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Present: Shri C. Das

Judge, Special Court Baksa, Mushalpur



JUDGMENT IN SPECAIL POCSO CASE NO.41/2018

u/s 4 of POCSO Act r/w Section 366 IPC

State

-versus-

Sri Uday Kalita

.... Accused

Appearance:

For the State: Mr. R. Chetry, Public Prosecutor, Baksa

For the accused: Mr. A. Rabha, P. Das, R. Barman, Advocates

Date of recording evidence: 8.8.18, 9.11.18

Date of argument: 5.3.19
Date of judgment: 19.3.19

JUDGMENT

- 1. The case of the prosecution briefly, is that on 13.8.17, the complainant Sri Ganesh Bayan lodged a FIR before the Officer-in-charge of Mushalpur police station, alleging inter-alias that on 9.8.17 at about 4 pm., while his 15 years old daughter/ victim girl (name is withheld) went out oh the home to go to her uncle's house, but on her way, some culprits kidnapped her from the road. After searching his daughter, later on, he came to know that the accused kidnapped his daughter from the road to Chennai. He alleged further that the father of the accused admitted about involvement of the accused in the occurrence. But he could not find out whereabout of the accused in Chennai.
- 2. The police accordingly, registered the Mushalpur PS. Case No.85/2017 and started its investigation. During the investigation, the I/O visited



the place of occurrence, drew its sketch map and examined the witnesses. He also, seized the birth certificate of the victim girl and recovered the victim. The I/O sent the victim for medical examination and recording her statement u/s 164 of Code of Criminal Procedure (in short; the CrPC) after her recovery. Further, the I/O handed over the victim girl to her legal guardian and collected the all necessary documents of the case. The I/O arrested the accused. At the end of the investigation, the I/O having found a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

- 3. The accused when appeared in the court, he was furnished with the relevant copies of the case immediately. After hearing both the sides and on perusal of the materials on record, the charge **u/s 366 IPC r/w Section 4 of POCSO Act** was framed against the accused person. The charge so framed, was read over and explained to the accused who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, 5(five) witnesses including the victim girl to support its case. In the statement recorded **u/s 313 of CrPC**., the accused person denied all incriminating circumstances appeared against him in the evidence. But the accused declined to adduce any defence evidence in his favour. The argument of the parties was heard at length and perused the evidence on record.

POINTS FOR DETERMINATION:

- 5. Whether on 9/8/17 at about 4 pm., at village; Srirpurdeor (Khanalia supa), the accused kidnapped the victim girl with intent that she may be compelled to marry against her will or in order that she may be forced or seduced to illicit intercourse with another person;
- 6. Whether on same day, time and place as above, the accused committed penetrative sexual assault upon the victim girl for five days;

DICISION AND REASON THEREFORE:

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7. Learned Public Prosecutor initiating the argument, submitted that it is a case where the minor victim girl was first kidnapped from her lawful guardian by the accused and then, committed sexual assault upon her for few days which

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leads to filing of the FIR by the informant and her legal guardian. He submitted further that the evidence of the prosecution witnesses along with the testimony of the victim clearly shows the involvement of the accused in the offence as alleged and as such, there is no other view comes out except the guilt of the accused. He submitted that in such type of cases where sexual offence is committed, the sole testimony of the victim girl without treating her as an accomplice to the offence, can be the basis of conviction of the accused. Hence, the accused is liable to be punished as per provisions of law, he urged.

- 8. Per contra, learned counsel for the accused submitted that there is no evidence of the prosecution witnesses which can implicate the accused in the offence as alleged. If the evidence of the evidence of the victim girl is perused, ti would disclose that there was love affairs between them and for that she went with the accused and thus, it can easily be held that the case is of elopement and not of kidnapping of the victim by the accused. He submitted further that the evidence of the prosecution witnesses cannot be relied upon to hold that the accused committed the offence of kidnapping of the victim girl from her lawful guardian. Moreover, there is much delay in lodging the FIR without showing sufficient cause of it which indicates of concealing the real facts by the complainant, thereby creating doubt over the prosecution case and as such, the accused is entitled to be acquitted.
- 9. It appears that the prosecution examined the complainant Sri Ganesh Bayan as PW1. He is the father of the victim girl. He deposed inter-alias that on the fateful day at about 3.30 pm the victim girl went out to the house of her uncle to stitch some cloths. But the victim girl thereafter was missing. He searched for the victim girl but could not trace her out. Hence, after 3 days, he filed the FIR vide Ext.1 with his signature. According to PW1, the police recovered the victim girl after a week. The victim girl was sent for medical examination and recording her statement in the court. On his inquiry, the victim girl told him that the accused took her away to Chennai.

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10. In the cross-examination, PW1 stated that he filed the FIR on 13.8.17. He did not mention the reason of delay in filing the FIR in Ext.1. He Baksa, Mushalpur mentioned in Est.1 that he suspected that the accused took away his daughter to Chennai. The police recovered the victim from Mushalpur. He could say whereabout of his missing daughter for one week. PW1 corroborates the claim of the prosecution regarding taking away the victim girl.

11. PW2 is the victim girl. Her name is withheld due to bar under the law. She was examined in camera in presence of her father. She stated inter-alias that on the fateful day at about 3 pm., her mother assaulted her physically for her failure to draw her attention to her study. Hence out of her anger, she left for the house of her aunt. But her aunt was absent in her house. Therefore, she went with the accused for a strolling. She went to Jorhat with the accused where her aunt resided. She informed her mother over phone regarding her stay in her aunt's house. Someone told her mother that the accused kidnapped her. As such, the FIR was filed. After few days, she returned to her home. Her father specified her not to leave home on such minor reason. The police took her for medical examination and Ext.2 is her medical report with her signature. She made her statement vide Ext.3 with her signatures. She was in Class-IX at the time of occurrence. But she was 18

12. In the cross-examination, PW2 stated that her father filed the case without consulting her about the facts. The accused did not force her to go with him. She refused medical examination since the accused did not cause any sexual assault upon her. She made her statement in Ext.3 as tutored by her mother. She stated further that she failed in her class examination thrice before reaching Class-IX. Thus, the evidence of the victim girl does not lend support to the prosecution case.

years of age at that time. The accused is not related to her by blood.

- 13. PW3 Smti. Tarulata Bayan is the mother of the victim girl and wife of PW1. She stated that the victim girl was very weak in her study. Hence, she rebuked the victim to attend to her study properly. Thereafter, the victim went out of the house to the house of the aunt. From there, the victim went to Gujarat with her uncle and aunt. The police seized the birth certificate of the victim vide Ext.4 with her signature.
- 14. In the cross-examination, PW3 stated that her husband filed the case due to pressure from local persons. She tutored the victim to make statement before the Magistrate. The victim was 18 years of age at the time of occurrence. She had no knowledge about the contents in Ext.4. Apparently, PW3 lends no support to the version of PW1.
- 15. PW4 Pranjit Bayan deposed inter-alias that before the day of occurrence, the mother of the victim assaulted the victim physically for her poor attention to her study. Hence, the victim out of her anger, went to the house of the



accused. Accordingly, the victim was missing from 4 pm. Mother of the victim inquired about the victim to him but he could not give any clue. The whereabout of the victim was not known till the night. So, the FIR was lodged. After 12 days whereabout of the victim was known through the police. It was informed that the victim was at the police station. Accordingly, he went to the police station and brought back the victim to her home. He stated that the victim was 18 years of age at the time of occurrence.

- 16. The evidence of PW5 Narakanta Kalita is that the informant told him that the victim was missing and as such, he came in search of the girl.
- Apparently, from the above evidence of the prosecution witnesses, 17. it appears that the victim girl went missing from her home on the fateful day. But the evidence of PW1, 2 and 3 is never consistent on the material point and it is found to be full of major discrepancies and contradictions between them. The evidence of PW1 discloses that he came to know that the accused took away the victim after her missing. But PW2 stated that she went for a strolling with the accused to her aunt's house without force by the accused. Apparently, she went with the accused on her own will and her evidence does not disclose that she went on missing as stated by PW1. The evidence of PW3 shows that PW3 never implicated the accused while she is the mother of the victim girl. Her version discloses that the victim went to Gujarat to her uncles' house. The evidence of PW3 does not show that PW2 went missing as claimed by PW1. Thus, such evidence of the prosecution witnesses has weakened the version of the prosecution story with doubt over the allegation of kidnapping of the victim girl by the accused. If the victim went to the house of her uncle, it does not appear that the accused was involved the offence of kidnapping the victim from her lawful guardian. As far as the age of the victim is concerned, the I/O seized her birth certificate vide Ext.4. There is no dispute raised regarding the authenticity of Ext.4. Thus, in the Ext.4, the birth certificate of the victim shows that age of the victim was less than 15 years. Hence, the victim was a minor at the time of occurrence.

- 18. The accused is alleged to have committed the offence u/s 366 IPC and section 4 of POCSO Act. The offence u/s 366 IPC mandates for the first part of the section--
 - 1) The accused kidnapped or abducted a woman;
 - 2) The accused intended or knew it likely that
 - a) the woman abducted or kidnapped would be compelled to marry



any person against her own will, or

b) she would be forced or seduced to illicit intercourse.

