# IN THE COURT OF ADDL SPECIAL JUDGE ::KOKRAJHAR

Present :- Sri C. Chaturvedy,

### **SPECIAL CASE NO.25/2017**

U/S.366 IPC, R/W Sec.4/17 of POCSO Act

## STATE OF ASSAM

Vs

1.Md. Ayjal Sheikh S/O Sobed Ali village- Fakiragram Puran Bazar P.S.Fakiragram Dist. Kokrajhar

2. Md. Motleb Ali S/O. Md. Noskar Ali Village- Dhendhema P.S. Sapatgram District- Dhubri

...... Accused

## Appearance: -

Learned Counsel for the State Mr. Manjit Ghosh, Special P.P.

Learned Counsel for the defence Mr. S. Pahariya

Charge framed on 29.11.2018

Evidence recorded on 21.12.2018: 20.01.2019:

16.02.2019; 08.03.2019; 22.04.2019, 24.06.2019

Arguments heard on 09.09.2019

Judgment pronounced on 20.09.2019

### **JUDGMENT**

- 1. The case of the prosecution is that on 05.09.2017, xxx, mother of the victim, lodged a written FIR with the In-charge of Rupshi Police Out Post alleging that on 4.9.2017 the victim left the residence at 11 AM but since she did not return till evening an inquiry was made and it was found that the accused Ayjal Sk has abducted the victim.
- 2. The FIR was forwarded to Kazigaon Police Station and a case under Section 363/366 IPC was registered and investigated.
- 3. Upon completion of investigation, a charge sheet was laid for commission of offence U/S 4 of POCSO Act (Protection of Children from Sexual Offences Act, 2012) against the 2 accused persons. The case was later transferred to this Court for disposal.
- 4. The accused were summoned and on their appearance, copies of the relevant documents were furnished to them. After hearing both the sides, charges under Section 366 IPC read with Section 4 /17 of the POCSO Act were framed against the accused persons to which they pleaded not guilty and claimed trial.
- 5. In the course of trial, prosecution examined 9 witnesses. At the closure of prosecution evidence, the accused person were examined under Section 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

#### **POINTS FOR DETERMINATION:-**

- (i) Whether accused Ayzal kidnapped the victim, a minor girl, for the purpose of committing sexual intercourse?
- (ii) Whether accused Ayzal committed sexual intercourse with the victim?

(iii) Whether accused Motleb abetted in the commission of offences by accused Ayzal?

### **DECISION AND REASONS:**

### **SUMMARY OF EVIDENCE: -**

- 6. Pw 1 xxx, is the victim. She deposed that she knows the accused Ayjal Hoque. She narrated that accused Ayzal called her on her mobile phone and informed that Kamal Mahato, her brother, who lives in Gauripur, has called her to Gauripur hence, she was required to go to Gauripur. Pw 1, thereafter, came to Gauripur bus stand where the accused Ayzal was found in the bus stand. From Gauripur, the accused Ayzal took her to Bagribari. He thereafter took her to Golakganj at the residence of pw 1's paternal Aunt. Pw 1 deposed that she stayed in the residence of her paternal Aunt for one night. Accused also stayed in the same residence but in a different room. Thereafter, the accused took her to Fakiragram at his own residence. At Fakiragram, accused Ayzal kept her in the residence of his elder sister where the accused committed sexual intercourse with her. Thereafter, police personnel brought them to Kokrajhar police station and from Kokrajhar Police Station they were taken to Rupshi police out-post. At Rupshi police out-post, a policewoman beat her up and also beat up the accused Ayzal. Pw 1 also deposed that her statement was also recorded under Section 164 CrPC. Ext 1 is the statement under Section 164 CrPC.
- 7. In her cross examination, pw 1 deposed that there was a contruction work going on in the hospital for the last six months. Accused Ayzal was working as Mason in the hospital and that she came to know Ayzal at the hospital. Pw 1 admitted that accused Ayzal used to

call her on her mobile phone and that she had not disclosed to anyone that she used to talk to Ayzal. Pw 1 admitted that she did not state in her statement under Section 161 CrPC that accused Ayzal committed sexual intercourse with her. She also admitted that at her paternal Aunt's house, she identified accused Ayzal as her maternal cousin brother. Pw 1 also admitted that one lady police told her to give a statement in the Court that accused Ayzal committed sexual intercourse with her. Pw 1 also admitted that she did not state before the Magistrate under Section 164 CrPC that accused committed sexual intercourse with her at the residence of his elder sister at Fakiragram.

