

IN THE COURT OF SESSIONS JUDGE AT BARPETA.

**Present :- Sri Vinod Kumar Chandak, M.A., M.Com., LL.B.,AJS,
Sessions Judge,
Barpeta.**

JUDGMENT IN SSESSION CASE NO. 138 OF 2018

(G.R. Case 2518/2016)

Howly P.S. Case No 290 of 2016

State of Assam

-versus-

**Akkash Ali,
S/O Habijur Rahman,
Resident of Ghilajari,
P.S. Howly,
District – Barpeta**

..... Accused.

APPEARANCES :

**For the State : Mr. Lalit Ch. Nath, learned
P.P., Barpeta.
For the Accused : Mr. Faijur Rahman,
learned Counsel, Barpeta.**

**CHARGE FRAMED UNDER SECTIONS 366(A)/376 OF THE INDIAN
PENAL CODE**

**Date of Charge : 15.11.2018 & 04.04.2019,
Date of Prosecution evidence : 27.02.2019; 04.04.2019;
30.04.2019 & 18.11.2019,
Date of Statement of accused : 13.12.2019,
Date of Argument : 07.01.2020 & 24.01.2020,
Date of Judgment : 18.02.2020.**

J U D G M E N T

1. The prosecution case, in brief, is that Howly P.S. Case No. 290 of 2016 under Sections 120(B)/366(A)/506/34 of IPC was registered on the basis of a F.I.R. lodged by Joytan Nessa, mother of the victim.

In the aforesaid **F.I.R.**(Ext.1), the informant Joytan Nessa (P.W.1),

who is the mother of the victim girl alleged, *interalia*, that accused person namely Akkash Ali gave threatening to forcibly marry her minor daughter aged about 13 years. Then, her parent sent her to her maternal (in-law's) house. On 11.05.2016, victim girl went on missing from her from her maternal house and it is suspected that accused Akkash Ali kidnapped her victim daughter and kept her at unknown place. It was also alleged that due to remaining busy in searching the victim there has been delay in lodging the FIR.

On receipt of F.I.R., the Officer-in-charge, Howly Police Station, registered a case being **Howly P.S. Case No 290/2016 under Sections 120(B)/366(A)/506/34 of the Indian Penal Code.**

During the course of investigation, the victim girl was recovered and sent her for medical examination. Her statement under station 164 of CrPC was recorded by the learned Magistrate. Police, on completion of investigation, filed charge sheet, in the case, against the accused person namely **Akkash Ali under Sections 366(A) of IPC** vide charge sheet **No.62/2017**, dated **30.04.2017**.

2. The learned Judicial Magistrate First Class, Barpeta summoned the accused. On appearance of accused, copy was furnished to him by learned court below. The case was committed to this court being exclusively Sessions triable case.

3. Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the learned counsel for the accused and the prosecution in this behalf, charges were framed against the accused **under Section 366 (A) IPC by the then learned Sessions Judge, Barpeta.** The charge was read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried. However, on perusal of the case record and relevant materials, I found materials to frame charge under Section 376 IPC. The charge **under Section 376 IPC was added** and framed by the undersigned vide order **dated 04.04.2019**. The newly added charge was read over and explained to accused to where the accused pleaded not guilty and claimed to stand trial.

4. During the course of trial, **05(five)** number of witnesses including the informant, victim and I.O. were examined, on behalf of the prosecution, to prove the charge **under Sections 366(A)/376 IPC**. Then prosecution evidence was closed, as prayed, by learned Public Prosecutor, Barpeta.

On closing of prosecution evidence, statement of the above named accused was recorded under Section 313 of CrPC. The accused denied all the alleged incriminating materials against him. He claimed himself to be innocent and told that he had been implicated harshly. He declined to adduce evidence in his defence.

5. I have heard **Mr. Lalit Ch. Nath, learned Public Prosecutor, Barpeta** as well as **Mr. Faijur Rahman**, learned Defence Counsel for the accused, who is facing trial for commission of offence under Section 366(A)/376 IPC.

6). Now the points for determination before this court are as follows --

(1) Whether the accused on 11.05.2016 at village Kathlijhar, within the jurisdiction of Howly PS, District Barpeta, kidnapped Runa Khatun, aged about 13 years, daughter of the informant Jayton Nessa, with intent that she might be compelled to marry against her will or knowing to be likely that she might be forced or seduced to illicit intercourse by means of criminal intimidation or by any other method, to go from any place with intent that she might be forced or seduced to illicit intercourse with any other person and thereby committed an offence punishable under Section 366(A) of the Indian Penal Code ?

