

IN THE COURT OF THE SESSIONS JUDGE SONITPUR::
TEZPUR

SESSION CASE NO. 130 of 2018

Under section 366 of I.P.C
(Arising out of G. R Case No. 650 of 2011)

State of Assam

-Vs-

Sudip Sarkar

...Accused Person

**Present: Smti J. Barman,
Sessions Judge,
Sonitpur :Sonitpur.**

For the State : Mr. M.C. Baruah, Public
Prosecutor

For the accused : Mr. B. Borthakur, Advocate.

Date of Argument : **19-02-2021**

Date of Judgment : **19-02-2021.**

JUDGMENT

1. The prosecution case in brief is that on 05.04.2011 at around 8.30 P.M., accused Sudip Sarkar had abducted the informant's daughter victim 'X'.

2. On receipt of the ejahar from the father (PW 1) of the victim, a case was registered being Tezpur PS case No. 321/2011 and endorsed A.S.I. Idrish Ali and S.I. M. Kakoti to investigate the case. During investigation, the Investigating

Officer recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 Cr.P.C., and on completion of investigation having found materials submitted charge-sheet against the accused Sudip Sarkar u/s 366 A of the IPC.

3. On appearance of the accused person, Learned Judicial Magistrate 1st Class, Sonitpur, Tezpur vide order dated 20.06.2018 furnishing copies of the documents as required under section 207 Cr.P.C, committed the case to the court of Session, being the offence u/s 366 A IPC exclusively triable by the court of Session.

4. Accordingly, on being appeared the accused person before this Court, after hearing both parties, charge u/s 366 of the IPC was framed against the accused Sudip Sarkar and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed to face trial.

5. To substantiate the case, prosecution examined seven witnesses. In statement recorded u/s 313 Cr.P.C, the accused denied all the allegations leveled against him and examined none.

6. I have heard the argument of learned counsel of both sides and also have gone through the evidence on record.

7. The point for decision in this case is that -

(1) Whether accused Sudip Sarkar on 05.04.2017 at around 8.30 AM at Vill Napam, under Tezpur PS, abducted the victim with intent that she might be compelled to marry the accused against her will or in order or knowing it to be likely that she might be forced or seduced to illicit intercourse with the accused and thereby committed an

offence punishable under section 366 of the IPC ?

Discussions, Decisions and reasons thereof:

8. In order to appreciate the argument advanced on behalf of both the sides, it is considered next to outline a sketch of the evidence on record.

9. The father of the victim deposing as PW1 stated that on day of the incident at about 7 P.M. while they were having dinner, his daughter came out of their house and then the accused Sudip Sarkar alongwith others abducted his daughter by a vehicle and after 2/3 hours after filing the F.I.R, she was recovered from the accused's house. He proved the F.I.R. as Ext. 1 He testified that at the time of the incident, the victim was 19 years old.

During cross, he stated that after the incident, he came to know that his victim daughter had love affairs with the accused since long and on the day, when they were having dinner out of love she went with the accused without informing them.

10. PW 2 Bhuban Sarmah in his evidence stated that on the day of the incident at around 7-8 PM hearing hulla in the house of Bhim Bahadur for missing of the victim girl, they went there and during search they came to know from one person that one boy abducted the victim by a vehicle. Immediately they informed police and then she was recovered from Tinmile. After recovery, from the victim he came to know that out of love, she eloped with the accused.

11. PW 3 Boloram Chetry only heard that the victim eloped with the accused.

12. The mother of the victim deposing as PW4 stated that on the day of the incident at around 8.00 PM, when her 16/17 years old daughter student of class IX, was reading, accused came by an auto to their house and had abducted her and later on the victim was recovered from his house at Dolabari and after recovery the victim told that accused had abducted her away by an auto.

In cross-examination, she deposed that she had no knowledge if the victim had love affair with the accused and went to his company on her own accord.

13. PW 5 is the victim herself. She stated that on the day of the incident after school hour, accused Sudip Sarkar came to her school and asked her to go with him otherwise he and she had to die. On the same day at around 6 P.M. when she went to Laxmi Narayan Mandir situated near her house, you again came and repeated the same version. Then she returned home and at around 7 P.M. she went near the said mandir wherefrom you along with three others had taken her away. After about one hour, her father brought her back from a house and thereafter filed the F.I.R. She proved her statement u/s 164 Cr.PC as Ext.2.

During cross, she admitted that on the day of the incident without informing at home, she went with the accused. She stated that she was born in the year 1995.

14. PW 6 Dr. Jahanara Begum the medical officer deposed that on 06-04-2011 in reference to Tezpur PS GDE No. 221/2015 dated 05-04-2011, she examined the victim 'x' and found hymen absent, she found no sexual assault on the victim and opined that the victim is just below 18 years. She proved the medical report as Ext.3 and X-ray report as Ext.4.

During cross she admitted that the radiological test may vary two years on either side.

15. PW7 Idrish Ali is the investigating officer. He deposed that on receipt of a verbal complaint from one Bhim Bahadur Chetry that his daughter was kidnapped, he made a GDE No. 95 dated 05-04-2011, finding the victim in the house of accused Sudip Sarkar brought both of them to the PS, got recorded the statement of the victim u/s 164 Cr.PC, sent the victim for medical examination and later on SI Musaddique Hussain submitted chargesheet against the accused u/s 366 (A) of IPC.

