IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

Spl. POCSO Case No. 18 of 2018

U/S - 366(A)/419 IPC and Sec. 4 of POCSO Act, 2012.

State

- Versus -

Kabir Ali

: Accused person.

Present : Sri L.K. Saikia, AJS. Additional Sessions Judge, Bajali, Pathsala.

Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons : Sri Nabajit Sarma, Ld. Advocate.

Dates of recording evidences : 05/03/2019, 19/03/2019,

02/04/2019, 06/05/2019, 30/05/2019.

Date of recording statements u/s 313 Cr.P.C. : 13-09-2019

Date of Argument : 18-09-2019 and 01-10-2019

Date of Judgment : 03-10-2019

J U D G M E N T

1. The prosecution case in brief, is that, one Manju Roy lodged an ejahar on 17/09/2018 with the In-Charge, Pathsala Police Out Post alleging, *inter-alia*, that on 16/09/2018 at about 4 pm her daughter 'X' (name withheld) told her that she is going to one of her friend and

thereafter she went out from their house but did not return home till 17-09-2016. She ranged to her mobile phone but it was found switch off. Hence, this case.

- On receipt of the ejahar, Pathsala OP registered GD Entry No. 445 dated 17/09/2018 and forwarded the same to Patacharkuchi Police Station to register a case under proper section of law and accordingly it was registered as Patacharkuchi P. S. Case No. 325/18 u/s 366(A) IPC.
- During investigation police visited the place of occurrence, recorded the statements of witnesses including the victim girl, sent her for medical examination but she refused to undergo medical examination, produced her before the Court wherein the Ld. Magistrate recorded her statement u/s 164 Cr.P.C, after that arrested the accused person and forwarded him to the court and after completion of investigation, having been found *prima-facie* case, the I/O sent up the accused for trial by filing charge sheet u/s 366(A) and 4 of POCSO Act, 2012.
- Addl. P. P. appearing for the State and the learned defence counsel and after perusal of materials available on record u/s 173 Cr.P.C., having been found sufficient grounds for presuming that the accused person has committed the offence, framed the formal charge under section 366 (A) /419IPC r/w Sec. 4 of POCSO Act, 2012 and the accusation of charge was read over and explained to him, to which he pleaded not guilty and claimed to be tried. Hence, the trial.
- It is pertinent to mention herein during trial it comes to light that the accused person had also committed the offence u/s 419 IPC. Hence after hearing from the learned counsel for both the parties, considering the evidence on record the formal charge u/s 419 IPC was framed and accusation of charge so framed, was read over and explained to the person to which he pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case examined altogether 6 (six) PWs including victim, informant and I/O. The defence plea is of total denial. The accused person was while examined u/s 313 of Cr. P. C. with regards to the incriminating materials available in the evidence of the witnesses repeated his denial. The defence side has not adduced any defence evidence.

7. POINTS FOR DETERMINATION

- (i) Whether the accused person on 16/09/2018 at around 4 pm kidnapped the victim girl from Pathsala Jyoti Nagar under the jurisdiction of Patacharkuchi P.S. with intent to seduced or to commit illicit intercourse or to marry her against her will by another person and thereby committed an offence punishable u/s 366- A IPC?
 - (ii) Whether the accused person on 16-09-18 at about 4 pm. and on earlier days at Jyotinagar Pathsala town under Patacharkuchi P.S. pretended to be Rakesh Das, cheated the victim by introducing himself as Rakesh Das and concealed his real name Kabir Ali, developed love affairs with her and he took her to Hyderabad and there he gave vermilion on her forehead and thereby committed an offence punishable u/s 419 IPC?
 - (iii) Whether the accused person on or after 16-09-2018 after kidnapping the victim girl committed penetrative sexual assault on her and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

EVIDENCE OF THE WITNESSES

8. PW – 1 Manju Roy, the informant in this case deposed that the victim is her daughter. On the day of occurrence, she was not at home. Her daughter "X" told her over telephone that she would go to attend in a birthday of her friend. On that day at about 4.30 pm she

reached home and found her daughter was not at home. Though she has been waiting till 9 pm but did not return her daughter home. After 9 pm she contacted her friends Binita Roy and Pinki over telephone but they replied that 'X' did not come to their house and then she tried to contact her daughter too but she had not replied on her call. On the next day morning at about 6 am, one Kabir informed her over telephone that he had taken away her daughter. When she asked Kabir where they were then he replied that they had booked train ticket for Delhi even ready to go. Hearing it she asked them to come back. But he replied that his parents are there in Delhi even tickets have already been booked so they could not come back. When they refused to come then finding no alternative she has filed the FIR. Ext. 1 is the FIR and Ext. 1(i) is her signature. At the time of happening of the incident the age of her daughter was 17 years and she had appeared for HSLC examination. After one month of the happening of the incident Kabir and her daughter returned to her home. On reaching home, people gathered at her home and someone among them informed to police then the police took both of them to the police station. The police has produced the victim before the Court and in the Court Magistrate has recorded her statement and thereafter given zimma to them. On reaching home she asked her daughter how Kabir Ali had treated to her during their stay in Delhi. Then she told her that they were living in a rented house and Kabir treated her as his wife. At the time of filing of the FIR, police asked her about the incident. Police seized HSLC admit card of her daughter from her and thereafter same was given zimma to her. Ext. 2 is the seizure list and Ext. 2(i) is her signature. Material Ext. 1 is the admit card of HSLC examination.

