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

Case No. : CRL.A(J)/116/2024

RAJU GOGOI @ RAJEN
S/O LT. MEGHNATH GOGOI @ LULU, R/O VILL- CHORAIMURIA, P.S.- NORTH LAKHIMPUR, DIST-LAKHIMPUR

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:SMTI CHUNIA DAS
ROMONI CHUK
NORTH LAKHIMPUR
LAKHIMPUR
ASSAM
INDIA

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Advocates for the appellant : Mr. A. Das. …..Amicus Curiae

Advocates for the respondents : Ms. B. Bhuyan, Sr. Counsel. & Addl. P.P., Assam,
assisted by Ms. R. Saloi for the respondent no.1 and
Ms. M.K. Brown, Legal Aid Counsel for the respondent no.2.

Date on which judgment is reserved	: **04.11.2026**
Date of pronouncement of judgment	: **11.11.2026**
Whether the pronouncement is of the operative part of the judgment ?	: N/A
Whether the full judgment has been pronounced?	: Yes

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. A. Das, learned Amicus Curiae for the appellants. Also heard Ms. B. Bhuyan, learned Senior Counsel and Additional Public Prosecutor assisted by Ms. R. Saloi, learned counsel for the State respondent and Ms. M.K. Brown, learned Legal Aid Counsel for the respondent no.2.

2. The appellant has put to challenge the impugned judgment dated 30/01/2024 passed by the Special Judge (POCSO), Lakhimpur, North Lakhimpur, in Special (POCSO) Case No. 04/2023, arising out of North Lakhimpur P.S. Case No. 371/2022, by which the appellant has been convicted under Section 366 IPC read with Section 6 of the POCSO Act, 2012. The appellant has accordingly been sentenced to undergo rigorous imprisonment for 5 years for committing the offence under Section 366 IPC with a fine of Rs.3,000/-, in default of payment, to undergo simple imprisonment for 3 months. The appellant has also been sentenced to undergo rigorous imprisonment for 20 years with a fine of Rs.10,000/-, in default of payment, to undergo simple imprisonment for 6 months under Section 6 POCSO Act.

3. The conviction and sentence of the 27 year old appellant had been done, as he had kidnapped his 14 year old sister-in-law and slept with her, prior to being traced and caught by the Police along with the victim, after 8 days.

4. The brief facts of the case is that an FIR dated 22/07/2022 was

submitted by the informant (PW-1) to the Officer-in-Charge of the North Lakhimpur Police Station, stating that her husband, to whom she had been married for two years had resented her ever since they got married. As her son had fallen sick, PW-1 had gone to her parents' house to get him treated. Around 2:00 a.m, the husband of PW-1 kidnapped PW-1's younger sister who was 14 year old and they could not find any trace of her sister despite searching for her. Pursuant to the FIR, North Lakhimpur Police Station Case No. 371/2022 under Sections 363 and 365 IPC was registered.

5. PW-7 was made the Investigating Officer. On taking up the investigation, PW-7 recovered the victim along with the appellant from Laluk Police Station. After recording the statement of the victim before a Magistrate under Section 164 Cr.P.C and collecting evidence, PW-7 submitted a charge-sheet against the appellant, on finding a *prima facie* case against him under Section 363/365 IPC read with Section 4 of the POCSO Act. The learned Trial Court thereafter framed charges against the appellant under Section 366/376(3) IPC read with Section 6 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

6. The learned Trial Court examined 7 Prosecution Witnesses and 1 Court Witness, prior to examining the appellant under Section 313 Cr.P.C. The learned Trial Court thereafter came to a finding that the appellant had committed the offences punishable under Section 366 IPC read with Section 6 of the POCSO Act.

7. Being aggrieved with the conviction and sentence passed vide the impugned judgment dated 30/01/2024 by the learned Trial Court, the present appeal has been preferred by the appellant.

