IN THE COURT OF THE SPECIAL JUDGE :: :: MORIGAON, ASSAM

Present: Sri S. K. Poddar, AJS

Sessions Judge cum Special Judge

Morigaon, Assam.

POCSO Case No. 13/2020 U/S 366/376 IPC r/w Section 6 of the POCSO Act.

State of Assam

-VS-

Md. Asif Ali

S/o Md. Akibot Ali

R/o Village- Borchukabaha

P.S. – Mikirbheta

District – Morigaon, Assam. Accused

Date of Charge : 04.02.2020.

Date of Evidence : 17.02.2020.

Date of Argument : 17.02.2020.

Date of Judgment : 17.02.2020.

Appearance for the Parties

Advocate for the State : Mr. A. Kalam, Ld. Special Public Prosecutor.

Advocate for the Accused : Mr. U. C. Roy, Ld. Advocate.

JUDGMENT

Prosecution case in brief is that on 18.12.2019, Musstt. H. Begum lodged an FIR before the Jaluguti PP under Mikirbheta Police Station alleging inter-alia that on the previous day i.e. on 17.12.2019, at about 8:00 PM, in her absence at the house the accused Md. Asif Ali kidnapped her minor daughter, the victim 'X' (name withheld) who was a student of Class-X. Subsequently, she came to learn that police had apprehended both the victim 'X' and the accused from somewhere.

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- On receipt of the FIR, GD entry was made vide Jaluguti PP GDE No. 338, dated 18.12.2019, and the same was forwarded to the Officer-in-Charge, Mikirbheta Police Station for registration of a case under proper sections of law. Accordingly, Mikirbheta PS Case No. 505/2019 u/s 363 IPC was registered and investigated into. During investigation, the victim was medically examined and statement of the victim was recorded u/s 164 Cr.P.C and on completion of investigation, the Investigating Officer (I/O) submitted charge sheet against the accused Md. Asif Ali for trial u/s 366(A) IPC r/w Section 4 of the POCSO Act, 2012.
- It may be mentioned herein that on the next day of the incident i.e. on 19.12.2019, the accused was arrested and upon his production before the Court he was remanded to judicial custody. On 04.02.2020, prayer for bail of the accused was made but the same was rejected.
- **4.** On 04.02.2020, charge sheet was laid before this Court and on the same day charges u/s 366/376 IPC r/w Section 6 of the POCSO Act, 2012 were framed and explained to the accused to which he pleaded not guilty.
- During trial, prosecution side examined two witnesses including the informant and the victim only. Considering the nature of the evidence of PW 1 and 2, further evidence is closed and examination of accused u/s 313 Cr.P.C is dispenses with and I proposed to dispose the case by using powers u/s 232 Cr.P.C. without calling the accused to enter into defence.
- I have heard argument of Id. Special P.P. Mr. A. Kalam and Mr. U. C. Roy, learned defence Counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE:

- **7.** (I) Whether on 17.12.2019, the accused has kidnapped the victim? If so what was the intention of the accused behind the kidnap?
 - (II) Whether on 17.12.2019, victim 'X' was subjected to aggravated penetrative sexual assault/rape by the accused?

DISCUSSION, DECISION AND REASONS THEREOF

- 8. PW-1, Musstt. Hajera Begum, the mother of the victim as well as the informant has deposed in her evidence that accused at the time of incident, victim was aged about 17 years. Presently she is appearing in Class - X final exams. On 17.12.2019, at evening hours on returning home from the residence of her sister, she found her daughter missing from the house. During search, on the next day morning, Jaluguti PP police informed her over phone that they have apprehended accused Asif with her daughter and kept them at Jaluguti PP. On knowing this, she had filed one written FIR. She exhibited the FIR vide Ext. 1 and her signature thereon vide Ext. 1(i). Police took her daughter for medical examination and also brought her to court for recording her statement. At court, on meeting her daughter, the victim 'X' told her that having love affairs with accused Asif, she eloped with him and where they went to take shelter, the said family members informed police. Police recovered them at night and kept at police station. Police interrogated her. In her crossexamination, PW 1 stated that she lodged the FIR on asking by police. She admitted that she had not seen the accused in taking away her daughter. She further stated that as the victim 'X' left the house without informing her, she lodged this FIR. Accused could not keep the victim 'X' in any house as police apprehended them. She has no grievances against the accused and she has no objection in acquittal of the accused.
- PW-2, the victim deposed in her evidence that her date of birth is 16.03.2002 and presently, she is appearing in class X final exams. She stated that on 17.12.2019, at about 7 pm, while she was alone in the house, she called the accused Asif to her residence and came out of the house for visit. The accused took her to the house of his sister at Rahdhala, but the said family members informed the matter to police and Jaluguri PP police personals bring her and accused Asif to police station. Thereafter police informed her mother who came to police station on the next day morning and filed the instant case. Police took her for medical examination and also brought her to court for recording her statement. Exbt. 2 is her statement given u/s 164 Cr.P.C. In her

