

IN THE COURT OF THE SPECIAL JUDGE :: :: MORIGAON, ASSAM

*Present: Sri S. K. Poddar, AJS
Sessions Judge cum Special Judge
Morigaon, Assam.*

POCSO Case No. 73/2019
U/S 419 IPC r/w Section 4 of the POCSO Act

State of Assam

-VS-

Md. Rakibul Khan @ Rekib
S/o Md. Musharaf Hussain
R/o Village- Nagabandha
P.S. – Laharighat
District – Morigaon, Assam. Accused

Date of Charge : 05.12.2019.
Date of Evidence : 20.01.2020.
Date of Argument : 20.01.2020.
Date of Judgment : 20.01.2020.

Appearance for the Parties

Advocate for the State : Mr. A. Kalam, Ld. Special Public Prosecutor.

Advocate for the Accused : Mr. P. R. Bora, Ld. Advocate.

J U D G M E N T

1. Prosecution case in brief is that on 28.06.2018, Smti. Junu Medhi lodged a complainant before the Superintendent of Police, Morigaon alleging inter-alia that the accused Md. Rekib by introducing himself as Kukil Hazarika developed love affairs with the victim 'X' (name withheld) aged 16 years, minor daughter of the informant and used to committed sexual assault upon her. It is also alleged that on 24.06.2018, the accused called the victim to the Morigaon town and took her towards Morigaon weekly market in a four wheeler vehicle and committed sexual assault and also attempted to commit sexual intercourse with her. Thereafter, the accused took the victim towards the Canara Bank,

Morigaon Branch and again committed sexual assault upon her and then sent her back in a tempo. The entire incident came to light when the victim explained about the same to her sister-in-law and uncle.

2. On receipt of the complaint, same was to the Officer-in-Charge, Morigaon Police Station on 29.06.2018, with a direction to register a case as per law and accordingly, Morigaon PS Case No. 298/2018 u/s 417/419/376(2)(i)/511 IPC r/w Section 7/8 of the POCSO Act, 2012 was registered and investigated into. During investigation, the victim was medically examined and statement of the victim was recorded u/s 164 Cr.P.C and on completion of investigation, the Investigating Officer (i/o) submitted charge sheet against the accused Md. Rakibul Khan for trial u/s 419/ 376 IPC r/w Section 4 of the POCSO Act, 2012.

3. It may be mentioned herein that during investigation, the accused was granted interim bail on 06.07.2018, which was subsequently made absolute vide order dated 03.08.2018.

4. On 05.07.2019, charge sheet was laid before this Court and vide order dated 05.12.2019, charges u/s 419 IPC r/w Section 4 of the POCSO Act, 2012 were framed and explained to the accused to which he pleaded not guilty. It may be mentioned here that on 13.08.2019, the accused was allowed to go on regular bail.

5. During trial, prosecution side has examined two witnesses including the informant and the victim only. Considering the nature of the evidence, examination of accused u/s 313 Cr.P.C is dispenses with and I proposed to dispose the case by using powers u/s 232 Cr.P.C. without calling the accused to enter into defence.

6. I have heard argument of Id. Special P.P. Mr. A. Kalam and Mr. P. R. Bora, learned defence Counsel and gone through the evidence on record. I have considered the submission of both the sides.

POINTS FOR DETERMINATION ARE:

7. (I) *Whether the accused Md. Rakibul Khan has misrepresented himself as Kukil Hazarika developed love affairs with the victim 'X'?*
- (II) *Whether on 24.06.2018, the victim 'X' was subjected to penetrative sexual assault/rape by the accused?*

DISCUSSION, DECISION AND REASONS THEREOF

8. PW-1, Junu Medhi, the mother of the victim 'X' as well as the informant of the case deposed in her evidence that, at the time of incident, her daughter, the victim was aged about 16 years and a student of Class-X. On 24.06.2018, while she was at Dhing, the victim rang her and informed that she will go to the house of her friend. After this, she left the house without informing her daughter-in-law. On her return from Dhing, she came to know from the victim 'X' that on 24.06.2018, she went to Morigaon with one boy namely, Rekib and after having tea etc. she returned. Subsequently, after 4 - 5 days, at the instigation of one Lakhi Bora, friend of her husband, she had to lodge the FIR alleging kidnap and rape of her daughter by the accused. In cross-examination, she admitted that she is an illiterate and cannot say about the contents of the FIR which was written under the dictation of Lakhi Bora and she simply put her thumb impression on the same on the direction of the said Lakhi Bora. The content of the FIR was not read over to her. She further stated that she filed another FIR against Lakhi Bora for committing rape on her daughter victim 'X'. After filing the case, she came to know that accused Rekib was innocent and by taking benefit of her illiteracy, Lakhi Bora has concocted the instant case with false allegations.

