

DISTRICT- BAKSA

IN THE COURT OF SPECIAL JUDGE, BAKSA, MUSHALPUR

Present- Smti. M.C. Bordoloi, M.A., L.L.B., (A.J.S.), Special Judge, Baksa

Special POCSO Case No. 2/18

(u/s 366-A IPC r/w section 4 of POCSO Act)

State of Assam -versus-

- 1. Dasharath Nath
- 2. Asir Ali
- 3. Rinku Ali..... Accused

Appearance:

Mr. Ranjit Chetri.....Public Prosecutor for the State Mrityunjoy Mazumdar.....Advocates for the accused person

Date of charge:

06-09-18

Date of Evidence:

01-06-19, 16-09-19, 06-11-19, 07-12-19

Statement recorded on: 10-02-2020

Date of Argument:

10-02-2020

Date of judgment:

15-02-2020

<u>Judgment</u>

One Rupsan Bibi, resident of Madhapur under Barama P.S. lodged the ejahar with the Barama P.S. On 13-02-15 alleging inter-alia that on the 12th day of February, 2015 at about 5.30 p.m. when her minor daughter(name withheld) had gone out of her house to the road, accused Dasharath Nath along with some others forcibly kidnapped her victim daughter in a car and despite search, her victim daughter could not be traced out. It was also alleged that accused Asher Ali, Asia Bibi



and Rinku Ali some days prior to the alleged occurrence extended threat of marriage of her victim's daughter to a Hindu Boy and that the said accused had aided accused Dasharath Nath in his act of kidnapping the victim girl. Hence the ejahar.

Upon receipt of the ejahar the then O/C of Barama P.S., registered a case vide Barama P.S. Case No. 17/15 u/s 366-A/506/294/109 IPC and caused investigation of the case.

Upon completion of investigation charge sheet vide no. 55/15 dated 31-10-15 u/s 4 of the POCSO Act against accused Dasharath Nath and u/s 109 IPC against accused Asir Ali and Rinku Ali was laid before the Hon'ble Sessions Judge, Nalbari who having taken cognizance of the offence issued summons to secure the presence of the accused persons in Court. Subsequent to the creation of Courts at Baksa, the Hon'ble Sessions Judge, Nalbari having found that the case was one falling within the jurisdiction of Baksa Court, transferred the same to the Court of Hon'ble Sessions Judge, Baksa who having secured the attendance of the accused persons in the Court, furnished copies of the case to the accused persons in compliance of the provisions of section 207 CrPC and having found prima-facie materials u/s 366-A IPC against all the accused persons and materials u/s 4 of the POCSO Act against accused Dasharath Nath framed charges u/s 366-A IPC against all the accused persons and another charge u/s 4 of the POCSO Act against accused Dasharath Nath vide order dated 06-09-18. The charges so framed, on being read over and explained to the accused persons, the accused pleaded not guilty and claimed trial.

The prosecution in order to prove its case examined 7 nos of witnesses. All the witnesses were cross examined by the defence side. Thereafter with the designation with the instant Court as a Special Court for trial of POCSO Cases vide Hon'ble Gauhati High Court notification dated 02-01-2020, the case record was transferred to the instant Court for disposal.

The statement of the accused persons u/s 313 CrPC are recorded in this Court putting forward all incriminating material which had

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surfaced during trial. The accused persons denied the allegations and declined to adduce defence evidence. Accordingly DW evidence stood closed.

The defence plea is that of total denial of guilt.

Arguments

Heard the arguments forwarded by the ld. Counsels of both sides. Ld. P.P., Baksa submits that Court shall pass appropriate order after scrutinizing the available materials in its entirety.

Ld. Defence counsel Mrityunjoy Mazumdar submits that instant case is a no evidence case and the accused persons deserve clean acquittal. Ld. Counsel points out to the fact that the prosecutrix herself gave a goodbye to the prosecution case, she completely negating the occurrence of any offence as alleged and instead averring that she went with the accused on her own will and presently leading happy married life with the accused Dasarath Nath. Ld. Counsel submits that the accused persons may be acquitted.

I have given my anxious consideration to the arguments forwarded. I have also perused the case record in its entirety.

The point for determination that has arisen in the instant case is:-

Point for determination:

- (I) Whether on the evening of 12-02-15 at about 5.30 p.m. accused persons at village Madhapur under Barama P.S. induced the victim girl to go from her home with intent that the victim may be forced or seduced to illicit intercourse with another person in furtherance of their common intention?
- (ii)Whether the accused Dasharath Nath committed penetrative sexual assault on the victim girl?
- (iii) What was the age of the victim at the time of the occurrence?

My decision on the aforesaid points for determination along with reasons is given herein under:-

Discussion decision and reasons there for



To address the aforesaid points for determination it will be worthwhile to peruse the evidence available on record and I proceed to do so.

