IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

Spl. POCSO Case No. 14 of 2018

U/S - 366 (A) IPC r/w Sec. 4 of POCSO Act, 2012.

State

- Versus -

Rubul Ali @ Adit

: Accused person.

Present: Sri L.K. Saikia, AJS. Additional Sessions Judge, Bajali, Pathsala.

Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons : Sri Giridhar Choudhury &

Sri Utpal Barmana Ld. Advocate.

Dates of recording evidences : 22/06/2019, 16/07/2019,

13/009/2019.

Date of recording statements u/s 313 Cr.P.C. : 18/09/2019.

Date of Argument : 18/09/2019.

Date of Judgment : 14/10/2019.

J U D G M E N T

- 1. The prosecution case in brief, is that, one Archana Kalita lodged an ejahar on 17/07/2018 with the In-Charge, Sarupeta Police Out Post alleging, *inter-alia*, that on 10/07/2018 at around 4 pm one Rubul Ali with the help of other persons namely Joshna Begam, Md. Pilina Ali, Md. Nala Ali & Safiqul Ali by making conspiracy kidnapped her minor daughter 'X' (name withheld) from her courtyard. Later on, she came to know that accused Rubul Ali and Safiqul Ali sexually harassed her daughter. The accused person converted her daughter into Muslim community. The informant further stated that before this incident the accused person had kidnapped her daughter and that time also the police recovered her daughter. Hence, this case.
- On receipt of the ejahar, Pathsala OP registered GD Entry No. 465 dated 17/07/2018 and forwarded the same to Patacharkuchi Police Station to register a case under proper section of law and accordingly it was registered as Patacharkuchi P. S. Case No. 469/18 u/s 120(B)/366(A)/34 IPC R/W 4 POCSO Act.
- During investigation police visited the place of occurrence, recorded the statements of witnesses including the victim girl, produced her before the Court wherein the Ld. Magistrate recorded her statement u/s 164 Cr.P.C, arrested the accused person and forwarded him to the court and after completion of investigation, having been found *prima-facie* case, the I/O sent up the accused for trial by filing charge sheet u/s 366(A) r/w Sec. 4 of POCSO Act, 2012.
- Addl. P. P. appearing for the State and the learned defence counsel and after perusal of materials available on record u/s 173 Cr.P.C., having been found sufficient grounds for presuming that the accused person has committed the offence, framed the formal charge under section 366 (A) IPC r/w Sec. 4 of POCSO Act, 2012 and the accusation of charge was read over and explained to him, to which he pleaded not guilty

and claimed to be tried. Hence, the trial.

The prosecution in order to prove its case examined altogether 5 (five) PWs including victim, informant and I/O. The defence plea is of total denial. The accused person was examined u/s 313 of Cr. P. C. wherein he denied all such allegations levelled against him by the prosecution witnesses. The defence side has not adduced any defence evidence.

6. POINTS FOR DETERMINATION

- (i) Whether the accused person on 10/07/2018 at around 8 a.m. kidnapped the victim girl from Dubi (Malipara) under the jurisdiction of Patacharkuchi Police Station with intent to seduced or to commit illicit intercourse against her will by another person and thereby committed an offence punishable u/s 366(A) IPC?
 - (ii) Whether the accused person on the same time, date, in the house of accused Rubul Ali and Safiqul Ali after kidnapping the daughter of the informant, committed penetrative sexual assault on her and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

EVIDENCE OF THE WITNESSES

that the victim is her daughter. She came to know the accused person from the date of occurrence. The incident took place about 2 years ago. The accused person took away her daughter from their rented house situated at Pathsala, ward No. 3. On the day of occurrence she went to market and on returning home, her other daughter (Nikita Kalita) told her that her sister (victim) was going with the accused by his motorcycle. Hearing it, searched about her daughter but found no any clue. Before the incident several times her daughter eloped with the accused person. So, for that on the day of incident also she went to the said cloth shop wherein the accused person was working for searching about her daughter. After 3 days of the happening of the

incident her daughter (victim) ranged to her other daughter by informing that they were then in Nagaon (Barpeta). Having got the information of living at Nagaon she had filed this FIR. After that her daughter was recovered. At the time of happening of the incident the age of her daughter was 15 years, 3 months and she was reading in class X. Police had seized the birth certificate of her daughter and thereafter given jimma to her.

In cross-examination, PW 1 stated she has not mentioned in her FIR about the delay of filing the FIR. Before this incident too her daughter eloped with the accused for 3 (three) times. Now her daughter is living with the accused person at Malipara. They are now blessed by a child. She knew how her daughter had eloped with the accused person. She does not know the actual age of her daughter.