9. PW-2, the victim deposed in her evidence that her date of birth is 21.05.2002. Accused Rekib Khan @ Rakibul was known to her since last 3 years. Pursuant to her love affairs with the accused Rekib, on 24.06.2018, she came to Morigaon with him and after staying for about 2-3 hours and having tea etc. she returned home. On that day, her mother was at Dhing. On that day, at evening hours, her relative uncle Lakhi Bora came to their house and inquired about her going out of home. After 2 - 3 days of this, at the instigation of said Lakhi Bora, her mother had to file the FIR against the accused Rekib.

Police interrogated her, took her for medical examination and also brought to the Court for recording her statement. Ext. 1 is her statement given before the Court and Ext. 1(i) to 1(iii) are her signatures thereon. In cross-examination, she admitted that she had love affairs with the accused and she used to visit with him. The Student Union workers along with Lakhi Bora scolded her and they tutored her for giving statement in the Court on that day. She further admitted that accused Rekib did not misbehave her on 24.06.2018, or any time prior to that. The accused never made any physical contact with her either prior to this case or after filing of the case. She stated that the FIR was lodged with false allegations against the accused and he is innocent. She works in the shop of Lakhi Bora and under his influence, her mother lodged this case.

10. So far age of the victim is concerned, the victim and the informant claimed that at the time of incident, the victim was aged about 16 years. This fact remained unrebutted during cross-examination by defence.

11. From the evidence of the PW-2 the victim, it appears that she deposed nothing against the accused involving him with the alleged offence of false representation by the accused. The victim in her evidence-in-chief clearly stated that pursuant to her love affairs with the accused, on 24.06.2018, she came to Morigaon with him and after staying for about 2-3 hours and having tea etc. she returned home. In her cross examination, the victim admitted that she had love affairs with the accused and she used to visit him. The Student Union Workers along with Lakhi Bora scolded her and they tutored her for giving statement in the Court on that day. This fact was confirmed by PW 1, the mother of the victim.

12. Under these facts and circumstances, the point to be determined is whether taking a minor girl without consent of her parents can be an offence by the accused. Let me look at the law in this aspect.

13. Hon'ble Supreme Court of India in the reported case of S. Varadarajan Vs. State of Madras [AIR 1965 SC 942] held as follows:-

11. It must, however, be borne in mind that there is a distinction between "taking: and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. [361](#) of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

14. Hon'ble Himachal Pradesh High Court in the reported case of Khyali Ram Vs. State of Himachal Pradesh [1979 Cri. L. J 620], held as follows:-

"In order to attract the offence of kidnapping under Section 361, I.P.C, something more had to be proved than mere joining of the accused with the girl. An active participation by the accused in the formation of the intention of the girl either immediately prior or sometime before she left her father's house, was required to be established. In my opinion, the ratio of the Supreme Court decision in S. Varadarajan v. [State of Madras MANU/SC/ 0081/1964](#) : 1965 CriLJ 33 is attracted in the instant case. It will be difficult to say that the accused had taken or enticed Ram Pyari and as such the offence under Section 361 was not formulated."

15. Hon'ble Supreme Court of India in the reported case Shyam and another vs. State of Maharashtra [AIR 1995 SC 2169] has held that

10. *"She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother."*

16. Considering the above ratios in mind, if we turned to case in hand, as discussed earlier, it appears that there is nothing in the evidence of PW-1 and PW-2 against the accused for the alleged offence of making false representation causing damage or harm to her mind and reputation. In the instant case, ingredient of offence u/s 419 IPC is totally missing.

17. On the next charge regarding commission of penetrative sexual assault, from the evidence of PW-2, the victim, it reveals that on the alleged date of occurrence she was minor in age and while giving evidence in the court she has clearly stated that accused Rekib did not misbehave her on 24.06.2018 or any time prior to that. The accused never made any physical contact with her either prior to this case or after filing of the case. Mere accompanying the victim for visiting to Morigaon without consent of the lawful custodian cannot be an offence of kidnap. There is nothing to show any sort of inducement by the accused.

18. From the above evidence as discussed, it is clear that there was no material whatsoever regarding false representation or of penetrative sexual assault by the accused upon the victim 'X'.

19. Considering above discussion, I am of the opinion that prosecution has failed to prove the ingredients of charge U/S 419 IPC and Section 4 of POCSO Act against the accused Md. Rakibul Khan @ Rekib. As such, accused Md. Rakibul Khan @ Rekib is acquitted from the charges U/S 419 IPC and Section 4 of POCSO Act, 2012 and set at liberty forthwith.

20. The bail bond executed by accused and his surety are extended for another six months from today u/s 437-A Cr.P.C.

21. Considering the nature of the case, the matter is not referred to DLSA for granting compensation u/s 357-A Cr.P.C.

22. Send a copy of the judgment to learned District Magistrate, Morigaon u/s 365 Cr.P.C.

23. Judgment is pronounced in open court. The case is disposed of on contest.

Given under my hand & Seal of this Court on this the, 20th day of January, 2020 at Morigaon.

Special Judge,
Morigaon