



GAHC010007282011

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

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL NO. 129 of 2011

1. Shri Dhiraj Das,
S/o Late Paran Das,
R/o Jogipara,
P.O.- Mondira, P.S.- Boko,
District- Kamrup, Assam.

2. Sri Mani Baishya,
@ Mani Kanta Bishya,
S/o Late Monomohan Baishya,
R/o Jogipara,
P.O.- Mondira, P.S.- Boko,
District:- Kamrup, Assam

.....Appellant.

-Versus-

State of Assam,
Represented by its Public Prosecutor.

.....Respondent.



Advocates for the appellant: Mr P Kataki.

Advocate for the respondent: Mr D Das, Addl. P.P.

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 07.06.2023

Date of judgment : 04.10.2023

JUDGEMENT AND ORDER

This appeal is directed against the Judgment and order dated 29.06.2011, passed by the learned Additional Sessions Judge (FTC) No. 1, Kamrup, in connection with Sessions Case No. 393 (K-G) of 2009, convicting Sri Dhiraj Das, Manash Baishya and Mani Baishya under Section 366 of the Indian Penal Code, 1860 ('IPC', for short) and sentencing them to undergo Rigorous Imprisonment for 5 (five) years and a fine of Rs. 2000/- each, with default stipulation. The appellants before this Court are Sri Dhiraj Das and Sri Mani Baishya (hereinafter also referred to as appellants and 'A-1' and 'A-2', respectively).

2. The facts leading to this appeal are that on 26.03.2008, at about 09:30 am, when the victim 'X' was proceeding towards her school on her bicycle, both A-1 and A-2 waylaid her and thereafter, kidnapped her. An FIR regarding this incident was lodged by the informant-say Y. This FIR was registered as Boko PS Case No. 83/2008, under Section 366 IPC and the Investigating Officer ('IO', for short) was entrusted with the investigation.

3. The IO embarked upon the investigation. He recorded the statements of the witnesses. During the course of investigation, he forwarded the victim to the Magistrate to record her statement under Section 164 of the Code of Criminal Procedure, 1973 ('CrPC', for short) and



also forwarded the victim for medical examination. On finding *prima facie* materials against the appellants, the IO laid charge sheet against the accused, including the appellants under Sections 341/366-A IPC.

4. On appearance of the accused, copies were furnished and this case was committed for trial. At the commencement of trial, a formal charge under Section 366 A IPC was framed and read over and explained to the accused appellants, to which they pleaded not guilty and claimed to be tried.

5. To connect the accused to the crime, the prosecution adduced the evidence of 11 witnesses, including the Medical Officer ('MO' in short) and the IO. The defence cross-examined the witnesses to refute the charges, but did not adduce any evidence. To the incriminating circumstances against them, several questions were asked to the appellants under Section 313 (1) (b) of the CrPC and the appellants took the plea of total denial.

6. The learned counsel for the appellants laid stress in his argument that an offence under Section 366-A IPC cannot be brought down to Section 366 IPC as the ingredients to prove Section 366-A IPC is not similar to the ingredients of Section 366 IPC. There is no allegation of any specific act of rape against the accused/appellants herein. The learned trial Court committed a grave error in convicting the appellants.

7. Per contra, the learned Additional Public Prosecutor has supported the decision of the learned trial Court.

8. It was held by the learned trial Court that the victim's (PW-5) evidence is supported by the evidence of PW-1 and PW-2. It was also held that the statement of the victim under

Section 164 CrPC is consistent to what she depicted before the IO. It was held that no effective cross examination was carried out to the effect and the victim withstood the test of cross examination. Just because, the victim was compelled to take a photograph with A-1, it cannot be held that the victim was a consenting party. It was held by the learned trial Court that the established circumstances wholly rules out any other reasonable hypothesis of the innocence of the accused and the chain of circumstances is so complete so as to rule out any reasonable possibility of false implication and the circumstances which are established by the prosecution leads to the conclusion regarding the culpability of the accused. Although charges were not framed under Section 366 IPC, the learned trial Court went ahead and convicted the appellants under Section 366 IPC. It is also averred that the charges were framed under Section 366-A IPC and the appellants were not heard on the charges under Section 366 IPC and without hearing them on such charges, they were erroneously convicted under Section 366 IPC, an offence which is not similar to the offence under Section 366-A IPC.

