



GAHC010167142021

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**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

Crl.A.175/2021
With I.A.(Crl.)459/2021

Hari Prasad Kakoti
S/O- Shri Pradip Kakoti,
R/O- Baligaon, Langhin,
Under Dokmoka Police Station,
Dist.- Karbi Anglong, Assam

.... **Appellant**

VERSUS

1: The State Of Assam And Anr.
Rep. By The P.P., Assam

2:Rumi Saikia
W/O- Shri Tulsi Saikia
R/O- Vill.- Baligaon
Langhin Under Dokmoka Police Station
In The District Of Karbi Anglong
Assam

..... **Respondents**

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant	:	Mr. T. Deuri
Advocate for the Respondents	:	Ms. S.H. Bora, Addl. P.P.
Date of Hearing	:	14.03.2023
Date of Judgment	:	08.06.2023

JUDGMENT & ORDER (CAV)

1. Heard Mr. T. Deuri, learned counsel for the appellant and Ms. S.H. Bora, learned Addl.

P.P. for the State.

2. Sri Hari Prasad Kakoti (hereinafter referred to as the accused) has preferred this appeal seeking defeasance of the judgment & order dated 03.09.2021 passed by the learned Assistant Sessions Judge in connection with Sessions Case No. 19/2011 convicting the accused u/s 376 of the Indian Penal Code (IPC for short) to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs. 10,000/- with default stipulation.

3. The genesis of the case was that on 28.02.2011 at about 11 AM, the accused kidnapped the 14 year old victim 'X' from her house. The victim's mother 'Y' found her daughter missing and set out on a frantic search and thereafter the victim's mother lodged an FIR on 01.03.2011, which was registered as Dokmoka P.S. Case No. 7/2011 u/s 366AIPC and the Investigating Officer (IO for short) embarked upon the investigation. On closure of investigation charge-sheet was laid against the accused u/s 366A/376 IPC. At the commencement of trial, a formal charge u/s 366 and 376 IPC was framed and read over and explained to the accused, who adjured his guilt and claimed innocence.

4. To substantiate its stance, the prosecution adduced the evidence of 16 witnesses including the IO and the Medical Officer (MO in short). The accused did not tender any evidence in defence.

5. On the incriminating circumstances arising against him, several questions were asked under Section 313 Cr.PC and the responses of the accused were recorded.

6. The trial court decided this case on the following points:

(1) Whether the accused person on 28.02.2011 at about 11:00 a.m., at Baligaon, Langhin under Dokmoka police station kidnapped, or abducted the victim/prosecutrix, then aged 14 years, D/o of the informant, namely, [REDACTED] from her house, with the intent that

she may be compelled (or knowing it to be likely that she will be compelled) to marry with him or any other person against her own will or in order that the said victim/prosecutrix will be forced or seduced to illicit intercourse with him thereby, committed an offence punishable u/s 366 of the Indian Penal Code?

(2) Whether the accused person on 01.03.2011 and 02.03.2011 at night, at Pub-Salmara, Phuluguri, PS: Raha, Dist: Nagaon committed rape several times upon the daughter of the informant without her consent and against her will and thereby, committed an offence punishable under Section 376 of the I.P.C.?"

7. It is submitted on behalf of the accused that there is not even a scintilla of evidence against him, to sustain conviction under Section 376 IPC. The FIR is not substantiated by the informant's deposition. In her evidence, she stated that she saw the accused taking away her daughter, whereas, it is mentioned in the FIR that while she was not at her home, her daughter was abducted. This contradiction has been overlooked by the learned trial Court. The victim's evidence as PW-2 clearly depicts that she stayed in the accused person's uncle's house for three days, but there is no evidence that she raised alarm or resisted forceful sexual assault by the accused, which clearly depicts that the victim was a consenting party. Allegedly the PW-1 saw the accused taking away her daughter, but it took her two days to lodge the FIR without explaining any reasons of delay. Many witnesses have stated that there was a love affair between the accused and the victim. The victim's father as PW-5 has also stated that when he went along with the police to recover his daughter, he found his daughter living with the accused as his wife.

