IN THE COURT OF SPECIAL JUDGE AT BARPETA.

Present :- Sri Vinod Kumar Chandak, M.A., M.Com., LL.B.,AJS, Special Judge, Barpeta.

JUDGMENT IN SPECIAL POCSO CASE NO. 14 OF 2018 (G.R. Case 4923 of 2016) Kalgachia P.S. Case No 726 of 2016

State of Assam

-versus-

Al Masud Jahan @ Al Masud Hasan @ Liku S/O Abdul Hai Ahmed, Resident of Balagaon (Khudrakuchi), P.S. Kalgachia, District - Barpeta ...

...... Accused.

APPEARANCES:

For the State : Sri Lalit Ch. Nath, learned P.P., Barpeta. For the Accused : Mr. Dharani Talukdar, learned Advocate,

Barpeta.

CHARGE FRAMED UNDER SECTION 366 OF THE INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.

Date of Charge : 24.05.2018,

Date of Prosecution evidence : 22.06.2018, 21.072018, 04.09.2018 &

28.02.2019,

Date of Statement of accused : 15.03.2019, Date of Argument : 09.04.2019, Date of Judgment : 22.04.2019.

<u>J U D G M E N T</u>

1. The prosecution case, in brief, is that Kalgachiai P.S. Case No 726 of 2016 under section 120(B)366(A) of the Indian Penal Code, 1860

Read with section 4 of the Protection of Children From Sexual Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Eusuf Ali Ahmed, the paternal uncle of the victim (hereinafter referred to as 'X').

In the aforesaid F.I.R. Dated 24.09.2016 **(Exhibit-2)** the informant Eusuf Ali Ahmed (P.W.2), who is the paternal uncle of the victim girl, alleged, interalia, that on 23.09.2016 at about 8:00 PM, when his niece Manjuwara Begum, aged 17 years, went to buy something in the market, the accused person forcibly took away her in a maruti vehicle.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Kalgachia Police Station, the same was registered as Kalgachia P.S. Case No 726 of 2016 under section 120(B)/366(A) of the Indian Penal Code read with section 4 of the Protection of Children From Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under station 164 of CrPC was recorded by the learned Magistrate. Police, on completion of investigation, filed charge sheet in the case against the above named accused Al Masud Jahan @ Al Masud Hasan @ Liku under section 366(A) IPC Read with section 4 of the Protection of Children From Sexual Offences Act, 2012 vide charge sheet No.281, dated 08.12.2016.

- 2. My learned Predecessor-in-office received the case record alongwith the case diary of the case. Accused was summoned. On appearance of accused, copy was furnished to him by my learned Predecessor-in-office.
- **3.** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the learned counsel for the accused and the prosecution in this behalf, charges were framed against the accused u/s 366 IPC R/W section 4 of the Protection of Children From Sexual Offences Act, 2012, which was read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4. During the court of trial, **11(eleven)** number of witnesses including the victim, informant, Medical Officer and the I/O were examined on behalf of the prosecution to prove the charge u/s 366 IPC R/W section 4 of the Protection of Children From Sexual Offences Act. 2012.

On completion of prosecution evidence, statement of the above named accused was recorded u/s 313 of CrPC. The accused denied all the alleged incriminating materials against him. He claimed himself to be innocent. He denied to adduce evidence in his defence.

- I have heard Mr. Lalit Ch. Nath, learned Public Prosecutor, Barpeta for the State as well as Shafiqul Islam, learned Defence Counsel for the accused, who is facing trial for commission of offence u/s 366(A) IPC R/W section 4 of the Protection of Children From Sexual Offences Act, 2012.
- **6.** Now the point for determination before this court are as follows ---
- (1) Whether on 23.09.2016 at about 8:00 PM at village Kalgachia within the jurisdiction of Kalgachia Police Station, the accused kidnapped Manjuwara Begum, aged about 17 years, who is niece of the informant Eussuf Ali, with intent that she might 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 by any other method, to go from any place with intent that she might be forced or seduced to illicit intercourse with any other person and committed penetrative sexual assault on said Manjuwara Begum and thereby committed an offence punishable u/s 366 of the Indian Penal Code read with section 4 of the Protection of Children From Sexual Offences Act, 2012 ?

DISCUSSION, DECISIONS AND REASONS THEREOF

7. To decide the above point and sections of law, let us

examine, analyze and appreciate the evidence of the witnesses alongwith the relevant documents.