8. The learned Amicus Curiae submits that there are discrepancies in the evidence of PW-1 (informant) and PW-2 (victim). While PW-1 stated that she slept in a different room with her husband and son and the victim slept in a separate room, the evidence of PW-2 (victim) is to the effect that she slept with her sister (PW-1) on the night she was kidnapped. The learned Amicus Curiae submits that while PW-2 had stated in her evidence that the appellant had entered their house by breaking the bamboo wall to kidnap her, yhere was no seizure of the broken bamboo wall by the Police. He also submits that there was discrepancy in the testimony of the victim, inasmuch as, PW-2 had stated that the appellant had taken her to Laluk, after kidnapping her. On the other hand, in her cross-examination, PW-2 stated that the appellant had taken her away to Moidomia and in her statement made under Section 164 Cr.P.C, PW-2 (victim) stated that the appellant had taken her to Bamungaon in Laluk. He accordingly submits that the discrepancies in the stand taken by PW-2, go to show that PW-2 was not a sterling witness and as such, conviction could not have been based solely on the evidence of PW-2. The learned Amicus Curiae further submits that the statement made by the appellant during his cross-examination under Section 313 Cr.P.C is to the effect that a false case had been lodged against him, on account of the fact that his wife (PW-1, the informant) had refused to come back to the matrimonial home even after requests had been made by the appellant. The learned Amicus Curie submits that the above would clearly show that there was no question of any illegal act having been committed by the

appellant on the victim girl and the only reason for the filing of the present case, was due to the appellant's wife not willing to come back to the matrimonial home. He also submits that the medical evidence shows that there was no external injuries on the private parts of the victim or on any part of the body of the victim and as such, there was no proof that the appellant had committed aggravated penetrative sexual assault upon her. Further, no spermatozoa was found on the victim.

9. The learned Amicus Curiae for the appellant further submits that the birth certificate of the victim was not seized or brought on record. He further submits that the ossification test of the victim showed that the victim was between 14 to 18 years old at the time of the incident and as such, Section 6 of the POCSO Act could not have been attracted to the facts of the present case. The learned Amicus Curiae thus submits that in view of the above discrepancies in the Prosecution case, the conviction of the appellant, vide impugned judgment, was not sustainable and should accordingly be set aside.

10. Ms. B. Bhuyan, learned Senior Counsel and Additional Public Prosecutor for the State respondent and Ms. M.K. Brown, learned Legal Aid Counsel for the respondent no.2 submit that though there are discrepancies in the statements of the witnesses, the same are minor discrepancies and not major discrepancies and as such, the said discrepancies can be ignored. They also submit that the age of the victim has been proved to be 14 years of age at the time of the incident. This has been proved in terms of the evidence given by the Court Witness-1 (CW-1), who has proved the age of the victim on the basis of the

Admission Register made by the school, which is admissible as evidence under Section 35 of the Evidence Act. They also submit that the said evidence of CW-1 has also been corroborated by the evidence of the father of the victim (PW-3), who has stated that his marriage had occurred in the year 2003 and the informant had been born one and a half years later, while the victim had been born 2 to 3 years thereafter. They also submit that the absence of injury in the private parts of the victim does not mean that no rape has occurred, as has been held by the Supreme Court in the case of ***The State of Himachal Pradesh vs. Manga Singh***, reported in ***(2019) 16 SCC 759.***

11. The respondents' counsels submit that the fact that the hymen was ruptured, corroborated the fact that the appellant had sexual intercourse with the victim. They also submit that the victim was 14 years of age, while her brother-in-law (appellant) was 27 years of age. As such, it was the duty of the brother-in-law to look after the young victim and not take advantage of her innocence. They also submit that the kidnapping of the victim had occurred on 21/07/2022, while the medical examination of the victim was done on 28/07/2022. As such, any injury that might have been there earlier could have been healed by then. They also submit that as the Prosecution had established the foundational facts regarding the presumption that the appellant had sexual intercourse with the victim, it was the duty of the appellant to discharge his burden of proving that he had not done the said illegal act, which he failed to do, in terms of Section 29 of the POCSO Act. As such, in view of the reasons stated above, there was no infirmity with the conviction of the appellant under Section 366 IPC and Section 6 of the POCSO Act.

