IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 47 of 2016 (Arising out of Barpeta P.S. Case No.1826/2016) U/S 366-A IPC R/W Section 4 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on:- 06.04.2017

State of Assam

- Vs -

Mahibul Hoque.....Accused.

Date of Recording Evidence on - 09.05.2017, 21.09.2017, 12.03.2018,

24.04.201801.11.201804.12.2018,

Date of Hearing Argument on - 25.02.2019

Date of Delivering the Judgment on - 07.03.2019

Appearance:

Advocate for the State------Mrs. P. Das, Ld. Addl. P.P. Advocate for the Accused------Mr. N.M.H. Rahman, Ld. Advocate.

JUDGMENT

- 1. The prosecution case, in brief, is that on 01.10.2016, one Golap Hussain lodged an ejahar in Barpeta police station alleging inter-alia that his minor daughter aged about 17 years was allegedly kidnapped by accused persons named in the FIR on 30.09.2016 at about 5 am in the morning while she was cleaning the courtyard. In the said process, accused No.2 rendered full assistance to accused. It is alleged that accused No.1 also caused bite injury on her cheek, breast and back etc. Hence the case.
- 2. Receiving the information, Barpeta police station registered a case being Barpeta PS Case No.1826/16 u/s 366-A/323/34 IPC and section 4 of POCSO Act and took up investigation of the case.
- 3. During the course of investigation, police visited the place of occurrence, recorded the statement of the witnesses including the victim girl and thereafter, victim girl was also produced in court for recording her statement u/s 164 Cr.P.C. before Magistrate. The victim was also sent for medical examination.
- 4. During the course of investigation, police also arrested the accused persons and later on, on conclusion of investigation finally laid the charge sheet against

accused Mahibul Hoque only u/s 366-A IPC and section 4 of POCSO Act with a view to stand trial.

- 5. During the course of time, when accused entered his appearance in court and after hearing the learned counsel appearing for the state as well as accused at length the then Special Judge vide order dated 06.04.2017 having found a primafacie case framed charges u/s 366-A IPC and section 4 of POCSO Act, 2012 against accused person. The particulars of the offences on being read over and explained accused pleaded not guilty and claimed trial.
- 6. During the course of trial, the prosecution in order to substantiate the case examined as many as 11 witnesses namely- doctor Mamata Devi as PW-1, Golap Hussain as PW-2, victim girl (X) as PW-3, Guljar Hussain PW-4,Md. Sukur Mamud as PW-5, Sirajul Hoque as PW-6, Mariyam Nessa as PW-7, Hasim Ali as PW-8, Siddique Ali Ahmed as PW-9, Osman Ali as PW-10 and Abul Hussain as PW-11 respectively.
- 7. Concluding the prosecution evidence, accused is examined u/s 313 Cr.P.C. However, accused denied the prosecution evidence as false and concocted. Nevertheless, on being asked accused declined to adduce defence evidence. His plea is total denial of the prosecution case.

8. Now point for determination ;-

- 1. Whether on 30.09.2016 at about 5 am accused kidnapped the victim girl (herein after referred as X) with intent that she might be compelled to marry against her will or knowing it to be likely that she will be seduced to illicit intercourse by means of criminal intimidation or by any other means to go from her residence to another place as alleged?
- 2. Whether on the same date and subsequent thereto accused with intent committed penetrative sexual assault on the victim girl as alleged?

9. **Discussion, Decision and reasons for such decision** :-

I have heard the learned lawyers appearing for both sides and also carefully scanned the prosecution evidence available on r ecord.

10. The learned Addl. P.P. by drawing the attention of the court to the evidence of prosecution witnesses particularly the evidence of PW-2, the informant, PW-3, the victim girl, PW-4, PW-5 and PW-7 submitted that the fact of committing the offence of kidnapping by the present accused and having physical relation with the girl by force is well established. The version of the victim girl is found most genuine and trustworthy. Her evidence has been fully corroborated by the evidence of other prosecution witnesses in material particular. Therefore, the learned Addl. P.P. vehemently contended that it is a fit case for recording judgment of conviction against accused u/s 366-A IPC as well as Section 4 of POCSO Act, 2012. According to learned Addl. P.P. the victim was minor on the date of commission of the offence. Therefore, it is a fit case where conviction can be recorded for the aforesaid offences.

