# IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE, BAJALI, PATHSALA

### Spl. POCSO Case No. 19 of 2018

U/S - 366 IPC r/w Sec. 4 of POCSO Act, 2012.

State

- Versus -

Minhaz Ali @ Minhazul

: Accused person.

# Present: Sri L.K. Saikia, Additional Sessions Judge, Bajali, Pathsala.

#### Appearance & particulars :-

For the State : Smti. Dhira Devi Ld. Addl. P. P.

For the accused persons : Sri Himangshu Goswami &

Smti Leena Das. Ld. Advocates.

Dates of recording evidences: 16-02-2019, 01-03-2019, 27-03-2019,

01-06-2016, 24-06-2019, 02-09-2019

26-09-2019.

Date of recording statements u/s 313 Cr.P.C. : 09-09-2019.

Date of Argument : 19-10-2019

Date of Judgment : 05-11-2019.

#### JUDGMENT

1. The prosecution case in brief, is that, one Abdul Subbur lodged an ejahar on 02-08-2018 with the In-Charge Dhumarpathar

Police Out Post alleging, *inter-alia*, that on 01-08-2018 the accused persons namely, Minhaz Ali, Fakkar Uddin and Abdul Abal kidnapped her minor daughter "X" (herein after referred to as the victim) by making a conspiracy. It is also alleged that prior to this occurrence, the accused persons threatened him that they would kidnapped his minor daughter even the accused Minhaz Ali threatened that he would take the victim by killing the family members of the informant. Hence, this case.

- 2. On receipt of the ejahar, Dhumarpathar police out post registered a GD Entry vide Dhumarpathar OP GDE No. 218/2018 and forwarded the same to Patacharkuchi Police Station to register a case under proper section of law and accordingly it was registered as Patacharkuchi P. S. Case No. 511/2018 u/s 366 (A)/34 IPC and started to investigate into the case.
- During the course of investigation police visited the place of occurrence, recorded the statements of witnesses including the victim girl, sent her for medical examination and collected medical examination report, produced her before the Court wherein the Ld. Magistrate recorded the statement of the victim u/s 164 Cr.P.C, arrested the accused Minhaz Ali and forwarded him to the court and after completion of investigation, having been found *prima-facie* case, the I/O sent up the accused for trial by filing charge sheet u/s 4 of POCSO Act, 2012.
- 4. In the meantime the accused had enlarged on bail and on appearance, the copies of the prosecution documents were furnished to him u/s 207 Cr.P.C.. After hearing both the parties, and finding a prima-facie case to presume that the accused person had committed the offence, my predecessor-in-office, framed formal charge under section 366(A) IPC r/w Sec. 4 of POCSO Act, 2012 and the accusation of charges were read over and explained to him, to which he pleaded not guilty and claimed to be tried. Hence, the trial.
- **5.** The prosecution side with a view to prove its case

examined altogether 8 (eight) PWs including M.O. and I.O. And the defence side took full scope of cross-examination of Pws. The accused person was examined u/s 313 of Cr. P. C. wherein he denied all such allegations levelled against him by the prosecution witnesses. The plea of the defenc is of total denial. The defence side has also adduced 1 (one) DW to disprove the prosecution case.

**6.** Heard argument of learned Addl. P. P. and the learned defence counsel. Perused the record.

#### 7. POINTS FOR DETERMINATION

- (i) Whether the accused person on 01-01-2018 in the late night kidnapped the victim, a resident of village Dhumarpathar under Patacharkuchi Police Station with intent to marry her against her will and thereby committed an offence punishable under section 366 IPC?
- (ii) Whether the accused person on 01-08-2018 and on subsequent dates committed penetrative sexual assault upon the victim and thereby committed an offence punishable u/s 4 of POCSO Act, 2012?

#### **EVIDENCE OF THE WITNESSES**

- **8.** To arrive at the judicial decision, let me see what the witnesses have stated.
- 9. PW 1 Md. Abdul Suhur informant of this case deposed that on 01.08.2018 at late night his daughter was not found at home and as such, he searched about her but found no any clue of missing. Then he has recalled that one day accused Minhaz threatened him and on being suspect he filed FIR (Ext. 1) against him on 02.08.2018. The date of birth of his daughter (victim) is 07.05.2001. After 8 to 10 days of filing the FIR one day, I/C of Dhumar pathar OP informed him that they had got an information that his daughter was going from Delhi to Kerala with the accused Minhaz and 17 days of filing of the FIR, I/C had recovered his daughter and took her to the police station. Before few

days missing of his daughter accused Minhaz Ali threatened him on the road that if he (informant) would not solemnized marriage of his daughter with him then the accused would marry with the victim forcefully even if required by killing and assaulting.

In cross-examination, PW 1 deposed that he does not know how his daughter went out from home. On being suspect he filed this case against the accused Minhaz Ali. The FIR was not drafted/written by him. PW 1 denied the suggestion that he have not stated before the police that before few days of missing of his daughter accused Minhaz Ali threatened him on the road that if he (informant) would not solemnized marriage of his daughter with him then the accused would marry with the victim forcefully even if required by killing and assaulting. PW 1 also denied the suggestion that there was a talk of marriage of his daughter with an other person so the victim willingly eloped with the accused person.

10. PW 2 the victim girl has deposed that on 02/08/2018 she herself willingly eloped with Minhaz. At first, they went to Guwahati Railway station at about 10 am and from Guwahati Railway station to Bongaigaon and therefrom to Delhi. Thereafter they went to Chennai by train and from Chennai to Kerela where in they stayed in the house of Sahnaj, one of his village sister. They were staying separately in Kerala. Thereafter, they returned to Barpeta Road railway station and then the police personnel brought them to Dhumarpathar police out post. On the next day, she was produced before the Court wherein her statement was recorded by the Ld. Magistrate (Ext. 2). Thereafter, she was medically examined at FAAMCH, Barpeta and handed over to her father.

In cross-examination, PW 2 stated that Minhaz did not do any bad work and bad behaviour with her. As she had love affair with Minhaz too much for that she willingly eloped with him. At the time of occurrence there was talk of her marriage with an another boy. Her father had filed this case due to prior grudge against Minjaz.

**11.** PW - 3 Md. Najumuddin Ahmed deposed that on 02.08.2018 he came to know that his grand-daughter was missing. One day about 1 month ago accused Minhaj Ali gave a mobile phone to the victim so they suspected him and filed the ejahar.

In cross-examination, PW 3 stated that he has no personal knowledge how the victim was missing from home.

12. PW 4 Md. Usman Ali deposed that on 02.08.2018 he heard that the victim was missing and finding no clue of her the informant had filed the ejahar. After about some days they came to know that victim was recovered at Barpeta Road Railway Station by the police.

In cross-examination, PW 4 stated that he has no personal knowledge how the victim was missing from home.

13. PW 5 Md. Falu Mia deposed that one day morning Sabur called him to his house and told him that his daughter has been missing and on searching could not find out her even to the house of Minhaj Ali. Thereafter finding no alternative Abdur Sabur has filed the FIR against accused Minhaj Ali.

In cross-examination, he stated that on being suspect to Minhaj Ali, informant had filed this case against the accused.

**14.** PW – 6 Md. Tiaz uddin deposed that one day at about 6 am Abdur Subur told that his daughter was missing. After 18 days, he have heard that police has recovered the victim from the Barpeta Road Railway Station.

In cross-examination, PW 6 stated that he has no personal knowledge who had taken away the victim and why.

P.W. 7 Dr. Mamata Devi deposed that on 20/08/2018 she was posted as Demonstrator in the Department of forensic medicine FAAMCH, Barpeta. On that day, at about 2 pm she examined a girl with reference to Patacharkuchi P.S. Case No. 511/18, u/s 366(A)/34 I.P.C

after taking consent of the girl. According to the alleged victim, she is in love with a boy named Minhajur Rahman from last 3 years. She eloped with the boy on 02/08/2018 at around 4 am and went to Guwahati and thereafter to Kerela. They had physical relationship during this period. Her father registered a case against him and police caught her on 17/08/2018 on Friday and brought today for medical examination and on examination she found the followings:-

#### **Physical Examination** -

Identification mark 1) A black mole over right chest. 2) A black mole 0.2 c.m as above right lateral lip on upper side. Weight – 35 Kg, Chest girth as nipple level 65 cm abdominal girth at navel level 51 cm General built & appearance - average. Hairs : Axillary/ body/ : 1-2 c.m in length, black in colour. Breast – Hemispherical in shape, soft in consistency, nipple and areola brown in colour. Puberty (as told by the individual) – 11 years. Menstruation (as told by the individual) – Regular 30 days cycle. L.M.P. (as told by the individual) – 28/07/2018. Mental condition – No abnormality detected. Gait – Normal. Intelligence – Average. Wearing garments & any suspected stains present - Intact, Stain absent. Bodily Injuries : Not detected at the time of examination.

#### **Genital Examination:**

Pubic hairs: 0.5 c.m in length, black in colour. Vulva (Labia majora & minora): Labia majora Exposed in lighotomy position. Hymen: Recent tear at 9 o clock position oozing of Blood is present, red in colour. Vagina: Healthy. Cervix & Uterus: Healthy, uterus not Palpabale per abdominally. Fourchette & Perineum: Healthy. Vaginal Swab collected/ not collected from posterior fornix. Result of vaginal swab smear examination: Microscopic examination of vaginal Smears reveal no spermatozoa.

PW 7 opined that on the basis of physical (including dental) examination, laboratory & radiological investigations done upon the victim, evidence of recent sexual intercourse is not detected on her person and no injury or violence mark is detected. Finding in the hymen suggest recent forceful penetration. PW 7 proved the medical examination report as Ext. 3 and Ext. 3(1) and Ext. 3(2) are her

signatures. Ext. 3 (3) is the signature of Dr. Manoj Kr. Sinha.

In cross-examination, PW 7 deposed that in history the victim stated before her that she had physical relationship with the accused. Physical relationship and sexual relationship may be the same, only difference is that intercourse may be present or may not be present. Mere touching may be also physical relationship. She further stated that 'recent' means within 3 to 5 days but in her report, she has not explained the meaning of recent. PW 7 denied the suggestion that the explanation that given in respect of physical relationship and sexual relationship not same and proper. It is also denied by her that she has not properly examined the victim as required under the law as such given a false report.

**16.** P.W. 8 Sri Ranjit Kalita deposed that on 02/08/2018 he was working at Dhumarpathar out post as I/C. On that day at about 10 am one Abdul Subur lodged an FIR stating inter-alia that on 01/08/2018 his minor girl was kidnapped. Before taking place of the incident, the accused person tried to kidnap her and for that he gave threating to the informant. After receiving the FIR made GD entry No. 17 dated 02/08/2018 and forwarded the FIR to Patacharkuchi P.S. for registering a case and taken up the matter for investigation. In the mean time O/C Patacharkuchi P.S. had registered a case vide Patacharkuchi P.S. Case No. 5/18 u/s 366(A)/34 IPC and endorsed him to investigate the case. During investigation, he has recorded the statement of the informant and sent W.T. message to all O/C and I/C's of Assam for taking initiation if victim was found. Thereafter went to the place of occurrence and drew up the sketch map (Ext. 4) of the place of occurrence. After that recorded the statement of the other witnesses of nearby places. Thereafter went to the house of the accused Minhaj Ali but found him absent at his home and after that engaged spy for collecting information about the victim. On 17/08/2018 he had got an information that the accused person was returning to Barpeta Road railway station along with the victim and on the basis of that information they could recover the victim. Thereafter they brought the victim girl to the out