(2) Whether the accused on same date and place, committed rape on Runa Khatun, aged about 13 years, minor daughter of informant Joytan Nessa and thereby committed an offence punishable under Section 376 of the Indian Penal Code ?

DISCUSSION, DECISIONS AND REASONS THEREOF

7). To decide the above point and sections of law, let us examine, analyze and appreciate the evidence of the witnesses alongwith the relevant documents.

Joytan Nessa (P.W.-1) who is the informant of this case has stated that she knows accused who belongs from different village. Incident took place before 3 years. Victim is her daughter. She was aged about 13 years at the time of incident. Accused used to disturb the victim by remaining present on the road at the school time of the victim. He also proposed her to marry with him. Her victim daughter informed her about this. Her related father-in-law lodged complaint to the father of the accused. But nothing changed and accused kept on disturbing her daughter. For this reason, she had to keep the victim at her father's house.

P.W.1 further stated that accused also went there with other persons and caused mischief there by damaging the bamboo fencing. This was told by the victim to her. After 2 days of this incident her victim daughter disappeared from the house of her father. She searched her but could not find her. Then, she lodged case before the Police.

She (P.W.1) exhibited the FIR vide Ext. 1 and Ext.1(1) and Ext. 1 (2) are her signature. After Nine months, victim rang her up and told to rescue her. But before she could talk more the line was disconnected. Next day, victim was brought to the house of accused. Then, they informed the police.

P.W.1 stated that police caught them and informed them. Police got her medically examined and also recorded her statement before Ld. Magistrate. Police recorded her statement. At present victim is studying in class IX.

In her cross examination, P.W.1 deposed that the FIR was written by one advocate and she went through the contents of the FIR. She lodged FIR against the accused on suspicion.

P.W.1 denied that she did not state before police that accused proposed her victim daughter; that her related father-in-law lodged complained

to the father of the accused but nothing happened; that accused went with other persons to the house of her father and caused mischief by cutting the bamboo fencing at the house of her father; that thereafter her victim daughter disappeared after 2 days; that victim telephoned her after 9 months to rescue her.

She stated that her age is 42 years and she might have married before 25 years. She got 4 children and victim is her third child. After about 7 years of her marriage the victim was born. Nobody could tell her as to how her victim daughter disappeared from the house of her father.

P.W.1 denied that the victim was not aged 13 years at the time of incident; that accused did not kidnap her. Police examined her on the date of giving FIR.

8). **Dr. Mamata Devi (P.W.2)** stated that on 03.02.2017, she was working as Lady Medical Officer, on duty Department of Forensic Medicine, Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta. On that day, case was brought by Howly Police Station in connection with Howly PS Case No. 19/16 under Section 120(B)/366A/506/34 IPC. The name of individual is Runa Khatun.

History:-

According to alleged victim, she is in cove with a body named Akash Ali from last 11/2-2 years. She eloped with the boy one year back and staying with him as husband and wife at his house. Her parents registered a case against the boy and so police caught her and brought her today for medical examination.

Physical Examination:-

Identification marks:- 1. A pin head size mole over left side of nose.

2. A pin head size mole over left side cheek.

Height :- 148 cm,

Weight:- 51 Kgs.

Chest girth at nipple level:- 85 Cm. Abdominal girth at navel level:- 82 Cm.

General built & appearance:- Average.

Teeth: Total:26.

Permanent: 26.

Temporary: Nil.

Hairs: Axillary/Body: 0.5-1 cm in length black in colour.

Breasts:- Soft in consistency. Nipple and areola brown in colour. On gentle squeezing discharge absent.

Puberty(as told by the individual): 12 years.

Menstruation(as told by the individual): Regular 30 days cycle.

LMP (as told by the individual): 31-01-2017.

Mental Condition: No absolutely detected.

Gait: Normal

Intelligence: Average.

Wearing garments & any suspected stains present: Intact, stain absent.

Bodily Injuries: Not detected at the time of examination.

Genital Examination:-

Pubic hairs: 0.5-1 cm in length black in colour.

Vulva(Labia majora & minora):- Labia minora exposed in lithotomy position.

Hymen: Old tears at 4 'O'clock and 6 'O'clock position.

Vagina:- Healthy.

Cervix & Uterus: Healthy.

Fourchette & Perineum : Healthy.

Result of vaginal swab smear examination: Microscopic examination of vaginal swab reveal no spermatozoa.

Result of X-Investigation:

Wrist Joint, Elbow joint, shoulder joint, pelvis, others (Face/Skull):- Requisition for X-ray of elbow, shoulder, wrist and pelvis was handed over to the escorting police constable W/C 177 Chanda Aloy along with the victim girl for X-ray of same in the department of Radiology FAAMCH, Barpeta. But report of the same has not received till date.

