# IN THE COURT OF THE SPECIAL JUDGE, DHEMAJI.

Present:

Shri S. Das, A.J.S.,

Special Judge, Dhemaji,

# JUDGMENT IN SPL.(POCSO) CASE NO. 01(JN) 2017.

U/S 366 IPC R/W Sec.4 of POCSO Act.

#### The State of Assam

- Versus -

Shri Ajodhya Payeng @ Ajodhai Pait

.....Accused Person

S/O Lt. Tarjit Payeng,

R/O Village-Dadhia Charisuti,

P.S. Chabua,

Dist.- Dibrugarh (Assam)

#### Appearance:

Shri A. Fogla,

Public Prosecutor

.....For the State

Shri Nikumja Pait,

Advocate

......For the Accused

Dates of prosecution evidence: 15-03-2017, 20-04-2017, 22-06-2017,

08-08-2017 and 09-02-2018.

Date of argument

: 14-02-2019.

Date of Judgment

: 13-03-20-19.

Special Judge,
Dhemaji

#### JUDGMENT

- 1. The prosecution case, in brief, is that on 27-04-2016 complainant- Shri Nelson Pao lodged an ejahar with Jonai Police Station alleging interalia that on 26-04-2016 at about 6.30 PM in the evening while his minor daughter- Smti 'X' ( real name is not mentioned) went to answer the call of nature, the accused-Ajodhai Pait took away his daughter from his house. They searched for her but they did not find her.
- 2. On receipt of the ejahar, police registered a case and started investigation and on completion of investigation Police submitted Charge-sheet against the accused-Ajodhya Payeng @ Ajodhai Pait u/s 366 of IPC R/W section 6 of the POCSO Act.
- 3. The case came up before the learned Sub-Divisional Judicial Magistrate, Jonai and the Ld. Magistrate issued process for appearance of the accused and on appearance furnished necessary copies to the accused and committed the case to this Court.
- 4. On receipt of the case record and on appearance of the accused, this Court considered the materials on record and upon hearing both the sides, framed charges u/s 4 of POCSO Act read with Section-366 of I.P.C. and read-over and explained to him to which he pleaded not guilty. The prosecution, in order to prove its case, examined 7 witnesses including I/O and M/O. At the closure of the prosecution evidence statement of the accused was recorded u/s 313 Cr.PC. Defence plea is of total denial. However, the defence adduced no evidence in support of his defence.

#### 5. Points for determination:

(1) That, on 26-04-2016 at about 6.30 PM at No.1 Tarajan under Jonai Police Station you committed penetrative sexual assault on Smti 'X', a minor girl aged about 17 years and thereby you committed an offence punishable u/s 4 of POCSO Act.

Special Judge.
Dhemaji

- (2) That you, on the same date, time and place kidnapped/abducted Smti 'X', with intent that she will be forced or compelled to illicit intercourse or to marry you and thereby committed an offence punishable u/s 366 of IPC
- I have gone through the evidence on record and heard arguments of both sides.

### Discussion, Decision and Reasons thereof

7. **PW1 Nelson Paw** stated that he knows the accused. His daughter's name is Smti 'X'. The occurrence took place on 24-4-2016 at about 6.30 PM. She (victim) said that she will go to the toilet. Then she disappeared and they searched for her but they did not find her. Later, at night they got to know that she had been kidnapped by the accused Ajodhya Payeng. Then they got to know that she was taken to Gujarat and so they informed the police. After a lot of pressure, she was recovered. Her date of birth was 28-12-1999. At that time she was in Class-XI. Now, she is with him. Exhibit-1 is the FIR and Ext-1(1) is his signature. Exhibit-2 is the seizure list and Ext-2(1) is his signature.

In cross-examination PW1 stated that later he got to know that she had gone with the accused to marry him.

8. **PW2 Smti Neena Pao** stated that she knows the accused. Nelson Pao is her husband. Victim Smti 'X' is her daughter. The occurrence took place in the year 2016. At that time she was at home. The accused-Ajodhai Pait tempted her and took her to Gujarat. At that time she was aged about 16 years. Then they filed the ejahar. They gave them (police) the birth certificate of the victim and she later took zimma of the same. Then the accused and the victim surrendered before the Jonai Police Station. Now, the victim is with them. At that time she was in Class-XI. On asking the victim, she told that the accused took away her. Exhibit-2 is the seizure list and Ext-2(2) is her signature. Material Ext-A is the birth certificate that was seized by police and shown to her in the Court.