post and recorded her statement u/s 161 Cr.P.C. On 18/08/2018 produced the victim before the Court of S.D.J.M(M), Bajali and in the court magistrate had recorded her statement, thereafter given jimma to her father. On 20/08/2018 the victim was sent to FAAMCH, Barpeta for medical examination along with woman constable Bharati Kalita and her father Abdul Subur. PW 8 stated that on 04/10/2018 at about 8 a.m. got an information that accused Minhaj Ali was present in the market of Chenglimari and accordingly they nabbed him and forwarded him to the Court. In the meantime, he was transferred and handed over the case-diary. Case-diary shows that after his transferred, S.I. Pradip Kr. Barman completed the remaining part of investigation and submitted charge-sheet vide No. 250/18 dated 15/11/2018 against the accused Minhaj Ali u/s 366(A) IPC r/w section 4 of POCSO Act. 2012. Ext. 5 is the charge-sheet and Ext. 5(i) is the signature of S.I. Pradip Kr. Barman.

In cross-examination, PW 8 deposed that he has not sent the extract copy of the GD entry No. 17 to the Court. He does not know whether any medical report of the victim was collected from Salbari Model Hospital. From 18/08/2018 to 20/08/2018 the victim was with his parents at their home.

17. D.W. - 01 Md. Minhaj Ali deposed that he had a love affairs with victim girl of this case. Having got the knowledge of the fact of their love affairs the family members of the victim decided to solemnize her marriage with an another boy. So, knowing the arrangement of her marriage one day she came to his house with a view to marriage with him. When the victim came to his house with a view to marriage with him then the family members lodged a case against him stating that he had kidnapped her. He stated that he never kidnapped her. Later on their marriage was solemnized by registering it in the Court and since then they have been living together as husband and wife at their house.

In cross-examination, DW 1 denied the suggestion that he kidnapped the victim and gave threatening to the family members of

her.

#### **Discussions, Decision, and Reasons thereof**

- **18.** Perused the case record and also gone through the provision of law.
- 19. The offence under section 4 of the Protection of Child from Sexual Offences (POCSO) Act deals with punishment for penetrative sexual assault and Section 3 of the POCSO Act defines penetrative sexual assault. The offence of penetrative sexual assault under POCSO Act and for that matter other offences also under this Act can be committed only on the child. The definition of child u/s 2 (d) of the POCSO Act is as follows:

"Child" means any person below the age of 18 years.

- **20.** Thus, a person can be convicted for an offence under POCSO Act only if the victim is below the age of 18 years.
- **21.** In the instant case, let us see as to whether the victim was a child, at the time of commission of offence, or not.
- **PW** 1 the informant of this case has deposed that date of birth of the victim is 07-05-2001 and at the time of occurrence she was a minor girl. He also stated that on being suspect he filed the case against the accused as he was also absent from his house. The original birth certificate of the victim girl is with him in his house.
- 23. On perusal of the testimony of the victim in this case, it appears that the victim has mentioned that her age was below 18 years at the time of happening of the incident. It is also stated before the Magistrate while recording her statement u/s 164 Cr.P.C. that her age was 17 years. She has also stated in her cross examination that she had a love affair with the accused and she eloped with the accused on her own. During the stay with the accused person he did not do any bad work with her. Her father filed this false case due to prior enmity

with the accused person.

- **24.** PW 7, doctor, who examined the victim has not opined anything regarding the age of the victim.
- 25. PW 1, PW 2 and PW 7 are the vital material witnesses of this case. Though the informant and the victim stated that at the time of happening of the incident the age of the victim was below 18 years but they have not submitted any documentary prove to establish the age of the victim. The I/O of this case has also not seized any document in relating to the age of the victim to ascertain her actual age.
- 26. Ld. Defence Counsel has also cited a ruling of Hon'ble Supreme Court of India in "Jaya Mala vs-Home Secretary, Government of Jammu and Kashmir & Ors." reported in (1982) 2 SCC 538 wherein Hon'ble Supreme Court of India dealing with a case were question of determination of the age was involved observed that "one can take judicial notice that the margin of error in age ascertained by radiological examination is 2 years on either side."
- Put in this case the doctor did not opine anything regarding to the age of the victim. Mere saying the age of a person without any documentary prof is not sufficient to ascertain the actual age of the victim as required under the law. As such, victim could not able to prove her age below 18 years as per definition of child as provided in Section 2 (d) of the Protection of Child from Sexual Offences Act, 2012. Moreover, the evidence discussed herein above clearly reveals that the victim was a consenting party to whatever has happened with her as she had love affair with the accused. Hence, this Court has no option except to fail the ascertaining the age of the victim.
- **28.** Therefore, this Court is constrained to hold that no offence against her has committed u/s 4 of the POCSO Act by the accused

person.

