DISTRICT: DHUBRI

IN THE COURT OF THE SPECIAL JUDGE, DHUBRI

PRESENT: - Shri A. Chakravarty, M.A., LL.M., AJS

Special Case No. 45 of 2017

U/S 363, 376 IPC & 4 of the POCSO Act Corresponding to G.R. Case No. 1913/2017

State of AssamComplainant

Versus

Sukur Ali ... Accused

Charge framed on : 09-08-2017

Evidence recorded on : 22-08-2017, 07-09-2017, 21-09-2017 & 23-10-2017

Statement recorded on : 01-11-2017 Arguments heard on : 06-11-2017

Judgment delivered on : 21-11-2017

Advocates who appeared in this case are:

Shri Maniruz Zaman, Special P.P. for the Prosecution

Shri Islamuddin Ahmed, for the Defence

JUDGMENT

- **1.** This case was registered on 11-05-2017, at Gauripur Police Station, under Sections 366(A), 376 of the Indian Penal Code, 1860 (in short "the IPC"), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short "the POCSO Act"), based on a First Information Report (in short "the FIR") filed by one Kalimuddin Sheikh against unknown culprits.
- **2.** The case of the prosecution, as stated in the FIR, is that on 07-05-2017, at around 04:00 p.m., the minor daughter of the informant (hereinafter referred to as

"the victim girl"), who was studying in Class-X at the Piyajbari High School, under Gauripur Police Station, went missing. The informant searched for the victim girl, but in vain. Apprehending that somebody might have induced the victim girl to go with him due to love affairs or might have kidnapped her for selling outside the State, the informant filed the FIR of the instant case with the Athani Police Outpost on 10-05-2017.

- **3.** The In-charge of the Athani Police Out-post entered the FIR in the General Diary Book of the Out-post vide entry No. 117, dated 10-05-2017 and forwarded the FIR to the Officer-in-Charge of the Gauripur Police Station for registration of a case. He also started investigation in anticipation.
- **4.** The Officer-in-Charge of the Gauripur Police Station registered the FIR as No.540/17 for an offence punishable under Section 366(A) IPC against unknown culprits and directed the S.I. of Police Sanjib Kr. Mazumdar to complete the investigation.
- **5.** During the course of investigation, the victim girl was recovered and she was medically examined. Her statement was recorded by the Magistrate under section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C."). Statements of several witnesses were also recorded. As during investigation, the Investigating Officer found that the accused Sukur Ali was the unknown culprit who had kidnapped the victim girl and has also committed offences under Section 376 IPC and Section 4 of the POCSO Act, the Section 376 IPC and Section 4 POCSO Act were added to the case. After completion of investigation, the Investigating Officer filed charge sheet for offences under Sections 366(A), 376 IPC and Section 4 of the POCSO Act against the accused Sukur Ali in this Court as the offences under the POCSO Act are tirable by the Special Court and this Court has been designated as the Special Court to try offences under the POCSO Act. Hence, this case.
- **6.** During trial, charges under Sections 363, 376 IPC and Section 4 of the POCSO Act were framed against the accused person. When the contents of the charges were read over and explained to the accused person, he pleaded not guilty and claimed to be tried.
- **7.** The prosecution, in order to prove its case, examined nine witnesses. The accused did not examine any witness.

- **8.** In his examination under section 313 Cr.P.C., the accused has denied the prosecution case and has stated that the allegations levelled against him are false and baseless.
- **9.** The points for determination in this case are:-
- I) Whether on 07-05-2017, at around 04:00 PM, at village Baniamari, Part-V, under Gauripur Police Station, the accused Sukur Ali kidnapped the victim girl who, at the relevant time, was a child under 18 years of age, from her lawful guardianship and thereby committed an offence punishable under Section 363 of the Indian Panel Code?
- II) Whether on or about 07-05-2017, the accused Sukur Ali committed rape on the victim girl and thereby committed an offence punishable under Section 376 IPC?
- III) Whether on or about 07-05-2017, the accused Sukur Ali committed penetrative sexual assault on the victim girl who, at the relevant time, was a child under 18 years of age and thereby committed an offence punishable under Section 4 of the POCSO Act ?

If so, what punishment does he deserve?

