

GAHC010106882010



2024:GAU-AS:10328

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 118/2010

Bipul Das (in Jail),

Son of Rajen Das, resident of Madhapur,

P.S.- Ghagrapar, District- Nalbari, Assam

.....Appellant/Accused

-Versus-

The State of Assam,

(Represented by the Public Prosecutor, Assam).

.....Respondent

Advocates for the petitioner : Mr U Dutta,

Advocate for the respondent : Mr M P Goswami, Addl. P.P., Assam

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 16.07.2024.

Date of Judgment : 22.10.2024

JUDGEMENT AND ORDER (CAV)

1. This appeal is directed against the Judgment and Order dated 17.06.2010, passed by the learned Sessions Judge, Kamrup, in Sessions Case No. 186 (K)/2010, convicting and sentencing Bipul Das (hereinafter, the appellant), under Section 366 of the Indian Penal Code, 1860 (IPC, for short), to undergo RI for 7 years and to pay a fine of Rs. 5,000/- with default stipulation.

2. The genesis of the case was that on 19.05.2008, at about 10:00 am, the minor victim-'X' was proceeding towards her school when Bipul Das forcibly pushed her into a Maruti Van and drove away. He confined her in his friend Raju's house for about 5 (five) days. The informant lodged an FIR with the Police at Sonapur Police Station about the confinement of the victim in an area under Beltola. The FIR was then registered as Sonapur PS Case No. 1/2008, under Section 366 of the IPC and the Investigating Officer (IO, in short) embarked upon the investigation. The victim was recovered and was forwarded for medical examination. The victim was also forwarded to the Magistrate to get her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (CrPC, for short). After completion of investigation, charge sheet was laid against the appellant.

3. At the commencement of trial, a formal charge under Section 366 IPC was framed and read over and explained to the appellant. The appellant abjured his guilt and claimed innocence.

4. To substantiate its stance, the prosecution adduced the evidence of eight witnesses and the defence cross-examined some witnesses to refute the charges. However, some witnesses were not cross-examined by the defence. On the incriminating evidence projected by the prosecution, through its witnesses several questions were asked to the appellant under Section 313 of the CrPC. To the Question No. 2, the appellant has answered that he was not aware that the victim was a minor at the time of the incident. He has admitted that the victim stayed in his rented house on her own volition for 4 days. He has admitted that the victim's father recovered the victim from his house and the appellant admitted that the victim was a school going student at the time of the incident. The Court examined the Headmaster of No. 1 Pub Barsiral L P School, to ascertain if the victim was a minor at the time of the incident.

5. Heard learned counsel, Mr U Dutta, for the appellant and the learned Additional Public Prosecutor, Mr M P Goswami, for the respondent/State.

6. The learned counsel for the appellant laid stress in his argument that the prosecution has failed to prove beyond a reasonable doubt that the victim stayed with the appellant for 4 days as the owner of the house where the victim was alleged to have resided with the appellant was not examined as witness.

7. The learned Additional Public Prosecutor, on the contrary has submitted that the evidence of the victim is consistent to her statement under Section 164 CrPC. The appellant

has also admitted that the victim came to his house on her own volition and stayed there for 4 days. Sufficient reasons were ascribed by the learned trial Court and no interference of the Judgment and Order is warranted, as the Judgment and Order has been rightly passed by the learned trial Court.

8. I have considered the submissions at the Bar with circumspection.

9. The question that falls for consideration is that whether the learned trial Court has erred by convicting the appellant under Section 366 of the IPC. To decide the case in its proper perspective, the evidence is re-appreciated.

10. The FIR unfolds that a missing entry was registered as the victim's father-'Y' informed the Police about his missing daughter and on an enquiry, it was unearthed that the appellant had kidnapped the minor victim-'X'. Y deposed as PW-1 that in the month of May, 2008, one day, at around 02:00 pm, while he was proceeding towards his place of work, Haren Goswami informed him that his daughter eloped with a boy by boarding a bus. Haren Goswami also informed him that he did not witness the incident, but he heard about the incident from another person. PW-1 further deposed that immediately, he returned home and asked his wife about his daughter who was not aware about their daughter's whereabouts. They set out on a frantic search, but his daughter could not be traced out. Then he lodged the FIR, Exhibit-1. He has proved his signature on the FIR as Exhibit-1 (1). His daughter went missing on Monday and on the next Friday, he received information that she was in the Lalmati area of Guwahati. He along with his brother-in-law went to the Lalmati area and learnt that the couple had fled away from that place also. He then received a phone call from the appellant's employer that he had apprehended the appellant along with the victim girl at Beharbari. They

then proceeded to Beharbari area and his daughter was handed over to him. Thereafter, they handed over the appellant and his daughter to the Police at Sonapur Police Station. His daughter was sent for medical examination and for recording her statement. His daughter was 13 years old at the time of the incident. In his cross-examination, he has admitted that he was not aware of any love affair between the appellant and his daughter and he was also not aware if his daughter voluntarily eloped with the appellant. This witness was again re-examined and he deposed in his examination-in-chief that he could not remember the date of the incident, but he could remember that his daughter disappeared on a Monday. In his cross-examination, he admitted that he could not remember the date of the incident which was written by the scribe of the FIR. He lodged the FIR on the second or on the third day of the incident.

