HEADING OF JUDGEMENT IN SPECIAL CASES:

DISTRICT: DHUBRI.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 26/2016
UNDER SECTIONS: 366-A IPC
READ WITH SECTION 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

MANIK SHEIKH @ MOHIDUL ISLAM

PRESENT:- DIPAK THAKURIA,

SPECIAL JUDGE,

DHUBRI.

APPEARANCES:-

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
E. AHMED, LEGAL-AID-COUNSELFOR THE ACCUSED.

DATE(S) OF EVIDENCE:- 18-08-2017, 26-04-2018, 24-05-2018, 07-06-2018, 21-06-2018.

DATE OF ARGUMENT:- 02-08-2018.

DATE OF JUDGMENT :- 16-08-2018.

<u>JUDGEMENT</u>

1. Accused Manik Sheikh @ Mahidul Islam stands trial for the offences punishable under section 366-A IPC read with section 4 of the POCSO Act for allegedly kidnapping the minor daughter of the complainant and also committing penetrative sexual assault to her on 17-04-2016 at about 7 p.m. at village Baniamari under Golokganj police station.

- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 18-04-2016 the complainant filed a written ejahar before the Officer-in-charge of Golokganj police station with an allegation that on previous night i.e. 17-04-2016 at about 7 p.m. taking the advantage of his absence from his house the accused Manik Sheikh and one Rahidul Haque kidnapped his 16 year old daughter. He searched his daughter but could not trace her out. He suspected that his daughter would be handed over to racket of woman trader.
- **3.** After receiving the ejahar, O. C. Golokganj police station registered a case as Golokganj P. S. Case No. 278/2016 under section 366-A/34 IPC. Subsequently section 4 of POCSO Act was added.
- **4.** The investigating officer arrested the accused and produced him before the Court and remanded to judicial custody, recorded the statements of witnesses under section 161 Cr. P. C. and statement of the victim was also recorded under section 164 Cr. P. C. and submitted charge sheet against the accused person to prosecute him under section 366-A IPC read with section 4 of POCSO Act.
- **5.** During investigation the accused was granted bail.
- **6.** After taking the cognizance of the case, process was issued to accused. Accused appeared and allowed him to remain on previous bail. Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary one of my learned predecessors was pleased to frame formal charges against the accused under sections 366-A IPC read with section 4 of POCSO Act. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried.
- **7.** During trial the accused defaulted. Ultimately he was arrested and produced under the strength of NBW/A and remanded to hajot. Advocate Ejaj Ahmed has been appointed as legal-aid-counsel to defend the accused.
- **8.** The prosecution examined ten witnesses including the medical and investigating officer and closed the evidence.

- **9.** After completion of the prosecution evidence, the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.
- **10.**Heard learned counsels appearing for the parties and perused the evidence on record.

FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 17-04-2016 at about 7 p.m. at village Baniamari under Golokganj police station kidnapped the minor daughter of the complainant with the intent to do illicit intercourse with her and thereby accused is liable to be punished under section 366-A IPC?

Whether the accused on the same day time and place committed penetrative sexual assault to the minor daughter of the complainant and thereby accused is liable to be punished under section 4 of the POCSO Act?

DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

- **11.** As stated earlier the prosecution has examined altogether ten witnesses in order to establish the charges framed against the accused. Among the prosecution witnesses P. W. 1 is the complainant and the father of the alleged victim whom the prosecution has examined as P. W. 2. The prosecution has examined the wife, son and brother of the complainant as P. W. 4, P. W. 5 and P. W. 7 respectively. P. W. 3 Nur Islam, P. W. 6 Abdul Kalam and P. W. 8 Insan Ali are independent witnesses. P. W. 9 Muskura Ahmed is the medical officer and P. W. 10 Abdus Sabur is the investigating officer.
- **12.** The defence examined none. Plea of the defence is total denial of the case.
- **13.**From the evidence of the complainant (P.W. 1) and his wife P. W. 4 it appears that on the day of the alleged incident their daughter, the alleged victim, was 16 year old. The alleged victim (P. W. 2) has also deposed that at the time of the incident she was

studying at Class X. Dr. Muskura Ahmed (P. W. 9) has deposed that as per radiological report the age of the alleged victim was 16 to 17 year. She has exhibited the radiological report of the victim prepared by Dr. Md. Laskar Ali and marked the same as Ext. 5. She has exhibited the signature of the radiologist as Ext. 5 (1). She is acquainted with the signature of the radiologist.