12. We have heard the learned counsels for the parties.

13. The evidence of PW-1 (informant) is to the effect that the appellant was her husband and the victim was her younger sister. The incident had taken place about one year back when her younger sister was 13 years old. On the day of occurrence, PW-1 was in her mother's house sleeping along with her husband and son in a room, while her sister (victim) was sleeping in another room. At about 2 a.m, PW-1 woke up and noticed that her husband was missing from the bed. On informing her mother about the same, they came to know that her younger sister was also missing from the house. On not being able to find them, PW-1 lodged an FIR with the police station in the morning. After 6 days, the police recovered her younger sister and also apprehended the appellant from Laluk. Police then recorded the statement of the victim, got her medically examined and her statement recorded under 164 Cr.P.C in the Court. Thereafter, on PW-1's mother asking the victim as to what had happened, the victim told her mother that the appellant had kidnapped her from the house by gagging her mouth and took her to Laluk, where he raped her. PW-1 further stated that the police seized one school certificate of her sister on being produced by her.

In her cross-examination, PW-1 stated that her appellant husband was a habitual drunkard and also used to take ganja, besides gambling. As he used to torture her physically after consuming alcohol, PW-1 was staying in her parents' house. Further, the appellant used to pick up quarrels with his own parents, the parents of PW-1 and the villagers. PW-1 also stated that the appellant who was in jail, threatened them that if he came out of jail, he would set their house on fire.

14. The evidence of PW-2, who is the victim and younger sister of the informant, is to the effect that the appellant was her brother-in-law. While she was sleeping with her sister at night, one year back, when she was 13 years of age, the appellant had entered their house by breaking the bamboo wall and kidnapped her by gagging her mouth and had taken her to Laluk. The appellant then took her to a house and raped her. PW-2 further stated that the appellant kept her in the said house and raped her for four days. The police recovered her from Laluk and also apprehended the appellant and took both of them to Laluk Police Station. The police recorded her statement, got her medically examined, besides having her statement recorded in Court under section 164 Cr.P.C. PW-2 also stated that she submitted her school certificate to the police, which was seized by the police.

In her cross-examination, PW-2 stated that she was 6 years older than her brother, who was 8 years old. Further, her sister was 3 years older than her. PW-2 stated that the appellant was a habitual drunkard, who also took ganja and gambled. After taking alcohol, the appellant used to torture her sister and picked up quarrels with his own parents, the parents of PW-2 and the villagers. Accordingly, PW-2 used to wish that he was in jail. PW-2 denied the suggestion that she had told the police that she was in love with the appellant and that he had taken her away to Moidomia 8 days back. PW-2 denied the suggestion that she did not sleep with her sister on the date of the incident or that she did not tell the police that on the date of the incident, the appellant had entered their house by breaking the bamboo wall and kidnapped her. PW-2 also denied the suggestion that she did not tell the police that the appellant had kept her for 6 days at Laluk.

15. The evidence of PW-3, who is the father of the victim, is to the effect that the informant was his elder daughter and the victim was also his daughter. The appellant was his son-in-law who had married his elder daughter (informant). On the day of occurrence, which was a year back, all the family members were sleeping. At about 2 a.m, PW-3's elder daughter made a hue and cry, informing him that his younger daughter was not inside the house. Even though they searched for her, they could not find her. In the morning, the elder daughter lodged an FIR in the police station. At that time, the younger daughter was 13 years old. After 4 days, the police recovered his younger daughter from Laluk Deuri Gaon and also apprehended the appellant. PW-3 stated that the police recorded the statement of his daughter and her statement was also recorded in the Court. She was medically examined and the police seized one school certificate of her daughter on being produced by her. The original school certificate issued by the Headmaster of the Garehoga Balika M.E. School was exhibited as M.O. 1. PW-3 also stated that he came to know that the appellant had kidnapped his younger daughter and taken her away to Laluk Deuri Gaon and that he also came to know from his wife that the appellant had a physical relationship with his younger daughter.

In his cross-examination, PW-3 stated that he married in the year 2003 and that his elder daughter was born after 1 ½ year of his marriage. His younger daughter (victim) was 2-3 years younger to his elder daughter. The appellant was a habitual drunkard who used to take ganja and gamble. After taking alcohol, he used to torture his elder daughter and picked up quarrel with his own parents and the villagers. He denied the suggestion that at the time of the incident, the victim was above 18 years of age and not 13 years.

16. The evidence of PW-4 is to the effect that he heard that the daughter of one Junuka Das had been taken away by someone.

17. The evidence of PW-5, who was serving as a Demonstrator, Pathology in North Lakhimpur Civil Hospital on 28/07/2022, was to the effect that at about 4 p.m, he medically examined the victim and according to the victim, she had been forcibly taken away by her brother-in-law (appellant) to his friend's house 8 days back. Later, her parents had filed a case against the appellant. The findings of the Doctor based on the medical examination of the victim was that the victim's hymen had ruptured and that as per the ossification test, the victim was more than 14 years of age but less than 18 years.

18. The evidence of PW-6 is to the effect that he did not know the informant, though he knew the victim by her face. He also knew the appellant. PW-6 stated that the incident took place about 1 year back and that the appellant had married the elder sister of the victim girl. On the date of the incident, the appellant had taken away the victim girl. He did not know what had happened afterwards.

19. The evidence of PW-7 is to the effect that on 22/07/2022, he was working as an ASI under the North Lakhimpur Police Station, when the then O/C received an FIR lodged by PW-1. A case was then registered as N.L.P.S. Case No.371/2022 under Sections 363/365 IPC and PW-7 was entrusted to take up the investigation of the case. After completing the investigation and having recorded the statement of the victim girl, besides having the victim's statement recorded under Section 164 Cr.P.C and collecting the medical report of the victim, he submitted a charge-sheet against the appellant under Sections

363/365 IPC read with Section 4 of the POCSO Act, as he found sufficient incriminating materials against the appellant.

20. In his cross-examination, PW-7 stated that PW-1 did not tell him that on the date of the occurrence, she along with her husband and son were sleeping on the same bed. PW-7 also stated that PW-2 (victim) stated that she was in love with her brother-in-law and he had taken her away to Moidomia. He also stated that he did not seize the bamboo fencing of the informant's house.

21. The evidence of the lone Court witness, CW-1, is to the effect that on 27/07/2022, he was working in Garehoga Balika Madhya Engraji Vidyalaya as Headmaster. On that day, he issued one certificate in the name of the victim, showing her date of birth as 10/01/2009. The certificate had been issued on the basis of the entry made from Book No.2, Sl. No.1089. CW-1 also stated that he had brought the counterfoil of the certificate issued in favour the victim. The certificate and the counterfoil were all exhibited. CW-1 also stated that he had brought the admission register for the year 2018 to 2023, wherein the name of the victim had been registered at Sl. No.52, showing her date of birth as 10/01/2009. The admission register was also exhibited in the Court.

In his cross-examination, CW-1 stated that there was no countersign of the higher authority in the certificate issued by him, as a countersign was not required. He also stated that there was no signature of the father and mother of the victim in Sl. No. 52 of the admission register. He also stated that the victim had earlier studied in an L.P. school, prior to studying in his school and that he had seen the certificate of the victim issued by the L.P. school.

