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

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

Sessions Judge,

Nalbari.

SESSIONS SPL (P)CASE NO: 01/2018 u/s-366-A IPC R/W Sec. 4 of the POCSO Act.

State of AssamComplainant

-Vs-

Md. Nur Islam.....Accused person.

Appearance:-

For the prosecution : Mr. D. Barman, Public Prosecutor

For the defence : Mr. N. Dutta, Advocate.

Date of argument : 29/10/2018. Date of Judgment : 29/10/2018.

J U D G M E N T

The prosecution case which is reflected in the ejahar by one Musstt. Manowara Khatun, is that on 16/11/17 during her absence in the house the accused person, namely, Md. Nur Islam with the instigation of Chand Mohammad, Safiqul and Chandrabhanu kidnapped her 13 years old daughter Rehena Khatun(hereinafter referred as Miss 'X'). After vigorous search on 6/12/17 her daughter was recovered from the house of Sahar Ali, 'Matbar' and from the victim she could know that she was taken to Kamalbari village after inducing her and accused Nur Islam established physical relationship with her for 10 days after marrying her. On the strength of the ejahar Bhangnamari PS Case No.35/17 u/s-366-A/34 IPC r/w sec. 4 of the POCSO Act has been registered and police force set into motion. On completion of the investigation police submitted charge-sheet against the accused Nur Islam u/s-366-A r/w sec. 4 of the POCSO Act. The I/O submitted final report against other three accused.

2. While the accused entered into his appearance this court getting prima facie material to frame the charge against the accused u/s-366 IPC r/w sec. 4 of

the POCSO Act. Charge is framed accordingly against the accused Nur Islam and charge is 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 five witnesses including the victim, informant and the M/O. The case of the accused is of denial. However, the defence did not adduce any defence evidence.

5. **POINT FOR DETERMINATION.**

- (i) Whether the accused on 16/11/2017 at village Rongchar(Kalarchar)under Bhangnamari P.S kidnapped Miss 'X' who is a minor girl with intent that she may be compelled to marry any person 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 16/11/2017 at village Rongchar(Kalarchar) under Bhangnamari PS committed committed penetrative sexual assault upon Miss 'X', aged about 13 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.
- 7. First of all let me discuss the evidence of PW-1 Manowara Khatun who is the informant cum mother of the victim. She disclosed that on the date of occurrence she and her husband went out of the house and her daughter Miss 'X' was alone in the house. It is revealed further by her that on the date of occurrence she went to the house of her parents in search of money as Miss 'X'

suffered from abdominal pain and money was required. It is also disclosed by her that at 5 pm while she returned back to the house she did not meet her daughter in the house. One Hussain Ali informed her that Miss 'X' was taken away by accused Nur Islam. She immediately lodged an ejahar at the PS on the next day. She exhibited Ext-1 as the ejahar. She disclosed that while she searched for the victim she met her daughter at the house of Sahar Ali (Matbar) and brought her daughter from the house of Sahar Ali. It is disclosed that police brought the victim before the Doctor for her medical examination and her statement was also got recorded by Magistrate. It is disclosed by her that while she inquired the victim then victim revealed that accused Nur Islam kept her at the house of his uncle at Kamalabari. During cross-examination she revealed that she had no knowledge what was written in the ejahar. It is also disclosed by her that accused had love affairs with her daughter and the victim after recovery informed her that accused Nur Islam took her for treatment. It is disclosed by her that as she did not find her daughter at the house so she lodged the ejahar implicating the accused. She also disclosed that her daughter revealed before her that she went to the house of Nur Islam's uncle as per her own accord. It is also disclosed that while the victim and Nur Islam could know that case was lodged, then they came back and the victim was handed over to 'Matbar' and 'Matbar' informed her and she was brought back the victim from the house of 'Matbar'. It is also disclosed by her that at the time of occurrence the age of the victim was 18 years. She also disclosed that the victim herself went with the accused.

8. PW-2, who is the victim testified that on the date of occurrence she suffered from abdominal pain and her mother went to the house of her maternal uncle for money for her treatment. It is disclosed that accused Nur Islam came to her house and brought her to medical and at medical Doctor treated her. It is revealed that thereafter she along with the accused went to the house of the uncle of the accused at Kamalabari and for 5/6 days stayed there. She revealed that as her mother did not meet her at the house so her mother lodged the ejahar. She after getting information that ejahar was lodged by her mother, came to the house of Sahar (Matbar) and her parents brought her from the house of Sahar. She revealed that police brought her before the Magistrate and her statement got recorded by Magistrate vide Ext-2. She also disclosed that she was

brought before the Doctor and Doctor examined her. It is also disclosed that the accused did not perform any bad work with her. During cross-examination she revealed that while she suffered from abdominal pain then she informed the accused and requested him to bring her before the Doctor and thereafter the accused brought her before the doctor and treatment was provided by Doctor. It is admitted that she herself went to the house of the uncle of the accused along with the accused. It is also revealed by her that as tutored by the women police she gave her statement before the Magistrate and police that she was raped by the accused. But actually the accused did not commit rape upon her. During cross-examination she stated that accused did not elope her but she herself went with the accused. It is also disclosed that her age was 18 years at the time of occurrence.

