

IN THE COURT OF THE SPECIAL JUDGE ::::::::::::::: HAILAKANDI

Special (POCSO) Case No. 21/2018.

(U/S – 366(A)/376 of I.P.C. R/W Sec. 4 of POCSO Act, 2012)

The State of Assam

Versus

Zakir Hussain Hazari Accused.

PRESENT :- Shri D. Bhattacharjee, AJS.
Special Judge, Hailakandi.

Appearance and particulars :-

For the State	:- Sri U.K. Das, Ld. Public Prosecutor.
For the accused person	:- Sri N.H. Barbhuiya, Ld. Advocate.
Dates of recording evidence of PWs.	:- 10.07.2019, 24.07.2019, 07.08.2019, 21.08.2019 & 04.09.2019.
Date of Argument	:- 21.10.2019.
Date of Judgment	:- 04.11.2019.

JUDGMENT

1. The prosecution case in brief is that on 12.07.2018 the complainant lodged a complaint with the Ld. CJM, Hailakandi alleging that on 02.07.2018 his 16 years old minor daughter at about 3 P.M. went out of house and then the accused kidnapped his daughter. He made search but everything remained un-heeded. On 03.07.2018 at about 7 A.M. his daughter returned home and informed him that the accused forcefully took her to his house and committed repeated sexual intercourse with her against her will throughout the whole night and on the next morning, the accused drove her out from his house. Thereafter, he went to the house of accused and reported his father the entire incident but his father rebuked him in slang language, even threatened him with dire consequence.

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2. The Ld. CJM, Hailakandi sent the complaint to the Officer-in-charge, Lala Police Station for investigation and accordingly, Lala P.S. Case No. 310/2018 was registered under Section 366/294/506/34 of I.P.C. read with Section 4 of POCSO Act.

3. During investigation, police visited the place of occurrence, prepared rough sketch map thereof, recorded the statements of witnesses, got the statement of victim recorded under Section 164 of Cr.P.C., got the victim medically examined, arrested the accused person and forwarded him to the court. After completion of investigation, police submitted charge sheet against the accused person Jakir Hussain Hazari under Section 366(A)/376 of I.P.C. read with Section 4 of POCSO Act, 2012.

4. This Court being the Special Court under POCSO Act, in compliance with Section 207 of Cr.P.C. furnished copies of relevant materials to the accused person. Having heard Ld. Public Prosecutor and the Ld. Defence counsel, the formal charge has been framed against the accused person Jakir Hussain Hazari under Section 366(A)/376 of I.P.C. read with Section 4 of POCSO Act, 2012. The charge so framed was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case examined altogether 7 PWs including M.O. and I.O. The defence plea is of total denial. The accused person was examined under Section 313 of Cr.P.C. wherein he denied all such incriminating materials brought in evidence against him by the prosecution witnesses. The defence declined to adduce any evidence.

6. Heard argument of the Ld. Public Prosecutor and the Ld. Defence Counsel.

POINTS FOR DETERMINATION

(I) Whether the accused person on 02.07.2018 at about 3 P.M. at village Bael, Manacherra Grant under Lala Police Station induced the victim, the minor daughter of the informant, to go with him intent that she may

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be or knowing that she will be forced or seduced to illicit intercourse and thereby committed an offence punishable under Section 366(A) of I.P.C.?

(II) Whether the accused person on same date, time and place under Lala Police Station, after kidnapping the victim committed rape on her and thereby committed an offence punishable under Section 376 of I.P.C.?

(III) Whether the accused person after kidnapping the victim as aforesaid, committed penetrative sexual assault on the victim and thereby committed an offence punishable under Section 4 of POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

7. The PW-1, victim has deposed that about one year back, one day in the evening while she was returning home from her maternal uncle's house, on the way, at about 3 P.M. the accused appeared with an alto vehicle and forcefully dragged her inside the vehicle and committed rape on her. Thereafter, after about 15 minutes, the accused took her in a school near to his house, where he again committed rape on her by gagging her mouth. Thereafter, she went to her relative's house situated near the school and stayed the night there. On the next day, she returned home and reported the entire incident to her parents. She has further stated that while the accused was committing rape in the school, someone was urging the accused by taking his name to release her and then she came to know the name of the accused Jakir. After knowing about the incident, her father went to the house of accused for bichar but they assaulted her father and thereafter, her father filed the case. Police got her examined medically. Her statement was recorded under Section 164 of Cr.P.C. vide Ext.-1. Her date of birth is 12.03.2002. Ext.-2 is her school certificate.