8. PW - 2 'x' the Vitim deposed that at about 1 year ago she eloped with the accused person and before that she went with him for 5th (five) times. One year ago one day in the morning she eloped with the accused person and at that time she was at her house with her mother at Pathsala ward No. 3. She went to the house of the accused Rubul Ali willingly and this time she was in advance stage of pregnancy for 2 (two) months from the side of accused Rubul Ali. One day accused Rubul Ali took her to Barpeta (Bhella) for solemnizing Nikah and there they had registered their marriage at the Kaji Office. Before this time she eloped with the accused Rubul Ali for 5 (five) times and when for the last time she eloped with Rubul Ali and at that time her age was about 16 years. After registering their marriage at Bhella Kaji office she went to the house of the accused Rubul Ali and after staying there for about few days police brought them to the police station and thereafter police sent her to FAAMCH, Barpeta for medical examination. After that police produced her before the Court and in the Court magistrate had recorded her statement (Ext. 3). While she was staying at the house of accused person she was blessed by a child, whose name is Ressi Ahmed. After staying 5 months at her mother's house again she eloped to the house of the accused Rubul Ali and now she is living with him at

Dubi Malipara along with the child.

In cross-examination, PW 2 stated that Accused Rubul Ali did not force her to go with him, she willingly eloped with him since they had love affairs for long time. At present she is living with the accused person as husband and wife and he did not misbehave her. Now her mother has also maintaining good relation with accused Rubul Ali even other family members of her mother and they have visiting terms.

9. PW 3 – Tarulata Tahbildar deposed that at about 2 years ago her grand daughter eloped with accused Rubul Ali. At the time of happening of the incident her daughter was living at Pathsala in a rented house of Dilip Kalita. On that day her daughter informed her over telephone about the missing of her grand daughter. After searching about 3 days her daughter lodged the FIR. Later on they came to know that accused Rubul Ali took away her grand daughter. Now her grand daughter is living with the accused at his house at Dubi Malipara.

In cross-examination, PW 3 deposed that several times her grand daughter eloped with the accused Rubul Ali and and every time there was a case even now also she is living with Rubul Ali at his house.

PW – 4 Niranjan Das deposed that on 17/07/2018 he was working at Pathsala police out post as I/C. On that day he received an FIR from complainant Smti. Archana Kalita and accordingly O/C Patacharkuchi P.S. registered a case vide Patacharkuchi P.S. Case No. 469/18 u/s 120(B)/366(A)/34 IPC r/w section 4 of POCSO Act. 2012 and endorsed him to investigate the case. During investigation he had recorded the statement of the complainant. Seized the original birth certificate of the victim on being produced by the complainant in presence of witness namely - Tarulata Talukdar vide seizure list (Ext. 2) and gave it jimma to the complainant. Material Ext. 1 is the birth

certificate. Later on, he visited the place of occurrence and drew sketch map (Ext. 4) of the place of occurrence. He also recovered the victim girl and apprehended the accused Rubul Ali @ Adit. Thereafter he was transferred to another place and as such, handed over the case-diary to the O/C Patacharkuchi P.S.

In cross-examination, PW 4 deposed that as per the FIR the incident took place on 10/07/2018 at about 4 am and the FIR was lodged on 17/07/2018. Some parts of the birth certificate which was seized by him is damaged even the place of birth is also damaged. As the birth certificate is damaged so it was laminated by covering an another paper in the backside. In his investigation he have not inquired about the issuing authority even not inquired about the legality of the birth certificate.

PW – 5 Sailen Kr. Kalita deposed that on 03/09/2018 he was working at Pathsala police out post as I/C. On that day O/C Patacharkuchi P.S. endorsed him to investigate the Patacharkuchi P.S. Case No. 469/18 u/s 120(B)/366(A)/34 IPC r/w section 4 of POCSO Act. 2012 for investigation. On perusal of the case diary it appears that the investigation has almost completed and thereafter he conducted the the remaining investigation and after completion of investigation finding the incident being true submitted charge-sheet vide No. 224 dated 30/09/2018 against the accused Md. Rubul Ali @ Adit u/s 366(A) IPC r/w section 4 of POCSO Act. 2012. Ext. 5 is the charge-sheet and Ext. 5(i) is his signature.

Discussions, Decision, and Reasons thereof

- **12.** Perused the evidence of the witness and also gone through the provision of law.
- 13. The learned defence counsel submitted that the case has been filed due to misunderstanding of a fact and on suspicion. There is absolutely no evidence against the accused person that he ever induced the victim girl to go with him or by any manner. As both of

them have love affairs as such, the victim girl willingly went with him and stayed there. Moreover she went with the accused person 5 (five) times prior to this incident. At present the victim girl is living with the accused person at his house as husband and wife and they also blessed by a child. Though the I/O has collected the birth certificate of the victim but did not prove it as required under the provision of law for which, the birth certificate could not be accepted. Considering the above facts and circumstances, prays to acquit the accused person from the liability of this case.

