HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 62/2018

UNDER SECTIONS: 365/376 IPC

READ WITH SECTIOM 6 OF THE POCSO ACT.

STATE OF ASSAM

VS.

SAHIDUR ALI HEIKH @ SAIZUL HAQUE & SAHJAHAN ALI @ SAHAN ALI

PRESENT:- DIPAK THAKURIA,
SPECIAL JUDGE,
DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
A. U. AHMED & R. K JAIN ADVS., FOR THE DEFENCE.

DATE(S) OF EVIDENCE:-20-06-2018, 04-07-2018. 18-07-2018, 01-08-2018, 24-09-2018, 05-01-2019,

11-02-2-19, 25-03-2019, 08-04-2019.

DATE OF ARGUMENT:- 20-05-2019.

DATE OF JUDGMENT:- 03-06-2019.

J U D G E M E N T

1. Accused Sahidur Ali Sheikh @ Saizul Haque and Sahjahan Ali @ Sahan Ali stand trial for the offences punishable under sections 365/376 IPC read with section 6 of the POCSO Act.

- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 12-04-2018 the complainant lodged a written ejahar before the Officer-in-charge of Golokganj police station against the accused persons mentioned above with an allegation that on previous day i.e. 11-04-2018 at about 6 p.m. while his 16 year old daughter was returning home from a shop, then the accused persons, on the road, by force kidnapped her in a motorcycle. The accused persons took her to Morakura Milan M. E School, striped off her clothes and against her will committed rape on her and in unconscious condition she was lying there. At about 11 p.m. one local person of village Morakura informed him about the incident and then he brought her daughter from the place of occurrence. His daughter told him about the incident.
- **3.** After receiving the ejahar, Officer-in-charge of Golokganj police station registered a case as Golokganj P. S. Case No. 317/2018 under sections 365/376/34 IPC read with section 4 of POCSO Act.
- 4. The investigating officer arrested the accused persons and produced them before the Court and remanded to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C., statement of the victim was also recorded under section 164 Cr. P. C., medically examined the victim girl and re-constructed the crime scene in presence of Executive Magistrate and by completing investigation submitted charge sheet against the accused Sahjahan Ali @ Sahan Ali under sections 365/201 IPC read with section 4 of POCSO Act and against accused Sahidur Ali Sheikh @ Saizul Haque under sections 365/201 IPC read with section 17 of POCSO Act.
- **5.** After taking the cognizance of the case copies were furnished to them and after hearing both the parties and perusal the case record and case diary formal charges against the accused persons under sections 365/376 IPC read with section 6 of POCSO Act were framed. Charges so framed were read over and explained to the accused persons which they pleaded not guilty and claimed to be tried.
- **6.** The prosecution examined sixteen witnesses including Medical, Scientific and Investigating Officers and closed the evidence. Executive Magistrate in whose presence crime scene was reconstructed was examined as Court witness.
- 7. After completion of the prosecution evidence, the statements of the accused persons

were recorded u/s 313 Cr. P. C. by putting questions to them from all incriminating evidence appearing against them on record and thereby giving them an opportunity to meet the same. In response to which, the accused persons denied the allegations as well as evidence on record and also declined to adduce evidence in defence .

8. Heard learned counsels appearing for the parties and perused the evidence on record.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused persons on 11-04-2018 at about 6 p.m. at Morakura Milan M. E. School under Golokganj police station kidnapped the minor daughter of the complainant with intent to cause said victim to be secretly and wrongfully confined and thereby accused persons are liable to be punished under section 365 IPC?

Whether the accused persons on the same day time and place committed rape on the minor daughter of the complainant and thereby accused persons are liable to be punished under section 376 IPC?

Whether the accused persons on the same day time and place committed aggravated penetrative sexual assault to the minor daughter of the complainant and thereby accused persons are liable to be punished under section 6 of the POCSO Act?

