# IN THE COURT OF THE SPECIAL JUDGE :::::: NALBARI

Present: Smti S. Bhuyan Special Judge

Nalbari.

# Spl (P) CASE NO: 24/18 u/s- 366 IPC and Section 4 of POCSO Act.

State of Assam ......Complainant

-Vs-

# Jiten Das @ Jitendra Das

S/O-Sri Amulya Das

R/o, Vill-Bahari Ganak Para

PS-Tarabari, Dist-Barpeta ......Accused person

Appearance :-

For the prosecution : Mr. K. Sarma, Special PP For the defence : Mr. S. Sarma, Advocate.

Date of institution of the case : 05/05/18

Date of framing charge : 06/02/19

Date of evidence : 07/03/19, 25/04/19, 27/05/19

Statement of accused recorded: 21/06/19

Date of Argument : 16/07/19, 17/07/19, 30/07/19

Judgment Delivered : 02/08/19

### **JUDGMENT**

- 1. The case of the prosecution as revealed from the ejahar lodged by PW-1 Jaydeb Barman s/o-Late Arun Barman of village Belsor Milanpara, P.S.-Belsor, District- Nalbari, is that on 01/05/18 at about 4 pm his minor daughter Miss 'X' (name changed) was kidnapped by accused Jiten Das who worked in the shop of one Girish Medhi. Hence, the case.
- 2. O/C Belsor PS on receipt of the ejahar registered Belsor PS case vide Belsor PS case No. 84/18 u/s-366 IPC adding section-4 of

the POCSO Act and lynched investigation. During investigation, IO of the case visit place of occurrence, drawn sketch map of the place of occurrence, recorded statement of the informant and other witnesses, brought victim and accused from Gogamukh, recorded statement of the victim u/s 161 Cr.P.C, produced her at SMK civil Hospital, Nalbari for medical examination and then produced her before the court to record her statement u/s-164 Cr.P.C and the arrested accused, produced him before the court and after completion of investigation submitted charge sheet against the accused Jitendra Das @ Jiten Das u/s-366 IPC and section 4 of the POCSO Act.

- 3. On receipt of the charge sheet my then learned predecessor took cognizance and issued process to the accused and after furnishing copies to the accused, framed charge u/s-366 IPC read with section 4 of the POCSO Act against the accused Jiten Das and when charges are read over and explained to the accused he pleaded not guilty and stood for trial.
- 4. In order to prove the charge against the accused person, prosecution altogether adduces evidence of 7 no's of witnesses including informant, victims, I/O and M/O of the case and exhibited 6 no's of documents. PW-1, Jaydeb Barman (informant), PW-2, Girish Medhi, PW-3, Sabitri Sen Deka, PW-4, Minati Sen Deka, PW-5 Miss 'X' (victim), PW-6, Bandhuram Baishya (I/O) and PW-7 Dr. Urmi Devi Choudhury (M/O). Ext-1, Ejahar, Ext-2, statement of victim recorded u/s-164 Cr.P.C, Ext-3 charge sheet, Ext-4 Sketch Map of the place of occurrence, Ext-5, Medical Report, Ext-6 X-ray report. After closures of the evidence of the prosecution, statement of the accused Jiten Das @ Jitendra Das recorded u/s-313 Cr.P.C and accused plea is total denial however he declined to adduce evidence in support of his plea of denial.

#### POINTS FOR DETERMINATIONS ARE:-

(i) Whether victim girl Miss X was under the age of 18 years and she was minor on the date of incident?

- (ii) Whether accused Jiten Das @ Jitendra Das kidnapped Miss 'X' and induces and compelled her to go with him to marry her against her will and consent and with that intent she is forced or seduced to illicit intercourse with him?
- (ii) Whether accused committed penetrative sexual assault upon Miss 'X', as defined under section 3 of the POCSO Act and she is under the age of 18 years on the date of incident?

# **Argument**

- 5. I have heard argument of learned counsel for both sides. Learned Special Public Prosecutor submitted that victim is a minor girl and prosecution beyond all reasonable doubt fairly able to establish the case against the accused.
- 6. Learned defence counsel made submission that there is a love affair between the accused and alleged victim girl and this fact is admitted by victim in her statement recorded u/s-164 and u/s-161 CrPC and before the court. No force inducement took place, she was not married. There is difference in place of recovery stated by victim and other PWs. No age proof documents submitted though victim claimed that she was school going student and radiological age is not the conclusive proof of the age of the victim when there is error of margin the radiological age and medical evidence does not show recent sexual intercourse so prosecution charge against the accused does not stand.