- **14.**So far age of the alleged victim is concerned, after perusal the oral testimonies of the parents of the alleged victim and the report of radiologist there is no iota of doubt that at the time of the alleged incident the alleged victim was a minor girl below the age of 18.
- **15.** The ejahar which the prosecution has exhibited and marked as Ext. 1, it appears that the complainant alleged that his minor daughter was kidnapped by the accused and one Rahidul Haque. The investigating officer after investigation submitted charge sheet only against accused Manik Sheikh. The complainant in his deposition has deposed that on 17-04-2016 at about 7 p.m. his daughter was missing from his house. He searched his daughter; but did not find her. So he filed the ejahar. He has authenticated his signature in the ejahar and marked the same as Ext. 1 (1). He has further deposed that police recovered his daughter along with the accused. P. W. 4, the wife of the complainant has corroborated the oral testimony of her husband. P. W. 4 has further deposed that her daughter told her that accused Manik Sheikh kidnapped her and took her to Guwahati and kept her four days in Guwahati and thereafter she was brought to Golokganj and kept her in the house of a relative of the accused for three days. Ultimately she was recovered by police. The defence cross-examined both P. W. 1 and P. W. 4 to test veracity of their oral testimonies. The complainant has admitted that he did not know from where police recovered his daughter. He has denied the suggestion of the defence that police did not recover his daughter from the custody of the accused. P. W. 4 has simply admitted that she had not seen who kidnapped her daughter. She has denied the suggestion of the defence that she did not disclose before I. O. that her daughter disclosed that the accused kidnapped her and kept her in Guwahati and Golokganj. P. W. 5, the brother of the alleged victim has deposed that on 17-04-2016 his sister was missing. His father lodged the ejahar and police recovered her from Golokganj. Police seized birth certificate of his sister vide Ext. 3 seizure list and he put his signature as Seizure witness and authenticated his signature thereon as Ext. 3 (1).
- 16. The independent witnesses P. W. 3 Nur Islam and P. W. 6 Abdul Kalam have deposed

that they heard about missing of the daughter of the complainant and she was subsequently recovered by police. P. W. 8 Insan Ali who is a tempo driver by profession has deposed that about three years back the accused and a girl were passengers of his tempo. They boarded at Balajan and he dropped them at Gauripur. In cross, he has deposed that there were other passengers in his tempo and he had not seen any abnormality.

- **17.**P. W. 7 is the uncle of the alleged victim. He has deposed that in the year 2016 the victim was missing and subsequently she was recovered. She told him that one boy named Manik kidnapped her. In cross-examination he has denied certain suggestions of the defence.
- **18.**P. W. 2 being the alleged victim is the vital witness for the prosecution. Her deposition shows that on the day of the incident at about 7/8 p.m. she came to the road in front of her house to take fresh air. Then brother of the accused came in a tempo who told her that the accused want to talk to her and asked her to board in the tempo. Then she went with him. The accused took her by the tempo to Taraghat and at Taraghat put her in a night super bus and took her to the house of his maternal uncle. The accused committed rape on her and confined her for two days in the house of his maternal uncle. On third night police came and rescued her. Her statement was recorded by Judicial Magistrate which she exhibited as Ext. 2 and authenticated her signature as Ext. 2 (1). In cross-examination she has denied the suggestion of the defence that she did not disclose before the Judicial Magistrate that the accused committed rape on her. The accused threatened her with dire consequences if she did not go with him and showed a dagger and pushed her into the night super bus. She has denied the suggestion of the defence that there was land dispute between her father and the accused.
- **19.** The alleged victim was medically examined by the P. W. 9 Dr. Muskura Ahmed on 23-04-2016 at Dhubri Health and Maternity Center. According to the medical officer the victim had gone with a boy and got register their marriage. Then parents caught them and brought to their house. On examination she found the victim was normal, find no any mark of injury on her body and also not find any evidence of rape at the time of examination. She has exhibited her report and marked the same as Ext. 4 and her signature as Ext. 4 (1).
- 20. The case was investigated by P. W. 10 Abdus Sabur. His deposition shows that on 18-

