

IN THE COURT OF THE SPECIAL JUDGE ::::: BONGAIGAON

Special (P) Case No. 6 (M)/2018.

U/S 366 IPC read with section 6 of POCSO Act.

(Arising out of Manikpur P.S Case No. 19 of 2018)

State of Assam

Vs.

Saminur Islam @ Saman.....Accused.

PRESENT :- Sri Binod Kr Chetri,
Special Judge (under POCSO Act),
Bongaigaon.

Appearance :-

For the State : Smti R. Choudhury, Special Public
Prosecutor.

For the accused : Sri Mohidul Islam, advocate.

Date of Argument : 29.06.2019.

Date of Judgment : 05.07.2019.

JUDGMENT AND ORDER

1. The prosecution case, in brief, as per FIR dated 19.01.2018 of Sri Muktar Ali is that on 18.01.2018 at about 8.30 A.M her minor daughter aged 16 years went to Manikpur Girls High School but did not return till evening and on searching came to know that the accused Saminur Islam @ Saman with the assistance of other accused persons kidnapped the victim girl.

2. On receipt of the FIR from the informant, the O/C, Manikpur Police Station, registered the case being Manikpur Police Station Case No. 19/2018 u/s 366/34 IPC and himself took up the case

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for investigation. Accordingly, the Investigating Officer arrested the accused, recorded the statement of the victim girl, sent the victim for medical examination and on completion of investigation laid charge-sheet against the accused u/s 366 IPC read with section 4 of POCSO Act.

3. On appearance of the accused and on perusing police report and hearing both sides, having found a prima facie case, charge u/s 366 IPC read with section 6 of POCSO Act was framed against the accused. The accused pleaded not guilty when charge was read over and explained to him and claimed for trial.

4.

Point for determination :

i) Whether on 18.01.2018 at around 8.30 A.M at village Dhupuri under Manikpur P.S abducted Smti Runa Khatun aged about 16 years with intent that she may be compelled to marry against her will or in order that she will be forced or seduced to illicit intercourse and thereby committed an offence punishable under section 366 IPC ?

ii) Whether on 18.01.2018 and thereafter in Guwahati committed aggravated penetrative sexual assault on the victim Runa Khatun aged about 16 years and thereby committed an offence punishable u/s 6 of POCSO Act ?

5.

In this case, to bring home the charge against the accused, prosecution has examined as many as 14 (eighteen) witnesses. Statement of the accused was recorded u/s 313 Cr.P.C in which, he denied all the allegations leveled against him and declined to adduce



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evidence.

6. Heard the argument advanced by the learned counsel of both sides.

7. Mrs R. Choudhury, the learned Special Public Prosecutor appearing for the State has submitted that it is a case of kidnapping as well as penetrative sexual assault on the victim girl and the cogent evidence of the victim is sufficient for conviction of the accused.

8. Refuting the argument advanced by the learned Special Public Prosecutor, Mr Mohidul Islam appearing for the accused has stated lack of evidence to bring home the charge u/s 366 IPC read with section 6 of POCSO Act.

PROSECUTION EVIDENCE

9. In order to appreciate argument advanced on behalf of both sides, I deem it appropriate to briefly recapitulate the evidence on record as follows :

10. PW 1, (victim), in her evidence deposed that on 18.1.2018 at about 8.00 A.M she went to school and on the way she met the accused on road at Darika and the accused on the pretext of visiting her to Barpeta took her by bus and dropped at Simlaguri and took tea there. Thereafter the accused took her by bus to Guwahati, Narengi and stayed in the rented house of his friend for 2 days and on the 3rd day the family members of the accused came and took her and the accused to Manikpur Police Station. She deposed that while staying at Narengi on



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18.01.2018 on the assurance of marrying her the accused had sexual intercourse with her. Police got her medically examined and also got her statement (Ext-3) recorded in the Court. Police seized her school registration certificate vide seizure list (Ext 2). Her date of birth is 14.8.2000 and Police also seized her mobile phone which the accused gave her before 10 days of the incident vide seizure list Ext 2.

During cross she stated that she has no birth certificate and she read in No.2 Dhupuri L.P. School. She denied the suggestion that she failed three times in school examination. She admitted that the accused on 01.01.2018 gave her a mobile hand set and she loves the accused and for this she went to Guwahati with the accused. She denied the suggestion that there was no physical relation with the accused at Guwahati and she alone went to Guwahati. She denied the suggestion that she was above 18 years on the day of the incident.

