

IN THE COURT OF THE SESSIONS JUDGE, DHEMAJI.

Present: **Shri S. Das, A.J.S.,**
Sessions Judge,
Dhemaji,

JUDGMENT IN SESSIONS CASE NO. 38(DH) 2016.

U/s 366 of I.P.C. R/W Sec 4 of POCSO Act.
(G.R. Case No.92/2016 (SLP); Silapathar P.S. Case No.29/2016 u/s 366(A) of the Indian Penal Code read with Sec. 4 of POCSO Act)

The State of Assam

- Versus -

Shri Moina Dutta,Accused Person
S/O Dimbeswar Dutta,
R/O No.2 Nagaon (Ganak Gaon),
P.S. Dhemaji,
Dist.- Dhemaji.

Committing Magistrate:- Shri P.C. Kalita,
Chief Judicial Magistrate,
Dhemaji.

Appearance:

Shri A. Fogla, Public ProsecutorFor the State
Shri K.C. Sonowal, AdvocateFor the Accused

**Date of prosecution evidence :01-08-2017, 19-09-2017, 27-11-2017,
15-03-2018 and 20-07-2018,**

Date of argument : 25-04-2019.

Date of Judgment : 09-05-2019.

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JUDGMENT

1. The prosecution case in brief is that on 01-02-2016 complainant- Shri Padma Deori filed an ejahar at Sissiborgaon Police Out Post under Silapathar Police Station alleging interalia that on 24-01-2016 in the evening at about 6 PM, his minor daughter-Smti Manashi Deori aged about 13 years was missing from their house in absence of other family members at the house. Upon searched for the victim girl, they came to know that accused-Moina Dutta kidnapped/abducted his minor daughter-with intent to marry her and kept confined her in the house of an unknown person near the house of the accused. Accordingly, on 01-02-2016 at about 10 AM they found the victim and took help as per law.
2. On receipt of the ejahar, I/C, Sissiborgaon Police Out Post made GD Entry vide No. 07/2016 and forwarded the same to O/C, Silapathar Police Station for registering a case under proper section of law. On receipt of the ejahar, O/C, Silapathar Police Station registered a case vide Silapathar P.S. Case No. 29/2016 Under Section 366(A) of the Indian Penal Code read with Section 4 of POCSO Act and entrusted S.I. Lalit Saikia to investigate the Case. Police started investigation and on completion of investigation submitted Charge-sheet against the accused-Shri Moina Dutta u/s 366(A) of IPC read with Sec. 4 of the POCSO Act.
3. The case came up before the learned Chief Judicial Magistrate, Dhemaji and the Ld. Magistrate issued process for appearance of the accused and on appearance furnished necessary copies to the accused and committed the case to this Court.
4. On receipt of the case record and on appearance of the accused, this Court considered the materials on record and upon hearing both the sides, framed charge u/s 366 of IPC read with sec. 4 of POCSO Act and read-over and explained to him to which he pleaded not guilty. The prosecution, in order to prove its case, examined 8 witnesses including the


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I/O and M/O. After closure of prosecution evidence, statement of the accused was recorded u/s 313 of Cr.P.C. Defence plea is of total denial. However, defence declined to adduce evidence in support of the plea.

5. Points for determination :

(1) That you, on 24-01-2016 at about 6 PM at village-Nilakhpur under Silapathar Police Station kidnapped Smti Manashi Deori, a minor girl aged about 13 years, with intent that she may be compelled to marry against her will or she will be forced or seduced to illicit intercourse and thereby you committed an offence punishable u/s 366 of IPC.

(2) That, you on 24-01-2016 at about 6 PM at village-Nilakhpur under Silapathar Police Station committed penetrative sexual assault on Smt. Manashi Deori, a minor girl aged about 13 years and thereby you committed an offence punishable 4 of POCSO Act.

6. I have gone through the evidence on record and heard arguments of both sides.

Discussion of evidence :

7. **PW1** Smti Manashi Deori stated that complainant is his father. She knows the accused. Occurrence took place about 1 ½ year back (from the date of her deposition). On the day of occurrence her parents went to the house of her maternal uncle. In the evening on the day of occurrence she heard someone calling her from their house-path ('**Paduli**') and then she came out of her house. Then she saw the accused. On being asked why he (accused) called her, then he asked her to go with him (accused). When she refused to go with him, then the accused forcibly took her to the house of his relative uncle and kept her there for 7 days. At night she was allowed to sleep with his grand-mother. Thereafter, one day she telephoned to her related uncle through the mobile phone of the accused's uncle to bring back her. Then her uncle replied that her brother has gone out. Thereafter, she

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called her mother over phone but her mother's phone was switched off. She then called her brother-Anil over phone about the occurrence. On that day, her mother and her aunt came and took her back home. Accused's father behaved badly to her mother. Her mother informed her father over phone about the matter. Then her father also came there and then accused's father also behaved badly. Her father informed the police over phone and then police came and recovered her and took her and the accused to the police station. Next day, police questioned her. Police got her examined medically by Doctor. She was produced before the Magistrate and she gave statement before the Magistrate. Exhibit- I is the said statement before the Magistrate and Ext-1(1-2) are her signatures therein.

