IN THE COURT OF SPECIAL JUDGE, SIVASAGAR

Present :- Sri S. K. Poddar, AJS

Special Judge, <u>Sivasagar</u>.

Spl. (P) Case No.65 of 2017 U/S 366 IPC, R/W Sec. 4 of POCSO Act. (Arising out of Sonari P.S. Case No. 29/2017)

State of Assam

-Vs-

Sri Rahul Malakar Accused

APPEARANCE:

For the prosecution : Sri A. K. Bora, P.P.

For the accused : Sri D.K. Gohain, Advocate

(legal aid counsel)

Date of framing Charge : 18.12.2017
Dates of Evidence : 12.01.2018
Date of Argument : 12.01.2018
Date of Judgment : 12.01.2018

JUDGMENT

- 1. Prosecution case, in brief, is that on 24.02.2017, one Md. Moinul Haque lodged an FIR with O/C, Sonari P. S. alleging, inter alia, since the morning of 24.02.2017, his minor daughter victim 'B' (name withheld) was found missing from her house. Due to non-finding victim in the house, they searched their missing daughter in different places and subsequently they learnt that accused Rahul Malakar, who is an inhabitant of Bhajo Teao Gaon under Sonari P.S. has kidnapped the victim.
- 2. On receipt of the FIR, Sonari P.S. Case No. 29/2017 U/S 366 (A) IPC was registered and investigated into. During investigation, victim was medically examined and recorded her statement in the court U/S 164 Cr.P.C.

The accused was arrested and forwarded him to court for judicial custody. On completion of investigation, submitted Charge-Sheet against the above named accused U/S 366 (A) of IPC.

- Upon submission of Charge-Sheet, learned Sub-Divisional Judicial Magistrate Charaideo at Sonari, by complying the provision of Section 207 Cr.P.C. has committed the case for trial before the court of Sessions with the accused in Jail custody.
- 4. On receipt of the case on commitment, vide order dated 05.05.2017, the case was transferred to the court of Id. Addl. Sessions Judge, Sivasagar for disposal. Accordingly accused Rahul Mallakar was produced before the court of Id. Addl. Sessions Judge, Sivasagar and vide order dated 19.05.2017, Id. Addl. Sessions Judge, Sivasagar framed the Charge U/S 366 IPC against the accused person. After recording the examination-in-chief of the informant, vide order dated 04.12.2017, learned Addl. Sessions Judge, Sivasagar has opined that as the offence brought against the accused falls under POCSO Act, 2012, case should be tired by Special Judge and sent back the case record to this court for disposal. Thus on receipt of the record, on 18.12.2017, this case was registered as Spl. (P) Case No. 65/2017, and after hearing both the sides, charge has been framed U/S 4 of POCSO Act, 2012 and Section 366 IPC against the above named accused person to which he pleaded not guilty.
- During trial, prosecution side has examined only two witnesses including the informant and the victim. Considering the nature of the evidence, 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.
- 6. I have heard argument of learned P.P. Mr. A.K. Bora and Mr. D.K. Gohain, learned Legal Aid 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 24.02.2017 the accused kidnapped or abducted the victim 'B'? If so, what was the intention of the accused person behind such kidnap/abduction?
 - (II) Whether on 24.02.2017 or thereafter the victim 'B' was subjected to penetrative sexual assault by the accused?

DECISION AND REASONS THEREOF

- 8. PW-1 Md. Moinul Hague, in his evidence deposed that his daughter, the victim is presently aged about 18 years and read upto class VIII and left the school about 2 year back. On the intervening night of 23.02.2017 and 24.02.2017 while he along with his other family members were sleeping, at night hours without their knowledge victim sneaked out of the home. On 24.02.2017 at morning after getting up, due to non finding his daughter in the house, they searched her. During search, he went to the house of accused Rahul Malakar and learnt that he was also missing from his house. On this matter, he lodged an FIR at Sonari PS. Exbt. 1 is the FIR. On 25.02.2017, one of his known person saw the victim at Bhajo Station and informed the matter to him. Accordingly he went to the station and found his daughter at Bhajo Station. On his asking, victim told her mother that she on her own went with accused Rahul Malakar. He also informed the matter to police. Police took his daughter for medical examination and to court for recording her statement. Presently the victim is living with him. In his cross-examination PW 1 admitted that presently he has settled the dispute with the accused and his family socially. He cannot say the date of birth of my daughter. He denied the defence suggestion that his daughter's present age is above 20 years. He further admitted that prior to this, on 24.02.2016 also, his daughter went with the accused. After this, he came to know that his daughter has love affairs with the accused and she on her own left the home with an intention to marry the accused. He has no objection in acquittal of the accused from both the cases.
- 9. PW-2 the victim B in her evidence deposed that accused Rahul Malkar was her class fellow in Bhajo high School. She have love affairs with the

accused since last 2 years. She read upto class IX and left the school about 2 year back. On the intervening night of 23.02.2017 and 24.02.2017 while her other family members were sleeping, at night hours without their knowledge she left her home and went with the accused. They went to Arunchal and stay there for one night. On 25.02.2017, they returned to Bhajo Station and while she was sitting at the station, her father came there and took her to their residence. On asking she informed her parents that she on her own went with accused Rahul Malakar. Police took her for medical examination and to court for recording her statement. Exbt. 2 is her statement given in Court. In her cross-examination PW 2 admitted that having love affairs with accused, she went with accused Rahul on her own. Accused did not induced her or used force in taking away from her house. He accompanied the accused with an intention to marry him. Prior to this case, on 24.02.2016 also, she went with the accused and returned home on same day. She has no objection in acquittal of the accused from both the cases.

