IN THE COURT OF THE ADDL. SESSIONS JUDGE, BARPETA

Special POCSO Case No. 22 of 2016
(Arising out of Sarthebari P.S. Case No.96/2015)
U/S 366-A IPC R/W Section 4 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on:- 30.08.2016

State of Assam

- Vs -

Md. Sattar Ali.....Accused.

Date of Recording Evidence on - 25.04.2017, 08.06.2017, 18.07.2017,

19.08.2017, 07.08.2018

Date of Hearing Argument on - 25.01.2019

Date of Delivering the Judgment on - 04.02.2019

Appearance:

Advocate for the State------Mrs. P. Das, Ld. Addl. P.P. Advocate for the Accused------Mr. Nazimuddin Mollah, Ld. Advocate.

JUDGMENT

- 1. The prosecution case, in brief, is that on 19.04.2015, one Nisan Ali lodged an ejahar in Sarthebari police station alleging inter-alia that on 08.04.2015 at about 11 am his 14 years old daughter namely-(X) disappeared while she went to the house of his relatives at Pithadiapam village. Since then he has been searching his daughter. On 13.04.2015 he came to know from a reliable source that accused person named in the FIR forcefully kidnapped her and having got this information he visited the house of accused on 14.04.2015 with a view to a settlement but did not find the accused and his daughter in the house of accused. Hence the case.
- 2. Following the information as above, Sarthebari police station registered a case being Sarthebari PS Case No.96/15 u/s 366-A IPC. Accordingly, ASI Dibakar Pathak has been entrusted to investigate the case.
- 3. During the course of investigation, police visited the place of occurrence, recorded the statement of the witnesses, drew sketch map, victim was also sent to court for recording her statement u/s 164 Cr.P.C. before Magistrate. Police has however, failed to nab the accused during the course of investigation. Hence, submitted the charge sheet against accused u/s 366-A IPC R/W section 4 of POCSO Act showing him

as absconder.

- 4. During the course of time, accused entered his appearance in court to face trial. On his appearance all the particulars of the case have been furnished to him as provided u/s 207 Cr.P.C. Thereafter, having heard the counsels appearing for both sides and on perusal of materials available on record charges u/s 366-A IPC R/W section 4 of POCSO Act have been framed. The particulars of the offences on being read over and explained accused pleaded not guilty and claimed trial.
- 5. During the course of trial, the prosecution examined as many as 8 witnesses namely- doctor Anima Boro as PW-1, Nisan Ali as PW-2, victim girl (X) as PW-3, Nafijuddin as PW-4, Ansher Ali as PW-5, Fajila Khatun as PW-6, Sri Rahul Deory as PW-7 and Dibakar Pathak as PW-8.
- 6. During the course of trial, prosecution also produced and exhibited medical certificate as Ext.1 and signature of doctor as Ext.1(1). The FIR as Ext.2 and signature of informant as Ext.2(1). The statement of the victim girl recorded by Magistrate u/s 164 Cr.P.C. as Ext.3 and her signatures as Ext.3(1) and 3(2). The charge sheet as Ext.4 and signature of I/O as Ext.4(1). The sketch map as Ext.5 and signature of I/O as Ext.5(1) respectively.
- 7. On conclusion of trial accused was examined u/s 313 Cr.P.C. in which he denied the prosecution case as false and misleading. On the other hand, on being asked accused declined to adduce defence evidence. His stand is total denial of the prosecution case.

8. Now point for determination ;-

1. Whether on 18.04.2015 at about 11 am accused kidnapped the minor daughter of the informant (herein after referred to as (X)) aged about 14 years with intent that she may be compelled to marry him against her will or knowing to be likely that she might be forced or seduced to illicit intercourse by means of criminal intimidation or other method and forced her to go from one place to another or forced or seduced to illicit intercourse and also committed penetrative sexual assault on her as alleged?

9. **Discussion, Decision and reasons for such decision** :-

I have heard the learned lawyers appearing for both sides.

