GAHC010003792011

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

Case No. : Crl.A./30/2011

ARSHADUL ISLAM
SON OF ROFIKUL ISLAM, VILL. DATTAKUCHI, P.O. DABALIA PARA DIST. BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MRS.P B HAZARIKA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER(ORAL)

Date: 17.08.2021

(*AM Bujor Barua, J.*)

Heard Mr. K Agarwal, learned senior counsel appearing for the appellant. Also heard Mr. D Das, learned Additional Public Prosecutor, Assam.

2. An ejahar dated 18.04.2006 was lodged by Kazi Atowar Rahman before the Officer-in-Charge, Barpeta Police Station (Sadar) *inter alia* stating that at about 8P.M., of the previous night when his daughter went to pass urine, the appellant herein namely, Arshadul Islam in furtherance of a conspiracy along with another accused namely Rafiqul Islam by taking advantage of the situation gagged the 15 years old minor daughter of the informant namely, Aklima Khatun and lifted and took her with him and in doing so there were two or three persons along with him. An allegation was also made that it has been mentioned in some letter that the informant and his daughter would be killed. An apprehension was raised that the accused appellant may sexually exploit his daughter or may sell her in some other unknown place or may kill her. On the basis of the information being lodged with the police, the Barpeta Police Station Case No.238/2006 under Section 366 A of the IPC was registered. At the stage of the trial, the following charges were framed against the accused appellant on 24.09.2008 which is extracted as below:

> "*Firstly: That on 17/04/2006 at about 8P.M. at village Dattakuchi under Barpeta PS you kidnapped informant's daughter Miss Aklima Khatun a minor girl under the age of 18 years to go from her house with intent that the said Aklima Khatun may be or knowing that it is likely that said Aklima Khatun will be forced or seduced to illicit intercourse with you and thereby committed an offence punishable under Section 366(A) IPC and within my cognizance.*
>
> *And thereby direct that you be tried by me/by the said Trial Court on the said charge (s) 366 (A) IPC."*

3. It is taken note of that although the ejahar dated 18.04.2006 refers the name of Rafiqul Islam to be the alleged accused No.2, the said person was not charge sheeted. In course of the trial, the prosecution examined eight witnesses including the informant Kazi Atowar Rahman, the Investigating Officer and the Doctor, PW-8 Dr. SP Sarma, while the defendants examined Habibar Rahman as DW-1.

4. Without going into the details of the evidence that has been led by the prosecution, we take note of that the allegations in the ejahar is that the accused appellant by taking advantage of the situation of the victim girl coming out of her residence had forcibly taken her away by lifting her along with 2/3 other persons and that the accused appellant may sexually violate the minor daughter of the informant Aklima Khatun or may sell her in some unknown place.

5. The charges against the accused appellant is that on 17.04.2006 at about 8P.M., the accused appellant had kidnapped the minor daughter of the informant namely, Aklima Khatun who was under the age of 18 years with the intent that Aklima Khatun may be or knowing that it is likely that she will be forced or seduced to an illicit intercourse with the accused appellant. A reading of the charge goes to show that there are three ingredients thereof. The first ingredient is that the accused appellant on the given date and time had kidnapped the daughter of the informant. The second ingredient is that the daughter of the informant was below 18 years and, therefore, a minor. The third ingredient is that the accused had the intent or knew that Aklima Khatun will be forced or seduced to an illicit intercourse with him.

6. We further take note of that on such charge, the accused appellant was tried under Section 366A of the IPC.

7. Section 366 of the IPC provides as extracted:

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [2][and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].

8. On the other hand, Section 366A of the IPC provides as extracted:

[366A. Procuration of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

9. A reading of the provisions of Section 366 of the IPC would show that in order to constitute an offence under Section 366 IPC, the first ingredient is that the person concerned kidnaps or abducts any woman. We also take note of that for the purpose of Section 366 IPC, a woman may be of any age which also does not exclude the woman who may be a minor. But the core requirement of the first ingredient is the person accused would be involved in kidnapping or abducting the woman concerned.

10. The second ingredient, amongst others, requires that there would be a likelihood that the woman so kidnapped or abducted would be forced or seduced to sexual intercourse without specifically providing as to with whom she may be forced or seduced to illicit intercourse.

11. Subsequently, by the Indian Penal Code (Amendment) Act 1923 (for short, the Act of 1923), the scope of Section 366 was expanded to the extent that whosoever induces any woman to go from any place with the intent that she may or likely to be forced or seduced to sexual intercourse with another person would also commit an offence under Section 366 IPC.

12. On the other hand, the first ingredient of Section 366A of the IPC is that whosoever by any means whatsoever induces any minor girl under the age of 18 years to go from any place. The second ingredient is that such inducement be done with the intent that such girl may be or knowing that it is likely that she would be, forced or seduced to illicit intercourse with another

person. The first ingredient of Section 366A makes it explicit that in order to constitute an offence under Section 366A, there must be an inducement from the person accused to any minor girl under 18 to go from one place to any other place.

13. From such point of view, apart from the subsequent addition to Section 366 by the Act of 1923, the core ingredient of Section 366 is that the woman concerned would be kidnapped or abducted whereas the core ingredient of 366A is that the woman concerned would be induced to go from one place to another.

14. In the 9th Edition of Black Law's Dictionary, the expression 'kidnapping' is defined to be a crime of forcibly abducting a person from his or her own country and sending the person to another. Without going into the aspect of abducting the person from his own country to another, what we would take note of in order to constitute a kidnapping there should be an element of forcibly requiring the person to go to another place. On the other hand, the expression 'inducement' is defined in the 9th Edition of Black Law's Dictionary to be an act or process of enticing or persuading another person to go from one place to another. The word 'forcibly' means the act of using force or violence, whereas the word enticing means attracting, or tempting or alluring. In view of the aforesaid meaning of the expression forcibly, we understand that the act of taking a person from one place to another if done by means of force or violence, it would constitute kidnapping. On the other hand, if the said act of taking one person from one place to another is by means of attraction or

temptation or allurement, the same would be inducement.

15. From the said point of view the charge against the accused appellant of having forcibly requiring the daughter of the informant to go from one place to another would be inconsistent with the provisions under which he was tried, i.e. Section 366A where the basic ingredient would be attracting, tempting or alluring the daughter of the informant to go from one place to another. For the accused appellant to raise his defence in the trial, he can bring any material to show that the daughter of the informant had gone with him because of some attraction or temptation or allurement or may be voluntarily. By bringing such material, the accused appellant can form an appropriate defence on the allegation that he had kidnapped the daughter of the informant meaning thereby he had not forcibly taken her away by using force or violence. But in doing so, the accused appellant would be subjected to the disadvantage of bringing on an admission that there was an element of inducement in taking the daughter from one place to another, which would again satisfy the ingredients for the offence u/s 366A of IPC, in fact the section under the which the trial had been conducted against him.

16. In the circumstance, it would be a question for determination as to whether by charging the accused appellant in the manner it was done as per the charge dated 24.09.2008 and based on such charge to be tried u/s 366A IPC, a prejudice would be caused to the appellant. As already indicated above, we are of the view that there is a distinct possibility of prejudice being caused inasmuch as, as enunciated above, if the accused appellant seeks to bring any material to take the defence against the charge of having kidnapped, he may

fall in to the trap of admitting to the ingredients of Section 366A under which he has been tried.

17. Section 464 CrPC inter-alia provides for the effect of an error in a charge. Section 464 CrPC is extracted below:-

> *"464. Effect of omission to frame, or absence of, or error in, charge-*
> *(1)- No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.*
> *(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-*
> *(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately from the point immediately after the framing of charge.*
> *(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:*
> *Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.*

18. Section 464(2) of CrPC provides that if the Court of appeal, confirmation or revision is of the opinion that a failure of justice has in fact been occasioned in the case of an error, omission or irregularity in the charge, it may direct a new trial to be had upon a charge that may be framed in a manner it thinks fit. But again the proviso to Section 464(2) provides that if the Court is of the opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

19. While examining the scope of Section 464(2) of the Cr.P.C., as regards the

fact of error in the charge, the Supreme Court in paragraph 22 of its pronouncement in *Bhoor Singh and Another Vs. State of Punjab* reported in *(1974) 4 SCC 754* had held that the object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction and, therefore, if necessary information is conveyed to him in other ways and there is no prejudice, the trial will not be invalidated by the mere fact of that charge.

20. Again while examining the effect of error in the charge, the Supreme Court in paragraph 5 of its pronouncement in *Kantilal Chandulal Mehta Vs. the State of Maharastra and Another* reported in *1969 (3) SCC 166* had arrived at its conclusion in the facts of the matter before it that no prejudice would be caused or is likely to be caused to the accused by the amendment of the charge as was directed by the High Court in that case.

21. The relevance of the aforesaid two propositions lead us to a corollary that if due to an error in a charge a prejudice is caused to the accused, such situation would lead to invalidating the trial itself.

22. In the circumstances, we are also required to understand the concept of prejudice to an accused in a criminal trial. In *V.K. Sasikala Vs. State Represented by Superintendent of Police*, reported in *(2012) 9 SCC 771* it has been held that the individual notion of prejudice difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is

the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour in any such perception and the same must be put to rest at the earliest.

23. Again in paragraph 34 of the pronouncement of *Rafiq Ahmad Alias Rafi Vs. State of Uttar Pradesh* reported in *(2011)8 SCC 300* in paragraph 35 it has been provided by the Supreme Court that when we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him and this has caused the accused with failure of justice. It has also been held that prejudice is also incapable of being interpreted in its generic sense and once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the Indian Criminal Jurisprudence then the accused can seek benefit under the orders of the Court.

24. In the aforesaid background of the concept of prejudice, when we look into the facts of the present case, it is noticeable that as per the charge, the petitioner is required to take a defence that he had not forcibly taken away the daughter of the informant. But under the relevant provisions of law under which the accused was tried he was required to show that he had also not enticed, or allured or attracted the daughter of the informant to go along with him. Both the defences to be taken in our view would have to be supported by evidence of different nature and in bringing in the evidence against the allegation of forcibly taking away the daughter of the informant, there is a possibility that the accused may bring in evidence which may lead to an admission of the offence for which he was tried. Such a situation in our view would cause a prejudice to

the appellant in his defence in the trial.

25. As the error in the charge may lead to a prejudice to the accused, we are of the view that the trial itself would be invalidated.

26. We also take note of the factual aspect as revealed from the records that the daughter of the informant had in her evidence stated that she was forcibly taken by the accused appellant, but during the stage of investigation before the police she stated that she had voluntarily accompanied the accused appellant and such contradiction was also put across in evidence during the trial.

27. Further material is also available on record that the daughter of the informant was not a minor at the relevant time when the alleged offence had taken place.

28. Considering all the aspects as indicated above, we deem it appropriate that it is a fit case for interfering with the judgment and order dated 28.01.2011 passed in Sessions Case No.70/2008 convicting the accused appellant under Section 366 A IPC. Accordingly the conviction and sentence by the judgment and order dated 28.01.2011 in Sessions Case No.70/2008 in the Court of learned Additional Sessions Judge (FTC), Barpeta stands quashed.

29. The accused appellant is set at liberty.

30. Registry to send down the LCR immediately.

JUDGE

Comparing Assistant