<u>DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION</u> <u>ARRIVED THEREON WITH REASON:</u>

9. In order to establish the charges framed against the accused persons, the prosecution has examined sixteen witnesses. Among them P. W. 1 is the complainant and the father of the victim girl. P. W. 4 is the wife of the complainant. P. W. 9 is the daughter of the complainant. P. W. 2 is the victim girl. P. W. 3 Dr. Muskura Ahmed is the medical officer who examined the victim after the incident. P. W. 5 Anil Adhikary, P. W. 6 Binanda Ray, P. W. 7 Kamleswar Ray, P. W. 8 Manoj Kr Ray, P. W. 10 Abhijit Ray and P. W. 11 Hirak Ray are independent witnesses. P. W. 12 Sanjay Sarkar is the videographer who video graphed the re-construction of crime scene. P. W. 13 Saiful Rahman and P. W. 14 Safiqul Rahman are independent witnesses in whose presence the re-construction of the

- crime scene was video graphed. P. W. 15 Jaharul Islam is the investigating officer and P. W. 16 Renu Borah Handique is the Scientific Officer who examined the seized clothes.
- **10.** Executive Magistrate Santa Karki Chetry who conducted the re-construction of crime scene is examined as C. W. 1.
- **11.** The defence examined none. Plea of the defence is total denial of the case.
- 12. Learned Special Public Prosecutor has submitted that the offence is heinous in nature. The accused persons, on the day of the incident, putting the victim girl under threat who was minor at the time of the incident, by force took her to a School and committed rape on her. The prosecution examined all the important witnesses and the depositions of the prosecution witnesses are trustworthy and the defence could not discard the credibility of the oral as well as documentary evidences adduced by the prosecution. After the incident the prosecution re-constructed the crime scene in presence of Executive Magistrate and independent witnesses. The accused had shown how he executed the crime and the same had been video graphed and the video footages of the reconstruction of crime scene were displayed in the Court during trial and the defence does not challenge the same. There is nothing to disbelieve the prosecution witnesses. The prosecution is able to establish the charges against the accused persons beyond all reasonable doubt. So, has prayed to hold the accused persons guilty under framed charges and impose adequate punishment to him.
- 13. On the other hand learned counsels appearing for the defence have submitted that the allegations against the accused persons are serious in nature. To prove the charges, the prosecution has to establish the charges against the accused persons beyond all reasonable doubt which the prosecution has failed to do so. The prosecution has failed to produce any convincing documentary evidence that the victim girl was a minor at the time of the incident. Next day of the alleged incident the alleged victim was produced before the Medical Officer for examination; but the Medical officer did not find any mark of injury or sexual intercourse on her. The independent witnesses have not supported the case of the prosecution as they have given just general statements. The prosecution seized the garments of the alleged victim and examined the same; but the under garment of the accused persons were not seized and not examined. So far reconstruction of crime scene is concerned the Executive Magistrate did not prepare the same as per law. She does not know Assamese language; but she prepared the report in

Assamese language. Besides it the place of occurrence as per the complainant was the ground of a school; but in the re-construction of crime scene the place of occurrence has been shown a cultivated land of two persons. As the prosecution has failed to establish the charges framed against the accused persons; so, they deserve benefit of doubt. Hence, prayed to acquit the accused persons.

14. The complainant (P. W. 1) who is the father of the alleged victim has deposed that about three months back one evening at about 6.30 p.m. his daughter was returning home from a shop and then the accused persons kidnapped her and at Morakuchi Milan M. E. School they committed rape on her. At about 11 p.m. one villager recovered her and his daughter told him about the incident. Next day he filed the ejahar (Ext. 1). He has authenticated his signature in the ejahar which is marked as Ext. 1 (1). From the contents of the ejahar it appears that the alleged incident took place on 11-04-2018 at about 6 p.m. From the oral testimony of the complainant and the contents of ejahar it appears that the place of occurrence was the public road and the Morakura Milan M. E. School. According to the complainant his daughter was kidnapped from the road while she was returning home and had taken her to Morakura M. E. School. During investigation the I. O. Jaharul Islam (P. W. 16) prepared the sketch map of the place of occurrence and exhibited the same as Ext. 7 which shows the place of occurrence is the ground of Morakura M. E. School. The prosecution examined the victim as P. W. 2. Her deposition shows that one month back one evening she went to a shop to purchase sugar. While she returned home she met the accused persons and they asked her where she had gone. She replied and then the accused persons had shown a dagger, gagged her mouth by a handkerchief and compelled her to go into the bike. They took her to Morakura M. E. school field and committed rape there on her. She lost her sense and one person named Dhol gave water to her head and she regained her sense and informed the matter to her family. P. W. 4, mother of the alleged victim has also deposed that her daughter told her that the accused persons lifted her to the field of M. E. School while she was returning home from a shop. P. W. 9 is the elder sister of the alleged victim. She has also deposed that the alleged victim told her that accused persons lifted her to M. E. School while she was returning home. The defence categorically cross-examined the above mentioned witnesses. So far alleged place of occurrence is concerned it appears that alleged place of occurrences were the village road and the ground of Morakuri M. E. School.