- 10. Now, before coming to final conclusion it would be appropriate to assess the evidence of the prosecution witnesses first in the context of arguments advanced by the learned lawyers appearing for both sides and the documents available on record.
- 11. The prosecution examined doctor Anima Boro as PW-1, who had examined the alleged victim girl on 27.04.2015. It is seen from her evidence that on examination, she did not find any sign of recent sexual intercourse. No injury marks on her private parts.

The victim was not suffering from any physical or mental disability. As per X-ray report her age is above 16 years and below 18 years of age. On perusal of FIR it appears that the girl was allegedly kidnapped on 08.04.2015 at 11 am and doctor examined her only on 27.04.2015 i.e. after about 19 days of the alleged kidnapping.

- 12. PW-2 Nisan Ali is the informant, who deposed that about 2 & ½ years back at about 11 am while his daughter went to her maternal uncle's house at Pithadipam accused kidnapped her on his bike from the road. When she did not return home they make enquiry and came to know that she did not visit the house of her maternal uncle. Thereafter, after 4 /5 days of the incident his daughter informed his son over phone that she has been with accused Sattar at Majgaon. Then, they visited the house of accused but could not found them. After 11 days he filed the case. He stated that his daughter was 14/15 years of age at that time. Subsequently, police recovered her from the house of accused and sent her for medical examination and produced her in court. He further deposed that some delay has been caused in filing the FIR as they were busy searching the girl. Ext.2 is the FIR and Ext.2(1) is his signature.
- 13. In the course of his cross examination he deposed that about 1 & $\frac{1}{2}$ or 2 years back his daughter was married to one Rifon Ali but at that time she was suffering from illness so Rifon Ali did not take her to his residence and he denied that his daughter was married with accused. He also denied that his daughter has been in affairs with Sattar and she called her over phone and then eloped with him.
- 14. PW-3 who is the alleged victim girl deposed that the incident occurred about 2 & $\frac{1}{2}$ years back. Accused kidnapped her while she was proceeding to the house of her maternal uncle at Pithadipam. Then accused took her to Purapara village and kept her there for 22 days. Though she tried to escape but she could not succeed. She stated that accused had physical intercourse with her and he married her by force but she came to know that accused has a previous wife. Then her father filed the case and police recovered her from the house of accused. She stated that she was examined by doctor and she also deposed evidence in court before Magistrate. Ext.3 is the said statement and Ext.3(1) and 3(2) are her signatures.
- 15. In her cross examination she denied that accused did not kidnap her by force. She also denied that on 08.04.2015 at 11 am she voluntarily went to the house of accused Sattar and on 09.04.2015 married with him as per Mohammedan rites and customs. She denied that she knows the accused earlier and had affairs with him and fled away with him without informing her family members.
- 16. PW-4 Mafizuddin deposed that he knows the informant, the victim girl and also the accused person. About 2 & $\frac{1}{2}$ years back the victim girl disappeared. However, on discrete search, they came to know that she was with accused at Majgaon. Accordingly, they visited the house of accused but could not found him. Later on, police recovered the victim girl. Having got this information he visited the police station. At that time the girl was about $\frac{13}{14}$ years old. She was reading in school. The victim girl told him that accused Sattar took her to Pithadipam village.