Special Judge.

Dhemaji.

In cross-examination PW2 denied the defence suggestion that at the relevant time of occurrence, the accused was at Gujarat. She denied that if they had love-affairs. She also denied that the birth certificate was taken out only after the case was filed.

9. **PW3 victim Smti 'X'** stated that she knows the accused. Nelson Pao is her father. The occurrence occurred in the year 2016. The accused took away her to Gujarat with intent to marry her. Her father had filed the case and so they came back to the police station and then she was medically examined by Doctor and her 164 Statement was recorded by the Magistrate. Now, she is with her parents. Exhibit-3 is the 164 Statement and EXt-3(1-4) are her signatures therein.

In cross-examination PW3 stated that at that time accused was working in a Company at Gujarat. She had gone by train on her own. She had gone to Kamakhya on her own. She had gone from Jonai alone. She was in love with the accused. Then she went with the accused on her own to Gujarat.

10. **PW4 Prabandha Pao** stated that he does not know the accused. Nelson Pao is his brother. Victim 'X' is his niece. The occurrence occurred in the year 2016. On the day of occurrence at about 8.30 PM the victim 'X' went missing and they searched for her. Then they filed the case. The victim 'X' was later recovered from Jonai Police Station. He did not ask her anything.

Defence declined to cross-examine PW4.

11. **PW5 Yadav Kumbang** stated that he does not know the accused. But, he knows the complainant-Nelson Pao and his daughter/ Victim 'X'. He came to know from some women of their village about one year ago that the victim eloped with a boy. After one month from the date of occurrence, police came to his house and took him to the house of the complainant as he was the VDP Secretary. Later on the victim was recovered. But, he does not know from where the victim was recovered. He did not ask anything to the victim girl. At the relevant tome of occurrence the victim was reading in college.

Special Judge.

Dhemaji

Defence declined to cross-examine PW5.

12. PW6 Niren Hazarika stated that on 27-4-2016 he was posted as 2<sup>nd</sup> Officer at Jonai Police Station. On that day, one Nelson Pao filed a written ejahar at Jonasi Police Station stating that his minor daughter-Smt. 'X' was missing on 26-4-2016 in the evening and it is known to them that the accused took away the victim. On receipt of the ejahar, O/C, JOnai Police Station registered a case vide Jonai P.S. Case No.82/2016 u/s 366 of IPC and entrusted him (PW6) to investigate the case. During investigation he visited the place of occurrence, recorded statement of the witnesses and drew a sketch map of the P.O. He searched for the accused and the victim girl but did not find. From the statement of the witnesses, he came to know that the accused took the victim to Gujarat. On 17-5-2016 the accused along with the victim surrendered at the police station. He recorded the statement of the victim and sent her to Jonai CHC. Next day he sent the victim to the court for recording her statement u/s 164 of Cr.P.C. He arrested the accused and forwarded him to the Court. He seized the birth certificate and HSLC Examination Mark-sheet of the victim. Thereafter, he collected the medical report of the victim. On completion of investigation, he submitted charge-sheet against the accused u/s 366/376 of IPC R/W Sec. 6 of POCSO Act.

In cross-examination PW6 stated that during investigation he came to know that there was love-affair between the accused and the victim girl. The victim eloped with the accused on her own will. During investigation he also knew that the accused was working in a Company at Gujarat. He got the birth certificate of the victim after the occurrence.

13. **PW7 Dr. Gunada Lagachu** started that on 18-5-2016 she examined Smti 'X'/the victim, aged about 17 years, at Jonai CHC on being escorted and identified by UBC-Hemi Chabukdhara of Jonai Police Station. On examination, she found as follows:-

Special Judge.

**Genital Organs and Vulva** – There is no sign and symptoms of injury present. Hymen is found not intact. Vagina admits two fingers.

Cervix - There is no sign and symptoms of injury present.

