

Present: Shri C. Das

Judge, Special Court Baksa, Mushalpur

## JUDGMENT IN SPECIAL POCSO CASE NO.01/2018

u/s 366-A IPC R/W Sec 4 of Pocso Act

State

-versus-

Makbul Hussain

....Accused

Appearance:

: Mr. R. Chetry, Public Prosecutor, Baksa For the State For the accused: Mr. B. Haque, N. Rajbongshi, Advocates

Date of recording evidence: 29.10.2018, 05.04.2019, 05.07.2019

Date of argument : 04.12.2019

Date of judgment

: 18.12.2019

### JUDGMENT

The case of the prosecution briefly, is that on 12.05.2017, the Judge Spinoshalo Complainant Sri Tarjen Iswary lodged a FIR before In-Charge of Kumarikata Police Outpost, alleging inter-alias that on 19.03.2017 post, alleging inter-alias that on 18.03.2017, at about 6 am, his daughter(name withheld) aged about 17 years, was missing from the house. He was searching for the girl since then, but could not trace her out. On 12.05.2017, the local police informed him over phone that his daughter along with a boy were apprehended by the police and kept at

the police station. Accordingly, he visited Kumarikata Police Out-post and found his daughter present there and also, came to know from his daughter that the accused had kidnapped her and kept her somewhere at an unknown place.

- 2. Accordingly, the police recorded the Kumarikata O.P. G.D.E. No.190 dated 12.05.2017 and forwarded the said FIR to the Tamulpur Police Station to register a formal case. Hence, Tamulpur P.S. Case No.125/17 was registered and investigation was started. During investigation, the I/O seized the original birth certificate of the victim girl and sent the victim for medical examination. The I/O examined the witnesses and arrested the accused. The I/O came to know that the victim is a minor girl though the medical examination report, estimated her age as above 18 years. At the end of the investigation, the I/O having found a prima-facie case well established, submitted the charge-sheet against the accused person to face trial in the court.
- 3. The accused when appeared in the court, he was furnished with the copy of the case immediately. After hearing all the parties and on perusal of material on record, the charge u/s 366-A IPC R/W Sec 4 of Pocso Act was framed against the accused. The charge was read over and explained to the accused who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, 6(six) witnesses including I/O and M/O to support the case. Thereafter, in the statement recorded u/s 313 Cr.PC, the accused denied all the incriminating circumstances appeared against him in the evidence. The accused however, declined to adduce any evidence in defence. The argument of the parties was heard at length and evidence on record was perused.

## **POINT FOR DETERMINATION:**

- 5. Whether on 18.03.2017, at about 6 am, at Kalajhar under Tamulpur Police Station, the accused induced the victim girl (name withheld), a minor girl under the age of 18 years, to go from her home with the intent that the said girl may be seduced or forced to elicit intercourse with other person;
- 6. Whether on same day, time and place as above, the accused committed penetrative sexual assault on the above victim girl;



#### **DECISION AND REASON THEREFORE:**

- 7. It appears from the record that there is no dispute that the victim girl was recovered with the accused. The prosecution examined the complainant Sri Tarjen Iswary as PW-1. He stated that on the fateful day, at about 6 am, the accused took away the victim girl from the house of his sister. Hence, he tried to find out the victim girl but could not trace her out. In the meantime, the police informed him over phone that the victim along with the accused were apprehended and accordingly, he went to Kumarikata Police Out-post. He saw the victim girl with the accused at the Police Out-post. Hence, he filed the ejahar vide Exbt.-1 with his signature. The victim was sent for medical examination and to record her statement in the court. According to PW-1, the victim was 17 years of age at the time of occurrence. The victim was given custody to him. But after one week, the victim girl again fled away with the accused from his house. At present, the victim is residing with the accused.
- 8. In the cross-examination, PW-1 stated that he had no knowledge if the victim girl had love affairs with the accused prior to the occurrence. The victim went with the accused on her own will. The victim was 18 years of age actually at the time of occurrence. The version of PW-1 apparently, is discrepant in respect of determining the age of the victim but he proved the FIR vide Exbt.-1.
- 9. PW-2 Smt. Bimala Iswary is the wife of PW-1. She stated that on the fateful day, the police informed her that the victim girl was at the police station. Accordingly, she along with her husband went to police station and found the victim girl with the accused. The police sent the victim girl for medical examination and to record her statement in the court. Subsequently, the victim girl was handed over to her. She submitted the birth certificate of the victim girl which was seized by the police vide Exbt.-2 with her signature. According to PW-2, the victim girl was 17 years of age at the time of occurrence. At present, the victim is residing with the accused.
- 10. In the cross-examination, PW-2 stated that the victim girl had love affairs with the accused prior to the occurrence. The victim girl went with the accused on her own will. She denied that victim girl was above 18 years of age at the time of occurrence. Thus, the version of PW-2 supported the claim of PW-1 except on the point of age of the victim girl.