In cross-examination PW1 denied the defence suggestion that she had love affair with the accused. It is denied that she had called the accused over phone.

She (PW1) also denied the defence suggestion that while she gave statement before police she stated that "***she had love affairs with the accused-Moina Dutta for about 1/ 2 months as per introduction. She also loved him. Moina Dutta used to visit her house as they had love affair. On 24-01-2016 she telephoned to Moina Dutta and she told that she would marry her. She told him to take her away, later on he told her that he cannot come there***".

She denied the defence suggestion that Moina Dutta did not take her away forcibly. It is also denied that at the time of occurrence, she was above 18 years of age.

8. **PW2** Smt. Moni Deori stated that the complainant is her husband and the victim is her daughter. Occurrence took place about 1 ½ year back (from the date of her deposition). On the day of occurrence in the evening at the time of prayer while she did not see her daughter at home, she shut the door and searched for her but she did not find her daughter.

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Then she came to her mother's house on a bi-cycle. But, she did not find her daughter there also. Her husband was at Sripani i.e. in his original home. On the next day in the morning she informed her husband over phone taking the same from her parent's house. On that day a daughter-in-law of her village told that the victim girl had been taken away by Moina Dutta. After 7 days of the occurrence, the victim informed them over phone to take her back home. Next day, she along with Sumi Borah went to your (house). When they told to his family members about taking back her home, then accused's family members opposed it and so she (PW1) informed her husband over telephone. As soon as her husband arrived at accused's house, the family members of the accused rebuked him and then her husband informed the police station. Police came and took the victim and the accused to the police station. At the time of occurrence the victim was 13 years old. She was a student of Class-IX.

In cross-examination PW2 stated that on the date of occurrence, she was at home. She did not go the house of the uncle of the victim. She does not know if the accused had love affair with the victim.

9. **PW3** Dr. Juri Doley stated that on 02-02-2016 she was working as Medical & Health Officer at Sissiborgaon Block PHC. On that day, she examined Smt. Manashi Deori @ Maina aged 13 years on police requisition from Sissiborgaon Out Post in connection with Silapathar P.S. Case No.229/2016 u/s 366(A) IPC R/W sec. 4 of POCSO Act. The victim was escorted and identified by WPC-Janaki Chetry Barman of SIlapathar Police Station and Smt. Moina Deori, mother of the victim. After taking consent from the victim, she examined her in presence of accompanied woman police constable and mother of the victim. On examination, she found as follows:-

General behavior- Normal, Mental status- Normal,

Cloths- Changed, Urine- Passed, Stool- Passed,

Findings- No Injury.

General Physical Examination:-

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Built & Nutrition- Average, Weight-43 kg, Height- 4.8 feet,
 Teeth- 13 lower jaw, 14 upper jaw, Development of Hair- a)
 Auxiliary- Under developed; b) Pubic- Developed
 Breast- Developed,
 Findings – Healthy.

There was no any violent mark (injury) found or over the body.

Examination of Genitalia:-

Genital- Developed,
 Pubic hair- Developed,
 Labia Majora & Minora – Healthy.
 Hymen- Not intact.
 Injuries- No injury.
 Clitoris- Healthy,
 Fourchette – Healthy,
 Vagina- Healthy,
 Discharge and stains- No discharge.

Internal Examination – The victim girl on digital examination (P/V) allow index figure freely without resistance.

Laboratory investigation:-

Pregnancy test- Negative,
 Name of Pathologist- Chandan Saikia.
 Ultrasonography- Not done.
 Radiological Examination; Part X-Rayed- (1) X-Ray – wrist and elbow (2) X- Ray –Illioc crest, Name of Radiologist- Dr. Bhupen Kuli, Dhemaji Civil Hospital.

According to Radiologist the present age of the victim is above 15 years and below 17 years.