Final Opinion:-

- (1) Her age is above 14 years. However to know the exact age radiological investigation is necessary.
- (2) Evidence of recent sexual intercourse is not detected on her person at the time of examination.
- (3) No injury or violence mark is detected.
- (4) Foreign particulars like hair, blood, semen etc are not detected on her person at the time of examination.

P.W.2 exhibited her medical report vide Ext.2 and Ext.2(1) and Ext.2(2) are her signatures.

In her cross-examination, P.W.2 stated that she did not receive Radiological report as advised by her.

9). **Victim [P.W.3]** has deposed that she knows the accused person and he belongs from their village. Informant is her mother. Incident took place at about 3 years ago. At that time, she was a student of class VI. At that time, accused used to disturb her on her way to school and threatened her to marry her forcibly. Then, she told the matter to her parent.

P.W.3 stated that out of fear, she was kept at her grand mother (maternal) by her parent at village Kuthlijar. Accused continued to disturb her on her way to school.

P.W.3 further stated that one night, while staying at her grand mother house somebody tried to push the gate of her grand mother house at about 1-2 AM. When, she opened the door as her grand mother and grand father are old person, accused along with Kader dragged her to outside by catching her hand and closing her mouth with some cloth. After that, they took her in a bike. The accused took her to the house of his brother-in-law (Bhini). The accused had physical relation with her forcibly. She gave her statement before learned Magistrate under Section 164 CrPC. Ext.3 is the said statement and Ext.3(1) and Ext.3(2) are her signature thereon.

Police recovered her from the house of accused Akkas Ali and sent her for her medical examination.

In her cross-examination, P.W.3 deposed that she was not married prior to filing of this case. She could not tell her date of birth exactly. Accused resides in the same village and he resides at a short distance from her house.

P.W.3 denied that she did not state before police that at that time accused used to disturb her on her way to school; that accused threatened her to marry her forcibly; that out of fear, she was kept at the house of her grant mother (maternal) by her parent at village Kuthlijar; that one night while staying at her grand mother's house, somebody tried to push the gate of her grand mother's house at about 1:00/2:00 AM; that when she opened the door as her grand mother and grand father are old persons, accused alongwith Kader dragged her to outside by catching her hand and closing her mouth with some cloth; that they took her in a bike; that accused took her to the house of his brother-in-law(Bhini); that accused has physical relation her forcibly.

Ext.A is the Kabin Nama with accused and Ext.A(1) is her signature. It was signed by her on being forced by the family members of accused Akkas Ali.

She denied that she signed the Kabin Nama voluntarily. She had to stay in the house of accused for seven months on being forced. She told other nearby people that accused had brought her forcefully. 'Bichar' was given to Moti Gaonburah and she told before the police regarding the 'bichar'.

P.W.3 also denied that she was not aged 13 years at the time of incident. She did not sign the Kabin Nama voluntarily. She did not live with the accused voluntarily. She did not marry the accused voluntarily. She told Kaji that she is being married forcefully. Her father was also brought forcefully at the time of Kabin Nama.

10). **Abul Kalam Azad [P.W.4]** has deposed that the victim is her daughter. He know the accused. Incident of this case took place before three years. His victim daughter used to go to Kathlijhar High School. While coming and going to the school, accused used to disturb his victim daughter. Finding no other alternative, he (P.W.4) sent her to his in-law's house at Kathlijhar. Then, on

one night, accused took her victim daughter forcefully after breaking the door of his in-law's house. He was informed by his father-in-law about the incident. Then, he searched her for one day, but he did not get his victim daughter. Then, he informed the matter to police. Then his wife lodged the FIR. Police recovered the victim from the house of accused person after 5/6 months of the incident. His victim daughter was not kept in the house of accused person after the incident. Police got her medically examined and also got her statement recorded by the learned Magistrate.

The age of his victim daughter was 13 years at the time of incident. Police seized the school certificate of his victim daughter from him. Ext.4 is the seizure list and Ext.4(1) is his signature.

In his cross-examination, P.W.4 stated that his victim daughter was studying in Kathlijar High School at the time of incident. He had given the certificate of that school in respect of date of birth of his victim daughter. He had not seen the said certificate in the court today and he had not brought any birth certificate in respect of his daughter. He did not see the victim during her stay with the accused for 5/6 months in their village. Ext.A(2) is his signature which was taken forcefully. He did not lodge any case for taking his signature forcefully. He told the Kaji that his signature has been taken forcefully in the Kabin Nama.