In cross-examination, PW 1 deposed that she has no personal knowledge how her daughter was missing from home as she was not present at home. On reaching home at 4.30 pm she has not received any information whereabout of her daughter from anyone. She has not informed to the police at that time. Police has not given her any receipt after seizing the HSLC admit card of her daughter from

her. PW 1 did not state before the police that on the next day morning Kabir told her over telephone that they have booked ticket for Delhi and when she asked to return them then Kabir told her that his parents are there in Delhi moreover tickets have already been booked so they could not come back. She also did not state before the police that on reaching home she asked her daughter how Kabir Ali had treated to her during their stay in Delhi, then she told her that they were living in a rented house and Kabir treated her as his wife. PW 1 denied the suggestion that her daughter willing eloped with Kabir. Her daughter was reading in Pathsala High School at the time of incident. She had appeared HSLC examination in the year 2018. She was born in the year 2002. She has also produced the original birth certificate before the police and police has given zimma to her. They have not received any letter from accused Kabir Ali that given to her daughter identifying himself as Rakesh Das. She has not seen her daughter going with Rakesh Das. They did not go to Delhi but Rakesh Das informed to them over telephone that they were going to Delhi, and she has not remembered the phone number. The sim by which accused informed to them is the sim of her daughter. Police has not seized the said sim. At the time of happening of the incident her daughter was a minor. She does not know how Rakesh Das ranged to them. PW 1 denied the suggestion that Kabir Ali did not take away her daughter and he never identified himself as Rakesh Das to them. She also denied that her daughter eloped with an another person and during missing Kabir Ali found her and take her back to her home, as such he was not involved into kidnap of her daughter. In the FIR she has mentioned her mobile number only, except her number she has not mentioned any other number in the FIR.

9. PW - 2, the victim girl deposed that the accused introduced himself as Rakesh Das. In the month of August, 2018 one day a miss call came to her phone number from someone and in the said miss call a boy introduced himself as Rakesh Das and he stated that he drives his own vehicle. Since then several days they have

talked over phone and developed a love affair between them. One day she asked him about the profession of his parents and then he told her that his father is a doctor and mother is a teacher. On last Biswakarma Puja day, the said boy asked her to go Jalukbari and on believing him and on his request she alone went to Jalukbari and at the Jalukbari fly over she got down from vehicle. Thereafter through phone call they both of them identified each other as they have talked earlier. After that he took her to Kamakhya Railway Station and they have been staying whole night at the railway station. In the morning about 6 am they have boarded train of Hyderabad and after 3 days of journey they reached in Hyderabad. Thereafter they went to the house of friends of Rakesh Das. In Hyderabad in a Ganesh Mandir Rakesh Das gave vermilion on her forehead. Thereafter they were living as husband and wife for a week in a rented house. During stay in the rented house said Rakesh Das cohabited with her. After one week of stay while she went to the working place of him then friends of Rakesh Das told her that Rakesh Das is a Muslim boy. Hearing it she find it difficult to believe but when his friends showed her the photo of praying Namaz by Rakesh Das then she understood that Rakesh Das is a Muslim boy. While she asked about the fact of his community, he confessed before her that his name is not Rakesh Das rather his actual name is Kabir and he belongs to Muslim community. After that he detained her there for about 15 days and during these 15 days they were living as husband and wife. His friends insisted upon her to accept Muslim religion but she did not accept it and want to come back to Pathsala. So one day both of them i.e. Kabir (Rakesh Das) and herself came to Pathsala to her home. On reaching home, the police personnel brought both them to the police station and on the next day police brought her to medical for her medical examination but she refused to do the same as she was well. Thereafter she was produced before the Court wherein her statement was recorded by the Magistrate. Ext. 3 is the said statement made before the Magistrate and Ext. 3(i), 3(ii) & 3(iii) are her signature. At the time of incident she was 17 years old so she was handed over on zimma to her mother. She appeared HSLC

examination. The police had recorded her statement.

In cross-examination of PW 2 deposed that her family consists of her father, mother, uncle, younger sister and grandmother. She has not reminded the date of incident. She has forgotten her mobile number even the number of Rakesh Das. After introducing through miss call both of them developed love affair over telephone. She did not state before the police that mother of the accused is a teacher and father is a doctor. She herself alone went to Jalukbari and met him at Jalukbari fly over. She has not informed anything to the traffic police or other person that she came with Kabir. From Jalukdari to Kamakhya Railway Station they went on foot. In the Kamakhaya Railway station they met the Railway police and when police suspected them then Kabir gave some amount of money to the police. During journey from Kamakhya to Hyderabad by train they met several persons and co-passengers but she has stated nothing to them that Kabir brought her from Pathsala. PW 2 did not state before the police that in Hyderabad in a Ganesh Mandir Kabir gave vermilion on her forehead. PW 2 denied the suggestion that she did not state before the Magistrate even before the police that after living 1 week in Hyderabad one day the friends of Rakesh told her that his name is Kabir and he belongs to Muslim community. It also denied that she did not state before the police that in Hyderabad his friends showed her photo of praying Namaz by Rakesh. She does not know the name of the friends of Kabir that she met in Hyderabad. She did not state before the police that some friends of Rakesh in Hyderabad insisted her to convert her religion from Hindu to Muslim. The victim girl also denied that knowing the fact that Rakesh is from Muslim community she developed love affair with him and went to Hyderabad. During stay in Hyderabad Kabir did not force her to take part in the cohabitation. She has got her birth certificate. PW 2 denied the suggestion that since the age that shown in her HSLC admit card and birth certificate is not identical so she had concealed her birth certificate and produced the HSLC admit. It is also denied by PW 2 that

