CHIRANG, KAJALGAON. ::::::::: IN THE COURT OF THE SPECIAL JUDGE

Special (P) Case No. 21(D)/2017

U/S 366/376 IPC R/W Section 4 of POCSO Act.

State of Assam

Vs.

Sri Kalyan RayAccused

PRESENT : Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

ADVOCATES APPEARED:

For the State

: Sri D. Das, Public Prosecutor

For the accused

: Sri P. Sarma, Advocate

Date of evidence

: 21.03.2018

Date of Argument

: 29.03.2018

Date of Judgment

: 29.03.2018

JUDGMENT AND ORDER

Sessions Judge on 1. The prosecution case, in brief, is that on 11.07.2017, the accused Kalyan Ray kidnapped the 17 years old daughter of the informant and committed rape on her forcefully.

The matter was informed to the O/C, Dhaligaon Police Station 2. who accordingly registered a case being Dhaligaon P.S. Case No. 181/17 U/S 366/376 IPC read with section 4 of POCSO Act and entrusted S.I. Samir Bhusan Banik, I/C, Dangtol O.P. to investigate the case. Accordingly, the Investigating Officer arrested the accused, visited the place of occurrence, recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 CrPC and after completion of investigation, submitted charge-sheet against the accused Kalyan Ray U/S 366/376 IPC read with Section 4 of POCSO Act. After receiving charge sheet, copies of relevant documents were furnished to the accused person. Accused was produced before the court from jail. On perusal of police papers and hearing both sides, having found a prima facie case, my learned predecessor framed charge U/S 366/376 IPC read with Section 4 of POCSO Act against the accused.

- In support of the case prosecution side examined as many as 3 (three) witnesses.
- 4. Following witnesses are examined:-
 - (1) Smt. Duleswari Choudhury as PW 1
 - (2) Smt. Gunebala Choudhury as PW 2
 - (3) Victim as PW 3

5. FIR was exhibited as Ext. 1. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext. 2.

Defence plea is of total denial. Defence adduced no evidence.

Heard argument from both sides.

8. Now points for consideration:-

For the offence U/S 366 of IPC

1. Whether on 11.07.2017 the accused kidnapped the victim, the daughter of the informant, a woman with intent that she might be compelled to marry him against her will or in order (or knowing it to be likely) that she might be forced (or seduced) to illicit intercourse with him?

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For the offence U/S 376 of IPC

2. Whether after the said date at his house, the accused committed rape on the victim?

For the offence U/S 4 of POCSO Act

3. Whether on the said date and place, the accused committed penetrative sexual assault on the victim?

DISCUSSION, DECISION AND REASONS THEREFOR:-

- 9. Now, I want to discuss and appreciate the prosecution evidence on record regarding above mentioned all points simultaneously for the sake of convenience.
- PW 1 is the informant of this case and she is the mother of the 10. victim. She deposed that occurrence took place on 11.07.17. According to PW 1, at that time her daughter PW 3 was reading in Class XII. She further deposed that date of birth of the victim is 18.03.2000. PW 1 clearly stated that victim eloped with the accused without their consent. On the date of occurrence, she went to the house of her friend situated within their village but she did not return. They waited her till 8/9 PM but she was not returned. They did not search her because they thought that she stayed the night in her friend's home. But on next day also, she did not return. On next day, father of the accused informed the husband of the PW 1 through mobile phone that their daughter PW 3 went to their house. but they did not do so. PW 3 stayed there for a period of 2 months. After two months, when their daughter PW 3 informed them that family members of the accused tortured her, she lodged the FIR before Dhaligaon P.S. Then police recovered the girl from the house of the accused. Victim stayed in their house for a period of 3 months. After that she again fled away from their home and took shelter in the house of the accused. Both of them were living together as husband and wife prior to filing of the case and at present, they are living peacefully. During cross-examination informant stated that she had no any objection against the accused. According to PW 1, due to love affairs her

daughter fled away and took shelter in the house of the accused. They had no knowledge about their relationship.

- 11. PW 2 Smt. Gunebala Choudhury is the grandmother of the victim. She also stated same thing which was stated by PW 1. This witness clearly stated that after knowing the fact that PW 3 eloped with the accused and took shelter in their home, they did not take any step for her return. They allowed the victim to stay thereon. The case was lodged by PW 1 because victim reported that she was tortured by mother-in-law as deposed by PW 2. According to this witness, she had three granddaughters and one grandson. The present age of her eldest granddaughter is about 23/24 years and after two years from the birth of eldest granddaughter, present victim was born. According to PW 2, due to love affairs victim fled away voluntarily.
- The victim who is the important witness in this case was 12. examined as PW 3. She deposed that she developed love affairs with the accused two years prior to the incident. On the date of occurrence, she fled away voluntarily and took shelter in the house of accused. At first, she met the accused at Bhairobi hotel situated at Subhash Nagar. After that she went to the house of accused and stayed thereon. After one month social marriage took place between her and accused. Prior to her marriage, she was sleeping with grandmother of the accused. Her mother lodged the case as because they did not agree with her relationship with accused. She was taken forcefully from the house of the accused and kept her in the house of PW 1. She stayed in her parental home for a period of 3 months. After that she again fled away and took shelter in the house of accused. Since then she has been living with the accused as husband and wife. This witness clearly stated that prior to filing of this case she and accused were living together as husband and wife after performing social marriage. She has no any allegation against the accused. According to this witness, no any physical relation took place prior to their marriage. She further deposed that at the time of investigation, she stated before the Judicial Magistrate same fact as stated before this Court. During the cross-examination, she stated that on the date of occurrence, she took the scooty of her elder sister. At that time, her age was about 19 years. This witness further deposed that it was wrongly mentioned in

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her birth certificate that she was born in the year 2000. Her mother-in-law did not torture her but this fact was stated in the FIR because same was tutored by her sister and mother.

