#### **HEADING OF JUDGEMENT IN SPECIAL CASES:**

**DISTRICT: DHUBRI.** 

IN THE COURT OF SPECIAL JUDGE: DHUBRI.

SPECIAL CASE NO: 15/2016
UNDER SECTIONS: 366-A/376 IPC
READ WITH SECTIOM 4 OF THE POCSO ACT.

STATE OF ASSAM

VS.

MOSTAFIZUR RAHMAN

PRESENT:- DIPAK THAKURIA,
SPECIAL JUDGE,
DHUBRI.

#### **APPEARANCES:-**

B. R. BASUMATARI, SPECIAL P. P. FOR THE STATE.
A. AHMED, ADV. FOR THE DEFENCE.

DATE(S) OF EVIDENCE:- 11-07-2016, 07-11-2016, 05-12-2016, 05-06-2017,

29-01-2018, 11-06-2018.

DATE OF ARGUMENT:- 03-08-2018.

DATE OF JUDGMENT :- 18-08-2018.

## J U D G E M E N T

**1.** Accused Mostafizur Rahman stands trial for the offences punishable under sections 366-A/376 IPC read with section 4 of the POCSO Act for allegedly kidnapping a minor girl and also committing rape on her on 06-09-2013 at about 6.30 p.m. at village Sonapur under Mankachar police station.

- 2. The facts of the case, as revealed from the ejahar, in brief, are as follows:- that on 09-09-2013 the complainant lodged a written ejahar at Mankachar police station against the accused and another with an allegation that on 06-09-2013 at about 6.30 p.m. the accused kidnapped his 15 year old minor daughter and confined her for that night and also committed rape on her. On 07-09-2013 the girl was recovered from the house of the accused and the villagers took the girl to Hatsingimari police station and interrogated her about the incident and handed her over to the complainant. Regarding the incident a village bichar was conveyed where the father of the accused assured that he would solemnize the marriage of the victim girl with the accused on 09-09-2013; but the father of the accused and one Ajijal Haque arranged the marriage of the accused with another girl on 08-09-2013.
- **3.** After receiving the ejahar Officer-in-charge of Mankachar police station registered a case as Mankachar P. S. Case No. 373/2013 under sections 366-A/376 IPC.
- **4.** During the investigating the accused was able to get protection of pre-arrest bail.
- **5.** The investigating officer recorded the statements of witnesses under section 161 Cr. P. C. and statement of the victim was also recorded under section 164 Cr. P. C. By completing the investigation I. O. has submitted charge sheet against the accused person to prosecute him under sections 417/366-A/376 IPC.
- **6.** Learned SDJM (M) Hatsingimari after furnishing the copies committed the case to this Court as the offences are exclusively triable by the Court of session.
- 7. One of my learned predecessors after perusal the case record and case diary was pleased to frame charges against the accused under sections 366-A/376 IPC read with section 4 of POCSO Act. Charges so framed were read over and explained to the accused which he pleaded not guilty and claimed to be tried. The case was registered as Special case.
- **8.** As the charge under section 4 of the POCSO Act was framed; so, the case was registered as Special Court by one of my learned predecessors vide his order dated 16-05-2016
- **9.** The prosecution examined eleven witnesses including medical and investigating officers

and closed the evidence.

- **10.** After completion of the prosecution evidence, the statement of the accused was recorded u/s 313 Cr. P. C. by putting questions to him from all incriminating evidence appearing against him on record and thereby giving him an opportunity to meet the same. In response to which, the accused denied the allegations as well as evidence on record and also declined to adduce evidence in defence.
- **11.**Heard learned counsels appearing for the parties and perused the evidence on record.

## FOLLOWING POINTS HAVE BEEN SET UP FOR DETERMINATION

Whether the accused on 06-09-2013 at about 6.30 p.m. at village Sonapur under Mankachar police station kidnapped the minor daughter of the complainant with a view to do illicit intercourse with her and thereby accused is liable to be punished under section 366-A IPC?

Whether the accused on the same day time and place committed rape on the minor daughter of the complainant and thereby accused is liable to be punished under section 376 IPC?

Whether the accused on the same day time and place committed penetrative sexual assault to the minor daughter of the complainant and thereby accused is liable to be punished under section 4 of the POCSO Act?

## DISCUSSIONS ON THE POINTS FOR DETERMINATION AND THE DECISION ARRIVED THEREON WITH REASON:

**12.**In order to establish the charges against the accused, the prosecution has examined eleven witnesses. Among them P. W. 1 is the complainant and the father of the victim girl. P. W. 2 is the victim girl, P. W. 3 is the mother of the victim girl, P. W. 4 Motiur Rahman, P. W. 5 Abu Bakkar, P. W. 6 Lutfur Rahman, P. W. 7 Saydur Rahman are independent witnesses. P. W. 8 Rinku Ahmed is the medical officer. P. W. 9 Dhanjit Haloi, P. W. 10 Rana Bhuyan and P. W. 11 Madan Kalita are the investigating officers.

