

esent : Shri C. Das.

Judge, Special Court, Baksa, Mushalpur

JUDGMENT IN SPECIAL POCSO CASE NO.10/2018

u/s 366 IPC r/w Section 4 of POCSO Act

State

versus-

Md. Akkash Ali

..... Accused

Appearance:

For the State : Mr. R. Chetry, Public Prosecutor, Baksa

For the accused: Mr. T. Sharma, Advocate

Date of evidence : 19/4/17, 7/6/17, 11/7/17, 19/9/17, 3/5/18, 27/6/18

Date of argument: 5/9/18 Date of judgment: 18/9/18

JUDGMENT

The case of the prosecution briefly, is that on 4/2/16, the 1. complainant Smti. Dayamanti Kalita lodged a FIR before the Officer-in-charge of Goreswar police station, alleging inter-alias that on 3/2/16 at about 5-30 pm., her daughter/ victim while proceeding towards her aunt's house, in the mid way, the accused came on a bike and kidnapped her daughter by gagging her mouth. The accused committed rape on the victim by keeping her in his relative's house. Baksa, Mushalpur Thereafter, the accused left the victim in unwell condition in the morning of next day near her house. She came to know about the occurrence from the victim girl.

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No.12/16 and started the investigation. During the investigation, the I/O visited the place of occurrence, recorded the statement of the victim and other witnesses and sent the victim girl for medical examination. At the end of the investigation, the I/O having found a prima-facie case well established, submitted the charge-sheet against the accused to face trial in the court.

- 3. The accused, when appeared in the court in response to issue of process against him, was furnished with the relevant copy of the case. After hearing of both the parties and on perusing the material on record, the charge u/s 366 IPC r/w section 4 of Protection of Children from Sexual Offences Act, 2012 (herein after referred as the POCSO Act) framed against the accused. The charge so framed, was read over and explained to the accused who pleaded not guilty and claimed to be tried.
- 4. The prosecution during the trial, examined as many as, seven(7) witnesses including the M/O andI/O to support its case. Thereafter, in the statement recorded u/s 313 CrPC., the accused denied all accusations so appeared against him in the evidence on record. The accused declined to adduce any evidence. The argument of the parties was heard at length.

5. POINTS FOR DETERMINATION:

i] Whether on 3/2/16 at village- Deosunga under Goreswar police station, kidnapped the victim (name is witheld), daughter of informant with intent to compel her to marry and for illicit sexual intercourse with any person;

ii] Whether on same date, time and place as above, the accused committed penetrative sexual assault upon the minor victim girl, daughter of the informant;

DICISION AND REASON THEREFORE:

6. At the outset,learned Public Prosecutor submitted streneously that the evidence of the prosecution witnesses is sufficient enough to bring home the charge against the accused. He submitted that the offence is committed against the victim who is a minor girl. He submitted further that the evidence on record clearly discloses that the accused after kidnapping the victim girl, committed penetrative sexual assault upon her and there may be elements of knowing the accused for long time by the victim girl but that does not indicate that the victim had the consent to do the same act with the accused while the consent of the

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victim is not material as she is found to be minor in age and therefore, the accused is liable to be punished as per law, he maintained.

- 7. Per contra, learned counsel for the accused vehemently submitted that there is no such reliable evidence of the witnesses of the prosecution to based a conviction against the accused. He submitted that there was no eye-witness of the occurrence and all the witnesses of the prosecution are heresay type except the victim girl. He pointed out the evidence of the victim that her evidence even though, is vital for the prosecution, it does not corroborate anything of the prosecution story. The evidence of the victim if perused, it would make clear that she does not implicate the accused in the alleged occurrence. Hence, it creates doubt over the prosecution case. Accordingly, he urged to acquit the accused on the basis of benefit of doubt. He relied the decision reported in (1976) 4 SCC 233 Rabindra Kumar Dey vs. State of Orissa, wherein, it was held that in our opinion three cardinal priciples of criminal jurisprudence are well-settled, namely:
 - 1] that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;
 - 2] that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and
 - 3] that the onus of the prosecution never shifts.
- 8. Relying on the above law laid down, learned counsel for the accused submitted that while all other witnesses are even though hearsay type of witnesses, supported the fact that it was the accused who kidnapped the victim and he committed sexual intercourse with the victim who is a minor girl at the relevant time of occurrence, it appears that the victim totally denied such allegation against the accused and as such, when the victim who is the vital witness of the prosecution, does not support the prosecution story, it cannot be held that the prosecution has able to prove its case against the accused beyond reasonable doubt. Hence the prosecution could not remove the fact of presuming that the accused is innocent.
- 9. Learned counsel for the accused further submitted that from the evidence of the victim, it is confirmed that there is total contradictory version come from the mouth of her which renderes that the prosecution case unreliable and shrouded by doubt. He relied the decision reported in AIR 1957 SC 637 Harbans Singh Bhan Singh vs. The State of Punjab wherein it was observed that it is no

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doubt a matted of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true, but between 'may be true' and 'must be true' there is inevitably a long distances to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

He submitted that from the evidence of the victim, it appears that 10. there are two views come from the evidence of the prosecution witnesses and thus, the principle of law is that view favours the accused, must be adopted. He placed reliance on the decision reported in (1973) 2 SSC 808 Kali Ram vs. State of Himachal Pradesh wherein, another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a speical relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by report to surmises, conjectures or fanciful consideration. It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused.

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11. After hearing the above submissions of the parties, it would be proper to place on record, the evidence so tendered by the prosecution witnesses. The prosecution examined the informant of the case as PW1. It appears that PW1 Smti. Daymanti Kalita is the mother of the victim girl who was 14 years of age at the

relevant time. PW1 deposed in the court that on the fateful day, in the evening, the victim was missing from the house. The victim went to her aunt's place but on the way, the victim disappeared. She searched for the victim girl but could not trace out and as such, she reported it before the police. But on the next day, morning the victim arrived at her home. On her inquiry, the victim reported her that the accused took the victim on a motor-cycle and stayed with her in a house of his relative where the accused committed sexual intercourse with the victim at night. Hence she went to the police station. The police after inquired about the incident from her, sent the victim for medical examination and gave her the custody of the victim. She filed the ejahar vide Ext.1 and she proved the same.

- 12. In the cross-examination, PW1 stated that the victim was in class-IX at the relevant time. She was absent at her home on the fateful day. Apparently, the evidence of PW1 is based on the report of the victim.
- 13. PW2 Sri Dilip Deka stated inter-alia that one day, at about 5 am., he heard the sound of a bike and the accused rode the bike. After 10 minutes later, he heard hue and cry and as scuh, he proceeded near and he saw gathering of public. The victim was weeping. According to PW2, the mother of the victim was absent. The victim informed the public that the accused picked her up from the road on a motor-bike in the evening and thereafter, the accused kept her in a house and committed rape on her. The local youth went to apprhend the accused. He could not say if there was any relation between the accused and the victim.
- 14. In the cross-examination, PW2 stated that he saw the accused in the morning. He did not find PW1. Apparently, the evidence of PW1 is corroborated by PW2. But like PW1, he was also, a reported witness of the occurrence. However, his evidence discloses that the accused came on a bike on the next day morning near to the house of PW1.
- 15. PW3 is the victim girl(her name is witheld). Her evidence is important as far as the prosecution case is concerned. She stated that her date of birth as per her mother is 19th September 1999, she used to visit cloth store of the accused for the last 3/4 years. According to her, in this way, her love affairs was udge Spl. Court grown through phone with the accused. The love affairs between her with the Baksa, Mushalpuraccused was continued for two years. At present, she still loved the accused. On the fateful day, the accused came on a bike. Since she was talking to the accused, local villagers reported the same to her mother. Hence on the inquiry of her mother, she

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disclosed that she fell in love with the accused. The accused was a Muslim person and as such, her mother and uncle did not accept the accused and therefore, filed the case. She stated that the accused did not take her. As per instruction of her mother, she told that the accused took her. According to her, the accused did not commit any sexual intercourse with her and the accused did not take her away. She still has the impression to marry the accused. She was not tutored by anybody in the court.

- 16. PW3 was thoroughly cross-examined by the defence but nothing could be illsited in favour of the prosecution. Thus, it appears from the above evidence that the victim does not support the prosecution story.
- 17. The evidence of PW4 Sri Ramen Kalita is that on the fateful day, while he was in his home in the evening at about 6.30 pm., the victim was missing. The victim was 15 years of age at the time of occurrence. He went in search of the victim but could not trace her out. He was informed that on the next day, the victim returned to her home. On his inquiry, the victim told her that the accused took her to the house of aunt of the accused. The accused committed sexual intercourse with her forcibly at night. He stated that PW2 saw the accused dropping the victim. He is the uncle of the victim who was studied in class-VIII at the relevant time. Thus the evidence of PW4 is contradictory to the version of the victim.
- 18. PW5 Md. Intaz Ali deposed that he heard hue and cry in the house of one Ishahaque that the accused brought the daughter of PW1 to the house. The accused kept the victim in the house of Ishahague Ali for one night. Apparently, the evidence of PW5 does not lend support to PW3.
- 19. PW6 Dr. Dipti Choudhury is the medical officer who examined the victim medically. She stated that during her examination, she did not find any bodily injury or in the private part of the victim. But her hymen was torn. The uterus was retroverted and the byagina admitted two fingers. The vaginal swabs were sent for laboratory test for sperm but no sperm was seen. As per radiological report, the estimated age of the victim was below 18 years but above q6 years. She Judge Spl. Court examined the victim medically. Thus the medical evidence lends no support to the Baksa, Mushalpur prosecution case. filed her report vide Ext.3. The I/O of the case supported the fact that PW6