#### **DISCUSSION, DECISION AND REASON THEREOF:**

7. The prosecution charge framed against the accused is u/s-366 IPC and section 4 of the POCSO act. To prove the charge u/s-366 IPC prosecution must bring on record the ingredients that there is a kidnapping and or abduction of a woman, second such kidnapping and abduction is done with intent that said woman would be compelled to marry a person against her will and consent and third the woman in order may be forced or seduced to illicit intercourse and to prove the charge of section 4 of the POCSO Act, prosecution must bring on record that the victim girl is minor under the age of 18 years she has been subjected to

penetrative sexual assault as defined in section 3 of the POCSO Act. Thus to establish the charge of section 4 of the POCSO Act, prosecution must bring home record the ingredient of section 3 of the POCSO Act. That is to say:

- 8. Section 3 of the POCSO Act says: "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 the 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.
- 9. Now, let me discuss the evidence on record to arrive at the just decision of the case.
- 10. PW-1, Jaydeb Barman lodged the ejahar. It is alleged in the ejahar that on 01/05/18, at about 4 pm, his daughter Miss 'X' (name changed) student of class IX when goes to attend her tuition class, accused Jiten Das kidnapped her and accused was working in a shop of Girish Medhi. Ext-1 is the ejahar. Ext-1 is lodged on 04/05/18 before O/C, Belsor PS.
- 11. PW-1 in his evidence deposed in the month of May, 2018 when he came back home, his wife told him that at 4 pm their daughter Miss 'X' went to attend her tuition class but she did not return home till 6 pm and during search he could come to know from one of the friend of his daughter that accused Jiten Das kidnapped his daughter Miss 'X'. PW-1 further stated his daughter

recovered at Gogamukh PS and police informed him and from Gogamukh he brought his daughter to Belsor PS.

- 12. In cross stated he visits the house of accused Jiten Das situated at Chenga Bahari with Girish Medhi and Bhakat in the vehicle of Bhakat. He stated along with the ejahar he submitted one copy of the age certificate of his daughter. He denied love affairs between accused and his daughter and that his daughter eloped with the accused.
- 13. PW-2 Girish Medhi deposed accused worked as worker at his shop and accused left the work 2 days before the incident and on the date of occurrence informant came to his house and asked him about the accused and hid daughter. Thereafter he visited the gaonburah of Chenga village along with the informant and then visit the house of accused along with gaonburah but did not find the accused at his house. His further evidence is that after 1-2 months of the incident victim along with accused recovered by the police of Gogamukh PS. In cross he stated he visit the house of accused along with informant and 2 son of informant in the vehicle of Mrinmoy.
- 14. PW-3 Sabitri Sen Deka, PW-4 Minati Sen Deka deposed they know informant Jaydeb, his daughter Miss 'X' and accused. PW-3 and PW-4 deposed they heard that Miss 'X' was untraced from her house. PW-3 further deposed at the time of incident Miss 'X' was student of class X. Both the witness stated that they only heard about the missing of the girl. They did not disclose who was that person kidnapped the girl. They did not make statement that they heard the incident either from the parents of the girl or from the victim girl and therefore, their evidence amounted to hearsay evidence. They even not whispered that accused had kidnap the PW-5, Miss X so thus, testimonies of PW-3 and PW-4 does not helped the prosecution case as no incriminating material transpires against the accused from their piece of evidence.
- 15. PW-5, is the victim girl. Her evidence is that informant is her father and she met and introduce with accused when accused was

working near their house and subsequently said meeting turned into love affairs that continued for 5 months. Thereafter, on 01/05/18, both went for outing at Barpeta riding on the bike of accused, from Barpeta they went to the house of accused situated at Chenga. At that time none was present in the house of accused. They spent one night at Barpeta, than they went to Mandia in the house of elder sister of accused where they stayed for 3 days. After that accused put vermilion on her forehead where from they went to Dhemaji and stayed one month in a house of relative of the accused. From Dhemaji they came to Lakhimpur, and at Lakhimpu they stayed at one of the friend's house of accused and at this place they have physical relation. While they were present in the house of the friend of accused for about 15 days police picked them and brought them to Belsor PS. Police produced her before the doctor for medical examination and thereafter produced before the court where she make statement before the magistrate. Ext-2 is her statement, Ext-2(1) to Ext-2(3) are her signatures. In cross, she stated that she has no knowledge if document to prove her age is given to the police or not. She denied that she did not make statement before police about the physical relationship that took place at Lakhimpur.

