

GAHC010009572011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./209/2011

KRISHNA HAZARIKA
SON OF SRI BUBUL HAZARIKA, RESIDENT OF VILLAGE BARANGABARI,
P.S. MORIGAON, DIST. MORIGAON, ASSAM

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MR.R ALI

Advocate for the Respondent :

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant :Mr. N Mahajan, Advocate

For the Respondents : Mr. D Das, Additional PP, Assam

Date of Hearing : 06.09.2022, 27.09.2022 & 06.12.2022

Date of Judgement :20.02.2023

JUDGEMENT & ORDER (CAV)

Heard Mr. N Mahajan, learned counsel for the appellant. Also heard Mr. D Das, learned Additional Public Prosecutor, Assam.

2. The present appeal is preferred against the judgment and sentence dated 14.11.2011 passed by the learned Sessions Judge, Morigaon in Sessions Case No. 54/2008 corresponding to GR Case No. 750/2008 whereby the present appellant was convicted under Section 366 of IPC and the appellant was sentenced to undergo rigorous imprisonment for 4 years and also to pay fine of Rs. 1,000/- and in default to undergo rigorous imprisonment for another two months.
3. The prosecution was launched on the basis of an FIR by the PW2 on 29.06.2008 before the Morigaon police station, inter-alia, alleging that the present appellant had kidnapped his minor daughter (name withhold) from the village Borongabari for illegal purpose and confined her for the same purpose. On the basis of such FIR, a police case being Morigaon PS case No. 175/2008 under Section 366 IPC was registered and after completion of investigation the investigating officer laid charge-sheet against the accused under Section 366 IPC.
4. To bring whom the charges against the appellant, the prosecution examined as many as 9 witnesses and one court witness. The accused was examined under the provision of Section 313 Cr.P.C. and thereafter the learned trial court below convicted the appellant and sentenced him as discussed hereinabove.

5. Before having the final determination on the challenge, let this court first examine the depositions of the PWs, the foundation of the conviction.
- I. **PW1**, a person from neighborhood deposed that he heard that the victim was missing and subsequently he could know she had gone for outing with the appellant. He was not cross-examined by the defence.
- II. **PW2** is the father of the victim and the informant. He deposed that he knew the accused, whose house is about one and half furlong long away from his house and situated in the same village. The victim is his daughter who was studying at Class VIII at that relevant time and was aged about 13 years 7 months. He deposed that his minor daughter on the date of incident went out with her bicycle, which he thought that she went for collecting milk. But as she did not return after considerable period of time, he went to his brother-in-law's house to see if, his daughter has gone there. Later, he was informed by one Hemanta Bora, that his daughter went with the accused and boarded a waiting tempo and both of them left the place. She left the bicycle in the premises of said Hemanta Bora. He collected the bicycle and then went to her school to see whether she was there for the purpose of rehearsal, however he could not find his daughter there also. Then he searched his daughter in the house of relatives of the accused. He verbally informed the matter to the police station, however police wanted him to wait and see. He enquired the matter from the driver of the tempo and the driver confirmed that a pair of boy and girl travelled by his tempo up to Basang hat. Thereafter on the next day, he

lodged the FIR. He further deposed that subsequently he got information that his daughter was at Kaki and accordingly proceeded to Kaki, where he found his daughter in the house of one Jiten Saikia. Both the accused and victim were found there and his daughter appeared before him as a bride. Thereafter, both of them were brought back and the accused was handed over to the village headman and he brought his daughter back home. He deposed that he produced the photocopy of birth certificate of the victim before the police and on the date of his deposition he has produced the birth certificate and proved the birth certificate as Ext 2. He also exhibited one exhibit 4, which is the agreement entered into between the accused and the guardian of the victim and proved his signature as Ext 4(i) in the aforesaid agreement.

During cross-examination, he deposed that his daughter stated before him that Jiten was the friend of accused. He also deposed that the tempo driver Pinku Das informed him that both had gone in his tempo. He also deposed that his daughter was neither forcibly taken from his house nor from the road. During cross, he further deposed that his daughter is considerably matured at that point of time.

- III. **PW3** is the uncle of the victim. He also learnt about the incident that accused had taken the victim. Therefore, he went to the house of the accused to enquire about the matter. Thereafter, the family members of the accused also searched for the accused. He further deposed that on the next date, they found both accused and the victim in Kaki and brought both of them together.

During cross-examination, he deposed that they reached the house of Jiten Saikia in the early morning and called both the accused and victim by name and then both of them came out. He deposed that victim had gained maturity commensurate with her age. He did not find his niece either wiping or complaining against the accused, when he first met her in the house of Jiten.