04-2016 the complainant lodged the ejahar at Golokganj police station. A case under section 366-A/34 IPC was registered and he was entrusted to investigate the case. He inspected the place of occurrence and prepared a sketch map of the place of occurrence and also seized the birth certificate of the victim girl. On 23-04-2016 the victim was recovered from Gauripur bus stand with accused Manik Sheikh. He arrested the accused and produced him in the Court. The statement of the victim was recorded through Judicial Magistrate and he prayed the Court for adding section 4 of POCSO Act which was granted. After completing the investigation he submitted the charge sheet against the accused under section 366-A IPC read with section 4 of POCSO Act. He has exhibited the seizure list as Ext. 3, sketch map of the place of occurrence as Ext. 6 and charge sheet as Ext. 7. Ext. 3 (2), Ext. 6 (1) and Ext. 7 (1) are his signatures. In crossexamination he has admitted that the mother of the victim did not tell him that her daughter told her that accused took her to Guwahati, kept there for four days and thereafter she was taken to Golokganj and kept her for three days in the house of a relative for three days. The uncle of the victim has also not disclosed before him that she told him that one boy named Manik kidnapped her.

- **21.** During argument learned Special Public Prosecutor has submitted that the victim girl who was a minor in clear terms has deposed that the accused committed rape on her. From the evidence on record it clears that the victim was taken by accused, kept her in various place and ultimately the investigating officer found her with the accused. Her oral testimony is sufficient to record conviction of the accused under framed charge.
- **22.**On the other hand learned legal aid counsel has submitted that from the evidence on record it transpires that the victim at her own will went with the accused. Before the medical officer the victim disclosed that she solemnized marriage with the accused. The medical officer detected no evidence of rape while she was examined. The prosecution has failed to establish the charge against the accused beyond all reasonable doubt. So, the accused deserves benefit of doubt. Hence, has prayed to acquit the accused.
- 23. Now let us appreciate the evidence on record. The contents of the ejahar shows that on 17-04-2016 at about 7 p.m. the alleged victim was missing from the house of the complainant and on the next day he informed the matter to police. In the ejahar the complainant mentioned the name of the accused and his brother. From the oral testimony of the victim (P. W. 2) it appears that on the day of the incident the brother of the accused met her and told her that his brother (the accused) intended to talk to her.