16. In this case the father of the victim (PW1) mentioned the age of the victim as 19 years at the time of the incident, whereas PW4 the mother of the victim and the victim herself claimed that at the time of the incident victim was 16/17 years old. As per evidence of the victim, she was reading in class VII at the time of the incident, whereas according to her mother (PW4) at that time she was reading in class IX. So the victim and her mother gave contradictory statement in which class she read in that time. The investigating officer did not collect any document regarding age of the victim. Other PWs remained silent regarding her age. Medical evidence reveals that as per the radiological report, the age of the victim is just below 18 years. It is well settled that the medical evidence is only an expert opinion, not conclusive proof. In the case of *Jaya Mala vs Home Secretary, Govt of Jammu and Kashmir & others*, reported in AIR 1982 SC 1297, the Apex Court held that margin of error in age ascertained by radiological examination was two years on either side. In the case *Samsul Haque vs State of Assam*, 2005(3) GLT 105, where, the doctor, who held the ossification test, had opined that the age of the victim is above 16 years and below 18 years, holding that there is a margin of error of two years on either side in an ossification test, the Hon'ble High Court held that the victim was not a minor and the case being voluntary elopement, the benefit must go to the accused. In the above, I unhesitatingly hold that the

prosecution failed to ascertain that the victim was minor at the time of occurrence.

17. In the above circumstances while deciding a matter of kidnap/abduction, whether motive on the part of the accused in taking the victim has any role to play or not is a matter to be considered. In my quest of above, I could lay my hand on the following few reported cases which are found relevant in this case.

18. In *Shyam & another vs. State of Maharashtra*, reported in AIR 1995 SC, 2169, the Apex court also opined that the conduct of the alleged victim girl, therein, subsequent to the alleged kidnapping, goes to show that she was willing party to go with the appellant on her own. The Apex Court has observed that the prosecutrix was fully grown up and, even if she did not attain the age of 18, was still in the age of discretion, sensible and aware of the intention of the accused, that he was taking her away for a purpose, and yet she did not put up a struggle or raised any alarm.

19. Hon'ble Supreme Court of India in the reported case of *S. Varadarajan Vs. State of Madras* [AIR 1965 SC 942] held as follows:-

“ 11. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from

the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

20. Now coming to the facts of this case, though the informant/ father of the victim, alleged that on the day of the incident while the victim came out from her house, accused had abducted her away by a vehicle but in the same breath in cross-examination he admitted that after the incident, he came to know that the victim out of love, went to the company of the accused voluntarily. The evidence of the victim around whom the case revolves reveals that on the day of incident accused came to school and asked her to go with him otherwise he would die and on the same day at around 7.00 PM while she came near Laxmi Narayan Mandir, accused alongwith three others had taken her therefrom and after one hour she was recovered from a house. In her cross she admitted that without

informing her parents she went with the accused. Though the victim in her statement u/s 164 Cr.PC as well in her deposition stated that the accused threatened her that he would die if she did not accompany her and hence she went with the accused, but her evidence clearly indicates that she went with the accused on her own accord. The victim and her parents made different versions with regard to the incident. Further taking the evidence of the victim and her parents, if the victim was abducted from house while other family members were present or if she was taken from side of the mandir situated near her house at the evening time at 6/7 P.M, certainly it would come to the notice of others or she could raise alarm to draw attention of others but neither she raised alarm nor being a full grown girl resisted the accused. On the other hand, in cross examination she clearly stated that without informing at home she went with the accused. The evidence of the victim's father (PW1), PW2 and PW3 clearly reveals that out of love she went to the company of the accused and after 2/3 hours she was found in the house of the accused.

21. From the evidence discussed above, it appears that the victim being a full grown girl, went with the accused on her own. In absence of cogent evidence, she can not be said to have taken or enticed against her will. The evidence of the victim clearly reveals that there was no inducement on the part of the accused in going with him and no force was used on the part of the accused. The evidence of the PWs does not suffer from any ambiguity in that respect. The victim without making any hue and cry accompanied the accused. All indicates that she was a consenting party in the entire episode.

22. The evidence discussed above, led me to draw the conclusion that it is not a case of abduction against her will or under inducement. Merely accompanying a person without being induced does not result commission of offence u/s 366 IPC. The prosecution case being clouded with shadow of doubt

has lost its authenticity as regards to the charge u/s 366 IPC and I am constrained to hold that accused cannot be held guilty for the alleged offence. Accordingly, accused Sudip Sarkar is acquitted from the charge u/s 366 IPC and set him at liberty forthwith. His bail bond shall be extended till next six months in view of section 437 A of Cr.P.C.

23. Send back the GR case to the learned committal court.

24. Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **19th** day of **February, 2021.**

(I.Barman)

Sessions Judge,
Sonitpur, Tezpur.

APPENDIX

Prosecution Witness

- 1. PW 1 :-** Infromant / father of the victim.
- 2. PW 2 :-** Bhuban Sarmah.
- 3. PW 3:-** Boloram Chetry.
- 4. PW 4:-** mother of the victim.
- 5. PW 5:-** victim.
- 6. PW 6:-** Medical officer.
- 6. PW 7:-** Investigating officer.

EXHIBITS.

- Exhibit 1** : FIR.
- Exhibit 2** : Statement of the victim u/s 164 Cr.P.C.
- Exhibit 3** : Medical Report.
- Exhibit 4** : X-ray report.
- