IN THE COURT OF THE SESSIONS JUDGE, MORIGAON

Sessions (Spl.) Case No.24/2016 U/S 366 A/376 IPC, R/W Section 4 of POCSO Act

Present : Mr. Dhrupad Kashyap DasSessions Judge, Morigaon.

State of Assam

Vs.

Sri Badal Biswas Accused

Date of Charge :-14.07.2016.

Date of recording evidence :- 02.09.2016, 18.04.2017, 03.06.2017,

18.07.2017 & 30.08.2017.

Date of Argument :- 06.12.2017, 19.12.2017 & 09.01.2018.

Date of Judgment :- 18.01.2018.

Appearance for the Parties

Advocate for the State :- Mr. A. Kalam, Ld. P.P.

Advocate for the accused :- Mr. M. C. Sarkar, Ld. Advocate,

JUDGMENT

1. In this case, the prosecution has alleged that a 13 (thirteen) years old girl fell victim to sexual assault at the hand of accused. The accused is one Sri Badal Biswas of village Lesaribori, P.S. Mayong, Dist. Morigaon (Assam). The informant Sridam Biswas is also a resident of the same village. He is the father of the victim, Miss X (the real name of the victim kept concealed to save her from infamy). According to the prosecution, on 07.03.2013 at around 4.00 A.M., the above-named accused kidnapped the victim from her compound by gagging her mouth, when she along with her mother came out from her house to attend nature's call in the wee hours. When the mother of the victim raised hue and cry; the informant along with other family members came out from their house. They all tried to trace out the victim but failed. It is further alleged in the ejahar

that prior to this incident the above-named accused taking the advantage of loneliness of the victim tried to rape her.

On the very day of occurrence of the incident, the informant went to Mayong P.S. and lodged an F.I.R. On receipt of the F.I.R., the then O/C Mayong P.S. registered a case vide Mayong P.S. Case No.15/2013, U/s 366 (A) IPC.

2. The investigation was set in motion. During the course of investigation, the I.O. visited the place of occurrence. The I.O drew up the sketch map of the P.O. and recorded the statement of the witnesses. Thereafter, the I.O. search for the accused and the victim but failed to recover the accused and the victim. However, the I.O. on 30.04.2013 during the investigation period recovered the victim girl from the house of the accused, but he could not find the accused. So, the I.O. failed to arrest the accused. Thereafter, the I.O. recorded the statement of the victim as well as other material witnesses and also got the victim medically examined and got her statement recorded U/s 164 Cr.P.C. The I.O. during investigation failed to arrest the accused. Thereafter, the I.O. collected the medical report and upon completion of investigation, he failed to submit charge-sheet as he gets transfer order. Thereafter, the then O/C Mayong P.S. submitted the charge-sheet against the above-named accused with allegation of offence punishable U/s 366 (A) of IPC, showing the accused as absconder. Thereafter, on the strength of warrant of arrest the accused was arrested by the police of Mayong P.S. and produced before the learned Court below, wherefrom, he was remanded to judicial custody. Thereafter, the Ld. Court below on production of the accused person furnished copies of relevant documents as mandated U/s 207 Cr.P.C. Thereafter, the learned Court Below committed the case to this Court by finding it to be exclusively triable by this Court. Subsequently, this Court considering the materials on record let the accused on bail and thereafter, the present accused attended before the Ld. Court. Thereafter, having heard Ld. Counsel of both sides and basing upon materials on record my learned predecessor framed charges U/s 366 (A)/376 of IPC, read with Section 4 of POCSO Act against the accused person, which were read over and explained to the accused to which he pleaded innocence and claimed to be tried.

3. Point for determination:

- (i) Whether the accused on the eventful day i.e. on 07.03.2013 at around 4.00 A.M. at village Lacheribori under Mayong P.S. in the district of Morigaon, induced the victim (a minor girl) while she came out from her house to address nature's call with intent that she might be or knowing that she is likely to be forced or seduced to illicit intercourse with him?
- (ii) Whether the accused on the same day, time and place committed rape of the victim?
- (iii) Whether the accused on the same day, time and place or after that committed penetrative sexual assault upon the victim, a minor girl?
- 4. In this case prosecution has examined as many as 8 (eight) PWs including the most material witnesses of this case. After completion of recording the evidence of the PWs, the accused was subjected to examine as warranted U/s 313 Cr.P.C. with respect to the incriminating materials that surfaced against him in the evidence on record. The accused declined to adduce defence evidence.
- 5. I have heard argument so advanced by Ld. Counsel of both sides. Considering the evidence on record, I have come to the following decisions.