So she went with the brother of the accused and met with the accused who initially took her to Taraghat and thereafter to Guwahati in a night super bus. According to learned legal aid counsel the alleged victim at her own will went with the accused. So, the question of inducement from the accused does not arise. The victim in her examinationin-chief has not disclosed anything that the accused by force took her to Guwahati. But in cross-examination she has deposed that the accused threatened her to face dire consequences if she did not go with him and showing a dagger pushed her into a night super bus. The victim, at the time of incident was a minor girl. Though she met the accused voluntarily; but in the bus stand the accused forced her to board into the night super bus. So, her visit to Guwahati by night super bus with the accused cannot be treated as voluntary. To constitute an offence punishable under section 366-A IPC the prosecution has to prove that the victim is a girl of below 18, the accused induced the victim to go from one place to another or to do an act and the inducement was made with the intent or knowledge it to be likely that the girl might be forced or seduced to illicit sexual intercourse with another male person. In the case in hand, from the evidence on record it transpires that the alleged victim was a minor girl below the age of 18 years and the accused compelled her to go from her house to another place. But the intention of the accused was not to hand over the girl to another person to do sexual intercourse with her. The main ingredient that the girl would be forced or seduced to illicit intercourse with someone other than himself is absent. So, I have no hesitation to hold that the prosecution has failed to establish the charge against the accused under section 366-A IPC. But at the same time it should be kept in mind whether any other offence attracts or not. As stated earlier that the alleged victim was a minor below the age of 18 years and the accused compelled her to go with him. Section 361 IPC defines kidnapping from lawful guardianship. As per section 361 IPC if the accused takes or entices away minor girl below the age of 18 without the consent of her guardian then it amounts to kidnap from lawful guardianship. In the case in hand the parents of the victim girl are her guardian and while the accused had taken away they were not aware about the incident. Without consent of the parents of the victim girl the accused compelled her to go with him from his house. So, there is no iota of doubt that accused kidnapped the minor girl, the victim, from her legal guardianship and the penal provision of kidnapping is under section 363 IPC. So, it is clear that the accused committed an offence punishable under section 363 IPC.

24. Now let us examine whether the accused committed penetrative sexual assault to the

- victim girl as defined under section 3 of the POCSO Act which is punishable under section 4 of the POCSO Act or not. As per section 3 of the POCSO Act if a person penetrates his penis, to any extent, into the vagina, mouth etc of a child he is said to commit the offence of penetrative sexual assault.
- 25. In the case in hand the victim is a child as defined under section 2 (1) (d) of the POCSO Act. It is established that the accused kidnapped her from her lawful guardianship and kept her with him till her recovery on 23-04-2016. So what had happened with her during this period, the victim girl is the best person to disclose the same. The victim (P. W. 2) in her deposition in clear terms has stated that the accused committed rape on her. It can easily be presumed that the victim being a girl of 16 or 17 year knows the meaning of word "rape." The defence cross-examined her and put a suggestion that she did not disclose before Magistrate that the accused committed rape on her which she denied. After recovery of the girl she was produced before the Judicial Magistrate for recording her statement under section 164 Cr. P. C. which the prosecution has exhibited through the P. W. 2 as Ext. 2. On perusal the statement of the victim girl recorded by the Judicial Magistrate it appears that she disclosed before the Magistrate that she and Mahidul i.e. accused established physical relation. If a girl below the age of 18 established physical relation of a person it amounts to rape as defined under section 375 of the IPC.
- **26.**Learned legal-aid-counsel has submitted that the medical officer while examine the victim could not detect any sign of rape. As the allegation of rape has not corroborated by medical officer; so, it will not be safe that the accused committed rape on her.
- **27.**The medical officer examined the victim on 23-04-2016 at about 12 noon. Her clinical opinion after examination of the victim is that there is no evidence of rape on the victim at the time of examination. From the report of the medical officer it is clear that on the day of examination i.e. 23-04-2016 she found no evidence of rape. But from the evidence on record it appears that the accused kidnapped the victim on 17-04-2016 and committed rape on her. As the victim was a minor girl at the time of the incident her consent was not material. If the accused sexually exploited the victim on 17-04-2016 or 18-04-2016; so it is natural that the medical officer could not detect anything as she examined her on 23-04-2016.
- **28.** The oral testimony of the victim girl so far allegation of committing rape on her by the

accused is found consistent. After her recovery she disclosed the fact to the Judicial Magistrate who recorded her statement under section 164 Cr. P. C. The circumstances that the accused kidnapped her and kept her several days with him and ultimately she was recovered from the clutch of the accused also go against the accused. So, I find no reason to disbelieve the evidence of the victim girl. As accused committed rape on her who is a minor girl; so, it can easily be concluded that the accused committed penetrative sexual assault to the victim as defined under section 3 of the POCSO Act and as such the accused is found guilty under section 4 of the POCSO Act.