- 16. PW-7 is the M/O. According to her evidence on 05/07/18, while she was working as M&HO at SMK Civil Hospital, Nalbari, she examined Miss 'X' aged 16 years D/O-Jaydeb Barman and as per history narrated by the victim girl Miss 'X' that on 01/07/18 at around 4 pm she in her own wishes went with the boy riding on her bicycle and physical relationship occurred with the boy in her own wishes one time. PW-7 stated on examination found external genitalia was healthy, hymen torn, vagina admits two fingers with difficulty. Urine for pregnancy test was negative. Vaginal swab no sperm seen. No abnormality was detected in USG lower abdomen. Estimated age as per radiological evidence was above 16 years and below 18 years of age.
- 17. PW-6 is the I/O of the case. His evidence is that on 05/05/18 laydeb Barman, lodged the written ejahar before O/C, Belsor PS on

the basis of which Belsor PS case no. 84/18 u/s-366 IPC has been registered. According to him he recovered the victim girl from Gordon Chowk area in front of a shop and she was identified by her father who was with him at the time of recovery. His cross is that he did not seize any documents relating to date of birth of victim and accused was not present at the time of recovery of victim girl.

- 18. On scrutiny of the statement of PWs including IO of the case it revealed that either, informant/father PW-1 of the alleged victim girl or the victim girl handover any documents with regard to the age of the victim to the police, i.e IO of the case. IO of the case in his evidence in cross stated he did not seize any documents relating to the date of birth of victim. Victim stated she is student of school that means her school certificate is present. PW-1 who is the father of the alleged victim girl did not whisper the age of the victim while adducing evidence. There is nothing produced by the informant to show the date of birth of the victim. As per the x-ray report the radiological age is estimated above 16 years and below 18 years.
- 19. The statement of PW-1 & PW-2 pointed accused was working in the shop house of PW-2 and accused left the job 2 days prior to the incident. On the date of incident PW-1 came to the house of PW-2 and enquired about accused and his daughter. That means PW-1 has the knowledge of leaving of his daughter with accused on the date of incident.
- 20. Their statement further pointed that on the next day they visit the house of accused. PW-1 deposed the delay is due to search of his daughter but the statement of PW-1 and PW-2 when read together goes to show that PW-1 has clear knowledge on the date of incident with whom his daughter with all probability can go and he has concrete knowledge that his daughter Miss X go away with accused Jiten. His statement recorded u/s-161 CrPC also goes to show that he has knowledge about the incident with whom his daughter goes on the date of incident. Therefore the reason shown by him in the ejahar that due to search there is a delay in lodging

the ejahar is not sound reasonable ground for delay in filing the ejahar.

- 21. PW-1 in his statement recorded u/s-161 CrPC and before the court did not whisper the reason for delay in lodging the case. Therefore, the reason made in the ejahar is not substantiate by him while adducing evidence before the court and his testimonies does not satisfy the reason for delay stated in the ejahar and same is not sufficient and satisfactory when PW-1 has clear knowledge about the incident with whom his daughter goes on the date of incident. In a case of sexual assault and rape of woman and child, there may be some social stigma that could led the delay in lodging the ejahar but in the case in hand, Pw-1 stated in the ejahar that due to search there is delay in lodging the ejahar but while adducing evidence before the court he is silent and deposed he visited the house of accused and his evidence revealed he has clear knowledge about the incident and his statement made in the ejahar is not harmonize with his evidence and therefore the delay in lodging the ejahar being not explained duly, reasonably is fatal for the prosecution.
- 22. It is settled principle of law that there is always 2-3 years error in the radiological age, and if 2-3 years is added in the radiological age then victim is appeared to be above 18 years of age at the time of incident.
- 23. It also settled principle of law that when there is an error and two possibilities appeared in a case then the possibilities that goes in favors of the accused will stand.
- 24. Charge against the accused is u/s-366 IPC and section-4 of the POCSO Act. To prove the charge of section-366 IPC prosecution must have to prove that there is kidnap or abduction of woman. Woman is kidnapped and abducted to marry her against her will and consent and third in order to marry her against her will and consent she is forced and or seduce to illicit intercourse.

