



IN THE SPECIAL COURT, BAKSA AT MUSHALPUR

Present : Shri C. Das

Judge, Special Court

Baksa, Muzalpur

JUDGMENT IN SPECAIL POCSO CASE NO.16/18 (OLD NO.2/17)

u/s 366/376 IPC r/w Section 4 of POCSO Act

State

-versus-

Sri Mahanta Das

.... Accused

Appearance :

For the State : Mr. R. Chetry, Public Prosecutor, Baksa

For the accused : Mr. L. C. Nath, Advocate

Date of recording evidence : 12.11.18, 8.3.19

Date of argument : 9.4.19, 4.5.19

Date of judgment : 4.5.19

JUDGMENT

1. The case of the prosecution briefly, is that on 21.5.15, the complainant Sri Indra Mohan Mandal lodged a FIR through the court, alleging inter-alia that on 12.4.15, at about 8 pm., the accused person kidnapped his minor daughter/ victim girl inducing her using force to go out from his house. Thereafter, the accused alongwith one Jyotish Das forcefully raped his minor daughter. After one month, the accused left his daughter/ victim at Simlaguri.

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Judge Spl. Court
Baksa Muzalpur

2. The police accordingly, registered the Gobardhana PS. Case No.86/15 and took the due process of the investigation. During the investigation, the I/O visited the place of occurrence, drew up its sketch map and examined the complainant, victim girl and other witnesses of the case u/s 161 of CrPC. Further



The I/O sent the victim girl to record her statement u/s 164 of CrPC., and for her medical examination by doctor. The I/O arrested the accused person. At the end of the investigation, since the I/O found a prima-facie case is well established, submitted the charge-sheet against the accused person to face trial in the court.

3. The accused after he being brought before the court, was furnished with the relevant copy of the case immediately. After hearing the parties, the charge u/s 366/376 IPC r/w section 4 of Protection of Children from Sexual Offences Act (in short ; the POCSO Act) was framed against the accused person. The charge so framed was read over and explained to the accused person who pleaded not guilty and claimed to be tried.

4. The prosecution during the trial, examined as many as, 4(four) withdraws to support its case. Learned Public Prosecutor thereafter, declined to examine further witnesses of the prosecution case for which the prosecution was closed. In the statement recorded u/s 313 of CPC, the accused denied all incriminating circumstances appeared against him in the evidence on record. The accused however, declined to adduce any evidence in defence. The argument of the parties was heard at length and perused the evidence on record.

POINTS FOR DETERMINATION :

5. Whether on 12.4.15, at village ; Machua within the jurisdiction of Gobardhana police station, the accused person kidnapped the daughter/ victim girl of the complainant Indra Mohan Mandal, with the intent that she might be compelled to marry him against her own will or knowing to be likely that she might be forced or seduced to illicit intercourse by means of criminal intimidation or by any other method, to go from any place with the intent that she might be forced or seduced to illicit intercourse with any other person ;

6. Whether on same day and place as above, the accused person committed rape on the victim girl by committing penetrative sexual assault on her ;

DECISION AND REASON THEREFORE :

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Judge Sp. Court
Baksa

7. Initiating the argument of the case, learned Public Prosecutor submitted that the offense of kidnapping and raping of a minor girl cannot be looked up lightly. He submitted that in such sexual assault case, the evidence of the



sole testimony of victim girl is vital for the prosecution case inasmuch as, such evidence needs no corroboration at all, since she is not an accomplice of the crime committed against her by the accused. However, such evidence of the victim is to be scrutinized carefully in order to rely on her whole testimony. He further submitted that if the evidence of the victim girl is thoroughly observed, it would disclose that her evidence is reliable and convincing enough to record a conviction order against the accused. He submitted that even though, her evidence is corroborated by other prosecution witnesses to enhance her credibility, apart from her being a natural witness tendering her story without any shadow of doubt. Hence, he urged to convict the accused as per provisions of law.

8. Per contra, learned counsel appearing for the accused vehemently submitted that foremost lacuna in the prosecution case is there is much delay in lodging the FIR by the complainant which creates immense doubt over his credibility. He submitted that no any prosecution witnesses including the victim girl did not lend support to the prosecution case inasmuch, there is no material on record to show that the accused committed rape on the victim girl after kidnapping from her house. At best, it is a case of elopement of the victim girl out of love affairs with the accused person and spent her days in his house without any protest. Therefore, the prosecution could not prove its case against the accused beyond shadow of doubt and as such, the accused is entitled to be acquitted from the charge of the case, he maintained.

9. After hearing the above submissions of learned counsel for the parties, one thing is clear that there is no dispute regarding the age of the victim girl. However, the age of the victim girl will be determined after appreciating the evidence on record.