- 29. In view of the above discussion and observation it is concluded that the prosecution is able to establish the offences against the accused under section 363 IPC and section 4 of POCSO Act beyond all reasonable doubts. Though the charge under section 363 IPC has not been framed; but there is no bar in holding the accused is guilty under said section vide provision of section 222 (2) Cr. P. C. So, it is held that the prosecution is able to establish the charge against the accused under section 363 IPC and 4 of POCSO Act beyond all reasonable doubt and accordingly the accused is held guilty under said sections and he is convicted accordingly.
- **30.** The offences committed by the accused/convict are simply condemnable. So, I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **31.**Heard accused/convict on quantum of sentence.
- **32.** Also heard learned counsels appearing for the parties.
- **33.**Accused/convict has stated that this was his first offence. He has prayed to excuse him as it was his first offence and he will not repeat such type of offence in future.
- **34.**Learned counsel for the prosecution has submitted that the accused/convict should be given adequate punishment so that it becomes an example for the wrongdoer.
- **35.**On the other hand learned legal aid counsel has submitted that the accused is a young boy; so, has prayed to deal with him leniently considering his young age.
- **36.** Prescribed punishment under section 363 IPC is imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. Prescribed punishment under section 4 of the POCSO Act is imprisonment of either description for a

term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

37. The accused/convict is a young person aged about 24 years and considering his age it is decided to impose minimum punishment prescribed by law.

ORDER

- **38.**The prosecution is able to establish the charge against the accused Manik Sheikh @ Mahidul Islam under section 363 IPC and section 4 of POCSO Act and accordingly he is convicted under said sections and sentenced him to go rigorous imprisonment for 3 (three) years and also pay fine of Rs. 5,000/ (rupees five thousand) in default rigorous imprisonment for 2 (two) months under section 363 IPC.
- **39.**The accused/convict is further sentenced to go rigorous imprisonment for 7 (seven) years and also pay fine of Rs. 10,000/ (rupees ten thousand) in default rigorous imprisonment for 3 (three) months under section 4 of POCSO Act.
- **40.** Both the sentences will run concurrently.
- **41.** Fine amount, if realized, shall be given to the victim as compensation.
- **42.** The period underwent during investigation and trial shall be set off as per law.
- **43.**Return the seized article to the person from whom it was seized after expiry of appeal period.
- **44.** Furnish a free copy of the judgment and order to the accused/convict as per provision of law.
- **45.**Furnish another copy of judgment and order to the District Magistrate, Dhubri for information and necessary action, if any, from his side.

Victim compensation.

46. The victim girl who was just 16 year old at the time of incident faced such a situation which cannot be explained and I am 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.

- **47.**The bench assistant is directed to provide the name of the victim girl, her father's 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.
- **48.**Send a copy of this judgment and order to the Secretary DLSA, Dhubri for information and necessary action.
- **49.**Given under my hand and seal of this Court this the, 16th day of August 2018

(D. Thakuria)
Special Judge, Dhubri.

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 26/2016

UNDER SECTIONS: 366-A IPC READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

MANIK SHEIKH

APPENDIX

A. Prosecution exhibits:

Ext. 1 : Ejahar.

Ext. 2 : Statement of the victim.

Ext. 3 : Seizure list.

Ext. 4 : Medical report.

Ext. 5 : Radiological report.

Ext. 6 : Sketch map of place of occurrence.

Ext. 7 : Charge sheet.

B. Defence Exhibits: Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Complainant,

P. W.2: Victim,

P. W.3: Nur Islam,

P. W.4: Mother of the victim,

P. W.5: Brother of the victim,

P. W.6: Abul Kalam,

P. W.7: Uncle of the victim,

P. W.8: Insan Ali,

P. W. 9: Dr. Muskura Ahmed &

P. W.10: Abdus Sabur.

E. Defence Witness: Nil.

F. Court Witness: Nil.

(D. Thakuria)

Special Judge, Dhubri