IN THE COURT OF SPECIAL JUDGE:: KAMRUP:: AMINGAON

District: Kamrup, Amingaon

Present: Smti. B. Kshetry

Special Judge,

Kamrup, Amingaon

Spl. Sessions (P) case No.53/2018

U/S-366 (A) IPC R/W section 4 of the POCSO Act

State of Assam

-Versus-

Siraj Ali @ Sirajul Hoque

s/o-Tamser Ali

Resident of vill -Mandira N. C., Malibari

P.S.-Boko

Dist- Kamrup, Assam

-----Accused

Appearance:

Mr. A.K. Baruah. Ld. Addl. Public Prosecutor

-----for the State

Md. Abdur Rahim, Ld. Advocate

-----for the accused person

Date of evidence: 13.03.2019, 14.05.2019, 28.05.2019,

08.08.2019

Date of Argument: 31.10.2019

Date of Judgment: 31.10.2019

JUDGMENT

- The Prosecution case, briefly narrating is that on 01.04.2018 the complainant – Rahim Badsa lodged an ejahar alleging that on 31.03.2018 at about 7.00 p.m, his minor daughter was taken away by the accused person—Siraj Ali @ Sirajul Hoque from his house when he was not at home. Hence, this case.
- On the basis of the said ejahar, Boko P.S Case No. 197/18 U/S-366
 IPC R/W Section 4 of the POCSO Act, 2012 was registered. Investigation
 was conducted into the case and after completion of investigation,
 charge-sheet was submitted against the present accused person U/S-366
 (A) of IPC R/W Section 4 of the POCSO Act, 2012.
- 3. The case was duly committed and this Court after hearing both the parties, framed charges U/S- 366 (A) IPC R/W Section 4 of the POCSO Act, 2012 against accused person— Siraj Ali @ Sirajul Hoque. The aforesaid charges were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.
- 4. During the trial, the Prosecution side examined 6 (six) witnesses including the informant and the victim girl. Statement of the accused person U/S-313 Cr. P.C is recorded. He has denied committing the offence and desired to adduce evidence. Defence side adduced evidence of one witness.

POINT FOR DETERMINATION

(I) Whether the accused person on 31.03.2018 at about 7.00 p.m induced the minor victim girl to go from any place or to do any act with the intent that she may be or knowing that it is likely that she will be, forced or seduced to illicit

- intercourse with another person and thereby committed an offence punishable U/S 366 (A) IPC?
- (II) Whether the accused person on the same date and time committed penetrative sexual assault on the informant's minor daughter and, thereby, committed an offence punishable U/S-4 of the POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined 6 (six) witnesses.
- 7. P.W.1, Rahim Badsa is the informant of this case. He knows the accused person. Prosecutrix is his daughter. P.W.1 deposed that the incident took place about 8/9 months ago at about 7.00 p.m. Prosecutrix was 17 years old at the time of occurrence. P.W.1 was not at home at the relevant time of incident. Prosecutrix was at home along with his wife and other children. On the date of occurrence, at 8.00 p.m when he returned home, his wife—Sahera Khatun told him that prosecutrix was missing from the house. Then, they searched for her everywhere. But she was not traceable. And on the night of occurrence, Danesh Ali, brother of accused—Sirajul Ali @ Sirajul Hoque came to their house and told them that the accused was not at home he suspected that accused might have taken the prosecutrix with him. Thereafter, P.W.1 went to meet the parents of the accused person and asked them to return the prosecutrix. They all searched for the prosecutrix and the accused but they were not traceable. After 9 days P.W.1 lodged the ejahar. P.W.1 put thumb impression in the ejahar. After 11 days of lodging the ejahar, prosecutrix and the accused were recovered by police from Mukalmua. Police seized the Birth Certificate of the prosecutrix and later give it in his zimma. Ext.1

is the seizure list. Ext. 1 (1) is his signature. Police recorded his statement. On enquiry, prosecutrix told him that she had love affair with the accused and she went with him on her own will to get married. The accused is already a married man having children. Material Ext 'A' is the original School Certificate seized vide Ext.1 (seizure list).

In his cross-examination, P.W.1 has revealed that the age of the prosecutrix at present is 19 years. P.W.1 further revealed that the prosecutrix is married now and stated that prosecutrix did not attend in any school. This original School Certificate was given to him by some other person. Further P.W.1 stated that the ejahar was not written by him, it was written by some other person for him. The ejahar was not read over to him. He had stated the age of the prosecutrix to be 18 years to Scribe, who wrote the ejahar. But he mentioned her age as 13 years. P.W.1 has no registered Birth Certificate of the prosecutrix and police did not seize any Birth Certificate from him.

8. P.W.2, victim has deposed in her evidence that informant of this case is her father. She knows the accused person. She deposed that the incident took place about 2 years ago at about 7.00 p.m. She was below 18 years old at the time of occurrence. At the relevant time of incident, she was at home but her parents were not at home. She deposed that she had love affair with the accused from two years before the incident. On the relevant date, she went with the accused—Sirajul Ali @ SirajulHoque on her own will to Mukalmua without informing her parents. They stayed together in the house of his uncle for 9 days and they sleep together. They had physical relation at her consent. But they did not get married. Police recovered both of them from Mukalmua and brought them to Boko P.S. Police sent him to the doctor for her medical examination and brought her before the Magistrate for recording her statement.