He denied that he did not state before police that while coming and going to the school, accused used to disturb his victim daughter; that finding no other alternative, he sent her to her in-law's house at Kathlijhar; that on one night, accused took her victim daughter forcefully after breaking the door of her in-law's house.

P.W.4 further denied that the age of his victim daughter was more than 18 years at the time of incident; that he voluntarily got his victim daughter married with the accused person; that his wife has lodged false case against the accused person just to harass him; that accused did not kidnap his victim daughter or raped her against her consent.

11). **Pulin Phukan [P.W.5]** deposed that on 12-05-2016, he was working at Howly PS as second officer. On that day, OC namely SI Sanjit Kr. Ray

entrusted him to investigate the present case.

He examined the informant as well as witnesses of this case. He visited the place of occurrence and drew sketch map of the place of incident. Ext.5 is the sketch map and Ext. 5(1) is his signature.

He searched the accused but could not find him. On 02-02-2017 both the accused and victim were recovered from the house of accused. Accused was arrested. Victim was sent for her medical examination and also got her statement recorded before the Ld. Magistrate u/s 164 Cr.PC.

He seized the school certificate of the victim vide. Ext. 4. Ext. 4(2) is his signature. The certificate was given to the zimma of the father of the victim. He also collected medical report of the victim.

On completion of investigation, he submitted charge-sheet against the accused person under Section 366(A) of IPC on 30-04-2017 being charge-sheet No. 62/2017.

Ext. 6 is the charge-sheet and Ext. 6(1) is his signature.

In his cross-connection, P.W.5 stated that Victim disappeared on 11-05-2016 as per FIR of the case. Victim was missing from the house of his maternal uncle Kuthlijar.

He did not record the statement of Hurmuz Ali, Asuruddinn and Mazibur Rahman as shown in the sketch map as they were not found at their residence at the time of investigation.

Witness Joyton Nessa (PW-1) did not state before him that **accused proposed her victim daughter ; that her related father-in-law lodged complained to the father of the accused but nothing happened ; that accused went with other persons to the house of her father and caused mischief by cutting the bamboo fencing at the house of her father ; that thereafter her victim daughter disappeared after 2 days; that victim telephoned her after 9 months to rescue her.**

Witness Runa Khatun (PW-3) did not state before him that **at that time, accused used to disturb her on her way to school; that accused threatened her to marry her forcibly; that out of fear she was kept at the house of her grand mother (maternal) by her parent at village**

Kuthlijar; that one night while staying at her grand mother's house, somebody tried to push the gate of her grand mother's house at about 1:00/2:00 AM; that when she opened the door as her grand mother and grand father are old persons, accused alongwith Kader dragged her to outside by catching her hand and closing her mouth with some cloth; that they took her in a bike; that accused took her to the house of his brother-in-law(Bhini); that accused has physical relation with her forcibly.

Witness Abul Kalam Azad (PW-4) did not state before him that **accused used to disturbed his victim daughter by coming and going to school; that finding no other alternative, he sent her to his in-law's house at Kathlijhar; that on one night, accused took his victim daughter forcefully after breaking the door of his in-law's house.**

P.W.5 did not collect the report of radiologist and he had not seen the seized school certificate in the court.

He (P.W.5) denied that accused did not do any offence, as alleged.

12). From a close perusal of the evidence on record, it is seen that Prosecution side want to establish that accused forcefully married the victim (P.W.3) by kidnapping her from her maternal (in-law's) house and took away her to his house forcibly.

The victim (P.W.3) deposed that accused person used to disturb her on her way to school and threatened her to marry her forcibly. Then, her family members sent her to her maternal (in-law's) house at Katlijhar. On the relevant day, accused Akkash Ali alongwith others forcefully took away to his house and married her forcefully through 'Kabirnama' and she had signed the 'Kabirnama' on being forced by the family members of accused Akkas Ali. Accused kept her in his house for seven months on being forced and she told other nearby people that accused had brought her forcefully. Her father was also brought forcefully at the time of 'Kabinnama'.

It is interesting to mention here that prosecution side did not examine not a single witness from where victim was allegedly kidnapped. On the

day of alleged incident, victim stayed at her grand mother (maternal) house kept by her parent but no one from the house of her grand mother(maternal) house was examined by the prosecution side. Victim admitted in her cross-examination that she informed the alleged incident to the neighbour of the accused but the prosecution side also did not examine of the said neighbour of the accused.

13). In the FIR, it is seen that victim went on missing on 11.05.2016 from grand mother (maternal) house. Victim clearly stated in her cross-examination that she was not married prior to filing of this case. But in the 'Kabinama', it is clearly seen that victim got married with accused before her missing.