10. As far as the evidence of the four witnesses of the prosecution is concerned, it appears that the prosecution examined the complainant Sri Indra Mohan Mandal as PW2. He is the father of the victim girl. He deposed in the court that the accused is now, his son-in-law. He further stated that on the fateful day, at around 7 pm., while he came to his home, he found that the victim girl is missing from the house. On his inquiry, his wife reported him that the victim girl went to her aunt's house. Accordingly, he took the information from the said aunt and came to know that the victim girl did not visit the house of her aunt's house. Thereafter, he filed the case. The police came and arrested the accused. The victim girl thereafter, returned to his home. The victim girl reported him that she went to her



aunt's house. The victim girl had love affair with the accused. Hence, he filed the case against the accused. The victim girl was sent for medical examination and recording her statement in the court. According to him, the victim girl was 19 years of age at the time of occurrence.

11. In the cross-examination, PW2 stated that he filed the case against the accused under suspicion. He stated that the victim girl failed three times earlier in the examination. At present, the victim girl is residing with the accused peacefully as husband and wife and both of them have a child. Thus, the evidence of PW2 does not show any kind of elements of kidnapping or abduction of the victim girl neither there is material of rape committed against the victim girl, discloses by him. However, his evidence makes it clear that the victim girl went missing on the fateful day from the house.

12. The prosecution examined the victim girl as PW1. Her name is withheld due to bar given under the law. She deposed inter-alias that the accused is her husband. She stated that on the fateful day, she went to her aunt's house. She had love affairs with the accused. She stated that her father; PW2 due to some misunderstanding, filed the case under impression that the accused took her with him. After 4 days, she returned from the house of her aunt. But the police arrested the accused. The police sent her for medical examination vide Ext.1 and recording her statement in the court vide Ext.2. She proved both the Ext.1 and 2. According to her, after 3 months, PW2 married her with the accused. At present, she resides with the accused as his wife and she gave birth to a child.

13. In the cross-examination, PW1 stated that she was 19 years of age at the time of filing of the case by PW2. At present, she is 23 years old. She is residing peacefully with the accused as husband and wife. She failed to clear her examination earlier for about 3 times. She stopped to pursue her study from 2013 in class-IX. Her daughter is 3 years old. Apparently, the victim girl discloses her age more than 18 years at the time of occurrence like PW2. Her evidence corroborates the claim of PW2 that she is now the wife of the accused and both of them live together.

14. Further, the evidence of PW3 Haren Roy is that he heard that the accused took away the victim girl and married her. At present, the victim girl has a child. The informant being father of the victim girl, filed the case for taking away the victim girl by the accused. The evidence of PW4 Chandra Kr. Barman is that he



has no knowledge of the occurrence. Apparently, PW3 supports the claim of PW1 and 2 while the evidence of PW4 does not lend any support to the prosecution case.

15. Thus, from the above discussion of the evidence so tendered by the prosecution witnesses, it appears that the prosecution case is based upon the evidence of PW1 and 2. The evidence of PW3 appears to be hearsay type and PW4 does not lend any support to the prosecution case, would come to help the prosecution. As regards to the age of the PW1 who is the sole victim of the alleged occurrence, it appears that her father; PW2 stated that the victim was above 18 years of age. PW1 also, stated that she was 19 years of age at the relevant time of occurrence. She could not clear her examination thrice earlier for which her age was 19 years perhaps at class-IX. There is no other document to determine the age of the victim. The prosecution did not adduce medical evidence to ascertain the age of the victim. However, the evidence of PW2 being the father of the victim can be relied upon to consider the age of the victim girl.

16. In **Sk. Belal @ Sk. Raja vs. State of Orissa, 1994 Cri LJ 467 (Ori)**, it was held that *in case of a kidnapping, the dispute was over age of girl. The medical evidence showed age of girl between 17 and 18 years, but the documentary evidence showed her age to be above 18 years. There was conflict between medical evidence and documentary evidence. The medical evidence was not conclusive proof of age. The accused was entitled to benefit of doubt.*

17. So, the above law settles that the document is more reliable than medical evidence to determine the age of girl. In **Abdul Rezzaq vs. State 2000 Cri LJ 3921 (All)**, it was held that *when there is reliable evidence of proof of age, then a margin available in fixation of age through radiological test need not be given.*

18. Likewise, for the above margin for age determination, in **(2017) 2 SCC 210 Mukarrab & ors. vs. State of Uttar Pradesh**, it was held that *age determination is essential to find out whether or not the person claiming to be a child below the cut-off age prescribed for application of Juvenile Justice Act. The issue of age determination is of utmost importance, as very few children subjected to provisions of 2000 Act have birth certificate. As juveniles in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even*



if ossification test of multiple joints is conducted. In absence of a birth certificate issued soon after birth by authority concerned, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age

19. But in the present case in hand, the radiological test report of the victim is not furnished by the prosecution and as such, other options are required to consider. Apparently, there is no documentary evidence like birth certificate produced by the prosecution to prove the correct age of the victim girl. Hence, the help of oral evidence is necessary to ascertain the age of victim girl. Since PW2 is father of victim, he knows the correct age of his daughter/ victim girl. Therefore, his evidence can be relied upon. His evidence shows that PW1 was 19 years of age at the time of occurrence. PW1 also, stated that presently, she is 23 years old. All these evidence on record, discernibly discloses that PW1 was above 18 years old at the time of occurrence. Hence, PW1 who is the sole victim of the occurrence, was not a child within the meaning **u/s 2(d) of POCSO Act**. Therefore, the offence **u/s 4 of POCSO Act** is not applicable to the accused.