- 29. Moreover, DW 1 the accused person himself has deposed that he had a love affairs with victim girl. Having got the knowledge of the fact of their love affairs the family members of the victim decided to solemnize her marriage with an another boy. So, knowing the arrangement of her marriage one day she came to his house with a view to marriage with him. When the victim came to his house with a view to marriage with him then the family members lodged a case against him stating that he had kidnapped her. He stated that he never kidnapped her. It is also stated that they had solemnized their marriage by registering it in the Court and since then they have been living together as husband and wife at their house.
- Hon'ble Kerela High Court in the case of Ashiq N.A. Vs State of Kerala in CRL. MC. NO. 381 OF 2018 whereby the Hon'ble High Court has quashed the criminal proceeding against and in the light of that the Ld. defence counsel of this case prays to acquit the accused person from the charges levelled against him.

the above approach could be in cases where the accused has married the defacto complainant and they have decided to settle all the disputes and for the predominant purpose of the welfare of the defacto complainant/ victim, to ensure her better future life, it is only just and proper that this Court in exercise of the extra ordinary inherent powers under Sec.482 of the Cr.P.C could quash the impugned criminal proceedings on the ground of settlement between the parties in cases where the accused has married the defacto complainant and the defacto complainant is insisting for quashment of the impugned criminal proceedings, etc.

- 5. In the light of the above said aspects, more particularly in the light of the submission made by the 2nd respondent, this Court is inclined to consider the plea for quashment of impugned criminal proceedings as otherwise it will detrimentally affect the family life of 2nd respondent (victim), and even the balance and harmony that could be achieved by them in the resolution of disputes that again be irrecoverably lost."
- As we already discussed above that the accused person married the victim girl and now they have been living as husband and wife together in the house of accused person and enjoyed a peaceful married life, this court is of the considered opinion that the accused person never kidnapped the victim girl by inducing or by any manner, as such, the prosecution side has failed to bring home the charges as levelled against him and hence the accused person could not be held guilty.
- **33.** Accordingly, the accused Minhaz Ali @ Minhazul is acquitted of the offence charged u/s 366 IPC r/w Sec. 4 of POCSO Act, 2012 and set him at liberty forthwith.
- **34.** A copy of this judgment and order be given to the the District Magistrate, Barpeta u/s 365 Cr.P.C.
- **35.** The Spl. POCSO Case is disposed of accordingly.

**36.** Judgment is pronounced and delivered in the open Court in presence of both the parties and I put my hand and seal of this Court on this 5th day of November, 2019.

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictated & Corrected by me

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.

Dictation taken and transcribed by me. (Alakesh Das, Steno)

#### **APPENDIX:-**

#### **Oral evidences:-**

- PW-1 Md. Abdul Suhur
- PW-2 Victim
- PW-3 Md. Najumuddin Ahmed
- PW-4 Md. Usman Ali
- PW-5 Md. Falu Mia
- PW-6 Md. Tiaz Uddin
- PW-7 Dr. Mamata Devi
- PW-8 Sri Ranjit Kalita

# **Documentary evidence:-**

- Ext. 1 Ejahar
- Ext. 2 Statement of the victim
- Ext. 3 Medical examination report.
- Ext. 4 Sketch Map
- Ext. 5- Charge-sheet.

# Defence evidence.

DW 1- Minhaz Ali

(L.K. Saikia) Addl. Sessions Judge Bajali, Pathsala.