11. Unlike the deposition of PW-1, Sri Nagen Talukdar deposed as PW-2 that his house is located in the same locality as that of the informant. At the time of the incident, he heard from the neighbouring people that the informant's daughter was found missing from her residence. Thereafter, about 5 days after her disappearance, the girl and a boy who were residing in the house of Chitra Das, were recovered by the Police and the couple was handed over to them. He has admitted that the victim was only 14 years old at the time of the incident and he did not know if the victim voluntarily eloped with the appellant or she was kidnapped by him.

12. PW-1 deposed that his daughter was handed over to him, whereas PW-2 deposed that the appellant and the victim were handed over to the Police from the residence of Chitra Das. This is not similar to the deposition of PW-1, who stated that they handed over the victim and

the appellant to the Police at Sonapur Police Station. Moreover, PW-1 has categorically stated that his daughter eloped with the appellant and he received the information from Haren Goswami that his daughter was seen boarding a bus with one boy. If the victim has voluntarily boarded a bus with the appellant or any other boy, can the appellant be held guilty of offence for kidnapping or abducting a woman with intent that she may be compelled to marry any other person against her will or in order to force or seduce her to illicit intercourse.

13. The victim herself deposed as PW-3 that she got acquainted with the appellant after she met him at a marriage ceremony at Ghograpar. Prior to this meeting, the appellant had visited her in her school. On the day of the incident, while she was proceeding towards her school, she met the appellant on the way to her school and as requested by him, she went along with him in a Maruti Van. She came to Lalmati and resided in a house for several days. She and the appellant slept in separate rooms. Thereafter, she was recovered by her father from the Lalmati area. Her father handed her and the appellant to the Police at Sonapur Police Station. Thereafter, she was forwarded for medical examination and for recording her statement. She has proved her statement before the Magistrate as Exhibit-2 and her signature as Exhibit-2(1).

14. The major discrepancy of the evidence is that the victim did not mention the date of the incident. PW-1 has stated that the incident occurred in the year 2008. The FIR also reveals that the incident occurred on 20.05.2008 and the FIR was lodged on 21.05.2008.

15. It is pertinent to mention at this juncture that the statement of the victim under Section 164 CrPC is not similar to her evidence-in-chief as well as her cross-examination. In her statement under Section 164 CrPC, the victim has stated that the appellant forcefully took her

in a red-coloured Maruti Van. She raised alarm and the appellant stopped her from screaming. The appellant forcefully took her along with him to Lalmati and kept her in his friend Raju's house for 5 days. Although she tried to return home, the appellant prevented her from returning home. After 5 days, her family members brought her back to her house. On the contrary, she has stated in her evidence-in-chief and in her cross-examination that as the appellant requested her, she went along with him in a Maruti Van. In her cross-examination, she has stated that the appellant did not compel her to accompany him nor did he induce her to go with him. Thus, it can be safely held that the argument of the learned Additional Public Prosecutor holds no water. The victim has vacillated from her statement under Section 164 CrPC. Her statement under Section 164 CrPC is not similar to her evidence in the Court. This casts a shadow of doubt over the veracity of her evidence and credence cannot be given to such vacillating statements of the key witness.

16. It has to be borne in mind that the appellant's friend Raju Das, who provided shelter to the appellant and the victim was not examined as a witness, which is a major discrepancy in the evidence.

17. At this juncture, it is pertinent to ascertain the age of the victim. The Medico-Legal Report was issued by Dr Manoj Kumar Sinha, who deposed as PW-7 that on 24.05.2008, he was working as Assistant Professor Forensic Medicine at GMCH and on that day he examined the victim-'X' and found the following-

- 1) Height - 143 cm.

- 2) Weight - 43 kgs
- 3) Chest Guard - 75 cm
- 4) Abdominal Guard- 64 cm
- 5) Teeth - 28 permanent.
- 6) Scalp Hair - 50 cm
- 7) Axillary hair - 1.2 cm
- 8) Pubic hair - 1 to 2 cm.
- 9) Breast - Healthy and soft.

Black nipple and areolae.

Menarche - 13 years of age.

