#### **HEADING OF JUDGEMENT IN SPECIAL CASES:**

**DISTRICT: DHUBRI.** 

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 41/2017
UNDER SECTIONS: 363/376 IPC
READ WITH SECTION 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

MOTLEB ALI MANDAL

PRESENT:- DIPAK THAKURIA,
SPECIAL JUDGE,
DHUBRI.

#### **APPEARANCES:-**

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
J. TALUKDAR, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 21-09-2017, 16-05-2018, 06-09-2018, 31-10-2018,

02-05-2019, 21-10-2019.

**DATE OF ARGUMENT:-** 06-12-2019. **DATE OF JUDGMENT:-** 20-12-2019.

## J U D G E M E N T

- **1.** Accused Motleb Ali Mandal stands trial for the offences punishable under sections 363/376 IPC read with section 4 of the POCSO Act for allegedly kidnapping and committing rape or penetrative sexual assault to the minor daughter of the complainant.
- **2.** The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 20-09-2016 the complainant lodged a written ejahar before the Officer-in-charge of

Golokganj police station against the accused Motleb Aki Mandal with an allegation that the accused, since last one year induced his 15 year old minor daughter to marry her. 2/3 months back his daughter agreed the proposal of the accused and within 8/9 months the accused established illicit relation with his daughter several times. On 19-09-2016 at about 11 p.m. the accused took his minor daughter to his house with a view to marry her. Whole night he committed rape on her and next day morning at about 6 a.m. the family members of the accused drove her out from his house.

- **3.** After receiving the ejahar, Officer-in-charge of Golokganj police station registered a case as Golokganj P. S. Case No. 943/2016 under sections 366-A/376 IPC read with section 4 of the POCSO Act.
- 4. The investigating officer arrested the accused, produced him before the Court and the Court remanded him 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. By completing the investigation, I. O. has submitted charge sheet against the accused person to prosecute him under sections 366-A/376 IPC read with section 4 of POCSO Act.
- **5.** Cognizance of the case was taken in charge sheeted sections and my learned predecessor granted bail to the accused.
- **6.** Copies were furnished to the accused and after hearing both the parties and perusal the case record and case diary formal charges against the accused under sections 363/376 IPC read with section 4 of POCSO Act were framed. Charges so framed were read over and explained to the accused which he pleaded not quilty and claimed to be tried.
- **7.** The prosecution examined nine witnesses including medical and investigating officers and closed the evidence.
- **8.** 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.

**9.** 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 19-09-2016 at about 11 p.m. at village Choraikhola under Golokganj police station kidnapped the minor daughter of the complainant from the lawful guardianship of her parents and thereby accused is liable to be punished under section 363 IPC?

Whether the accused on the same day time and place committed rape on the minor daughter of the complainant and thereby accused is liable to be punished under section 376 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:

- **10.**In order to establish the charges framed against the accused, the prosecution has examined altogether nine witnesses. Among them P. W. 1 is the complainant and the father of the victim girl who lodged the ejahar (Ext. 4) where he put his thumb impression and the prosecution exhibited the same through the investigating officer Hari Prasad Pathak (P. W. 9). The contents of the ejahar and the oral testimony of the complainant show that on 19-09-2016 at about 11 p.m. the accused lifted his minor daughter to his house. In the ejahar, the complainant alleged that the accused promised to marry his daughter and established physical relationship with her. In the ejahar it was alleged that the accused after taking his daughter to his house kept her the whole night and committed rape on her. While deposed in the Court he has deposed that his daughter had affairs with the accused and on the night of the incident the accused promising her to marry took her to his house. But the family members of the accused physically assaulted his daughter and drove her out from their house.
- 11. Undoubtedly the victim girl whom the prosecution examined as P. W. 8 is the principal

witness for the prosecution. Her deposition shows that she had affairs with the accused. One day at about 11.30 p.m. the accused visited her house and had taken her to his house where he did bad work with her. The family members of the accused physically assaulted her and drove her out from their house at about 3 a.m. and the accused fled away from his house. She was medically examined and her statement was recorded by Judicial Magistrate under section 164 Cr. P. C. which the prosecution has exhibited and marked as Ext. 3. Ext. 3 (1) is her signature.