- 25. On scrutiny of statement of the PW-5 victim Miss 'X', it is seen that she deposed there was a love affairs between her and accused and on 01/05/18 both of them went for outing at Barpeta riding on the bike of accused. Her evidence does not point that she was forcefully taken away by the accused. History stated by her before the doctor is that on 01/07/18 at around 4 pm she in her own wishes went with the boy riding on her bicycle and physical relationship occurred with the boy in her own wishes one time. Before doctor Miss X does not pointed her finger accusing accused that it was accused kidnap her or abduct her with intent to marry her against her will and consent. She stated before doctor that she went with accused for outing. Her evidence further pointed from the house of accused she with accused went to Mandia in the house of accused's elder sister where she and accused stayed for 3 days, thereafter accused put vermilion. She did not whisper use of any force on her. Her evidence further pointed they went to Dhemaji from Dhemaji they came to Lakhimpur where they have physical relationship. In respect of physical relationship she did not state that accused used force on her. Her evidence is that from Lakhimpur police picked both of them and brought them to Belsor.
- 26. In cross she stated she did not make statement before police about the physical relationship between them taking place at Lakhimpur. In her 161 CrPC statement, she stated that 1<sup>st</sup> she came with accused riding on her bicycle and accused came on his motor cycle and when she meet accused her friend Anima Devi was present and Anima left her when she went with accused and from Barnibari both went on the motor cycle of accused. Before police and magistrate she stated that accused have sexual intercourse with her after drinking. In the court she does not state that accused have sexual intercourse with her under intoxication and she did not spell out that accused committed rape on her or have sexual intercourse with her forcefully against her will and consent.

27. Victim did not make statement that accused had committed rape on her. In her deposition she did not talk about taking place

of forceful sexual intercourse with her against her consent.

28. The prosecution failed to bring beyond all reasonable doubt

the age of the victim is below 18 years by producing any school

certificate or birth certificate and radiological age being not the

accurate age there caste doubt.

29. In view of the aforesaid discussion, I come to my definite

finding that prosecution evidence is not sufficient enough to hold

accused Jiten Das @ Jitendra Das guilty of committing of offence

u/s-366 IPC and section-4 of the POCSO Act and I hold prosecution

failed to bring home the charge u/s-366 IPC and section-4 of the

POCSO Act beyond all reasonable doubt and accused entitled to

benefit of doubt.

30. In the result accused Jiten Das @ Jitendra Das acquitted

from the charge of section-366 IPC and section-4 of the POCSO Act

and is set at liberty.

However, his bail bonds remain stands for next 6 (six) 31.

months u/s-437-A CrPC.

Judgment is given under my hand and seal of this court on

this the 2<sup>nd</sup> day of August, 2019.

Special Judge

Nalbari

Dictated & corrected by me

Special Judge, Nalbari.

Typed by:

Biswajit Bhattacharjya, Copyist

Spl (P) Case No:24/18

10 of 11

# **APPENDIX**

# A. <u>Prosecution witnesses</u>

PW-1, Jaydeb Barman (informant),

PW-2, Girish Medhi,

PW-3, Sabitri Sen Deka,

PW-4, Minati Sen Deka,

PW-5, Miss 'X' (victim),

PW-6, Bandhuram Baishya (I/O)

PW-7, Dr. Urmi Devi Choudhury (M/O)

# B. <u>Defence witness</u>

NIL

# C. <u>Prosecution Exhibits</u>

Ext-1, Ejahar,

Ext-2, statement of victim recorded u/s-164 Cr.P.C,

Ext-3 charge sheet,

Ext-4 Sketch Map of the place of occurrence,

Ext-5, Medical Report,

Ext-6, X-ray report.

# D. <u>Defence Exhibit</u>

Nil.

Special Judge Nalbari