

IN THE COURT OF THE SPECIAL JUDGE ::::: BONGAIGAON

Special (P) Case No.8(M)/2017.

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

(Arising out of Manikpur P.S. Case no. 104/2016)

State of Assam

Vs.

Abul HussainAccused.

**PRESENT :- Smti. I. Barman,
Special Judge (under POCSO Act),
Bongaigaon.**

Apearance :-.

*For the State : Smt. R.Choudhhury, Special
Public Prosecutor.*

For the accused : Sri P. Baidya, Advocate.

Date of Argument : 25.09.2018.

Date of Judgment : 28.09.2018.

28.9.18
Special Judge,
Bongaigaon.

JUDGMENT AND ORDER

1. Prosecution case in a nut shell is that the informant's 12 years old daughter who was reading in Baripara M.E. School in class VII while proceeding to school on 10.10.2015 from home to attend examination, accused Abul Hussain alongwith one another who were waiting in the motor cycle restrained her in the mid way near

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Durgamandir of Baripara village and gagging her mouth abducted her by the said motor cycle at around 8.30 A.M. Seeing the incident a student of the school informed the informant and later on on 18.10.2015 the victim was recovered from the house of Ranen Boro. It is further alleged that the accused alongwith the unknown person abducting the victim committed her rape and later on with intend to sell her took her to West Bengal, but on raising alarm, she was kept in the house of Ranen Boro.

2. The informant filed the complaint before the learned Chief Judicial Magistrate, Bongaigaon and on being received the complaint through learned Court, the O/C, Bongaigaon P.S. registered a case being Bongaigaon Police Station Case No. 104/2016 U/S 366(A)/376 IPC and entrusted S.I. Haidar Ali Ahmed to investigate the case. Accordingly, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, recovered the victim, sent her for medical examination, got recorded her statement U/S 164 Cr.P.C and on completion of investigation laid charge sheet against the accused Abul Hussain U/S 366//376 IPC read with section 4 of POCSO Act showing him as absconder.

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3. On perusing police report and hearing both sides, having found a prima facie case, charge U/S 366 IPC read with section 4 of POCSO Act was framed against the accused. The accused pleaded innocence when charge was read over and explained to him and claimed for trial.

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Points for determination:-

1. Whether on 10.10.2015 at around 8.30 A.M at village Baripara under Manikpur Police Station, accused Abul Hussain kidnapped the victim 'X' aged about 12 years with intent that she may be compelled to marry against her will or in order that she will be forced or seduced to illicit intercourse and thereby committed an offence punishable U/S 366 IPC ?
2. Whether after 10.10.2015 at West Bengal the accused committed penetrative sexual assault on the child X aged about 12 years and thereby committed an offence punishable under section 4 of POCSO Act ?
4. In this case, to bring home the charge against the accused, prosecution has examined as many as 9 witnesses. Defence side examined none.
5. Statement of the accused was recorded U/S 313 Cr.P.C in which, he denied all the allegations levelled against him and pleaded innocence.
6. I have heard argument advanced by the learned counsel of both sides.

Discussion, decision and reasons there of:-

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7. At the very out set I would like to scrutinize the evidence on record for the purpose of adjudicating the charges against the accused.

8. PW 1, is the informant as well as father of the victim deposed that on the day of incident at around 8 A.M his victim daughter aged about 12 years a student of class VIII proceeded to Baripara M.E. school and at around 10 A.M one Wahed Ali, a student of the said school informed him that one boy had abducted the victim by bike and later on he came to know that accused Abul Hussain had abducted her. Though he searched for her but did not find. He further deposed that on the very day of incident, he lodged the FIR at Police Station but police did not accept it and after about one week the victim was recovered from the house of the accused. After recovery, from the victim he came to know that the accused had taken her to West Bengal to sell her and then he lodged the FIR, Ext 1. During cross he stated that the accused is the cousin brother of the victim and they used to visit each other's house. He admitted that on the very day when he filed the FIR, he asked not to register the case at that time but when they did not find the victim asked police to register the same and later on through Court they lodged the present FIR. He admitted that in lower class the victim failed twice. He did not know in which place of Bengal the victim was taken.

