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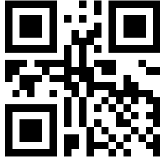

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.REV.P./250/2012

Sri Bhairab Das
S/O Sri Maheswar Das
R/O- Vill. Nij-Ghagua,
P.S. Morigaon,
District- Morigaon (Assam) ---- Petitioner

-Versus-

The State of Assam ---- Respondent

Advocate for the petitioner : Mr. A. Choudhury,
Mr. A. Tiwari,
Amicus Curiae.

Advocate for the respondent : Mr. B Sarma,
Addl. P.P., Assam.

:: BEFORE ::
HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

Date of Hearing : 09.03.2022.

Date of Judgment : 29.04.2022.

JUDGEMENT AND ORDER (CAV)

Heard Mr. A. Choudhury, learned counsel for the petitioner as well as Mr. A. Tiwari, learned Amicus Curiae. Also heard Mr. B. Sarma, learned Addl. Public Prosecutor, Assam, representing the State.

2. Facts and circumstances giving rise to the present case is that on 19.05.2009, the victim/daughter of the informant Pradip Das who is a student of Class-IX did not return home after attending school examination, at about 2.30 P.M. Her father/informant made searches of her in the school premises and came to know that the accused petitioner Bhairab Das has abducted the victim girl in a black Indica vehicle and fled away. Immediately after the occurrence, father of the victim lodged an FIR against the petitioner, which was registered as Morigaon P.S. Case No.89/2009 under Sections 366-A IPC.

3. During the course of investigation, victim girl was recovered and her statement was recorded under Sections 161 and 164 CrPC. Medical examination of the victim was done. The accused Bhairab Das surrendered before the court and after completion of the investigation, *charge sheet* was submitted against the accused petitioner under Sections 366-A/376 IPC.

4. The accused faced the trial and denied the charges framed against him under Sections 366(A)/376 IPC.

5. Trial was conducted and after recording the statement of all witnesses and considering the case in totality, the learned Assistant Sessions Judge, Morigaon in Sessions Case No.113/2009 (G.R. No.500/2009) vide order dated 15.11.2011 convicted the accused petitioner under Section 366/376 IPC. He is sentenced to R/I for 4(four) years under Section 366 IPC along with a fine of Rs.2,000/-, in default S/I for 2(tow) months. He is also sentenced to R/I for 5(five) years under Section 376 IPC and to pay fine of Rs.2,000/-, in default S/I for 2(two) months.

6. On the appeal so preferred, the learned Sessions Judge, Morigaon, in Criminal Appeal No.35/2011 upheld the judgment and sentenced passed by the learned trial court vide its

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order dated 26.04.2012.

7. Being aggrieved by the judgments and orders of both the trial court as well as the appellate court, the present revision is preferred on the various grounds, *inter alia* that the courts below has misread the provision of law and the evidence on record and thereby committed materials irregularity in passing the impugned judgments and orders; that he courts below have come to an erroneous finding in convicting the petitioner guilty under Sections 366/376 IPC; that the learned courts below failed to apply its judicious mind and based its reliance on the statement of PW1, whose statement was not even supported by any independent witness or eye witness; that the prosecution is full of contradiction which goes to the root of the case, making the version unreliable and as such the conviction and sentence are perverse to the materials on record and liable to be quashed and set aside, etc. etc. and prays for quashing and setting aside the impugned sentence and conviction and set the petitioner at liberty, after going through the materials on record.

8. The learned counsel for the petitioner primarily raised following contentions during argument –

(i) That the victim was major and the learned court had wrongly arrived at a finding that the victim was minor ;

(ii) The age of the girl was not proved by prosecution properly, and the guardian/parents of the victim, also could not proved the date of birth of their daughter/victim girl;

(iii) According to the M.O., the age of the victim is 15 to 16 years and her age can be varied by adding two years on either side;

(iv) The FIR which is on record is the second FIR and the earlier FIR that was filed is not proved. Hence, the prosecution case is doubtful;

(v) The uncorroborated testimony of the victim, even not supported by the medical officer, is not safe to rely in order to sustain conviction.