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Apart from above, PW-3 Smt. Baijanti Mushahary deposed inter-alias that on the fateful day, in the morning, she came to know that the victim girl was missing from the house. She searched for the victim girl but could not trace her out. On 12.05.2017, the police informed over phone that the victim along with the accused were apprehended. The victim was sent for medical examination and to record her statement. The victim was 17 years of age at the time of occurrence. Subsequently, the victim girl was again missing from the house. After searching, she came to know that the victim is residing with the accused.

- 12. In the cross-examination, PW3 stated that she had no knowledge if the victim had love affairs with the accused prior to the occurrence. The version of PW-3 also, corroborates the testimony of PW-1 and 2.
- 13. Further, the evidence of PW-4 Leonard Basumatary, lend support to the version of PW-1. He stated that on the fateful day, the victim girl was missing from her house. Subsequently, on 12.05.2017, the police informed that the victim girl was apprehended. He saw the victim girl with the accused at the police station.
- 14. In the cross-examination, PW-4 stated that subsequently, he came to know that there was love affairs between the victim and the accused. At present, the victim is residing with the accused and gave birth to a child.
- 15. PW-5 is the victim girl (name withheld). She stated that prior to the occurrence, she had love affairs with the accused person for about 3 years. On the fateful day, at about 9 am, she eloped with the accused person to Guwahati. The accused married her in Guwahati by performing Nikah. Hence, her father filed the case. After few days, she along with the accused appeared before the local police station. The police sent her for medical test and to record her statement in the court. Exbt.-3 is her medical report with her signatures. Exbt.-4 is her statement in the court with her signatures. Thereafter, her parents brought her back to home. After 10-15 days, she again went to She has also, 6 months old baby. She claimed that she was 18 years of age at the time of sudge Mushalo vioccurrence. M.R.Exbt.-1 is her birth certificate. In the cross-examination, PW-5 stated that she did not give consent for her medical feet the house of the accused. At present, she is living with the accused as husband and wife.
  - 16. The evidence of PW-6 the I/O of the case is that, on 12.05.2017 while he was posted at Kumarikata O.P, on that day, at about 3 pm, he lodged GDE No.183 since,

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The accused along with the victim girl appeared before him and reported that on 17.03.2017, both of them fled away from their houses without informing to their parents and that both of them went to Guwahati. Accordingly, he informed the respective guardians of them. After arrival of the guardians, he came to know that the victim girl was missing from the house since 18.03.2017 and she was below 18 years of age. The victim had love affairs with the accused but she was a minor and not a matured girl. Thereafter, PW-1 filed the ejahar vide Exbt.-1. He visited the place of occurrence and recorded the statement of the witnesses. He seized the original birth certificate of the victim girl vide Exbt.-2 with his signature. M.R.Exbt.-1 is the said birth certificate of the victim girl. He arrested the accused and sent the victim girl for medical examination and to record her statement u/s 164 Cr.PC. He collected medical report of the victim. At the end of the investigation, he submitted the charge-sheet against the accused vide Exbt.-5.

- Thus, on the basis of the above evidence of the prosecution witnesses, it appears that there is a controversy surfaces between the finding of the age in the medical test as well as, as per the birth certificate of the victim girl. So far as, the prosecution case is concerned, the Medical Officer was not examined in the trial. The evidence of PW-5 shows that she refused for medical test. Perhaps that is the reason why the Medical Officer was not examined. There is no dispute that the birth certificate of the victim girl was seized vide Exbt.-2. M.R. Exbt-1 is the birth certificate of the victim girl. As per the birth certificate, the date of birth of the victim girl was 27.07.2000. Hence, it comes to the notice that the victim was below 18 years of age at the time of occurrence. In case of child as defined u/s 2(d) of Pocso Act, he or she must be below 18 years. Therefore, the victim PW-5 was a minor girl/child within the meaning of Section 2(d) of Pocso Act.
- 18. The evidence of PW-1 shows that after missing of the victim girl, PW-1 remained silent for long time without seeking help of law but when after two months, the police informed about the recovery of the victim, he filed the ejahar. He denied that he had knowledge that the victim had love affairs with the accused but the delay in filing the ejahar implies that PW-1 had full knowledge of love affairs between the accused and PW-5. Apart from that, the evidence of PW-1 shows that the victim was again missing from the house and PW-1 did not lodge any ejahar. From such analysis, it appears that the sudge Spring Court the house and PW-1 did not lodge any ejahar. From such analysis, it appears that the saksa Mussing in accused was known to PW5 since before and had love affairs between them.
  - 19. The evidence of PW-1 is corroborates by PW-2, 3 and 4. Their evidence shows that the victim girl was missing from the house on fateful day without knowledge

PW-1 and 2. it is not denied that the victim was seen at the police station after recovery. It appears that PW-5 along with the accused also surrendered before the I/O after about two months. Thus, it shows that PW-5 went with the accused.