DISCUSSION, DECISION AND REASONS THEREOF

In this case, it is alleged by the prosecution that on the eventful day the above-named accused kidnapped the daughter of the informant i.e. the victim, a minor girl, from her house campus, while she came out from her house to attend nature's call and thereafter, he committed sexual assault upon the victim girl without her consent.

(a) To prove this fact, the prosecution has examined PW-1 (Sridam Biswas), the informant. He in his evidence has stated that the victim Miss- X is his daughter and the accused is his co-villager. The occurrence of the incident

took place in the year 2013. PW-1 stated that at the time of occurrence of the incident his daughter (the victim) was aged about 13 (thirteen) years. She (the victim) is a school going girl studying at Class – VII at Lecharibori M.E. School. According to PW-1, the occurrence of the incident occurred in the early morning. PW-1 stated that 2/3 days prior to the incident of the occurrence, he went to Garmari to work there and while he was staying at Garmari, the occurrence of the incident took place. PW-1 stated that at the time when he went to Garmari, he met the accused and his father and asked them to look after his family and they agreed. PW-1 stated that on the day of the occurrence of incident in the early morning, his wife informed him that his daughter was kidnapped by accused Badal. Then, he immediately returned back to house and after arrival, he found that his wife and three other person were busy in searching his daughter. PW-1 stated that he called some elderly persons of his village to discuss about the matter and he sought for their advice. Then, they advised him to call VDP secretary and Gaonburha to his house; but, they did not come to his house. Thereafter, PW-1 went to the police station and filed an F.I.R. against the accused. PW-1 stated that earlier accused Badal intruded inside their house and tried to molest his daughter, but failed. PW-1 stated that on suspicion, he lodged the ejahar against accused Badal. PW-1 proved Ext.1 the ejahar, whereupon Ext.1 (1) is his signature. PW-1 further stated that after around 20 (twenty) days he found his daughter at the house of Badal and then police recovered his daughter from the house of Badal. Then, his daughter was examined and her statement was also recorded. PW-1 stated that when he questioned his daughter, she told him that on the date of occurrence she was helping her mother to clean the courtyard and when her mother was chewing betel inside the house, then she was forcibly taken away by the accused. She (his daughter) further told him that she was taken to the house of several persons and subsequently, she was taken to Deodhar Mandir, where they exchanged "mala". Thereafter, both of them came to the Court and sworn an affidavit.

In his cross-examination PW-1 stated that he married in the year 1984. The victim is his fifth child. After four years of his marriage his first child was born. After three years of birth of his first child, the second child was born. His fourth child was born after two years of the birth of his third

child and the fifth child i.e. the victim was born after three years of birth of fourth child. PW-1 further stated that the victim is now married to one boy after about 4/5th months of the incident of occurrence. Accused is his next door neighbour. They used to visit the house of the accused. PW-1 stated that he does not know if there is any love affair in between the accused and his daughter (the victim). PW-1 denied all the suggestions put to him by the defense.

(b) PW-2 (Joymati Biswas), the mother of the victim girl, stated in her evidence that informant is her husband and the victim Miss - X is her daughter. The occurrence of the incident took place around 3 / 4 years back at around 3.30 A.M. At the time of occurrence of the incident her husband was not at home. She was staying in her house along with her three daughters and her mother-in-law. PW-2 stated that she woke up from sleep at 3.30 A.M. She also asked her daughter (the victim) to woke up and told to do other works. Then, PW-2 started to prepare meal. PW-2 stated that her daughter (the victim) started to sweep the courtyard by boom-stick. PW-2 stated that after taking betel, she did not find the victim. Then, she searched for her here and there. PW-2 stated that she did not hear any sound before disappearance of her daughter (the victim). She (PW-2) raised hue & cry and on hearing her hue & cry, village people came to their house. Then, she (PW-2) narrated the story before them. PW-2 further stated that after about one month, the victim was found in the house of accused Badal. Police recovered the victim from the house of Badal. Then, the victim was examined and her statement was also recorded by police. PW-2 further stated that when she questioned the victim (her daughter), she (her daughter/victim) told before her (PW-2) that the accused forcibly took her away. She (her daughter/victim) further told her that she was taken to different places. PW-2 further stated that her daughter (victim) was married in the state of West Bengal after around 5/6 months of her recovery.