8. The DW-1 has also stated that the victim was staying with the accused as his wife. It is submitted that the learned trial Court overlooked the fact that the doctor has not given valid reasons as to how he came to a finding that the victim was 18 years old. The prosecution has also not produced any school certificate relating to the age of the victim or to substantiate its

stance that the victim was a school going girl. The medico legal report reveals that no evidence of sexual intercourse was detected on examination of the victim. The next door neighbour, PW-4 has candidly stated that the victim 'X' and the accused had a love affair and so on and so forth.

9. Per contra, the learned Addl. P.P. has submitted that the victim, being a girl under 18 years of age cannot consent to a marriage. The accused is indeed guilty of offence under Section 376 IPC. The conviction and sentence is indeed appropriate.

10. On the anvil of the rival submissions, the question that falls for consideration is that whether the trial Court erred in convicting the accused.

11. To decide this case in his proper perspective, the evidence has to be reappraised.

12. The informant's wife has testified as PW-1 that the incident occurred on 28.02.2011 at about 11.00 a.m. She was returning after dropping her younger daughter at Mount Everest English School. At that time, her daughter (victim) was proceeding towards her school namely, Mount Everest English School. She saw the accused taking away her elder daughter on his motorcycle. Her daughter raised alarm. The public had also informed her that her daughter had been forcefully taken away by the accused on his motorcycle. She then went to the accused person's house and informed the matter to his parents, but his parents ignored her. At the time of the incident, her daughter was a student of Class-XI and she was only 14 years of age. She lodged the FIR with the police. She has proved the FIR as Exhibit-1 and her signature on the FIR as Exhibit-1(1). Her daughter was recovered with the help of the police from the uncle's house of the accused at Salmara in Nagaon district. The victim was brought to the Dokmoka P.S. and she was handed over to their custody. The victim informed her that

the accused forcefully took her to Salmara and had committed sexual assault on her.

13. The PW-1 has however admitted in her cross-examination that her daughter had a love affair with the accused at the time of the incident. She also stated that the accused kept her in his uncle's house.

14. The victim 'X' has testified as PW-2 that the incident occurred on 28.02.2011 at about 9.30 a.m. She was a student of class-IX at Mount Everest School at the time of the incident. She was on her way to her school, when the accused forcefully picked her up on his motorcycle from the road side and took her to his uncle's house in a village at Nagaon. She raised alarm, but nobody came to her rescue. Thereafter, the accused kept her in confinement in his uncle's house for two days and he committed rape on her. She further deposed that the accused forcefully had sexual intercourse with her for about 4 to 5 times. Subsequently, her father recovered her with the help of the police and brought her back to Dokmoka P.S. and thereafter, the accused was arrested. She proved her statement under Section 164 Cr.P.C. as Exhibit-2 and Exhibit-2(1) as her signature. She has also testified that she was not married.

15. In her cross-examination, PW-2 has denied the suggestion that she did not raise alarm, when the accused took her on his motorcycle. She has denied that she had a love affair with the accused person.

16. The statement of this witness is contradictory to the statement of her mother who has admitted that her daughter, 'X', had a love affair with the accused. The accused has also admitted in his statement u/s 313 Cr.P.C that he did not kidnap the victim 'X', but he took her on his motorcycle to his uncle's house. He has also stated that he has been falsely implicated.

He has adduced defence evidence.

17. The DW-1, Smti Bharati Deka has testified that one day in the year, 2011, the accused came to their house with the victim 'X'. The victim was wearing vermilion on her forehead and she was also carrying a bag with her. The accused and the victim informed her that they got married in a temple, after victim 'X' eloped with the accused. That night at about 3.00 a.m. the police came to their house and they handed over 'X' to the police. This witness has also denied that the accused forcefully committed sexual assault on 'X'.

18. Another witness Shri Rajib Laskar has testified as DW-2 that the victim 'X' was their neighbour and she had a love affair with the accused since, 2002. The accused and 'X' eloped in the year 2011. They went to the accused person's uncle's house at Nagaon.

19. Thus, it is clear from the evidence of DW-1 and DW-2 that the accused went to DW-1's house along with the victim. There is not even an iota of doubt that the victim had a love affair with the accused. The uncontroverted evidence of PW-11 clearly reveals that the accused and the victim had a love affair. Shri. Jiten hazarika has testified as PW-11 that the incident occurred in the year, 2011. The accused had a love affair with the victim and eloped with her.

20. PW-4 has also testified in his cross-examination that the victim 'X' had a love affair with the accused. Shri Chandra Laskar has testified as PW-4 that his house is adjacent to the informant's house. The incident occurred about 6/7 years ago. The accused took away 'X'. The victim 'X' was around 14 to 15 years old, at the time of the incident. Later, both the accused and the victim were recovered and the informant lodged the FIR with the police at Dokmoka P.S. He has admitted in his cross-examination that he was aware of the fact that

the victim had a love affair with the accused.

21. It is thus apparent that not only the defence witnesses but even the prosecution witnesses, PW-4 and PW-11 including the informant PW-1 has admitted that the victim had a love affair with the accused.

22. Another witness Smt Rashmi Rekha Laskar has testified as PW-13 that at the time of the incident, she was a student of class-VIII. She saw 'X' riding on the accused person's motorcycle as a pillion rider. She was in the courtyard of her house and the victim 'X' waved her 'bye bye'. This witness has however stated in her cross-examination that she did not know if 'X' had a love affair with the accused at the time of the incident.

23. The evidence of PW-13, however transpires that 'X' at times used to ride on the accused person's motorbike.

24. The Medical Officer's evidence clearly reveals that the victim did not sustain any injury. Dr. Deba Kumar Dewri Bhorali has testified as PW-6 that on 03.03.2011, he was posted at Diphu Civil Hospital as Medical Officer. On that day, he examined the victim and found the following:-

No. 1, the girl age is below 18 years.

No. 2, No evidence of recent sexual intercourse.

No. 3, No injury detected on her body.

He proved his medico legal report as Exhibit-3 and Exhibit-3(1) as his signature.

25. The victim has stated that she was sexually assaulted by the accused four or five times but no injuries were detected on her examination by the doctor. The incident occurred on

28.02.2011. After the alleged abduction, the victim 'X' was allegedly assaulted 4 or 5 times by the accused on 01.03.2011 and 02.03.2011, but when she was examined by the doctor, no injuries were detected. No evidence of recent sexual intercourse was also detected when 'X' was examined by the doctor on 03.03.2011. It is thereby held that the victim's evidence does not inspire confidence.

26. *In the case of **Dola @ Dolagobinda Pradhan and another (2018) 18 SCC 695**, the Hon'ble Supreme Court acquitted the appellant as the story of the prosecutrix was found to be improbable to convict the accused, more so, when medical evidence of rape was found to be lacking.*

27. The evidence of the informant also does not inspire confidence. The FIR marked as Exhibit-1 clearly reveals that in her absence, her daughter was kidnapped by the accused on 28.02.2011 at about 11.00 a.m. Her evidence in the Court is apparently an improvement over her FIR. When she adduced her evidence as PW-1, she stated that she saw the accused forcefully taking her daughter and her daughter was raising hue and cry.

28. The learned counsel for the accused emphasised through his argument that the statement of the victim under Section 164 Cr.P.C is contrary to her evidence in the Court. She has not stated under Section 164 Cr.P.C. that she had raised alarm when the accused took her on his motorcycle. Initially, the accused took her to his friend's father-in-law's house and on the next day, he took her to his uncle's house. The evidence of the victim also does not at all implicate that accused forcefully confined her in his uncle's house. There is no evidence that the victim tried to escape, which insinuates that the victim must have been a consenting party. A scrutiny of the medico legal report marked as Exhibit-3 also clearly depicts that the



Medical Officer as PW-6 has not assigned any valid reasons why the victim's age was found to be below 18 years. The victim's age is thus not clear. Assuming the age of the victim 'X' to be below 18 years, the accused will get the benefit of two years on the higher side of 18 years.