(vi) Referring to the conduct of the victim, it has been stated that she voluntarily accompanied the accused person and stayed with him for several days without any protest,

which indicates, that no offence was committed by the accused and medical evidence also does not reveal the factum of sexual intercourse upon the victim girl.

9. In support of the contention raised, the learned counsel for the petitioner has placed reliance upon the decisions of *Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir and Others, (1982) 2 SCC 538*; *Birad Mal Singhvi vs. Anand Purohit, 1988 Supp SCC 604; Satpal Singh vs. State of Haryana, (2010) 8 SCC 714* and Bimal Chandra Sarkar vs. State of Tripura, (2010) 4 Gau LR 567 and also the decisions of this Court passed in Crl.Rev.P/247/2014 and Criminal Appeal No.124(J) 2014.

10. Learned Amicus Curiae Mr. Tiwari has also urged this Court to consider the case in hand in the light of the decision in *2021 3 SCC 12, Anversinh @ Kriansinh Fatesinh Zala vs. State of Gujarat*, wherein Hon'ble Supreme Court in a similar fact situation, where the victim accompanied the accused to several places without protest, has reduced the sentence to the period already undergone by the accused.

11. Mr. Tiwari has also placed reliance on another decision in *Md. Abdul Matin Pradhani vs. the State of Assam, 2016 4 GauLJ 87*, wherein referring to the observation made by the Apex Court in *1995 SC 2169*, it has been held that where the prosecutrix is fully grown up and even she did not attain the age of 18 years, still in the age of discretion, sensible and aware of intention of the accused that she was taking away for a purpose and she did not put up a struggle or raise any alarm, and thereby appears to have taken voluntary part.

12. On the other hand, the learned Addl. P.P. Mr. B. Sarma has vehemently opposed the contention raised by the petitioner, that the victim herein is minor and a student of Class-IX, her age was duly proved by her parents as well as by the medical officer and her age has also been proved by the school authority from the school register. There is no occasion to ask for further proof as regard the age. So far as regard the decisions/citations referred by the petitioner's side, it is contended that the same is not applicable in the present case in hand, inasmuch as, there is nothing to disbelieve the statement of victim. It is stated that minor consent is no consent, even her long stay with the accused is considered.

13. I have gone through the submissions of both the parties as well as the decisions relied upon by the learned counsel for both the parties.

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14. In *Anversinh @ Kriansinh Fatesinh* (supra) and *Md. Abdul Matin Pradhani* (supra), the matters relate to the offence under Section 366 IPC and due to non-availability of adequate evidence about the age of the victim girl from guardian/parents and school certificates, the benefit of 2 years has been given to the medical opinion. As per the *Jaya Mala* case (supra), marginal of error in age ascertained by the Radiological examination, in ossification test may of two years on either side. Those cases that has been referred by the petitioner, certain benefit has been granted to the accused person there being no any ascertainment of the age of the victim from proper person/parents etc.

15. Having regard to the contention raised, let us examine the evidence on record. The victim girl/PW1, in her statement has stated that on the day of occurrence while she was returning from her school after appearing in the examination, the accused person who came in a black colour vehicle suddenly got down and caught hold of her and took her inside the vehicle and got her seated inside the vehicle and then gagged her mouth, for which she immediately became unconscious. Thereafter, she was taken to Guwahati and kept in a hotel and forcefully committed sexual intercourse with her with threatening that she will be killed with sharp weapon if he is not allowed to do the same. As she was under menstruation at that time, there was bleeding for such forceful intercourse and her clothes were stained with blood. After that as somebody rang the accused on telephone, the accused took her to different places and asked her to say that she has voluntarily come with him if anybody asked about the incident. Out of threat, she did not report anybody that she was kidnapped by the accused person and the accused who is a married man told her that he will marry her and if she refuses, she will be killed. The accused even put vermilion upon her forcefully and took joint photograph and also obtained her signature on various papers.

16. Thus, the victim in her statement has stated that she was kidnapped from the road while she was returning from the school and by keeping her in different places, the accused petitioner forcefully committed sexual intercourse upon her with threatening. She nowhere indicated that she had any acquaintance with the accused person since earlier and she voluntarily accompanied the accused. She was picked up from the road, took her in a vehicle taking all the precaution that she may not make hue and cry. Her statement also reveals that she turned unconscious on such sudden abduction by the accused and on subsequent

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occasions she was put under threat while committing rape upon her. In her cross-examination also she has stated that due to such constraint threat by the accused petitioner, she made no report to other persons where she was kept concealed. It can be inferred that such a school going girl student of tender age can be overpowered by threat by a matured person. Admittedly, the accused petitioner is a married person having two children and he lured and induced the victim, not to report the matter to anybody with an assurance that he would marry her despite he is a married man. Simultaneously, he also threatened the victim girl with dire consequences if he is not allowed to indulge such sexual activities. Her evidence while put to cross-examination remained unshaken and no any material contradiction has been proved to check the veracity of her statement. In the given facts and circumstances, her long stay with the accused petitioner cannot be considered as a valid consent in the parlance of law.

17. So far as regard the supporting witnesses, it is to be noted that PW5 and PW6 are also the students of said school and were returning after attending the examination when they saw that the victim was taken on a black colour car/vehicle. In the sense, they are the eye witnesses to the occurrence when the victim girl was taken away in the vehicle on the day of occurrence by the accused petitioner. They, however, stated that the victim was going ahead on the road and not with them. PW6 was declared hostile by the prosecution and she has however denied any statement made before police that they saw the accused Bhairab Das getting down from the vehicle and taking the PW1 (victim girl) inside the vehicle.

18. PW7 is the driver who has stated that on the day of occurrence, police seized his vehicle as one person along with a girl went in his vehicle. He has, however, denied any knowledge about the occurrence of kidnapping.

19. Parents of the victim girl in their evidence as PW2 and PW3 have stated the same as has been revealed in the FIR that as their daughter did not return from school, they made extensive search for her and came to know that one person came on a black colour vehicle and took away their daughter from the road who was returning after attending examination. Then, they came to know that it was the accused Bhairab Das who has taken the girl. They also went to the house of the accused petitioner and asked their parents whereabouts accused and they asked them to do the needful.

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20. From the totality of the evidence, the complicity of the present petitioner is made out, which lends support to the statement of the victim girl. It also reveals from their evidence that the accused is a married person which has also been admitted by the accused himself in his statement under Section 313 CrPC.

21. In the cross-examination, it is suggested that the victim voluntarily followed the accused petitioner and there was no forceful rape, to which she denied. She has also been suggested that her age is 20 years and same is denied by her.

22. The victim as well as her parents, all of them stated that the age of the victim girl is 14 years at the time of occurrence and the learned counsel for the petitioner has contended that her age is not proved as her parents could not divulge the exact date of birth and two years can be added in view of medical report, that her age is between 15 to 16 years.

23. The evidence of CW1, Headmaster of the Ghagua School where the victim was a student, has been challenged that although he has produced the Student Admission Register, where the age of the victim girl is mentioned as 02.02.1995, but the then Headmaster of the school who entered the date of birth in the Register is not examined, so, the age of the girl was not conclusively proved. On this aspect, the learned counsel for the petitioner has relied upon the decision of *Satpal Singh* (supra), wherein it has been held that where the entry in the primary school register is not produced and proved, by examining the person who made the entry, the same cannot be taken as a proof about the entry under Section 35 of the Evidence Act. It has been held that entry made in the official record by an officer or the person authorized in performing of an official duty is admissible under Section 35 of the Evidence Act. But the party may still ask the court/authority to examine the probative value. The authenticity of entry would depend as to on whose instructions information/entry stood recorded and what was the source of information. Thus, entry in the school register/certificate requires to be proved in accordance with law. However, in the said decision, it has been held that if the prosecution establishes that there is no consent, issue of majority became irrelevant.

24. Having regard to the challenge so made by the petitioner's side as regard the entry in the school register, I have given due consideration to the evidence given by CW1. In his

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evidence, he has produced the School Admission Register from 2001 to 2005 and 2008 to 2009 and has certified that as per school register, in the year 2009, victim was a student of Class-IX and her date of birth was 02.02.1995 as per the L.P. school certificate produced at the time of admission vide Ext-5. He knows the parents of the victim girl who are PW2 and PW3 and as regard the entry in the L.P. School register. He has also proved the signature of the then Headmaster of the school in the register, whose signature is known to him as he worked together for 27 years. Obviously, he has duly proved the signature of the Headmaster of the concerned school about the entry of date of birth of the victim. There appears nothing to discard and disbelieve the evidence of CW1 and the relevant register.

25. On the other hand, both the parents have specifically stated that the age of the victim girl was 14 years at the time of occurrence and although the father of the victim could not disclose the exact date of birth of the victim girl but her mother has specifically stated that their daughter's victim girl) date of birth is 02.08.1995. Although exact age does not tally with the school register but it reveals that the victim born in the year 1995 and the occurrence took place on 19.05.2009, which obviously speaks that the victim is 14 years few months at the time of occurrence and she is not at all major. The medical officer has also opined that the age of victim girl is 15 to 16 years. On the basis of the report of Radiologist, he has however stated that the age of the victim girl is below 18 years. Thus, so far as regard the age of the victim can be held that she was minor at the time of occurrence and there is no doubt about it.

26. The prosecution case does not solely depend upon the evidence of medical officer to prove the age of the victim but her age has been proved by her parents as well as the school authority. So, the medical evidence which is mere opinion cannot prevail over and above the other evidence on record.

27. In her evidence, the victim has narrated in detail that how the accused took her from place to place changing the address so that the people could not reach them. He used to commit rape upon her by showing of threat and sometimes some allurement. It was the accused petitioner who took her from the road and not that the victim herself went with him voluntarily. In such sequence, even if she was with accused for 14 days, it will yield no any consequences to rescue the accused person. The accused being a married person having

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children has kidnapped a girl with a false assurance that he will marry her subject to allowing him to continue such sexual conduct and victim has no such maturity to gauge the evil design of accused.

28. So far as the consent is concerned, in *Satpal Singh* (supra), it has been held that a woman has given consent only if she has freely agreed to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by the another and concurred in by the former. An act of helplessness in the face of inevitable compulsions is not consent in law. More so, it is not necessary that there should be actual use of force. A threat of use of force is sufficient.

29. Further, it has been held that concept of consent in the context of 375 IPC has to be understood differently, keeping in mind the provision of Section 90 IPC, according to which consent given under fear/coercion or misconception/mistake of fact is not consent at all. The scheme of Section 90 IPC, is couched in negative terminology. Consent is different from submission

30. In the given case, the victim was kept under threat and compulsion to stay with the accused petitioner, which cannot be termed as a consent within the purview of Section 90 IPC. Even if she is held to be major also, such a consent itself immaterial.

31. In view of the facts and circumstances coupled with the tender age of the victim girl, she cannot be blamed for her conduct, who stayed with the accused petitioner for several days under compelling circumstances. The accused petitioner has drawn the victim out of the custody of her parents and there is nothing to suggest that she possessed the mental acuities and maturity to protest against the conduct of the accused and consent of minor would be no defence to a charge of kidnapping and rape.

32. So far as regard the challenge to the FIR, it is found that the PW5/FIR writer as well as the investigating officer have clearly stated that in the earlier FIR as there was no signature of the informant so the second FIR was filed by obtaining his signature. Nothing to reflect that both the FIR was different in the context and complicity.

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33. In the given facts and circumstances, the benefit that was given in the *Anversinh @ Kriansinh Fatesinh Zala* and *Md. Abdul Matin Pradhani* (supra), cannot be bestowed upon the accused petitioner. Even though there is provision of reduction to award punishment under Section 366 IPC, but the punishment cannot be reduced beyond the minimum statutory punishment under Section 376 IPC.

34. The accused petitioner in his statement recorded under Section 313 CrPC, has not replied any of the circumstances that has appeared against him and made no any statement save and except mere denial.

35. Object behind recording statement u/s 313 CrPC, is to afford an opportunity to the accused personally to explain any circumstances appearing in the evidence against him at the trial. In case statement u/s 313 CrPC consists of inculpatory part accompanied by explanatory part and two cannot be separated if there is an admission of certain facts u/s 313 CrPC that can be acted upon within the parameters of Sec. 58 Evidence Act. [(Ref: 1. Subhash Chand Vs. State of Rajasthan, (2002) 1 SCC 702 (Three-Judge Bench and 2. Parsadi Vs. State of UP, 2003(47) ACC 153 (DB)].

36. Examination of accused u/s 313 CrPC is not mere a formality. Answers given by the accused to the questions put to him during such examination have a practical utility for Criminal Courts. Apart from affording an opportunity to the delinquent to explain incriminating circumstances against him, they would help the court in appreciating the entire evidence adduced in the court during trial. [(Ref: (i) Parminder Kaur Vs. State of Punjab, (2020) 8 SCC 811 (Three- Judge Bench) and (ii) Rattan Singh Vs. State of Himachal Pradesh, AIR 1997 SC 768)].

37. It is held in *(2010) 8 SCC 249, Sanatan Naskar and Another vs. State of West Bengal*, that the answers by an accused under Section 313 CrPC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 CrPC is wide and it is not a mere formality.

As already noticed, the object of recording the statement of the accused under Section 313 CrPC is to put all incriminating evidence to the accused so as to provide him an

opportunity to explain such incriminating circumstances appearing against him in the evidence of prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and, besides ensuring the compliance therewith, the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements mad are false, the court is entitled to draw adverse inferences and pass consequential orders as may be called for in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in a case. The provisions of Section 313(4) CrPC explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

38. It has been held in *Phula Singh Vs. State of Himachal Pradesh, AIR 2014 SC 1256* (para

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6) and *Surya Baksh Singh Vs. State of UP, 2014 (84) ACC 379 (SC)* that the accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the Court, then the accused may choose to maintain silence or complete denial, when his statement under Section 313 CrPC is being recorded. However, in such an event the Court would be entitled to draw an inference including such adverse inference against the accused as may be permissible in accordance with law.

39. Further, in *Dharnidhar vs. State of U.P., 2010 (6) SCJ 662* and *Mohan Singh Vs. Prem Singh, 2003 CrLJ 11 (SC)*, it has been held that it is settled principle of law that the statement of an accused made u/s 313 CrPC can be used by the court to the extent it is in line with the case of the prosecution and the case of prosecution can be substantiated and treated as correct by the court to that extent.

40. In *Sujit Biswas vs. State of Assam,* reported in *2013 (12) SCC 406* , the Hon'ble Supreme Court held that it is obligatory on the part of the accused while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to incriminating circumstances associated with him. The Court must take note of such explanation even in case of circumstantial evidence so as to decide whether chain of circumstance is complete.

41. In the instant case, the accused has simply denied the questions put to him under Section 313 CrPC and offers no any explanation as to under what circumstances he surrenders before police, for which an adverse presumption can be drawn against him as he failed to discharge his obligation to give explanation and reply to the circumstances so appeared against him.

42. The medical report although has suggested that there is no sexual intercourse, but other findings on clinical examination where the vaginal hymen was found absent is also suggestive of such sexual intercourse. The M/O in his cross-examination has stated that when spermatozoa presents in the vaginal smear and there is evidence of fresh injury in the vaginal part, then it is recent sexual intercourse. The victim was kidnapped on 19.05.2009 and her medical examination was done on 03.06.2009, and as such, finding of no sign of recent

sexual intercourse will not negate the entire prosecution case.

43. In view of the findings and discussions above as well as the legal proposition, it can be held that the prosecution has been able to establish the charges against the accused/petitioner herein and nothing appears which may call for interference.

Resultantly, the revision petition stands dismissed. The petitioner will surrender before the learned court below to serve the sentence.

Return the LCR.

JUDGE

Comparing Assistant

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