knowing Kabir as Rakesh Das she willingly went with him. There is no any such letter that given to her by Kabir Ali identifying himself as Rakesh Das. She has got the telephone number of Kabir Ali on cross connection. While she went with accused Kabir Ali at that time she told to her mother that she is going to house of her friend. Police did not take to Delhi for identifying the rented house where she stayed with Kabir Ali. Kabir Ali did not give any gift to her as a token of love. They did not lodged any FIR stating the fact that Kabir took her to Delhi identifying himself as Rakesh Das. She willingly went with accused Rakesh Das believing himself as Hindu. Police has not seized anything from her. She was not medically examined. PW 2 denied the suggestion that before the police and Magistrate she deposed falsely.

10. PW - 3 Smti. Kalyani Roy, in this case deposed that informant Manju Roy is her daughter-in-law and victim is her granddaughter. About 5 months back the incident took place. On the day of incident at about 7 p.m. after returning from Namghar to her home, she came to know that informant has been searching the victim and she told her that on that day she went to house of her friend but she did not return till 7 p.m. Though they search her and wait her for her return but she did not return the whole night. On the next day her daughter-in-law lodged an ejahar with the police. On that very day the police personnel interrogated her about the incident. After missing of one month of the victim, her daughter-in-law informed her that the victim was in Hyderabad. One day after one month and a few days, they return to the home of victim and having got the information of arrival, the police arrested them and took them to police station. On arriving home while she asked her grand-daughter where they were then she told her that she was in Hyderabad along with the accused person as husband and wife. Her grand-daughter told her that the boy with whom she eloped was from Muslim community. At the time of incident her grand-daughter was aged about 15-16 years old. On the day of returning of her grand-daughter from Hyderabad she was not at home.

In cross-examination, PW 3 stated that she does not know personally how the victim was missing from home and with whom she had eloped. She does not know the exact date of birth of her grand-daughter. She does not know who has cheated the victim and about impersonation. Victim went out from home by saying that she would go to her friend's house with a view to attending a birthday party.

11. PW - 4 Sri Sontosh Roy, in this case deposed that on the day of the incident he went out for work. On returning home his mother (Kalyani Roy) informed him that his daughter has gone to attend in a party of her friend but till then she did not return . On that day his wife Manju Roy went to attend a marriage ceremony and after her returning she arrived at home and then asked whether the victim has returned or not then he told her that she did not return. Since she had not returned so they contacted to her friends but she was not there. Thereafter they were searching about her but found no any clue of his daughter. On the next day his daughter ranged to his wife that she eloped with a boy to Delhi and the boy with whom she went was a boy and his title is some Das. Hearing it on the next day also he went out for working as he is a daily labourer and after returning home his wife informed him that she had lodged an Ejahar. At the time of the incident the age of his daughter was about 14 to 15 years and was a student of class X and appeared HSLC examination but failed. Police did not ask him anything about the incident. After about one month his daughter return to home from Delhi together with the boy. On returning home from Police station his wife intimated him that the boy with whom his daughter eloped was a boy from Muslim community.

In cross-examination of PW4 deposed that he does not know personally how his daughter was missing from home and with whom she had eloped and the exact date of birth victim. His daughter did not inform him about the incident over telephone. What he knows about the incident that informed by his wife to him. At first his daughter was reading in Pathsala M.E. School and thereafter

reading in Pathsala Girls High School from where she appeared HSLC examination but he has forgotten in which year she had appeared. PW 4 denied the suggestion that at the time of the incident the age of his daughter was above 15 years.

12. PW - 5 Smti. Gitanjali Nath deposed that on the day of incident at about 7 pm her mother informed her over telephone that victim went to attend in a birthday ceremony of her friend but till then she had not returned. Thereafter again at 11 pm she ranged to her mother who told her that her sister had not returned from her friends house by attending birthday party. So, on the next day evening at about 5 pm she came to her mother's house at Pathsala Jyotinagar and came to know from her grand mother that her mother went to the police station for lodging FIR. On the third day of the incident at about 5 pm her sister ranged to her mother and intimated her that she was in Delhi. Thereafter her mother informed to the police station about the fact. About 7 to 8 days later, she returned to home by train with the accused person Kabir and got down at Barpeta Road railway station and after that arrived Pathsala with Kabir. After arriving at home one of their neighbour informed to police that victim and Kabir had arrived at home. Having got the information police came to their home and took Kabir and her to the police station. When her sister intimated to them that they were in Delhi with a boy namely Rakesh Das and hearing his name they thought that he is from Hindu Community. But after coming to the police station from Delhi they came to know that the name of the boy is not Rakesh Das rather he is Kabir from Muslim community.

In cross-examination of PW 5 deposed that she has not reminded the date and time of the occurrence. She has not seen by her own eye how and with whom victim went to Delhi. She does not know whether the victim had any love affairs with someone or not. Her parents also did not intimated anything that she had any love affairs with a boy. Her mother did not tell her the name of the friend's of victim to whom she went to attend birthday ceremony. There is no

any document with them and to her sister that Kabir gave to the victim that he is Rakesh Das. PW 6 denied the suggestion that Kabir never gave his identity to anyone as Rakesh Das even the victim too. It is also denied the in-spite of knowing Kabir from Muslim community her sister continued love affairs with Kabir. PW 5 denied to the suggestion that Kabir never giving identity as Rakesh Das to victim, as she love her so she eloped with him and her mother had filed false case against Kabir that he had fraudulently wanted to married the victim. She had seen the accused person Kabir Ali in the police station for the first time. PW5 denied to the suggestion that Kabir Ali never introduced himself as Rakesh Das to her sister.