DECISION AND REASONS THEREOF

- **10.** I have carefully examined the evidence on record, gone through the relevant documents on record and after hearing the arguments advanced by the learned counsels for both the sides, give my decision on the above points as follows:-
- **11.** As all the points are co-related, all the points are discussed and decided jointly.
- **12.** The victim girl (P.W.-3) has deposed that on the day of the occurrence, at around 05:00 p.m., while she was returning from tuition, at Makrirjhara, her neighbour Salma took her to a shop and gave her a *Singara* (eatable). After eating the *Singara*, she became unconscious. When she regained her senses, she found that she was taken in a motorcycle to Mayarchar. The accused Sukur Ali and one Abul were present there. The accused Sukur Ali took her to his house at Mayarchar

and committed rape on her. From there, the accused Sukur Ali took her to Sunarigaon and kept her there in the house of his brother Shahjahan for three days. There also, the accused Sukur Ali committed rape on her. From there, the accused Sukur Ali again took her to his house at Mayarchar. There from, the police recovered her. Her statement was recorded by the Magistrate. Ext-1 is her said statement and Ext.-1 (1) and Ext.-1 (2) are her signatures therein. The police also sent her to the hospital for medical examination.

13. In the cross-examination, she has stated that she does not know the name of the tuition master. She was attending tutorial classes for one year. Three girls and four boys also attended the tutorial class on that day. She does not remember their names. The house of the tuition master and the shop where Salma gave her the Singara were adjacent to each other. There were several shops and a bus stop there. They went out together from the tutorial class. The distance between Makrijhara and Mayarchar is about twenty kilometers. She spent the first night at Mayarchar. The accused told her that the name of the said place was Mayarchar. Next day, the accused took her by motorized boat from Mayarchar to Sunarigaon. It took about an hour to reach the house of the brother of the accused. There were six inmates in the house of the brother of the accused, including his wife and mother. She did not tell anybody that the accused Sukur Ali had kidnapped her. After three days, they returned from Sunarigaon to Mayarchar by motorized boat. There were many passengers in the said boat. She did not tell any passenger of the boat that the accused Sukur Ali had kidnapped her. Next day, the police came and recovered her from Mayarchar. She told the police the above incidents. She has denied the suggestion that she did not tell the police all the above incidents. She has denied the suggestion that she did not tell the police that the accused Sukur Ali had kidnapped her and committed rape on her. She has denied the suggestion that she did not tell the police that Salma gave her a singara and after eating the singara, she became unconscious and thereafter, the accused Sukur Ali and Abul took her to Mayarchar. She has denied the suggestion that the accused Sukur Ali did not kidnap her and did not commit rape on her. She has denied the suggestion that she did not tell the Magistrate that the accused Sukur Ali had kidnapped her and committed rape on her. She has denied the suggestion that she did not tell the police or the Magistrate in the same manner like she has deposed

in the court. She has denied the suggestion that the accused Sukur Ali is innocent and she has deposed falsely. She does not remember the date of the alleged incident. In total, the accused kept her for six days at Mayarchar and Sonarigaon. She has no relation with the accused before the said incident. She did not tell the Magistrate that she had love affair with the accused. She has denied the suggestion that the accused Sukur Ali had no relation with Abul. She has denied the suggestion that she has deposed falsely. She has denied the suggestion that the accused is no way connected with this case.

- **14.** P.W.-1 Kalimuddin Sheikh, the informant has deposed that about three months ago, one day, the victim girl went missing from his house. He then searched for her but, in vain. Therefore, he filed the FIR of the instant case with the police. The Police recovered the victim girl from the house of the accused.
- **15.** In the cross-examination, he has stated that he does not remember the date and time when the police recovered the victim girl from the house of the accused. He has denied the suggestion that the police did not recover the victim girl from the house of the accused. He has also denied the suggestion that at the relevant time, the age of the victim girl was more than 18 years.
- **16.** P.W.-2 Soleman Ali Ahmed and P.W.-6 Azgor Ali have deposed that they know nothing about the alleged incident.
- **17.** P.W.-7 Johiruddin Sheikh has deposed that the victim girl is his neighbour. As he did not see the victim girl for a few days, he inquired about her. The mother of the victim girl told him that she had gone to the house of her elder sister. After five/six days, he heard that the victim girl was recovered from Kamarpara.
- **18.** In the cross-examination, he has stated that he did not tell the police that he heard that the victim girl was recovered from Kamarpara.
- **19.** P.W.-5 Dr. Md. Laskar Ali, the Radiologist of the Dhubri Civil Hospital who had examined the victim girl to ascertain her age has deposed that her radiological was approximately 17 years. He has further deposed that her radiological age was less than 18 years. Exhibit-3 is the report prepared by him and exhibit 3 (1) is his signature therein.