- 9. PW-4 Sahidul Ali who is the father of the victim disclosed that on the date of occurrence while he returned back from the house he could know from his wife that victim had some abdominal pain and as his wife was not present at the house so accused Nur Islam who is his neighbour brought her to Mukalmua hospital. It is disclosed that thereafter Nur Islam brought the victim to the house of his relative. It is disclosed that as the victim did not return back so his wife lodged a case. It is revealed by PW-4 that at the time of occurrence the age of his daughter was 18 years. During cross-examination he revealed that the accused did not kidnap his daughter and he took the victim for her treatment. It is disclosed that on suspicion his wife lodged the ejahar against the accused.
- 10. PW-1, Dr. Urmi devi Choudhury is the Medical Officer of this case. On 07/12/17 while she was working as M & H.O-1 at SMK Civil Hospital, Nalbari on that day she examined Miss 'X', aged 13 years, D/O-Sahidul Ali of village Rangchar, PS-Bhangnamri who was brought by WHG- Hazera Khatun in connection with Bhangnamri PS Case No.35/17. Medical examination of the victim was done in presence of Pulu Baishya and her guardian Manowara Khatun. On examination of the patient she found the following:-

Her external genitalia was found healthy. Hymen was torn but healthy. Vagina and cervix was healthy. Vagina admits 2 fingers. Her last menstruation period was 15 days back. Vaginal swab was sent for microscopic examination for

sperm determination. But no sperm seen as per the report. Urine test for pregnancy was advised.; but report not received till submission of medical report. X-Ray was advised for age estimation. From the radiological report it is found that age of the victim is above 16 years but below 18 years. USG of lower abdomen was advised. From the USG report earlier gestational sac seen sized less than 5 mm. Doctor opined that the victim is consistent with recent sexual intercourse or assault. The doctor exhibited Ext-3 as the medical report, Ext-3(1) as her signature thereon. She also exhibited Ext-4 as the X-Ray report submitted by Dr. Prabodh Kr. Sarma and Ext-4(1) as the signature of Dr. Prabodh Kr. Sarma which is known to her.

From the evidence of the PW-1 Manowara Khatun who is the mother of 11. the victim and PW-4 Sahidul Ali who is the father of the victim it appears that victim was aged 18 years at the time of occurrence. Doctor evidence though showed that victim is below the age of 18 years and above 16 years yet Doctor admitted that as per medical jurisprudence there may be two years variation on either side. From the evidence of the victim it transpires that the victim suffered from some abdominal pain and as her mother went to the house of maternal uncle seeking for money for her treatment, so she requested to accused Nur Islam to bring her to the hospital and accordingly accused brought her to the hospital. It also appears that after visiting the Doctor she herself went with the accused to the house of the uncle of the accused and then came to the house of Sahar (Matbar). During the evidence before the court the victim nowhere disclosed anything that she was kidnapped or raped by the accused. The informant PW-1 and the father of the victim PW-4 clearly revealed that after recovery of the victim, the victim disclosed that she herself went with the accused for her treatment and thereafter she as per her own accord went to the house of the uncle of the accused Nur Islam. It also appears from the evidence of the informant that due to misunderstanding she lodged the case. The statement of the victim recorded u/s-164 CrPC though showed that victim complained that she was kidnapped and raped by the accused yet her evidence before this court is contradictory to her statement recorded u/s- 164 CrPC. The 164 CrPC statement is not a substantive piece of evidence. The victim disclosed that she gave her 164 CrPC statement as tutored by others.

12. From the evidence on record it appears that prosecution has miserably

failed to establish the allegation of kidnapping and rape against the accused.

Evidence is lacking that the accused kidnapped and rape her. As per medical

jurisprudence there may be variation of two years on either side. In the instant

case as the victim's father himself stated that the age of the victim was 18 years

at the time of occurrence so I feel that it can be safely hold that the victim was a

major girl at the time of occurrence. As the victim is consenting party and is a

major girl and as she herself went with the accused and ash she has nowhere

disclosed that she was raped by the accused, so I find that no offence u/s-366

IPC r/w section 4 of the POCSO Act has been committed by the accused.

13. Prosecution has miserably failed to prove the case against the accused

u/s-366 r/w section 4 of the POCSO Act. Accordingly, accused Nur Islam is

acquitted from the above mentioned section.

14. The accused Nur Islam 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.

15. Judgment is pronounced at the open court in presence of the accused.

16. Copy of this Judgment be kept with record.

Given under my hand and the seal of this court on this 29th day of

October, 2018.

Sessions Judge, Nalbari.

Dictated and corrected by me

Sessions Judge, Nalbari.

APPENDIX

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

PW-1 Musstt. Manowara Begum.

PW-2 Miss 'X'.

PW-3 Dr. Urmi Devi Choudhury.

PW-4Md. Sahidul Ali.

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

Nil.

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

Ext-1 Ejahar.

Ext-2 Statement u/s-164 CrPC.

Ext-3 Medical report.

Ext-4 X-Ray report.

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

Nil.

Sessions Judge, Nalbari.