

**IN THE COURT OF THE SPECIAL JUDGE ::::::: NALBARI**

Present: **Smti S. Bhuyan**  
**Special Judge**  
**Nalbari.**

**Special (P) Case No. 38/18**

**u/s- 366/376 IPC r/w section 4 of the POCSO Act**

**State of Assam**

-Vs-

**Md. Mobarak Ali @ Jitu Barman**

S/o- Md. Farman Ali

R/o- Village Dalbari Kaniha, PS- Ghograpar

Dist- Nalbari (Assam) .....Accused person

Appearance:

For the prosecution : Mr. Krishna Sarma, Special PP

For the defence : Mr. Abdul Majid, Advocate

Date of evidence : 10/06/19, 30/07/19, 25/10/19,  
6/12/19

Statement of accused recorded : 17/01/2020

Date of Argument : 06/02/2020

Judgment Delivered : 19/02/2020

**J U D G M E N T**

**Prosecution Case**

1. The case of the prosecution as revealed from the ejahar lodged by informant Khargeswar Kalita on 10/12/17 is that his daughter Miss X (name changed, hereinafter referred as Miss X) on 1/12/17 at morning by 10.30 AM went out from home saying that she is going to her music tuition class and when she did not return back her parents could not find her after vigorous search. In the evening by 6.30 PM her parents received a phone call from 9101329239 saying that their

daughter is at Guwahati, Hengrabari and on the morning of 10/12/17 by 6.30 AM his elder sister Minati Das informed him over phone that one boy dropped his victim daughter in front of her house. Thereafter, he lodged the ejahar after bringing his daughter at home.

### **Investigation**

2. On receipt of the ejahar O/C Nalbari PS registered Nalbari PS case No. 942/17 u/s- 366 IPC r/w section 4 of the POCSO Act on 10/12/17 and entrusted ASI Babul Ch. Saikia with the charge of investigation. During investigation, the I/O recorded statement of the informant and victim at the police station who came to lodge the ejahar; visited the place of occurrence near Sandha Post Office and drawn its sketch map vide Ext-7. He sent the victim girl before the doctor for medical examination; produced the victim girl before the magistrate to record her statement u/s- 164 CrPC; and on completion of investigation getting incriminating materials he submitted charge sheet vide Ext.8 against accused Mobarak Ali @ Jitu Barman u/s- 366/376(2)(i) IPC r/w section 4 of the POCSO Act.

### **Trial**

3. On receipt of the charge sheet my Learned predecessor took cognizance and after furnishing necessary copies to the accused, framed charges u/s- 366/376 IPC r/w section 4 of the POCSO Act against accused Mobarak Ali @ Jitu Barman and when charges are read over and explained to the accused he pleaded not guilty and stood for trial.

4. In order to prove the charge against the accused, prosecution adduces evidence of as many as 9 witnesses including informant, victim, I/O and M/O of the case and exhibited 8 no's of documents. PW-1 Miss X (victim girl), PW-2 Khargeswar Kalita, PW-3 Dr. Dhritishree Barman(M/O), PW-4 Joydeb Kalita, PW-5 Nayanmoni Malakar, PW-6 Gagan Deka, PW-7 Minati Das @Minu Das, PW-8 Ankur Baishya, PW-9 ASI Babul Ch. Saikia (I/O). Ext-1 statement of victim girl recorded u/s- 164 CrPC, Ext-2 ejahar, Ext-3 is the Medical Report of the victim girl,

Ext-4 is the X-ray report, Ext-5 is the laboratory report of urine for pregnancy test, Ext-6 is the laboratory report of vaginal swab test, Ext-7 Sketch map, Ext-8 Charge-sheet. After closure of the evidence of the prosecution, statement of the accused Mobarak Ali @ Jitu Barman is recorded u/s-313 CrPC and accused plea is total denial. However, accused declined to adduce evidence in support of his plea of denial.

5. **Points For Determination**

- i) Whether the accused on 09/12/17 at about 10.30 AM near from the Sondha Post Office kidnapped Miss 'X' with intend that she may be compelled to marry against her will or in order that she may be forced or seduced to illicit intercourse and thereby committed an offence punishable u/s 366 IPC?
- ii) Whether the accused on 09/12/17 at Guwahati committed rape upon Miss 'X' aged 16 years, and thereby committed an offence punishable u/s 376 IPC?
- iii) Whether the accused on 09/12/17 at Guwahati committed penetrative sexual assault upon Miss 'X' aged 16 years, and thereby committed an offence punishable u/s 4 of the POCSO Act?

**ARGUMENT**

6. I have heard arguments from both sides. Learned Special PP submitted that prosecution has fairly able to establish the charge of sections 366/376 IPC and section 4 of the POCSO Act against the accused and prays to convict the accused with the maximum punishment under the above sections of law.

