IN THE COURT OF SPECIAL JUDGE :: :: SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge,

Sivasagar.

Spl. (P) Case No. 12 of 2019 u/s 366/376(3) IPC & Section 6 of POCSO Act, 2012 (Arising out of Gaurisagar PS Case No. 283/2018)

State of Assam

-Vs-

Sri Haladhiya Konwar Accused

APPEARANCE:

For the prosecution : Mr. Srimanta Gogoi, Special P.P. For the accused : Mr. Utpal Chutia, Advocate

Date of framing Charge : 29.03.2019
Dates of Evidence : 02.05.2019
Date of Argument : 02.05.2019
Date of Judgment : 02.05.2019

JUDGMENT

- 1. Prosecution case in brief is that on 26.12.2018, informant Sri Sunil Gogoi lodged an FIR with O/C, Gaurisagar P.S. alleging, inter alia, that on 25. 12.2018, at about 1 PM, his younger sister victim 'S' (name withheld) was found missing from her house. Non-finding her, they searched for the victim and during search, they learnt that accused Haladhiya Konwar @ Amar has kidnapped the victim while she was alone in the house with a view to marry her.
- 2. On receipt of the FIR, Gaurisagar P.S. Case No. 283/2018 u/s 366/376(3) IPC r/w Section 4 of POCSO Act was registered and investigated. During investigation, victim was recovered. She was medically examined and also got

her statement recorded u/s 164 Cr.P.C. Accused was arrested and forwarded to Court for judicial custody. On completion of investigation, I.O. has submitted Charge-Sheet against the accused u/s 366/376(3) IPC, read with Section 4 of POCSO Act, 2012.

- 3. Since the offence u/s 4 of POCSO Act is exclusively triable by the Court of Special Judge, as such accused Haladhiya Konwar was produced before this Court for trial. Upon receipt of the charge sheet, cognizance of ffence was taken and after furnishing copy to the accused, vide order dated 29.03.2019, charges u/s 366/376(3) IPC, read with Section 6 of POCSO Act, 2012 has been framed against the above named accused person to which he pleaded not guilty and claimed to stand trial. During trial, prosecution side has examined two witnesses viz. the informant and victim.
- 4. Considering the nature of the evidence of victim, and informant, further evidence was closed. Examination of accused u/s 313 Cr.P.C is dispenses with. I proceed to dispose the case by applying powers u/s 232 Cr.P.C and without calling the accused to enter into defence. Accused faced the trial as UTP.
- I have heard argument of Id. Special P.P. Mr. Srimanta Gogoi and Mr. Utpal Chutia, learned defence counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE -

- 6. (i) What was the age fo the victim on 25.12.2018?
 - (ii) Whether on 25.12.2018, accused kidnapped or abducted the victim? If so, what was the intention of the accused behind such kidnap/abduction?
 - (iii) Whether on 25.12.2018 or thereafter, accused committed aggravated penetrative sexual assault/rape on the victim?

DECISION AND REASONS THEREOF

7. PW 1 Sri Sunil Gogoi, the informant as well as elder brother of the

victim in his evidence deposed that victim 'S' is his younger sister. She read upto Class-VII. On 25.12.2018, at about 7 PM, on returning home, he came to know that victim is missing from the house and from his wife he came to know that victim went to Gaurisagar, the work place of her mother. After sometime, his mother returned home alone and on asking about the victim, she disclosed that neither she called the victim nor victim came to her work place. On this they searched for her but found no trace. On the next day, during search, he went to the residence of accused at Bhagamukh, Sivasagar and then came to know that victim was at the residence of accused Haladhiya Konwar. He met the victim and she disclosed that she came on her own with an intention to marry with accused. Out of anger, he slapped her. On this incident, as she refused to return, he lodged the FIR at Gaurisagar P.S. Subsequently police apprehended the accused and recovered the victim from the house of relative of accused at village Bhitarual. Police took the victim for medical examination and also brought her to Court. From Court victim was given in his custody. Presently victim is with her mother. In his cross by defence, PW 1 stated that he has no knowledge on the age of the victim and do not want to prosecute this case any further. He has no objection in acquittal of the accused from this case.

8. PW 2 the victim in her evidence deposed that accused Haladhiya Konwar is known to her being relative through her sister-in-law. Presently she is aged about 17 years. She read up-to Class-VII and left the school in the year 2019 after getting promotion to Class-VIII. She also deposed that on 25.12. 2018, at about 12 noon, without informing her family members, she went with accused Haladhiya Konwar to his house in a Tempo and stayed in his house for the night. On the next day, her brother Sunil Gogoi went to the house of accused and non-finding them, lodged the case. Accused took her with him to the house of his relative at Bhitarual Gaon. Subsequently, on the same evening, police came there and apprehended the accused and brought her to Gaurisagar P.S. Police took her for medical check-up and also brought her to Court where

she gave her statement vide Exbt. 2. From Court, she went with her mother and brother and informed them the fact of this case. In her cross by defence, the victim admitted that she went with the accused on her own for visit being relative. She further stated that accused did not put force on her for going with him. She has no objection for acquittal of the accused from this case.