20. But inspite of above deficiency in the prosecution case, it appears that the accused is charged **u/s 366/ 376 IPC**. Such offence is applicable to adult woman too. PW1 is found to be an adult woman. The offence of kidnapping **u/s 366 IPC** requires the ingredients of the accused must kidnap or abduct the victim woman in terms of **provisions u/s 359 IPC** which mandates that the kidnapping is of two kinds ; kidnapping from India, and kidnapping from lawful guardianship. Since there is no material to show that the accused took away the victim woman from India, other kind of kidnapping is applicable to this case that PW1 was kidnapped from lawful guardianship of PW2 who is her natural father. The offence of abduction is defined **u/s 362 IPC** that whoever by force compels, or by any deceitful means induces any person to go from any place. So main ingredient in the offence of abduction is using force by deceitful means to induce a person to go to any place. But in the instant case, there is no evidence found for using force by deceitful means by the accused to PW1 to go from her home with him. It is admitted fact that both the accused and PW1 had love affairs prior to the occurrence and as such, using force does not arise for PW1. Further, the requirements **u/s 366 IPC** are that such kidnapping or abduction is done with intent that the victim woman may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced



or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse as well as, by means of criminal intimidation or of abuse of authority or any other method of compulsion, induces any woman to go from any place with same intent as stated above.

21. In the instant case, the evidence of PW2 discloses that PW1 was missing from his house. His evidence further shows that PW1 went to the house of her aunt. But PW1 was found to be not visited the house of her aunt. Hence, PW2 started searching for PW1 and filed the FIR before the police. Accordingly, the police recovered PW1. Hence, the evidence of PW2 does not disclose of any material of kidnapping or abduction of PW1 by the accused. However, the police recovered PW1 from the accused. It is not clear from the evidence on record that the accused whether or not took away PW1 from her house. Since there was love affairs, PW1 may be left for the house of the accused voluntarily without any force or deceitful means of inducement. Again, the evidence of PW1 and 2, it appears that the accused is the husband of PW1 and both of them have a child too. This means that the accused married PW1 with the consent of her guardian being PW2. In the evidence, PW1 never lodged any protest of her marriage with the accused forcibly. So if PW1 was taken away from lawful custody of PW2 by the accused, it is not found that he had the intent of compelling PW1 to marry against her will or forced or seduced to illicit intercourse with any person. Therefore, due to above deficiency in the evidence on record, the accused cannot be held for committing the offence **u/s 366 IPC** against PW1.

22. Apart from above, the ingredients requires for constituting the offence of rape as defined **u/s 375 IPC** which is punishable **u/s 376 IPC**, is that a man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

First.-Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent, when, at the time of giving such consent, by



reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

23. But in the instant case, the evidence of sole victim, being PW1 does not disclose anything of committing sexual intercourse with her by the accused without her will and consent. It is true that since PW1 is bestowed with a child from the side of the accused, there was sexual intercourse between the accused and PW1. In absence of anything which requires to attract the ingredients **u/s 375 IPC**, in the evidence of the sole victim woman, the accused cannot be held for committing the offence of rape against PW1. As such, there is doubt that the accused committed the offence of kidnapping or abduction of PW1 and committed rape on her. Thus, the evidence of the prosecution witnesses could not implicate the accused in the offence **u/s 366/376 IPC**.

24. Under the above facts and circumstances of the case, it appears that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty **u/s 4 of POCSO Act r/w Section 366/376 IPC**. As such, the accused is acquitted and set at liberty. His bail bond is however, remained in force for another 6 months **u/s 437-A CrPC**. Forward a copy of judgment to the District Magistrate, Baksa, at Muzalpur **u/s 365 CrPC**. Before parting with the case, this court recommends payment of compensation **u/s 357 CrPC** to the complainant of the case under the Assam Victim Compensation Scheme by the DLSA, Baksa. Inform accordingly.


**Judge Spl. Court
Baksa Muzalpur**

25. Given under the hand and seal of this court on this 4th day of May 2019.

Dictated and corrected by :



C. Das,

Judge, Special Court
Baksa, Muzalpur

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Judge, Special Court
Baksa, Muzalpur

Typed by :

P. Deka, Com. Typist

**ANNEXURE :****List of prosecution witness:**

- PW1 ... The victim girl (name withheld)
- PW2 ... Sri Indra Mohan Mandal ... complainant
- PW3 ... Sri Haren Ray
- PW4 ... Sri Chandra Kr. Barman

List of defense witness:

Nil

List of documents exhibited:

- Ext.1 ... medical reported
- Ext.2 ... statement of the victim u/s 164 CrPC

Judge, Spl. Court
Judge Spl. Court
Baksa, Muzalpur