IN THE COURT OF SPECIAL JUDGE :::::::::: BILASIPARA

Present: Shri J. Borah, AJS

Special Judge, Bilasipara

Special (POCSO) Case No- 10 of 2018

u/s 366(A)/376/343 Indian Penal Code

& u/s 6 of Protection of Children from Sexual Offences Act

State of Assam

-Vs-

Abdul Motleb @ Motleb Ali

..... accused person

Date of framing charge :- 29-11-2018

Date of recording evidence :- 13-12-2018

24-01-2019

25-01-2019

25-03-2019

10-06-2019

Date of Argument :- 30-07-2019

Date of Judgment :- 13-08-2019

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam

For the defence :- Mr. Hekmat Ali Seikh,

Ld. Advocate for the accused.

JUDGMENT

1. This case is under section 366(A)/343/376 Indian Penal Code, I.P.C in short and under section 6 of Protection of Children from Sexual Offences

Act, in short POCSO Act. So, the name of the victim is not mentioned here and she is referred to, hereinafter, as 'x'.

2. The prosecution case, in brief, is that Sorhab Ali, the informant lodged an ejahar with the Bilasipara police station informing that 'x' is his cousin. On 25-08-2018 at about 06.00 P.M 'x' went to witness the boat race game taken place in the river Brahmaputra at Baghpara. The Abdul Motleb @ Motleb Ali allured 'x' and took her away. The accused Abdul Motleb @ Motleb Ali moved 'x' from one place to another. He took her at his house. He committed rape on her for three days continuously.

So, the informant prayed for taking necessary action against the said accused.

- 3. The Bilasipara police station received the ejahar and registered as Bilasipara police station case no. 1036/2018 u/s 366/376 I.P.C and u/s 6 of POCSO Act. The case was investigated and having found prima facie u/s 366/376/343 I.P.C against the accused Abdul Motleb @ Motleb Ali, laid the charge sheet before the court for trial.
- 4. The accused Abdul Motleb @ Motleb Ali, hereinafter called the accused, appeared in this case. He was furnished copy. Charge was framed u/s 366(A)/343/376 I.P.C and under section 6 of POCSO Act against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 11 (eleven) witnesses, namely-

1.	Dr. Md. Laskar Ali	P.W-1
2.	Sorhab Ali	P.W-2
3.	`x'/ the victim	P.W-3
4.	Hazarat Ali Choudhury	P.W-4
5.	Khadem Ali	P.W-5
6.	Abdur Rezzak	P.W-6
7.	Abu Bakkar Siddique	P.W-7
8.	Mahar Ali	P.W-8
9.	Dr. Aruna Saikia	P.W-9
10. Kurban Ali		P.W-10
11.	P.W-11 Ashish Kr. Sengupta	P.W-11

- 6. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence adduced by the prosecution witnesses and also declined to adduce evidence in defence.
- 7. Heard argument for both sides.

8. **POINTS FOR DETERMINATION**

- i. Whether accused on 25-08-2018 at about 06.00 P.M at village Mayarchar Pt. VII under Bilasipara police station, kidnapped informant's cousin 'x', a minor girl under the age of 18 years with intention that said 'x' may be forced or seduced to illicit intercourse by him or with other?
- ii. Whether accused after kidnapping 'x' from Mayarchar Pt. VII on 25-08-2018, at village Nayeralga Pt IV under Bilasipara police station wrongfully confined 'x' for three days?
- iii. Whether accused after kidnapping 'x' from Mayarchar Pt. VII on 25-08-2018, at village Nayeralga Pt IV under Bilasipara police station committed rape on 'x'?
- iv. Whether accused after kidnapping 'x' from Mayarchar Pt. VII on 25-08-2018, at village Nayeralga Pt IV under Bilasipara police station committed penetrative sexual assault on 'x' repeatedly?