- **14.** Per contra learned Addl. PP submits that from the evidence of the witnesses it comes to light that on the day of incident the accused person took away the victim girl and as such, he has committed the offence charge thereunder and prays to pass the order of conviction.
- **15.** Considered the tenacious submission of the learned counsel appearing for the accused and learned Addl. PP appearing for the state. Also gone through the relevant materials.
- 16. PW 1 the informant stated that her daughter eloped with the accused person on that day for which she lodged the FIR. Before this incident too, she eloped with the accused person for 3 (three) times. At present her daughter has been living with the accused person at his house and out of their wedlock a child was born to them. PW 3 deposed that several times her grand daughter eloped with the accused Rubul Ali and now she is living with him at his house. PW 4 is the investigating officer who deposed that he seized the birth certificate of the victim girl on being produced by the informant but he did not inquire about the genuineness of the same by asking the issuing authority.
- 17. PW 2 is the vital material witness of this case i.e. the victim girl. She stated that she had love affair with the accused person and on the day of incident she voluntarily went with him to his house.

Thereafter they went to Bhella under Barpeta district and solemnized marriage before the Kaji by executing Kabin-nama. At that time she was 2 (tow) months pregnant. The victim girl also stated that prior to this incident she eloped with the accused person for 5 (five) times. This time also she got pregnant from the side of the accused person and therefore she went with him. At present she is living with him as husband and wife and they were blessed by a female child. The victim girl also stated that the accused person did not use any force or inducement upon her to go with him.

- 18. Now, on careful and dispassionate analysis of the evidence of the prosecution witnesses, it appears that PW2 i.e. victim the accused person prior to this incident. She in her girl loves evidence categorically stated that she went with the accused person own volition. Moreover, at the time of incident she was pregnant from the side of accused person. From her evidence it is also seen that the accused person at any point of time did not induce or compel her to go with him rather she willingly went with him and solemnized marriage at the office of Kaji. The victim girl in her statement recorded u/s 164 Cr.P.C also stated that as she loves the accused person for long time, and her mother did not agree to give marry her to the accused, as such she went with him. The Investigating Officer seized the birth certificate of the victim girl during the course of investigation but he did not inquire the genuineness by asking its issuing authority. Hence, the said birth certificate cannot be accepted as per the provision of law. Moreover, the prosecution side has failed to prove the birth certificate as required under the law. Mere exhibition of document is not enough unless it is proved as required u/s 64 of Evidence Act. In-spite of that the delay of lodging the FIR was not mentioned by the complainant.
- 19. On perusal of Section 366 (A) IPC it appears that a person can be convicted u/s 366 (A) IPC only if taking away or enticement is proved. In the instant case the element of taking away on enticement by accused with force or coercion is found absent. Moreover, the age of

the victim girl is also not established in this case. The prosecution also failed to establish the age of the victim girl at the relevant time with credible document. Therefore, in order to sustain the charge under this section the age of the victim must be proved by the prosecution. A kidnapping *per se* may not lead to any inference as to what purpose or what intent girl has been kidnapped. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to or at the time of and subsequent to the commission of the offence.

- 20. In the instant case, no such inference can be drawn from the evidence on record that accused kidnapped or compelled the girl to go with him with a view to seduce to illicit intercourse or knowing it to be likely that she may be forced or seduced to illicit intercourse. In the course of her evidence the alleged victim girl has not made any such allegation against accused. The inducement on the part of the accused is seemingly absent in the instant case.
- 21. The another charge which was framed against the accused person is Sec. 4 of POCSO Act, 2012. On perusal Sec. 4 of POCSO Act and after going through the evidence available on record particularly the evidence of the alleged victim it transpires that she never stated anything against the accused person of the commission of the penetrative sexual assault against her. From her evidence nothing can even be inferred even remotely that accused had committed the offence u/s 4 of POCSO Act. As it appears from the evidence of the prosecution side, the age of the victim could not be established that she was a minor at the time of happening of the incident hence, the ingredients of section 4 POCSO Act, 2012 found missing in the instant case.
- 22. In view of above, it can be safely concluded that the prosecution has failed to prove its case against the accused person beyond all reasonable doubt.
- 23. Accordingly, the accused Rubul Ali @ Adit is acquitted of

the offences charged u/s 366 (A) IPC r/w Sec. 4 of POCSO Act, 2012 and set him at liberty forthwith.

- **24.** The terms of bail bond of accused persons is extended for a period of 6 (six) months from to-day as provided U/S 437(A) Cr.P.C.
- **25.** A copy of this judgment be given to the District Magistrate, Barpeta u/s 365 Cr.P.C.
- **26.** The Spl. POCSO Case is disposed of accordingly.
- **27.** Judgment is pronounced and delivered in the open Court in presence of both the parties and I put my hand and seal of this Court on this 14th day of October, 2019.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

APPENDIX:-

Oral evidences:-

- PW-1 Smti Archana Kalita
- PW-2 Victim
- PW-1 Smti Tarulata Tahbildar
- PW-2 Sri Niranjan Das
- PW-1 Sri Biren Kr Kalita

Documentary evidence:-

- Ext.-1. Ejahar
- Ext. 2- Seizure List
- Ext.-3 Statement of victim
- Ext.-4 Sketch Map
- Ext. -5 Charge-sheet.

Material Exhibit:-

Ext. 1 Birth Certificate.

Defence evidence.

Nil.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.