- **20.** P.W.-4 Dr. (Mrs.) Muskura Ahmed, the medical officer who had examined the victim girl has deposed that she did not find any abnormality or injury and any sign of recent sexual intercourse on the victim girl. Exhibit-2 is the examination report prepared by her and exhibit 2 (1) is her signature therein.
- **21.** P.W.-8 ASI Sanjib Mazumdar, the Investigation Officer of the case has deposed that during the course of investigation, he visited the place of occurrence and prepared a site plan. Ext.- 5 is the said site plan and Ext.- 5 (1) is his signature therein. He has also recorded the statements of the witnesses. He has recovered the victim girl along with the accused. He sent the victim girl for medical examination and collected the medical examination report. He also sent the victim girl to the court for recording her statement under section 164 Cr.P.C.
- **22.** In the cross-examination, he has stated that the distance between Makrijhara and Baniamari is about three kilometers. He has shown the Baniamari village, from where the victim girl was allegedly kidnapped by the accused, as the place of occurrence. The house of the victim girl is situated near the place of occurrence. The witnesses also reside near the place of occurrence. He has never visited Sonarigaon and Makrijhara in connection with this case. During investigation, he visited Mayarchar, but did not examine any witness there. He did not examine Abbas, Salma and Abul as witnesses. The victim girl did not tell him that the accused committed rape on her or sexually assaulted her. He has denied the suggestion that he has not properly investigated the case.
- **23.** PW-9 S.I. Kulesh Chakravarty, the other Investigating Officer of the case has submitted the charge sheet.
- **24.** As can be seen from the above discussion, the case of the prosecution that on 07-05-2017, at around 04:00 PM, at village Baniamari, Part-V, under Gauripur Police Station, the accused Sukur Ali took away the victim girl, who at that time was a child under 18 years of age, from her lawful guardianship, took her to his house at Mayarchar and from there, to Sonarigaon, will admit of no doubt. The victim girl has deposed that the police recovered her from the house of the accused. The defence did not even challenge her in the cross-examination that the police did not recover her from the house of the accused. The Investigating Officer

(PW-8) has also deposed that he recovered the victim girl along with the accused. The defence did not challenge him also in the cross-examination that he did not recover the victim girl along with the accused. Therefore, as the victim girl has deposed that the accused had kidnapped her and committed rape on her, must be accepted to be true. Further, as the P.W.-4 Dr. (Mrs.) Muskura Ahmed, the medical officer who had examined the victim girl has deposed that she did not find any abnormality or injury and any sign of recent sexual intercourse on the victim girl, the instant case, at the most, is a case of consent. But, in view of the provisions of the Section 114-A of the Indian Evidence Act, 1872, the consensual sexual intercourse between the accused and the victim girl has to be treated as "Rape". Section 114-A of the Indian Evidence Act, 1872 reads as under:

"114-A. Presumption as to absence of consent in certain prosecutions for Rape-In a prosecution for Rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been Raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

The accused was not able to give any satisfactory explanation in his statement recorded Under Section 313 of the Code nor was he able to adduce any defence evidence to rebut the presumption contained in Section 114-A of the Indian Evidence Act, 1872 against him.

25. Section 4 of the POCSO Act deals with penetrative sexual assault. The term "penetrative sexual assault" has been defined in Section 2(f) of the POCSO Act, which states as follows:--

"penetrative sexual assault has the same meaning as assigned to it in Section 3".

Section 3 of the POCSO Act reads as follows:--

"3. Penetrative sexual assault - A person is said to commit "penetrative sexual assault" if -

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part off the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

Section 2(a) of the POCSO Act, defines aggravated penetrative sexual assault, which reads as follows:--

"aggravated penetrative sexual assault" has the same meaning as assigned to it in Section 5."

Section 5(1) of the POCSO Act reads as follows:--

"whoever commits penetrative sexual assault on the child more than once or repeatedly is said to commit aggravated sexual assault".