- 8. Pw 2 xxx, is the mother of the victim. She deposed that accused Ayzal kidnapped her daughter xxx. Accused had called her daughter to Gauripur informing that her brother has called her to Gauripur. In the evening hours when her daughter did not return home, she inquired about her whereabouts and came to know that accused Ayzal had kidnapped her daughter. In this regard, she lodged an FIR at Rupshi outpost. After two days, her daughter was recovered. Pw 2 also deposed that her daughter informed her that accused committed sexual intercourse with her.
- 9. In cross-examination, pw 2 deposed that she lodged the FIR on the day when her daughter went missing. She admitted that she did not inform the police that accused Ayzal called her daughter to Gauripur informing that her brother has called her to Gauripur. Pw 2 denied the suggestion that her daughter did not inform that accused Ayzal committed sexual intercourse with her.
- 10. Pw 3 Kamal Mahato is the brother of xxx, the victim. He deposed that on the day of occurrence he had gone to Siliguri in connection with

his works. In the evening hours, he received an information that his younger sister is missing. He returned to Gauripur and started searching for his sister in various places. On the following day, he informed the Rupshi police about the matter. Later, his sister was recovered by Police.

- 11. In cross-examination, pw 3 deposed that he had gone to Siliguri one day prior to the date when his sister went missing. Pw 3 admitted that his mother knew that he has gone to Siliguri. Pw 3 deposed that his sister also knew that he has gone to Siliguri.
- 12. PW4 Sri Dulal Mahato deposed that he came to know that Soma Mahato has eloped with a boy. He does not know anything else about the case.
- 13. PW5 Sri Subhash Sha deposed that the mother of the victim approached him and informed that her daughter is missing. After conducting inquires from the relative they could not find the victim. Thereafter, the mother of the victim lodged an FIR at Rupsi police Out Post. On the following day, police brought the victim and the accused Ayjal Hoque at Rupsi Police Out Post.
- 14. In cross examination, PW5 deposed that he personally does not know where had the victim had gone along-with the accused.
- 15. PW6, Sri Nikhil Mahato deposed that about one year back the mother of the victim approached him and informed that her daughter is missing. He advised her to lodge an FIR with the Rupshi Police Out Post and accordingly she lodged an FIR with the Rupshi Police Out Post. On the following day, police informed them that the victim girl and the boy, who took her, had been found. He along-with others went to the place

Rupshi Police Out Post and saw the victim girl and the accused present today (the witness pointed towards Ayjal Hoque).

- 16. PW7, Md. Sabed Ali deposed that he does not know the informant of this case. Accused Ayjal is his son. Accused Motleb is his son-in-law. He only knows that his son Ayjal and one girl eloped together but he does not know the name of the girl. He only know that the girl is from Rupsi.
- 17. PW8 Dr. Sushma Brahma deposed that she had examined the victim and her findings were as follows :

Vaginal Canal not easily admits two fingers.

Hymen ruptured.

Presence of injuries :- Abrasion seen on posterior vaginal wall.

Injury :- Multiple bruise seen left thigh.

Colour :- Radish blue.

Age of injury :- 12 to 36 hours.

Spermatozoa test :- No spermatozoa seen.

Opinion:-

After all clinical examination, vaginal smear and ossification test, the following points are noted.

The age of the girl is 16 years old but below 18 years.

Mark of injury found on her body and private parts.

She has been exposed to sexual intercourse within 36 hours.

