

IN THE COURT OF THE SPECIAL JUDGE, DHEMAJI.

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

JUDGMENT IN SPECIAL(POCSO) CASE NO. 18(DH) 2017.

(G.R. Case No.04/2013 ; Silapathar P.S. Case No.02/2013 Under Sections 366(A)/376 (2) (G) of the Indian Penal Code)

The State of Assam

- Versus -

1. Md. Bablu Ali @ Bablu Baidya,

S/O Late Sattar Ali,
 R/O Gandhi Nagar,
 P.S. Silapathar,
 Dist.- Dhemaji.

2. Md. Allauddin Seikh,

S/O Md. Handim Seikh,
 R/O Gandhi Nagar,
 P.S. Silapathar,
 Dist.- Dhemaji. Accused Persons

Committing Magistrate:- Shri J.K. Das,

Addl. Chief Judicial Magistrate,
 Dhemaji.

Appearance:

Shri A. Fogla,

Public Prosecutor For the State

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Shri K.C. Sonowal, Advocate ,For the Accused

**Dates of prosecution evidence : 4-6-2015, 19-8-2015, 19-11-2015,
2-2- 2016, 2-5-2016, 22-2-2017
and 5-8-2017,**

Date of arguments : 24-01-2018

Date of Judgment : 09-03-2018. (*One accused remained absent on two dates fixed for judgement on the ground of illness.*)

JUDGMENT

1. **Accused- Bablu Ali @ Bablu Baidya and Allauddin Seikh** stand charged u/s 366/376 (D) of I.P.C. read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act).

2. The prosecution case in brief is that on 03-01-2013 complainant- Smti Junmoni Phukan W/O Shri Nobin Phukan , R/O VIII.- Maj Gaon, P.S. Silapather, District- Dhemaji lodged an ejahar with Sissiborgaon Police Out Post under Silapather P.S alleging interalia that on 02-01-2013 at about 12 P.M. while her minor daughter- Miss X (name withheld) was going to the house of her '**Apaidew**' (aunt) situated at Karphulani Gaon, the accused persons named above, kidnapped/ abducted her forcibly from Betanipam Chariali on bi-cycle and took her towards the jungle of Adi-Gaon of Nilakh Hill and committed rape on her. It is also stated in the ejahar that the people of that locality saw the incident and informed the Police and police recovered the victim along with the accused persons. Hence, the case.

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3. On receipt of the ejahar police registered a case vide Silapathar P.S. Case No.02/2013 u/s 366/376 (2) (g) of I.P.C. Police started investigation and on completion of investigation submitted Charge-sheet against the accused persons u/s 366(A)/376 (2) (g) of I.P.C.

4. The case came up before the learned Addl. Chief Judicial Magistrate, Dhemaji and the Ld. Magistrate issued process for appearance of the accused persons and on appearance furnished necessary copies to the accused persons and committed the case to this Court.

5. On receipt of the case record and on appearance of the accused persons, this Court considered the materials on record and upon hearing both the sides, my learned predecessor on 17-06-2017 framed charges u/s 366/376(D) of IPC against the accused persons and read-over and explained to them to which they pleaded not guilty. Later on, again my ld. predecessor altered the charge and accordingly added section **4 of POCSO Act** in this case. The charges were read-over and explained to them to which they pleaded not guilty. The prosecution, in order to prove its case, examined 9 witnesses including the I/O and M/O. The accused persons were examined u/s 313 of Cr.P.C. Defence plea is of denial. Defence adduced no evidence.

6. Points for determination :

1) That you, on 02-01-2013 at about 11 AM at Village-Betanipam under Silapathari Police Station you kidnapped Smti 'X', a minor girl below the age of 18 years, taking her away out of her lawful guardianship without the consent of her guardian with the intention to compel her to have illicit intercourse and thereby you committed an offence punishable u/s 366 of IPC.

2) That you both on the same day, time and place, taking her to Nilakh Adi-Gaon committed gang rape on Smti 'X' having forceful

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sexual intercourse with her and thereby you committed an offence punishable u/s 376 (D) of IPC read with section 4 of the POCSO Act.

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

Decisions and Reasons thereof:

8. PW1 is the victim Miss 'X'. She stated that she knows both the accused persons. Complainant is her mother. The occurrence took place about 2 years back. On the date of occurrence while she went to the house of her '**Apaidew'** (elder sister of her mother), the accused persons forcibly took away her from the road to the jungle known by the name nilakh. Thereafter, accused-Bablu laid her down on the ground and committed rape on her removing her skirt. She also stated the other accused did not commit rape on her. After committing rape on her, the accused persons wanted to take her to other place but she did not agree to go with them. On the way VDP personnel met them. They handed-over them to the Police. On the following day, her mother knowing about the incident, filed an FIR at the Police Station. Doctor examined her medically. Police took her statement. Her 164 Statement was recorded by the Magistrate. Exhibit-1 is the said statement and Ext-4(1) is her signature therein. At the time of incident, she was 13 years 4 months old. In her statement u/s 164 Cr.PC she has given same statement.