- IV. **PW4** is the mother of the victim. She deposed that the accused is from the same village and she did not have any visiting relation with them and in the relevant date, she was not at home and went to house of a neighbor. When she returned in the evening, she could learn from her husband that her daughter had been taken away by the accused. Thereafter, her husband searched the house of relative of accused, she could not be found nor the accused. She also deposed how both of them were found at Kaki and how she was brought back home. She deposed that after three days the victim informed her that due to inducement given by the accused she went with him. The inducement given according to her was that she should not continue her studies and as the longevity of a man is not certain so she should enter into marital relation at the earliest. Accordingly, her daughter went with him. She denied the suggestion that whatever she deposed before the court, were not stated before the investigating officer.
- V. **PW5** is the victim. During her examination-in-chief, she deposed that she knows accused and he is colleague of her elder sister and they attended tutorial class together. She further deposed that on 28.06.2008, while she was waiting to go to the house of her aunt,

near the Shiv temple, the accused met her. She was going on a bicycle. He took her bicycle and left the same in the house of someone, may be in the house of Hemanta. She asked him for the key, but he did not give it to her. The accused wanted her to come to Morigaon for an outing, which was at a distance of 3 K.M. from Bangarabari. She was taken in a tempo to Morigaon and in the tempo there was the driver and the conductor and none else. She also deposed that at Morigaon town, the accused took her in a bus, where many passengers are there in the bus and she did not tell anyone that he brought her by force against her will. The accused took her to the Jagirod and took her to the railway station and then by train to Lanka. In Lanka, he took her to the house of his paternal aunt. In the house of the paternal aunt, she was married but there was no priest. Sari was given to her and vermilion was put on her forehead so that her father could not take her back. She further deposed that she did not object or resist as she did not know anyone. Thereafter, after stay of only one night at Lanka, she was taken to Kaki on foot as well as by rickshaw and the accused was helped by two other boys. She further deposed that her father recovered her from the house of a friend of Krishna at Kaki and brought her back home. She was medically examined and her statement was also recorded in court and in the police station. She exhibited her recorded statement as Ext. 5 and proved her signature.

During cross, she deposed that at Kaki she was kept in the house of village headman. She denied the suggestion that she

wrote letter to the accused. She also deposed that the accused is from her own village and he took her for outing and got married at Lanka.

- VI. **PW6** is the tempo driver. During his examination-in-chief, he deposed that he can recall seeing the accused on the date when he hired his auto rickshaw for going from Bangarabari to Nabheti. He also deposed that the accused took a girl along with him and stated before him that they would go to attend a marriage ceremony. He further deposed that he could not recall the time. He also deposed that he did not even know how both were related.

During cross, he deposed that he did not notice the boy using any force on the girl to go with him and both were in normal condition. Subsequently, he could know from one Uday Deka that the girl eloped with the boy.

- VII. **PW7** is a distant relative of the accused. He accompanied the father of the victim to the rescue the victim. He deposed that the father of the victim informed him that his daughter had eloped with the accused and therefore took him to search his daughter and they found the victim in the house of the Kerkon Bora, who was dead at that time but his sons were there. It is also deposed that they asked for help of the villagers. He also deposed that they arrived at the place in the night and in the morning took both accused and victim with them. He did not ask anything to the boy and girl. Victim was wearing a Mekhela Sadar.

During cross, he deposed that on being asked to come out both

the victim and the accused came out from the house of Kerkon Bora and both were taken in a vehicle.

VIII. **PW-8** is the doctor, who examined the victim girl on 02.08.2008. He deposed that X-Ray reveals that the girl should be aged between 17 to 18 years and her vaginal hymen was absent. The doctor also opined that no evidence of sexual intercourse is found and no mark of injury in her body or in her part is found. Doctor proved his report and his signature in the report as Ext. 6 and Ext. 6 (i).

IX. **PW9** is the I/O. He deposed regarding the receipt of the ejahar and that he had recorded the statement of the witnesses and got the statement of the victim recorded in the court. After completion of investigation, he filed the charge-sheet.

During cross-examination, he deposed that he did not go to Kaki and one attested copy of birth certificate of the victim was given to him by the father of the victim and he has kept the same in the case diary.

X. The court also examined one Dr. Kuleswar Nath as CW1, who was serving as SDM & HO at Bhurbandha PHC on the relevant period. He brought the birth and death register of Bhurbandha PHC. He deposed that from the record, it is seen that on 16.11.1994, one birth certificate was issued in the name of the victim girl under SL No. 267 by then SDM & HO. He exhibited the death and birth register and deposed that the date of birth of the victim was registered as 16.11.1994.