- **26.** The scope of the provision of Section 3 is crystal clear. Hence, the Section requires no further elucidation. Section 4 is the penal provision for Section 3.
- 27. In order to attract any offence under the provisions of the POCSO Act, it should be proved by the prosecution that on the date of the commission of the crime, the victim was a child. The term "child" has been defined in Section 2(d) of the POCSO Act, which states that child means any person below the age of 18 years. Thus, for the purpose of any offence under the POCSO Act, the age of the victim should be proved to be below 18 years as on the date of commission of the alleged crime. Further, one of the essential ingredients of the offence of kidnapping is that the victim should not have attained the age of 18 years. Therefore, for the purpose of the offence of kidnapping as well as for any offence under the POCSO Act, the age of victim should be proved to be below 18 years on the crucial date. In the instant case, as can be seen from the above discussion, on

the day of the occurrence, the victim girl was a child under 18 years of age. PW-5 Dr. Md. Laskar Ali, who had examined the victim girl to determine her age, has deposed that the Radiological age of the victim girl was approximately 17 years but, less than 18 years. The defence only suggested to the PW-5 that at the time of examination, the radiological age of the victim girl was more than 18 years which, the PW-5 has denied. Therefore, the suggestion is of no use as the defence did not adduce any positive evidence to prove the suggestion and evidence on record does not support the suggestion. Therefore, it must be held that on the day of the commission of the alleged offence, the victim girl was a child under 18 years of age.

- **28**. As the victim girl has deposed that the accused kidnapped her and committed rape on her at Mayarchar and also at Sonarigaon and she was subjected to lengthy cross-examination by an experienced advocate but nothing has come out to create reasonable doubt in her testimony.
- **29.** In the case of **MUKESH Vs. STATE OF CHHATTISGARH**, reported in (2014) 10 SCC 327, the Hon'ble Supreme Court has held as follows:-
- "15. Further, as has been repeatedly held by this Court in a catena of cases, the sole Testimony of the witness is sufficient to establish the commission of Rape even in the absence of corroborative evidence. Reliance has been placed on the decision of this Court in the case of **Md. Iqbal and Another Vs. State of Jharkhand, AIR 2013 SC 3077,** which states as under:
- 17. There is no prohibition in law to convict the accused of Rape on the basis of sole Testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses.
- 18. In **Narender Kumar v. State (NCT of Delhi)** this Court has observed that even if a woman is of easy virtues or used to sexual intercourse, it cannot be a licence for any person to commit Rape and it further held: (SCC p. 180, paras 30-31)
- 30. ... conviction can be based on sole Testimony of the prosecutrix provided it lends assurance of her Testimony. However, in case the Court has reason not to accept the version of the prosecutrix on its face value, it may look for

corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

- 31. The Court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtues/unchaste woman that itself cannot be a determinative factor and the Court is required to adjudicate whether the accused committed Rape on the prosecutrix on the occasion complained of."
- **30.** In view of the above, in the instant case, the testimony of the victim girl must be accepted to be true. Therefore, the accused Sukur Ali must be held guilty of kidnapping and committing rape/penetrative sexual assault on the victim girl, which are offences punishable under Sections 363, 376 IPC and Section 4 of the POCSO Act. But, as the punishment for the offence under Section 376 IPC and Section 4 of the POCSO Act are same, there is no necessity of convicting the accused under Section 376 IPC.
- **31.** Regarding culpable mental state of the accused, we may refer to the Section 30 of the POSCO Act, which reads as follows:-
- **"30. Presumption of culpable mental state.-** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
- (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".
- **32.** In the instant case, on 07-05-2017, at around 04:00 PM, at village Baniamari, Part-V, under Gauripur Police Station, the accused Sukur Ali kidnapped the victim girl, who at the relevant time was a child under 18 years of age from her lawful guardianship and took her to his house at Mayarchar and from there, to Sonarigaon and committed rape/penetrative sexual assault on her. Therefore, it must be presumed that he had culpable mental state. Further, the accused did not

rebut the said presumption. Therefore, it is held that the accused had culpable mental state in committing the alleged offences. That apart, the presumption of guilt under Section 29 of the POSCO Act also needs to be applied as all the necessary facts regarding commission of the offence under the POSCO Act have been proved. The said presumption also has not been rebutted by the accused.