11. The evidence of PW 2 (Muktar Ali), is that on 18.01.2018 at about 8.30/9.00 A.M his daughter, aged about 17 years went to Manikpur Girls Higher Secondary School but did not return back then they searched for her and at the time of search one girl namely Elakjan told that she saw talking the victim girl with one driver, the accused Saminur. He deposed that they went to the house of the accused but did not find him and on the next day at 8.30/9.00 A.M his daughter over phone informed that she was coming to house but did not come till evening. Then he filed the ejahar (Ext 4) and after 2 days of filing the ejahar Police recovered the victim girl. He deposed that on asking the victim girl she said that the accused raped her. Police seized the registration certificate of the victim. M. Ext 1 is the said original

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registration certificate.

During cross he stated that he has four children, out of them victim is his elder daughter and he don't remember her date of birth. His daughter's present age is 17 years and she has not completed 18 years. He denied the suggestion that her daughter loved the accused and she went to meet the accused at Guwahati. He denied the suggestion that the accused did not kidnap the victim and not raped her.

12. PW 3 (Jahera Bibi), the mother of PW-1, deposed that the incident took place about 3 months ago and on the day of incident at about 8.30 A.M her victim daughter aged about 15 /16 years reading in class X went to Manikpur H.S. School but did not return. On the next day, her victim daughter rang up from the phone of the accused and informed her husband that she was coming but did not come, then her husband filed the ejahar. After 4 days of the incident Police recovered the victim from Satgaon, where she was kept in the rented house of the accused's friend and there the accused had physical relation with her. Police got her medically examined and her statement was recorded. She also deposed of her daughter failing once in class X.

During cross she stated that she did not remember the date of birth of the victim and presently the victim is 16 years and not 21 years. She does not know whether there is love affairs between the accused and the victim. She denied the suggestion that she did not state before Police that the accused did not rape her and the victim did not go to Guwahati with the accused.

13. PW 4 (Abdul Baten Gazi), deposed that on 18.01.2018 at about 4.30/5.00 P.M after returning from work he heard



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that the daughter of informant aged 16 / 17 years went to Manikpur Girls H.S. School but did not return. On the next day the victim from the mobile phone of the accused informed that the accused took her and would return, but did not return then her father lodged the ejahar. After 4 days of incident Police recovered the victim from Satgaon and the victim told that the accused took her to Guwahati and kept her in the rented house of his friend and raped her.

During cross he stated that the victim is his niece, aged 16/17 years and as per document her date of birth is 14.08.2000. He stated that he did not see how the victim went to Guwahati and Police recovered the victim from Guwahati, Satgaon. He denied the suggestion that he stated falsely that the accused raped the victim in the rented house at Guwahati. He denied the suggestion that the victim is above 18 years and she willing went to Guwahati and not finding the accused at Guwahati after returning filed the case falsely.

14. PW 5 (Usuf Ali), deposed that the incident took place at about 4 / 5 months ago and on the day of incident the victim, aged 17 years at 9.00 A.M went to Manikpur H.S. Girls school but did not return and after 2 days came to know from people that the accused took the victim. After one day he came to know that the victim and the accused came to Police Station.

During cross he stated that he did not know the exact date of birth of the victim and he stated her age may be 17 years and the victim may be above 18 years.

15. PW 6 (Momer Ali) deposed that about five months ago the victim went to the school but did not return. Later on, he heard

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that the victim went with the accused at Guwahati and the Police recovered the victim girl from Guwahati.

During cross he stated that he forgot from whom he heard. He denied the suggestion that he did not state before Police that the accused did not take the victim to Guwahati.

16. PW 7 (Somer Ali), deposed that the incident took place about five months ago and in the month of February Police came to his house in search of the accused and asked about the house of the accused and he showed the house of the accused and from public he came to know that the accused abducted one girl. He deposed that the accused is a married person having a son.

During cross he stated that he did not know whether the victim voluntarily came with the accused or the accused took her.

17. PW 8 (Nazrul Ali) deposed that about three months ago one morning at 7.00 A.M the accused came to his house and as a friend he asked him to sit and he went to tie the cow and after coming saw police and many people came and police took the accused and from the village people he heard that the accused brought a girl.

During cross he stated that he does not know why the Police came and except that the accused brought a girl he knows nothing.

18. PW 9 (Abdul Kayem) deposed that the incident took place about 5 / 6 months ago and on the day of incident the accused took the victim girl to Guwahati but the police recovered the victim girl from a place at Kalgachiya. He heard that the accused committed rape to the victim and Police seized a birth certificate of the victim and a mobile

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hand set vide Ext 2.

During cross he stated that he does not know how the accused took the victim and the victim did not tell him that the accused raped her. He denied the suggestion that as the informant is his relation hence he deposed falsely and the victim went to Guwahati to meet the accused.