During cross-examination, he deposed that such certificate was issued on 11.04.1995.

6. The accused was examined under Section 313 Cr.P.C. He stated during such examination that he had love affair with the victim. Accordingly, he wanted to marry her. He took the victim girl to the house of his aunt on their mutual understanding. He denied that he took away the victim from the legal guardian. He stated that there is no question of kidnapping. He also denied the fact of marrying her. He further stated that when he availed the service of PW6, at that time the victim was also present with him. He further deposed that he is not aware of date of birth of the victim. He further stated that he is innocent and the victim accompanied him voluntarily. He did not insist her to follow him.
7. In the aforesaid backdrop of evidence, Mr. Mahajan contends that this is not a case of kidnapping inasmuch as the victim voluntarily went with the accused and the victim has not alleged any use of force. The evidence of doctor corroborated that there was no sexual assault upon the girl and her age was between 17 to 18 years. Therefore, the appellant could not have been convicted contends Mr. Mahajan. Mr. Mahajan, learned counsel further contends that it is clearly established through the deposition of the father of the victim that victim was very matured at that point of time and the PW3 also deposed that the girl was matured enough to take independent decision at that point of time.

In support of his contention, Mr. Mahajan relies on the judgment of this Court in the case of ***Hajarat Ali Vs State of Assam*** reported in ***2004 SCC Online Gau 191***.

Mr. Mahajan taking this court to the record of the proceeding and the statement recorded before the police under 161 contends that the victim girl specifically stated that on the first night they slept separately and she has not stated before the police regarding the ceremony of any marriage. Therefore, Mr. Mahajan contends that there is a huge contradiction and improvement between the statement made under Section 161 Cr.P.C. and the deposition made before the court by the victim girl. Therefore, this court can very well look into such statement during the appellate stage and this court is competent at the appellate stage to look into and scrutinize the case diary to find out the contradiction even in absence of not exhibiting and marking the statement of the victim under section 161 Cr.P.C. during the course of trial. In support of his contention, he relies upon the judgment of this court in the case of ***State of Assam Vs. Dineswar Doley and Ors*** reported in ***2009 SCC Online Gau 645***.

8. Mr. Mahajan, learned counsel also contends that the learned Court below has not considered the statement of the accused recorded under Section 313 Cr.P.C. inasmuch as the accused had taken a specific stand that they had love affairs and they eloped voluntarily. Mr. Mahajan, learned counsel the prosecution exhibit-4 itself testifies such fact, however, the learned Court below had ignored such fact. Therefore, non consideration of the statement of the accused recorded under Section 313 Cr.P.C. and the Exhibit-4 has prejudiced the appellant and therefore, the appellant is liable for acquittal.
9. In support of such contention, Mr. Mahajan, learned counsel relies on a judgment of the Hon'ble Apex Court in the case of ***Reena Hazarika – Vs- State of Assam*** reported in ***(2019) 13 SCC 289*** and the judgment

of the Hon'ble Apex Court in the case of ***Jay Prakash Tiwary –Vs- State of Madhya Pradesh*** reported in ***(2002) 22 SCC online SC 966***.

10. Mr. Mahajan, learned counsel further submits that even if the victim was a minor, however, her age was more than 12 years and as per Doctor's evidence, she was 17 to 18 years but as per birth certificate she was aged about 13 years 7 months and therefore, since she is above 12 years, her consent not being under any force or durance as is evident from the deposition of the victim herself, will be covered under the provision of Section 90 of the IPC and therefore, this cannot be said to be a case under Section 366 IPC.
11. Per contra, Mr. B. Das, learned Additional Public Prosecutor, State of Assam submits that all the ingredients of Section 366 of IPC has been proved by the prosecution to the witnesses beyond any reasonable doubt. It is proved beyond reasonable doubt that the victim on the date of occurrence of the offence was a minor girl and therefore, her consent is not a consent in the eye of law. Further, putting vermilion on her forehead is also proved beyond reasonable doubt. Thus the marriage was also proved and from her deposition it has clear that she was compelled to get married inasmuch as she has done everything without protest as no persons were there in the house at Kaki. Therefore, Mr. Das, learned Additional P.P. submits that the learned trial Court had rightly convicted the accused person.
12. It is well settled that to constitute an offence of "abduction" a person must be carried off illegally either by force or deception. Thus a person is required to be compelled to go from one place to another by force or deceit. Therefore, the intention of the accused is the foundation which is

required to be determined in case of abduction. As held by the ***Hon'ble Apex Court in Kavita ChandraKant Lakhani –Vs- State of Maharashtra*** reported in ***(2018) 6 SCC 664***, once such intention is established, the offence is complete, whether or not the accused succeeded in effecting his purpose and whether or not the women consented to the marriage or the illicit intercourse.