22. The explanation given by the appellant during his examination under Section 313 Cr.P.C, is basically to the effect that a false case had been registered against him due to his wife taking a decision not to come back to the matrimonial home, despite the appellant's request to his wife to come back home. Further, the informant had stated that she would lodge a false case against the appellant to teach him a lesson.

23. The first issue to be decided is whether the victim was a minor, keeping in view the fact that the Doctor's evidence is to the effect that the ossification test determined the age of the victim to be more than 14 years and less than 18 years as on 28/07/2022, while the incident had occurred between 21/07/2022 and 27/07/2022. In terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the determination of the age of a child in conflict with law has to be determined as per the procedure provided therein. It is settled law that age determination that can be made in terms of Section 94 of the said Act can also be used for determining the age of a victim of a sexual assault under the POCSO Act. The determination of the age of a victim through an ossification test can be done only if the date of birth of the victim cannot be proved by way of the date of birth recorded in the admission register and the certificate issued on the said basis by the school.

24. In the present case, the evidence of CW-1, who is the Headmaster of the Garehoga Balika Madhya Engraji Vidyalaya, is to the effect that the date of birth of the victim, as per the admission register of the school and the certificate issued by the headmaster is 10/01/2009. The entry in the admission register of the school had been made in the year 2020, while the incident had occurred in the year 2022.

25. The evidence of the father of the victim, who is PW-3, in his cross-examination shows that the victim was born sometime in the year 2008, as his deposition is to the following effect:-

> *"I married in the year 2003. My elder daughter was born after 1 and half year of my marriage. My younger daughter i.e the victim is 2-3 years younger to my elder daughter."*

26. Thus, the entry in the admission register of the school, which is the basis for the birth certificate issued by the Headmaster of the school, has been corroborated by the father of the victim. As such, the date of birth of the victim would have to be considered to be 10/01/2009 and in which case, the taking away of a child below 16 years and having sexual intercourse with the said child would attract the offence punishable under section 366 IPC and Section 6 of the POCSO Act.

27. Thus, while the age of the victim at the relevant point of time has been proved to be around 14 years, the next issue to be decided is whether the victim had been subjected to sexual intercourse by her 27-year-old brother-in-law.

28. The evidence of the victim (PW-2) is to the effect that the appellant had raped her after kidnapping her and the same has been corroborated by the evidence of the Doctor (PW-5), who testified that the hymen of the victim girl was ruptured. It is also clear from the evidence that the victim and the appellant were apprehended from Laluk after a few days of the disappearance of the victim. Though the evidence of the victim (PW-2) and the Investigating Officer

(PW-7) gives rise to an inference that the victim was in love with her brother-in-law and had gone willingly with her brother-in-law from her house, a minor is not capable of giving a valid consent. Consequently, even if the victim had gone willingly with the appellant from her house and had sex with the appellant, the victim being below 16 years of age, the taking away of the victim who was below 16 years of age from her house and from the guardianship of her parents, which culminated in having sexual intercourse with her, amounted to committing the offence of kidnapping under Section 366 IPC and aggravated penetrative sexual assault in terms of Section 5(l) of the POCSO Act.

29. In view of the Headmaster of the school having proved the date of birth of the victim as per the certificate issued by him, by relying upon the Admission Register of the school showing the victim's date of birth to be 10.01.2009, the age determination by way of an ossification test was not required. As the incident had occurred in July 2022, when the victim would have been around 13 to 14 years old, the provisions of the POCSO Act and Section 366 IPC is attracted.

30. In view of the reasons stated above, we do not find any infirmity with the learned Trial Court convicting the appellant under Section 366 IPC read with Section 6 of the POCSO Act, 2012.

31. The appeal is accordingly dismissed.

32. Send back the TCR.

33. In appreciation of the assistance provided by the learned Amicus Curiae for the appellant and Legal Aid Counsel for the respondent no.2, their fees should be paid by the Gauhati High Court Legal Services Committee, as per norms.

JUDGE **JUDGE**

Comparing Assistant