- 18. In cross examination, PW8 deposed that she had not recorded the case history in Exhibit-2. She admitted that she had not found trace of semen on her examination. She deposed that the multiple bruise on the left thigh can also occur if a person is physically tortured.
- 19. PW9 Sri Ganesh Sarkar deposed that on 4.9.2017 he was posted as In-charge at Rupshi Police Out Post. The mother of the victim orally

informed that her daughter, xxx, had gone to Gauripur to visit her elder brother but she is missing and now she has learnt that her daughter has left with Ayjal Hoque of Puranbazar Fakiragram. This information was recorded vide G D Entry No.59 dated 4.9.2017. On receipt of this information, pw 9 went to Fakiragram at the residence of accused but did not find him. The father of accused told him that accused Ayjal Hoque might have gone to Goalpara at the residence of his elder sister. On the following day, he along-with the father of accused, went to Goalpara but the house of sister of accused was locked. While returning from Goalpara, pw 9 received a call from S.P. Kokrajhar, informing that accused is presently returning towards Fakiragram. Pw 9 then came to Fakiragram and found the accused and the victim at the residence of Motleb Ali, the brother-in-law of the accused. On 5.9.2017, Gauri Mahato lodged a written FIR. Exhibit-3 is the FIR received from Gauri Mahato. Pw 9 also deposed that he had also seized the School Leaving Certificate of the victim. Material Exhibit-1 is the School leaving certificate.

20. In cross examination, PW 9 deposed that he had not examined the Head master of JM Girls Institution which issued Material Exhibit-1. He also deposed that he has not seized the counter foil and Admission register of Material Exhibit-1. He admitted that in Material Exhibit-1 there is erasing marked against "SL Number". Pw 9 further deposed that he had not examined whether Material Exhibit-1 is an authentic document or not. Pw 9 admitted that the investigation started on the basis of G D Entry No. 59 dated 4.9.2017. He had examined the complainant and some other witnesses on the basis of GD Entry. He deposed that has not submitted extract copy of general diary entry on the basis of which he started the investigation of this case. The FIR on

5.9.2017 was the 2nd FIR. PW9 denied the suggestion that he had deposed falsely.

# **DECISION ON POINT No. (i) WITH REASONS: -**

- 21. Learned defence Counsel argued that the evidence on record establishes that the victim went with the accused on her own accord without any force or coercion by the accused. It has been further argued by the learned defence Counsel that there is no concrete proof that the victim was minor at the time of occurrence of alleged offence and that the evidence on the point of age of victim is not reliable. Thus, it is argued by the learned defence Counsel that the no case has been made against the accused Ayzal Hoque since the victim was apparently a major lady and that she went with the accused according to her free will.
- 22. Though with respect to the age of the victim some arguments have been made but such a plea was not taken during the cross examination of the material witnesses such as pw 1 and pw 2, the victim and her mother, respectively. The victim stated her age to be 18 years at the time of evidence, tendered in the year 2019, which would mean that in the year 2017 she was definitely less than 18 years of age. The learned defence Counsel has argued that M.Ext 1 is not an authentic document and its veracity has not been investigated into. However, M.Ext 1 is only a corroborative evidence to suggest that the victim had not attained 18 years of age at the time of occurrence. M.Ext 1 was issued in the year 2015, about 2 years prior to the occurrence. It appears that the plea as to consenting age of the victim was taken at the belated stage of trial and such a plea has not been probabilised by the defence. It is, therefore, held that the victim had not attained the age of consent at the time of occurrence of alleged offence.

- 23. The other arguments of the learned defence Counsel is that victim consented to her movement with the accused Ayzal Hoque hence the accused cannot be blamed for the elopement of the victim.
- 24. In State of Haryana v. Rajaram, (1973) 1 SCC 544, the Hon'ble Supreme Court considered the scope of Section 361 IPC and held that the object of this section seems as much to protect the minor children from being seduced for improper purpose as to protect the rights and privileges to guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words 'takes or entices any minor ... out of the keeping of the lawful guardian of such minor' in Section 361, are significant. The use of the word 'keeping' in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud, persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.
- 25. In *Rajaram* (supra), the Hon'ble Supreme Court also approved the ratio of certain English decisions in which it has been stated that

forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force, a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. 26. The Hon'ble Supreme Court in **Rajaram** (supra), held that the principles of English law same seems to be the position under Indian law. The expression used in Section 361 IPC is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361 IPC are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC. But if the guilty party has laid a foundation by inducement, allurement or threat, etc.

and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case.