In cross-examination PW1 stated that she did not know the names of the accused persons before the occurrence. But, she had seen them before the day of occurrence. VDP personnel met them on the road and took them to her house. Blood oozing out from her vagina for committing rape by accused-Bablu. She did not state before police and the Magistrate about oozing out of blood from her private part at the time of recording her statement. She denied the defence suggestion that she has given false

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evidence that the accused committed rape on her taking her to jungle. The accused persons offered her '**Ghuguni**' at a Hotel while she was taken to Nilakh. She did not state before the people in the hotel about the accused forcibly taking her by the accused persons. Due to the threatening given by the accused persons, she did not state about the matter. She also denied the suggestion that she gave false evidence against the accused-Bablu that he committed rape on her as tutored by the VDP personnel. She stated that the accused persons forcibly took her away from the road. Both the accused persons were coming on bi-cycle. She went walking. It is also denied that the accused persons neither forcibly took her away nor committed rape on her. It is also denied that she stated before the Magistrate that the accused persons took her in an Auto. She also denied that she has given false evidence

9. PW2 Smt. Junmoni Phukan stated that she knows both the accused persons. The victim is her daughter. The incident took place about 2 years back. On the day of incident, her daughter /victim went to the house of her "**Apaidew**" (mother's elder sister). VDP personnel informed her that the victim 'X' along with the accused were detained at the police station. She went to the Police Station on the following day. On being asked to the victim 'X', she told her that accused persons forcibly took her towards the jungle of Nilakh and accused-Bablu forcibly committed rape on her. Then she had filed the case. The FIR was written by another person. She put her thumb impression on the FIR. Police examined her daughter medically by a Doctor. Police recorded her statement.

In cross-examination PW2 denied that her daughter/victim did not state before her that the accused persons took her (victim) towards Nilakh. She also denied that the accused Bablu did not commit rape on her. She stated that at the time of occurrence her daughter was promoted to Class-IX. After the incident, her daughter/victim left the school. After the incident, father of the victim obtained certificate from the school. The

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certificate was shown to the police. Further, she stated in cross-examination that her daughter/ victim told her about the occurrence. She denied the suggestion that she had filed the case as narrated by VDP personnel.

10. PW3 Shri- Boluram Borah stated that the occurrence took place about 2 years back (from the date of his recording evidence). Bipin Dutta and Nakul Dutta had informed him that the accused persons and a girl were found in suspicious condition. Many people gathered there and detained both the accused and also the girl. Somebody had informed the Police and Police came. On being asked, the girl told that both the accused persons had forcibly took away her and committed rape on her. He did not ask anything to the accused persons. The girl was from Silapathar. He does not know the accused persons.

In cross-examination PW3 stated that he did not ask the girl anything. He denied the suggestion that the girl did not tell him that the two boys forcibly took her away and committed rape on her. He further stated that Police did not ask anything.

11. PW4 Prafulla Saikia stated that the occurrence took place about 2 years back (from the date of his recording evidence). At the relevant time, he was the Secretary of VDP. On the day of the incident in the evening, Boluram Borah had informed him that a girl and two boys (accused) were found in suspicious condition and people had detained all of them in the place. He then went to that place where the girl and the accused were detained by the people. The girl was a minor. Police came on being informed by someone. Police took both the accused and the girl. He did not ask anything to the accused and the girl.

12. PW5 Smt. Majani Phukan stated that she knew both the accused persons namely Bablu Ali and Allauddin Seikh. Complainant is her mother and the victim is her sister. About 2 years ago, his sister/victim went

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to the house of her '**Jethai**' at Betanipam village. Then both the accused persons forcibly took her away to the hill of Nilakh and committed rape on her there. VDP Personnel met the accused and the girl and handed-over all of them to the police. Police investigated about the incident. Police seized the wearing panty of her sister. Exhibit-2 is the seizure list and Ext-2(1) is her signature.

In cross-PW5 denied the suggestion that the victim girl did not state before me that the accused persons committed rape on her taking her to the Nilakh Hill. He did not know why police seized a panty. He has not seen the seized panty in the Court.

