



GAHC010277902019



## IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

### **CRIMINAL APPEAL (J) No.85 of 2019**

Sri Kiran Sonowal,  
Son of Late Puwanram Sonowal  
Resident of Village- Dhemaji Batghoria  
(Kakuwari Chowk) P.S.- Dhemaji, District:  
Dhemaji, Assam.

**.....Appellant**

**-Versus-**

The State of Assam.

**.....Respondent**

For the Appellant	:	Ms. B Sarma, Amicus Curiae
For the Respondent	:	Ms. S Jahan, Additional Public Prosecutor, Assam

**- B E F O R E -**

**HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA**

Date of hearing and Judgment & Order : ***5th April, 2021.***

### **JUDGMENT & ORDER (ORAL)**

Heard Ms. B Sarma, learned Amicus Curiae for the appellant. Also heard Ms. S Jahan, learned Additional Public Prosecutor, Assam.

**2.** This criminal appeal arises out of judgment and order of the Trial Court which was passed by the Additional Special Judge, Fast Track Court, North Lakhimpur in Special (POCSO) Case No.107/2018 under Sections 366 IPC read with Section 4 of the POCSO Act.

**3.** As per the story of the prosecution, an FIR was lodged on 07.04.2018 at Boginadi Police Station at about 4-00 PM alleging that on 06.04.2018, i.e. the day prior to the lodging of the FIR, at 4-00 pm, the daughter of the informant (hereinafter referred to as "M/s K"), who was 16 years old, was kidnapped by one Sri Kiran Sonowal with the help of another accused Sri Bhola Sonowal and she was confined in the house of Bhola Sonowal. The police consequently started investigation and filed charge-sheet under Section 366 IPC read with Section 4 of POCSO Act and subsequently the Special Judge framed charges against the accused under the aforesaid provisions and the trial commenced thereafter.

**4.** Meanwhile it must be stated that the FIR merely states that accused Kiran Sonowal and Bhola Sonowal had kidnapped M/s K. There is no mention in the FIR as to the rape or physical assault of any crime on the victim. Subsequently from the statements of other witnesses including that of the Investigating Officer, it has come that the girl was recovered very next day from the residence of the accused and thereafter her statement was recorded under Section 164 Cr.P.C before the Magistrate. By that time she had already stayed with her parents for three days since her recovery

and the accused/appellant was in custody. She clearly states before the Magistrate that she had eloped with the accused on 03.04.2018 and on 05.04.2018, they got married and the two had physical relationship. She then says that five days later, they were caught in the house and her medical examination was also done by police. In other words, a clear-cut statement has been given that she had willingly gone with the accused and got married with the accused.

**5.** The medical examination of the victim was done on 09.04.2021, i.e. very next day of her recovery. She was medically examined by Senior Medical & Health Officer of North Lakhimpur Civil Hospital who found that the breast of the victim are well developed, pubic hair is present and hymen is absent. More importantly ossification test was also conducted to determine the age of the girl which was found to be above 18 years. Apart from these, no external injury were found on the body of the victim and the clear opinion of the Doctor was *"The age of the girl is above 18(eighteen) years. No recent evidence of sexual intercourse and no any external physical injury seen"*.

**6.** In the trial to prove its case, the prosecution examined as many as seven witnesses.

**7.** PW-1, Tankeswar Chutia is the father of the victim. He has stated that the incident took place in the first week of April, 2018. He learnt that some messages were sent to his daughter in her mobile asking her to collect a gift from the accused and when she went to collect the gift she was kidnapped. The next day, his

daughter informed her mother over phone that the accused had taken her along with him by lifting her into a vehicle to some place at Dhemaji. Thereafter the address was collected and the victim was rescued.

PW-1 was put to cross-examination where the defence had categorically asked the question that when his daughter was missing since 4:00 PM on the date of the incident, why had he not lodged the FIR on that day itself to which this witness could not give any satisfactory reply.

**8.** PW-2 is the prosecutrix herself who states that the informant is her father and the incident took place about 6 months back (her examination-in-chief was done on 08.10.2018). She says that she had received a message from the accused that she should come and collect her gift and when she went out to Boginadi Centre to collect her gift, the accused said that her gift was in a vehicle and she was then taken to near the vehicle. She was then pushed inside the vehicle by 4/5 persons and taken to Dhemaji. She was asked to sleep with the accused where the accused established physical relations with her. She was also forced to marry the accused. Then she made a call to her mother and told her mother regarding her whereabouts and thereafter police rescued her.

She was cross-examined at some length by the defence. She was categorically asked as to why she had given a different picture in her statement made under Section 164 Cr.PC before the Magistrate. She did not deny that she had given such a statement

but she could not give any satisfactory answer as to why she has changed her statement.

**9.** PW-3 is the mother of the prosecutrix and wife of PW-1. Her deposition is almost the same as that of PW-1.

**10.** PWs- 4 and 5 are the neighbours of the victim and their deposition is also not helpful for the prosecution.

**11.** PW-6 is the doctor. In her examination-in-chief, the doctor has verified the medical report which was given earlier. She also admits the fact that according to her opinion the victim was more than 18 years of age and there was absolutely no sign of recent physical relation.

