with her, the culpable mental state is to be presumed. But, the accused has not rebutted the said presumption. Therefore, it can be said that the appellant had culpable mental state while taking P.W.1 on her way home to Golakganj only for the purpose of marriage and committing sexual assault. That apart, the presumption of guilt under [Section 29](#) of the Act also needs to be raised, as all the necessary fundamental facts have been proved. The said presumption also has not been rebutted by the accused/appellant.

40. Regarding medical evidence of the victim, according to learned counsel for the appellant, no injury was found by the medical officer while examining the victim on her private parts. As per medical evidence, the prosecutrix is habituated to sexual intercourse. As there is no evidence to prove the allegation to have sexual assault towards the victim beyond reasonable doubt, the impugned judgment passed by the learned Special Judge is not at all sustainable.

41. The medical officer was examined in the case as P.W.9, she deposed before the Court that on 20.02.2018 she was posted as medical officer at RNB Civil Hospital, Kokrajhar. On that day, on police requisition, she had examined the victim and on examination she did not find any injury mark on her private parts. According to P.W.9, the victim is habituated to sexual intercourse.

42. It appears from the record that the incident occurred on 16.02.2018 but the victim was examined by the doctor on 20.02.2018 i.e. after 4(four) days of the incident. It is quite natural that after 4(four) days of the incident, there may not be any injury mark on the private parts of the victim. But the evidence of P.W.9 indicates that there was sign of sexual intercourse on examination of the victim.

43. Now coming to the conviction, the appellant has been convicted under Section 366 IPC which reads as follows-

“S. 366. Kidnapping, abducting or inducing woman to compel her marriage etc.-Whoever kidnaps or abducts any woman with intent that she may be, compelled, or knowing it to be likely that she will be compelled, to marry any person *against* her *will*, or in order that she may be forced or seduced to illicit intercourse, *or* knowing *it* to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for *a* term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority *or* any other method of compulsion, induces any woman to go from any *place* with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.”

44. It is the contention of the learned counsel for the appellant that the offence under Section 366 of IPC would be made out, if only the accused had kidnapped her with an intention to force or seduce her to have illicit intercourse with another person. In other words, the kidnapping of a minor girl from and out of her lawful guardianship to force or seduce her to have sexual intercourse with himself would not make out an offence under [Section 366](#) of IPC. A plain reading of [Section 366](#) IPC would make it clear that the person kidnapping and the person with whom a girl is forced or seduced to have sexual intercourse should be two different persons. Therefore, the conviction of the appellant under Section 366 IPC is not sustainable and instead, he is liable to be punished only under [Section 363](#) of IPC.

45. Now turning to the conviction under Section 4 of POCSO Act which deals with penetrative sexual assault. The term penetrative sexual assault is defined in Section 3 of POCSO Act which is reproduced as below-

“S. 3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if-

(a) 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; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

46. In the case in hand, it appears from the evidence of P.W.1 that the accused/appellant after getting her married at Golakganj stayed with her and had sexual intercourse with her for 3(three) days. The medical report also supported the fact that Medical Officer(P.W.9) had found the sign of sexual activities on examination of the victim.

47. Now, turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances. The aggravating circumstances relate to the crime and the mitigating circumstances relate the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was kidnapped and she was sexually exploited. The wound caused to the girl is not only to the body, but also to the mind of not only the victim, but that of the entire family members.

48. Turning to the mitigating circumstances, the accused was around 24 years of age at the time of incident. It is not brought to the notice of this Court that after the occurrence, the accused/appellant has committed any other offence. There is likelihood of his reformation. But, the statute under Section 4 of the POCSO Act prescribes a minimum punishment for a term of 7(seven) years with fine. When the intention of the Legislature is to impose stringent punishment for not less than 7(seven) years with fine, this Court has got no option, except to impose the minimum punishment of 7(seven) years. Hence, the imprisonment under Section 4 of POCSO Act is upheld and the fine amount is reduced from Rs.25,000/- to Rs.10,000/-. For the offence under Section 363 IPC, there is no minimum punishment prescribed. Therefore, for the said offence, having regard to the mitigating and aggravating circumstances, he can be sentenced to undergo rigorous imprisonment for 1(one) year and the fine amount is reduced from Rs.10,000/- to Rs.5,000/-. Both the sentences are directed to run concurrently.

49. In the result, the appeal is partly allowed with aforesaid modification.

50. Send back the LCR.

JUDGE

Comparing Assistant