- 20. Now to find out from the evidence on record that if the accused kidnapped the victim girl and committed penetrative sexual assault upon PW-5. Firstly, the offence u/s 366 IPC requires that (1) the accused induced a minor girl below the age of 18 years; (2) she was induced to go from one place or to do any act; (3) she was induced with the intent that she might be or knowing it to be likely that she would be forced or seduced to illicit intercourse with another person. All those ingredients are essential to constitute the offence u/s 366-A IPC. The prosecution is duty bound to adduce evidence to meet the above requirements of law. In second case, the offence u/s 4 Pocso Act which defines u/s 3 of Pocso Act requires that 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 nus of the child or makes the 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 boy of the child or makes the child to do son 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.
- All or any of the above ingredients require to meet the offence u/s 4 of 21. Pocso Act., subject to condition of the prosecution to meet the provisions u/s 30 of Pocso Act against the accused.
- Judge Sp! Jour knowledge of whereabout of the victim girl, and as such, it can be said that the accused took away the victim girl from the land. 22. As far as the evidence is concerned, it appears that since PW-1 had no taking away of the minor girl like PW5 by the accused can be done by means of inducement to her. There is no evidence on record to show convincingly particularly from

testimony of PW1, 2 and 5 that the accused applied any means of inducement to PW5. Further, the evidence on record shows that the accused and the victim had love affairs with each other prior to the occurrence. Hence, it is highly probable that PW-5 went with the accused on her own will. Situated above, there is doubt that if the accused took away PW5 by inducement from the lawful custody of her guardian. It cannot be held from the evidence on record that the accused induced the victim girl who is a minor to go from her house. Since, the accused married the victim girl, it cannot be said that the accused had intention to force or seduce the victim girl to illicit intercourse with another person. As such, the evidence on record discloses that the prosecution has failed to implicate the accused u/s 366-A IPC beyond any doubt.

- The evidence of PW-5 as well as PW-1 and 2 does not show that the 23. accused committed any penetrative sexual assault upon the victim girl. No doubt the evidence of PW-5 shows that she was married by the accused and thus, it implies that both of them had physical relation out of their consent. Subsequently, after recovery of the victim, PW-5 again, fled away with the accused and she gave birth to a child. It thus, implies that both of them had sexual intercourse with each other to give birth to a child. But that is not sufficient to hold that the accused committed penetrative sexual assault upon the victim since PW-5 does not disclose of any such sexual assault by the accused, the physical relation between the accused and PW-5 can only be termed as consensus physical relation since both of them married to each other. The evidence on record does not satisfy the requirements to draw presumption u/s 30 of Pocso Act against the accused. Hence, the evidence of the prosecution witnesses does not satisfy the required ingredients u/s 4 of Pocso Act to implicate the accused.
- 24. Under the above facts and circumstances of the case, the prosecution has failed to prove the case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s 366-A IPC R/W Sec 4 of Pocso Act. The accused is as such, acquitted and set at liberty. His bail bond shall remain in force for another 6 months u/s 437-A Cr.PC. The seized articles shall be returned to the owner as claimed in due course of law. Forward a copy of judgment to the District Magistrate, Baksa at Mushalpur u/s 365 Cr.PC. This court recommends for payment of compensation Baksa Mushalpur to the victim of the occurrence by DLSA, Baksa.

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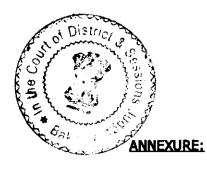


# Given under the hand and seal of this court on this 18th day of December

Dictated and corrected by:

Bidge Sps Court Bidge Special Court Baksa, Mushalpur Judge Spy Court Judge Special Court Bales, Musicipilour

Typed by: B. Brahma, Stenographer



## List of prosecution witness:

PW1 ... Tarjen Iswary ... informant

PW2 ... Smt. Bimala Iswary

PW3 ... Smt. Baijanti Muchahary

PW4 ... Leonard Basumatary

PW5 ... victim girl (name withheld)

PW6 ... Sri Munna Pachani ... I/O

## List of defence witness:

Nil

# List of documents exhibited:

Exbt.1 ... FIR

Exbt.2 ... seizure list

Exbt.3 ... medical report

Exbt.4 ... statement of victim u/s 164 CrPC

Exbt.5 ... charge-sheet

## Material exhibited:

M.RExbt. 1 ... birth certificate of victim girl

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