- **33.** In the result, from the facts and circumstances of the case and above discussion, I hold that the prosecution has succeeded in bringing home the charges under Sections 363 IPC and Section 4 of the POCSO Act against the accused Sukur Ali beyond all reasonable. Hence, I hold him guilty of committing the offences punishable under Section 363 IPC and Section 4 of the POCSO Act and convict him under the said Sections of law. The points are decided in the affirmative, accordingly.
- **34.** The minimum sentence prescribed under Section 4 of the POCSO Act is Rigorous Imprisonment for seven years which cannot be modified or altered. Therefore, the Probation of Offenders Act is not applicable to the instant case. As such, the accused is not entitled to get the benefit of the ameliorative relief as envisaged under the said Act.
- **35.** Heard the accused on the question of sentence. He has pleaded leniency in awarding the punishment on the ground that he is a first offender and is a youth.
- **36.** In the case of **State of A.P. v. Bodem Sundara Rao,** reported in (1995) 6 SCC 230: AIR 1996 SC 530, dealing with a case of reduction of sentence from 10 years R.I. to 4 years R.I. by the High Court in the case of rape of a girl aged between 13 and 14 years, the Hon'ble Supreme Court has observed as follows:

"In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the Court's verdict in the

measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane." The sentence was accordingly enhanced to 7 years R.I. in the said case.

- **37.** In the case of **CHANDER SINGH Vs. STATE**, reported in (2016) 2 Crimes 792, in a case under Section 8 of the POCSO Act, the Hon'ble Delhi High Court has held as follows:--
- "20. Consequently, the conviction of Chander Singh is altered to one for offence defined under Section 7 and punishable under Section 8 of Pocso Act. The punishment for sexual assault prescribed under Section 8 is imprisonment for not less than 3 years which may extend up to 5 years and to pay fine as well. The conduct of Chander Singh in sexually assaulting a deaf and dumb girl who was not in a position to protect herself fully warrants maximum punishment. Consequently, the order on sentence of Chander Singh is altered and modified. Chander Singh is directed to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 10,000/- in default whereof to undergo simple imprisonment for a period of 1 month."
- **38.** In the instant case, as can be seen from the testimony of the victim girl, she seems to have eloped with the accused of her own accord as the accused was taking her from one place to another using motorcycle and public transport and kept her in his house and in the house of his brother but, the victim girl neither tried to escape nor complaint to anybody that the accused had kidnapped her. She also seems to have consented to sexual intercourse with the accused. But, even if there is consent, as has been discussed earlier, the commission of sexual intercourse with the victim girl by the accused was penetrative sexual assault as the victim girl was under 18 years of age. In view of the above, I deem it proper to punish the accused Sukur Ali leniently.

ORDER

- **39.** Considering the entire facts and circumstances of the case, I sentence the accused Sukur Ali to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000/- (Rupees one thousand) only, in default to undergo rigorous imprisonment for one month, for committing the offence under Sections 363 IPC and to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 10,000/- (Rupees ten thousand) only, in default to undergo rigorous imprisonment for one year, for committing the offence under Section 4 of the POCSO Act which, in my opinion, will meet the ends of justice in this case. Both the sentences shall run concurrently as both the offences have arisen from one transaction. The period of detention already undergone by the accused during investigation and trial shall be set off from the sentence of imprisonment. His bail bond stands cancelled. Issue jail warrant.
- **40.** Furnish a copy of the judgment to the convict free of cost, immediately.
- **41.** Signed, sealed and delivered in the open Court on this the 21st day of November, 2017, at Dhubri.

(A.Chakravarty)
Special Judge, Dhubri

Dictated & corrected by me.

(A.Chakravarty)
Special judge, Dhubri

APPENDIX

1. PROSECUTION WITNESSES:

P.W 1	Kalim Uddin Sheikh
P.W2	Soleman Ali Ahmed
P.W3	The victim girl
P.W4	Dr. (Mrs.) Muskura Ahmed
P.W5	Dr. Md. Laskar Ali
P.W6	Azgor Ali
P.W7	Johiruddin Sheikh
P.W8	A.S.I. Sanjib Mazundar
P.W9	S.I. Kulesh Chakravarty

2. PROSECUTION EXHIBITS:

Exhibit-1	Statement of the victim u/s.164 Cr.P.C.
Exhibit-2	Medical examination Report.
Exhibit-3	Radiological Report
Exhibit-4	FIR
Exhibit-5	Site Plan
Exhibit-6	Charge sheet

(A.Chakravarty)

Special Judge, Dhubri