- **15.**To constitute an offence punishable under the provisions of POCSO Act the prosecution has to establish that the alleged victim was a child at the relevant time as defined under section 2 (d) of POCSO Act.
- 16.Learned special public prosecutor has submitted that at the time of the incident the alleged victim was a minor girl just 15 to 16 years old. P. W. 1 and P. W. 4 who are the parents of the victim girl have deposed that their daughter was minor at the time of the incident. The alleged victim and the medial officer (P. W. 3) have also deposed that at the time of the incident the victim girl was below 16 years old. On the other hand learned defence counsel has submitted that the prosecution has failed to produce any document to show the age of the victim. The complainant in his cross-examination has deposed that he collected school certificate of his daughter after the incident; but the prosecution has not produced the same. In this regard learned defence counsel has relied on a decision of the Hon'ble Supreme Court passed in Sunil vs. State of Haryana in Criminal Appeal No. 2308 of 2009.
- 17. In the ejahar the complainant has mentioned that his daughter was 16 years old. The complainant (P. W. 1), his wife (P. W. 4) and their daughter (P. W. 9) have deposed that at the time of the incident the victim girl was below 16 years. The medical officer (P. W. 3) has not given her opinion regarding the age of the victim in her report (Ext. 3). She simply mentioned the age of the victim girl as stated by the victim girl. Though the complainant in his examination-in-chief has deposed that on the day of recording his statement in the Court during trial his daughter was just 15 years old; but in crossexamination he has stated that 15/16 years back his marriage was solemnized. His deposition shows that the alleged victim is his second daughter. Interestingly he has stated that his elder daughter is 25 years old and the victim is just 1 and $\frac{1}{2}$ years younger than his first daughter. The mother of the alleged victim in her crossexamination has denied the suggestion of the defence that she did not disclose before the investigating office that at the time of the incident her daughter was 16 years old. The investigating officer (P. W. 15) in his cross-examination has stated that P. W. 4 did not disclose before him that her daughter was 16 years old at the time of the incident. The eldest daughter of the complainant (P. W. 9) at the time of recording her statement in the Court during trial has mentioned her age as 26 years. If the alleged victim is just 1 and ½ years younger as stated by her father (P. W. 1) then the age of the alleged victim would be more than 18 years.