- 11. Ons the other hand, the learned defence counsel appearing for the accused arduously contended that the ingredients of offence u/s 366-A IPC and also section 4 of POCSO Act has not been established in the instant case for sustaining conviction against the accused person. The learned counsel contended that the age of the victim on the date of incident has not been established by the prosecution. Moreover, the victim in her evidence herself admitted that she was in love affairs with accused so she voluntarily proceeding with accused cannot be ruled out. Moreover, the alleged incident of kidnapping took place in the morning at 5 am while she was allegedly cleaning the courtyard.
- 12. The learned counsel contended that in such a backdrop, victim girl ought have shouted while accused tried to kidnap her and her family members could well prevent the accused from taking her away. However, there is no evidence in the mouth of the victim girl that at the time of taking her away by accused person she made any hue and cry which can be heard by others. Therefore, the learned defence counsel contended that in all respect, the prosecution miserably failed to establish that the accused committed the offences u/s 366-A IPC and Section 4 of POCSO Act. Hence the counsel submits that accused deserve to be acquitted.
- 13. Having heard the rival arguments of the learned counsel, this court is forced to read the evidence of prosecution witnesses between the lines for arriving at a just decision in the case.
- 14. On perusal of evidence of PW-1 doctor Mamata Devi, who attended the victim on 03.10.2016 it is seen that she did not find any spermatozoa on vaginal smear examination. No sign of recent sexual intercourse was also found. No evidence of any violence mark on her person. No foreign particls like blood, hair, semen etc were found on her person. The girl was also advised X-ray examination but she did not received the X-ray report for which she could not ascertain the exact age of the victim girl.
- 15. PW-2 is Golap Hussain, the informant, who is the father of the alleged victim girl. According to him, about one year back his daughter was kidnapped by accused in a bike while she was cleaning the courtyard and took her to the "Rash Mandir" near Howly and then took her to his house. Later on, he found his daughter in Simlaguri police out post and took her back to his residence. Ext.2 is the FIR and Ext.2(1) is his signature. According to him the age of his daughter at the time of incident was 2 months less than 18 years of age but he cannot say her date of birth. He has six daughters. He got up from sleep at 7 am but do not know when other family members got up from their sleep. He did not hear any hue and cry and his other daughters and wife also did not make any hue and cry. When he got up at 7 am his wife told him that the victim is not in the house she might have gone somewhere else. But the O/C Simlaguri out post informed him over phone that his daughter was recovered from Kawarpara village. He did not ask anything to the victim girl. It is also evident from cross examination that there were residence of people behind the "Rash Temple" where residence several people exist but none of the person from that locality were made

witnesses. He also did not mention in the FIR that victim told him about the incident.

- 16. PW-3 is the alleged victim, who deposed that on 30.09.2016 at about 5 am while she was cleaning the courtyard accused along with another boy came in a motorcycle and took her to the "Rash Temple" at Howly where accused committed rape on her. Then accused Mahibul took her to his residence but his parents assaulted her and got her out from their residence. Later on, her father recovered her from the police station. She also stated that her statement was recorded before Magistrate u/s 164 Cr.P.C. Ext.4 is the said statement and Ext.4(1) and 4(2) are her signatures.
- 17. In her cross examination the girl however, deposed that when accused took her in the bike she shouted but none came forward to rescue her. Though she stated that she do not love him but at one point she stated that she want to live with accused as he took her. She also stated that she desires to live with accused by hurt but accused and his first wife do not want to give her the dignity of wife so finding no way out she filed the case.
- 18. The evidence of PW-4 Guljar Hussain is hearsay. He had not seen the girl taking away by accused. Later on, heard it from others that she was taken by accused.
- 19. In his cross examination he stated that the victim is his nephew and stayed in the same house but he had not heard any hue and cry on the date of incident. He also do not hear any sound of motorcycle coming and going. He told the neigbours that his nephew was missing. Later on, she was recovered from Simlaguri police station and thereafter, the victim filed the case.
- 20. PW-5 Md. Sulur Mamud deposed that hearing hue and cry he went to the field near the L.P. School and saw a gathering, asking questions to the girl then she told that she love the accused person.
- 21. In his cross examination also he stated that the girl told that accused love her so she want to go with him.
- 22. The evidence of PW-6 Sirajul Haque also depsoed that about one year back at about 9 to 9:30 am the victim girl entered into the house of accused but one Akkash prevented her then villagers gathered and took her to the police station.
- 23. PW-7 Mariyam Nessa deposed that in the year 2016 at about 5 am while she went to the well nearby her house, she saw the victim girl cleaning the courtyard. Then she heard a sound of the girl and saw, she was taken away by two boys in the bike. Thereafter, she informed the matter to her husband. Later on, it is learnt that she was in the Simlaguri out post.
- 24. In her cross examination she stated that her husband took the girl from Simlaguri out post after giving under taking in paper.
- 25. PW-8 Hasim Ali, the investigating officer. According to him, based on information a case was registered and he was entrusted to investigate the case. Accordingly, he did the investigation, recorded the statement of the witnesses including the statement of the victim. She was also sent for medical examination and finally having found a case charge sheet has been filed against accused u/s 366-A IPC

and Section 4 of POCSO Act.

