#### IN THE COURT OF SPECIAL JUDGE AT BARPETA.

Present :- Sri Vinod Kumar Chandak, M.A., M.Com., LL.B.,AJS, Special Judge, Barpeta.

# (G.R. Case 936 of 2017) Barpeta P.S. Case No 376 of 2017

State of Assam

-versus-

Amzad Ali, S/O Sadhu Mia, Resident of Keotpara (Nadirpar), P.S. Barpeta, District – Barpeta

...... Accused.

#### **APPEARANCES:**

For the State : Sri Lalit Ch. Nath, learned P.P., Barpeta. For the Accused : Mr. Dharani Talukdar, learned Advocate,

Barpeta.

# CHARGE FRAMED UNDER SECTION 366(A) OF THE INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.

Date of Charge : 02.06.2017,

Date of Prosecution evidence : 27.03.2018, 02.04.2018, 19.07.2018,

& 02.03.2019,

Date of Statement of accused : 12.04.2019, Date of Argument : 12.04.2019, Date of Judgment : 26.04.2019.

# J U D G M E N T

**1.** The prosecution case, in brief, is that Barpeta P.S. Case No 376 of 2017 under section 366(A)/506 of the Indian Penal Code, 1860 Read with added

section 4 of the Protection of Children From Sexual Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Malek Ali, the father of the victim (hereinafter referred to as 'X').

In the aforesaid F.I.R. dated 27.09.2017 **(Exhibit-3)** the informant Malek Ali (P.W.1), who is the father of the victim girl, alleged interalia that on 21.02.2017, at about 6:00 PM, when his victim daughter, aged 13 years, went to the bank of river for a walk, the accused person alongwith others suddenly came from backside and forcibly took away her in a boat. The informant searched for his daughter till late night, but could not find her out. On the next day, he found her in the house of Sadhu Mia, who is the father of the accused. On enquiry, Sadhu Mia informed him that the accused kept his victim daughter there, to marry her. It is further alleged that the accused did not marry his victim daughter later, rather they threatened the informant.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Barpeta Police Station, the same was registered as Barpeta P.S. Case No 376 of 2017 under section 366(A)/506 of the Indian Penal Code. Later on, section 4 of the Protection of Children From Sexual Offences Act, 2012 was added, as prayed, by the I.O. of the case.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under station 164 of CrPC was recorded by the learned Magistrate. Police, on completion of investigation, filed charge sheet in the case against the above named accused Amzad Ali under section 366(A) IPC Read with section 4 of the Protection of Children From Sexual Offences Act, 2012 vide charge sheet No.307, dated 05.05.2017.

- **2.** My learned Predecessor-in-office received the case record alongwith the case diary of the case. Accused was summoned. On appearance of accused, copy was furnished to him by my learned Predecessor-in-office.
- **3.** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the learned counsel for the accused and the prosecution in this behalf, charges were framed against the accused u/s 366A IPC R/W section 4 of the Protection of Children From Sexual Offences Act,

2012, which was read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

**4.** During the court of trial, **05(five)** number of witnesses including the victim, informant, the Medical Officer, I/O were examined on behalf of the prosecution to prove the charge u/s 366(A) IPC R/W section 4 of the Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of the above named accused was recorded u/s 313 of CrPC. The accused denied all the alleged incriminating materials against him. He claimed himself to be innocent. He denied to adduce evidence in his defence.

- I have heard Mr. Lalit Ch. Nath, learned Public Prosecutor of Barpeta for the State as well as Mr. Dharani Talukdar, learned Sr. Defence Counsel for the accused, who is facing trial for commission of offence u/s 366(A) IPC R/W section 4 of the Protection of Children From Sexual Offences Act, 2012.
- **6.** Now the point for determination before this court are as follows ---
- (1) Whether on 21.02.2017 at about 6:00 PM, at village Jarabari, within the jurisdiction of Barpeta Police Station, District Barpeta, the accused kidnapped victim, aged about 13 years, who is daughter of the informant Malek Ali, with intent that she might be compelled to marry him against her will or knowing to be likely that she might be forced or seduced to illicit intercourse by means of criminal intimidation or by any other method, to go from any place with intent that she might be forced or seduced to illicit intercourse with any other person and thereby committed an offence punishable u/s 366(A) of the Indian Penal Code?
- (2) Whether the accused committed penetrative sexual assault on the victim and thereby committed an offence punishable u/s section 4 of the Protection of Children from Sexual Offences Act, 2012 ?

### **DISCUSSION, DECISIONS AND REASONS THEREOF**

**7.** To decide the above point and sections of law, let us examine, analyze and appreciate the evidence of the witnesses alongwith the relevant documents.

**PW-1 Malek Ali**, who is the informant as well as the father of the victim, deposed that incident took place one year before. His daughter Meghjan Nessa went to bring their goats from the bank of river Chowlkhowa. Then the accused took her away in a boat after gagging her mouth from backside. The accused was accompanied by Ibrahim Ali and Amir Ali. At that time, the victim was aged about 14 years and was studying in ME Madrassa. They could not find out the victim. Next day, he found the victim in the house of the accused. The accused told that he would marry the victim. When he asked the accused to marry the victim, then Ibrahim Ali and Amir Ali threatened him. College students from his village then recovered the victim from the house of the accused. At last, he deposed that on the next day of incident, accused fled away with the niece of one Siddique Munshi to Baghbar and married her there. PW1 deposed that victim told him that accused did bad works with her forcefully.

**During cross examination**, PW1 stated that he did not know the content of the FIR, which was written by one Advocate of Barpeta. He also deposed that elder brother of accused Aamir Ali lodged against him, victim and other which is pending in the learned court of Addl.CJM, Barpeta.

He denied other suggestions of defence side.

**PW-2, Dr. Mamata Devi**, who is the M.O. of the case, deposed that on 04-03-2017 she was working as Lady Medical Officer, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta. On that day she examined one **Miss Meghjan Nessa**, D/O Malek Ali brought by Barpeta PS in connection with Barpeta P.S. Case No. 376/2017 under section 366(A)/506 IPC on being identified by Arati Das and her uncle Jahidul Ali and found as follows:

#### **History**:-

According to alleged victim, on 21-02-2017 one boy name Amjad Ali came to their house which was near by river. He forcefully took her into a boat and took her to his

house and had physical relationship for several times. 8(eight) years later on 28-02-2017 he left her at her house. Now her parents registered the case against the boy and so Police brought her today for medical examination.

## **Physical Examination:**

Identification marks: - 1. A pin head size black mole over right side of cheek.

2. A pin head size black mole over left cheek.

Weight: - 35 Kg.

Chest girth at nipple level:- 71 Cm. Abdominal girth at navel level:- 61 Cm.

General built & appearance: - Average.

Teeth: Total:28: Temporary: Nil. Permanent: 28.

Hairs: Axillary/Body: 0.2-0.5 cm in length in colour. Scanty .

Breasts:- Hemispherical in shape, soft in consistency. Nipple and avela brown in

colour .

Puberty(as told by the individual): 13 years.

Menstruation(as told by the individual): 18-02-2017, regular 30 days cycle.

LMP ( as told by the individual): 18-02-2017.

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: 0.2-0.5 cm in length, scanty, brown to black in colour.

Vulva(Labia majora & minora):- Labia minora exposed in lithotomy position.

Hymen: Old tear at 8 'O'clock and 7 'O'clock position.

Vagina:- Healthy.

Cervix & Uterus: C- Healthy. Uterus not palpable per abdominally.

Fourchette & Perineum : Healthy.

Result of vaginal swab smear examination: Microscopic examination of vaginal swab

reveal no spermatozoa.

Result of X-Investigation: Plate No. R-1 NLC Dated 04-03-2017.

Wrist Joint: Epiphyseal union around wrist joint is not completed

Elbow Joint:-Epiphyseal union around elbow joint is completed.

Shoulder Joint :- Epiphyseal union around shoulder joint is not completed.

Pelvis: 1. Epiphyseal union around iliac crest and ischial tuberosity is not completed and not fully appear.

N.B.:- However in our opinion epiphyseal union around medial epicondyle is not completed yet .

## Final Opinion:-

- (1) Age of the victim is above 12(Twelve) and below 14(Fourteen) years.
- (2) Evidence of recent sexual intercourse is not detected on her person.
- (3) No injury or violence mark is detected on her person.

Ext.1 is the medical report and Ext.1(1) is her signature.