- **18.**From the evidence of the complainant it appears that his daughter was a student and he collected school certificate from the head teacher. But the investigating officer has not seized the same. The complainant has also not produced the school certificate of his daughter. The complainant in his cross-examination has deposed that after the incident he collected the school certificate and he does not know who put the date of birth of his daughter in the certificate. The Hon'ble Supreme Court in **Sunil vs. State of Haryana in Criminal Appeal No. 2308 of 2009** has not relied on a certificate obtained after six days of the incident and three days after the arrest of the accused. In the case in hand, as the prosecution has not produced the certificate in the Court for perusal; so, it is not known what the date of birth of the victim was. After the incident the victim was produced before the medical officer (P. W. 3) for medical examination. But the medical officer did not give her opinion regarding the age of the victim girl. The ossification test of the victim girl was not done to ascertain the age of the victim.
- **19.**The case is very serious in nature and the punishment is also very stringent. So, the prosecution has to collect cogent document to ascertain the age of the victim girl. As the victim girl is a school going girl; so, the investigating officer could have been collected certificate from the school. The investigating officer at least ascertain the age of the victim girl by doing ossification test. As the immediate elder sister of the victim was 25/26 years old and she is just 1 and ½ years younger than her and without any convincing document it is not safe to hold that the victim girl was a child at the time of the incident as per section 2 (d) of POCSO Act.
- 20.Learned special public prosecutor has submitted that the victim girl has stated that the accused persons lifted her and committed rape on her. Her statement was recorded by Judicial Magistrate under section 164 Cr. P. C. and the victim girl has stated before the Judicial Magistrate about commission of rape. The prosecution re-constructed the crime scene in presence of Executive Magistrate, video graphed the same and the prosecution examined the witnesses before whom the crime scene was re-constructed. Besides it the investigating officer seized wearing apparel of the victim, sent it for forensic examination and the forensic expert found semen in the cloth of the victim.
- **21.**On the other hand learned defence counsel has submitted that on the next day of the incident, the alleged victim was medically examined but the medical officer detected no mark of injury on her person. The so called re-construction of the crime scene was not

as per law as the place of incident was shown a different one. So far finding of semen in the cloth of alleged victim is concerned it is not proved that the semen was of the accused persons as the investigating officer did not seize the wearing apparel of the accused persons and sent them for forensic examination.

- **22.**From the evidence on record it transpires that the alleged victim (P. W. 2) has stated that on the day of the incident the accused persons lifted her from the road while she was returning home from a shop and at Morakuchi Milan M. E. School she was raped. She lost her sense and one person named Dhol saw her and gave her water in her head. She regained her sense and informed about the incident to her family.
- 23.On the next day of the alleged incident the statement of the alleged victim was recorded by Judicial Magistrate under section 164 Cr. P. C. (Ext. 2). The alleged victim authenticated her signature in her statement as Ext. 2 (1) and Ext. 2 (2). On perusal the Ext. 2 it appears that she has stated before the Judicial Magistrate that the accused persons lifted her while she was returning home from a shop under threat and took her to Morakuchi M. E. School. Something was given in her mouth and she lost her sense. The alleged victim has not disclosed before the Judicial Magistrate that the accused persons committed rape on her. She simply stated that after regaining her sense she found that the zipper of her pant was open and one person named Dhol gave water in her mouth and then over phone she informed about the matter to her brothers. From the statement of the alleged victim recorded by Judicial Magistrate it transpires that at the time of the incident the alleged victim was wearing a pant and she found that the zipper of her pant was opened. But the investigating officer vide Ext. 4 seizure list seized one brown colour leggings, one blue colour kurti and one ash green colour panty.
- **24.** Next day of the alleged incident P. W. 2 was medically examined by Dr. Muskura Ahmed (P. W. 3) at Dhubri Civil Hospital. The prosecution has exhibited the report of the medical officer as Ext. 3. The medical officer before examination asked about the history of incident from the victim girl and recorded the same in her report. As per victim, she went to the shop then two boys known to her took her to Morakuchi M. E. School and make her unconscious by putting some cloth in her nose and she cannot say anything. From the history recorded by the medical officer it transpires that the alleged victim did not disclose before the medical officer that she was raped by the boys who lifted her. During examination, the medial officer found her normal, she did not find any mark of injury on her body and also not find any evidence of rape on the victim at the time of

examination. She has authenticated her signature in her report which is marked as Ext. 3 (1).