9. Now, the question that falls for consideration is that whether the learned trial Court erred by convicting the appellants under Section 366 IPC.

10. To decide this case in its proper perspective, the evidence is once more re-appraised. The informant testified as PW-1 that on 26.03.2008, his daughter left for school at 09:30 am and did not return home. His daughter was a student of Class-X at that time and she was only 16 years old. He frantically searched for his daughter and he learnt that on that day, his daughter did not even attend school. A boy named Subhash Kalita (since deceased) informed him that Dhiraj (A-1) took away 'X' in an Ambassador car. He then lodged the ejahar (FIR) with the Police. The ejahar was written according to his narrative and he affixed his signature on the FIR. He proved his signature as Exhibit- 1 (1). He identified the signature of the Scribe



Hitesh Rabha as Exhibit- 1 (2), as he is acquainted with the signature of the Scribe. After three days, his daughter was found along with A-1 and A-2 in a house at Bijoy Nagar and they were caught and brought from the house. When confronted, his daughter informed him that while she was proceeding towards her school, A-1 took her away in an Ambassador car, but his daughter did not disclose with what intention A-1 had taken her away.

11. In his cross-examination, PW-1 stated that his daughter once failed in Class-VI. He also admitted that he lodged the ejahar (FIR) on 29.03.2008.

12. The delay in lodging the FIR casts a shadow of doubt over the veracity of PW-1's evidence. What took him so long to lodge an FIR if his daughter was kidnapped. He stated in his evidence-in-chief that one boy named Subhash Kalita informed him that his daughter was taken away by A-1, but even after three days, he did not mention the name of Dhiraj, A-1 in the FIR, despite being informed on the same day by Subhash Kalita that A-1 had taken away his daughter in an Ambassador car.

13. PW-1's wife-say Z deposed as PW-2 that about two years ago, one day her daughter X left for school, but did not return. At that time, her daughter was a student of Class-X and she was 17 ½ years old. After a frantic search, she learnt that her daughter did not even reach the school on the day of the incident. After 4 days, her daughter was rescued by the Police from a house at Kukurmara. When they confronted their daughter, she informed them that A-1 had forcibly taken her away in a vehicle.

14. This witness vehemently denied that her daughter had an affair with A-1. She admitted in her cross-examination that her marriage was solemnized about 22 years ago and after

about a year and a half, she was blessed with 'X'. The learned counsel for the appellants laid stress in his argument that if PW-2 was married about 22 years ago and if 'X' was born after a year and a half, then 'X' was not a minor at the time of the incident, because the incident allegedly occurred on 26.03.2008 and this witness deposed in the Court on 10.02.2010. These arguments of the learned counsel for the appellant is not relevant to this case, because the fact that the victim 'X' was not a minor at the time of the incident has not been disputed and the appellants were convicted under Section 366 IPC.

15. The victim 'X' testified as PW-5 that on 26.03.2008, at about 09:30 am, she was proceeding to Hekera Higher Secondary School and on the way due to mechanical breakdown of her bicycle, she was waiting and meanwhile, A-1 arrived in an Ambassador Car and he assured her that he would drop her near her school. She got into the car and left her bicycle in front of a shop under lock and key. On the way, A-1 offered her betel nut and as soon as she ate the betel nut, she experienced giddiness and became unconscious. She regained her senses in the evening and she found herself confined in a room in a house and she also noticed two other boys. She identified the other two boys, A-2 (Mani Baishya) and Manash Baishya. She was confined in the room for three days. During her confinement, the appellants as well as the other accused, Manash Baishya took her to a nearby studio and clicked her photographs with Dhiraj (A-1) and compelled her to write love letters addressed to Dhiraj (A-1), expressing her love and affection. After a couple of days, her parents recovered her with the help of the Police. She narrated about the incident to her parents. She was examined by a doctor and her statement was recorded by a Judicial Officer. This witness proved her statement under Section 164 CrPC as Exhibit -2 and her signatures as Exhibit- 2 (1) and 2 (2).



16. The evidence of this witness PW-5 belies the evidence of her mother, PW-2, who stated in her cross-examination that her daughter's bicycle was lying on the road, whereas PW-5 stated in her evidence-in-chief that she left her bicycle in front of a shop under lock and key. The evidence of PW-5 appears to be far-fetched and sketchy. It is not plausible that three boys will make her write love letters expressing her love for one person. It is also not fathomable that after confining the victim in a room, three boys would be able to take her to a nearby studio to click photographs of the victim with the main accused, A-1.

17. In her cross-examination, PW-5 stated that she was acquainted with Dhiraj since her childhood. She, however, denied that she had a love affair with Dhiraj, A-1 since 2006. She also vehemently denied that when her parents learnt about her love relationship with the appellant Dhiraj, they decided to send her to Kokrajhar and so she eloped with Dhiraj, A-1 on the date of the incident. She admitted that Exhibit-A was her photograph with Dhiraj and Exhibit-B was a letter written by her to Dhiraj, A-1. She denied that her photograph with Dhiraj and the letter addressed to Dhiraj was written before she was allegedly kidnapped by Dhiraj, A-1.

18. Except her parents, the other witnesses did not support the evidence of PW-5. Jadu Baishya deposed as PW-3 that the victim is his niece. During the month of March, 2008, the victim went to her school and did not return. They searched for the victim and then, Mani Baishya, A-2 admitted that the victim was confined somewhere. The victim was recovered with the help of the Police, but he did not know from where the victim was recovered. After recovery 'X' informed them that Dhiraj (A-1), Mani (A-2) and Manash Baishya took her to Kukurmara.

19. PW-3, however, did not implicate that the victim was kidnapped and confined by the accused/ appellants. PW-4, Durgeswar Baishya also did not mention the name of the person in whose house the victim was allegedly confined. The owner of the house, where the victim was allegedly confined was an important witness, but the prosecution failed to produce the owner of the house as a witness. Thus, it is noticeable that the evidence is bristled with discrepancies.

20. It has to be borne in mind that PW-3 is the victim's uncle, but he refrained from incriminating the accused, including the appellants.

21. Another witness, Durgeswar Baishya deposed as PW-4 that the victim was found missing, about two years back. They searched for her and received information that the victim was confined in a village at Kukurmara. They recovered the victim from Kukurmara with the help of the Police. He did not ask the victim how she had reached Kukurmara.

22. Thus, the evidence of PW-4 does not at all, implicate that the appellants are complicit.

23. PW-6 was the local Gaonbura at the time of the incident. PW-6, Khagen Kalita testified that about 2 years ago, the victim's father informed him that victim did not return home from school. He advised the victim's father to lodge an FIR with the Police. Later on, he learnt that the appellants along with Manash Baishya kidnapped the victim and she was rescued from Chapartari. When they confronted the victim, she did not disclose about any incident.

24. Thus, the evidence of PW-6 also does not at all implicate that the appellants are complicit. Witnesses, Munindra Sarkar, who deposed as PW-7 and Smt Sumitra Das, PW-8 denied any knowledge about the incident.

25. Smt Sonali Das Kalita deposed as PW-10 that she was a student of Class-VII in Hekera Higher Secondary School and the victim 'X' was a student of Class-X in the same school. She heard that the victim was taken away by somebody, but she did not know the names of the persons, who had taken away the victim 'X'.

26. The Medical Officer, Dr. Richa Pandey, testified as PW-9 that on 29.03.2008, she examined the victim 'X' in connection with this instant case and found the following:-

“ *****

(14) Hymen intact. Area adjoining labia minora in the lower boarder congested, red and tender.

(15) Orifice admits tip of one finger with difficulty.

(16) Vagina healthy.

(17) Cervix- healthy

(18) Uterus not palpable

Opinion – Evidence of venereal disease not detected clinically.

2) Evidence of injury on her body or private part not detected, except the congestion at the lower end of labia minora.

3) Vaginal smear was taken on glass slide from posterior fornix and in an around the cervix.

4) On radiological examination skiagram No. R 48 dated 31.03.2008

1) X-Ray writ Joint epiphyseal union of bones are almost completed around the joint. Lower end of radius and ulna not yet united.

2) X-Ray elbow joint-epiphyseal union of bones complete around the joint.

3) X-Ray shoulder joint-epiphyseal union of bones almost complete around the joint. Epiphyseal union of bones around the acionial and upper end of humerus not

yet completed.

4) X-Ray pelvic bone-epiphyseal bone are not complete. Report was made by Dr. N C Das, Deptt. Of Radiology.

Result of laboratory investigation

Vaginal smear did not show the presence of spermatozoa or gonococci.

Opinion- On the basis of physical examination, radiological examination and laboratory investigation done on Nayantara Baishya, the opinion is that: –

- 1) Her age is above 14 years and below 16 years.*
- 2) Mark of violence present over her private part as described.*
- 3) There is no evidence of sexual intercourse on her person.”*

27. The Medical Officer proved the Medico-legal report as Exhibit-3 and Exhibits- 3 (1) 3 (2) and 3 (3) as her signatures.

28. Reverting back to the evidence of this case on hand, the Exhibits- A and B clearly depict that the victim had taken a picture with A-1 and the victim had also written a letter addressed to the appellant, A-1. She has not denied her signatures and she has also not denied her picture, but she has vehemently denied that she took the picture on her own volition and voluntarily wrote the letter. She stated that she was compelled to write the letter and click the picture by the accused appellants. This statement of the victim is not worthy of credence. After scrutinizing the oral and the documentary evidence, it is held that the appellants deserve a benefit of doubt. The Medical Officer's evidence that the victim was below 16 years and above 14 years, if believed, then the benefit of two years on the higher side is given to the appellants, considering the facts and circumstances of this case. It is significant through the Medico-legal report that the hymen of the victim was intact, except congestion at the lower end of 'labia minora'. The doctor's opinion also reflects that there was no evidence of

sexual intercourse on examination of the victim. The argument of the learned Additional Public Prosecutor that the victim was sexually assaulted by the A-1 has not been proved beyond a reasonable doubt. The victim has herself not stated that she was sexually assaulted by any of the appellants or accused. There is no evidence that the appellants compelled the victim to marry any person against her will or compelled her to illicit intercourse. The learned trial Court has indeed erred while convicting the appellants under Section 366 IPC.

29. The IO, Sri Bireswar Chutia, deposed as PW-11 that on 28.03.2008, while serving as In-charge at Boko Police Station, he received the FIR lodged by the complainant about his missing daughter. He registered GD Entry No. 311 dated 28.03.2008 and went to the place of occurrence. He recovered the victim from the house of Hemen Kumar Das, along with the accused, Dhiraj Kumar Das (A-1) and Mani Kanta Baishya (A-2), while another person, Manash Baishya fled away. He, thereafter, returned along the victim and the two apprehended accused to the Boko Police Station on 29.03.2008. On that day, the OC of Boko PS, received a formal FIR from the complainant-Y and registered Boko PS Case No. 83/2008 under Section 366-A IPC and entrusted him with the investigation. He proved the signature of the OC, Gautam Chakraborty, as Exhibit-1(3). He recorded the statements of the witnesses and prepared the sketch map of the place of occurrence. He proved his signature on the sketch map as Exhibit- 4 (1). On completion of investigation, he submitted charge sheet against the accused persons under Section 366-A IPC. He proved his signature on the charge sheet as Exhibit – 5 (1).

30. It has surfaced from his evidence that the victim was found along with the accused (appellants) in the house of the Hemen Kumar Das. The prosecution failed to produce Hemen

Kumar Das as a witness which casts a shadow of doubt over the evidence adduced by the prosecution. The IO has not even indicated through his evidence that the victim was confined in the house of Hemen Kumar Das by the accused. It is manifest that this is the reason why Hemen Kumar Das was not made an accused in this case, despite the fact that the victim was found in the house of Hemen Kumar Das. There is not a whisper in the evidence of the IO that the victim was confined by the appellants in the house of Hemen Kumar Das. The IO, PW-11 in a casual manner mentioned in his statement that he found the victim along with A-1 and A-2 in the house of Hemen Kumar Das. The cross-examination of the IO is not noteworthy.

32. To prove the offence under Section 366 IPC, the prosecution has to prove that-

- i) the victim was kidnapped or abducted,
- ii) with intent that she may be compelled,
- iii) or knowing it to be likely that she will be compelled,
- iv) to marry any person against her will,
- v) in order that she may be forced or seduced to illicit intercourse,
- vi) or knowing it to be likely that she would be forced or seduced to illicit intercourse.

33. In the instant case, there is not a whisper in the evidence that the victim was sexually assaulted. The victim, PW-3 herself did not implicate that she was sexually assaulted by any of the appellants. When confronted by PW-6, the victim kept mum. She tried to implicate that she was offered betel nut and then she experienced giddiness. The appellant, A-1, however, denied in his statement under Section 313 CrPC that he offered betel nut to the victim or took

her in an ambassador car. The victim's evidence that she became unconscious after taking betel nut was not substantiated by the evidence of her parents, PW-1 and PW-2. The statement of the victim under Section 164 CrPC does not at all substantiate her evidence. The victim in her evidence-in-chief deposed elaborately how she he was offered betel nut and how she was taken by the appellant in an ambassador car and, thereafter, how she regained her consciousness in the evening. She also described how she was confined in a room by the appellant and two of his accomplices for three days. She also described how she was taken to a nearby studio and clicked photographs with A-1 and how she was compelled to write a love letter to A-1 and so on and so forth. However, in her statement under Section 161 CrPC proved as Exhibit-2 (1), the victim stated that the day she was taken by A-1 and A-2 in an ambassador car, she became unconscious and later she learnt from her father that she was taken to Kukurmara and kept in a house for three days. Except the evidence of the victim that she was forcibly taken by three boys and confined in a house, the remaining part of the evidence-in-chief of the victim is not substantiated by her statement under Section 164 CrPC. It is intriguing to notice that the victim's father, PW-1, stated that while she was proceeding to the school A-1 took her in an ambassador car. PW-1, being the complainant, he did not at all implicate that A-1 and A-2 forcefully took away his daughter and kept her confined in the house with intent to marry her or to seduce her to illicit intercourse. It would apt to reiterate that the person in whose house, the victim was allegedly confined for three days, was also not examined as a witness or not made an accused in this case. The other witnesses PW-3, 4, 6, 7 and 8 also did not support the victim's case.

34. The learned counsel for the appellant relied on the decision of Hon'ble the Supreme Court in **Bhagirath –Vs-State of Madhya Pradesh**, reported in (1976) 1 SCC 20, wherein

it has been held that-

“18. Thus from whatever angle the matter may be looked at, the prosecution had miserably failed to make out a case against the appellant. When the substratum of the evidence given by the eyewitnesses examined by the prosecution was found to be false, the only prudent course, in the circumstances of this case, left to the Court was to throw out the prosecution case in its entirety against all the accused.”

35. The Hon'ble Supreme Court in the case of **Mohd. Ali @ Guddu vs- State of Uttar Pradesh**; reported in **(2015) 7 SCC 272**, held as under:-

“Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non- examination of

the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon."

36. 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 boundan 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 CrI.A. No.110 of 2008 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.

11. From what has been discussed above, I am of the considered view that the learned Trial Judge committed manifest error by holding her to be a minor on the basis of the evidence of the doctor which obviously calls for interference in this appeal.

12. Consequently, the judgment of the learned trial court is set aside. The accused appellant is acquitted and set at liberty forthwith. Bail bond, if any, stands discharged."

37. It is thereby held that the conviction of the appellant by the learned trial Court under



Section 366 IPC is not sustainable.

38. In the wake of my foregoing discussions, the appellants A-1 and A-2 are hereby acquitted from the charges under Section 366 IPC on benefit of doubt. The judgment and order dated 29.06.2011, passed by the learned Additional Sessions Judge (FTC) No. 1, Kamrup, convicting the appellants in connection with Sessions Case No. 393 (K-G) of 2009, is hereby set aside.

39. However, keeping in view the provisions of Section 437-A CrPC, the appellants, 1) Sri Dhiraj Das and 2) Sri Mani Baishya @ Mani Kanta Bishya, are directed to furnish personal bond each in the sum of Rs. 30,000 (Rupees Thirty Thousand) only and assure the bond in the like amount before the learned trial court which shall be effective for a period of six months.

JUDGE

Comparing Assistant