PW1 the prosecutrix/victim in her evidence stated that the occurrence took place in the year 2015 and that she eloped with accused Dasharath Nath without informing her parents, whereupon her mother filed the case and police recovered her from the house of accused Dasharath Nath and caused her medical examination and also caused her statement to be recorded in Court. PW1 exhibited her medical examination report as Ext. 1, her signature thereon as Ext. 1(1), her statement recorded in Court as Ext. 2 and her signatures thereon as Ext. 2(1) and Ext. 2(2).

PW1 also stated that after her recovery from the house of the accused Dasharath Nath, her mother took her custody and took her to her house but again after two months she left with accused Dasharath Nath and thereafter accused Dasharath Nath married her as per social norms and presently they have a child.

In her cross examination PW1 clarified that she eloped with accused Dasharath Nath on her own will and that her parents had consented to their marriage.

Baksa, Mushalour Baksa, Mushalour PW 2- Rupsan Bibi in her evidence stated that her victim daughter was kidnapped by the accused persons on the fateful day at about 5.30 p.m. while she was on her way to attend her tuition classes and that victim failed to return home till late night and that when the victim could not be found despite search, she lodged the FIR. PW2 exhibited the FIR as Ext 3 and her signature thereon as Ext. 3(1). PW2 also stated that police recovered the victim girl from the house of accused Dasharath Nath and caused her medical examination, recorded her statement in Court and that thereafter she took her victim daughter in her custody but her victim daughter again left her house and went with accused Dasharath Nath with whom she has been presently residing after her marriage.



When put to cross examination PW2 disclosed that victim had gone away with accused Dasharath Nath on her own will and that she had filed the case out of misunderstanding against accused persons.

PW3- Anjuma Bibi in her evidence stated that on the fateful evening she could learn that the victim girl was missing from her house and later could know that accused Dasharath Nath took away the victim girl and subsequently police recovered the victim from the house of accused Dasharath Nath and that after 3/4 months of the first occurrence accused Dasharath Nath again took away the victim girl with him and that presently victim resides in the house of accused Dasharath Nath after her marriage with him.

In her cross examination PW3 disclosed that the victim fled away with the accused as she had love affairs with the accused.

PW4 -Dulal Nath deposed that the occurrence took place in the year 2015 and that accused Dasharath Nath had love affairs with the victim girl as such both of them went away to some place for some days whereupon the family members of the victim reported about the occurrence to him and after few days accused Dasharath Nath also informed him that he brought the victim girl with him and that thereafter he called the accused back home with the victim girl and solemnized the victim's marriage with the accused Dasharath Nath.

In his cross examination PW4 disclosed that accused Asher Ali and Rinku Ali being friends of accused Dasharath Nath, informant filed case against them as well.

PW5- Dr. Urmi Devi deposed that on 28-02-2015 she examined the victim girl at the SMK Civil Hospital, Nalbari at 4.30 p.m. and found the following:-

Victim was oriented, her pulse was 88 per minute and that victim washed her genitalia, mouth, canal and changed her clothes after the incident. Victim's hymen was torn but healthy and vagina and cervix healthy. Vaginal swabs was sent for microscopic examination but no sperm was seen. BETA hsg test of urine was advised for pregnancy test but

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report not found till the time of reporting. USG of lower abdomen was advised but no abnormality was seen. X-ray was advised for age estimation. Radiological evidence estimated age of victim below 18 years and above 16 years of age.

Opinion- as not consistent with recent sexual intercourse or assault.

PW5 identified the victim's medical report as Ext. 1, her signatures thereon as Ext. 1(2) and Ext. 1(3), the victim's X-ray report as Ext. 4 and the signature of Dr. Probadh Kumar Sarma thereon as Ext. 4(1).

PW6 -Ghanashyam Talukdar deposed that on 13-02-2015 when he was sitting at his shop the informant came there and narrating that 4 persons had kidnapped her daughter on 12-02-2015 at about 5.30 p.m. from the front of her house, asked him to write an ejahar and that he wrote the same, read over the contents thereof to the informant. PW6 identified the FIR as Ext. 3 and his signature thereon as Ext. 3(2).

PW 7- Owaz Ali is the investigating Officer of the case. He deposed that he investigated the case on being endorsed to, and during investigation he visited the place of occurrence examined the witnesses, drew the sketch map of the place of occurrence, recovered the victim, caused the victim's medical examination, recorded her statement in Court etc. PW7 identified the signature of Durlav Ch. Das the then O/C of Barama P.S. on Ext. 3- FIR as Ext 3(3), he also identified the sketch map of the place of occurrence as Ext. 5 and his signature thereon as Ext. 5(1). PW7 exhibited the charge sheet filed by Khargeswar Deka against the accused persons as Ext. 6 and signature of Khargeswar Deka thereon as Ext. 6(1).

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In his cross examination PW7 disclosed that he could not confirm the fact of the existence of love affairs between the accused and the victim girl during investigation as the accused could not be found. This is the evidence available on record.



