#### :: IN THE COURT OF THE SESSIONS JUDGE ::::: NALBARI ::

<u>Present</u>: Mrs. S. Begum.

Sessions Judge,

Nalbari.

## <u>SESSIONS SPL (P)CASE NO : 26/2017</u> u/s-366/376(i) IPC R/W Sec. 4 of the POCSO Act.

State of Assam ......Complainant

-Vs-

Md. Didar Ali.....Accused person.

Appearance :-

For the prosecution : Mr. K.K. Sarma, Spl.Public Prosecutor

For the defence : Mr. T. Ahmed, Advocate.

Date of argument : 24/01/2019. Date of Judgment : 24/01/2019.

#### JUDGMENT

The prosecution case which is reflected in the ejahar lodged by one Sufia Khatun (herein after referred as Miss 'X') on 25/11/16 is that on 20/11/16 at about 10 am while she was returning back home after cutting straw near the embankment of Nuna river, the accused by gagging her mouth brought her to the nearby Kahuwa jungle by carrying her in his lap and thereafter rapped her. On 23/11/16 a village 'Mel' was held in this regard but no solution was arrived at in the said 'Mel'.

- 2. On the strength of the ejahar Ghograpar PS Case 227/16 u/s-366-A/376(2)(h)/294 IPC r/w sec. 4 of the POCSO Act has been registered.
- 2. Police force set into motion on receipt of the ejahar and police on completion of the investigation submitted charge-sheet against accused Didar Ali u/s-366/376(2)(i) IPC r/w sec. 4 of the POCSO Act.
- 3. While the accused entered into his appearance before this court copy was furnished and getting prima facie material against the accused u/s-366/376(2)(i) IPC r/w sec. 4 of the POCSO Act charge was framed accordingly and read over to the accused to which he pleaded not guilty and claimed to be tried.

4. The prosecution to bring home charge against the accused examined as many as four witnesses including the victim.

5.

## **POINT FOR DETERMINATION.**

- (i) Whether the accused on 20/11/16 at about 10.00 am at Panimajkuchi under Ghograpar PS kidnapped Miss 'X', aged about 14 years with intend that she may be compelled to marry against her will or in order that she may be forced or seduced to illicit intercourse and thereby committed an offence punishable u/s-366 IPC?
- (ii) Whether the accused on 20/11/16 at about 10.00 am at Panimajkuchi under Ghograpar PS committed rape upon Miss ('X') aged about 14 years and thereby committed an offence punishable u/s-376(i)?
- (iii) Whether the accused person on the same day, time and place committed penetrative sexual assault upon Miss ('X'), aged about 14 years and thereby committed an offence punishable u/s-4 of the POCSO Act?

#### **DECISION AND REASONS THEREOF**

6. I have carefully scrutinized the evidence on record and heard argument forwarded by learned counsel for both the sides. Now to arrive at a judicious decision let me discuss and appreciate the testimony of the prosecution witnesses. At the out set let me discuss the evidence of PW-4 Miss ('X') who is the victim. She disclosed during her evidence that about three years ago the occurrence happened. She disclosed that there was love affairs between her and accused Didar since several years ago and that she eloped with him 3 years ago and stayed for 10/15 days with him. However, no physical relation happened between them. She disclosed that at that time her age was 18 years. She further disclosed that as the accused refused to marry her so she lodged the ejahar Ext-4. Prior to lodging the FIR she came back to the house of her parents and after lodging the ejahar her statement got recorded by Magistrate. She revealed that she gave the statement before Magistrate as tutored by her mother. She also disclosed that as accused refused to marry her so her mother tutored her to depose against the accused. It is further revealed that one week after lodging the ejahar the accused agreed to marry her and keeping his promise he also married her. Since then they are living as husband and wife and one child was born to her. She revealed that she at present resided with the accused happily. Ext-5 is the statement. Ext-5(1) to Ext-5(3) is her signature.

- 7. PW-1 Lalmia who is the father of the victim during his evidence testified that few days prior to the incident he could know that his daughter Miss ('X') had love affairs with the accused and that she would eloped with the accused. About 15/20 days later the victim told him that she would not marry the accused and would not go with him. Thereafter accused Didar one day kidnapped his daughter. Police of Ghograpar PS brought the father of accused to the Ghograpar PS and asked him to produce Didar. Then father of the accused produced Didar at the PS. Police recovered his daughter from the house of Didar.
- 8. PW-2 Dr. Dipti Baishya is the medical officer in this case. On 26/11/16 she examined Miss Safia Khatun, aged 14 years, D/o- Lal Ali of village Panimajkuchi under Ghograpar PS, who was brought by WBC-72 Mayarani Dihingia in connection with Ghograpar PS Case No.