13. PW - 6 Sri Sailen Kr. Kalita, in this case deposed that on 17/09/2018 he was working as In charge of Pathsala out post. On that day the informant Manju Roy lodged an FIR stating inter-alia that her 17 years old daughter did not return to home after attending birthday of her friend. Having got the FIR made GD entry No. 445 dated 17/09/2017 at 11 am and forwarder it to O/C Patacharkuchi P.S. for registering a case and he, himself took up the matter for investigation. O/C Patacharkuchi P.S accordingly register the FIR vide Patacharkuchi P.S. case No. 625/18 u/s 366(A) IPC. and endorsed him to continue the investigation that he has already taken up. Ext. 4 is the copy of GD Entry and 4 (1) is his signature. After receiving the FIR they contacted with the accused and victim over telephone and by adopting technic of compromise they called them to the Pathsala Railway station and on arrival at Pathsala railway station he has apprehended the accused and the victim. After bringing to the police out post he has recorded the statement of the accused person. During investigation it is found that initially the accused person introduced himself before the victim as Rakesh Das from Hindu community and thereafter induced the victim and accordingly took away. But after arrest it comes to light from the statement of the accused that his name is Kabir Ali from Muslim community. Thereafter he visited at the place of occurrence and draw up the

sketch map of the place of occurrence and after that recorded the statement of the witnesses. Ext. 5 the sketch map and Ext. 5(1) is his signature. He also sent the victim for medical examination to FAAMCH, Barpeta but the victim has refused to do medical examination before the doctor. After that victim was produced before the Court and in the court magistrate has recorded her statement u/s 164 Cr.P.C. During investigation it also comes to light that while the accused person took the victim to Hydarabad, there he maintained physical relationship with the victim in a rented house and thereafter one day victim came to know from the friends of the accused person that his is not Rakesh Das rather Kabir Ali from Muslim community. He seized the age related document of the victim from the informant. Ext. 2 is the seizer memo and Ext. 2(2) is his signature. After that it is found that since it was an admit card of the victim so given jimma to the informant. He has seen the said seized admit card in the court. Material Ext. 1 is the admit card. From the statement recorded u/s 164 Cr.P.C. it appears that during the stay in the rented house there was physical relationship in between the accused person and the victim. After completion of the investigation finding sufficient materials against the accused person filed the charge-sheet vide No. 245/18 dated 31/10/2018 u/s 366(A) IPC adding section 4 of POCSO Act. Of 2012. Ext. 6 is the chargesheet and Ext. 6(1) is his signature.

In cross-examination of PW 6 deposed that during investigation he has not made any inquiry by going to the home address of the accused person that he is the Kabir Ali and not Rakesh Das and to that effect he has also not submitted any documents before the court. Before 16-09-2018 they have not inquired into the CDR relating to phone number 87238-80369. He has not made any inquiry about the name of friends of the victim to whose house she attended birthday party. He has not inquiry into the CCTV footage of Kamakhya railway station, Guwahati to ascertain the presence of the accused and the victim and boarding on the train to Hydarabad. He

has not recorded statement of any person who had seen the accused person taking away the victim while she was going to attend birth day party of her friend.

Discussions, Decision, and Reasons thereof

14. To arrive at a judicial decision perused the case record and gone through the provision of law.

Point No. (III). Charge u/s 419 IPC.

- **15**. PW 1 is the informant who stated that on the day of occurrence her daughter went to attend in a birthday party and since then she was missing. On the next day at about 6 am one Kabir informed her that he had taken away her daughter for which she lodged the FIR. The informant also stated that at the time of incident age of her daughter was 17 years. PW 4 is the father of the victim who stated that on the next day of of occurrence, his daughter ranged to his wife and tole that she eloped with a boy and his title is some Das. After about one month his daughter came back to Pathsala and then police apprehended both of them and on returning home from police station his wife told him that the boy with whom his daughter eloped was a boy from Muslim community. PW 5 is the another daughter of the informant and sister of the victim girl. She stated that on the day of incident, her mother informed her that the victim was missing after going to attend in a birthday party. PW 5 also stated that while her sister intimated her that she was in Delhi with a body named Rakesh Das and as such they thought that he is a Hindu boy but after they arrived at Pathsala police station, she came to know from the victim that the name of the said boy was Kabir and he belongs to Muslim community.
- **16.** PW 2 is the vital material witness of this case i.e. the victim girl who in her evidence stated that one day the accused introduced himself as Rakesh Das through mobile phone and thereafter

a relation of friendship was grown up in between them and subsequently it turn into love affairs at the passing of time. The accused also stated that his father is by profession a Doctor and mother is a teacher. On last Biswkarma Puja day, i.e. the day of incident the accused asked her to go to Jalukbari and on believing him and on his his request, she went to Jalukbari and met him there. After that they went to Kamakhya Railway Station. She further stated that she along with the accused person went to Hyderabad by boarding train from there and after arrival in Hyderabad in a Ganesh Mandir, the accused put vermilion on her forehead and used to stay as husband and wife in a rented house and during that that time in the said house, Rakesh Das co-habited with her. After one week of stay one day she went to the working place of Rakesh Das and then the friends of Rakesh Das told her that Rakesh Das is a Muslim boy. Though at first she did not believe him but on being shown the photograph of praying Namaz by Rakesh Das she confirmed that Rakesh Das is a Muslim boy. PW 2 stated that while she asked the fact about community of Rakesh Das, he confessed that his name is not Rakesh Das rather he is Kabir Ali and belongs to Muslim community. Thereafter the accused person detained her for 15 days there. It is also stated that the friends of Rakesh Das insisted upon her to accept Muslim religion bu she did not accepted it and returned to Pathsala. On arrival at Pathsala the police personnel brought them to Police Station and her statement was recorded. She was also produced before the Magistrate wherein her statement was recorded by the Magistrate and after that she was given zimma to her parents. She further deposed that while the police recorded her statement she did not state before them about the profession of the father and mother of accused. She also stated that during the journey from Kamakhya to Hyderabad by train they met several persons and co-passengers but she stated nothing to them that Kabir brought her from Pathsala. She also does not know the name of friends of Kabir who showed the photograph of Kabir praying Namaz. PW 2 denied the suggestion that knowing the fact of Rakesh is from Muslim community she developed love affair with him and went to

Hyderabad.

- 17. PW 6 is the Investigating Officer who deposed that during the course of investigation, he recorded the statement of the witnesses including the victim girl. It is came to his knowledge that the accused person got introduced himself before the victim as Rakesh Das and took away her by inducing. But after arrest it comes to light from the statement of the accused that his name is Kabir Ali and he belongs to Muslim community. The I.O has also stated that he seized the H.S.LC. admit card of the victim vide seizure list Ext. 2.
- **18.** In the instant case the accused is charge u/s 419 IPC among other charges. The ingredients of Section 419 IPC are-
 - (1) that the accuse cheated some person;
 - (2) that he cheated him by-
 - (i) Pretending or representing himself to be some others person,
 - (ii) Knowingly substituting or representing one person for another.
- 19. From the record reveals that the accused person got introduced himself as Rakesh Das with the victim girl and developed relationship of love affairs with her. On his request she came to Jalukbari to met him and thereafter he took away to Hyderabad by train and in a Ganesh Mandir of Hyderabad he put vermilion on her forehead and started to live as husband and wife in a rented house. The above facts and circumstance of the accused shows that he had a guilty mind at the time of commission of offence and his conduct also prove it that with a view to deceive the victim girl he concealed his real identity.
- **20.** So, it was the boundant duty of the accused person to prove his innocence that by acting as coming from Muslim community

he got introduced with the PW 2 and thereafter he developed love affairs with the victim and subsequently got married her. PW 1, PW 3, PW 4, PW 5 also stated that the PW 2 told themselves that the accused persons when got cross-connection on mobile then he got introduced himself as Rakesh Das by concealing his real identity. This fact have been proved by the I/O PW 6 that while he recorded the statement of accused person u/s 161 Cr.P.C. then the accused person gave his identity as Kabir Ali and he is from Muslim community. The defence side did not cross-examine to the I/O in this respect that the accused person did not give his identity before him as Kabir Ali for which evidence of this part is remained unchallenged

- day the accused introduced himself as Rakesh Das and his father is by profession a Doctor and mother is a teacher. After that on last Biswkarma Puja day, he took away the victim to Hyderabad and in Hyderabad in a Ganesh Mandir, the accused put vermilion on her forehead and used to stay as husband and wife in a rented house and during that that time in the said house, Rakesh Das co-habited with her. After one week of stay one day she went to the working place of Rakesh Das and then the friends of Rakesh Das told her that Rakesh Das is a Muslim boy and also shown the photograph of praying Namaz by Rakesh Das. As and when she asked the fact about community of Rakesh Das, he confessed that his name is not Rakesh Das rather he is Kabir Ali and belongs to Muslim community.
- 22. In Kanumukkala Krishnamurthy v. State of A.P, reported in AIR 1965 SC 333, the Hon'ble Supreme Court held that cheating can be committed in either of the two ways described in Section 415 IPC. "Deceiving a person" is common in both the ways of cheating. A person deceived may be fraudulently or dishonestly induced to deliver any property or to consent to the retention of any property by any person. The person deceived may also be intentionally induced to do or to omit to do anything which he would not have done if not deceived and which act of his caused or was likely to cause

damage or harm in body, mind, reputation or property.

23. The relevant observations in **Kanumukkala Krishnamurthy** (supra), are reproduced as follows:-

"Cheating can be committed in either of the two ways described in Section 415 IPC "Deceiving a person" is common in both the ways of cheating. A person deceived may be fraudulently or dishonestly induced to deliver any property or to consent to the retention of any property by any person. The person deceived may also be intentionally induced to do or to omit to do anything which he would not have done if not deceived and which act of his caused or was likely to cause damage or harm in body, mind, reputation or property."

24. Cheating, as defined under Section 415 IPC has various forms, which are punishable as offences under Section 417, 418, and 420 IPC. It may be pointed out that cheating by personation has been specifically defined under Section 416 IPC as follows:-

"416: -Cheating by personation.—A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person."