- 25. As stated earlier during investigation, the investigating officer seized one leggings, one kurti and one ash colour panty. The prosecution examined the seizure witnesses. P. W. 9, the elder sister of the victim girl is one of the seizure witnesses. She has authenticated her signature in the seizure list which is marked as Ext. 4 (1). According to her on the next day of the incident the articles were seized. P. W. 10 Abhijit Ray and P. W. 11 Hirak Ray are two other seizure witnesses. Both of them have deposed that on the next day of the incident they visited the house of the complainant and police seized some clothes. Ext. 4 (2) is the signature of P. W. 10 and Ext. 4 (3) is the signature of P. W. 11. From their cross-examination it appears that married elder sister of the alleged victim handed over the seized clothes to police.
- 26. The investigating officer Jaharul Islam (P. W. 15) has deposed that after seizing the clothes he sent the same to FSL for forensic examination and collected report. The investigating officer exhibited the seized article as M. Ext. 2 i.e. the brown colour leggings, M. Ext. 3, i.e. the blue colour Kurta and M. Ext. 3 i.e. the ash green colour panty. The prosecution examined Renu Borah Handique (P W. 16), the scientific officer, who examined the seized clothes. Her evidence shows that in connection with Golokganj police station case No. 317/2018 she examined one brown colour leggings, one blue colour kurti and one ash colour panty. She found positive test for human semen (spermatozoa) in the ash colour panty. She found negative test for semen in other seized articles. She has exhibited her report as Ext. 8 (it should be Ext. 9) and authenticated her signature there on as Ext. 8 (1) {it should be Ext. 9 (1)}. She has exhibited the forwarding letter as Ext. 9 (it should be Ext. 10) and the signature of Director Kumud Ch. Sarma as Ext. 9 (1) {It should be Ext. 10 (1)}.
- 27. The investigating officer has deposed that on 13-04-2018 he arrested accused Sahan Ali and on 15-04-2018 he arrested accused Sahidur. The prosecution has not seized the wearing apparels of the accused persons. Their semen were not collected, sample of blood was also not taken. As the forensic expert has not matched the semen found in the examined panty of the alleged victim with the semen of the accused persons it will not be safe to hold that the semen found in the seized panty was the semen of the accused. It is not known as to why the investigating officer did not collect the semen and blood sample of the accused persons.

- **28.**The prosecution examined one Anil Adhikary (P. W. 5). He has deposed that about one month back at about 11.30 p.m. one Anowar and some other called him and he found a girl who identified her as the victim. Anowar and other requested him to hand over the girl to her father. So he had taken the girl to her house and handed her over to her father. The girl told him that two boys took her to paddy field where she lost her sense. She did not disclose their names. The girl told him that she had affairs with the boys who took her to the field.
- **29.**P. W. 6 Binanda Ray and P. W. 7 Kamleswar Ray have deposed that about three months back at about 7.30 p.m. they saw that a girl was running through railway track at Morakuchi and she was telling someone to take her otherwise she would commit suicide. They could not recognize the girl. The oral testimonies of P. W. 6 and P. W. 7 do not help anyway either to the prosecution or to the defence.
- **30.** The evidence of Manoj Kr. Ray (P. W. 8) shows that on the day of the incident the victim girl visited his shop to purchase sugar and after purchasing sugar she returned home. Next day he heard that accused persons committed rape on her. But he could not disclose the name of the person who informed him about the incident. After one day of the incident the complainant told him about the incident. In cross-examination he has denied the suggestion of the defence that he did not disclose before I. O. that after one day the complainant told him about the incident. The I. O. in his cross examination has deposed that P. W. 8 did not disclose before him that the complainant told him about the incident. Anyway P. W. 8 is nothing but a hearsay witness.
- **31.**The investigating officer (P. W. 15) has deposed that on 13-04-2018 he arrested accused Sahan Ali, took him for police custody for five days. On 14-04-2018, crime scene was reconstructed through the accused Sahan Ali by Executive Magistrate Santa Karki Chetry. On 20-04-2018 he seized the CD of the re-construction of crime scene vide Ext. 6 seizure list. Ext. 6 (1) is his signature. Collected report from FSL and by completing the investigation submitted charge sheet against the accused persons vide Ext. 8 charge sheet. Ext. 8 (1) is his signature.
- **32.**From the case record it appears that P. W. 12 Sanjay Sarkar video graphed the reconstruction of crime scene and P W. 13 Saiful Rahman and P. W. 14 Safikul Rahman were present in the process. In presence of Executive Magistrate Santa Karki Chetry (C. W. 1) the reconstruction of crime scene was prepared. While P. W. 12, P. W. 13, P. W.