In her cross-examination, P.W.2 has disclosed that she has never gone to school. And the time of giving her deposition before the court she stated her age to be 18 years old. Her parents were trying to get married with another person, so she eloped with the accused. Accused did not forcibly have sexual intercourse with her.

9. P.W.3, Bhajen Ali has deposed in his evidence that he knows the informant of this case, who is his neighbour. He know the accused person. He also know the prosecutrix. P.W.3 deposed that the incident took place more than 1 year ago. P.W.3 was at home at the relevant time of incident. Then, he heard from the informant (father of the prosecutrix) after 3 days of the occurrence that the prosecutrix has been taken away by the accused. After 4/5 days, prosecutrix returned home. Later, P.W.3 heard that prosecutrix had love affair with the accused and she went with him on her own. At present, prosecutrix married to another person. She was 18 years old at the time of occurrence. Police recorded her statement

In his cross-examination P.W.3 has revealed that he did not know if the accused took the prosecutrix forcibly or she went with him on her own will.

10. P.W.4, Abul Hussain deposed in his evidence that he knows the informant of this case, who is his neighbour. He knows the accused person and also the prosecutrix. P.W.4 deposed that the incident took place about 6/7 months ago. On the date of occurrence at 9.00 p.m informant and his wife came to his house and told him that the prosecutrix has been taken away by the accused—Siraj Ali and his friend—Bhajen Ali (P.W.3) from their house. P.W.4 advised them to search for her and give the ejahar. After 4/5 days, the prosecutrix was recovered from Singimari char (Bahari) by the police. On enquiry, prosecutrix told him that the accused took her to Singmari Char (Bahari) with assurance to marry her but he did not marry her. At present, prosecutrix married to another person.

In his cross-examination P.W.4 deposed that he does not know if the accused took the prosecutrix forcibly or she went with him on her own will.

11. P.W.5, M/O, Dr. Oli Goswami has deposed in her evidence that on 20.04.2018 she was working as a PG on duty, Department of Forensic Medicine at GMCH. On that day, at around 1.40 p.m she examined one, Melansha Khatun, female, 13 years of age brought in reference to BokoP.S case No. 197/18 U/S-366 IPC. She was accompanied and identified by WPC 582 Dipika Basumatary. The victim alleged before her that the accused—Siraj had committed sexual intercourse with her for 9 episodes during her stay for 10 days with him at Boko.

On the physical examination of the victim found---

Her height—156 cm, weight—39 kg, chest girth—73 cm, abdominal girth—67 cm, total 28 teeth all were permanent. Scalp hair-46 cm, black in colour. Axillary hair-1-2 cm black in colour, Pubic hair— 1-2 cm, black in colour. Her breast—hemispherical, nipple and areola are dark brown in colour. No milk ejected on squeezing the breasts. Menarche—11 years, cycle- 28 ± 2 days, black, well distributed. Last menstrual period- 07.04.2018.

On genital examination:-

Genital organs—well Developed, healthy, vulva—labia majora is healthy, labia minora is well visible even when thighs are not fully abducted, Hymen –old tears seen at 1, 3, 6, 9, o' clock positions, vagina—healthy, Cervix—healthy, Uterus—not palpable per abdominally, evidence of venereal disease –not detected clinically, Vaginal swabs collected from—posterior fornix and aroundt he cervix, injury on the body—not detected at the time of examination, her mental condition at the time of examination—normal, behavior—Co-operative and Intelligence and Memory—average, gait—Normal.

Laboratory investigation:-

Vaginal smears does not show any presence of spermatozoa or gonococcus.

<u>Opinion:</u> On the basis of physical examination, radiological and laboratory investigations done, I opined that:-

- 1. No evidence of recent sexual intercourse found on her person.
- 2. No injury detected on her private parts except old hymenal tears.
- 3. Her age is above 16 years and below 16.5 years of age.

Ext. 2 is the medical report. Ext. 2 (1 to 3) are her signatures.

In her cross-examination P.W.5 deposed that the age of the victim has been mentioned in her report after physical and radiological examination. As no spermatozoa was detected on the vaginal smear so, it has been written in her report that no recent sexual intercourse found on the victim.