For the second part of the section –

- 1) Accused induced any woman to go from certain place;
- 2) Accused did it by criminally intimidating her;
- 3) He did so by abuse of his authority; or
- 4) He did so by any method of compulsion;
- 5) Accused intended or knew it likely that such woman would be forced or seduced to illicit intercourse.
- 19. On the other hand, the offence u/s 4 of Protection of Children from Sexual Offences Act makes such offence is punishable under POCSO Act (in short; the POCSO Act) as defined u/s 3 of the POCSO Act that 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 insets, 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 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.
- 20. If the evidence of PW2 who is the sole victim of the occurrence of this case is perused, it would show that she was never kidnapped or abducted by the accused. She claims that she went to with the accused without being forced by the accused. Hence, the case of the victim cannot be termed as abduction as there is no apparent, force used by the accused. Since PW2 stated that she went to her uncles' house and for strolling with the accused to Gujarat, it cannot be held that the accused kidnapped her from the lawful custody of her guardian. It can be said that from the evidence of PW1 that the accused took away the victim from her lawful custody even though it was not purely kidnapping or abduction.
- Judge Spl. Court Baksa, Mushalpur
- 21. The Hon'ble Supreme Court in (1979) SCC 336 Chote Lal vs. State of Haryana, held that Besides proving the fact of abduction, it is also, necessary to prove that it was for one of the purposes mentioned in the section.

However, in Nawabkhan vs. State 1990 Cri. LJ 1179 (MP) it was held that Use of force is not an essential ingredient of offence u/s 366 IPC. Abduction and kidnapping can be achieved by deceitful means. Thus, the above law has settled the requirements u/s 366 IPC.

In Kabita Chandrakanta Lakhani vs. State of Maharashtra (2018) 6

SCC 664, wherein, it was held that the volition, the intention and the conduct of the accused is necessary to determine the offence. That to establish an offence u/s 366 IPC mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled to marry a person against her own will or may be forced or seduced or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless prosecution proves that abduction is for purposes mentioned u/s 366 IPC, court cannot hold the accused guilty and punish him u/s 366 IPC.

- Thus, from the above law, it can be said that if on one hand, the prosecution proves the abduction of a woman, on the other, it has to prove that such abduction was aimed at for using the woman for illicit intercourse or to marry against her own will to complete the ingredients of the section 366 IPC. Apart from that if there are deceitful means in the abduction or kidnapping, force may not be the vital factor to complete the offence.
- 25. In the case in hand, it appears that there is no evidence on record that the accused used force or seduce the victim to marry against her own will and to involved her in illicit intercourse with any person apart from using force or any deceitful means to the victim to take her away. Hence, the ofence u/s 366 IPC is not attracted to against the accused. Further, it appears that PW2 never stated that the accused some kind of sexual assault upon her by method of penetration into her vagina, urethra or anus. If the victim did not adduce any evidence to that effect, the accused cannot be held u/s 4 of POCSO Act.
- 26. Under the above facts and circumstances of the case, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s 366 IPC r/w section 4 of POCSO Act. The accused is acquitted and set at liberty. However, his bail bond shall stand extended for another 6 months u/s 437-A of CrPC. The seized articles shall be returned to its owner as claimed in due course of time. Forward a copy of



judgment to the District Magistrate, Baksa, Mushalpur u/s 365 of CrPC. It appears that the victim is entitled to get monetary compensation. Hence, this court recommends for payment of compensation of Rs.1Lakh to the victim by the DLSA, Baksa under Assam Victim Compensation Scheme.

27.2019.

Given under the hand and seal of this court on this 19^{th} day of March

Dictated and corrected by:

Judge Spl. Court

Judge Spl. Court

Baksa, Mushalpur

Baksa, Mushalpur

Judge Spl. Gourt Baksa, Mushalpur Baksa, Mushalpur

Typed by:

P. Deka, Com. Typist

ANNEXURE:

List of prosecution witness:



PW1 ... Sri Ganesh Bayan ... complainant

PW2 ... the victim girl (name is withheld)

PW3 ... Smti. Tarulata Bayan

PW4 ... Sri Pranjit Bayan

PW5 ... Sri Narakanta Kalita

List of defence witness:

Nil

<u>List of documents exhibited:</u>

Ext.1 ... FIR

Ext.2 ... medical report

Ext.3 ... statement of the victim

Ext.4 ... seizure list

Judge Spi Court Judge Special Court Baksa, Mushalpur Baksa, Mushalpur