13. After going through the entire evidence given by three material witnesses, I have found that at the time of occurrence age of the victim was above 17 years. Victim clearly stated that her age was above 18 years but no any document was submitted in this respect. According to PW 3, she eloped with the accused willfully. She stayed in the house of the accused for a period of one month. After one month, social marriage took place and after that case was lodged. PW 2, grandmother of the victim stated that after knowing the fact that victim took shelter in the house of the accused, they allowed her to stay there. It reflects nothing but the knowledge of the guardian of PW 3 that there was relationship and due to relationship, their daughter/granddaughter eloped with the accused willfully. It is also found from the evidence of PW 1, 2 and 3 that case was lodged only after knowing the fact that mother-in-law of the victim tortured her. On the other hand, PW 3 during her cross-examination stated that her mother-in-law did not torture her but this allegation was tutored by her mother and sister. According to this witness, at present both of them i.e. she and accused are living together as husband and wife. It is also found from the evidence that at the time of filing of the case, accused and victim were living together as husband and wife. PW 3 clearly stated that social marriage took place prior to filing of this case and after the marriage, they were living together. Another fact which is revealed from the evidence is that victim was forcefully taken away to her parental home and she stayed there for a period of 3 months only. After that she again fled away to the house of the accused. This conduct of the victim reflects nothing but their love affairs. According to the victim, her father, mother and other family members did not support their relationship. They did not want to marry her to the accused. As there was no consent on the part of the parents and family members of the victim, this case was lodged by stating false story as stated by the victim. The parents also allowed the victim to stay in the house of the accused for a period of 2 months. They knew that social marriage took place between the accused and the victim and they were living together as husband and wife for which no case was lodged at that time. After two months, they

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lodged the case alleging that in-laws of the victim tortured her. So, no case was established U/S 4 of POCSO Act. Section 376 IPC was also not attracted because after marriage, physical relationship took place as husband and wife.

- 14. Another charge was framed U/S 366 IPC. From the evidence of victim, I have found that she fled away willfully. Not only one time, she had fled away two times. If she was minor, consent of her parents is necessary as argued by learned P.P. From the evidence of victim, it is not revealed that accused took her from their home. She met the accused at Bhairobi hotel and after that she asked the accused to take her to their home. So, taking of victim by the accused is not proved beyond all reasonable doubt.
- 15. Though learned P.P. pointed out that accused may be convicted U/S 363 IPC, but learned defence counsel pointed out that present case is not covered by Section 363 IPC also.
- 16. Now, I want to discuss the relevant provision of law regarding kidnapping.

17. Section 361 IPC defined kidnapping as follows:

"361. Kidnapping from lawful guardianship:

Whoever takes or entices any minor under 16 years of age if a male, under 18 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

- 18. In the case of **S. VARADARAJAN VS. STATE OF MADRAS reported in AIR 1965 SC 942. The Hon'ble Apex Court** regarding section 361 IPC held as follows:
 - "9. 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

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would like to guard ourselves from laying down that in no conceivable circumstances 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 her lawful guardian. 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.

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10. 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 to 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 quardian's house or a house where her quardian 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'."

19. After going through the above discussion and cited case law, I have found that in present case at hand, it is not proved beyond all reasonable doubt that accused took the victim from her lawful guardian. I

have also mentioned that no sexual intercourse took place between the accused and the victim prior to their marriage and according to victim, social marriage took place. Case was lodged after the marriage when victim and accused were living together as husband and wife. So, prosecution failed to establish the charge either U/S 366 IPC or U/S 363 IPC. All points mentioned above are remained as not proved beyond all reasonable doubt. Accused is not found guilty.

ORDER

- 20. Prosecution failed to prove the case U/S 366/376 IPC R/W Section 4 of POCSO Act against accused Sri Kalyan Ray beyond all reasonable doubt. Accused is acquitted on benefit of doubt and set at liberty. He is directed to furnish bail bond of Rs. 10,000/- with one suitable surety of the like amount for a period of six months as required U/S 437(A) Cr.P.C. Till then he is allowed to remain on previous bail.
- 21. A copy of this Judgment and Order shall be given to the District Magistrate for information.
- 22. Given under my sign and seal of this Court on this the 29th day of March, 2018, at Kajalgaon, Chirang.

Dictated and corrected by me,

Chirang.

<u>APPENDIX</u>

Prosecution witness:

PW 1 – Smt. Duleswari Choudhury

PW 2 – Smt. Gunebala Choudhury PW 3 – Victim

Exhibit (Prosecution):

Ext-1 FIR

Ext-2 Statement of the victim U/S 164 Cr.P.C.

Material Exhibit (Prosecution):

Defence Witness:

Nil.

Defence Exhibit:

Nil.

(D.J. Mahanta) Special Judge Schir-

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