10. From the evidence on record it appears that, though in the FIR specific allegation of kidnap has been leveled against accused Rahul Malakar, but during evidence, as discussed above, P.W. 2 the victim has admitted that she had love affairs with the accused since last two years and on the intervening night of 23.02.2017 and 24.02.2017 while her other family members were sleeping, at night hours without their knowledge she left her house and went with the accused to Arunachal and stayed there for one night. On 25.02.2017 they returned to Bhajo Station and while she was sitting at the station, her father came there and took her to her residence. On asking victim informed her parents that she on her own went with the accused. From her cross examination it appears that accused did not induce her or used force in taking away from her house, rather having love affairs with the accused she went with him on her own. From the evidence of P.W. 1, the father of the victim supported the evidence of the victim. In cross he further admitted that the dispute between the accused and his family has socially settled and now he

has no objection in acquittal of the accused person from this case.

- 11. From the above it appears that though the victim is below the age of 18 years of age, but she did not implicated the accused on the point of kidnap by way of inducement or taking her away by using force to leave the protective umbrella of her parents. Admittedly she left the home on her own. As such merely because she was minor on the date of incident, it cannot be said that by removing the victim from the custody of her parents, accused has committed the offence of kidnap as defined u/s 361 Cr.P.C. In support of my above finding, the following ratios may be gainfully quoted.
- 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 Calcutta High Court in the reported case of Sachindra Nath Mazumder Vs. Bistupada Das and Ors. [1978 Cri.LJ 1494] held as follows:-
 - "7. Next, it was to be proved that the accused was materially instrumental either in counselling the minor to leave or helping her in leaving the guardian's protection. The victim girl P.W. 5 stated in her evidence that she had left the guardianship of her father on her own accord, as she was in love with accused Bistu whom she married subsequently. True, the girl was recovered from the house of the brothers namely, accused Bistu Pada and Kesto Pada, but a man is not bound to return to her father's custody a girl who without any inducement on his part has left her home and come to the accused later on. It must be shown that the man took some active step by persuasion or otherwise to cause the girl to leave her home. In the absence of any evidence as to inducement or actual taking, mere finding of the accused and the victim girl living under the same roof would not substantiate the prosecution case of kidnapping.
 - 8. The girl in this case stated in her evidence that she had abandoned the guardianship of her father on her own accord, as her father was reluctant to give her in marriage to accused Bistu. A minor may not be competent to give her consent to her taking, but a minor is certainly competent to leave the protection of her guardian on her own accord. Thus, the position remains that P.W. 5 left her parent's guardianship on her own accord only because her guardian was not approving the proposed marriage. In the circumstances, the girl even if she had been found under 18 years, would not be said to have been kidnapped by the accused. Mintu P.W. 5 and accused Bistu are said to have been married subsequently."
- 14. 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:-

"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."

15. Hon'ble Supreme Court of India in the reported case Shyam and another vs. State of Maharashtra [AIR 1995 SC 2169] has held that

"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 guardianship of her mother."

- 16. So far the charge regarding commission of penetrative sexual assault is concerned, P.W.2 the victim is totally silent on this aspect. In her examination-in-chief, the victim nowhere stated that accused has committed sexual intercourse with or without her consent. There is no allegation of penetrative sexual assault against the accused Rahul Malakar either in FIR or in evidence.
- 17. To sum up the discussion, I am of the considered opinion that prosecution has failed to prove the charges U/S 366 IPC and Section 4 of POCSO Act, or any other minor offences against the accused Rahul Malakar. As such, accused Rahul Malakar is acquitted from the charges U/S 366 IPC and Section 4 of POCSO Act, 2012 and set at liberty forthwith.
- 18. Issue release order to the Jail Supdt. of District Jail, Sivasagar accordingly.
- 19. As the accused is in Jail, no order is passed U/S 437 A Cr.P.C.
- 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. Learned legal aid counsel is entitled for his professional fees from DLSA as per rules.

- 22. Send a copy of the judgment to learned District Magistrate, Sivasagar U/S 365 Cr.P.C.
- 23. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 12th day of January, 2018 at Sivasagar.

Special Judge Sivasagar

APPENDIX

- 1. <u>Prosecution witnesses</u>:
 - P.W.1 Md. Moinul Haque (informant)
 - P.W.2 Miss Babina Begum (victim)
- 2. Defence witnesses None
- 3. <u>Court witnesses</u> None
- 4. Exhibits by prosecution -
 - Exbt. 1 FIR
 - Exbt. 2 164 Cr.P.C. statement of the victim.

Special Judge <u>Sivasagar</u>