- 17. In his cross examination he reiterated the same fact deposed by him in his evidence-in-chief. He however, stated that he heard that the victim girl was earlier married to another boy but he was not present in the said marriage. He also did not know whether there was any affairs of the victim girl with accused person.
- 18. PW-5 Anser Ali deposed that he know informant but accused was not seen earlier. Having heard the news that the daughter of the informant was kidnapped by Sattar. After 3 /4 days he heard that victim was along with accused at Majdia village. They went to the house of accused but could not found him. Later on, police recovered her. Then victim told him that she was taken away by accused from the road.
- 19. In his cross examination he stated that the informant is his brother but under what circumstances the girl disappeared he could not say. Prior to this incident the girl was married with another boy of Nalirpam village.
- 20. The evidence of PW-6 is inconsequential.
- 21. PW-7 is the police officer, who finally laid the charge sheet.
- 22. PW-8 Dibakar Pathak is the I/O, who investigated the case. According to him on receiving the FIR from one Nisan Ali the officer-in-charge of Sarthebari police station entrusted him to investigate the case. Accordingly, he visited the place of occurrence, drew sketch map, recorded the statement of the witnesses and then came to know that accused kidnapped the girl. Thereafter, on 27.04.2015 he came to know from Bhabanipur police out post that the girl is in Bhabanipur out post. Then he brought her, sent her for medical examination and then got her statement recorded before Magistrate u/s 164 Cr.P.C. After recording her statement victim was handed her over to her father but accused could not be arrested as he was absconding. Ext.5 is the sketch map and Ext.5(1) is his signature.
- 23. In his cross examination he deposed that he did not collect the birth certificate from informant but informant had given him a school transfer certificate. From the said certificate he recorded the age of the girl. As per medical examination report her age was above 16 but below 18 years however, victim told her age as 14 years. She also stated before him that she was married with another boy before the present incident.
- 24. Based on the above evidence of the prosecution the learned Addl. P.P. submitted that the victim girl was in fact kidnapped by accused by force. She was forced to move from one place to another and accused had forceful intercourse with her and also forced her to have sex with him on the pretext of marriage. The girl was admittedly a minor girl. So, it is a fit case for sustaining conviction u/s 366 (A) IPC R/W section 4 of POCSO Act as accused had committed penetrative sexual assault on her.
- 25. On the other hand, the learned counsel appearing for the accused person contended that there is no concrete proof/evidence regarding the age of the alleged victim girl though she stated her age to be 14/15 years at the time of occurrence and the doctor (PW-1) based on X-ray report opined that her age is above 16 and below 18 years. Since prosecution has not produced and proved the age certificate of the girl it cannot be said that at the time of incident she was below 18 years. Doctor's evidence

is not conclusive in this regard. Moreover, the leaned counsel for the accused vehemently contended that the victim in fact eloped with accused on her own which fact has been clearly revealed from the evidence of prosecution witnesses. From the evidence of PW-2 and PW-3 it is clear that she made a phone call to her brother that she had been with accused at Purapara village and accused married her. She also came to know that accused had a previous wife having two children. Then based on her information police recovered her which clearly shows that she voluntarily went with accused but subsequently refused to stay with him after coming to know that accused has another wife and two children. So, there is no force on the part of the accused. She voluntarily went with him and consented sexual intercourse with accused. Therefore, no ingredients of the offences u/s 366 IPC R/W section 4 of POCSO Act is made out.

- 26. Having heard the rival contention of the learned lawyers appearing for both sides and on careful examination of the evidence and documents available on record the following facts have clearly emerged.
 - (a) That the alleged incident of kidnapping took place on 08.04.2015 at abut 11 am and the FIR (Ext.1) was lodged on 19.04.2015 i.e. after about 11 days.
 - (b) The victim girl was recovered by I/O on 27.04.2015 and her statement before Magistrate was recorded on 29.04.2015.
 - (c) In the course of their evidence PW-2 the informant, PW-3 the alleged victim girl and PW-4 the brother of informant clearly admitted that prior to the incident the victim girl was married to another boy.
 - (d) From the evidence of PW-3 the alleged victim girl; it also appears that she stayed with accused for about 22 days and during that period she had physical intercourse with accused and then she came to know that accused has another wife having children then only she informed the matter to her father. Thereafter, police recovered her.
 - (e) From the evidence of PW-2 and PW-4 it appears that having got the information that the victim girl was with accused in his residence they visited the house of accused with a view to a settlement with the society but having not been successful in their mission the case was filed.
- 27. After dispassionate examination of the above facts, it appears that even though the girl stated that she was forcefully kidnapped by accused from road while she was proceeding to the house of her maternal uncle at Pithadipam village, but her evidence is belied by the subsequent revelation of facts.
- 28. After assessment of the evidence of PW-2, PW-3 and PW-4, who are the vital prosecution witnesses it is crystal clear that the victim eloped with accused on her own and consented to sexual intercourse with accused on her own and after spending 22 days in the house of accused she came to know that accused has a wife living with two children, so, she refused to live with him and informed the matter to her father who made an attempt to settle the matter but having failed; he filed the case. Moreover, another