fateful day, while he was at Goreswar police station, the I/C of Swagpur Out post sent PW1 with the victim with a FIR vide Ext.1. Accordingly, he registered a case and took up the investigation of the case. He sent the victim for medical examination. He went to the place of occurrence, drew a skatch map thereof vide Ext.4. He examined the witnesses and visited the house of the accused in search of him. He found that the house where the offence was committed, was in abondoned condition without any occupant. At the end he filed the charge-sheet against the accused vide Ext.5.

- 21. Apparently, from the evidence of the prosecution witnesses so tendered in the case, it appears that PW1 is corroborated by PW2 and 4. The evidence of PW5 also, supported the fact that the accused brought the victim with him to the house of a relative of the accused and kept her for one night. According to PW1, 2 and 4, they heard that the accused took the victim on a bike and kept in a house and committed sexual intercourse with her at night and on next morning, the accused dropped the victim near her house from the mouth of the victim. The evidence of PW2 discloses that he heard sound of a bike and saw the accused was moving away. But he never stated that the accused dropped the victim girl on a bike near her house. He also, saw the victim weeping after few minutes later. That does not indicate that the accused brought the victim near to her house. Thus such evidence is not sufficient to accept that the accused dropped the victim on a bike on the next day of her missing from the house. It appears that the evidence of PW1. 2 and 4 are herasay and reported the incident by the victim. Apparently, whatever, was heard by PW1, 2 and 4 is contradicted by the victim. As such, their evidence appears to be not reliable and convincing to believe. Further, their evidence is not reliable to accept immediately unless corroborated by the evidence of PW3 who is main witness of the alleged occurrence.
- 22. So far as, the victim vide PW3 is concerned, it appears that she totally contradicted the said version of PW1, 2 and 4. It appears from the evidence of PW3 that she had love affairs with the accused for a considerable period of time before the alleged occurrence. In view of that it is possible that PW3 might have missing from her home without informing others to visit the accused. Further, the evidence of PW3 discloses that it is true that the accused came with a bike to her Mushalpurvillage and had some talk with her which was reported to PW1. Hence she reveals that she is in love with the accused. But the barrier was the religion which is different from each other and that was reason PW1 filed the case. PW3 denies that she was not kidmapped by the accused neither she was raped by the accused.

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Apparently, the victim girl is found to be quite matured enough to understand the consequences and effect of the act of kidnapping and rape. Since she did not implicate the accused for her kidnapping and rape, it shourds doubt over the veracity of the claim of PW1 that her daughter was kidnapped and than raped by the accused. Hence the accused is entitled to get the benefit of such doubt. Accordingly, the accused is given benefit of doubt.

- 23. Under the above facts and circumstances of the case, it is found that the prosecution has not able to prove its case against the accused beyond all reasonable doubt. Accordingly, the accused is held not guilty u/s u/s 366 IPC r/w Section 4 of POCSO Act. The accused is therefore, acquitted and set at liberty. His bail bond is however, allowed to remain in force for another 6 months u/s 437-A CrPC. The victim is recommanded to get compensation under Assam Victim Compensation Scheme. Forward a copy of judgment to the District Magistrate, Baksa, Mushalpur.
- 24. Given under the hand and seal of this court on this 18th day of September, 2018.

Dictated & Corrected by:

C. Das,

Judge, Special Court,

Baksa, Mushalpur

Typed by:

Courtor

P. Deka, Com. Typist

Judge, Special Court, Judge Spl. Court Baksa, Mushalpur



ANNEXURE:

List of prosecution witness:

PW1 ... Smti. Dayamanti Kalita ... informant

PW2 ... Sri Dilip Deka

PW3 ... The victim girl

PW4 ... Sri Ramen Kalita

PW5 ... Md. Intaz Ali

PW6 ... Dr. Dipti Choudhury ... m/o

PW7 ... Sri Nayanmoni Das ... i/o

List of defence witness:

Nil

List of documents exhibited:

Ext.1 ... ejahar

Ext.2 ... victim's statement u/s 164 CrPC

Ext.3 ... medical report

Ext.4 ... sketch map

Ext.5 ... charge-sheet

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