Thus, the 'kabinnama' disclosed that victim married with the accused before the date of her missing and it brings a clear doubt in the prosecution story where the victim was missing from 11.05.2016.

14). P.W.1 namely Joytan Nessa who is the mother of the victim girl stated in her evidence that victim called her after nine month of her missing to rescue her but she (P.W.1) did not tell the same before the I.O.

On the otherhand, P.W.4 stated in his evidence that victim was recovered from the house of accused after 5/6 months of the incident which contradicted the statement of P.W.1.

It is interesting to mention here that victim (P.W.3) stated in her cross-examination that she stayed in the house of accused for seven months on being forced. Thus, the month of victim's missing from her house which all the witnesses mentioned in their evidence are not same and this creates a clear doubt in the prosecution story.

15). Victim (P.W.3) stated in her cross-examination that accused resides at a short distance from her house and she stayed in the house of accused for seven months. It is difficult to believe that none of the villager informed the family members of victim of her (victim) presence in the house of accused.

Moreover, the FIR contains that victim was 13 years of age but

I.O. had not seized any birth certificate to ascertain the age of victim. Similarly, Medical Officer of this case, in her medical examination report has stated that the age of the victim was 14 years but for ascertain exact age, Radiological Examination report is necessary. Thus, Medical Officer was also failed to ascertain the age of victim. I.O. (P.W.5) of the case clearly admitted in his cross-examination that he had not seized the school certificate on the Court. Hence, it is not possible to hold the victim before 18 years of age or minor on the date of incident.

Thus, from the available evidence on record I find it difficult to hold that accused kidnapped or raped the victim.

16). In the case of *Utpal Mishra -versus- State of Assam, 2015 [2] GLR 542*, it has been held by the Hon'ble Gauhati High Court in **Para No.- 22** of its judgment as follows:

PARA NO-22

The principals of criminal jurisprudence are that :

- a) There should be legal, reliable and unimpeachable evidence to prove that the prosecution story "must be true" rather than "may be true";**
- b) It is settled principle of criminal jurisprudence that more serious the offence, stricter is the degree of proof;**
- c) Standard of proof in a criminal case: burden is always on the prosecution and the same never shifts. Prosecution can never derive any benefit from the weakness of the defence version;**
- d) Holding a witness "implicitly reliable" leads to denial of judicial consideration of the infirmities in evidence;**
- e) Defence witnesses can not be disbelieved by relying on conjectures and surmises: they are entitled to equal treatment with those of the prosecution;**

f) If two views are possible in a criminal case, the view favourable to the accused should be accepted;

g) The averment/allegation with respect to the commission of rape has got to be clear and specific for basing a finding of guilt rather than being just inferential. The evidence/averments/allegations must fulfill the ingredients of offence of RAPE as defined under Section 375 of IPC;

h) The prosecution must prove the case in the manner in which they are alleged to have caused. It is elementary where the prosecution has a definite and positive case, it must prove the whole of that case;

i) In a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such situation.

17). It is cardinal principal of criminal law that the Prosecution has to prove its case beyond reasonable doubt and that the prosecution case has to stand on its own leg.

18). On scrutinizing the evidence on record, considering the entire aspect of the matter and evidence, produced by the prosecution, I am of the considered opinion that the prosecution has failed to establish that the accused kidnapped or raped the victim. Hence, accused is entitled to acquittal under the benefit of doubt, which I accordingly do from the charge under Section 366(A)/376 of IPC.

19). In the result, **accused Akkash Ali** of the charge under section 366(A)/376 IPC, levelled against them, on benefit of doubt.

The bail bond of accused **Akkash Ali stand discharged.**

20). Given under my hand and seal of this Court on this **18th day of February, 2020.**

Dictated & corrected by me.

**Sd/-
Sessions Judge, Barpeta.**

A P P E N D I X

(A) **Prosecution witnesses:**

P.W.1	= Joytan Nessa, the informant,
P.W.2	= Dr. Mamata Devi, the M.O.,
P.W.3	= Runa Khatun, the victim,
P.W.4	= Abdul Kalam Azad,
P.W.5	= Pulin Phukan, the I.O.

(B) **Prosecution Exhibits:**

Ext.1	= FIR,
Ext.2	= Medical Report,
Ext.3	= Statement of the victim recorded under Section 164CrPC,
Ext.4	= Seizer list,
Ext.5	= Sketch Map,
Ext.6	= Charge-sheet

(C) **Defence witnesses:** Nil.

(D) **Defence Exhibits:**

Ext.A	= Kabin Nama
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(E) **Court witnesses:** Nil

(F) **Court Exhibits:** Nil.

Sd/-

Sessions Judge, Barpeta.