19. PW 10 (Razzak Ali) deposed that the incident took place at about 5 / 6 months ago and one day he went to school to drop his son then seeing him Police asked him whereabout the house of the accused and asked him to come to the house of the accused and from Police he came to know that one girl from Patiladaha went to the accused at Guwahati and police seized one mobile hand set vide Ext 5.

During cross he stated that he put the signature in the seizure list at Police Station. The victim told him that she went to Guwahati to meet the accused and there was love affairs between them.

20. PW 11 (Abdus Rahim Muhammad) deposed that the incident took place in the month of January this year and PW 10 took him to Police Station due to arrest of the accused in connection with woman related case and Police seized a mobile from you vide Ext 5.

During cross he stated that he did not know from whom the mobile was seized and he could not say correctly if the mobile shown in the Court is that seized mobile.

21. PW 12 (Abdul Latif) deposed that about 7 / 8 months ago in the evening after returning from 'namaz' he saw Police at his house and the accused is friend of his son and the accused came with

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a girl to his house and Police came in search of the accused and finding them at his house took them.

During cross he stated that he did not know from where the accused brought the girl.

22. PW 13 (Dr Priyanka Roy) deposed that on 23.01.2018 at around 1.25 P.M she examined Miss Runa Khatun, aged 17 years and opined that no opinion could be given whether the victim had sexually been assaulted or not. She found no mark of injury on her person and as per radiological report her age was above 17 years and below 20 years.

23. PW 14 (Rustom Raj Brahma), the Investigating Officer deposed that on 19.01.2018 on being received the FIR (Ext 4) from the informant he himself took up the investigation, recorded the statement of the witnesses, prepared the rough sketch map of the place of occurrence (Ext 7) ; visited the house of the accused and engaged some sources to trace out the accused and the victim girl and after coming to know that the accused were detained in Kowadi under Bijni P.S reached there and on being enquired came to know that you eloped with the victim girl and had sexual relation with her, seized vivo mobile handset (Ext 5) ; recovered the victim girl and seized one Hitch mobile handset (Ext 2), arrested the accused ; seized one original school registration card of the victim (Ext 1) ; sent the victim girl for medical examination ; got recorded her statement u/s 164 Cr.P.C and on completion of investigation submitted charge sheet (Ext 8) for the offence u/s 366 IPC read with section 4 of POCSO Act.

During cross examination he stated that during

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investigation the victim girl stated before him that she stayed with the accused in rented house at Satgaon. He denied the suggestion that the accused did not state before him that he did not make sexual relation with her. He denied the suggestion that the registration certificate, M.Ext 1 is not genuine certificate. He admitted the fact that he did not enquire about the birth certificate of the victim girl. He denied the suggestion that he did not investigate the case properly and submitted the charge sheet against the accused without any materials against him.

Discussions, decision and reasons thereof



24. The case is simple that the victim girl went with the accused to Guwahati on 18.01.2018 out of love. PW-1 (victim) in her cross stated that on 01.01.2018 the accused gifted her a mobile handset and that she loves him and for this she went with him to Guwahati. During her stay at Guwahati on 18.01.2018 the accused had sexual intercourse with her. On the third day of their stay at Guwahati, the family members of accused brought them to Manikpur Police Station. She stated her age to be 17 years and that her date of birth is 14.08.2000. Her school registration card was seized by the Police vide Ext 1 (seizure list). Ext 2 is her statement u/s 164 Cr.P.C and there also she stated of love affairs with accused and eloping with him on 18.01.2018 and had sexual intercourse with the accused and after three days, relatives of accused came and brought them.

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25. Now it is to be seen whether PW-1 went voluntarily and had sexual intercourse or not with the accused and what was her age at that relevant time.

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26. Her evidence is clear that she was in love with the accused and on 18.01.2018 eloped with him to Guwahati where they stayed for 2 days and on the third day the family member came and brought them to Manikpur Police Station. She had sex with the accused on 18.01.2018 as accused told her that he will marry her. So everything was voluntarily. No force, no inducement, no false promise and no cheating. It is not that the accused induced her on the false promise to marry her to have sex with her and thereafter referred to marry her.
27. Her (PW-1) evidence of sexual intercourse do not find support from medical evidence as PW-13 (doctor) found no injuries and found her hymen intact. If there was penetrative sexual intercourse then there should have been rupture of hymen.
28. The only issue left is the age of PW-1 (victim girl). Ext 1 is the seizure list by which school registration certificate of PW-1 (Mat. Ext 1) was seized. In the certificate her age is shown 14.08.2000 and if we go by this certificate then on 18.01.2018 i.e day of elopement and sex, she was aged 17 years 5 months 4 days. The medical report (Ext 6) also opined her age to be above 17 years and below 20 years.
29. Now, it is to be seen whether because PW-1 is less than 18 years of age, the act done by her voluntarily on own sweet will become an offence on the part of the accused of kidnapping and penetrative sexual assault on PW 1. Simply because PW 1 is short of six months for 18 years, whether the offence of kidnapping and rape is made out automatically. To the normal human thinking, the answer is 'No'.