**During cross examination**, PW2 has stated that the victim was examined after 10 days of the occurrence. Hymen may be teared for various reasons and not necessarily due to sexual intercourse.

**PW3-Meghjan Nessa,** who is the victim of this case, deposed that the incident took place one year before. During evening she went to the bank of river to bring water. Then the accused took away her to his house after gagging her mouth and committed rape on her. The accused kept her in his house under lock and key for 8 days. Then her father lodged case in thana and some school boys recovered her. Police came to her house and took her to thana and seized her school certificate. She made statement before police as well as before the magistrate. She made her statement before the police and magistrate. PW3 exhibited her statement before the learned Magistrate as **Ext.2** wherein **Ext.2(1) & 2(2)** are her signatures.

**During cross examination**, she told that her father went to bring her back from the house of accused on the next day of incident, but the family members of accused did not send her back. She stayed for eight days in the house of accused. She denied that she did not state before the police that accused raped

her. She denied all other suggestions of the defence side.

**PW4- Sahidul Ali** deposed that that he knows the accused as well as the informant and the victim. Incident occurred about two years ago. During evening the victim went to bring goats from the bank of river. Then the accused took away her from there to his house after gagging her mouth and kept her in the house of the accused under lock and key. The victim stayed in the house of the accused for 3/4 days. Malek lodged case and as per direction of police, Abdul, who is the brother of Malek, alongwith two boys brought back the victim. During that time, the victim was aged 13 years and studying in school.

**In his cross-examination** he stated that the victim is his niece. He stated that he did not go to the house of accused alongwith Matbor. He also admitted that he did not state before the police as deposed by him in the court, as police did not ask him. He denied all other suggestions of defence side.

**PW5- Hrishikesh Thakuria**, the I.O. of the case, deposed that on 27/02/2017 he was working at Barpeta PS in the same capacity. On that day one Malek Ali lodged the FIR before the OC Barpeta PS. Second OC of the PS registered a case being Barpeta PS case no 376/2017 U/S 506/366(A) IPC. Ext. 3 is the FIR and Ext. 3 (1) is the signature of second OC Sri Babu Singh.

On the next day he proceeded at the place of incident. He examined the relevant witnesses like informant, victim etc. he drew the sketch Map. Ext 4 is the sketch map. Ext. 4 (1) is his signature. He also went to the house of the informant and seized the birth certificate of the victim girl. Ext. 5 is the seizure list. Ext 5(1) is his signature. He handed over the seize birth certificate in the zimma of informant.

He could not found accused at his house. On 04/03/2017 the victim herself came to police station. He examined the victim and sent her for medical examination. He also got her statement recorded by the Ld. Magistrate U/S 164 Cr.Pc. On 16/03/2017 accused appeared before him. He was produced before the Juvenile board. After his ossification test the accused was found to be major by the board.

Then section of POCSO act was added, on his prayer. He collected

medical examination report of the victim. On completion of investigation he submitted charge Sheet against the accused person. Ext. 6 is the charge sheet date 05/05/2017. Ext. 6 (1) is his signature.

In cross-examination he deposed that as per sketch map the place of incident have been shown on the bank of river Pahumara. He did not seize any articles from the place of incident. The house of complainant is on the Eastern side of the river Pahumara where as the house of accused is on the Western side of river Pahumara. He did not seize any river boat, wearing apparel of the victim. Incident took place on 21/02/2017 whereas FIR was lodged on 27/02/2017. The victim was sent for her medical examination as well as her statement u/s 164 CrPC on 04/03/2017.

He confirmed in his evidence that witness **Malek Ali (PW-1)** did not state before him that, on being asked victim told him that accused had done bad work with her forcibly; that accused promised her to marry her and when she demanded accordingly then Amir Ali and Ibrahim Ali threatened her and that college student rescued her from the house of accused.

The I.O. further stated that witness **Nek Jan Nessa (PW-3)** did not state before him that accused raped her; that accused kept her confined in a room after putting lock; that Amzad took her after gagging her mouth. He also deposed that the victim did not state before him that the mother of the victim kept calling her by telephoning her.

8. From a close perusal of evidence on record it is seen that victim knew the accused prior to the incident. Now coming to the charge u/s 366A IPC against the accused, the victim stated that on the relevant evening, she went to bring water from river and then accused took her to his house after gagging her mouth. But the father of the victim i.e. PW1 deposed that while taking the victim, one Ibrahim Ali and Aamir Ali also accompanied the accused. But the victim did not mention their name in her evidence.