DECISION AND REASONS THERE OF

- 9. In this prosecution case P.W-1 Dr. Md. Laskar Ali is the Medical & Health officer, P.W-2 Sorhab Ali is the informant, P.W-3 'x' is the alleged victim, P.W-4 Hazarat Ali Choudhury, P.W-6 Abdur Rezzak, P.W-7 Abu Bakkar Siddique, P.W-8 Mahar Ali and P.W-10 Kurban Ali are independent witnesses. P.W-5 Khadem Ali is the brother of 'x', the victim. P.W-9 Dr. Aruna Saikia is the Medical & Health officer and P.W-11 Ashis Kr. Sengupta is the investigating officer.
- 10. Since P.W-2 Sorhab Ali is the informant and P.W-3 'x' is the alleged victim. So, both the witnesses are vital. So, let's see evidence of this witnesses at first.
- 11. P.W-2 Sorhab Ali has stated in his evidence that he is the informant in this case. 'x' is his cousin. Occurrence took place 3/4 months ago (from

the date of adducing his evidence on 13-12-2018). 'x' went to Baghmara to witness boat race game in the river Brahmaputra. After end of the game, 'x' returned home. On her way, the accused kidnapped her. Accused took her to his house. Accused took her to his maternal aunt's house. Thereafter, both of them were caught by VDP personnel and they were handed over to the Nayeralga police out post. He heard from 'x' that the accused committed rape on 'x' continuously for three days. He lodged the ejahar in connection with the occurrence, Ext-2 is the said ejahar.

In his cross P.W-2 has stated that he cannot say if 'x' is above 18 years. The ejahar Ext-2 was lodged after three days from the day of occurrence. PW-2 has denied that the accused did not commit rape on 'x'.

12. P.W-3 'x' has stated in her evidence that the informant is her cousin. The occurrence took place three months ago (from the date of adducing her evidence on 13-12-2018). On that day she went to Baghmara to see the boat race game in the river Brahmaputra. She retuned alone from the place of game at about 0430 P.M. On her way, accused caught hold of her hand, gagged her mouth and took her to his house. She shouted at his house, but nobody help her. The father of the accused left their house. Her family members went to the house of the accused. But the family members of the accused told them (the family members of 'x') that they did not bring 'x'. The accused committed rape on her. The accused then moved her to his aunt's house. The members of the All Assam Muslim Students Union caught hold of them and handed over to the Nayeralga police out post. She gave her statement before the Magistrate, Ext-3 is the said statement.

In her cross P.W-3 has stated that at the time of occurrence she was a student of Nayeralga Senior Madrassa. She was returning alone after watching boat race. P.W-3 denied that the accused did not take her forcibly. P.W-3 has also denied that she has adduced false evidence. P.W-3 has also denied that she was above 18 years at the time of occurrence.

13. Thus, careful scrutiny of evidence of P.W-2 and P.W-3 shows that both of them have stated in their respective evidence that 'x' was below 18 years old at the time of occurrence. But to support their evidence they have submitted nor exhibited any birth certificate or school certificate. In absence of proper document, mere oral evidence that 'x' was below eighteen years cannot be accepted.

In such a situation let us see the evidence of P.W-9 Dr. Aruna Saikia, the Medical & Health Officer.

P.W-9 Dr. Aruna Saikia has stated in her evidence that on 29-08-2018, she examined 'x' and found the age of 'x' 17 years to 18 years (radiological investigation).

So, according to P.W-9, the age of 'x' at the time of occurrence was 17 to 18 years. It is an opinion of a Medical & Health Officer. It is settled principle that the age of the person concerned may vary of two years on either side.

It is also settled proposition that if there are two views, then it goes in favour of the accused.

Considering all aspects, it appears that x' was 18 years or above 18 years at the time of occurrence.

14. Next question left before us whether the accused took away 'x' forcibly from her way to house from Baghmara.

P.W-3 has stated that she gave statement before the magistrate, Ext-3. In her statement Ext-3 'x' stated that at about 07.00 in the evening she with Salema, Alema and two cousins were coming from Baghmara after watching boat race. When they reached at Pahipara, the accused took her on his shoulder and took her away.

But in her evidence P.W-3 'x' has stated that she come alone from Baghmara after watching boat race.

So, there found distinct contradictions between her previous statement made in Ext-3 and evidence adduced before this court. When 'x' has stated in her statement made before the Magistrate that she come with Salema, Alema and two other cousins, at the same time P.W-3 'x' has adduced in her evidence that she came alone from Baghmara. This is a vital contradiction. This may shroud the prosecution case with doubt.