Opinion- the victim girl on digital examination (P/V) allow index figure freely without resistance. There was no any injury found on her

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private parts; Urine for B HCG Test- Negative. Accordingly the present age of the victim is above 15 years and below 17 years.

Exhibit-2 is the Medico- Legal Report of the victim and Ext.2(1) is my signature. Ext.3 is the report of Radiologist and Ext.3(1) is the signature of Dr. Bhupen Kuli.

PW3 (Doctor) was not cross-examined by defence.

10. **PW4** Smti Lakhimai Dutta stated that she knows the complainant. Accused-Moina Dutta is her son. Victim Manashi Deori is the daughter of Padma Deori. Occurrence took place about two years back. Accused and the victim loved each other and the victim came to their house and stayed in their house. Later on, victim's parents took her to their house.

Defence declined to cross-examine PW4.

11. **PW5** Shri Ranjan Kr. Borah stated that he knows the complainant but, he does not know the accused. He knows the victim and her father. Occurrence took place about two years back. On the day of occurrence, he went to the house of Padma Deori and took betel nut in his house and then he came to know that his daughter Manashi was missing from his house.

Defence declined to cross-examine PW5.

12. **PW6** Shri Dimbeswar Dutta stated that he knows the complainant. Accused-Moina Dutta is his son. Victim Manashi Deori is the daughter of Padma Deori. Occurrence took place about two years back. Accused and the victim loved each other and the victim came to their house and stayed in their house. Later on, victim's parents took her to their house.⁶

This witness (PW6) was nor cross-examined by defence.

13. **PW7** S.I. Lalit Saikia stated that on 01-02-2016 he was serving as attached officer at Sissiborgaon Police Out PPost. On that day, I/C Ganesh

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Barman received an ejahar from Shri Padma Deori. Accordingly, he made GD Entry vide No. 07/16 dated 01-02-2016 and forwarded the ejahar to O/C, Silapathar Police Station for registering a case. He himself took-up investigation and proceeded to the P.O., Nilakhpur. He recorded the statement of the complainant at the Out Post. At the P.O. he drew a sketch map and recorded the statements of witnesses u/s 161 of CR.P.C. He recovered the victim from the accused's possession at Ganak Gaon and he took custody of both victim and accused and brought him (accused) and the victim to the Police Out Post. On 02-02-2016 O/C, Silapathar Police Station registered a case vide SLP. P.S. Case No.29/16 u/s 366 (A) IPC R/W Sec. 4 of POCSO Act on the basis of the ejahar received from Padma DEori and he endorsed him as Investigating Officer. Then he formally arrested the accused and forwarded to the court. The victim was medically examined by Doctor and recorded her statement by the Magistrate u/s 164 Cr.P.C. Thereafter, he submitted Charge-sheet against the accused u/s 366 (A) of IPC read with Sec. 4 of POCSO Act.

Exhibit- 4 is the GD Entry. Ext-5 is the sketch map and Ext-5(1) is his signature. Ext-6 is the seizure list and Ext-6(1) is his signature. Ext-7 is the Charge-sheet and Ext-7(1) is his signature. Exhibit-8 is the ejahar and Ext-8(1) is the signature of S.I. Ganesh Barman with note. Ext-8(2) is the signature of O/C Abdul Hannan with his note.

In cross PW7 stated that witness-Manashi Deori (victim) stated before him that she developed love affair with Moina DUTTA about 1-2 months prior to the incident. Accused-Moina Dutta used to visit her house. She also stated that on 24-01-2016 she made a phone call to Moina Dutta and asked him to come and take her but Moina Dutta told that he would not be able to come.

14. **PW8** Shri Padma Deori stated that he is the complainant. He knows the accused. Victim Manashi Dutta is his daughter. In the month of

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February/2016 one day, he received phone call from his wife to the effect that the accused- Moina Dutta had kidnapped/abducted his daughter Manashi from his house at Nilakh. At the time of occurrence his wife and her daughter lived in his house at Nilakh (he has two houses one at Nilakh and the other one is at Sripani). At that time he was in his house at Sripani and on getting information he immediately came to his house at Nilakh and he started to search for his daughter, but they could not trace her out. After about one week his daughter made call to his wife over telephone and asked her to come to the house of the accused's relative at Moridhal. Then his wife went there and met her daughter. Then his daughter told his wife that she would go home if her father comes to take her. Then he was informed and he went there, but the family members of accused Moina did not allow his daughter to come with them. Then he informed police over telephone and police arrived and then they recovered their daughter. He lodged complaint before police. Ext.-8 is the ejahar and Ext.8(3) is his signature. Police gave his daughter in his zimma.