In her cross-examination, PW-2 stated that she has five children. After four years of their marriage their first child was born and the average age difference between the rests of four children is about three years. PW-2 stated that the accused used to reside in the eastern side of their house. Earlier they have good relation and have good terms with the family of the

accused. PW-2 further stated that she had no knowledge if her daughter had love affairs with the accused. PW-2 denied all the suggestions put to her by the defense.

(c) PW-3 (Sri Ganesh Mandal) stated in his evidence that he knows the informant and his daughter, who is the victim. He also knows the accused person. PW-3 stated that the alleged occurrence of the incident took place about 4 (four) years ago. PW-3 stated that on the date of the occurrence of the incident, at night, the mother of the victim girl came to his house and told him that her daughter is missing. Thereafter, he went to her house in search of the victim girl. PW-3 stated that the mother of the victim girl told him that the accused Badal Biswas took away her daughter. Then, he went to the house of accused Badal Biswas on that very night in search of the victim girl. He (PW-3) also informed about the incident to the father of the accused person, who told him that for last 2/3 days Badal was not coming to his house. Thereafter, he (PW-3) came back to his house. Later on, he heard that the victim girl was recovered. The parents of the victim girl did not inform him about the circumstances leading to the discovery of the victim girl.

In his cross-examination, PW-3 stated that he did not know under what circumstances the victim girl went missing. Police did not record his statement. PW-3 denied the suggestion that after coming to know about the incident he did not go to the house of the accused in search of the victim girl.

(d) PW-4, the victim, in her evidence stated that the informant is her father. She knows the accused person who resides near her house. PW-4 stated that the alleged incident occurred about 4 (four) years ago. At that time, she was a minor girl of around 14 (fourteen) years old. PW-4 stated that on the date of occurrence of the incident, in the early morning, she was cleaning the compound of their house and at that time, the accused person along with 2/3 other persons came there and closed her mouth by a piece of cloth, and thereafter, all of them kidnapped her from her house. They kidnapped her in a four wheeler vehicle. PW-4 stated that the accused took her to different places which she did not know. He (the accused) kept her at

different places and committed sexual intercourse with her against her will. PW-4 stated that she restrained him from doing such an act but he did not listen to her. She shouted and cried a lot to release her but none had come to rescue her and the accused Badal also did not listen to her request to release her. PW-4 stated that after about one month accused Badal took her to his house. During her stay with the accused, she somehow managed to give information about the incident to her parents through one person namely, Kanai. Later on, her parents recovered her from the house of the accused. PW-4 further stated that after recovery, she was produced before the Police Station. Her father had already lodged the case against the accused. She was also produced before the Doctor for medical examination. Police produced her before Magistrate for recording her statement. PW-4 proved Ext. 2 her statement before Magistrate, whereupon Ext. 2(1) and Ext. 2(2) are her signatures. PW-4 further stated that she stated the same incident before the police and the Magistrate.

In her cross-examination, PW-4 stated that there is a road in between the house of the accused and her and there are also many houses situated near her house. PW-4 stated that at the time of incident of occurrence, she was a school going girl. PW-4 stated that the accused kept her in the house of one Santosh. She complained about the accused to Santosh but it proved futile. The accused kept her at different places but she hardly understand the language of the people of those areas. PW-4 stated that the accused confined her in a particular place where only he and she stayed. The neighboring people did not know the incident of kidnapping by the accused. PW-4 further stated that after recovery, her parents had arranged her marriage with a person at Bengal. Now, she is leading a married life with her husband and she had a female baby. She had another baby also who died earlier. PW-4 denied all the suggestions put to her by the defence.

(e) PW-5 (Dr. R. P. Bora) stated in his evidence that on 30.04.2013, he was posted at Morigaon Civil Hospital as S.D.M.O. On that day, he conducted an X-ray of Ms. Binu Biswas. Radiological X-ray was taken to determine the age of the patient. As per the X-ray report the age of the patient is between

16/17 years old. PW-5 proved Ext. 3 the X-ray report, whereupon Ext. 3(1) is his signature.

In his cross-examination, PW-5 stated that as per jurisprudence the Epiphysis of the radius fuses with the shaft at the age of 18 years and Epiphysis of ulna fuses with the shaft at the age of 17 years. PW-5 denied the suggestion that he has not properly examined the patient.

(f) PW-6 (Smt. Rina Das) stated in her evidence that the informant is her father. The victim Bina Biswas is her younger sister. She knows the accused person. PW-6 stated that at the time of occurrence of the incident her sister was 13 (thirteen) years old and she (PW-6) was 16 (sixteen) years old. PW-6 stated that at the time of the occurrence of the incident she and her sister were sleeping in their house. PW-6 further stated that on the date of the incident, in the early morning, her younger sister went out from their house. Thereafter, they started searching of her by calling her name but they could not find her. Then, her father lodged the case suspecting that the accused person behind the incident. PW-6 further stated that after about 10/12 days they got a phone call from the accused telling that her younger sister is with him. Later on, police went to the house of the accused and recovered her sister from the house of the accused person. PW-6 further stated that on being asked her sister (the victim), she told them that on the date of the occurrence of the incident, the accused person came to their house and by putting cloth on her mouth he (the accused) kidnapped her.

In her cross-examination, PW-6 denied the suggestions put by the defence.

(g) PW-7 (Kuladhar Nath) stated in his evidence that on 07.03.2013, he was posted at Mayong P.S. as A.S.I. On that day, he was endorsed with the investigation of Mayong P.S. Case No. 15/2013 dated 07.03.2013, registered U/S 366 (A) IPC. PW-7 stated that during investigation of the case, he drew up the sketch map of the place of occurrence. PW-7 proved Ext.4 the said sketch map, whereupon Ext.4 (1) is his signature. PW-7 stated that he recorded the statement of the witnesses, such as, informant, victim and many other witnesses. PW-7 further stated that on the date of the occurrence of the incident in the early morning, the mother and the victim

girl went out for the urinal and the accused was hiding in their compound and on seeing the victim, the accused kidnapped the victim by putting clothes on her mouth. PW-7 further stated that he recovered the victim girl from the house of the accused person but he could not find the accused person at his house. He (PW-7) recovered the victim on 30.04.2013, during investigation period and at that time the accused was absconding and, therefore, he could not arrest the accused person. PW-7 further stated that he send the victim girl for medical examination and she was also produced before the learned Magistrate for recording her statement. PW-7 further stated that the victim girl clearly implicated the accused person that he committed the crime. PW-7 could not submit the charge-sheet due to his transfer but he collected relevant medical reports of the victim.

In his cross-examination, PW-7 stated that the incident of kidnapping took place at the compound of the informant. He did not mention the house of the neighboring people of the informant in his sketch map. The house of the accused is situated at a distance of 200/300 meter away from the house of the informant. PW-7 stated that he recorded the statement of an independent witness namely, Ganesh Mandal. PW-7 further stated that the victim girl did not state before him that she was cleaning her compound and at that time the accused person came along with other two persons and kidnapped her. PW-7 further stated that he does not know whether there was love affair in between the accused and the victim girl. PW-7 denied all the suggestions put to him by the defence.

(h) PW-8 (Md. Rafiqul Islam) stated in his evidence that on 07.03.2013, he was serving as Officer-in-Charge at Mayong Police Station. PW-8 stated that the A.S.I., Kuladhar Nath investigated the Mayong P.S. Case No. 15/2013, U/s 366 A IPC. PW-8 stated that A.S.I. Kuladhar Nath had almost completed the investigation. After his investigation, the case was handed over to him (PW-8) for completion as well as submission of charge sheet. PW-8 further stated that he perused the entire investigation made by A.S.I. Kuladhar Nath. At that time, the accused was still absconding. PW-8 further stated that as the investigation had already completed, so, he finally submitted charge-sheet against the accused showing him as absconder U/s

366 A IPC. PW-8 proved Ext. 5 the charge sheet, whereupon Ext. 5(1) is his signature.

In his cross-examination, PW-8 stated that the victim appeared to be a minor as per Medical Report. He does not know whether there was any love affair in between the accused and the victim. PW-8 denied all the suggestions put to him by the defence.

6. While discussing evidence on records, PW-1 being the informant stated in his evidence that he came to his house after getting information about the alleged occurrence of the incident and after arrival at his house, he found his daughter missing and his wife and other persons were searching for their daughter. When they did not find their daughter, PW-1 went to police station and lodged an ejahar against the accused. He proved the ejahar as Ext.1 and confirmed his signature as Ext.1 (1). However, PW-1 did not state the contents of his ejahar which he himself lodged before the police station. He did not state in his evidence that on the date of occurrence at early in the morning when his daughter (victim) along with his wife came out to attend nature's call; the accused, who hiding near his house, had kidnapped his daughter in front of his wife by gagging mouth of his daughter. But, PW-1 stated that on being asked his daughter told him that at the relevant time of the occurrence of incident, she was helping her mother in cleaning their compound and when her mother went inside for taking betel, the accused forcibly took her away. Hence, PW-1 being the informant deposed a different circumstance of kidnapping of his daughter in his evidence than the circumstances narrated in his ejahar. As such, the evidence of PW-1 is found to be contradictory with his own ejahar i.e. Ext.1.