In cross examination, she has stated that in the vehicle, apart from the accused, there was one driver. Reshma Begum Choudhury, Abdul Motlib Choudhury and Abdul Mannan Choudhury requested the accused to release her while he was committing rape on her and those persons have got there shops near the school and they witnessed the occurrence of rape from the

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shop. It was Monday and at 3 P.M. the school was found closed. She went to the school after around 150 meters walk with the accused. There are 10/12 houses near the school. From the place of occurrence, she reached her home after crossing Lala Police Station.

8. The PW-2, Taimus Uddin Choudhury, the informant of the case has deposed that the victim is his daughter. The date of birth of his daughter is 12.03.2002. On 02.07.2018 while he returned home from his work at about 4 P.M., his wife reported him that his daughter went to her maternal uncle's house at about 1 P.M. but she did not return back home. Thereafter, he went to the house of his daughter's maternal uncle Abdul Matin Choudhury searching his daughter, who reported that his daughter left their house at 3 P.M. On the next day in the morning, at about 7 A.M. his daughter made a phone call to him and told him to take her from Lala. Then, he went there and found his daughter standing near a shop. On being asked his daughter reported him that on the previous day while she was returning from her maternal uncle's house, the accused came with an alto vehicle and forcefully took her inside and took her to his house and committed bad acts throughout the whole night. He got his daughter to his house. Thereafter, he went to the house of accused but on the way, two persons advised him not to go to the house of accused as he is a very dangerous person and any untoward incident might occur. Then, he gave bichar to those two persons and awaited for two days and when he realized that he won't get bichar, he lodged the complaint. Some of the neighbouring people of the accused person told him that the accused is a married person having two children. Ext.-3 is the complaint lodged by him.

In cross examination, he has stated that he does not know the name of the persons to whom he gave bichar.

9. The PW-3, Sifatun Nessa Choudhury, the mother of the victim has deposed that on 02.07.2018 at about 1 P.M., his daughter went to her maternal uncle's house. At 4 P.M. her husband returned home from his place of work. On not getting his daughter in the home, he asked her about his daughter.

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Thereafter, he went to the house of her brother and was informed that his daughter left at 3 P.M. Her husband started searching for her daughter. In the next morning, her daughter made a phone call to her father and her husband recovered her daughter. On being asked, her daughter reported her that the accused kidnapped her in an Alto car and took her to his house where he committed bad acts with her forcefully. Her husband gave bichar to the elderly people of the village of accused but when they did not get justice, they filed the instant case.

In cross examination, she has stated that she did not see the incident.

10. The PW-4, Dr. R. Begum has deposed that on 19.07.2018 she examined the victim at S.K. Roy Civil Hospital, Hailakandi and found no evidence of recent intercourse, no mark of violence present over the private parts except one old abrasion over right thumb of size 0.5cm x 0.5cm and the age of the victim was found to be above 16 and below 18 years which was confirmed by the Forensic Medicine Department, SMCH, Silchar. Ext.-4 is the medical report.

11. The PW-5, Reshma Begum Barbhuiya has deposed that the victim is her sister-in-law. About one year back, one day at about 3 P.M. on hearing hue and cry, she came out and saw two boys dragging the victim inside a white colour Alto car. On the next day, the victim asked her father over telephone to take her back from Lala. She did not meet the victim till date.

In cross examination, she has stated that she did not see the face of her sister-in-law while she was dragging forcefully inside the vehicle. From the wearing clothes, she assumed that it was the victim. It takes 15/16 minutes on foot to reach the place wherefrom the victim was kidnapped, from the house of her husband. There is one house, one shop and some vacant land in between her husband's house and the place of occurrence. There are 15/16 families near the house of her husband and all of them are the relatives of her husband. She came out from her husband's house at about 1 P.M. on the

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relevant day for shopping and she returned back home at 5 P.M. From the shop, she went to her maternal uncle's house.

12. The PW-6, Abdul Motlib Choudhury has deposed that he is the maternal uncle of the victim. On 02.07.2018 at about 1 P.M. the victim came to his house and thereafter, at about 3 P.M. the victim left his house. He came to know from the father of the victim that the victim went missing. Thereafter, they all made search for her but with no effect. On 12.07.2018 his brother-in-law lodged the FIR. After about 2/3 days of filing the case, the victim was recovered.

13. The PW-7, the Investigating Officer has deposed that on 19.07.2018 he received a complaint from the court being lodged by the informant and accordingly, he being the Officer-in-charge, registered the same vide Lala P.S. Case No. 310/2018. He himself investigated the case and after investigation, he submitted charge sheet against the accused person vide Ext.-8.