- 14 and Court witness 15 were examined in the Court the video graphs were played in the Court and all the witnesses have deposed that the video graphs were done in their presence.
- **33.**P. W. 12 is the videographer and working in the office of SP Dhubri since 1995 as casual worker. He has deposed that after video graphs he prepared CD and handed over the same to O. C. Golokganj police station. He has exhibited the CD as M. Ext. 1 of video footages of reconstruction of crime scene. M. Ext. 1 (1) is his signature. The reconstruction of crime scene was written down by Executive Magistrate. Ext. 5 is the reconstruction of crime scene written by Executive Magistrate. Ext. 5 (1) is his signature. P.W. 13 and P. W. 14 put their thumb impression in the re-construction of crime scene prepared by the Executive Magistrate.
- **34.**C. W. 1 Santa Karki Chetry has deposed that on 14-04-2018 District Magistrate, Dhubri entrusted her to re-construct the crime scene in connection with Golokganj police station case no. 317/2018 as per prayer of Officer-in-charge of Golokganj police station. At around 11.30 a.m. she visited Golokganj police station and the accused Sahan Al voluntarily intended to show the place of occurrence and how he committed the offence. The accused took them to the place of occurrence situated at village North Raipur Part II under Golokganj police station. One Moksed Ali and one Abdul Bari are the owners of the land. A life size toy representing the victim was kept in the place of occurrence. According to the accused the girl called him over phone to the place of occurrence on the night of the incident, he visited the same, talked to her for some time and thereafter he had sex with her. The accused and the victim intended to elope. The accused went to his house and the girl was on the road and in the meantime some villagers found the girl and took her to her house. After reconstruction of the crime scene the report was written in Assamese language by a person arranged by I. O. Thumb impressions of the witnesses and the signature of the videographer were taken in her report. Ext. 5 is the report and Ext. 5 (2) is her signature. In cross-examination she has stated that there is no school as Morakura M. E. School near the place of occurrence.
- **35.**Learned defence counsel has submitted that if the report of reconstruction of crime scene is accepted as correct then the place of occurrence was the land of Moksed Ali and one Abdul Bari. The M. E. School is not near to the place of occurrence shown in the reconstruction of crime scene.

- **36.**Crime scene reconstruction is a method of solving a crime that starts with the creation of a theory of how it occurred. As there was no eye witness of the occurrence of the offence; so, the prosecution reconstructed the crime scene through the accused. From the evidence of the investigating officer it appears that the accused Sahan Ali was under police custody at the time of preparation of reconstruction of crime scene. From the oral testimony of C. W. 1 and the video footage of the reconstruction of crime scene it appears that before reaching the place of occurrence of the accused and the Executive Magistrate a life size toy representing the victim was kept there. The prosecution has not disclosed who instructed to keep the life size of toy in that place. As the victim is living so the reconstruction of the crime scene should starts from her. It appears that the statement of the victim was recorded two days prior to the reconstruction of the crime scene; so, the investigating officer was aware that as per the victim the place of occurrence was the ground of Morakuchi M. E. School; not land of Moksed Ali and Abdul Bari. The investigating officer without doing any research reconstructed the crime scene through the accused which shows a different place of occurrence. Besides it, as per Executive Magistrate the victim called the accused over phone to the place and after talking sometimes they had sex and they intended to elope which was not realized as some villagers found the girl on road and took her to her house.
- **37.**C. W. 1 has deposed that after reconstruction of the crime scene they returned to Golokganj police station where she prepared the report. But P. W. 13 and P. W. 14 have deposed that the report was prepared on spot and they put their thumb impression there. From the evidence of P. W. 12 it appears that he put his signature in the report (Ext. 5) as I. O. asked him to do so.
- **38.** After properly scrutinizing the oral testimonies of P. W. 12, P. W. 13, P. W. 14 and C. W 1 and the report (Ext. 5) it appears that it is doubtful where the Ext. 5 was prepared. As the life size toy representing the girl had been kept before showing the place of occurrence by the accused and the place of occurrence does not tally with the place of occurrence described by the victim girl; so, it is not safe to accept the Ext. 5 as correct.
- **39.**To establish the offence of rape the prosecution has to establish the requirements mentioned in section 375 of IPC. Though the victim girl deposed that she was raped by