13. It is also well settled that the essential ingredients of Section 366 (i) IPC, 1860, is kidnapping or abducting any women and Such kidnapping or abducting must be:

- i) With the intent that the woman may be compelled or knowing it to be likely that she will be compelled to marry any person against her will, or
- ii) in order that she may be forced or seduced to illicit intercourse, or knowing that she may be forced or seduced to illicit intercourse; or by criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place, with the intent that she may be or with knowledge that it is likely that she will be forced or seduced to illicit intercourse with some person.
- iii) In order to attract the latter part of the section there should be either criminal intimidation, which has been defined under section 503 of the Code, or abuse of authority, or there is any other method of compulsion is used, by the offender, and by this action the offender induces any woman to go with him. Whether the accused was able to achieve its motive is irrelevant in deciding whether the act constituted an offence or not, all that matters is whether the essentials of the section can be proved or not. Once the prosecution is able to prove the essentials, the act of the accused will be said to have been an offence and will attract the provisions of the section. It is the intention and the conduct of the accused which determines the offence.

14. The essential of abduction is forceful compulsion or inducement by

deceitful means. Such compulsion or inducement is to move the victim from one place to another. Kidnapping is explained under Section 361 of the IPC to be taking or enticing away, a minor or a person of unsound mind. Such minor must be under 16 years if male and under 18 years if female. Such taking or enticing away, must be with an intention to keep the victim out of lawful guardian and such taking or enticing away must be without consent of the lawful guardian.

15. In the aforesaid proposition of law including the evidence and materials laid by the prosecution as discussed hereinabove clearly lays the following:-

- I. That while victim and the accused were travelling together, no force was used by the accused (evidence of victim, evidence of PW-6, the Tempo driver).
- II. When the victim was discovered in the house of Jiten Saikia, the victim was not complaining anything against accused regarding any physical intercourse or forceful marriage (evidence of PW-2, the father and PW-3 who accompanied the PW-2, to house of Jiten Saikia).

16. The deposition of the victim recorded under Sections 161 & 164 of Cr.P.C. and the deposition during the trial reflects the following:-

- I. The accused is the classmate of her elder sister and he tried to follow the victim and wanted to start love affairs with her and after having a "Paan" offered by him, she started loving the accused and on the fateful day, she accompanied the accused and they did not sleep together at that night. And she has realized that she has

committed a mistake.

II. During the deposition before the learned Court below she has not alleged any force or inducement or any sexual intercourse. However, she stated that vermilion was put on her forehead, though there was no priest. The victim did not depose who had put vermilion on her forehead. The fact also remain that putting of vermilion was first time stated during her deposition in the Court.

17. The father of the victim has exhibited, Exhibit-4, an agreement entered into between the guardians compromising the event. On perusal of the Exhibit-4, reveals that as both the accused and victim has not attained the marriageable age, the marriage cannot be solemnized and the accused and the victim girl shall remain with their parents.

18. From the aforesaid, it is further established that the victim girl and the accused were in a relationship and both of them voluntarily went in the tempo. No materials has been laid by the prosecution and as discussed hereinabove that the accused abducted the victim with the intent that she may be compelled or knowing it to be likely that she will be compelled to marry the accused or in order that she may be forced or seduced to elicit intercourse or knowing it to be likely that she will be forced or seduced to elicit intercourse.

19. The victim herself deposed that initially the accused expressed his love for her and after sometime, she also started loving the accused and she went with the accused. The act of the accused as disclosed from the evidence as discussed hereinabove, do not show any intent to abduct the victim in order to marry her against her will or to torture or to seduce to

have illicit sexual intercourse.

20. From the materials, this Court is of unhesitant view that the act on the part of the accused was nothing but an act of emotional outbreak. The intention as required under Section 366 of the IPC is not available.
21. Accordingly, the judgment and sentence dated 14.11.2011 passed by the learned Sessions Judge, Morigaon in Sessions Case No. 54/2008 corresponding to GR Case No. 750/2008 is set aside and quashed. The appellant shall be put at liberty forthwith. Bail bond stands discharged. LCR be returned back.

JUDGE

Comparing Assistant