Dr. Mamata Devi [PW1], who is the M.O. of the case, deposed that on 14.01.2016 she was working as Medical Officer on duty at Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta. On that day, in connection with Kalgachia P.S. Case No.726/2016 u/s 120(B)/366 IPC r/w Section 4 of POCSO Act, she examined one **Monjuwara Begum**, D/O Mozibar Rahman of village Khudiakuchi under Kalgachia PS on being accompanied by her uncle Firoz Sarkar and identified by Police personal Anjana Pathak and found as follows:

History:-

According to alleged victim, she is in love with a boy named Almasud Jahan from last 3 years. She eloped with the boy on 23-09-2016 and went to Howly. They stay there for 5 days. From there went to Guwahati and Goalpara. Her parents registered a case against the boy and so they came today and police brought her for medical examination.

Physical Examination:

Identification marks:- 1. A pin head size mole over right side of cheek.

2. A pin head size mole over left side of cheek.

Height:- 150 cm. Weight:- 40 Kg

Chest girth at nipple level:- 75 Cm. Abdominal girth at navel level:- 65 Cm.

General built & appearance: - Average.

Teeth: Total:28 Permanent: 28.

Temporary: Nil.

Breasts:- Hemispherical in shape, soft in consistency. Nipple and avola

brown in colour.

Puberty(as told by the individual): 12 years.

Menstruation(as told by the individual): Regular.

LMP (as told by the individual): 01-10-2016.

Mental Condition: No abnormality detected.

Gait: Normal

Intelligence: Average.

Wearing garments & any suspected stains present: Intact, stain absent.

Bodily Injuries: Not detected at the time of examination.

Genital Examination:-

Pubic hairs: 0.5-1 cm in length, black in colour.

Vulva(Labia majora & minora):- Labia minora exposed in lithotomy position.

Hymen: Old tear at 6 'O'clock and 9 'O'clock position.

Vagina:- Healthy.

Cervix & Uterus: Healthy. Uterus not palpable per abdominally.

Fourchette & Perineum : Healthy.

Result of vaginal swab smear examination: Microscopic examination of vaginal swab reveal no spermatozoa.

Wrist Joint, Elbow Joint, Shoulder Joint, Pelvis and Other(Face/Skull):-Requisition for X-rays of elbow, shoulder, wrist and pelvis was sent vide SG No.405/16 dated 14-10-2016 and handed over to the escorting police constable Sri Anjana Pathak alongwith the victim girl. But report of the same has not received till the writing of this report.

Ultrasonography advised & result :- USG comes abdomen (01-11-2016). Impression- No. significant findings noted.

Uterus- pc normal is size, shape and echo texture.

Final Opinion:-

- (1) Her age is above 14(fourteen) years. However to know the exact age radiological investigations are necessary.
- (2) Evidence of recent sexual intercourse is not detected on her person.
- (3) No injury or violence mark is detected.
- (4) Evidence of pregnancy is not detected.
- (5) Foreign particles like semen, hair, blood are not detected on her person at the time of examination.

PW1 exhibited her report vide Ext.1 wherein Ext.1(1)& 1(2) are her signatures and Ext.1(3) is the signature of Dr. SI Barbhuyan,

Professor and Head, Dept. of Forensic Medicine, FAAMCH, Barpeta.

Defence declines to cross examine PW1.

Eusuf Ali Ahmed [PW2], who is the paternal uncle of victim, deposed that on 19.09.2016 his niece Manjuwara came to his house. On 23.09.2016 at around 8:00 PM, she went to nearby market. His house is situated at the backside of his shop. He heard the sound of maruti car. On coming out, he saw a white maruti car passed in front of his shop. Later, he came to know that the accused kidnapped his niece in the said maruti car. He searched for her and verbally informed the matter to the thana. Then on the next day, he lodged the FIR. PW2 exhibited the FIR as **Ext.2** wherein **Ext.2(1)** is his signature. He stated that during the time of incident, the victim was aged about 17 years. After 23 days of the incident police informed him that the victim appeared in the thana and after 2 days, victim was given in zimma of her mother. After recovery, the victim told him that the accused kept her at Howly, Goalpara etc. and made physical relation with her against her will.

In his cross-examination, PW2 stated that_victim was a student of BA Class at Barpeta Bogrigaon College. He denied the suggestion of defence side that he did not state before the police that he heard the sound of Maruti car, saw one white colour maruti going in front of his house; came to know after some time that the victim has been kidnapped by the accused in the said vehicle; informed police verbally on the night of incident; that victim told him that accused took her to Howly, Goalpara etc and established physical relation with her forcibly.

He denied that the victim was aged more than 18 years at the time of incident.