According to his opinion, there were no recent signs of sexual intercourse. No marks of violence were present on her person. Her age was above 14 years and below 16 years. He has proved the Medico-Legal Report as Exhibit-4 and his signatures as Exhibits-4(1), 4(2) and 4(3).

17.1. This witness was not cross-examined by the defence.

18. According to the evidence of PW-7, the age of the victim was above 14 years and below 16 years.

19. The learned counsel for the appellant laid stress in his argument that the appellant gets the benefit of two years on the higher side of 16 years. The victim voluntarily went with the appellant. The appellant himself is a young lad and it is fathomable that both the victim and

the appellant had a love relationship. There was no coercion or inducement by the appellant and if granted two years on the higher side of 16 years, the appellant gets the benefit of doubt.

20. The appellant has relied on the decision of this Court in ***Dhiraj Das & Another –Vs- State of Assam***; reported in **2024 (1) GLT 354**, wherein it has been observed that-

“35. In the light of the decision of Hon’ble the Supreme Court in Mohd. Ali @ Guddu (supra) and Bhagirath’s case (supra), it is held that it is a case where the appellants ought to be given the benefit of doubt. The benefit of two years on the higher side of the age of the victim is also extended to the appellants. It has been held by a coordinate Bench of this Court in Ranjit Kalita –vs- State of Assam; reported in (2017) 6 GLR 113, that-

“10. The IO during investigation never made any effort to collect any age certificate of the victim girl. At the relevant time she was a student of Class X and was to appear in the HSLC examination. Evidence shows that she was unsuccessful on earlier occasion. Prosecution mainly relied on the oral testimony of the witnesses coupled with the evidence of the doctor to establish that she was a minor girl at the relevant time. The doctor who has been examined as PW 6 stated that on the basis of the physical, Radiological and Laboratory Investigation he found her to be above 15 years and below 16 years. Though the defence failed to put any question to him regarding the margin of error while determining the age on the basis of Radiological examination but law is well settled that the margin of error is always 2/3 years on either side and if the age of the doctor mentioned in his report as above 15 years is accepted then with addition of 2/3 years she would be a major. Oral evidence also shows that she was unsuccessful on earlier occasion in her class and though she claimed to be aged about 15 years she would be obviously more than 15 years on the date of occurrence. It was the bounden duty of the IO to collect the age certificate of the girl from the school in which she was studying but he miserably failed to do so and consequently, on the basis of the Radiological examination and oral testimony of the witnesses including the evidence adduced by the defence witnesses she must be

held to be a major on the date of alleged commission of the crime and was capable of giving consent and she being a consenting party no ingredients of offence u/s 366 of the IPC has been made out against the accused appellant. In the case of Balasaheb (supra) the age of the victim was found to be 14 years to 16 years by Radiological examination and the Division Bench of the Bombay High Court relying on the Modi's Medical Jurisprudence and Toxicology, 21st Edition, page 40 came to the finding that that the margin of error might be plus 3 years. If that be so, the age of the girl would be 18 years and she being a consenting party, the accused is liable to be acquitted.....”

21. Reverting back to this case, it is held that in this case too, although the victim and her father has given her age as 14 years, yet the Medico-Legal Report, Exhibit-4 reveals that the victim was above 14 years and below 16 years. Thus, the accused is given the benefit of two on the higher side of 16 years. As the victim has not implicated that the appellant forcefully committed sexual assault on her, the appellant is thus not held guilty of offence under Section 366 IPC. The victim PW-3 deposed that she slept in a separate room and so did the appellant. The evidence of other witnesses also did not help improve the prosecution case.

22. PW-4, Smt Chitra Das deposed that in the month of May, 2008, she heard that the victim was found missing from her school. After 4/5 days, the victim and the appellant were brought by the victim's family members. She denied any knowledge about the incident. She deposed that as the local people tried to assault the appellant she provided shelter to the appellant and informed the Police. Thus, the evidence of PW-4 is a deviation of the evidence of PWs-1, 2 and 3. There was not a whisper in the evidence that PW-4 provided shelter to the appellant when the local residents tried to assault the appellant. All these contradictions and discrepancies in the evidence causes a dent in the evidence adduced by the prosecution.

23. The victim's uncle, Sri Anil Das deposed as PW-5 that his brother-in-law informed him that his niece-X did not return home from school. Then he went to the victim's house and set out on a frantic search. After 5 days, they received information that the victim is in Guwahati. They proceeded to Guwahati, but before they could reach the place, the victim fled. Thereafter, they learnt that the victim was in the house of the employer of the appellant. Accordingly, they reached Beharbari area, where the appellant's employer's house is located. They recovered the victim and the appellant and handed them over to the Police at Sonapur Police Station. They did not confront the victim about the incident. He was not aware that the victim eloped with the appellant on her own volition. At the time of the incident, the victim was only 12 years old. The victim got acquainted with the appellant when she met him in his house in his marriage ceremony at Ghograpar.