25. Cheating by personation is made punishable under Section 419 IPC. A reading of Section 415 IPC together with Section 416 IPC makes it clear that though cheating has two different forms, viz, cheating and cheating by personation. Cheating by personation

has been made a distinct offence because the person not only cheats but he does so by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is. Whereas cheating per se attracts substantive punishment of upto 1 (one) year imprisonment, cheating by personation attracts substantive punishment of imprisonment upto three years. Thus, it is evident that cheating by personation is graver and distinct offence than cheating made punishable under Section 417 IPC.

- 26. The learned counsel for the accused person submitted that the victim girl had well known that the accused person belongs to Muslim community and knowing his fact, she eloped with him on the day of occurrence. But the parents of the victim girl did not know about the fact of love affair, so she filed the ejahar. As the victim had already known the religion of the accused person, so offence u/s 419 IPC could not be established by the prosecution side in this case.
- As against the above, the learned Addl. PP submits that the accused person concealed his identity by keeping her behind the darkness of his actual religion with a criminal mind to deceive the victim, developed love affairs and took to Hyderabad wherein he put vermilion on her forehead in a Ganesh Manidr. So, it is like an open page of book that he cheated a minor girl by introducing as Rakesh Das and as such, prays to convict the accused under the said section.
- **28.** Heard the learned counsel for the accused person and the learned Addl. PP appearing for the state.
- 29. It was the boundant duty of the accused person to prove his innocence that by acting as coming from Muslim community he got introduced with the PW 2 and thereafter he developed love affairs with the victim and subsequently got married her. But if we considered the evidence of PW 1, PW 2, PW 3, PW 4, PW 5 and PW 6 it is found nothing that the accused firstly introduced with PW 2 by giving his real identity as coming from Muslim community and his name is Kabir. Had there no

any guilty mind from the part of the accused person from the beginning he had to introduce himself as coming from Muslim community and his name was Kabir but the facts and circumstances and the evidence of the witnesses shows that his guilty mind is there before introducing himself to PW 2. In such a nature of cases mere denying a fact is not sufficient unless proved by material fact. But the accused person did not do anything to proof his innocence as required **u/s 114 Cr.P.C.**

30. In view of the forgoing discussion, I am of the considered view that the prosecution has successfully establish the charge u/s 419 IPC.

Now coming to point No. (I)

- **31.** The other charge u/s 366-A IPC is also facing the accused person in this case.
- **32.** Before going to discuss the evidence that adduced by the Pws let me see the ingredients of section 366-A IPC are-
 - (1) that the accused induced a girl;
 - (2) that eh person induced was a girl under the age of eighteen years;
 - (3) that the accused had induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse;
 - (4) such intercourse must be with a person other than the accused;
 - (5) that the inducement caused the girl to go from any place or to do any act.
- 33. In the instant case, the victim girl adduced her evidence before the Court as PW 2. She stated that the accused person on the day of occurrence called her to Jalukbari and accordingly she came

there and after that they went to Hyderabad by train and they had been living as husband and wife in a rented house. During the period of staying with the accused person the accused person co-habited with her and after knowing the fact of his religion though the accused person detained her for about 15 days.

- **34.** On perusal of Section 366-A of IPC it appears that a person can be convicted u/s 366-A IPC only if taking away or enticement is proved. In the instant case the element of taking away on enticement by accused with force or coercion is found absent. Moreover, as mentioned in the above ingredients i.e. **"such intercourse must be with a person other than the accused;** is seemingly missing as the accused person kept her in the rented house as his wife and co-habited with her.
- **35.** The other witnesses PW 1, PW 3, PW 4 and PW 5 are silent about the fact that the victim was co habited other than the accused person while in Hyderabad as they are the not ocular witness of this case. What they have stated before the court all are stated by hearing from the victim.
- **36.** In view of the aforesaid discussion, it is found that the prosecution side has failed to make out a case against the accused person u/s 366-A IPC.

Point No. (ii)

- **37.** The accused is also facing trial for committing the offence u/s 4 of POCSO Act, 2012.
- **38.** The learned counsel appearing for the accused person vehemently contended that there is absolutely nothing in the evidence of the prosecution witnesses which constitute the ingredients of the offences u/s 4 of POCSO Act. According to the learned defence counsel, the prosecution has failed to bring home the guilt of accused for sustaining conviction for the offence u/s 4 of POCSO Act. As such, the learned counsel prays to acquit the accused person.

39. In the context of the submission it would be in the fitness of things to refer to section 4 as defined in the POCSO Act 2012.

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.
- **40.** From above, it appears that mere penetration is enough to constitute of an offence of penetrative sexual assault against a child and consent is immaterial for commission of the said offence.

Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend imprisonment for life, and shall also be liable to fine.

- 41. PW 2 the victim girl in this case has deposed that she got introduced herself with the accused person through mobile phone and at first he identified himself as Rakesh Das. Subsequent thereto a relationship of love had been growing up in between them in such consequence, one day, on believing and on the request of accused person, she came to Jalukbari to met him. After that they met each other and went to Kamakhya Railway Station and boarded train to Hyderabad. On reaching in Hyderabad, the accused person gave vermilion on her forehead in a Ganesh Mandir and they were staying in a rented house. During that period the accused person co-habited with her. After one week one day while she went to the working place of Rakesh Das, the friends of Rakesh Das told to her that her husband is a Muslim boy. At first it was difficult to believe upon it but as and when the said friend showed her the photograph of offering Namaz by the Rakesh Das, she understood that her husband belongs to Muslim community. When she asked about the fact then the accused person confessed before her that his name is Kabir Ali and he is from Muslim community. After the said incident the accused person detained her for about 15 days there and they were living as husband and wife during these days.
- 42. The offence u/s 4 of the Protection of Child From Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that mater other offences also under this Act can be committed only on a child. The definition of child u/s 2(d) of the POCSO Act is as follows:

"Child" means any person below age of 18 years.

Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years.

43. Hon'ble Apex Court in the case of **Mahadeo S/o Kerba**

Maske Vs. State of Maharashtra and Anr., (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

"Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

- (a) (i) the matriculation or equivalent available; and in the absence whereof; certificates, if
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, or the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."
- 44. Apex Court further held in *paragraph 12 of Mahadeo*S/o Kerba Maske (supra) as under -

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well."

- **45.** In view of the above position of law this Court therefore has relied on the HSLC Admit Card issued by the authority in determining the age of the victim.
- 46. In the instant case the victim stated as PW 2 that her age is 17 years. The I/O has seized the HSLC Admit card (Material Ext. 1) of the victim girl wherein the date of birth is recorded as 01-12-2002. The incident of taking away the victim had taken place on 16-09-2018 and as such, it appears that at the time of incident the victim girl was below 18 years and she was a minor.
- 47. Ld. Counsel for the accused has argued that as per H.S.L.C. Admit card the age of victim is about 16 years and the said age may be vary two years and two years variation of age shall go in favour of accused. However, I am not agreed with the submission of Ld. Counsel for the accused as Hon'ble Supreme Court has made it clear that where there is school certificate or other document. There is no question of variation of age. Variation may occur in a case of report of medical evidence as regards the age. However, in the present case H.S.L.C. Admit card is the best evidence as regards the age of victim and as such the submission made by Ld. Counsel for the accused is not tenable in the eye of law.
- **48.** Record reveals that the accused person had taken away the victim girl without consent from the lawful guardian on the day of

occurrence and got married her by introducing as Hindu and after that he co-habited with her. Though she has not raised objection at the time of co-habitation but she was a minor girl and her consent is not required to constitute an offence of POCSO Act, 2012 since minor consent is no consent.

- **49.** Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the 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.
- **50.** So as per section 29 of the act the evidence of PW 2 can be presumed that the accused person had committed the offence unless contrary is proved.
- **51.** PW 2 the victim has categorically stated that she was taken away by the accused person pretending to be Rakesh Das and then he committed sexual intercourse with her. Though she wanted to come back after knowing the actual religion of Rakesh Das but he detained her about 15 days there and during that period also they were living as husband and wife.
- 52. The Learned counsel for the accused has argued on the point that the investigating officer has not complied with the provision of the section 24 of the POCSO Act, 2012 and also the provision of Section 102 Cr.P.C. while conducting investigation. It is also argued that while the victim was examined the police personnel were in uniform.
- **53.** Per contra the Ld. Addl. PP. submits that defective investigation is not a reason for disbelieving that fact and circumstance of the case also the evidence of the victim in the circumstances of rape case corroboration of the fact is not so much necessary if the evidence of victim is found reliable and trustworthy. There may be some lacuna on the part of the investigating officer but which means it is not that the fact is not true.

- 54. At this juncture, this Court has follow the case of *C. Muniappan and Others vs. State of Tamil Nadu, (2010) 9 SCC*567, explained the law on this point in the following manner: "There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused.
- **55.** The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded.
- The presumption under Section 29 of the POCSO Act was not rebutted either by bringing out any favourable reply from the evidence of the prosecution witnesses or producing documentary evidence on the side of the defence. On the other hand, in this case, the evidence of P.W.2, who was minor and aged about 16 years at the time of occurrence, is crystal clear without giving any room of doubt to test the veracity of the crime committed by the accused.
- **57.** In the case of POCSO Act, two provisions are there regarding presumption i.e. 29 and 30 of POCSO Act.
- 58. In the case in hand, the accused has been prosecuted for committing penetrative sexual assault, as defined in Section 3 of the Act. Thus, in terms of Section 29 of the Act, this Court is bound to draw a presumption in favour of the victim that the accused had committed the offence, unless contrary is proved by the accused. In other words, the onus is upon the accused to establish that he had not committed penetrative sexual assault towards the victim. Admittedly, in the instant case, the accused has not rebutted the said presumption in any manner just putting the argument. Thus, this Court has no reason to draw the presumption in favour of the accused.

- **59.** Similarly, u/s.30 of POCSO Act, Special Court has to draw presumption in favour of the prosecution where culpable mental state is required on the part of the accused. Section 30 reads as under:
 - "30. Presumption of culpable mental state (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
 - (2) For the purpose of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of prosecution."
- Menever a question of culpable mental state on the part of the accused is required to prove the guilt of the accused, Court shall presume the existence of said mental state. Though accused can take the defence to prove the fact that he had no such mental state with respect to his act but accused has to prove the said fact beyond reasonable doubt and not by showing its existence by establishing preponderance of probability. Thus, u/s.30 of the Act, liberty is given to the accused to take a defence that he had no such mental state of his act but he has to prove the said fact beyond reasonable doubt.
- **61.** But in the present case, the accused has neither taken any such defence nor adduced any defene witnesses. Thus, this Court is bound to draw a presumption that the accused had culpable mental state of his act.
- **62**. Culpable mental state" is defined in the explanation to

Section 30 of the Act which includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. To bring home the guilt of the accused u/s.30 of the Act, prosecution has to establish sexual intention on the part of the accused but in terms of Section 30 of the Act, Special Court is bound to draw a presumption in favour of the prosecution that accused had such intention unless presumption is rebutted by the accused beyond reasonable doubt.