**12.** PW-7 is the Investigating Officer, who is a formal witness, and places the facts of the investigation, such as the one already narrated above.

**13.** The defence had also examined two witnesses, namely, Smti. Manomati Sonowal as DW-1 and Smti. Pallabi Sonowal as DW-2, who said that the accused is their relative and the prosecution story is not the correct story. According to their version both the victim and the accused were in loved with each other. The prosecutrix was pressurizing the accused to marry her but as she was not of marriageable age (in fact these DWs categorically stated that the reason was that the prosecutrix was a minor), the accused did not agree for the marriage.

**14.** In his statement under Section 313 Cr.PC, the accused has denied all the charges of prosecution and he has stated that the prosecution story was a false one. He has further stated that he worked as a salesman in Puja Store at Boginadi Centre and he admits that he and the prosecutrix were in love with each other. She also showed her willingness to elope with him, he says, but as she was minor, he refrained her from doing so.

**15.** Based on this evidence, the learned Additional Special Judge has convicted the accused under Section 366 IPC read with Section 4 of the POCSO Act. The age of the prosecutrix was an important factor for his determination, and the learned Special Judge was of the opinion that although there was a photocopy of the birth certificate which was somehow recovered by the prosecution but since the recovery had not been done as per law, therefore, no reliance could be made on this document. In that birth certificate, the date of birth of the prosecutrix was recorded as 28.08.2001 which shows that the prosecutrix was 16 years 8 months at the time of the alleged incident. The Trial Court thus discarded this piece of evidence, and in the opinion of this Court rightly so. However, the Trial Court has not taken into consideration the medical evidence which was based on a scientific test, i.e. bone ossification test. The medical evidence shows that the age of the prosecutrix was more than 18 years and the reason for not taking into consideration the medical evidence is that according to the Court, in his statement under Section 313 Cr.PC, the accused has said that he refused to elope with the prosecutrix as she was a minor. In other words, the learned Special Judge was

of the opinion that since the accused himself calls the prosecutrix as a minor, she is to be treated as minor! In other words the determination of the age of the victim is based on conjectures and surmises, rather than on any hard evidence or scientific proof. By all available evidence, which was placed before the Trial Court, the age of the prosecutrix was more than 18 years.

**16.** Once it is determined that the prosecutrix was a major, her consent which is apparent becomes a determining factor as to the commission of the alleged crime. In her statements given under Section 164 Cr.PC, she has categorically stated that she had gone on her own will with the accused. Even in her statement before the Court, there is no categorical assertion that she had been raped. Even if it is assumed for the sake of argument that there is evidence that she had a physical relationship with the accused, she was a major. Provisions of POCSO would in any case not be attracted, as the prosecutrix was a major at the time of the occurrence of the alleged crime. This Court is also of a considered view that proper procedure has not been followed by the learned Special Judge, POCSO while dealing with the matter. In fact, once there was medical report before the learned Special Judge, POCSO, according to which the age of the prosecutrix was more than 18 years, then a question must have come before the Court as to the age of the prosecutrix and whether she is a child or not. In such a contingency, the Special Judge should have proceeded

under sub-section 2 of Section 34<sup>1</sup> of the POCSO Act. In any case, this vital piece of evidence was liable to be considered by the Court for determination of age of the prosecutrix. This has not been considered at all.

**17.** Indeed it is true that in a case of rape, conviction can be made on the sole testimony of the prosecutrix. Even if it is presumed for the sake of argument that in her statement before the Court the prosecutrix did suggest that she was raped, the fact of the matter is that her statement does not inspire confidence. There is enough evidence on record to show that she was in love with the accused. They both are more or less of the same age, i.e. between 18 to 19 years of age. In her statement under Section 164 Cr.PC, she had categorically stated that she had willingly eloped with the accused and that both were in love with each other. Therefore, if there is any suggestion of rape by the prosecutrix before the Court, it does not inspire any confidence. When conviction can be made on the sole testimony of the prosecutrix, such a statement must be very carefully examined and scrutinized. In the scrutiny of this Court, this evidence is not liable to be trustworthy.

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<sup>1</sup> **34. Procedure in case of commission of offence by child and determination of age by Special Court.**—(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of <sup>1</sup> [the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].  
(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.  
(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.



**18.** The overwhelming evidence which were there before the Court in the form of the age of the prosecutrix, who is more than 18 years of age, her first statement which was recorded by the learned Magistrate under Section 164 Cr.PC where she categorically stated that she had willingly eloped with the accused, gives an entirely different picture. The statements given by the prosecutrix in the Court are not inspiring at all and no reliance should have been placed on her statement.

Moreover, as far as the determination of the age is concerned, this Court is of the considered view that the Trial Court has gone completely wrong in making an assumption on this vital aspect and has come to the conclusion that the prosecutrix is a minor on the basis of the statement given by the accused.

**19.** In view of this, this appeal is allowed. The judgment and order of the Trial Court is set aside. The accused, who is in jail, shall be set at liberty forthwith.

**20.** Registrar General is directed to communicate this order forthwith to the concerned jail authority so that the accused is released.

**CHIEF JUSTICE**

Comparing Assistant

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