Farida Khatun [PW3], who is the wife of the informant, stated that the informant happens to be her husband. Incident occurred on 23.09.2016 at about 8:00 PM. The victim was in their house, who went to market to buy something. Then hearing the sound of vehicle she alongwith her husband went outside. Later on, they learnt that their niece was missing. The father of accused phoned her husband. Next day her

husband lodged the case in thana. After 21 days the accused produced the victim before the thana. The victim told that she had physical relation with the accused. During that time, the victim was aged 16/17 years.

In her cross-examination PW3 denied that there was love affairs between the accused and the victim. She could not say as to whether she stated before the police that as there was love affair between the accused and victim, so the victim was kept at their house.

She denied that she stated before police that on the night of incident at about 8:00 PM, victim went to some uninformed destination. She denied all other suggestions of defence side.

The **victim [PW4]** deposed that informant is her uncle. She knows the accused. She went to the house of informant on 19.09.2016. After staying there for 4/5 days, on 23.09.2016 at about 8:00 she went to market and then the accused alongwith some unknown persons came in a white maruti car amongst whom one person took her in the vehicle after gagging her mouth. The accused took her to Howly, Pathsala and Goalpara and kept for 21 days. She was kept in hotel and the accused made physical relation with her forcefully. She also stated that the father of accused sent her to thana with the maternal uncle of the accused as her uncle lodged case against the accused. The accused threatened her that if she states against the accused, then he will kidnap her sisters and will kill her uncle. She made her statement before the police and magistrate. She was medically examined. PW4 exhibited her statement as **Ext.3** wherein **Ext.3(1) & 3(2)** are her signatures.

In her cross-examination the victim deposed that she was at State Home from 14.10.2016 to 18.10.2016 as she refused to go with her mother. On 18.10.2016 also she wanted to go with the accused.

She told that she was having love affairs with the accused for last 3 years. She told him about the assault made to her by her mother and son of her uncle and requested the accused to take her with him otherwise, she will die.

She admitted that she did not state before police that she was kidnapped by the accused or he had done bad work with her.

She admitted that she did not state before police that one vehicle came before her; one person came behind her and took her to that vehicle after gagging her mouth; that accused kept her in hotel and had physical relation with her; that she was threatened by the accused.

She denied that she was aged more that 18 years at the time of incident.

Mst. Hasina Khatun [PW5], who is the mother of the victim, stated that the informant happen to be her brother-in-law. She know the accused and their houses are adjacent to each other. At the time of incident the victim was aged about 17 years and studying in BA. On 19th day of September, 2016 Manjuwara went to the house of the informant and on 23rd day of September, the accused kidnapped her. The informant informed her as well as her husband over phone that the victim was not at home. They searched for the victim, but could not find her. She further stated that on 14th day of October, father of the accused took the victim to police station and from there, she was sent to State Home. Thereafter, they got the victim from the court. After coming home, the victim told that the accused took her forcefully. Further version of the PW5 is that the victim told her that the accused tortured her and also tutored her what is to be stated before the court, otherwise he will kill her. After 6 months, marriage of the victim was arranged, but the same was broken by the father of the accused and she lodged case regarding this matter. Later on, the victim was married to another person.

In her cross-examination PW5 stated that there was love affairs between the accused and the victim of this case. Victim was studying in 2nd semester of degree course. The accused gave one mobile phone to the victim. She denied that the victim was below 18 years of age at the time of incident.

Rustom Ali Ahmed [PW6], who is the elder brother of the informant, stated that he knows the accused. Incident occurred on 23.09.2016. The victim was 17years plus at that time. On the day of incident, at around 8:10 PM the informant phoned him that the victim

could not be traced out. Then they searched for the victim and informed the matter to the mother of the victim. Then PW6 and the informant verbally informed the matter in the thana and on the next day written ejahar was filed. After 21 days, they got the victim. It was informed to them from thana that the victim has been taken to thana by the maternal uncle of the accused. The victim was kept in State Home for 2 days and thereafter, she was given in zimma of her mother.

Defence declines to cross examine PW6.

Mozammil Hussain [PW7] stated that he knows the informant, but he neither knows the accused nor the victim. He even does not know anything about the incident.

Defence declines to cross examine PW7.

Dauder Rahman [PW8], who is the paternal uncle of the accused, stated that incident occurred one year ago. He heard that the niece of Eusuf Ali eloped with the accused from the house of Eusuf Ali. At that time, the victim was aged more than 18 years. She went with the accused voluntarily and appeared at thana at her own will.

Defence declines to cross examine PW8.