Uterus - Not palpable.

Evidence of veneral disease- Absent.

PW-7 opined that there is no evidence of injury on her body or private parts. Vaginal smears taken on glass or laboratory investigation shows no living or dead spermatozoa on microscopical examination. For determination of age, X-Ray was advised but report not communicated.

**Laboratory investigation**- Urine for B. H. G. Result- Negative. In her opinion, PW7 opined that there is no sign of external or internal injury or mark of violence found over the body of the victim at the time of examination.

Exhibit-9 is the medical examination report and Ext-9(1) is his signature therein. Ext-10 is the laboratory examination report of urine for BHCG and EXt-10(1) is the signature of laboratory technician, Girish Rajbonshi which is known to him.

Defence declined to cross-examine PW7 ( Doctor).

# Appreciation of Evidence :-

14. From the discussion of the evidence on record it appears that prosecution examined 7 witnesses including the doctor and IO. However, in this instant case the whole case raise upon the version of the victim who has been examined as PW2. In her evidence in chief victim stated that accused had taken her to Gujrat with intend to marry her and her father filed cased against the accused and then they came back and appeared before police. However in her cross examination she stated that she had love affair with the accused and she had voluntarily gone with the accused to different places

Special Judge,
Dhemaji

and then of her own accord she had gone to Gujrat. Further in her statement u/s 164 Cr.PC also victim stated that she had love affair with the accused and on 26-04-2016 and she had voluntarily gone to meet the accused at Railway Station and they went to Gujrat with some boys. She also stated that she telephoned Ajudhya Payen @ Ajodhai Pait and he was waiting for her at Gurudowara Station and he accompanied her to the room he was occupying and she stayed there for two days. Thereafter they took room on rent and live together and indulged in sexual intercourse and it was will the consent of the victim. The accused put vermilion on her forehead and then they came back to Jonai police station.

- 15. It also appears from the evidence of the victim as well as from Ext.8 birth certificate of the victim that the victim is aged just above 16 years on the time of occurrence i.e. 26-04-2016. So far as evidence of MO (PW7) is concerned, in his report the MO has stated that the victim is aged about 17 years at the time of examination on 27-04-2016. On perusal of medical report it appears that no ossification test was done to ascertain the age. Now the question arises whether the birth certificate can be acted upon.
- 16. The ld. counsel for the defence vehemently submitted that the age certificate of the victim was obtained after the incident was occurred and hence the birth certificate cannot be relied upon.
- 17. On perusal of the birth certificate it appears that occurrence took place on 26-04-2016 and the certificate was issued on 18-05-2016. So it is quite apparent that the birth certificate was obtained long after birth of the victim and about one month after the incident occurred. So, I find it difficult to accept the birth certificate showing the age of the victim. So, the victim cannot be stated to be below 18 years.
- 18. It may be mention here that in the instant case it is found that the victim had going with the accused, but fact remains that the victim has

Special Judge,
Dhemali.

consistently made statement that she had gone of her own accord had gone with the accused.

- 19. On careful consideration of evidence on record it emerges that the victim had gone with the accused voluntarily and in the absence of credible evidence that victim was below 18 years of age, it is difficult to rope the accused with the commission of alleged offence.
- 20. I have gone through the relevant provisions of section 366 IPC and section 3 of POCSO Act. In respect of both the offences we find that the victim being not under 18 years of age of her own accord went with the accused will not constitute offence under the aforesaid sections.
- 21. Considering all the facts and circumstances even if it is found that accused had sexual intercourse with the victim no case u/s 366 IPC R/W section 4 of POCSO Act made out in this case.
- 22. In view of what has been discussed above I find that prosecution has failed to prove offence u/s 366 IPC and R/W section 4 of POCSO Act against the accused beyond all reasonable doubt.

# ORDER:

- 23. In the result, I find accused Ajudhya Payen @ Ajodhai Pait not guilty u/s 366 IPC and R/W section 4 of POCSO Act. Accordingly he is acquitted of the charges.
- Set him at liberty forthwith.
- Judgment is pronounced in open Court.
- 26. Given under my hand and seal of this Court on this the 13th day of March, 2019.

Sascial Judge, Dhemaji.