

GAHC010183032012



2024:GAU-AS:11166

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

Case No. : Crl.A./193/2012

MAINA SAIKIA
S/O SRI KANTI SAIKIA, R/O VILL. GAHPUR, HAZARIKA CHOUK, P.S.
GAHPUR, DIST. LAKHIMPUR, ASSAM.

VERSUS

THE STATE OF ASSAM

Advocate for the Appellant in : , MR. T R DEURI AMICUS CURIAE,

Advocate for the Respondent : , MR BB GOGOI, ADDL.PP,

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 16.07.2024
Date of Judgment : 18.11.2024

JUDGMENT & ORDER (CAV)

1. This appeal is directed against the judgment and order dated 19.06.2012 passed by the learned Additional Sessions Judge (FTC), Lakhimpur, North Lakhimpur in connection with Sessions Case No. 118 (NL)/2011 arising out of GR Case No. 1296/2010. The appellant Sri Maina Sarkar (hereinafter referred to

as the appellant or accused) is aggrieved by the judgment and order as he has been convicted under Section 363 of the Indian Penal Code, 1860 (IPC for short) to undergo rigorous imprisonment for one year and to pay a fine of Rs.15,000/- (Rupees Fifteen Thousand) with default stipulation.

2. The genesis of the case was that on 10.11.2011 the appellant kidnapped the minor victim X, who was alone at home. The victim's mother then lodged an FIR with the police at Bihupuria Police Station, which was registered as Bihupuria Police Station Case No. 325/2011 under Section 366 (A) of IPC. The Investigating Officer (IO for short) embarked upon the investigation and recorded the statements of the witnesses. The victim was forwarded to the Magistrate for recording her statement under Section 313 of Code of Criminal Procedure, 1973 (CrPC for short) and also she was forwarded for medical examination. Evidence was collected by the IO. On finding sufficient materials against the appellant, charge sheet was laid against the appellant under Section 366 (A) IPC. At the commencement of trial, a formal charge was framed under Section 366 IPC and the appellant abjured his guilt and claimed innocence.

3. To substantiate its stance, the prosecution adduced evidence of seven witnesses and the defence cross examined the witnesses to refute the charges. The victim's father 'Z' was also examined as Court Witness No. 1. On the incriminating evidence projected by the prosecution through the witnesses, several questions were asked to the appellant. To the question No. 1 the appellant has answered that the victim called him over phone and went to his house on her own volition. When the appellant was confronted about kidnapping a minor victim who was 14 (Fourteen) years old, the appellant replied that the victim informed him that she was 18 (Eighteen) years old at the

time of incident. The tone and terror of answers of the appellant to the questions under Section 313 of CrPC depicts a plea of total denial.

4. It has been held by the learned Trial Court that the prosecution could prove beyond a reasonable doubt that the victim was below 16 (Sixteen) years of age. Learned Trial Court has held that it has surfaced through the evidence that the victim had a love relationship with the appellant. Although the victim has alleged that five boys had kidnapped her, the neighbours did not hear any commotion at the time of incident.

5. The learned counsel for the appellant has submitted that the Medical Officer has opined that the victim was above 15 years and below 17 years and the appellant gets the benefit of 2 years on the higher side. The victim had a love relationship with the appellant and she voluntarily went with the appellant. The appellant was also under the impression that the victim was a major and he has indeed admitted that the victim went with him on her own volition.

6. The learned Trial Court has framed charge under Section 366 of the IPC, but as the victim went with the appellant on her own volition, the learned Trial Court has scaled down the offence under which the appellant was charged, as the victim was found to be a minor at the time of incident. It is submitted that a false case has been brought up against the appellant. There is no instance of kidnapping and no case of kidnapping has been made out against the appellant.

7. On the contrary, the Learned Additional Public Prosecutor, Mr. B. B. Gogoi has submitted that no interference is warranted in this case. A lenient

punishment has been imposed upon the appellant. The victim was below 18 years of age and thus, consent is irrelevant in such a case. The decision of the learned Trial Court is appropriate and warrants no interference.

8. Now, the question that falls for consideration is whether the learned Trial Court has erred, while convicting the appellant.

9. To decide this case in its proper perspective, the evidence is reappreciated.

10. The victim's mother, 'Y' deposed as PW-1 that the victim, 'X', was a student of Class-X at the time of the incident. The incident occurred about 4/5 months back. She further stated that at present, the victim's age is 14 years. At the time of the incident, she was not in her house as she went to Laluk, whereas her husband was in the house. She told the victim to go to her elder sister's house. Later, she learnt from appellant's uncle, who informed her over phone that the victim was in their house and she need not search for the victim. She then demanded that they should hand over the victim to their custody, but they refused to return the victim to their custody, which impelled her to lodge the FIR, After 2 (two) days, with the help of the Police, she brought back her daughter. She has proved the FIR as Exhibit-1 and Exhibit-1(1) as her signature.

11. In her cross-examination, PW-1 has denied any knowledge about a love relationship between her daughter and the appellant. Her daughter informed her that the appellant was keen to meet her as they got acquainted with each other through phone. She has vehemently denied that her daughter was 19 years old at the time of the incident. She also stated in her cross-examination that she was not aware if 'X' went with the appellant on her own volition.

12. The victim-'X' deposed as PW-2 that she got acquainted with the appellant through phone. The incident occurred in the Assamese month of Kati (between October-November). As she was about to leave for her elder sister's house, the appellant called her over phone. Then the appellant requested her to meet him on her way to her sister's house, but she refused to meet him on the way and she asked the appellant to come over as she would be waiting near her house. The appellant then came in a car which was also occupied by five other boys and took her in the car to Hazarika Chuk and kept her for two days. Later, her mother came and took her back to her house. She gave her statement before the Magistrate. She has proved her statement as Exhibit-2 and Exhibit 2 (1) as her signature. In her cross-examination, she has denied the suggestion that she had earlier met the appellant during Durga Puja, but she has admitted that she used to sometimes chat with the appellant over phone. She has admitted that she had a love relation with the appellant and has reiterated that she was to visit her elder sister's house, when the appellant met her near the school and took her in his vehicle.

13. At this juncture, it is apt to mention that contradictions could elicited through the cross-examination of PW-1 and PW-2, as per Section 145 of the Indian Evidence Act, 1872 ('Evidence Act', for short) qua Section 162 of the CrPC.

14. The IO, Sri Achyut Bora, PW-7 has stated through his cross-examination that PW-1 has not mentioned in her initial statement that on the date of the incident, she was in Laluk, whereas her husband was at home and she asked her daughter-X to go to her elder sister's house. She has also not mentioned in her initial statement that she received a call from the appellant's

uncle that she need not search for her daughter as her daughter was in their house and then she demanded that they should return their daughter but the appellant's uncle denied to send back the victim to her house and this impelled her to lodge this case. This is a major contradiction in the evidence and this thwarts the evidence. Thus, contradictions could be elicited through the cross-examination of PW-2. The IO has also affirmed that PW-2 has not mentioned in her initial statement that when she was about to proceed to her elder sister's house the appellant expressed his desire to meet her on her way to her elder sister's house.

15. It is pertinent to note that there is no allegation of forceful abduction. PW-2 has indeed stated that she was taken by the appellant in a vehicle, but she has not stated that she was induced by the appellant to go with him.

16. It has surfaced from the evidence that the appellant was well acquainted with PW-2. The appellant requested her over phone to meet him on her way to her elder sister's house, but she refused and expressed her desire to meet him near her house, near the school. There is not a scintilla of evidence that the appellant induced her to go with him in his vehicle to Hazarika Chuk. She has matter of factly stated that the appellant took her in a vehicle to Hazarika Chuk, but it cannot be deciphered through her testimony that the appellant induced her or forced her to go with him to Hazarika Chuk. The evidence of PW-1 is also vague. She has stated that the appellant's uncle informed her over phone that the victim was in their place and they need not search for her and then she demanded that they should return their daughter to them. It is not clear from her evidence if the appellant or the appellant's uncle refused to send back the victim-'X' to her house. Can the appellant be held liable on the basis of weak

evidence replete with contradictions.

17. There is no direct evidence, how the appellant took the victim to Hazarika Chuk. There is no evidence that the appellant forcefully confined the victim in Hazarika Chuk.

18. Learned counsel for the appellant laid stress in his argument that PW-1 has stated that the victim was 14 years old at the time when her evidence was recorded, which is unbelievable. In the prevailing circumstances, a student of Class-X would be around 16 years of age and not 14 years old.

19. It is further argued that the victim has given her age as 13 years when her statement under Section 164 CrPC was recorded and when her evidence was recorded after 3 or 4 months, she gave age as 15 years, whereas her mother gave the victim's age as 14 years, which clearly indicates that the evidence of PW-1 and PW-2 does not at all inspire confidence.

20. The victim's father was summoned as a Court witness and he deposed that at the time of the incident, the victim was a student of Class-IX and she was 15 years old. Thus, there are varying ages projected by the witnesses. No school certificate was exhibited or verified by any witness.

21. The Medical Officer, Dr (Mrs.) Dhriti Das deposed as PW-5 that on 14.11.2011, at about 12:30 pm, she was at Civil Hospital attending OPD duty. When she examined the victim and came to the conclusion that the victim was above 15 years but below 17 years, on the basis of the radiological report and X-Ray report. She has proved the X-Ray Report as Exhibit-3 and Exhibit-3(1) as her signature. She has proved the Medico-Lega Report as Exhibit-4 and Exhibit-

4(1) as her signature.

22. Considering the contradictions elicited through the cross-examination of the witnesses, it is held that the benefit of two years on the higher side of the age of the victim can be given to the appellant. Even if the victim's age is considered to be 16 years, and if 2 or 3 years is added to 16, the age of the victim comes up to be 18 years or 19 years. The evidence of PW-1 and PW-2 does not at all implicate that the victim was taken to the appellant's house. Rather, the evidence of PW-1 depicts that the appellant's uncle called the victim's mother, i.e. PW-1 and informed them that the victim was with them. Thus, it can be safely held that this is not a case of kidnapping from lawful guardianship, as the victim who went with the appellant on her own volition was in a house at Hazarika Chuk. Victim is held to be a major at the time of the incident. The evidence of PW-3 and PW-4 does not at all implicate that the appellant kidnapped the victim.

23. Dinaram Bora deposed as PW-3 that the appellant took away the victim in a car and the appellant's uncle informed the victim's mother over phone about the incident.

24. In sync with the evidence of Dinaram Bora, his wife Rupa Moni Bora also deposed as PW-4 that her sister was kidnapped by the appellant and then the appellant's uncle informed them that the victim was with them. Thus, the evidence of PW-4 does not inspire confidence as both the informant and the victim did not at all implicate that the victim was kidnapped by or forcefully taken away by the appellant.

25. In the wake of the foregoing discussions, it is thereby held that the learned trial Court has erroneously held the appellant guilty of offence under Section 363 of the IPC. Thereby, the appellant is acquitted from the charges under Section 363 of the IPC and is set at liberty forthwith if he is not wanted in any other case.

26. 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.

27. Before parting with the record, this Court extends the appreciation to the services rendered by Mr T Deuri, learned *Amicus Curiae* and recommend that the Registry may make arrangement for payment of necessary remuneration to the learned *Amicus Curiae* as per the existing norms.

28. Send back the Trial Court Record.

JUDGE

Comparing Assistant