vital fact is that there is no conclusive evidence regarding the age of the alleged victim girl except oral evidence. There is no documentary proof as to her age. The evidence of doctor is also not conclusive to determine her age. Therefore, no reliance can be placed on the evidence of PW-1 as regards the age of the victim girl. Moreover, on examination of the victim girl doctor found no recent sign of sexual intercourse and no injury marks found on her private parts. Therefore, it cannot be inferred that accused had forceful sexual intercourse with her.

- 29. It is settled law that the prosecutrix, in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the basis of conviction unless corroborated in material particular. However, in the instant case, after careful and dispassionate examination of the prosecution witnesses this court is unable to hold the accused guilty of offences u/s 366 IPC R/W section 4 of POCSO Act as the evidence of doctor does not prove the fact of having any forceful sexual intercourse with the victim by accused person. There is no chemical examination report. Therefore, prosecution evidence is found not trustworthy which does not lend any assurance that victim was forcefully kidnapped by accused and had penetrative sexual assault on her. As it transpires the victim girl contradicted her evidence in court with that of her statement given by her before Magistrate u/s 164 Cr.P.C. In her statement u/s 164 Cr.P.C. (Ext.3) she clearly stated that she knows accused Sattar Ali about 6 months back and developed affairs with him and as a result of her affairs she eloped with him on 08.04.2015 without informing her family members and thereafter, she married with him on 09.04.2015. She also clearly stated that accused did not kidnap her but in court she turned around and deposed that accused kidnapped her by force. Therefore, the evidence of the alleged victim is not credible and trustworthy and false implication at the behest of her parents cannot be ruled out. Moreover, from the evidence of PW-2, PW-3 & PW-4 it is clear that she married with another boy prior to this incident which fact raised a suspicion in the mind of the court about her actual age. In the absence of any credible proof regarding her age, the sole oral version o the prosecutrix cannot be trusted. Therefore, considering all the evidence of the prosecution witnesses, this court has come to unerring conclusion that prosecution has miserably failed to substantiate the offences u/s 366-A IPC R/W section 4 of POCSO Act.
- 30. In the result, this court has no option but to acquit the accused Md. Sattar Ali from the alleged offences u/s 366-A IPC R/W section 4 of POSCO Act, on the ground of benefit of doubt and set him at liberty forthwith.
- 31. His bail bond stand cancelled and surety is discharged.
- 32. Let a copy of the judgment be sent to the learned District Magistrate, Barpeta for his information as provided in section 365 Cr.P.C.
- 33. Given under my hand and seal of this Court on this 4th day of February, 2019, at Barpeta.

Dictated & Corrected my me

(Sri C.B. Gogoi) Special Judge, Barpeta

APPENDIX

1. The prosecution has examined the following 8 nos. of witnesses :-

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PW-1 = is Dr. Anima Boro, the M.O.
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PW-2 = is Nisan Ali, the informant..

PW-3 = is victim (X).

PW-4 = is Mafizuddin.

PW-5 = is Ansher Ali.

PW-6 = is Fajila Khatun.

PW-7 = is Sri Rahul Deory, the S/I.

PW-8 = is Dibakar Pathak, the I/O.

2. The prosecution has exhibited following document :-

Ext.1 = is the medical report.

Ext 1(1) = is the signatures of doctor Anima Boro.

Ext.2 = is the FIR.

Ext.2(1) = is the signature of Nisan Ali.

Ext.3 = is the statement of victim recorded u/s 164 Cr.P.C.

Ext.3(1) & 3(2) = are the signature of victim.

Ext.4 = is the charge sheet.

Ext.4(1) = is the signature of S/I Rahul Daimary.

Ext.5= is the sketch map

Ext.5(1) = is the signature of ASI Dibakar Pathak.

Sd/-

(Sri C.B. Gogoi) Special Judge, Barpeta.