- 9. So far age of the victim is concerned, from the evidence of PW 2, the victim, it appears that she claimed her present age as 17 years. No document was produced on age. The medical examination report of the victim which is attached with charge sheet, also disclosed that on the date of examination, the victim was below the age of 18 years. Evidence on age of the victim remained unchallenged. As such I hold that on the alleged date of incident, victim was below the age of 18 years.
- 10. So far allegation of kidnap is concerned, the victim deposed nothing against the accused involving him with the alleged offence of kidnap. In her evidence the victim nowhere stated that accused by using force or by inducing took her with him. Her evidence shows that accused being relative through the wife of his brother, without informing her family members, she went with the accused on her own and stayed in the house of accused for the night.
- 11. Under the above facts, the question fall for determination is whether, taking away of minor girl child from the custody of the lawful guardian though on her by victim, will amount to kidnap as defined u/s 361 IPC.
- 12. Hon'ble Supreme Court of India in the reported case of S. Varadarajan Vs. State of Madras [AIR 1965 SC 942] held as follows:-
 - 11. It must, however, be borne in mind that there is a distinction between "taking: and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. <u>361</u> of the Indian Penal Code. We would limit ourselves to a case like

the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

- 12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".
- 13. Hon'ble Gauhati High Court in the reported case of Saddam Hussain Vs. State of Assam [2018 (1) GLJ 293] has followed the above ratio while setting aside the conviction of an accused u/s 366 IPC under similar facts.
- 14. Hon'ble Himachal Pradesh High Court in the reported case of Khyali Ram Vs. State of Himachal Pradesh [1979 Cri. L. J 620], held as follows:-

"In order to attract the offence of kidnapping under Section 361, I.P.C, something more had to be proved than mere joining of the accused with the girl. An active participation by the accused in the formation of the intention of the girl either immediately prior or sometime before she left her father's house, was required to be established."

15. Hon'ble Supreme Court of India in the reported case Shyam and another vs. State of Maharashtra [AIR 1995 SC 2169] has held that

"She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her

away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother."

- By keeping the above law in mind, when we look at the fact of the case in hand, as discussed earlier, it is clear that it the victim, who was aged about 17 years, on her own went to the house of accused, who happened to be her relative. Victim has categorically admitted that accused did not used force on her to go with him. Thus it is clear that there is no incriminating material against the accused. Merely accompanying the minor victim cannot be an offence. In the instant case, ingredients of offence U/S 366 IPC or even any other minor offence like section 363 are totally missing.
- 17. So far charge of rape/penetrative sexual assault is concerned, from the evidence PW 2 the victim, it appears that she is totally silent regarding commission of rape/penetrative sexual assault by the accused while keeping her with him in his house. In her evidence the victim nowhere stated that accused has even committed sexual assault on her. There was no material in the evidence of PW 1 and PW 2 regarding rape/aggravated penetrative sexual assault by the accused. The allegation brought against the accused was not supported by the victim herself.
- 18. Considering the above evidence on record, I am of the opinion that prosecution has failed to prove the ingredients of charges u/s 366/376(3) IPC and Section 6 of POCSO Act 2012 against the accused Sri Haladhiya Konwar. As such, accused Sri Haladhiya Konwar is acquitted from the charges u/s 366/376(3) IPC and Section 6 of POCSO Act, 2012 and set at liberty forthwith. Issue release order accordingly.
- 19. No order is passed u/s 437-A Cr.P.C. as accused is in Jail custody.
- 20. Considering the facts of the case, the matter is not referred to DLSA for granting compensation u/s 357-A Cr.P.C.

- 21. Send a copy of the judgment to learned District Magistrate, Sivasagar u/s 365 Cr.P.C.
- 22. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 2nd day of May, 2019 at Sivasagar.

Special Judge, Sivasagar:

APPENDIX

- 1. Prosecution witnesses:
 - PW 1 Sri Sunil Gogoi (Informant)
 - Pw 2 Victim 'S'
- 2. Defence witnesses None
- 3. Court witnesses None
- 4. Exhibits by prosecution -
 - Exbt. 1 FIR
 - Exbt. 2 Statement of the victim given u/s 164 Cr.P.C.

Special Judge <u>Sivasagar</u>