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30. Coming back to the age of the victim girl, her date of birth is mentioned as 14.08.2000 as per school registration certificate. Birth certificate is not available and her father PW-2 stated that he don't know PW-2's date of birth and the school teacher wrote down the date of birth, as told by him. PW-3 (mother of PW-1) deposed that PW-1 failed once in class IX. In her cross she stated that she is aged 35 years of age and got married at the age of 14 years and after 1 year of marriage PW-1 was born. If that be so, PW 1's age as on 17.04.2018, i.e the day when PW-3 adduced evidence, would be 20 years. Her father PW-2 also don't know her date of birth and medical report speaks of PW-1's age as above 17 years. Going by medical evidence PW-1 appears to be major at the time of evidence.

31. Leaving aside the controversy of age and accepting the age as 17 years 5 months and 4 days on the day of evidence as per date of birth as 14.08.2000, the question to be decided is whether the act of elopement of PW-1 with the accused and sex with him on 18.01.2018 was voluntarily or with threat or inducement. It is to be seen whether the accused committed the offence charged with.

32. PW-1 stated having love affairs with the accused went with him in a bus to Guwahati, stayed in a rented house and had sex with the accused as the accused told him that he will marry her. After three days, the relatives of accused brought them to Manikpur Police Station. The accused had even gifted a mobile hand set some days prior to their elopement. In her statement u/s 164 Cr.P.C (Ext-3) she stated about her love with the accused and that she wanted to marry him, that on 18.01.2018 they took a bus to Guwahati and stayed on a rented house



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at Narengi,Guwahati and indulged in sexual relationship on that day itself. All these speaks of her voluntariness in going with the accused and having sex with him. No where in her statement indicates of any threat, cheating, misrepresentation or inducement on the part of the accused.

33. Such a relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. If we go by the POCSO Act, it prohibits minors from having any kind of sexual relationship. If that interpretation is accepted, it would mean that the human body of every individual under 18 years of age is the property of the State and no individual below 18 years can be allowed to have pleasures associated with one's body. Recently Madras High Court in a case suggested exclusion of consensual sex after 16 years of age from the purview of the POCSO Act. There was also suggestion for amendment of the Act to the effect that the age of the offender ought not to be more than five years or so, then the consensual victim girl of 16 years or more, so that the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumable infatuation or innocence.

34. The Hon'ble Constitutional Court of South Africa in the case of Teddy Bear Clinic for Abused Children & anth -vs- Minister of Justice and Constitutional Development & anth reported in [(2013) ZACC 35 (7 Judge Bench)] confirmed that the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 which criminalised consensual sexual conduct of adolescents above 12 years and below 16 years were unconstitutional.




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35. From above discussion and findings arrived at, it transpires that prosecution has failed to prove the ingredients of commission of offence u/s 366 IPC as well as section 6 of the POCSO Act. Being so, it is held that prosecution has failed to bring home the charge u/s366 IPC read with section 6 of POCSO Act against the accused Saminur Islam @ Saman and as such the accused is acquitted forthwith and set him at liberty. His bail bond shall remain in force till next six months.

36. Given under my hand and the seal of this Court on this 5th day of July, 2019.



(Binod Kr Chetri)
Special Judge,
Bongaigaon.

Dictated and corrected by me,

(Binod Kr Chetri)
Special Judge,
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A P P E N D I X

Prosecution witness:

PW 1 – Victim
PW 2 – Muktar Ali.
PW 3 – Jahera Bibi.
PW 4 – Abdul Baten Gazi.
PW 5 – Usuf Ali.
PW 6 – Momer Ali.
PW 7 – Somer Ali.
PW 8 – Nazrul Ali.
PW 9- Abdul Kayem.
PW 10- Razzak Ali.
PW 11- Abdus Rahim Mohammad.
PW 12- Abdul Latif.
PW 13 – Dr Priyanka Roy.
PW 14- Rustom Raj Brahma, I.O.

Defence Witness:

Nil.

Documents Exhibited by Prosecution:

Ext-1 Seizure list
Ext-2 Seizure list.
Ext-3 Statement of the victim U/S 164 CrP.C.
Ext 4 Ejahar
Ext-5 seizure list
Ext-6 Medical report.
Ext-7 Sketch map of the place of occurrence.
Ext 8 Charge sheet.

Material Exhibited by prosecution:

M.Ext 1 – Registration certificate of the victim.

Defence Exhibit:

Nil.


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