- 12. The defence categorically cross-examined both the complainant and the victim. They could not say the date of the occurrence. In cross-examination the complainant has denied the suggestion of the defence that he filed the case against the accused as instructed by Nirod Ali Mollah who is the father-in-law of the brother of his wife. He has further denied the suggestion of the defence that just to compel the accused to marry his daughter he filed the false case against him. After one day of the incident he filed the case and the police recovered the girl from the road. The victim girl (P. W. 8) in her cross-examination has stated that the accused before taking her to his house contacted with her over phone. Her family members and Panchayat Member found her on road. Family members of both the houses were not agreed with the marriage between her and the accused. She has denied the suggestion of the defence that the accused did not take her to his house and also not did bad work with her.
- **13.**From the oral testimonies of the complainant, the victim, the ejahar and the statement of the victim recorded by Judicial Magistrate under section 164 Cr. P. C. (Ext. 2) it transpires that there was affair between the accused and the victim and on the night of the incident at about 11 p.m. the accused visited the house of the complainant and took the victim to his house and the family members of the accused physically assaulted her and drove her out at around 3 p.m.
- 14. The prosecution examined the grandmother of the victim girl as P. W. 2 who has also deposed that the accused and her granddaughter had affairs and with a promise to marry her took her to his house; but his family members physically assaulted her and drove her out. In cross-examination she has stated that had the accused married her granddaughter, they would not file the case. The independent witness Kabir Ali Mollah (P. W. 3) knows nothing about the subject matter of the case. Niradh Ali Mollah (P. W. 4) has deposed that on the day of the incident at about 2 a.m. the complainant visited his house and told him that the victim was kidnapped by the accused. Though he visited the

house of the accused with the complainant; but they were misbehaved by the family members of the accused. The victim told him that the accused kidnapped her and the family members of the accused physically assaulted her. In his cross-examination he has also deposed that the victim and the accused had affairs and the accused intended to marry her; but his guardians were not agreed. He has admitted that before I. O. he had not disclosed that the victim told him that accused kidnapped her. The prosecution examined brother-in-law of the complainant as P. W. 5 who is the relative of the accused too. He simply said that two years back accused told him that he loved the victim and wanted to marry her. In cross-examination he has stated that the marriage of the victim was solemnized with another person.

- **15.**The victim was medically examined by Dr. Mazida Sultana (P. W. 6). Her deposition shows that the victim girl told her that she had affairs with Motilal Ali Mandal who promised to marry her and she had physical relation with the boy. The boy took her to his house; but his mother refused to accept her. On examination she found no injury mark on her body, hymen was found absent, there found no spermatozoa in her vaginal smear and found no evidence of recent sexual intercourse with her. She has exhibited her report as Ext. 1. Ext. 1 (1) is her signature. To ascertain the age of the victim Dr. Mohammad Laskar Ali (P. W. 7) did ossification test. He, after perusal the x-rays opined that approximate radiological age of the victim was 15 years. He has exhibited his report as Ext. 2 and his signature as ext. 2 (1). In cross-examination he has admitted that he did not examine the teeth of the victim and the age may vary two years in either side.
- **16.**The case was investigated by P. W. 9 Hari Prasad Pathak. His deposition shows that during investigation he recorded the statements of witnesses, examined the victim at Dhubri Civil Hospital, recorded her statement under section 164 Cr. P. C. The accused took the plea of juvenility and he sent the accused to Fakharuddin Ali Ahmed Mediacal College, Barpeta and found negative report. Ultimately he submitted charge sheet against the accused under sections 366-A/376 IPC read with section 4 of POCSO Act. He has exhibited the ejahar as Ext. 4, the sketch map of place of occurrence as Ext. 5 and charge sheet as Ext. 6. He has authenticated his signature in Ext. 5 and Ext. 6 as Ext. 5 (1) and Ext. 6 (1). He has also authenticated the signature of Rustom Raj Brahma, the then O. C. Golokganj P. S. on the ejahar as Ext. 4 (1). In cross-examination he has admitted that he did not examine the ejahar writer, did not seized wearing apparel of the victim. The victim girl visited police station with her father. He did not find any

criminal antecedent of the accused.

- 17. During the course of the argument learned special public prosecutor has submitted that in a case under section 376 IPC or section 4 of POCSO Act the main witness for the prosecution is the victim girl. The victim is a child as defined under the provision of POCSO Act. She has clearly stated that' the accused lifted her to his house, did bad work with her and ultimately she was driven out from his house. The deposition of the victim has been fully corroborated by other prosecution witnesses including the official witnesses. So, there is no iota of doubt that the accused, on the day of the incident kidnapped the minor daughter of the complainant and committed rape on her.
- **18.**On the other hand, learned defence counsel has submitted that from the evidence of the prosecution witnesses it becomes clear that the victim and the accused had affairs and what they did it was on their consent. Though the prosecution claimed that the victim was a child as per POCSO Act; but the prosecution has failed to produce any document to ascertain the age of the victim. It is not known as to why the investigating officer did not collect the birth certificate of the victim girl. After the incident marriage of the victim was solemnized with another boy which shows that she was a major. The prosecution has failed to establish the charges framed against the accused person.
- **19.**In a case charged under the provision of POCSO Act the age of the victim girl is very important. As per section 2 (d) of the POCSO Act under the age of 18 is to be considered as the child. In the case in hand the complainant in his ejahar has stated that his daughter at the time of the incident was just 15 years old. The complainant being the father of the victim girl is the best person to know the age of the victim. The victim on the day of recording her deposition in the Court during trial has stated that she is 17 years old and as per her the incident took place about two years back. After the incident her statement was recorded by Judicial Magistrate under section 164 Cr. P. C. and before the Judicial Magistrate she mentioned her age as 15 years. After filing the case the victim was produced before the medical officer who conducted ossification test and after examining the x-rays, the medical officer opined that at the time of examination the victim was 15 years old. The medical Officer (P. W. 7) in his cross-examination has stated that the age may vary two years in either side. If two years is added, still the age of the victim on the day of incident was 17 years. Learned defence counsel in his argument has stressed the fact that the victim solemnized her marriage with another person. The marriage of the victim was solemnized with another person does not mean

that she was a major girl. The medical officer (P. W. 7) after examining the x-ray reports concluded that the victim was 15 years old. He has not examined the teeth of the victim which does not negate his report. Besides it the father of the victim has clearly stated that at the time of the incident the victim was just 15 years old. So, from the evidence led by the prosecution there is no doubt that at the time of the incident the victim was a child as defined under section 2 (d) of POCSO Act.

- 20. To constitute an offence punishable under section 376 IPC or section 4 of POCSO Act the prosecution has to establish the ingredients under section 375 IPC or section 3 of POCSO Act. From the evidence on record it transpires that there was affair between the accused and the victim girl. The complainant in his written ejahar has stated that the accused with promise to marry his daughter established physical relationship with his daughter several times and on the night of the incident the accused committed rape on her the whole night. But while he deposed in the Court during trial does not whisper a single word that the accused established physical relationship with his daughter and on the night of the incident committed rape on her the whole night. The victim (P. W. 8) while deposed in the Court simply stated that the accused did bad work with her. The statement "did bad work with her" is vague one. On the day of recording her statement she was a matured one and she was married. So, she knows what physical relation is. But she has not disclosed whether there was any physical relation on that night or not. The victim has not stated anything that prior to the date of incident the accused had sex with her. P. W. 4 in his deposition has stated that on being asked the victim girl told him that the accused kidnapped her to his house. Regarding commission of rape by the accused the victim girl did not tell to P. W. 4. The medical officer examined the victim on 22-09-2016 but found no evidence of recent sexual intercourse on her. The medical officer found the hymen was absent. Hymen may tear for various reasons. Only on absence of hymen it cannot be concluded that the accused had sex with the victim girl.
- **21.** After perusal the evidence on record it is clear that the prosecution has failed to establish the ingredients of rape or penetrative sexual assault against the accused. So, it is safely concluded that the prosecution has failed to establish the charges against the accused either section 376 IPC or section 4 of POCSO Act.
- **22.**So far charge under section 363 IPC is concerned, it has already been established that on the day of the incident the victim was a minor girl. The allegation against the accused

is that on 19-09-2016 at about 11 p.m. the accused visited the house of the victim girl and had taken her to his house and on that night at about 3 a.m. she was driven out from his house. From the oral testimonies of the material witnesses examined by the prosecution it is established that the accused took the victim to his house and on that night at about 3 a.m. she was driven out from his house.

- **23.** As per section 359 IPC, kidnapping of two kinds: kidnapping from India and kidnapping from lawful guardianship. The case does not fall under the category of kidnapping from India. As per section 361 IPC whoever takes or entices any minor under the age of eighteen years of a female out of the keeping of the lawful guardian of such minor without consent of her guardian is said to be kidnap such female minor from lawful guardianship.
- **24.** In the case in hand, the accused took the victim to his house at about 11 p.m., kept her in his house till 3 a.m. and drove her out from his house. The guardian i.e. the father of the victim was not aware that his daughter was taken away by the accused to his house. When he came to know the fact, he informed about the incident to P. W. 4 at around 2 p.m. and the complainant and P. W. 4 on that night visited the house of the accused; but the family members of the accused misbehaved them. So, from the evidence on record it clears that the accused without consent of the guardian of the victim had taken her to his house. As the accused had taken the victim at night at about 11 p.m. and on that night at about 3 a.m. she was driven out from his house; so, intention of the accused was not good. The quintessence of offence under section 363 IPC is criminal intention. The intention of a person can be derived from his act. In the case in hand, if the intention of the accused was good he would come to the house of the complainant in day time; but the accused visited the house of the complainant at night at 11 O'clock. Besides it, the accused "did bad work" with the victim in his house as deposed by the victim. Though the victim did not clarify what the accused actually did with her; but it is clear that his conduct towards the victim was not good. The fact that the minor victim was drove out from the house of accused at about 3 a.m. confirms the misbehavior towards the victim by the accused.
- **25.**In view of the above discussion and observation it is safely concluded that the prosecution is able to establish the charge against the accused under section 363 IPC beyond all reasonable doubt. Accordingly the accused is found guilty under section 363 IPC and he is convicted under said section.

- **26.**The accused/convict had affairs with the victim and before she attaining majority, at night, had taken her away and on that night compelled her to stay on the street. The act of the accused is simply condemnable and I find no justifiable ground to extend the benefit of Probation of Offenders Act to the accused/convict.
- **27.**Heard accused/convict on quantum of sentence.
- **28.** Also heard learned counsels appearing for the parties.
- **29.**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.
- **30.**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.
- **31.**On the other hand learned counsel for the defence has submitted that the accused is a young boy and at the time of the incident he was just 18 years old. He was not aware about the consequence what he did and has no criminal antecedent; so, has prayed to deal with him leniently considering his young age.
- **32.** 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.
- **33.**The accused/convict is a young boy just 22 years old. The prosecution has failed to show any criminal antecedent of the accused/convict. Besides it, it is established that he had affairs with the victim girl. Considering his age it is decided to impose following punishment.

## <u>ORDER</u>

- **34.**The prosecution is able to establish the charge against the accused Motleb Ali Mandal under section 363 IPC and accordingly he is convicted under said section. The accused/convict is sentenced to undergo rigorous imprisonment for 3 (three) year and also pay fine of Rs. 10,000/ (rupees ten thousand) in default rigorous imprisonment for another 1 (one) month.
- **35.** The prosecution has failed to establish the charge against the accused under section 376

IPC and section 4 of POCSO Act beyond all reasonable doubt. So, accused is acquitted of

the charges under section 376 IPC and section 4 of POCSO Act on benefit of doubt

**36.** Fine amount, if realized, shall be given to the victim as compensation.

**37.** The period underwent during investigation and trial shall be set off as per law.

**38.** Furnish a free copy of the judgment and order to the accused/convict as per provision of

law.

**39.** Furnish another copy of judgment and order to the District Magistrate, Dhubri for

information and necessary action, if any, from his side.

Victim compensation.

**40.** The victim girl at the time of the incident was just 15 years old and due to criminal act of

the accused she suffered mental agony and physical pain; so, 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.

**41.**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.

**42.** Send a copy of this order to the Secretary DLSA, Dhubri for information and necessary

action.

**43.** Given under my hand and seal of this Court this the 20<sup>th</sup> day of December 2019.

(D. Thakuria)

Special Judge, Dhubri.

10

#### IN THE COURT OF SPECIAL JUDGE: DHUBRI.

## **SPECIAL CASE NO: 41/2017**

# UNDER SECTIONS: 363/376 IPC READ WITH SECTION 4 OF THE POCSO ACT.

## **STATE OF ASSAM**

VS.

### **MOTLEB ALI MANDAL**

## <u>APPENDIX</u>

A. Prosecution exhibits:

Ext. 1 : Medical report.

Ext. 2 : Radiological report.

Ext. 3 : Statement of the victim.

Ext. 4 : Ejahar.

Ext. 5 : Sketch map.
Ext. 6 : Charge sheet.

B. Defence Exhibits : Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Complainant,

P. W.2: Grandmother of the victim,

P. W.3: Kabir Ali Mollah,

P. W.4: Niradh Ali Mollah,

P. W.5: Relative of the victim,

P. W.6: Dr. Mazida Sultan,

P. W.7: Dr. Mahammad Ali Laskar,

P. W.8: Victim &

P. W.9: Hari Prasad Pathak.

E. Defence Witness: Nil.

F. Court Witness: Nil.

(D. Thakuria)

Special Judge, Dhubri.