In cross-examination PW8 stated that he lodged the complaint after recovery of the girl. He had not mentioned in his ejahar that his daughter was willing to come back home, but the family members of the accused restrained her. He denied the defence suggestion that he did not state before police that his daughter was willing to come back home, but the family members of the accused restrained her. He denied that his daughter was above 18 years of age at the time of occurrence. Further, PW8 denied the defence suggestion that his daughter had love affairs with the accused and she had eloped with him on her own accord.

Appreciation of Evidence :

15. From the discussion of the evidence on record it appears that the victim has been examined as PW1. According to PW1 on the relevant date and time the accused came in front of her house and called her out.

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Accordingly she came out and saw the accused. Then accused asked her to come with him. When she refused, accused forcibly took her on his motorcycle to the house of his uncle and at the house of his uncle they stayed for about 7 days. PW1 also stated that during these days she slept with accused's grandmother. PW2 is the mother. In her evidence she stated that on the relevant date her daughter went missing. PW5 and PW6 heard about the incident. PW3 is the doctor who examined the victim. PW7 is the IO and PW8 is the complainant. The complainant stated that on the date of occurrence he received a phone call from his wife to the effect that accused Monia Dutta kidnapped his daughter. At that time he was at Sripani. He also stated that his daughter was confined in the house of accused Monia Dutta and then her daughter somehow telephoned her mother and they recovered their daughter with the help of police. Defence cross examined PW1 and put suggestion that the victim gave statement before police that *she had love affairs with the accused-Moina Dutta for about 1/2 months. She also loved him. Moina Dutta used to visit her house as they had love affair. On 24-01-2016 she telephoned to Moina Dutta and she told that she would marry him. She told him to take her away, later on he told her that he cannot come there.*

16. I have carefully considered the evidence of pws particularly the evidence of the victim. It transpires that on the date of occurrence the accused met the victim and the accused persuaded the victim to go with him. It also transpires from the evidence of pw1 that she stayed in the house of the accused's uncle but the accused did not come in physical contact with the victim. Nor the accused tried to abuse her physically.

17. So it is found from the evidence of PW1 that the accused did not commit any sexual assault on the victim. Now let me look into the ingredients of sec 366 IPC.

To prove an offence u/s 366 prosecution has to prove the following ingredients—

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1. The accused kidnapped or abducted a woman;
2. Accused intended or knew it likely that
 - (a) The woman abducted or kidnapped would be compelled to marry any person against her will or
 - (b) she would be forced or seduced to illicit intercourse.

18. In the instant case we find that there is absence of evidence as regards accused compelling the victim to marry or forcing or seducing her to illicit intercourse. Hence, the ingredients of section 366 IPC are not established in this case. However, there is enough evidence on record to make out a case of kidnapping. It reveals from the record that the victim was a student of class X and in her evidence she stated that at the time of occurrence she was aged 14 years. The medical report Ext.3 regarding test for determination of age would show that the victim is above 15 years and below 17 years.

19. **361 IPC reads Kidnapping from lawful guardianship.—**
 "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen 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".

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

20. Having considered the materials on records in its entirety, I find that a case u/s 363 of IPC is made out against the accused.
21. In my opinion the accused can be convicted u/s 363 IPC by invoking sec 222 Cr.PC though no charge has been framed.

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22. In view of what has been discussed above, I find that prosecution has been able to prove the charge u/s 363 of IPC against the accused beyond all reasonable doubt. I find that prosecution has failed to prove the charge u/s 366 IPC and 4 of POCSO Act beyond reasonable doubt.

O R D E R:

23. In the result I find accused **Moina Dutta** guilty u/s 363 IPC. Accordingly the accused is convicted thereunder. I find the accused not guilty u/s 366 IPC and 4 of POCSO Act. Accordingly he is acquitted of the charges.

24. Heard the accused Moina Dutta on the point of sentence. It is submitted that his father is old and ailing and he is only earning member of his family and he prays for lenient view while awarding sentence.

25. Considering all aspect the accused is sentenced to S.I. for 1 (one) month and to pay a fine of Rs.1,000/- (one thousand) i.d. S.I. for another 1(one) month u/s 363 IPC.

26. Set off the period of detention.

27. A free copy of judgment be given to the accused person.

28. Judgment is pronounced in open Court.

29. Given under my hand and seal of this Court on this the **9th** day of May/2019.

Sgts 120P
 (S. Das)
 Sessions Judge
 Sessions Judge
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