- **63.** The accused person while examined u/s 313 Cr.P.C. did not take any plea to prove himself innocent. Mere denial is not sufficient to establish his version as trustworthy.
- 64. Even believing the sole testimony of the victim Court can record the conviction. The Hon'ble Apex Court in *Virendra Vs State of U.P., (2008) 16 SCC 582.* The same are reproduced as under: "The Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that:
 - 118. Who may testify All persons shall be competent to testify unless the Court consider that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."
- A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per-se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.

- 66. In the case of **Ratansinh Dalsukhbahai Nayak Vs - State of Gujarat, (2004) 1 SCC 64,** it was held that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possessions or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. In the instant case there is no other element in the evidence of victim except believing her fact as stated by her as true.
- Maharashtra, (1997) 5 SCC 341, it was held as follows: "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered u/s. 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."
- **68.** In the present case, the deposition of the victim stands well corroborated with the statement recorded u/s 164 Cr.P.C by the Ld. Magistrate. Though the witnesses were cross-examined in full length, but nothing has come on record, which could suggest that the prosecution case is false in any aspect or that the prosecution witnesses are not deposing the truth. PW 2 in her evidence also the statement u/s 164 Cr.P.C. stated that the accused person took away her to Hyderabad and stayed in a rented house wherein the accused

person cohabited with her. I find the deposition of the victim and and other witnesses to be cogent, convincing and reliable. Irrespective of any support from Section 29 and 30 of POCSO Act, 2012 the prosecution case in fact stands well proved from the deposition of the victim.

- **69.** In the considered view of this Court, the prosecution has clearly established in proving beyond shadow of all reasonable doubt that accused Kabir Ali had committed penetrative sexual assault on the victim.
- 70. In the result, I find that prosecution has establish this case against the accused Kabir Ali u/s 419 IPC r/w Section 4 of POCSO Act, 2012 and as such, the accused person can be held guilty under the said sections and accordingly convicted thereunder. But the prosecution side failed to prove the case charge u/s 366-A IPC against Kabir Ali beyond all reasonable doubt and hence, he is acquitted from the charge u/s 366-A IPC.

HEARING ON THE POINT OF SENTENCE

- **71.** The accused is heard on the point of sentence. He has submitted before the Court that he has old ailing parents in his house and he is the only earning member of his family and hence prayed for leniency.
- 72. Turning to the question of sentence, it is the settled law that while deciding the quantum of punishment, it is required that the Court should strike a balance between the aggravating circumstances and the mitigating circumstances. The aggravating circumstances relate to the crime and the mitigating circumstances relate to the criminal. In this case, so far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The wound caused to the girl is not only to the body, but also to the mind of not only the victim, but that of the entire family members. The stigma, which she is going to carry for ever is not erasable. Thus, the aggravating circumstances are so grave

in nature.

73. Turning to the mitigating circumstances, the accused was not involved in any other crime, prior to the incident. The statute under Section 4 of POCSO Act prescribes a minimum punishment for a term of 7 (seven) years with fine. When the intention of legislature is to impose stringent punishment for not less than seven years, this Court has got no option except to impose minimum punishment for 7 (seven) years.

ORDER

- Accordingly I convict the accused Kabir Ali u/s 419 IPC and sentenced him to undergo Rigorous Imprisonment for 3 years and fine of Rs. 5,000/- and I.d. of payment of fine to undergo R.I for 6 (six) months. The fine amount of Rs. 5,000/- if recover be deposited into the account of Taluk Legal Service Committee, Bajali. Further the accused person is convicted u/s 4 of POCSO Act and sentence him to R.I. for 7 (Seven) years and also to pay a fine of Rs. 10,000/- (Rupees Ten Thousand only), in default, R.I. for 6 (six) months. The fine amount of Rs. 10,000/- if recover be handed over to the victim as compensation u/s 357 (A) Cr.P.C. Both the sentences of imprisonment would run concurrently. The period of detention during investigation and trial be set off from the period of imprisonment imposed on him.
- **75.** A copy of the order be sent to the Secretary, DLSA, Barpeta for necessary action.
- **76.** A copy of this judgment be given to the accused free of cost and a copy thereof be sent to the District Magistrate, Barpeta.
- **78.** The accused/convict has been informed about his right to appeal against this judgment before the Hon'ble Gauhati High Court.
- **79.** The seized article be disposed of after appellate period. A copy of this order be given to PSI, Bajali.
- **80.** The Spl. POCSO Case is disposed of accordingly.

81. Judgment is pronounced and delivered in the open Court in presence of both the parties and I put my hand and seal of this Court on this 3rd day of October, 2019.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

APPENDIX:-

Oral evidences:-

- PW-1 Smti Manju Roy
- PW-2 Victim
- PW-3 Smti Kalyani Roy
- PW-4 Sri Santosh Roy
- PW-5 Smti Gitanjali Nath
- PW-6 Sailen Kr Kalita

Documentary evidence:-

- Ext.-1. Ejahar
- Ext. -2 Seizure List
- Ext.-3- Statement of victim
- Ext.-4 Extract copy of GDE
- Ext.-5- Sketch Map
- Ext.-6- Charge-sheet

Material Evidence:

Ext. 1- HSLC Admit Card.

Defence evidence.

Nil.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.