13. PW6 Shri Nakul Bora stated that the occurrence took place in the year 2013. On the day of the incident, he, Rongman and Bipin Dutta went to Arunachal Pahar (hill) for bringing fire-wood. On the road, they met the accused persons present in the dock, and a girl. Seeing the accused persons and the girl in suspicious condition, they handed-over all of them to the VDP. Later, Police came. Police took his statement.

In cross-examination PW6 stated that he saw both the accused persons on the date of occurrence and on the date of his recording evidence in the Court. The victim girl did not state before him about committing rape on her by the accused persons.

14. PW7 Shri Mamon Phukan stated that the occurrence took place about 3 years ago (from the date of his recording evidence on 2-2-2016). He stated that while he was going to the shop by the road, he saw many people gathered in the house of Boluram Borah. Then he also went there and came to know that both the accused persons took the girl with evil intention. The people gathered in the house of Boluram, told him that both the accused did '**bad thing**' with the girl. Police recorded his statement.

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15. PW8 Dr. Pranab Jyoti Dutta stated that on 03-01-2013 he examined **the victim** at Dhemaji Civil Hospital, on police requisition on being identified by WPC- Rupahi Chutia. On examination, he found no external injury on perineal region. Hymen was old, ruptured. Bleeding from the vaginal canal was noted. Cervix was found nulliparous. Vaginal swab was found negative. For determination of age, X-Ray was advised but report was not submitted. He opined that there was no recent sign of forceful sexual assault at the time of examination. Ext 3 is the medical examination report.

PW8 (Doctor) was not cross-examined by the defence.

16. PW9 Shri Tuchen Chutia the IO stated that on 24-06-2013 he was at Sissiborgaon Police Out Post as In-Charge. On that day he was entrusted with the investigation of Silapathar P.S. Case No.02/2013 u/s 366/376 (2) (G) IPC by O.C. Abdul Hannan. Ongoing through the evidence on the Case Diary, he found material against the accused persons- Bablu Ali and Allauddin Seikh and thereafter he had filed the Charge-sheet against them.

PW9, the I/O is also not cross-examined by defence.

Appreciation of Evidence :

17. From discussion of evidence on record, it appears that the victim Miss 'X' in her evidence stated that while she was going to the house of her 'Apaidew' (maternal aunt), the accused persons met her on the road, caught hold of her and forcibly dragged her to the jungle of Nilakh area. Accused-Bablu Ali made her to lie on the ground, removed her clothes and committed rape on her. She also stated that the other accused person did not commit rape on her. She also stated that the accused persons tried to take her to some other place but she resisted and in the meantime, they were caught by VDP members and they (VDP) handed-over them to Police. PW2 is the mother of the victim. She stated that while her daughter was going to the house of her maternal aunt (Apaidew), the accused persons met her on the

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road and forcibly took her towards the jungle at Nilakh and accused-Bablu committed rape on her. On being asked, her daughter told her that accused Bablu Ali committed rape on her. Then she lodged the complaint at the Police Station. PW3 is the father of the victim. He has stated that his daughter was kidnapped by the accused persons and they were caught by VDP members. On being asked, his daughter told him that the accused persons did bad act with her. PW4 stated that on the date of occurrence the victim and the accused persons were caught while they were roaming on the road place in suspicious manner. PW5 is the sister of the victim. She has given same evidence as PW 2, PW 3 and PW 4. PW 5 and 6 also stated that the accused persons and the victim were caught at Nilakh area.

18. From the evidence of PWs, it appears that all the PWs have corroborated each other with respect to the fact that on date of occurrence while the victim was going to her relative's house the accused persons forcibly took her to jungle.

19. It may be noted that the doctor in his report stated the age of the victim as 13 years but he has not given the radiological age of the victim I have carefully considered the evidence in regard to the age of the victim. Pw2, the mother of the victim in cross examination stated that at the time of occurrence the victim was a student of class ix. However no age certificate has been produced by the prosecution side. At the same time there is nothing on record to show that the victim was a major. So it can be well inferred that the victim was below 18 years.

20. **Now let me look at the provisions of sec 366 IPC and 376 D R/W sec 4 of POCSO Act.**

Section 366 IPC Kidnapping, abducting or inducing woman to compel her marriage, etc-- 'Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to

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be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

21. I have carefully considered the evidence on record and I have also considered the facts and circumstances brought on record. In the instant case though charge was framed under sec 366 IPC, from the facts it reveals that both the accused persons took away /kidnapped the minor girl and they moved to different location here and there .The victim also stated that the accused persons wanted to take her to elsewhere but she resisted. So, from the conduct of the accused persons it can be inferred that they took her with intention to engage her in sexual activity either with them or with others. So, in my opinion a case under sec 366 A IPC is made out against the accused persons. I find the evidence of the victim and other P.Ws convincing and reliable in this regard.