In cross examination, he has stated that after 16 days of the occurrence, the complaint was lodged. The houses of Altaf Hussain Laskar, Nasir Uddin Laskar and Azir Uddin Laskar as shown in the 2nd sketch map are near the house of accused person but he did not examine them in as much as he did not mention the reason thereof. The father of the victim did not produce any age related document of the victim to him. He did not seize anything in connection with the case. The PW-1 (victim) did not state before him that while she was returning from her maternal uncle's house, the accused committed rape on her in the vehicle and thereafter, he took her to a school and committed rape on her by gagging her mouth and 3 persons on seeing the incident, requested the accused to release her and thereafter, she went to her relative's house near the school and on the next day, she returned her home and reported the incident to her father. The PW-2, father of the victim did not state before him that on the relevant day at about 4 P.M. while he returned home from his work, his wife told him that his daughter went to her maternal uncle's house but did not return home and thereafter, the witness made search for his daughter but did not find her and on the next day, in the morning, his daughter informed him over

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telephone that she was standing at Lala, nearby a shop and accordingly, he (PW-2) went there and took her with him and on being asked, his daughter told him that on the previous day while she was returning from her maternal uncle's house, the accused appeared there with an Alto car and forcefully took her. The PW-2 also did not state before him that when he started proceeding to the house of accused and after being reached near the house of accused, he met two persons of the locality of the accused, who advised him not to go to the house of accused as he is a very dangerous person and it might occur any untoward incident. The PW-3 did not state before him that on the relevant day, her husband went to the house of her brother searching her daughter but they told him that their daughter left the house at 3 P.M. and thereafter, her husband made search for the victim and in the next morning, the victim made a phone call to her husband and thereafter, her husband recovered their daughter. This witness also did not state before him that the victim told her that the accused kidnapped her in an Alto vehicle. The PW-5 did not state before him that on the relevant day at about 3 P.M., on hearing hue and cry, she came out side of the house and saw 3 persons kidnapped the victim in a white colour Alto car. He did not find any evidence from the second place of occurrence to substantiate the allegation of rape.

14. In the back drop of above evidence, under the facts and circumstances of the case, at the very outset, the age of the victim girl needs to be determined. The Ld. Defence counsel submits that the Ext.-2, School certificate is a false and collusive document created for the purpose of this case and in support of this contention, he submits that no such school certificate was produced before police during investigation but during trial, on the advice of the legal experts, the instant school certificate has been procured and as such, on the basis of the same, it cannot be said that the victim was minor at the relevant time. Further, the Ld. Counsel for the defence laid much stretch on the radiological age mentioned in the Ext.-4. On the other hand, the Ld. Public Prosecutor submits that the school certificate is genuine one and as such, the victim is a minor girl at the relevant time.

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15. The PW-1, victim while adduced evidence on 10.07.2019 has stated her age as 13 years and her date of birth is 12.03.2002. The PW-2, father of the victim has stated that the date of birth of the victim is 12.03.2002. The Ext.-2, school certificate does not reveal the date of birth of the victim but it is mentioned that on 31st December 2011, she was aged 12 years 8 months and 18 days and she passed Class-VI. Now, it appears that in the year 2002 she was born and she passed Class-VI in the year 2011 i.e. after 9 years of her birth. If at the age of 6 years, she got admission in Class-I, while she reached the age of 9 years, at best she was studying in Class-III but the certificate is given stating that she passed Class-VI while she was aged 9 years. Further, the victim while adduced evidence on 10.07.2019 she has stated her age as 13 years and if the same is believed to be true, it is appeared that she and her father have stated the date of birth falsely. If her date of birth is 12.03.2002, on 10.07.2019 her age was about 17 years but she has stated as 13 years. The above discussion shows that the victim and her father have given false statements as regards the age of the victim.

16. Now, coming to the authenticity of Ext.-2, school certificate, it is appeared from the evidence of PW-7, Investigating Officer as well as the Ext.-8, charge sheet that the said certificate was not produced before police during investigation and as such, police could not seize the same. Further, when the defence denied the genuineness of the Ext.-2, the abundant duty casts upon the prosecution was to prove the document by calling its Issuing Authority but the prosecution failed to discharge the burden. Therefore, this Court has no option to accept the Ext.-2, school certificate to determine the age of the victim.

17. Since, the victim and her guardian are not sure about the age of the victim, this Court has to go by the expert opinion available on record. The PW-4, Dr. R. Begum who examined the victim on 19.07.2018 at S.K. Roy Civil Hospital, Hailakandi, has opined that the victim was above 16 years and below 18 years and it was confirmed by the Forensic Medicine Department, SMCH, Silchar and Ext.-4 is the medical report. The above medical evidence remained unchallenged and hence, there is no difficulty to accept the same. The

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proposition of law is settled that margin of error in radiological age is 2 years in either side and if 2 years is added to the lower side i.e. 16, it appears that the victim was major at the relevant time. In view of above, this Court has arrived at the findings that the victim was a major girl and therefore, the provisions of POCSO Act, 2012 is not at all applicable in the instant case.

18. The Ld. Defence counsel further submits that the father of the victim wanted to give marriage of the victim with the accused but on his refusal, the instant case has been filed falsely and in support of the same, he has pointed out the following :- (i) 10 days delay in the lodging the complaint, (ii) no information was given to police immediate after the occurrence, (iii) in Ext.-1 statement, the victim stated that she was raped inside the vehicle but while adduced evidence, she has stated that the accused raped her in a school and in the complaint, it is stated that she was raped in the house of accused, (iv) the victim in her evidence has stated that while the accused was committing rape on her in the school, Reshma Begum, Abdul Motlib Choudhury and Abdul Mannan Choudhury witnessed the incident and requested the accused to release her but except Reshma Begum, none of them was examined, more so, Reshma Begum (PW-5) did not state that she saw the accused committing rape on the victim, (v) the victim testified that she went to the school after around 150 meters walk with the accused and this evidence itself shows that if the case of the prosecution believes to be true, still it is appeared that the victim was not forcefully taken by the accused but she on her own will went with the accused, last but not the least the victim has stated that there are many houses and shops near the school but none of the inhabitants was examined to prove the same and the above inconsistencies in the testimony of the victim itself make it clear that the entire allegation is out and out false.

19. As per complaint, the incident occurred on 02.07.2018 but even after such a heinous crime, the complainant and the victim did not inform the police rather they were waiting for bichar and according to the complainant (PW-2), he gave the bichar to some persons got by him on the way to the house of accused and he even does not know their name. The said version of the

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complainant is highly unbelievable that the persons whom he has got no introduction, he had given bichar to them and was awaiting for the bichar for a couple of days together. The complaint was lodged after 10 days and the complainant could not give any satisfactory explanation for the inordinate delay caused for the same and therefore, the delay itself casts serious doubt in the prosecution case.

20. After hearing the above submissions, when I consulted the record, it is transpired that there are substance in the above contentions. In the complaint, it is stated that the victim was taken into the house of accused where she was raped repeatedly by the accused, in the Ext.-1, statement under Section 164 of Cr.P.C, the victim has stated that she was raped inside the vehicle and in the evidence before this Court, she has stated that she was raped in the school. The above contradictions make it explicitly clear that the victim has changed her versions time to time and it is a clear cut sign of falsification.

21. The victim in her evidence has stated that while the accused was committing rape on her in the school, Reshma Begum, Abdul Motlib Choudhury and Abdul Mannan Choudhury witnessed the incident and requested the accused to release her but except Reshma Begum, none of them was examined, more so, Reshma Begum (PW-5) did not state that she saw the accused committing rape on the victim. Further, the victim testified that she went to the school after around 150 meters walk with the accused and this evidence itself shows that if the case of the prosecution believes to be true, still it is appeared that the victim was not forcefully taken by the accused but she on her own will went with the accused. Moreover, the victim has stated that there are many houses and shops near the school but none of the inhabitants was examined to prove the same and the above inconsistencies in the testimony of the victim itself make it clear that the entire allegation is out and out false.

22. In view of above, this Court is of the view that the prosecution failed to prove its case beyond all reasonable doubt and accordingly, ***the accused person Jakir Hussain Hazari is acquitted of the offence***

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**charged under Section 366(A)/376 of I.P.C. read with Section 4 of
POCSO Act, 2012.** Set him at liberty forthwith.

23. Send a copy of this judgment to the Superintendent, District Jail, Hailakandi to release the accused person forthwith.

24. The Special (POCSO) Case is disposed of accordingly.

Given under my hand and seal of this Court on this the 4th day of November, 2019 at Hailakandi.

10 Nov. 11.19.
**Special Judge,
Hailakandi.**

Dictated and corrected by me:

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Special Judge, Hailakandi.

Dictation is taken and transcribed by Samsher Bahadur, Stenographer
Grade – III.

Appendix :-

Oral Evidences :-

- PW-1, Victim.
- PW-2, Informant.
- PW-3, Sifatun Nessa Choudhury.
- PW-4, Dr. Rehan Begum.
- PW-5, Reshma Begum Barbhuiya.
- PW-6, Abdul Matlib Choudhury.
- PW-7, Investigating Officer.

Documentary Evidences :-

- Ext.-1, Statement of victim U/S 164 Cr.P.C.
- Ext.-2, School Certificate of the victim.
- Ext.-3, Complaint petition.
- Ext.-4, Medial report.
- Ext.-5, FIR Form.
- Ext.-6, First sketch map of the place of occurrence.
- Ext.-7, Second sketch map of the place of occurrence.
- Ext.-8, Charge sheet.

Defence declined to adduce evidence.

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Special Judge,
Hailakandi.