- **13.** The prosecution exhibited the statement of the victim girl recorded by Judicial Magistrate under section 164 Cr. P. C. as Ext. 1, medical report as Ext. 2, Ejahar as Ext. 3, sketch map of place of occurrence as Ext. 4 and charge sheet as Ext. 5.
- **14.** The defence examined none. Plea of the defence is total denial of the case.
- **15.**Out of eleven witnesses the prosecution has examined four independent witnesses. They are P. W. 4 Motiur Rahman, P. W. 5 Abu Bakkar, P. W. 6 Lutfur Rahman, and P. W. 7 Sayedur Rahman. On perusal the oral testimonies of the independent witnesses particularly P. W. 4, 5 and 6 it appears that they knew nothing about the subject matter of the case. P. W. 7 Sayedur Rahman has deposed that on the day of the incident in the morning hour he had seen the alleged victim was standing outside of the house of the accused. The victim, on being asked told him that the accused had asked her to come to his house. Thereafter the parents were informed about the incident who refused to come to the spot. Ultimately the victim was handed over to police. In cross-examination he has admitted that he had not seen the accused on spot.
- **16.** Apparently the oral testimonies of the independent witnesses have not supported the case of the prosecution.
- **17.** Now the fate of the prosecution is purely based on the credibility of the oral testimonies of the alleged victim, her parents and the official witnesses.
- 18. The complainant (P. W. 1) has deposed that the accused proposed to marry his 15 year old daughter before six months of the incident. On the day of the incident the accused took his daughter to his house and leaving her there he fled away. Villagers had handed over his daughter to police and police handed over his daughter to him. Subsequently he came to know that the accused married another girl. So, he filed the case. P. W. 3 who is the mother of the victim girl has deposed in the same tune as deposed by her husband (P. W. 1). From cross-examination of the complainant it transpires that Hatsingimari police outpost handed his daughter to him and he filed no ejahar there. After three days of the incident he lodged the ejahar. On 28-02-2013 there had been a sitting of the village elders in connection with his daughter having eloped with the accused and in that sitting it was decided that his daughter would live with him at his house and she would not go to the house of the accused. P. W. 3 in her cross-examination has denied the suggestion of the defence that at the time of incident her

daughter was 19 year old.

- **19.**The alleged victim (P. W. 2) has deposed that the accused in order to marry her had taken her to his house. He kept her and ran away. Thereafter the villagers brought her from the house of the accused to police station wherefrom the matter was informed to her father. At police station villagers of both the villages had called for amicable settlement and 9<sup>th</sup> September 2013 was fixed the marriage date between her and the accused; but the accused married another girl on 8<sup>th</sup> September 2013. Then her father lodged the ejahar. She has exhibited her statement recorded under section 164 Cr. P. C. as Ext. 1 and Ext. 1 (1) and (2) are her signature. In cross-examination she has deposed that I. O. had not collected her birth certificate. On 28-02-2013 a bichar was called to decide the matter and as per condition of the bichar she was barred from visiting the house of the accused. Her father filed the case as the accused refused to marry her. She has denied the suggestion of the defence that on the day of the incident she was 20 year old.
- **20.** The medical officer Dr. Rinku Ahmed (P. W. 8) has deposed that on 10-09-2013 she examined the victim and on that day she was 15 year old. She found the victim was normal, she detected no injury on her person and also not found any spermatozoa in her vaginal swab. The clinical opinion of the medical officer not consistent with recent sexual intercourse. The medical officer exhibited the report as Ext. 2 and her signature as Ext. 2 (1).
- 21. The prosecution has examined three investigating officers. P. W. 10 Rana Bhuyan attempted to arrest the accused; but could not succeed. P. W. 11 Madan Kalita submitted charge sheet against the accused under sections 417/366-A/376 IPC vide Ext. 5 charge sheet. Ext. 5 (1) is his signature. P. W. 9 Dhananjai Haloi has deposed that on 09-09-2013 O. C. Mankachar entrusted him to investigate the case. He visited place of occurrence, prepared the sketch map of spot, recorded the statements of witnesses, produce the victim girl before the medical officer for examination and Court for recording her statement. The complainant put thumb impression in the ejahar. He has exhibited the ejahar as Ext. 3. Also exhibited the signature of then O. C. Mankachar Samir Bhushan Banik as Ext. 3 (1). He has also exhibited the sketch map as Ext. 4 and his signature thereon as Ext. 4 (1). In cross-examination he has deposed that he examined no police personnel of Hatsingimari police outpost. He had not seized the birth certificate or the school certificate of the victim.

- 22. In a case of POCSO Act or the case registered under section 366-A IPC the prosecution has to prove that the victim girl on the day of the incident was a minor below the age of 18. In the case in hand the investigating officer (P. W 9) in his cross-examination has clearly stated that he has not seized the birth certificate or school certificate of the victim girl and had also not issue notice to the complainant to produce the birth certificate of the victim girl. The medical officer (P. W. 8) though in her evidence stated that the victim was 15 year old; but her assessment of the age was not based on the findings of radiological report as there is no evidence in the case record that ossification test of the victim girl was done to ascertain her age. It is a serious lapse on the part of the three investigating officers that they had not collected any authentic document to ascertain the age of the victim girl and ossification test was also not done.
- 23. As stated earlier the parents and the alleged victim are the vital witnesses for the prosecution. From the evidence of the alleged victim and her statement recorded by Judicial Magistrate under section 164 Cr. P. C. it appears that she had affairs with the accused. The parents of the victim disclosed that there was a proposal from the accused that he intended to marry their daughter. So, there is no iota of doubt that there was affair between the accused and the alleged victim. From the evidence on record it transpires that on the day of the alleged incident the accused had taken the alleged victim to his house; but the accused kept the victim in his house and left his house. The alleged victim has not stated that she was induced by the accused to go with him to his house. To constitute an offence punishable under section 366-A IPC the prosecution has to prove that the victim is a girl of below 18, the accused induced the victim to go from one place to another or to do an act and the inducement was made with the intent or knowledge it to be likely that the girl might be forced or seduced to illicit sexual intercourse with another male person. In the case in hand, from the evidence on record it transpires that the prosecution has failed to establish by producing cogent evidence that the alleged victim was a minor girl below the age of 18 years and the accused compelled her to go from her house to his house. There was affair between the accused and the alleged victim; so, there was no intention of the accused to hand over the girl to another person to do sexual intercourse with her. The alleged victim has stated nothing that the accused had sex with her. The main ingredient that the girl would be forced or seduced to illicit intercourse with someone other than himself is absent. So, I have no hesitation to hold that the prosecution has failed to establish the charge against the accused under section 366-A IPC.

**24.**So far charges under section 376 IPC or section 4 of POCSO Act are concerned, the prosecution has to establish the requirements mentioned under section 375 IPC and section 3 of the POCSO Act. The main ingredient of both the sections is penetration of male organ to the female organ of the alleged victim. But the principal witness for the prosecution i.e. the alleged victim has stated nothing that there was sexual intercourse between she and the accused. The only allegation against the accused is that he promised to marry the alleged victim; but instead of marrying her, married another girl.

So, the complainant filed the ejahar.

**25.** After carefully scanning the evidence on record I come to the safe conclusion that the prosecution has failed to establish the charge against the accused under sections 366-A/376 IPC read with section 4 of POCSO Act beyond all reasonable doubt which is

mandatory in criminal law.

**26.**In view of the above discussion and observation it is safely held that the accused deserves benefit of doubt. Accordingly the accused is acquitted of the charge framed against him under section 366-A/376 IPC read with section 4 of POCSO Act on benefit of

doubt and he is set at liberty.

**27.**Liability of the bailor of the accused remains in force for next six months as per law.

28. Given under my hand and seal of this Court this the 18th day of August 2018

(D. Thakuria)

Special Judge, Dhubri.

#### IN THE COURT OF SPECIAL JUDGE: DHUBRI.

## SPECIAL CASE NO: 15/2016

# UNDER SECTIONS: 366-A/376 IPC READ WITH SECTIOM 4 OF THE POCSO ACT.

### **STATE OF ASSAM**

VS.

### **MOSTAFIZUR RAHMAN**

## <u>APPENDIX</u>

A. Prosecution exhibits:

Ext. 1 : Statement of the victim.

Ext. 2 : Medical report.

Ext. 3 : Ejahar.

Ext. 4 : Sketch map of place of occurrence.

Ext. 5 : Charge sheet.

B. Defence Exhibits: Nil.

C. Court Exhibits : Nil.

D. Prosecution Witnesses:

P. W. 1: Complainant,

P. W.2: Victim,

P. W.3: Mother of the victim,

P. W.4: Motiur Rahman,

P. W.5: Abu Bakkar,

P. W.6: Lutfur Rahman,

P. W.7: Sayedur Rahman,

P. W.8: Dr. Rinku Ahmed,

P. W.9: Dhanjit Haloi,

P. W.10: Rana Bhuyan &

P. W.11: Madan Kalita.

E. Defence Witness: Nil.

F. Court Witness: Nil.

(D. Thakuria)

Special Judge, Dhubri.