15. Another aspect is that according to P.W-3, the accused took her on his shoulder and thereafter took her away.

If this evidence of P.W-3 \dot{x} is accepted to be true, then question arises, why she remain silent while she was on the shoulder of the accused. P.W-3 \dot{x} is silent in this respect.

16. Another aspect is that according to P.W-3 'x' the accused moved her from one place to other and one house to other. If that is so, whey 'x' did

not raise any alarm to make herself free from the clutch of the accused.

- 17. All this shows that the accused did not take her forcibly, rather she accompanied the accused voluntarily.
- 18. Now let us see whether the accused committed rape on 'x'.

'x' in her statement Ext-3 stated the accused took her to his house and kept for three days there and committed rape on her continuously.

But in her evidence P.W-3 has stated that the accused took her to *pehi's* house. Thereafter she was taken to other place.

So, there found contradiction between her previous statement Ext-3 and the evidence adduced before this court. This is vital contradiction and this may affect the prosecution case with doubt.

It is to be worth mentioning that there were many people around her. If she was not consenting party, she could have resisted the accused, but she is silent on her evidence why she did not take the help of other to save her from the ill act of the accused.

Moreover, the evidence of P.W-9 Dr. Aruna Saikia who had done medical examination on 'x' is of opinion that there is no sign of sexual intercourse on 'x'.

The evidence of P.W-2 is that he heard from P.W-3 that the accused committed sexual intercourse on her. At the same time the evidence of P.W-3 is itself not so convincing to take into consideration that there was rape on 'x'.

- 19. All this shows that 'x' was not committed rape by the accused. If there was any sexual intercourse on 'x' by the accused, then it was prior to the consent of 'x'
- 20. Now let us see the evidence of other witnesses.

P.W-4 Hazarat Ali Choudhury has stated in his evidence that he asked both the accused and 'x' and they told him that the accused took her.

P.W-5 Khadem Ali has stated in his evidence that 'x' is his sister. The accused kidnapped his sister 'x' from her way when she was returning from Baghmara. After two days they were caught and they were handed over to the police.

P.W-6 Abdur Rezzak has stated in his evidence that both the accused and 'x' told him that they had love affairs.

The evidence of P.W-7 Abu Bakkar Siddique requires no detail analysis.

P.W-8 Mahar Ali has stated in his evidence that one boy and a girl took shelter at the house of Anar Ali. He went there and saw both of them.

P.W-10 Kurban Ali has stated in his evidence that he knows nothing about the occurrence.

P.W-11 Ashis Kr. Sengupta is investigating officer. His evidence is mere official. He investigated the case and prepared chargesheet, Ext-6.

- 21. Thus, the evidence of P.W-4, P.W-5, P.W-6, P.W-7, P.W-8 and P.W-10 are found not sufficient and reliable to establish that the accused forcefully took away 'x' from her way to Baghmara and there after the accused committed rape on 'x'. Rather the said evidence divulges that there was love affair between the accused and 'x' and the occurrence was the outcome of the said relation between two.
- 22. Situated thus, it leads to conclusion that the prosecution has failed to prove it's case u/s 366(A)/376/343 I.P.C and section 6 of POCSO Act against the accused beyond all reasonable doubt.
- 23. Held, the accused is not guilty u/s 366(A)/376/343 I.P.C and section 6 POCSO Act.
- 24. Accordingly, the accused is acquitted and set at liberty.

The bail bond of accused stands cancelled and bailor is discharged from liabilities.

The case is disposed of.

Given under my hand and seal by this court on this 13th day of August, 2019 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by,

S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESSES:-

P.W-1 Dr. Md. Laskar Ali

P.W-2 Sorhab Ali

P.W-3 'x'/ the victim

P.W-4 Hazarat Ali Choudhury

P.W-5 Khadem Ali

P.W-6 Abdur Rezzak

P.W-7 Abu Bakkar Siddique

P.W-8 Mahar Ali

P.W-9 Dr. Aruna Saikia

P.W-10 Kurban Ali

P.W-11 Ashish Kr. Sengupta

PROSECUTION EXHIBITS:-

Ext-1 Medical report (Radiological report)

Ext-2 Ejahar,

Ext-3 Statement of 'x' recorded u/s 164 Cr.P.C,

Ext-4 Medical examination report,

Ext-5 Sketch map,

Ext-6 Charge sheet

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- NIL

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara