### IN THE COURT OF SPECIAL JUDGE: CACHAR; SILCHAR

# SPL. POCSO CASE NO .01 of 2016

(U/S 366/376 IPC R.W. Sec. 4 of POCSO Act.)
Present:-Shri K. Choudhury, LL.M.,
Special Judge,
Cachar,Silchar.

State of AssamComplainant.
-Versus-
Md. Nazimuddin Laskar. S/O Md. Altab Ali Laskar, Rokorpar, P.S. Lakhipur. Dist Cachar
Charge framed on:26-02-16.
P.Ws. examined on:03.05.16; 04.05.16; 26.05.16; 26.07.16; 30.08.16; 04-02-17; 17.05.17
Statement of accused recorded under section 313 Cr.P.C :22.03.2017.  Argument heard on:
Judgment pronounced and delivered on: 11-09-17 Learned Counsel Appeared
For the State:Mr. R.M. Das, Ld. PP. For the Accused:Mr. M.H. Mazumdar, Advocate.

### **JUDGMENT**

1. Prosecution case as it evolves from the record is that minor daughter of the informant a student of class VII, herein below referred as the victim, went to school but did not return. On search it could be learnt that the victim was kidnapped by the accused Nazimuddin Laskar. Hence, FIR was lodged after about 2 months showing the age of the victim as 14 years 8 months. The same was received and registered as Joypur P.S.

case No. 25 of 14 dated 24-06-14, U/S 366 IPC.

- 2. During investigation, the victim was recovered. Her statement was recorded U/S 164 Cr.P.C. She was also got medically examined. Doctor opined her age as above 14 and below 16. According to her statement, on 24 April 2014 while she came out from her school at about 12 noon appearing examination the accused called her. On her approach, the accused got her into an auto rickshaw and pressing her mouth took her to his maternal uncle's house. Thereafter on 26.04.14, the accused forcibly married her against her will and brought her to his house at Binnakandi, Kaptanpur, where she had to stay for about 2 months as his wife. It is further alleged that since after the marriage, the accused used to have physical relation with her against her will.
- 3. On completion of investigation, I.O. submitted charge sheet against the accused U/S 366/344 R/W. Sec. 6 of POCSO Act. Learned Judicial Magistrate 1<sup>st</sup> Class after furnishing copies of all necessary police papers committed the case. After hearing both sides and considering the materials on record, this Court framed formal charges against the accused U/S 366/376 IPC, R/W. Sec. 4 of POCSO Act. The charges were read over and explained to which the accused pleaded not guilty. Hence trial began.
- 4. To prove the case prosecution examined as many as eight witnesses including the M.O. and the I.O. Defence plea is of false implication and also that the victim at her own will eloped away with the accused and at the material time, she was major. Further defence plea is that the victim was not recovered from the house of the accused. During

examination U/S 313 Cr.P.C. the accused took the plea of false implication and also stated that the victim on one day visited the house of the accused and proposed to marry him which he refused and drove her out. After a few days, parents and maternal uncle of the victim came to his house with a marriage proposal but his parents refused. After a few days, police came to their house but did not get him. Subsequently he went to the P.S. and was arrested. The victim was not recovered from his house. However, in his defence, no evidence is adduced.

- 5. Now, under facts and circumstances of this case, whether the victim was kidnapped by the accused and the accused committed rape or penetrative sexual assault on her.
- 6. To decide the above points I have heard learned counsel of both sides at length and perused the evidence on record.

Findings, decision and reasons thereof are given below:

7. P.W.1, Saleha Begum Laskar, the mother of the victim, deposed that about 2 years back at one day the victim went to her school to appear in examination, but did not return. After that her brother Ali Haidor over telephone informed her asking not to make any search of the victim as the victim was taken away by the accused. They made search but could not find the victim. After about two months she along with the police and one of her nephew went to the house of the accused at Rokorpar and recovered the victim. At the material time, age of the victim was 14 years, 8 months. The victim reported her that, on the date of the occurrence the accused forcibly took her by an auto.

- 8. P.W. 2 the victim of this case deposed that, in the month of April 2014 while she was coming out after appearing in her Class VII examination, on the way the accused forcibly took her inside an auto gagging her mouth and took her to Ramnagar (Lakhipur) to his maternal uncle's house and there his maternal uncle forcibly gave her marriage with the accused against her will. Thereafter, the accused took her to his house at Rokorpar under Lakhipur P.S. where she stayed with the accused as his wife for about two months and had physical relation with her. During that period she somehow managed to inform her maternal uncle namely Ali Haidor over telephone requesting him to take her back. Thereafter, her mother (PW-1) and her brother Jamil Ahmed went there with police and recovered her. Exhibit-2 is her statement made before the Magistrate. She disclosed her the then age as 14 years 8 months.
- 9. PW. 3 Haidor Ali Mazumder @ Ali Haidor, maternal uncle of the victim, deposed that at the time of the alleged occurrence the victim was reading in class VII. On the date of the alleged occurrence she went out to appear in her school examination, but did not return. On that afternoon at about 4 p.m. the accused informed him over telephone that they need not search the victim as he took away the victim. It is further deposed that receiving such information he informed her sister (PW-1) and made search of the victim, but of no result. Two months after that his nephew namely Lalon informed him that the victim was in the house of the accused at Rokorpar. Thereafter, mother of the victim (PW-1) lodged the FIR. Accordingly, his sister (PW-1) and her son Lalon and others went with the police to the house of the accused and recovered the victim. The victim (PW-2) told him that on the way to her house from school, the accused forcibly took her by an auto.

- 10. PW- 4, Md. Islam Uddin Laskar, father of the victim deposed that at the material time, his victim daughter a student of class VII, aged about 14 years went out for school, but did not return and during search his brother in law, Ali Haidor (PW-3) informed him that he (PW-3) had received information from the accused that the victim was taken away by the accused and they need not search her. About after one and half month, they received information that the victim was residing with the accused in his house at Rokorpar. Subsequently, they recovered the victim with help of police accompanied by his wife and said Lalon @ Jomir. The victim reported that while she was coming out from the school, the accused forcibly took her to different places.
- 11. PW-5, Dr. Priyanka Sinha, MO & HO of F & SM at SMCH, deposed that she examined the victim on 25.06.2014 at SMCH and the victim narrated history to the effect that about two and half months prior to the examination, she eloped with Najim Uddin Laskar and both of them got married and since then they were staying together in the house of the accused and had sexual intercourse many times. Her parents were against the marriage. The victim disclosed her age as 14 years and 8 months. Doctor opined her age as above 14 years and below 16 years.
- 12. PW-7 Dilwar Hussain Barbhuiya deposed that at the material time the victim did not return from her school which he could know from his maternal uncle Ali Haidar (PW-3) who also informed that he (PW-3) received telephonic information from accused Nazimuddin that he (accused) took the victim and requested that not to make any search of the victim and asked him (PW-3) not to inform police otherwise the

victim would be lost. However, during search after two months they found the victim in the house of the accused at Rokorpar under Lakhipur P.S. Thereafter, they with the help of police recovered the victim from the house of the accused. After the recovery, the victim reported them that the accused on the way back from her school took her by a vehicle showing threat.

- 13. PW-8 Moklisur Rahman deposed that on 24.6.2014, OC of Jaipur Police Station receiving FIR, the Exhibit-3, registered the same and entrusted him (PW-8) to investigate the case. During investigation, he recovered the victim girl along with accused Nazimuddin from Kaptanpur from the house of the accused on 25.6.2014 at late night. Thereafter the victim was got examined by the doctor. He also collected school certificate of the victim from her school. Exhibit-10 is the attested Xerox copy of the school certificate.
- 14. PW-6, Tribhubhan Saikia deposed that on 24.06.2014 he was posted as O.C. of Joypur P.S. On that day, he received the FIR from Saleha Begum and registered the same as Joypur P.S. Case No. 25/14 U/S 366(A) IPC and endorsed the same to A.S.I. Moklisur Rahman for investigation who after investigation handed over the C.D. to him (P.W.-6) on 07.07.2014. According to him, it revealed in the C.D. that during investigation said Moklisur Rahman .i.e. PW-8 recorded the statement of the witnesses and recovered the victim girl from the house of the accused. It is also deposed that during his tenure (P.W-6), he gave requisition for age proof document to the Horinagar Public L.P School. Headmaster of the school forwarded him the certificate of the victim. Headmaster on receipt of the requisition acknowledged the same and in

reply enclosed the transfer certificate of the victim, the Exhibit-5 showing the date of birth of the victim as 14.10.2001. The same is an attested copy. He filed a petition to the Learned C.J.M for adding Section 4 of POCSO Act.

- 15. In the cross examination of PW-8, the following omissions are confirmed:
- (a) PW-1 did not state before the IO that in the afternoon, her brother Haidor told her that the victim was taken by the accused and asked her not to make any search and that P.W-1 along with her nephew Lalon went with the police in the house of the accused in search of the victim and recovered the victim and that the victim reported her (PW-1) that victim was forcibly taken by the accused lifting in an auto.
- (b) PW-2 did not state before the I.O. about forceful taking away and about gagging of her mouth and that uncle of the accused forcibly gave her marriage with the accused and that she managed to inform her maternal uncle over telephone.
- (C) PW-3 did not state before the IO that accused on the date of the alleged occurrence in the afternoon asked the P.W-3 over telephone not to search the victim as the victim was taken away by him (accused) and that PW-3 informed the PW-1 over telephone about the same and about that PW-1 along with her nephew Lalon went with the police to the house of the accused and recovered the victim and that the victim reported that the accused took her away forcibly by an auto.
- (d) PW-4 did not state before the IO that his brother-in-law PW-3 reported that PW-3 received information from the

accused that the victim was taken away by the accused and they need not search for the victim and that police being accompanied by PW-1 and her nephew Lalon recovered the victim who reported that accused took her forcibly while she was coming from school.

- (e) PW-7 did not state before the I.O. that on the date of occurrence, his maternal uncle Ali Haidor was informed by the accused over telephone that accused took the victim and not to make search and not to make any information to the police otherwise the victim would be lost, and that after two months, they found the victim in the house of the accused and about recovery by police and about report of the victim about forceful taking away.
- 16. During argument, learned P.P. has submitted that sometimes the defence took the plea of total denial and sometimes the defence took the plea that the victim at her own will eloped away with the accused, further it is submitted that the prosecution by way of corroborative and cogent evidence could establish that the victim was taken away by the accused forcibly and at the material time, she being a student of class VII was minor and there is no reason to disbelieve their testimony supported by the evidence of the I.O. with regard to the recovery. On the contrary, learned defence counsel submitted that the prosecution case is open to doubt and no suitable explanation has been given by the informant about the two months delay in lodging of the FIR and this delay is fatal for the prosecution. Further submission is that testimony of material witnesses are full of infirmities and contradiction to impeach their credibility. Learned defence counsel also strongly contended that the age of the victim could not be ascertained properly by the doctor. In support of the submissions, the learned defence

counsel on 08.09.2017, submitted one memorandum of written argument vide petition no. 531/32. Perused the same. The learned defence counsel categorically mentioned the omission as confirmed by the I.O. The learned defence counsel also placed argument under different heads such as determination of the age of the victim, recovery of the victim, nature of investigation, lodging of FIR. According to the learned defence counsel, the prosecution could not conclusively prove that at the material time, the victim was a minor on the ground that her parents could not tell about the specific date of birth of the victim. It is also contended that as per the admission of the PW-5, the doctor, for age determination x-ray of bones is necessary and the doctor had no specialization in Radiology and according to the doctor, the radiological report was given by Aditi Das. PW-5 also in the cross examination stated that the finding of Dr. Aditi Das and the chart of Modi's jurisprudence, suggest that the age of the victim is more than 16. The doctor also mentioned that they follow the medical jurisprudence of Dr. Modi and when it is said that proximal epiphysis of humorous bone are fused with parent bone it means that the coracoids and the angle of coracoids are fused with proximal end of humorous. The doctor has also stated that as per page 32 of the book of Modi's Jurisprudence of 20<sup>th</sup> Edition, 3<sup>rd</sup> impression, it is mentioned that coracoid tip and angle of coracoids fused at the age of 16 for Bengali females and the same is also mentioned in page no. 214 of 24th Edition 2012. Therefore, the learned defence counsel contended that at the material time the victim was above 18 years.

Now, it is seen that the doctor in her cross examination asserted that her findings differ with the above as she arrived at also on her own findings. She further stated that as there was a confusion regarding determination of pregnancy she did not go for x-ray of iliac crest as it would create troubles in the pregnancy and her report is based wrist joint. She denied the suggestion that the age of the victim was more than 18 years after taking into consideration the marginal error of 2 years under different counts. She has further denied the suggestion that their determination of age being above 14 and below 16 years is not correct and her findings were based on assumption. She has stated that her report was concurred and endorsed by the head of the department. PW-1, mother of the victim deposed that at the material time, the victim was aged about 14 years, 8 months, PW-4 the father of the victim deposed that at the material time, the victim was aged around 14 years. The victim (PW-2) in her statement deposed that she was aged about 14 years 8 months. It is not denied that at the material time, the victim was a student of class VII. Nothing has come out to show that the victim had to be detained in any class. Generally, a student appears in H.S.L.C. or class X examination at the age of 15 plus. This goes to show that at the material time, the victim being a student of class VII was below 18 years. Doctor also asserted her age as below 16. It is true that doctor's finding regarding age is not a conclusive proof of age but mere an opinion. In the instant case, all the major four joints were not examined under X-ray. Major joint being iliac crest was not examined on the ground that it might create problems in pregnancy. It appears from the evidence of the doctor that the epiphysis of wrist joints were in the last stage of fusing with parent bones. The defence assertion of Modi's Jurisprudence as discussed earlier and come out in the cross examination of M.O. (PW-5) only with regard to the shoulder joint and not being with regard to other major joints cannot be totally relied upon in the absence of any other supporting probabilities and also being denied by the doctor. Similarly, although the learned defence counsel raised objection for accepting attested photocopy of the school certificate but it cannot be totally ignored under the facts and circumstances of the case mainly on the ground that it is deposed to have been collected by the P.W.-8 from the concerned Headmaster of the concerned school during investigation. Therefore, doctor's evidence supported by the above observations and evidence of the material witnesses corroborated by the FIR regarding the age can be totally relied upon.

17. All the witnesses were cross examined at length. In the cross examination of PW-1, PW-2, PW-3 and PW-4, mere denial suggestions were given. PW-7 in his cross examination denied the suggestion that the victim at her own will eloped away with the accused.

Omissions as confirmed in the evidence of the PW-8, under the facts and circumstances of this case, are considered as not material omission mainly on the ground that such omissions do not affect substance of the prosecution case that the victim was taken away by the accused and was recovered from his house. The alleged recovery, though denied by the accused, but evidence of I.O. is found to have been corroborated by other material witnesses and found to be reliable. That too, going away of the victim with the accused is also found to be established by way of virtual admission while putting suggestion that the victim at her own will eloped away with the accused as brought in the cross examination of PW-7. As the victim is found to be below 18 years of age, it is immaterial whether she voluntarily went with the accused or taken away forcibly. It is evident that victim was recovered

after about 2 months of the alleged incident. It is also evident that FIR was lodged after two months of the alleged incident. Learned defence counsel strongly contended that this delay is fatal for the prosecution, in as much as, evidence discloses that at the material time during search Ali Haidor, the PW-3, reported the parents of the victim that the accused took away the victim and not to make any search. If that be so, according to the learned defence counsel, why the informant the PW-1, awaited for two months in lodging of the FIR and this piece of evidence is also a material omission confirmed by the I.O. The PW-3 in his evidence supported the above evidence of the PW-1 that he reported the PW-1 over telephone that accused took away the victim and they need not search the victim. It is thus seen that the parents of the victim had the earlier opportunity to file ejahar against the accused which they did not avail. It appears that they even after receipt of such information, made search and only after receipt of cogent information, that the accused kept the victim in his house at Rokorpar, the father of the victim with others went there and after that mother of the victim filed FIR. According to the victim, she was first taken to Ramnagar to the house of maternal uncle of the accused and where she was given marriage against her will and after that she was brought to Rokorpar. Under such circumstances, lodging of FIR after getting proper information regarding the exact whereabouts of the victim is not considered as fatal under the facts and circumstances of this cases and that too, in a case where the informant is an illiterate. Further, it appears that the initiative was taken to get her back only on receipt of telephonic request made by the victim to his maternal uncle, the PW-3, to take her back from the house of the accused as disclosed in her evidence. Under such circumstance, delay so caused in filing FIR is also

considered as not fatal.

- 18. In view of the above findings, discussions, observations, deductions and consideration of evidence in its entirety, it is held that prosecution has been able to prove its case beyond all reasonable doubt U/S 366 I.P.C. and Section 4 of POCSO Act. Therefore, accused is held to be guilty and convicted accordingly.
- 19. Heard the accused on the question of sentence. He has stated that he has got aged ailing parents and three unmarried sisters and there is none except him to look after them and for that he need to be leniently dealt with.
- 20. Having consideration of the above and due regard to all other aspects, and the relevant provision of law this Court is of the view that minimum punishment may be imposed. The accused is thus convicted and sentenced U/S 366 IPC to undergo Rigorous Imprisonment (R.I.) for a period of two years, and also a fine of Rs. 3000/- and in default he shall further undergo R.I. for a period of one month. The accused is also convicted and sentenced U/s 4 of POCSO Act to undergo R.I. for a period of seven years and also a fine of Rs. 10,000/- and in default he shall further undergo for a period of three months. Period of custody shall be set off from the sentence. Both the sentences will run concurrently. Fine amount if realized shall be paid to the victim as compensation.
- 21. In addition to the above condition this court is of the view that the victim should be adequately compensated mainly on the ground

that, as per evidence out of fear the victim discontinued her study while reading in class VII. Therefore consideration of all aspects an amount of Rs. 50,000/- is required to be awarded as interim compensation prior to any further enquiry. In case any prayer is made for payment of any further compensation the Secretary DLSA shall make an enquiry for assessment of any further compensation. The Secretary DLSA shall take appropriate step for payment of interim compensation so awarded.

22. Free copy of the Judgment be furnished to the accused as per the Provision of Section 363 of Cr.P.C. and a copy also be forwarded to the District Magistrate as per section 365 of Cr.P.C. Copy of the Judgment also may be forwarded to the S.P., Cachar, Silchar.

Bail bond stands discharged.

Judgment is pronounced and delivered in the open court under my signature and seal of this court on this 14th day of September, 2017.

Dictated & Corrected by me

(Shri K. Choudhury), Special Judge. Cachar, Silchar. (Shri K. Choudhury), Special Judge, Cachar, Silchar.

Transcribe by D. Paul, Stenographer, Gr. III

#### IN THE COURT OF SPECIAL JUDGE, CACHAR, SILCHAR.

### SPL POCSO Case No. 01 of 2016. APPENDIX

#### (A) PROSECUTION WITNESSES: -

P.W. 1 – Saleha Begum Laskar.

P.W. 2 – Mirjana Begum Laskar.

P.W. 3 – Haider Ali Mazumdar @ Ali Haider.

P.W. 4 – Md. Islam Uddin Laskar.

P.W. 5 – Dr. Priyanka Sinha.

P.W. 6 – Tribhubhan Saikia. I.O.

P.W. 7 – Dilwar Hussain Barbhuiya.

P.W. 8 – Moklisur Rahman.

#### (B) DEFENCE WITNESSES: - NIL.

## (C) PROSECUTION EXHIBITS: -

Ext.1 - Medical Report.

Ext.1(1) - Signature of P.W.2

Ex. 1(2) - Signature of P.W.5.

Ex. 1(3)to 1(5) - Signature of Dr. G. Das.

Ext. 2 - Statement of PW-2.

Ext. 2(1) & 2(2) - Signature of P.W.2

Ext.3 - F.I.R.

Ext. 3(1) – Signature of PW-6.

Ext. 4 – Requisition

Ext.4(1) – Signature of P.W.6

Ext.4(2) – Acknowledgment of headmaster.

Ext.5 — Reply of requisition by the headmaster(under objection)
Ext.5(1) — Signature of headmaster (under objection).
Ext.6 — Prayer before C.J.M. for adding Section 4 of POCSO Act.

Ex. 6(1) - Signature of P.W.6. Ext.7 - Charge sheet. Ext.7(1) - Signature of P.W.6

Ext.8 – Sketch map.

Ext.8(1) - Signature of P.W.8.
Ext.9 - House search memo.
Ext.9(1) - Signature of P.W.8

Ext.10 — Attested Xerox copy of school certificate (under objection).

Ext.10(1) — Signature of school authority (under objection)

Ext.11 – Copy of arrest memo.

Ext.11(1) – Signature of P.W.8.

- (E) <u>DEFENCE EXHIBITS</u>: NIL
- (F) <u>COURT EXHIBITS</u>: NIL
- (G) EXHIBITS PRODUCED BY WITNESSES: NIL.

(Shri K. Choudhury), Special Judge, Cachar, Silchar.