22. **Now let me look at Sec 366 A IPC says** – 'Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine'.

23. Here I may refer to the decision in **K.Prema S. Rao and another v. Yadla Srinivasa Rao and others reported in (2003) 1 SCC 217**- it was held that' provisions of Section 221 Cr.P.C. takes care of such a situation and safeguards the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence he could have been charged with such offence.' Moreover the ingredients of the offence u/s 366 and 366A IPC are similar and the accused persons got opportunity to defend.

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Dharmajt.

24. So far as the allegation of forceful sexual intercourse is concerned it is in the evidence of PW1, the victim, that accused Babul Ali committed forceful rape on her.

25. Before I evaluate the evidence in this regard let me look at the provisions of rape.

Section 375 IPC. Rape—A man is said to commit "rape" if he—

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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Section 3 of POCSO Act. defines Penetrative sexual assault—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 anus of the child or makes the child 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 body of the child or makes the child to do so 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.

Section 4 of POCSO Act. Punishment for penetrative sexual assault.— ‘Whoever commits penetrative sexual assault shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine’.

26. The Id. counsel for the defence while arguing the case contended that the testimony of the victim does not find corroboration from the medical evidence as the MO in his report opined that there is no recent sign of forceful sexual assault on the victim. He also submitted that in the absence of medical report as to the sexual assault prosecution case cannot succeed.

27. On careful scrutiny of the evidence on record it appears that the medical evidence does not give us a clear picture in regard to sexual or penetrative assault. The MO on examination neither found swelling nor redness nor inflammation on the vagina. He opined that **no recent sign of sexual assault** found on the person of victim. It reveals from record that the occurrence took place on 02-01-2013 and the victim was medically examined on 03-01-2013. I am conscious of the fact that in a case of sexual assault accused can be convicted only on the sole testimony of the victim.

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But from the evidence as discussed above I find it difficult to rope the accused persons with the commission of rape or gang rape or penetrative sexual assault.

28. In view of what has been discussed above I find that prosecution has been able to prove the charge u/s 366A /34 IPC against the accused persons namely- Bablu Ali and Allauddin Seikh Beyond all reasonable doubt. I find that prosecution has failed to prove charge u/s 376D R/W section 4 of POCSO Act against the accused persons beyond all reasonable doubt.

ORDER

29. In the result I find the accused persons namely –Bablu Ali and Allauddin Seikh guilty u/s 366A/34 IPC. Accordingly, they are convicted thereunder. I find the accused persons not guilty u/s 376D IPC. R/W section 4 of POCSO Act .Accordingly they acquitted of the said charge.

30. Heard the accused persons on the point of sentence the accused persons pleaded for mercy.

31. Considering the gravity of the offence and the circumstances in which the offence was committed I am not inclined to give any benefit u/s 360 Cr.PC. or under the provisions of probation of offenders Act.

32. Accordingly the accused persons are sentenced to R.I. for 5(five) years each and to pay a fine of Rs.5,000/-(five thousand) each i.d. and R.I. for another 6 (six) months each u/s 366 A /34 IPC .

33. Set off the period of detention.

34. A copy of judgment free of cost be given to the accused persons.

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35. Judgment is pronounced in open court.
36. Given under my hand and seal of this Court on this the **9th** day of March/2018.

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(S. Das)
Special Judge,
Dhemaji.
Dhemaji.

Appendix:

Prosecution Witnesses

- P.W. 1 - The victim 'X',
- P.W. 2 - Smt. Junmoni Phukan,
- P.W. 3 - Boloram Borah,,
- P.W. 4 - Prafulla Saikia,,
- P.W. 5 -Smti Majoni Phukan,
- P.W. 6 - Nakul Borah,
- PW- 7 - Mamon Phukan,,
- PW- 8 - Dr. Pranabjyoti Dutta,
- PW- 9 - Tuchen Chutia, I/O.,

Defence Witnesses:-None.

Prosecution Exhibits

- Exhibit-1 - Statement of the victim u/s 164 Cr.P.C.
- Exhibit 1(1) - Signatures of victim 'X'
- Exhibit 2 - Seizure List,
- Exhibit 2(1) – Signature of Smt. Majoni Phukan,
- Exhibit 3 - Medical Report,
- Exhibit-3(1) - Signature of Dr. Pranabjyoti Dutta,
- Exhibit-4 - Charge-sheet
- Exhibit-4(1) - Signature of Tuchen Chutia, I/O.,

Defence Exhibits :- None.

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