12. P.W.6, S/I, Bhogesh Ch. Deori, is the I/O of this case, who has investigated the case. In his deposition, he has stated that on 01.04.2018, he was serving as i/c, Mandira O.P under Boko P.S. On that day, on receiving an ejahar lodged by one Rahim Baux in Mandira O.P, he forward the ejahar to O/C, Boko P.S for registering a case. Accordingly, the O/C, Boko P.S registered a case bearing Boko P.S Case No. 197/2018 U/S-366 of IPC and directed him to investigate the case. He visited the place of occurrence, recorded the statements of the witnesses and prepared the sketch-map. He seized the Birth Certificate of the victim girl. On search, he did not find the victim girl and the accused—Siraj Ali. On 08.04.2018, P.W.6 got an information that the victim and the accused are in Daulakhal in the house of the Maternal Uncle of the accused. P.W.6 deputed ASI-Ratan Kalita along with other staffs to recover the victim girl. They

recovered the victim girl from Daulakhal on the night of 08.04.2018 and brought her along with the accused to Boko P.S. on 09.04.2018 morning. P.W.6 recorded the statement of the victim on 09.04.2018 and sent for her medical examination on the same day but she refused. P.W.6 arrested the accused on 09.04.2018 and forwarded him before the court. Thereafter, again on 21.04.2018 P.W.6 sent the victim for medical examination and the same was done. P.W.6 collected the medical report of the victim. On 21.04.2018 P.W.6 produced the victim before the Magistrate for recording her statement U/S-164 Cr. P.C. Thereafter, P.W.6 completed the investigation and submitted the charge sheet against the accused—Siraj Ali @ Sirajul, U/S-366 of IPC R/W section 4 of POCSO Act, 2012. Ext.1 is the seizure list, Ext. 1 (2) is his signature. Ext. 3 is the sketch-map, Ext. 3 (1) is his signature. Ext. 4 is the charge-sheet and Ext. 4 (1) is his signature.

- 13. In his cross-examination, P.W.6 disclosed that victim (P.W.2) told him that she went with the accused on her own and there was love affair between them since 2 years before the incident. Material Ext. 'A' is the Birth Certificate seized by him vide Ext.1, which is seen by me today in the Court. Material Ext. 'A' is the School Certificate issued by Headmaster Mandira N.C Pubpara L.P. School. P.W.6 deposed that he did not know if the victim never attended any school. On the basis of the certificate P.W.6 added Section 4 of POCSO Act in the charge-sheet.
- 14. Defence side also adduced the evidence of D.W.1.
- 15. D.W.1, Sahera Khatun is the mother of the prosecutrix. She deposed that her daughter (prosecutrix) was 18 years old at the time of occurrence and she eloped with the accused on her own.
- 16. Therefore, from the evidence of the prosecutrix (P.W.2) it is clear that she she had love affairs with the accused since 2 years ago and on the day of the incident, she had gone with him on her own will to get married with him. P.W.2 also stated that during her stay with the accused

at Mukalmua they slept together and had physical relation with her consent. Other P.Ws also supported the version of P.W.2. Perused her statement recorded U/S-164 Cr. P.C wherein she clearly stated before the Learned Magistrate that she had love affair with accused—Siraj Ali and she fled away with him on her own but the accused person did not forcibly kidnap her.

- It is the evidence of D.W.1, who is the mother of the prosecutrix 17. (P.W.2) that at the time of incident her daughter (prosecutrix) was 18 years old and on the date of occurrence she eloped with the accused on her own will. Independent witness, P.W.3 also stated that prosecutrix was 18 years old at the time of occurrence. In her statement recorded U/S-164 Cr. P.C, she disclosed her age to be 15 years at the time of occurrence. Prosecutrix (P.W.2) stated her age to be below 18 years at the time of occurrence. So, she gave contradictory statements regarding her age in her evidence before Court also before Magistrate. She cannot be relied upon. That the prosecutrix was a major girl at the time of occurrence as confirmed by her own mother (D.W.1). It is stated by the P.W.1, (informant) that his daughter (prosecutrix P.W.2) never attended any school. So, the Material Ext. 'A', which is the Original School Certificate cannot be relied upon at all. Prosecutrix is found to be a major girl at the time of occurrence.
- 18. There, the accused person is not implicated by the victim and the informant in any manner. Prosecutrix was not taken away forcibly by the accused person on the date of incident. She went with the accused on her own sweet will out of love affairs between them. Her evidence reveals that she had physical relation with the accused on her own consent. So, she is a consenting party to the sexual intercourse that took place between them and was a major at the time of occurrence. So, the offences U/S- 366 (A) of IPC R/W section 4 of the POCSO Act, 2012 is not attracted at all.

19. In the result, the prosecution has miserably failed to prove the case beyond all reasonable doubt against the accused person— Siraj Ali @ Sirajul Hoque. He is held not guilty and he is acquitted of the offence U/S-366 (A) of IPC R/W section 4 of the POCSO Act, 2012 and set at liberty forthwith. His bail bond stands cancelled. Bailor is discharged from their liabilities.

20. The case is disposed of on contest.

21. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 31^{st} day of October, 2019.

Special Judge, Kamrup, Amingaon

Dictated and corrected by me

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

P.W.1, Rahim Badsa

P.W.2, victim

P.W.3, Bhajen Ali

P.W.4, Abul Hussain

P.W.5, M/O, Dr. Oli Goswami

P.W.6, S/I, Bhogesh Ch. Deori

Prosecution Exhibit

Ext.1 is the seizure list

Ext. 2 is the medical report

Ext. 3 is the sketch-map

Ext. 4 is the charge-sheet

Special Judge,

Kamrup, Amingaon