27. In the present case, since the learned Counsel for the defence has argued that it was the voluntary act of the victim that she went with the accused. I have examined the evidence of victim and it is found that the fact that accused Ayzal took her to various places is not in dispute. Thus, even if the original flight of the victim from her home to Gauripur may not constitute enticement but the taking away of the victim to various place does attract the basic ingredients of the offence of kidnapping. Now, intention as envisaged under Section 366 IPC can be gathered from the circumstances. Accused Ayzal initially took the victim to Bogribari and from there to Golakgani. From Golakgani, the accused took the victim to his elder sister's house and stayed there at night. The planning of going to various places may be random but the intention is apparent that the accused wanted to have sexual relationship with the victim. In these circumstances, the offence of Section 366 IPC is clearly made out and the accused Ayzal is found to be guilty thereto.

The point No. (i) is decided in affirmative.

### **DECISION ON POINT No. (ii) WITH REASONS: -**

- 28. The learned defence Counsel vehemently argued that the allegation of sexual intercourse is an afterthought and the evidence of the pw 1 clearly reveals that she was beaten up by the police personnel to depose that accused Ayzal has committed sexual intercourse with her.
- 29. So far as the charge under Section 4 of the POCSO Act is concerned, it may be pointed that Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.
- 30. Along-side, Section 29 is the provision of Section 30 of the Act which provides for reverse burden enabling the Court to presume the existence of culpable mental state.
- 31. In Noor Aga v. State of Punjab, (2008) 16 SCC 417 it was held by the Hon'ble Supreme Court that the provision for reverse burden is not only provided for under the special Acts but also under the general statutes like the Penal Code. The Evidence Act provides for such a burden on an accused in certain matters, as, for example, under Sections 113-A and 113-B thereof. It further held that enforcement of law, on the one hand, and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens. The court must assess the importance of the right being limited to our

society and this must be weighed against the purpose of the limitation.

The purpose of the limitation is the reason for the law or conduct which limits the right.

- 32. The Hon'ble Supreme Court in *Noor Aga* (supra), added that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused.
- 33. It may be mentioned that pw 1 in her statement under Section 161 CrPC did not state anything about sexual intercourse but in her statement under Section 164 CrPC she has clearly mentioned that she had sexual intercourse with the accused Ayzal. Pw 1 also deposed in her evidence during trial that accused Ayzal committed sexual intercourse with her at Fakiragram. I have also through the medical evidence in this regard. Pw 8, the Medical Officer, in her deposition stated that she found mark of injury on her body and private parts. Pw 8 also opined that the victim has been exposed to sexual intercourse within 36 hours.
- 34. Ideally, an omission to state a material fact in the statement under Section 161 CrPC can be treated as contradiction but in the present case the victim is a child. The statement under Section 161 CrPC was given immediately after her production in the police station. As her evidence reveals, she was subjected to humiliation for eloping with a boy and bringing disrepute. She was also beaten up by a lady police

constable. Thus, in such traumatic circumstances, her statement under Section 161 CrPC cannot be treated as substratum of her case rather; her statement in the Court has to be taken on its face value in view of the provisions of Section 29 of the Act.