cross-examination, she stated that she went with the accused on her own for visit to his relative. The accused did not use force on her for going with him. As her mother was not present in the house, she could not inform her about her going with the accused. She also stated that at police station, her mother scolded her and she gave her statement as tutored by her mother and presently, they have compromised the matter with the accused. Accused did not misbehave her.

- **10.** On the above evidence on record, let me decide the points formulated. So far age of the victim is concerned the victim and the informant claimed that at the time of incident, the victim was aged about 17 years. Victim in her evidence claimed that her date of birth is 16.03.2002. This date of incident is 17.12.2019. Thus it appears that on the date of occurrence, victim was aged about 17 years 9 months. This fact of age of the victim remained unrebutted during cross-examination by defence.
- 11. Now coming on the allegation of kidnap, from the evidence of the PW-2 the victim, it appears that she clearly stated that she had love affairs with the accused and on 17.12.2019, at about 7 pm, while she was alone in the house, she called the accused Asif to her residence and came out of the house for visit. In her cross examination, the victim admitted that she went with the accused on her own for visit to his relative. The accused did not use force on her for going with him. Accused did not misbehave her. PW 1, the informant has corroborated the above aspect of going voluntarily. Under these facts and circumstances, the point to be determined is whether taking a minor girl without consent of her parents can be an offence by the accused. Let me look at the law in this aspect.
- **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. 361 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 Himachal Pradesh High Court in the reported case of Khyali Ram Vs. State of Himachal Pradesh [1979 Cri. L. J 620], held as follows:-
 - 10. "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. In my opinion, the ratio of the Supreme Court decision in S. Varadarajan v. State of Madras 1965 CriLJ 33 is attracted in the instant case. It will be difficult to say that the accused had taken or enticed Ram Pyari and as such the offence under Section 361 was not formulated."
- **14.** Hon'ble Supreme Court of India in the reported case Shyam and another vs. State of Maharashtra [AIR 1995 SC 2169] has held that
 - 11. "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 quardianship of her mother."

- 15. Considering the above ratios in mind, if we turned to the case in hand, as discussed earlier, it appears that there is nothing in the evidence of PW-1 and PW-2 against the accused for the alleged offence of kidnapping. In the instant case, ingredient of offence u/s 366 IPC is totally missing.
- **16.** On the other charges regarding commission of rape or penetrative sexual assault, from the evidence of PW-2, the victim, it reveals that she has clearly stated that accused Asif Ali did not misbehave her and at police station her mother scolded her and she gave her statement as tutored by her mother. She also stated that accused failed to keep her at house and police brought them to Jaluguti PP on the same night.
- **17.** From the above evidence as discussed, it is clear that there was no material whatsoever regarding kidnapping or commission of penetrative sexual assault by the accused upon the victim 'X'.
- 18. Considering above discussion, I am of the opinion that prosecution has failed to prove the ingredients of charge U/S 366/376 IPC and Section 6 of the POCSO Act against the accused Md. Asif Ali. As such, accused Md. Asif Ali is acquitted from the charges U/S 366/376 IPC and Section 6 of POCSO Act, 2012 and set at liberty forthwith.
- 19. In view of the provisions of section 437A Cr.P.C and following the law laid down by Hon'ble Gauhati High Court in Abdul Malek @ Malek Ali –vs-State of Assam [2018 (5) GLT 272], accused Sri Bhagirath Nath @ Bhagi Nath be released forthwith from Jail custody on execution of PR Bond of Rs. 5,000/only with a condition that he shall appear before appellate court, if so required. This Bond shall remain in force for six months from the date of execution.

- **20.** Considering the nature 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, Morigaon 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, 17^{th} day of February, 2020 at Morigaon.

Special Judge, Morigaon, Assam