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9. PW 2 Wahed Ali deposed that on the day of incident the accused calling the victim from school, had taken her somewhere and he seeing the victim going with the accused, informed at her house. During cross he stated that he did not whether the victim went

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to her aunty's house or some other place. He also admitted that the accused neither gagged her mouth nor tied her hand and feet at the time of taking her away.

10. PW 3 is the victim herself. She deposed that on the day of incident at around 9.00 A.M she proceeded to Boripara M.E School, Manikpur and before entering into the premises of the school, accused Abul Hussain came and proposed her to go for outing. She further stated that as the accused is her cousin brother, hence she accompanied him by motor cycle to Patiladaha and from Patiladaha they came to New Bongaigaon by bus wherefrom by train they went to West Bengal. At West Bengal they resided in the house of the father-in-law of accused's elder brother for about one week wherefrom she making call to her father and came to the house of Ranan Boro at Panbari. Then she making call to her father, came to the house of Ranen Boro at Panbari wherefrom her father brought her home. She proved her statement U/S 164 Cr.P.C as Ext 2. During cross she stated that she on her own accord accompanied the accused for outing and thereafter informing her father asked him not to be worried. She admitted that they used to visit the accused's house and sometimes she also resided in the house of he accused whose mother is her maternal aunty but due to misunderstanding her father filed the case though no such incident as alleged took place. She further stated that she gave her statement before the Magistrate as tutored by police and at the time of incident she was 18 years old. She also admitted that she failed twice at school.

11. PW 4 Saidul Islam deposed that the informant

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alongwith his daughter, wife and one another coming to him reported accused Abul Hussain had eloped his daughter and asked to call a 'mel' but he refused. During cross he stated that he did not know whether the accused actually abducted the victim or not.

12. PW 5 the mother of the victim testified that on the day of incident at around 10 A.M her victim daughter was missing from school and later on her friends told them that accused Abul Hussain had taken the victim by cycle and after one week her husband had brought the victim from the house of the accused. She stated that the mother of the accused is her own sister. So the accused is the cousin brother of the victim. After recovery the victim told that she with the accused went to the house of the father-in-law of the elder brother of the accused for outing only wherefrom she came to the house of the accused. According to her, at the time of incident the victim was 16 years old. During cross she stated that due to misunderstanding the case was filed. She also stated that she does not remember the date of birth of the victim and only on guess she stated her age as 16 years but she might have been 18 years at the time of incident. She also stated that the victim on her own accord went with the accused to her maternal aunty's house for outing.

13. PW 6 Dr. Hafiza Ahmed the Medical Officer deposed that on 05.05.2016 she examined the victim and found urine for HCG gave positive. No injury was found over any part of the body. She opined that it could not be ascertained whether she was raped or not. She proved the medical report as Ext.3. During cross she stated that on the basis of laboratory report, she mentioned the HCG test gave positive test but the laboratory report is not available in the record.

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14. The evidence of PW 7 Ranen Basumatary is only heard that accused Abul Hussain and one girl came to his house.

15. PW 8 Sayed Ali heard that the accused had taken the victim and regarding the incident police seized a school certificate of the victim vide seizure list Ext 4. He proved the school certificate as M.Ext 1.

16. PW 9 Haider Ali Ahmed, the investigating officer deposed that on 3.5.2016 on receipt of FIR from PW 1 he was entrusted to investigate the case. Accordingly, he visited the place of occurrence, recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement U/S 164 Cr.P.C, collected the medical report and not finding the accused showing him as absconder submitted charge sheet against the accused U/S 366(A) IPC read with Section 4 of POCSO Act vide Ext.5. During cross he stated that he did not seize the school certificate from school.

17. In this case, admittedly the accused is the cousin brother of the victim. She in deposition clearly stated that at the time of incident she was 18 years old. Victim's mother though in chief stated that at that time, the victim was 16 years old but during cross she admitted that she did not remember the date of birth of the victim and only on guess she stated her age as 16 years and she might have been 18 years old. The victim and her father also admitted that in school the victim failed twice. Regarding age Investigating Officer seized the school certificate of the victim which shows her date of birth as 17.8.2003. So as per school certificate at the time of incident she was 12 / 13 years old.

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But the prosecution has not examined the issuing authority of the school certificate, M.Ext 1. No admission register was also proved on the basis of which the date of birth was entered in M.Ext 1. In such circumstance, it cannot be said that prosecution has been able to prove the age of the victim.

18. Now let us see the other facts and circumstances of the case. The alleged offence is abduction of the victim and commission of penetrative sexual assault. But during evidence the victim herself stated that on the day of incident she accompanied with her cousin brother the accused on her own accord for outing. At first they went to Patiladaha from where they came to New Bongaigaon by bus and then by train went to West Bengal in a relative's house of the accused where they resided for about one week. So she accompanied the accused by bus and by train. In this long journey to Patiladaha, New Bongaigaon and West Bengal, she met many persons in the bus as well in the train but she neither raised any alarm nor resisted the accused. She easily would have informed the other passengers of the bus or train or police personnel, TT etc. But she did nothing. Though the victim's father in deposition stated that after recovery from the victim he came to know that the accused took her to West Bengal with intend to sell her but the victim herself had not supported the same. Rather she and her mother categorically stated that due to misunderstanding the case was filed against the accused. Though in statement U/S 164 Cr.P.C she alleged commission of rape and abduction but during deposition she admitted that as tutored by police she gave statement though no such incident took place.

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19. Another significant feature of this case is that the alleged incident occurred on 10.10.2015 and the victim was recovered after one week. But the complaint was filed in Court on 30.10.2015 and it was produced at the Police Station only on 3.5.2016. This long delay in filing the FIR also casts doubt about the genesis of the case.

20. In the above evidence particularly the evidence of the victim clearly indicates that the victim on her own went with the accused who is her cousin brother. There was no force or threat in taking her away. There was also no inducement on the part of the accused. There is also no iota of evidence that the accused committed any sexual assault on the victim. On close appreciation of the PWs, I hold and decide that the prosecution could not establish the charge U/S 366 IPC and section 4 of POCSO Act against the accused Abul Hussain. Accordingly, accused Abul Hussain is acquitted from the charge U/S 366 IPC and section 4 of POCSO ACT and set him at liberty forthwith. His bail bond shall remain in force till next six months.

21. Given under my hand and the seal of this Court on this 28th day of September, 2018, at Bongaigaon.

I. Barman 28.9.18
(I. Barman)
Special Judge
~~Special Judge~~
~~Bongaigaon.~~
~~Bongaigaon.~~

Dictated and corrected by me,

I. Barman
(I. Barman)
Special Judge,
~~Special Judge~~,
~~Bongaigaon.~~
~~Bongaigaon.~~

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A P P E N D I X

Prosecution witness:

PW 1 – father of the victim.
PW 2 – Wahed Ali.
PW 3 – victim.
PW 4 – Saidul Islam.
PW 5 – mother of the victim.
PW 6 – Dr Hafiza Ahmed.
PW 7 – Ranen Basumatary.
PW 8 – Sayed Ali.
PW 9 – Haider Ali, I.O.

Defence Witness:

Nil.

Documents Exhibited by Prosecution:

Ext-1 FIR.
Ext-2 statement of the victim u/s 164 CrPC.
Ext-3 medical report.
Ext-4 seizure list.
Ext-5 Charge sheet.

Material Exhibited by prosecution:

M.Ext 1- School certificate.

Defence Exhibit:

Nil.

L.B. a.18
(I. Barman)
Special Judge,
Bongaigaon
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