In the instant case, all the accused persons stands charged under section 366 A IPC and accused Dasarath Nath also u/s 4 of the POCSO Act. Prosecution witnesses did not support the prosecution case. The victim (PW1) affirmed and re-affirmed that she went with the accused Dasarath Nath on her own volition and that none had kidnapped or taken her away forcibly from her parental house. Informant (PW2) also averred that she had filed the case as she was unaware that her victim daughter had herself went with the accused.

It is abundantly clear from the evidence on record that accused Dasarath Nath or even the other accused persons had not committed the overt act of kidnapping the victim girl as alleged. Evidence is also silent that accused persons more specifically accused Dasarath Nath had done any acts which led to the formation of opinion in the mind of the victim girl, to abandon her parents guardianship and go with accused Dasarath Nath. Evidence is also silent in respect of inducement in any form extended to the victim girl by the accused persons, to go or to be with accused Dasarath Nath. It is only forthcoming that victim exercised her own discretion .

Now in the present case prosecution could not bring on record any document in respect of the victim girl's age. But the victim(PW1) herself stated that she was 17 years of age at the time of the occurance.PW5 the medical officer also stated the victim's age to be below 18 years at the relevant time. Though documentary evidence of victim's age is not on record, the unchallenged evidence of PW1 in respect of her age coupled with the medical evidence, it can be concluded that victim was 17 years of age at the time of occurrence.

Now question as to whether allowing a victim under the age of 18 years to remain in his company ,makes the accused liable for legal consequences or could he said to have committed the act of taking away the victim girl from lawful guardianship.

The case of **S. Varadarajan Vs State of Madras reported in 1965 AIR 942** can be pressed into service. In the case(supra) Hon'ble

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Supreme Court had clearly brought out the distinction between the words "taking" and "enticing". Their Lordships held that-

"It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to quard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful quardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking"".

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In the case at hand, the victim girl being a lettered girl and being above 17 years, just on the verge of attaining majority,



was having the capacity to know the full import of what she was doing voluntary- that is joining the company of the accused without her parents' consent and approval. As nothing has been shown in this case that some kind of inducement was held out by the accused person or an active participation by the accused in the formation of intention of the minor to leave the house of her guardian, the accused Dasarath Nath can not be held guilty of taking the victim out from the lawful guardianship. In fact nothing is also forthcoming that accused at some earlier stage also persuaded or solicited the minor girl to accompany him. Nor there is any evidence of pursuasion by the accused to marry him. The case of and illiterate girl would have been different but in the instant case the victim girl being a student at the relevant time, for the exercise of her discretion to be with the accused, accused persons can not be put to fault.

Again the evidence on record is silent in respect of any overt acts of sexual assault being done by accused Dasarath Nath on the victim's person. Rather it is clarified by the victim(PW1) that accused Dasarath Nath neither had sexual intercourse with her nor forced her to have sexual intercourse with him. Ingredients of section 4 of the POCSO thus, finds no attraction herein.

Accordingly in the above premises, I am constrained to hold that prosecution has failed to establish the charge under section 366-A IPC r/w section 4 of the POCSO Act against the accused persons beyond all reasonable doubt.

The points for determination stands answered accordingly.

In the fact and circumstances of the case compensation to the victim does not find justification. Hence no compensation is awarded to the victim.

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Order

In the light of the above discussions, accused persons namely Dasarath Nath, Asir Ali and Rinku Ali are acquitted of the charges u/s 366-A IPC R/W Section 4 of the POCSO Act and set at liberty forthwith.

The bail bond of the accused person shall remain in force for a period of 6 months with effect from today in view of the provisions of Section 437-A Cr.PC.

Given under my hand and seal of this court on the 15th day of February, 2020.

Special Judge, Baksa, Mushalpur

Dictated and corrected by me

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APPENDIX

Prosecution witness:	
PW1	victim(name withheld)
PW2	Rupsan Bibi
PW3	Anjuma Bibi
PW4	Dulal Nath
PW5	Dr. Urmi Devi
PW6	Ghanashyam Talukdar

Prosecution Exhibits:

PW7

Ext.1	Medical report of the victim
Ext.1(1)	Signature of victim
Ext.1(2) and Ext. 1(3)	Signatures of Dr. Urmi Devi
Ext.2	Statement of the victim u/s 164 CrPC
Ext.2(1) and Ext. 2(2)	Signature of victim
Ext.3	FIR
Ext.3(1)	Signature of Rupsan Bibi
Ext.3(2)	Signature of Ghanashyam Talukdar
Ext.3(3)	Signature of Durlav Ch. Das
Ext.4	X-ray report of victim
Ext.4(1)	Signature of Dr. Prabudh Kr. Sarma
Ext. 5	Sketch map of place of occurence
Ext.5(1)	Signature of Owaz Ali
Ext. 6	Charge Sheet
(Ext.6(1)	Signature of Khargeshwar Deka

Owaz Ali

Defence witness:

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Nil.

Material exhibits:

Nil.

Court witness:

Nil.

(Smti. M.C. Bordolo Special Judge Special Judge, Baksa, Baksa Mushalpur