PW-2 being the mother of the victim girl as well as PW-4 (victim girl) also did not state in their evidence that accused committed the alleged incident while both of them came out from house to attend nature's call in the wee hours of the date of occurrence. Hence, it is found that all the evidence of these vital witnesses are contradictory in nature, if compares with the ejahar.

From the evidence on record, it appears that accused is the next door neighbour of the informant and the informant had good relation with the family members of the accused. However, PW-4 (victim girl) stated that the accused along with 2/3 other persons came to their house and kidnapped her in a four wheeler vehicle. But, the I.O. during investigation did not find involvement of any vehicle in commission of the alleged occurrence of the incident. The victim girl in her evidence did not utter any single word that the accused kidnapped her by gagging her mouth so that, she could not shout. It was also alleged by the victim girl that the accused kept her at different places after taking her away. But, surprisingly, she (victim girl) did not make any complaint to those people whom she met at different places with the accused. So, it is not believable that despite her shouting/crying during confinement, none had come forward to rescue her from the detention of the accused. She also did not clarify as to how she managed to inform her parents about her where-about. She stated that she managed to inform her parents about the incident with the help of one person, namely – Kanai, but he was not examined by the prosecution nor examined by police.

PW-1, the informant of this case lodged the ejahar against the accused on the very day of the occurrence of incident and the accused was implicated on the basis of suspicion only. But, the informant did not clarify why he suspected the accused behind the incident, in as much as, the victim was alleged to have been recovered from the custody of the accused after many days of the occurrence. The I.O. of the case as PW-7, confirmed that the victim girl did not state before him that she was cleaning her compound at the time of occurrence of the incident and the accused person came along with two more persons.

The Ld. Defence Counsel has also pointed out that on perusal of entire materials-on-record; a flavor of love affairs between the victim and the accused could be perceived.

PW-1, the father of the victim stated that his daughter (victim) told him after her recovery that she was also taken to a temple (Deodhar Temple) by the accused where they exchanged 'mala' which means performance of marriage.

Therefore, the Ld. defence Counsel has submitted that there was love affairs between the victim girl & the accused and the accused was in no way involved into any offence as alleged. Further, there was no any cogent

evidence that the victim girl was minor one. Prosecution has failed to prove the age of the victim.

7. After careful analysis of the evidence on record, it has surfaced that there is lack of cogent evidence in respect of the alleged incident of occurrence. The evidence of the victim and the parents of the victim does not inspire confidence in the mind of the Court. So, the accused can not be brought to book. The prosecution is found to have left clouds as well as doubts on many aspects of the evidence on record. Thus, this Court found that the prosecution has failed to prove the case beyond any reasonable doubt and the accused deserves to get the privilege of benefit of doubt. As such, the accused person is not found guilty for the offences punishable U/s 366 (A)/376 IPC, r/w Section 4 of POCSO Act and hence, he is acquitted on benefit of doubt and set at liberty.

Judgment is delivered and pronounced in the open Court on this 18th day of January, 2018 under my hand and seal.

Dictated & corrected by me

Sessions Judge Morigaon.

APPENDIX

A. Prosecution witness

1. PW-1: - Sridam Biswas,

2. PW-2:- Joymoti Biswas,

3. PW-3: - Sri Ganesh Mandal,

4. PW-4: - Sri Bina Biswas,

5. PW-5 :- Dr. R. P. Bora,

6. PW-6: - Smt. Rina Das,

7. PW-7: Kula Dhar Nath,

8 PW-8 :-Md. Rafigul Islam.

B. <u>Defence witness: Nil.</u>

C. Prosecution Exhibit:

- 1. Ext.1 :- the ejahar.
- 2. Ext.2 :- the statement U/s 164 Cr. P.C. of the victim.
- 3. Ext.3 :- the X-Ray report.
- 4. Ext.4 :- the sketch map.
- 5. Ext.5 :- the charge-sheet.
- D. Defence exhibits :- Nil.

Sessions Judge, Morigaon.