7. Learned defence counsel made statement that the Section 4 of the POCSO Act as well as section 366 IPC does not attract on the ground that the girl is major, there was love affairs between the girl and the boy. The girl goes of her own with the boy i.e accused to get married and when the accused called Kaji to solemnize their marriage

the girl raised objection and thereafter she was brought by the accused to her place of destiny and after 2 days of incident the ejahar was lodged when girl came to her relatives house and to cover up the actual fact and to show innocence of the girl this false ejahar has been lodged against the accused.

**DISCUSSION, DECISION AND REASON THEREOF:**

8. PW-1 is the alleged victim of the case PW-2 is the informant PW-3 is the Medical Officer PW-4, PW-5, PW-6, PW-7 and PW-8 are the independent witness and PW-9 is the I/O of the case.

9. PW-4 evidence is that he only heard accused taking away Miss 'X' and dropped her at Sualkuchi and after four months of this Miss 'X' got married. His evidence does not disclose from whom he heard about the incident therefore, his evidence is purely hearsay evidence and does not hold the prosecution case.

10. PW-5 Nayanmoni Malakar stated that he know that Miss 'X' disappeared from her house and came to know that accused took away Miss 'X' and on next morning she was recovered at Bongshor and accused dropped Miss 'X' at her jethi's house, then he along with PW-2, the informant went to Bongshor and brought Miss 'X'. PW-5 is not an eye witness and his evidence does not point that alleged victim told him that she was taken away by the accused and alleged victim in her evidence did not whisper that accused forcefully took her. PW-1 is the alleged victim of the case and she made statement that she went with accused to get married and coming to know accused is a Muslim boy she did not marry with him and I find that statement of PW-5 is not enlighten the prosecution case brought up against the accused. The statement of PW-6 and PW-8 is that they only heard about Miss 'X' was missing and PW-6 stated that he heard from his friend Nayanmoni that daughter of Nayanmoni's maternal uncle was missing and PW-8 stated one day elder brother of Miss 'X' took him to police station telling him that someone kidnapped her and Miss 'X' elder brother entered into the police station and he stayed out side the police station. PW-8

evidence does not disclose the identity of the person who kidnapped Miss 'X'. More so PW-1 not stated that she was kidnapped by the accused person therefore, the statement of PW-6 and PW-8 are not relevant and beneficial for the prosecution with regard to the charges brought up by the prosecution against the accused.

11. PW-7 is the elder sister of the wife of the informant i.e. jethi of Miss 'X' and her evidence is that one fine morning Miss 'X' came to her house and she told her that she was dropped by her boyfriend at Bongshor and they have love affairs but Miss 'X' came to know that boy is Muslim so she did not marry him. Thus, the statement of PW-7 pointed that it was Miss 'X' who went with the boy and not marry him as because he is a Muslim boy and the prosecution allegation of kidnapping and committing sexual assault on PW-1 not disclosed by PW-1 when PW-1 meet her for the first time.

12. Ext.2 is the ejahar and lodged on 10/12/17 by PW-2 Khargeswar Kalita that on 9/12/17 at about 10.30 am his daughter Miss 'X' went to music tuition class but did not return home till evening and about 6.30 pm they receive one phone call from mobile No. 9101329239 that his daughter is present at Hengrabari and on 10/12/17 at about 6.30 am his elder sister Minoti Das informed him that his daughter PW-1 Miss 'X' was dropped by a boy in front of their house and on that evening they went to Sualkuchi in the house of his elder sister, brought his daughter and lodged the ejahar alleging that accused Jitu Barman kidnapped his daughter by alluring and enticing her. PW-2 before the court stated that he do not know the accused Jitu Barman and about one year back when his daughter did not return home from her tuition class he after consultation with his brother as per their advice went to the police station and lodged the case. While he was present at the police station, he received information that his daughter is present at her jethi's house at Sualkuchi and police direct him to produce his daughter before the police and accordingly he produced his daughter. In cross he stated his daughter got married last year and he lodged the ejahar being not aware of the actual fact. The statement of the PW-2, the informant of the case clearly pointed that he does not

support his statement made in his ejahar Ext.2 with regard to accused enticing inducing his daughter and kidnapping her.

13. Reading of the statement made by PW-2 in his ejahar pointed that he has knowledge about not returning his daughter at home on the day of incident and acquainted about the presence of his daughter at Guwahati from 6.30 pm on the day of incident but did not lodge the ejahar on the day of the incident and lodged ejahar on 10/12/17 at 7 pm after bringing his daughter from Sualkuchi when he got the information at 6.30 am from his elder sister that his daughter was dropped in front of his elder sister's house by a boy in the early morning. Thus, the statement of PW-2 made in his ejahar does not derive confidence and there is no cogent reason for delay in coming.

14. PW-1 is the alleged victim of the case. Her evidence pointed incident took place in the month of December 2017. She stated when she first met the accused, accused introduced himself as Jitu Barman and their love affairs started. The accused made proposal of marriage which she accepted and both went to get married and at Guwahati accused told her that their marriage will be solemnized by Kaji then she questioned accused why kaji will perform their marriage and not by a priest and then she came to know that the accused is a Muslim boy and she refused to marry accused and asked accused to drop her at her parents house and accused out of fear do not want to come to her parents house so she asked accused to drop her at her jethi's house and accordingly accused dropped her at her jethi's house. The reading of the statement of PW-1, the alleged victim of the case clearly pointed that there was a love affairs between alleged victim and accused and PW-1 was under impression that accused was a Hindu boy so thus, she went with accused to get married but when kaji was called upon to solemnize their marriage, she realized that accused is not a Hindu boy and is a Muslim boy so she asked accused to drop her and accused accordingly dropped her at her jethi's house. At the time of adducing the statement PW-1 stated that her age is 19+. her statement recorded in the month of June 2019 i.e. in the month of June 2018 she was 18+ i.e. in the month of December she is

18 years old. Here victim does not claim that she was minor at the time of incident nor her father PW-2 stated victim was minor at the time of incident. Radiological estimated age is not the conclusive piece of evidence to hold the actual age of a person. The statement of PW-1 and PW-2 pointed that victim attend her school but no age prove certificate from the school produced to prove PW-1 below 18 years at the time of incident and when PW-1 and PW-2 does not claim that PW-1 was minor at the time of incident and when her age stated before the court leads that she was major at the time of incident it can be safely hold that victim was not minor at the time of incident.

15. The statement of PW-1, alleged victim leveled that she went with the company of accused to Guwahati of her own to get married as they are in love but she did not marry accused as he is a Muslim boy and accused as per her advice dropped her at her jethi's house and therefore, from the statement of the alleged victim PW-1 it is clear that her journey to Guwahati with accused is not under compulsion or on force. There was no coercion, no inducement. Her evidence clearly pointed that accused not forced her to marry him against her will and consent. No element of taking away of PW-1 with intend to solemnize her marriage against her will and consent which are the vital ingredient to Section 366 IPC were coming out from the statement of PW-1.

16. The plain perusal of the statement of PW-1 pointed that PW-1 has not made a single line against the accused alleging the accused had induced or forced her to have sexual intercourse with him. Her cross examination also pointed that accused is also called as Jitu so she thought him to be Hindu boy. Her cross examination pointed that accused did not mis-behave with her and her evidence does not bring on record, of the ingredients of Section 4 of the POCSO Act that accused committed aggravated sexual assault on her.

17. In view of my aforesaid discussion, I come to my definite finding that prosecution failed to establish the charge of section-366/376 IPC

r/w Sec 4 of the POCSO Act against accused Mobarak Ali @ Jitu Barman beyond all reasonable doubt and accused entitled benefit of doubt and I hold him not guilty u/s- 366/376 IPC r/w Section 4 of the POCSO Act

18. In the result, accused Mobarak Ali @ Jitu Barman acquitted from the charge of u/s- 366/376 IPC r/w Section 4 of the POCSO Act and is set at liberty. His bail bonds shall remain stands for next 6 (six) months u/s- 437(A) CrPC.

Judgment is given under my hand and seal of this court on this the 19<sup>th</sup> day of February, 2020.

(Smti. S. Bhuyan)  
Special Judge, Nalbari

Dictated & corrected by me

(Smti. S. Bhuyan)  
Special Judge, Nalbari

Typed by: Anzima Brahma  
Stenographer Grade III.

## **APPENDIX**

### **A. Prosecution witnesses**

PW-1 Miss X (victim girl),  
PW-2 Khargeswar Kalita,  
PW-3 Dr. Dhritishree Barman(M/O),  
PW-4 Joydeb Kalita,  
PW-5 Nayanmoni Malakar,  
PW-6 Gagan Deka,  
PW-7 Minati Das @Minu Das,  
PW-8 Ankur Baishya,  
PW-9 ASI Babul Ch. Saikia (I/O).

### **B. Defence witness**

NIL

### **C. Prosecution Exhibits**

Ext-1 statement of victim girl recorded u/s-164 CrPC,  
Ext-2 ejahar,  
Ext-3 is the Medical Report of the victim girl,  
Ext-4 is the X-ray report,  
Ext-5 is the laboratory report of urine for pregnancy test,  
Ext-6 is the laboratory report of vaginal swab test,  
Ext-7 Sketch map,  
Ext-8 Charge-sheet.

### **D. Defence Exhibit**

Nil.

(Smti. S. Bhuyan)  
Special Judge, Nalbari.