- 35. A reading of the evidence of pw 1 would clearly show that she had sexual intercourse with the accused though, it may also be added that pw 1 has deposed in a tenor which indicates that she did not resist the sexual intercourse with the accused.
- 36. Now, the cross-examination has not been able to impeach the testimony of pw 1 that willingly or unwillingly, accused did have sexual intercourse with the victim. The essence of offence under Section 3, punishable under Section 4 of the POCSO Act, does not lie in non-consensual acts, but sexual intercourse with a child, be it with consent or without consent. Section 3 of the POCSO Act is reproduced below;
  - **3. Penetrative sexual assault**.—A person is said to commit "penetrative sexual assault" if—
    - (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
    - (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
    - (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
    - (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

- 37. Thus, in view of Section 3 of the POCSO, if sexual intercourse is established it would be entirely the onus of the accused to probabilise, by convincing evidence, that he never had any sexual intercourse with the victim which, in the present case, accused Ayzal has been unable to probabilise.
- 38. In view of the above, accused Ayzal is found guilty of the offence under Section 4 of the POCSO Act and the point No. (ii) is decided in affirmative.

#### **DECISION ON POINT No. iii WITH REASONS: -**

39. The summary of evidence reproduced above would show that no evidence has been tendered against accused Motleb to suggest that he aided or abetted the commission of offences by accused Ayzal Hoque. The only reason that he was arraigned is because accused Ayzal was found in his residence. This alone will not constitute abetment unless there is evidence to show that he concealed accused Ayzal and the victim and facilitated the kidnapping of the victim. There being no evidence to suggest the role played by accused Motleb, he cannot be held guilty with the aid of Section 17 of the POCSO Act.

The point No. (iii) is decided in negative

#### **HEARING ON THE POINT OF SENTENCE: -**

- 40. I have heard accused Ayzal Hoque on the point of sentence and he submitted that he hails from a poor family and his prolonged detention in custody will ruin his family. He, thus, prays for leniency.
- 41. The evidence on record reveals that the movement of the victim with the accused Ayzal and her subsequent submission to physical relationship was with her consent. The consent is irrelevant so far as the

culpability is concerned but, I believe, it is a relevant circumstance which may be taken into account while sentencing the accused. I believe the facts of the present case does not call for harsher punishment and rather rigorous imprisonment for 3 years for the offence under Section 366 IPC and rigorous imprisonment for 7 years for the offence under Section 4 of the POCSO Act with payment of fines will be a proper sentence.

#### **ORDER**

Accused Motleb Ali is acquitted of the charges under Section 366 IPC and Section 4/17 of the POCSO Act and set at liberty forthwith.

Accused Ayzal Sheikh is convicted for the offence under Section 366 IPC and sentenced to rigorous imprisonment for 3 years with fine of Rs 1000 in default to suffer imprisonment for 3 months.

Accused Ayzal Sheikh is further convicted for the offence under Section 4 of the POCSO Act and sentenced to rigorous imprisonment for 7 years with fine of Rs 5000 in default to suffer imprisonment for 1 year.

Both the sentences shall run concurrently.

A free copy of the judgment be furnished to convict Ayzal Sheikh

A copy of the judgment be sent to District Magistrate, Kokrajhar

A recommendation is also made to the District Legal Services Authority, Kokrajhar, to consider payment of adequate compensation to the victim of this case.

Material Exhibit be kept in record until further orders.

Given under the hand and seal of this Court

Dictated by

Addl. Special Judge Kokrajhar Addl Special Judge Kokrajhar

# <u>Appendix</u>

## 1. Prosecution Exhibits:-

Exhibit-1 Statement u/s 164 CrPC

Exhibit-2 Medical report

Exhibit-3 FIR

Exhibit-4 Seizure list
Exhibit-5 Charge sheet

Material Exhibit 1 School Certificate

# 2. <u>Defence Exhibit</u> Nil

# 3. Prosecution Witness

P.W.1 xxx, victim
P.W.2 xxx, victim's mother

P.W.3 xxx, victim's brother

P.W.4 Sri Dulal Mahato
P.W.5 Sri Subhash Sha
P.W.6 Sri Nikhil Mahato

P.W.7 Md. Sabed Ali

P.W.8 Dr. Sushma Brahma
P.W.9 Sri Ganesh Sarkar

4. <u>Defence Witness</u> Nil

5. <u>Court witness</u> Nil

Addl. Special Judge(FTC), Kokrajhar