the accused persons; but she did not disclose the commission of rape to her by the accused persons before Judicial Magistrate who recorded her statement under section 164 Cr. P. C. on the very next day of the incident. The medical officer examined her on the next day of the incident; but found no injury mark on her body and also not found any mark of recent sexual intercourse on her. The victim deposed that on the day of the incident she lost her sense and after regaining the same she found the zipper of her pant was opened; but the I. O. seized her legging; not her pant. Besides it her mother has deposed that she saw mud in the clothes of her daughter; but there was no mark of mud in the clothes seized by the investigating officer.

- **40.** After careful examination on the evidences on record I come to the safe conclusion that the prosecution has failed to establish that the accused persons committed rape on the victim girl on the night of the incident. The prosecution has also failed to show that the victim was a child at the time of incident as defined under section 2 (d) of the POCSO Act; so, question of invoking any provision of POCSO Act does not arise.
- **41.** Now let us scrutinize whether the prosecution is able to establish the charge under section 365 IPC or not.
- **42.** Section 362 IPC defines the offence abduction. As per section 362 IPC whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. The section requires two things 1. Forceful compulsion or inducement by deceitful means and 2. The object of such compulsion or inducement must be going of a person from any place.
- **43.**After marshalling the evidence on record it appears that on the day of the incident i.e. 11-04-2018 the victim girl at about 6 p.m. was returning home from a shop. The shop keeper Manoj Kr. Ray (P. W. 8) has confirmed the same that the victim visited his shop with a view to purchase sugar and returned her home at about 5.30/6 p.m. P. W. 5 Anil Ch. Ray at about 11.30 p.m. found the victim and on that night he handed over the girl to her parents. The parents of the victim have also deposed that their daughter was not at their residence from 6 p.m. to 11.30 p.m. From the evidence of the prosecution witnesses it is clear that the victim girl after returning from the shop of Manoj Kr. Ray at about 6 p.m. did not reach her home. The victim girl (P. W. 2) has deposed that while she returned home from the shop she met with the accused persons who compelled her to go with them to the ground of M. E. School. Her deposition shows that she did not go

with the accused persons voluntarily. She was compelled to go with them and kept her till 11.30 p.m. So far taking her way from the road to the M. E School is concerned she has depicted the same thing before the Judicial Magistrate on the next day while her statement was recorded under section 164 Cr. P. C. She disclosed the same thing to the medial officer who examined her on the next day of the incident.

- **44.**So far taking the victim girl from road to the M. E. School is concerned all the material witnesses have supported the same. It appears that the accused persons forcefully compelled the victim to go with them to the ground of M. E. School and compelled to stay her up to 11.30 p.m. So, it is clear that the accused person abducted the victim girl as defined under section 362 IPC punishable under section 365 IPC
- **45.**In view of the above discussion and observation it is concluded that the prosecution has failed to establish the charges against the accused persons under section 376 IPC and section 6 of POCSO Act beyond all reasonable doubt. But able to establish the charge against them under section 365 IPC.
- **46.**So the accused persons are acquitted of the charges under section 376 IPC and section 6 of POCSO Act on benefit of doubt. But they are found guilty under section 365 IPC and hence they are convicted under said section.
- **47.**The accused persons/convicts abducted a young girl from road, kept her up to 11.30 p.m. and thereafter abandoned her in an isolated place. Their indecent act deserve no mercy. So, I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused persons/convicts.
- **48.**Heard accused persons/convicts on quantum of sentence.
- **49.** Also heard learned counsels appearing for the parties.
- **50.**Accused persons/convicts have stated that this was their first offence. They have prayed to excuse them as it was their first offence and they will not repeat such type of offence in future.
- **51.**Learned counsel for the prosecution has submitted that the accused persons/convicts should be given adequate punishment so that it becomes an example for the wrongdoer.