- 26. PW-9 Siddique Ali Ahmed, the police officer who made the G.D. Entry when the girl was found moving on the road. Ext.8, 9 and 10 are extract copies of G.D. Entry and Ext.8(1), 9(1) and 10(1) are his signatures.
- 27. However, in his cross examination he stated that in the G.D. Entry No.494, 495 and 496 there was no mention of kidnapping of the girl by accused.
- 28. The evidence of PW-10 Osman Ali and PW-11 Abul Hussain are in consequential.
- 29. After careful assessment of the entire prosecution evidence available on record, it is seen that the prosecution failed to prove the actual age of the girl on the date of commission of the offence. The birth certificate has not been proved in court. The medical officer who advised X-ray also could not ascertain the age of the girl due to non submission of X-ray report.
- The another important fact is that there is no credible evidence to show that the girl was induced or forcefully taken away by accused with a view to seduced her with another person as well as with the accused person. From the very version of the victim girl it is crystal clear that she voluntarily went with the accused without any force, pressure, threat etc. She was missing in the morning hours and at such time normally people move around in the village area for walking as well as for the purpose of cultivation. It is surprising that none of the person hear the shout or appeal of the girl to save her from the accused person. By her own version she never tried to escape from the cuddle of the accused person. Rather, from her cross examination it is evident that she willingly stayed with the accused after she went with him on her own but she was forced to file the case only because of the fact that accused and his first wife did not recognize her marital status. When this court found no such elements of the offence u/s 366-A IPC the ingredients of the offence u/s 4 of POCSO Act also does not attract as the girl voluntarily consented to sexual intercourse with accused without any resistance as the medical officer (PW-1) on examination found no injury on her private part. Therefore, what had happened appears to have been with the full consent and agreement of the girl. So, in the absence of any concrete prove as to her age on the date of commission of the offences, no inference can be drawn that the girl was minor on the date of incident. In her statement before Magistrate u/s 164 Cr.P.C. on 03.10.2016 she stated her age to be 17 years and in court she stated her age to be 18 years. Therefore, she appears to be major.
- 31. In view of the above discussion and reason, this court found force in the contention of the learned counsel appearing for the accused that prosecution has miserably failed to substantiate the offences against accused u/s 366-A IPC and Section 4 of POCSO Act for sustaining conviction.
- 32. In the result, this court has no option but to acquit accused Mahihul Hoque from the alleged offences u/s 366-A IPC and Section 4 of POSCO Act, on the ground of benefit of doubt and set him at liberty forthwith.

- 33. The term of bail bond of accused person is extended for a period of 6 (six) months from to-day as provided U/S 437(A) Cr.P.C.
- 34. Let a copy of the judgment be sent to the learned District Magistrate, Barpeta for his information as provided in section 365 Cr.P.C.
- 35. Given under my hand and seal of this Court on this 7th day of March, 2019, at Barpeta.

Dictated & Corrected my me

Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta

APPENDIX

1. The prosecution has examined the following 11 nos. of witnesses :-

```
PW-1 = is doctor Mamata Devi, M/O.
```

PW-2 = is Golap Hussain, the informant.

PW-3 = is victim (X).

PW-4 = is Guljar Hussain.

PW-5 = is Md. Sukur Mamud.

PW-6 = is Sirajul Haque.

PW-7 = is Mariyam Nessa.

PW-8 = is Hasim Ali the S/I.

PW-9 = is Siddique Ali Ahmed, the I/O.

PW-10 = is Osman Ali.

PW-11 = is Abul Hussain.

2. The prosecution has exhibited following document :-

Ext.1 = is the medical report.

Ext 1(1) = is the signatures of doctor Mamata Devi.

Ext.2 = is the FIR.

Ext.2(1) & 2(2) = are the signature of informant Golap Hussain.

Ext.3 = is the petition.

Ext.3(1) = is the signature of Golap Hussain.

Ext.4 = is the statement of victim u/s 164 Cr.P.C.

Ext.4(1) & 4(2)= are the signature of victim.

Ext.5= is the sketch map

Ext.5(1) = is the signature of S/I Hasim Ali.

Ext.6 = is the seizure list.

Ext.6(1) = is the signature of Hasim Ali, the S/I.

Ext.7= is the charge sheet.

Ext.7(1)= is the signature of S/I Hasim Ali.

Sd/-

(Sri C.B. Gogoi) Special Judge, Barpeta.