29. Shri. Prabin Chandra Hazarika, is the informant's elder brother. He has stated as PW-3 that the incident occurred on 28.02.2011. The accused kidnapped the victim while she was proceeding towards her school. He was at Howraghat at that time, when he received the message about the incident, and he came to the informant's house and they set out on a frantic search, and then they learnt that the accused took away the victim to his sister's house at Salmara in Nagaon district and the informant lodged the FIR with the police at Salmara O.P. under Dokmoka P.S. The police recovered the accused and the victim from the aforesaid house. At the time of the incident, the victim was below 18 years of age.

30. The PW-3 has not stated that the accused committed sexual assault on the victim. Although, he is the informant's elder brother, he has not incriminated the accused. He has also admitted in his cross-examination that he did not know if there was a love affair between the accused and the victim.

31. The PW-5 is the victim's father. He has testified that the incident occurred on 28.02.2011. He was in Delhi at the time of the incident and his wife informed him, over phone at about 11.00 a.m. that the accused kidnapped his daughter during her absence in her house. His daughter was 14 years old at the time of the incident. When his wife could not trace out his daughter, she lodged the FIR. On the following day, he returned to his house. On the 3rd day of the incident, the police recovered his daughter from Phuluguri and brought her to Dokmoka P.S. He had also accompanied the police to Dimaruguri. When he confronted

his daughter, she informed him that the accused kidnapped her when she was on her way to her school and she had stayed with the accused as his wife for three days. He has admitted in his cross-examination that he did not know whether his daughter had a love relationship with the accused. At present his daughter is married and she is blessed with a son. His daughter got married in the year 2015. He has denied the suggestion that 3/4 months after the incident, his daughter eloped with another boy.

32. It is pertinent to mention at this juncture that even the victim's father did not implicate that the accused forcefully committed sexual assault on his daughter. He has just stated as a passing remark that his daughter stayed with the accused as his wife. This may also mean his daughter had willingly stayed with the accused as his wife. Doubt creeps into one's mind when the victim's father hesitates to incriminate the accused.

33. PW-1's brother also did not incriminate the accused. Shri Prahalad Hazarika, testified as PW-7 that the complainant is his sister. In the year, 2011, his daughter told him that victim 'X' went to school but did not return and so his sister initiated this case against the accused, who took 'X' to some place not known to her. Then after 2/3 days, the police recovered the accused and the victim and brought them to the police station. Now, the victim is married to another person named Gopal. This witness has also categorically stated that he did not know if the victim had any love affair with the accused.

34. Another witness who has not implicated the accused with the offence of rape is PW-8. Smti Tarala Hazarika testified as PW-8 that on 28.02.2011, the complainant came to her house and informed her that her daughter was missing and then she along with the complainant and some other villagers set out on a frantic search. Then the complainant filed

his case. The complainant later told her that the accused kidnapped her daughter. Thereafter, the police recovered the accused and the victim and brought them to the police station. She also stated that she did not know if the accused had a love affair with the victim.

35. It is thus clear from the evidence of the witnesses that the victim was not abducted by the accused. Several witnesses including the complainant have stated that the victim had a love affair with the accused. The complainant herself has admitted that the victim had a love affair with the accused. Apart from the complainant and the victim, not a single witness have incriminated that the accused forcefully committed rape on the victim. It cannot be ignored that 16(sixteen) witnesses have been examined and except the victim and her mother, not a single witness have deposed that the accused committed rape on the victim. The evidence of PW-11, PW-13, DW-1 and DW-2 clearly reveals that the victim eloped with the accused on her own volition. The informant's evidence also does not at all inspire confidence, although, she has testified that she saw the accused taking away her daughter 'X'. On the contrary, she has mentioned in the FIR that the accused took away her daughter in her absence. This major contradiction thwarts the informant's (PW-1's) evidence. Her husband has also stated as PW-5 that he was informed by his wife that the accused took away his daughter during the absence of PW-1. Informant's (PW-1's) brother, PW-7 has also stated that in the year 2011, his sister told him that her daughter went to the school and did not return. Smti Tarala Hazarika, PW-8 has also testified that the complainant later told her that the accused had kidnapped her daughter. Initially, she (PW-8) along with PW-1 went searching for PW-2.

36. The evidence of PW-9 also does not at all implicate that the accused committed rape on the victim. Shri Dinesh Deka has testified as PW-9 that both the informant and the accused are known to him. About 6/7 years ago, the villagers told him that the accused

kidnapped the informant's daughter. He did not know, if the victim had a love affair with the accused.

37. The accused person's mother Smti Surjya Kakoti has testified as PW-10 that the accused is her son. About 5/6 years ago at about 10.30 a.m. the complainant came to her house and informed her that her daughter eloped with her son. Then after one day, the victim's father along with the police went to her (PW-10's) parent's house at Nagaon and recovered the victim and her son and brought them to Dokmoka P.S. In her cross-examination, she has testified that the accused had a love relationship with the victim 'X'. Now, the victim is married to another person and her son is also married to another woman.

38. Shri Hemanta Deka has testified as PW-15 that the accused is his brother-in-law. The incident had occurred in the year 2015. The accused had eloped with the victim and kept her in his uncle's house and on the next day, the police took the accused and the victim to the police station.

39. The I/O, Md. Manirul Islam has testified as PW-16 that on 01.03.2011, he was posted as S.I. at Dokmoka P.S. On that day, the informant lodged the FIR, which was registered as Dokmoka P.S. Case No. 7/2011, registered under Section 366(A) IPC. He embarked upon the investigation and recorded the statement of the informant and set out to search the victim. He recovered the victim from Phulguri village under Raha P.S. and recorded the statement of the victim and forwarded her for medical examination. He also forwarded the victim to the Magistrate who recorded her statement under Section 164 Cr.P.C. He arrested the accused and forwarded him to the Court. During investigation, the victim revealed that she was sexually assaulted by the accused and so a prayer was made before the Court for addition of

Section 376 IPC. He recorded the statements of the other witnesses and seized the motorcycle bearing registration no. AS-09A-7834. He submitted the charge-sheet against the accused under Section 366A/376 IPC. He proved the sketch-map as Exhibit-4 and his signature on the sketch map as Exhibit-4(1). He proved the seizure list as Exhibit-5 and 6 and his signatures on the seizure lists as Exhibit-5(1) and 6(1). He proved his signatures on the charge-sheet as Exhibit-7(1). No effective cross-examination was carried out.

40. The trial Court found it difficult to believe that the victim was kidnapped in the broad daylight. Although, the accused was charged under Section 366 IPC, he was not held guilty of offence under Section 366 IPC. It was held by the learned trial Court that the initial statement of the victim under Section 164 Cr.P.C clearly reveals that the victim was a consenting party. The accused gave his phone number on the previous day of the incident and asked her to come out of her house and thus on the following day, she willingly went away with the accused person. It has been correctly held by the learned trial Court that it is unfathomable, how a victim could be kidnapped in the broad daylight on a motorcycle, which is an open vehicle. Definitely, the public will come to her rescue. PW-1 has mentioned that the public informed her that the victim was forcefully taken away by the accused on his motorcycle but not a single witness has deposed in the Court that the victim 'X' was forcefully taken away by the accused on his motorcycle. On the contrary, the victim's friend, PW-13 has stated that the victim waved her 'bye bye' while she went away with the accused on his motorcycle.

41. The evidence of PW-1 and PW-2 appears to be improbable and I am unable to countenance the judgment of conviction based on the statements of PW-1 and PW-2. It is unfathomable that a person will be able to commit rape in his uncle's house. The evidence of PW-1, 2, 3, 10, 15, DW-1 and DW-2 clearly reveals that the accused took the victim to his

uncle's house. The evidence of the witnesses reveal that the victim was recovered after 2 or 3 days. The PW-1 (informant), PW-4, PW-11, DW-1 and DW-2 have candidly stated that the victim had a love affair with the accused. It has been mentioned in my foregoing discussions that the witnesses have stated that the victim eloped with the accused on her own volition. Despite the allegation that the accused committed rape on the victim 'X' 4 or 5 times, yet no injuries were detected on her examination by the doctor and no recent evidence of sexual assault was detected by the Medical Officer.