Hafizur Rahman [PW9] stated that he knows the informant and the victim, but does not know the accused. He does not know anything about the incident.

Defence declines to cross examine PW9.

Asadul Ali [PW10] stated that he does not know the informant, but he knows the accused. He also stated that he drove the ALTO 800 vehicle. He was declared hostile at the instance of prosecution side.

In his cross examination by the prosecution side, he stated among things that on the relevant day he picked up a girl from Kalgachia near K. K. Pathak High School and dropped them at Simalaguri.

In his cross-examination by defence side he stated that police

did not record his statement.

Hazarat Ali Ahmed [PW11], who is the I.O. of this case, stated that on 24.09.2016 he was working at Kalgachia PS as In-charge. One Yusuf Al Ahmed lodged FIR. Ext.2 is the FIR. He registered a case being Kalgachia PS case No.726/2016 u/s 120(B)/366(A) IPC read with section 4 of POCSO Act. Ext.2(2) is his signature.

On that day itself, he proceeded to the place of incident, examined the relevant witness, drew the sketch map. Ext.4 is the sketch map and Ext.4(1) is his signature. He also examined the complainant but did not find the accused person, on that day.

On 14.10.2016 the victim herself came to police station. He examined the victim and sent her for medical examination. He also got her statement recorded by the learned Magistrate u/s 164 CrPC. During investigation he seized the birth certificate of the victim girl vide seizure list Ext.5. Ext.5(1) is his signature. He had seen the photocopy of the said birth certificate today in the case record. He had given the original birth certificate in the zimma of the mother of the victim. He collected the medical report of the victim and submitted the charge sheet against the accused person. Ext.6 is the charge sheet dated 08.12.2016. Ext.6(1) is his signature.

In his cross-examination PW11 stated that he recorded the statement of the victim in civil dress. Victim came alone. He did not remember whether any female family members went with the victim at the time of her medical examination. He did not seize any articles except the birth certificate of the victim.

Witness Yusuf Ali Ahmed (PW2) did not state before him that there was love affairs between the accused and victim; that he heard the sound of maruti vehicle, he could see one white colour maruti vehicle went in front of his shop, after a while he came to know that accused has kidnapped his niece in the maruti vehicle.

Witness Farida Khatun(PW3) did not state before him that she and her husband came out after hearing the sound of maruti vehicle and could see the maruti vehicle; that father of the victim telephone her husband.

At the time of incident victim was a college student. She was the eldest child of the family.

He denied that he had not done the investigation as per law.

- 8. From the closed perusal of the evidence on record it is seen that the victim claimed that she was under 18 years of age and the other witnesses also stated and wanted to establish that she was less than 18 years of age at the time of incident. The I.O. of the case (PW11) deposed that he seized the birth certificate of the victim girl vide seizure list Ext.5. But the prosecution side did not produce the said birth certificate during trial of the case to determine age of the victim girl. Though the I.O. found the photocopy of the said birth certificate on the case record, but the same is not admissible in evidence when the original was available with the mother of the victim.
- **9.** Further, the prosecution has relied on the evidence of M.O. (PW1). But the M.O. namely, Dr. Mamata Devi, in her evidence opined that victim was above 14 years and to know the exact age of the victim radiological investigation are necessary.
- **10.** Hence, from the above, it cannot be said with certainty that victim was below 18 years of age at the time of evidence beyond all reasonable doubt.
- 11. Now coming to charged sections in this case, it is seen that the accused has been charged u/s 366 IPC alongwith section 4 of POCSO Act. To bring home the guilt of the accused u/s 366 IPC, it is necessary for the prosecution to prove that the accused induced the prosecutrix or compelled her by force to go from any place; that such inducement was by deceitful means; that such kidnapping or abduction took place with the intent that the prosecutrix may seduced to illicit intercourse and/ or that the accused knew it to be likely that the prosecutrix may seduced to illicit intercourse, as a result of her abduction or kidnapping.