At the time of examination the victim was oriented in space and time. On local examination of genitalia she found the following:

Labia majora and labia minora healthy. Fourchette, Vulva and Perineum healthy. Hymen torn but it was old tear. Vagina and cervix healthy. Vaginal swab was taken for sperm determination but no sperm seen as per test result. Beta-HCG was done to detect pregnancy, which shows negative result. USG of lower abdomen was done but no gestational sac was seen. From radiological evidence, age of the victim was found to be above 14 years but bellow 16 years. Doctor opined that the victim was not consistent with recent sexual intercourse or assault. Ext-1 is the medical report; Ext-1(1) is her signature. Ext-2 is the X-Ray report, Ext-2(1) is the signature of Prabodh Kr. Sarma which is known to her.

9. PW-3 Tasiran Nesa testified that victim Sufia Khatun is her daughter. The occurrence happened about 3 years ago. The accused had love affairs with her daughter. The accused proposed to marry her daughter but she refused his proposal. Thereafter, her daughter eloped with the accused. Her daughter was aged 18 years at that time. The accused solemnized marriage with her daughter. Due to their marriage wedlock one male child was born to her daughter. At present her daughter is living happily with the accused as husband and wife.

- 10. The evidence of victim and her mother PW-3 shows that victim had love affairs with the accused and that she herself eloped with the accused. Though the father of the victim testified that the accused kidnapped his daughter but the said fact was not corroborated by the victim herself. Both the victim and mother testified that the victim herself went with the accused, so it appears from their evidence that the victim is a consenting party. However consent of a minor does not amount to consent in the legal sense. Now let me scrutinize whether the victim was a minor or major at the time of occurrence. The victim and her mother specifically revealed that the age of the victim was 18 years at the time of occurrence. Doctor though testified that the victim age is above 14 years and below 16 years yet as per medical jurisprudence the age may vary two years on either side. So adding the variation of two years on upper side the possibility cannot be ruled out that her age is near about 18 years. Considering the evidence of the mother of the victim and adding two years variation on the uppoer side possibility cannot be ruled out that victim is a major girl. As per criminal jurisprudence if two views are possible the view favourable to the accused should be accepted. So on the basis of the above discussion it can be safely held that the victim is a major girl.
- 11. The victim being a major girl and a consenting party no offence u/s-366 IPC is established against the accused.
- 12. Evidence is lacking that the victim was raped by the accused or that any penetrative sexual offence was committed upon the victim by the accused while she went with the accused. The victim herself revealed that no physical relationship happened between her and the accused accused while she eloped with the accused.
- 13. It appears from the evidence of the victim and her mother that victim was 18 years at the time of occurrence and that ejahar was lodged and the statement was given implicating the accused so as to compel him to marry the victim as the accused refused to marry her.
- 14. However after filing the ejahar accused married her and she due to her conjugal life with the accused gave birth to a baby.
- 16. Prosecution has miserably failed to prove the case against the accused u/s-366/376(i) r/w section 4 of the POCSO Act. Accordingly, accused Md. Didar Ali is acquitted from the above mentioned section.

- 17. The accused Md. Didar Ali will go on a fresh bail of Rs.10,000/- with one surety of like amount u/s-437-A IPC assuring that he will appear before the higher court as and when such court issue notice in respect of any appeal or petition filed against the judgment and order of this court.
- 18. Judgment is pronounced at the open court in presence of the accused.
- 19. Judgment written in separated sheet be kept with record.

Given under my hand and the seal of this court on this the 24<sup>th</sup> day of January/2019.

Send a copy of judgment to District Magistrate, Nalbari.

Dictated and corrected by me

Session Judge, Nalbari.

Sessions Judge, Nalbari.

Contd.

#### **APPENDIX**

## A. <u>Prosecution witness</u>.

PW-1 Lalmia.

PW-2 Dr. Dipti Baishya (M.O).

PW-3 Tasiran Nesa.

PW-4Miss ('X').

# B. <u>Defence witness.</u>

Nil.

# C. <u>Prosecution Exhibit.</u>

Ext-1 Medical report.

Ext-2 X-Ray report.

Ext-3 X

Ext-4 Ejahar.

Ext-5 Statement.

# D. <u>Defence Exhibit.</u>

Nil.

Sessions Judge, Nalbari.