42. It has been held by the Hon'ble Supreme Court in **Tameezuddin Vs. State (NCT of Delhi), (2009) 15 SCC 566** that:-

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.”

43. In this instant case, the victim has put forth a story, which appears to be improbable. It is not fathomable that any elderly person of a family would encourage or harbour a person who has kidnapped a woman. It is beyond imagination that a person who has taken an unknown girl to his uncle's house will be able to commit rape 4 or 5 times in his uncle's house. This story appears to be unbelievable as the victim already had a love affair with the accused prior to the incident. It has to be borne in mind that the victim's father did not incriminate that the accused committed rape on his daughter. A person cannot be incarcerated on the basis of tall tales of the prosecutrix. The evidence of the victim is not

found to be of sterling quality. The story appears to be improbable and without logic. In such a case, the Court has to look for supportive and corroborative evidence.

44. It has been held by the Hon'ble Supreme Court in ***Dola @ Dolagobinda Pradhan's*** case (supra) that: "*In our considered opinion, the Trial Court as well as the High Court have convicted the appellants without considering the aforementioned factors in their proper perspective. The testimony of the victim is full of inconsistencies and does not find support from any other evidence whatsoever. Moreover, the evidence of the informant/victim is inconsistent and self-destructive at different places. It is noticeable that the medical record and the Doctor's evidence do not specify whether there were any signs of forcible sexual intercourse. It seems that the First Information Report was lodged with false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband. The High Court has, in our considered opinion, brushed aside the various inconsistencies pointed out by us only on the ground that the victim could not have deposed falsely before the Court. The High Court has proceeded on the basis of assumptions, conjectures and surmises, inasmuch as such assumptions are not corroborated by any reliable evidence. The medical evidence does not support the case of the prosecution relating to the offence of rape. Having regard to the totality of the material on record and on facts and circumstances of this case, it is not possible for this Court to agree with the concurrent conclusions reached by the courts below. At best, it may be said that the accused have committed the offence of hurt, for which they have already undergone a sufficient duration of imprisonment, inasmuch as they have been stated to have undergone two years of imprisonment. Accordingly, the appeal is allowed. The judgments of the Trial Court as well as the High Court are set aside. The appellants are acquitted of the charges levelled against*

them. They should be released forthwith, if they are not required in any other case."

45. In this instant case, the evidence of PW-1 and PW-2 that the accused committed rape on the victim is not substantiated by the evidence of any of the witnesses. The prosecution has examined as many as 16 (sixteen) witnesses but the allegation of rape by PW-1 (mother of the victim) and of PW-2, (the victim herself) has not been corroborated and substantiated by the evidence of other witnesses.

46. The allegation of brutality while committing rape has not been substantiated by the medical evidence. I would like to reiterate that the prosecutrix, 'X' has claimed that she was sexually assaulted 4 or 5 times while she was in the accused person's uncle's house, but no such evidence of assault is forthcoming. A prudent person cannot be oblivious of the fact that a victim cannot be brutally and sexually assaulted by a nephew in his uncle's house without any family member dissuading such an act. The accused person's uncle was also not examined as a witness. It is not discernible that any person will be able to sexually assault a young girl 4 and 5 times in his uncle's house without any intervention by the uncle or any family member of the uncle of the accused. The learned trial Court has erred while holding the accused guilty of rape, because the victim was a minor. It has been erroneously held by the learned trial Court that as the victim was below 18 years of age, the accused is guilty of rape despite the fact that the victim was a consenting party. At least the benefit of two years on the higher side of 18 years ought to have been extended to the accused. I am unable to give my stamp of approval to the impugned judgment and order.

47. In view of my foregoing discussions, it is held that the evidence of the victim and the evidence of her mother does not inspire confidence. The accused person deserves the benefit



of doubt. The appeal is hereby allowed. The accused Hari Prasad Kakoti is acquitted from the charges under Section 376 IPC and he is to be set at liberty forthwith, if he is not wanted in connection with any other case. Surety stands discharged.

Send back the LCR.

JUDGE

Comparing Assistant