- 12. However, from the case in hand, it is seen that though the victim stated that at the relevant time, she went to market and the accused alongwith some unknown persons came in a maruti car and she was taken in that car after gagging her mouth. It is hard to believe that, a girl can be taken from the market in front of all the person, in the way, as deposed by the victim. Moreover, there is none who had seen the accused taking the victim in the said vehicle. The informant (PW2) deposed that he came to know that the accused kidnapped his niece in the maruti car, but he had not disclosed, as to who told him, that the accused had taken the victim with him. All the witnesses, produced by the prosecution side, are hearsay witnesses and nobody had seen the actual alleged kidnapping by the accused. Further, the victim stated that she was kept in hotel and the accused made physical relation with her forcefully. But in her crossexamination she deposed that she was having love affairs with the accused for last three years and she herself requested the accused to take her with him, otherwise, she will die. Moreover, she has clearly admitted that she did not state before the police that either she was kidnapped or accused had done any bad works with her. No wonder, for this reason, the M.O.(PW1), while writing the history of the patient, has written in her medical examination report (Ext.1) that the victim told her that she was having love affairs with the accused for last three years and she eloped with him on 23.09.2016 and stayed at Howly for 5 days. Then she went to Guwahati and Goalpara.
- 13. It is interesting to note here that though the informant and his wife tried to hide that there was love affairs between the victim and the accused of the case, but the mother of the victim Musstt. Hasina Khatun (PW5) clearly admitted in her cross-examination that there was love affairs between the accused and the victim of the case.
- **14.** There is no evidence of inducement or threat to the victim at the relevant time of the incident. Even it is on the record that the victim, after her surrender before the thana, refused to go with her mother and

the learned court below had directed to keep her in the State Home for two days. The victim in her cross-examination admitted that she was at State Home from 14.10.2016 to 18.10.2016 as she refused to go with her mother. Even on 18.10.2016 she wanted to go with the accused.

- The evidence of PW7,8,9 & 10 are of no use to the case of prosecution side. PW8 even deposed that the victim was aged more than 18 years and she went to the accused voluntarily and appeared before the thana at her own will. Last, but not least, it may be pointed out that the victim was a student of BA 2nd semester at the time of incident and she must have been more than 18 years of age, at the time of incident. Further, the victim also has not implicated the accused in her statement u/s 164 CrPC.
- **16.** It is cardinal principal of criminal Law that prosecution case has to stand on its own leg and offence has not be proved against the accused beyond reasonable doubt.
- 17. On scrutinizing the evidence on record, considering the entire aspect of the matter and evidence, produced by the prosecution, I am of the considered opinion that the prosecution has failed to establish that the accused kidnapped the victim. The victim in her deposition before the court as well as in her statement under section 164 CrPC did not utter a single word that accused had sexual relation with her forcibly. Hence, accused is entitled to acquittal under the benefit of doubt, which I accordingly do.
- 18. In the result, accused Al Masud Jahan @ Al Masud Hasan @ Liku is acquitted of the charge under section 366 IPC read with section 4 of The Protection of Children From Sexual Offences Act, 2012, levelled against him, on benefit of doubt.

Accused is on bail. The bail bond of accused is extended for another 6(six) months from today as per provision of 437-A CrPC.

19.	Given un	der my	hand	and	seal	of thi	s Co	urt	on	this	22nd	day
of April, 201	9.											

Dictated & corrected by me.

Sd/- Sd/-

Special Judge, Barpeta Special Judge, Barpeta.

Typed by me

(Kavery Das, Stenographer)

APPENDIX

(A) Prosecution witnesses:

P.W.1 = Dr. Mamata Devi, the M.O.,

P.W.2 = Eusuf Ali Ahmed, the informant,

P.W.3 = Farida Khatun,

P.W.4 = Manjuwara Begum, the victim,

P.W.5 = Mst. Hasina Khatun, P.W.6 = Rustom Ali Ahmed, P.W.7 = Mozammil Hussain, P.W.8 = Dauder Rahman,

P.W.9 = Hafizur Rahman,

P.W.10 = Asadul Ali,

P.W.11 = Hazarat Ali, the I.O.,

(B) **Prosecution Exhibits**:

Ext.1 = Medical Report,

Ext.1(1) & 1(2) = Signatures of Dr. Mamata Devi,

Ext.1(3) = Signature of Dr.S.I. Barbhuyan, Professor & HOD, Deptt. of Forensic Medicine, FAAMCH,

Barpeta.

Ext.2 = Ejahar,

Ext.2(1) = Signature of the Eusuf Ali Ahmed, Ext.2(2) = Signature of I.O. with endorsement, Ext.3 = Statement of the victim u/s 164 CrPC,

Ext.3(1) & 3(2) = Signature of victim,

Ext.4 = Sketch Map, Ext.4(1) = Signature of I.O., Ext.5 = Seisure list, Ext.5(1) = Signature of I.O., Ext.6 = Charge Sheet, Ext.6(1) = Signature of I.O.,

(C) **Defence witnesses**:Nil.

(D) Defence Exhibits: Nil.

(E) **Court witnesses**:Nil

(F) **Court Exhibits**: Nil.

Sd/-

Special Judge, Barpeta.