The M.O.(PW2) in her report (Ext.1), while writing history of the incident, has written that accused went to the house of victim and took her forcefully in a boat. However, I.O.(PW5) in his cross-examination, clearly admitted that he did not seize any boat. He also confirmed that the victim(PW3) stated before him that

accused took her after gagging her mouth.

It, thus, appears that victim had gone with the accused voluntarily. No wonder, for this reasons the victim admittedly stayed in the house of accused for about eight days though her father cum informant (PW1) went to the bring her back on the very next date of the incident.

Though the victim deposed that family members of the accused did not send her back with PW1, but fact remains that informant did not inform the police for about 8 days. Moreover, the informant clearly stated in his cross-examination that there was love affairs between the accused and victim prior to the incident and for that reason victim went to the house of accused. The informant also stated that he could come to know that the victim is in the house of accused from the next day of the incident, but he did not go to the house of accused to bring back the victim. Thus, it is seen that evidence of victim and informant contradicts each other's versions.

Moreover, it is interesting to note here that police has not examined the two boys and brother of informant namely Abdul, who, as per evidence of PW4 (uncle of victim) brought back the victim from the house of accused, to lend support to the prosecution history that accused kidnapped the victim.

**9.** Regarding the charge u/s 4 of POCSO Act, it is seen that victim and informant deposed that accused raped her in his house after kidnapping her. However, the victim did not state before police in her statement that she was raped by accused. The I.O.(PW5) confirmed in his cross-examination that victim did not tell him that accused raped her.

Though, in a case of rape, the settled law is that accused can be convicted on the sole testimony of victim, but such testimony must be consistent, true and should have a ring of truth in it.

In the case, in hand, the victim is not found to be consistent in the material particular that accused raped her. Her testimony appears to be very doubtful. Moreover, the M.O.(PW2) of the case did not find evidence of recent sexual intercourse on the person of victim leave apart any injury or violence mark on her person to support the case of victim that she was raped by accused during her stay with him repeatedly.

**10.** It is cardinal principal of criminal Law that prosecution case has to stand on its own leg and offence has not be proved against the accused beyond reasonable doubt.

**11.** On scrutinizing the evidence on record, considering the entire aspect of the matter and evidence, produced by the prosecution, I am of the considered opinion that the prosecution has failed to establish that the accused kidnapped the victim or committed rape on the victim. Hence, accused is entitled to acquittal under the benefit of doubt, which I accordingly do.

12. In the result, accused **Amsad Ali** is **acquitted** of the charge under section 366(A) IPC read with section 4 of The Protection of Children From Sexual Offences Act, 2012, levelled against him, on benefit of doubt.

**13.** Given under my hand and seal of this Court on this 26th day of April, 2019.

Sd/-Special Judge, Barpeta.

Typed by me

(Kavery Das, Stenographer)

#### <u>APPENDIX</u>

(A) Prosecution witnesses:

P.W.1 = Malek Ali, the informant, P.W.2 = Dr. Mamata Devi, the M.O., P.W.3 = Meghjan Nessa, the victim,

P.W.4 = Sahidul Ali,

P.W.5 = Hrishikesh Thakuria, the I.O.,

(B) Prosecution Exhibits:

Ext.1 = Medical Report,

Ext.1(1) = Signature of Dr. Mamata Devi,

Ext.2 = Statement of the victim u/s 164 CrPC,

Ext.2(1) & 2(2) = Signature of victim,

Ext.3 = FIR,

Ext.3(1) = Signature of 2nd O/C Sri Babu Singh,

Ext.4 = Sketch map,

Ext.4(1) = Signature of Sri Hrishikesh Thakuria, I.O..

Ext.5 = Seizure list,

Ext.5(1) = Signature of Sri Hrishikesh Thakuria, I.O.,

Ext.6 = Charge Sheet,

Ext.6(1) = Signature of Sri Hrishikesh Thakuria, I.O.,

(C) **Defence witnesses**:Nil.

(D) **Defence Exhibits**: Nil.

(E) **Court witnesses**:Nil

(F) **Court Exhibits**: Nil.

Sd/-

Special Judge, Barpeta.