- **52.**On the other hand learned counsels for the defence have submitted that the accused persons are young boys just 24 and 26 years old. They are in judicial custody from the date of arrest; so, has prayed to deal with them leniently considering their young age.
- **53.** Prescribed punishment under section 365 IPC is imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
- **54.** The accused persons/convicts are young boys aged about 24 and 26 years and there is no criminal antecedent against them and they are in jail for about 13 months. Considering their young age and the fact not having criminal antecedent, it is decided to impose punishment already undergone in the jail during investigation and trial and fine which I think will meet the ends of justice.

ORDER

- **55.** The prosecution has failed to establish the charges against the accused persons Sahidur Ali Sheikh @ Saizul Haque and Sahjahan Ali @ Sahan Ali under sections 376 IPC and 6 of POCSO Act beyond all reasonable doubts. So, they are acquitted of the charges under section 376 IPC and section 6 of POCSO Act on benefit of doubt.
- **56.** The prosecution is able to establish the charge against the accused Sahidur Ali Sheikh @ Saizul Haque and Sahjahan Ali @ Sahan Ali under section 365 IPC beyond all reasonable doubt and accordingly they are convicted under said section and sentenced them to go simple imprisonment for thirteen months and also pay fine of Rs. 2,000/ (rupees two thousand) each in default simple imprisonment for another 1 (one) month.
- **57.** Fine amount, if realized, shall be given to the victim as compensation.
- **58.** The period underwent during investigation and trial shall be set off as per law.
- **59.** Destroy the seized articles mentioned in Ext. 4 after expiry of appeal or revision period.
- **60.** Furnish a free copy of the judgment and order to the accused persons/convicts as per provision of law.
- **61.**Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

62.If have considered the mental condition of the victim girl and of the view that the victim girl is entitled to get compensation under section 357-A Cr. P. C. So, District Legal Services Authority, Dhubri is asked to determine appropriate amount of compensation to the victim girl as per victim compensation scheme and pay the same as early as possible.

63. The bench assistant is directed to provide the name of the victim girl, her parents' name and address to the Secretary DLSA, Dhubri in a sealed envelope so that DLSA, Dhubri can communicate with the victim or her legal guardian.

64.Send a copy of this order to the Secretary DLSA, Dhubri for information and necessary action.

65.Given under my hand and seal of this Court this the, 3rd day of June 2019.

(D. Thakuria)
Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 62/2018

UNDER SECTIONS: 365/376 IPC READ WITH SECTIOM 6 OF THE POCSO ACT.

STATE OF ASSAM

VS.

SAHIDUR ALI SHEIKH & ANOTHER

<u>APPENDIX</u>

A. Prosecution exhibits:

Ext. 1 : Ejahar.

Ext. 2 : Statement of the victim u.s. 164 Cr. P. C.

Ext. 3 : Medical Report.

Ext. 4 & 6 : Seizure list.

Ext. 5 : Report on re-construction of crime scene.

Ext. 7 : Sketch map of place of occurrence.

Ext. 8 : Charge sheet.

Ext. 9 : Report of scientific officer.

Ext. 10 : Forwarding letter.

M. Ext. 1 : CD of reconstruction of crime scene.

M. Ext. 2 : Leggings.

M. Ext. 3 : Kurta.

M. Ext. 4 : Ash colour panty.

B. Defence Exhibits: Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Complainant,

P. W.2: Victim,

- P. W.3: Dr. Muskura Ahmed,
- P. W.4: Mother of the victim,
- P. W.5: Anil Adhikary,
- P. W.6: Binanda Ray,
- P. W.7: Kamleswar Ray,
- P. W.8: Manoj Kr. Ray,
- P. W.9: Sister of the complainant,
- P. W.10: Abhijit Ray,
- P. W.11: Hirak Ray,
- P. W.12: Sanjay Sarkar,
- P. W.13: Saiful Rahman,
- P. W.14: Safiqul Rahman,
- P. W.15: Jaharul Islam &
- P. W16: Renu Borah Handique.
- E. Defence Witness: Nil.
- F. Court Witness:
 - C. W. 1 Santa Karki Chetry.

(D. Thakuria)

Special Judge, Dhubri.