24. It is apt to mention at this juncture that the FIR marked as Exhibit-1 clearly reveals that the FIR was lodged on the following day of the incident, whereas, on the contrary, the evidence of PW-5 reveals that they learnt that the victim eloped with the appellant after 5 days of her disappearance. The evidence of PW-1 and PW-5 clearly reveals that both had set out on a frantic search after the victim was found missing. The FIR clearly implicates the appellant's name, whereas the evidence of PW-5 clearly reveals that they learnt that the victim eloped with the appellant after searching for the victim for 5 days. On the contrary, the statement of the victim under Section 164 CrPC, Exhibit-2 reveals that the victim eloped with the appellant in the morning of 19.05.2008. Thus, it is clear that the evidence is fraught with discrepancies and contradictions.

25. The other witnesses, PW-6 and PW-8 are official witnesses.

26. Badrul Islam deposed as PW-6 that on 21.05.2008, while he was working as OC at Sonapur Police Station, at about 06:00 pm, the informant-Y lodged the FIR that the appellant kidnapped the minor victim. On receipt of the FIR, he registered a GD Entry No. 552 dated 21.05.2008 and entrusted ASI Dilip Kumar Das with the preliminary investigation. He has proved his signature on the FIR as Exhibit- 1 (2). He further deposed that on 29.07.2008, after completion of preliminary investigation, ASI Dilip Kumar Das handed over the Case Diary. He finally submitted charge sheet against the appellant. He has proved his signature on the charge sheet as Exhibit-3(1). He has admitted in his cross-examination that according to the statement of the victim girl, the date of occurrence was 19.05.2008, at about 10:00 am.

27. At this juncture, it is pertinent to mention that the learned defence counsel laid stress in his argument that the delay in lodgement of the FIR leaves sufficient scope for manipulation and fabrication of the FIR. This is a serious allegation against the appellant. The victim obviously disappeared in the morning of 19.05.2008, whereas the FIR was lodged on 21.05.2008, i.e., after 2 days. A benefit of doubt has to be extended to the appellant as the FIR was lodged after 2 days.

28. It is submitted by the learned counsel for the appellant that the FIR ought to have been lodged immediately on the same evening when the informant was apprised that his daughter was seen boarding a bus with a stranger. What prevented the informant from immediately informing the Police on the following day. After 2 days, the FIR was lodged on 21.05.2008. I therefore find substance in the argument of the learned counsel for the appellant. Due to the delay in the lodgment of the FIR, this case suffers from another discrepancy.

29. Sri Dilip Kumar Das, SI of Police, deposed as PW-8 that on 21.05.2008, he was attached

as ASI of Police at Sonapur Police Station and was entrusted with the preliminary investigation of the case. He embarked upon the investigation and visited the place of occurrence (PO, for short) and recorded the statements of the witnesses. Thereafter, he received information that the appellant and the victim were taking shelter in the house of Chitra Das. He brought the appellant and the victim to the Police Station on 23.05.2008 at about 08:00 pm and interrogated them. He forwarded the victim for medical examination and arrested the appellant and forwarded him to judicial custody. He also forwarded the victim for recording her statement under Section 164 CrPC.

30. In his cross-examination, he has admitted that he did not collect any birth certificate, horoscope or school certificate pertaining to the age of the victim. He has also admitted in his cross-examination that the victim mentioned in her initial statement that she asked the appellant to meet her after her test examination.

31. In the wake of the foregoing discussions, it is thereby held that the victim went with the appellant on her own volition. As the Medical Officer has mentioned the age of the victim to be above 14 years and below 16 years, it would be appropriate to extend the benefit of 2 (two) years on the higher side of 16 years.

32. It is trite law that when two views are to be chosen, the view in favour of the appellant has to be chosen. A benefit of doubt is hereby extended to the appellant. It would be apt to reiterate that there is no evidence of forceful sexual assault on the victim. It is thereby held that the learned trial Court has erroneously held the appellant guilty solely on the vacillating statements of the victim recorded under Section 161 CrPC, 164 CrPC and her deposition in the Court. Thereby, the Judgment and Order dated 17.06.2010, passed by the learned

Sessions Judge, Kamrup, in Sessions Case No. 186 (K)/2010, convicting and sentencing Bipul Das, under Section 366 IPC is hereby set aside. The appellant is set forth at liberty, on benefit of doubt. The appellant to be released, if he is not wanted in any other case.

33. However, keeping in view the provisions of Section 437-A Cr.P.C./481 BNSS, the accused appellant is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

34. Send back the Trial Court Record.

JUDGE

Comparing Assistant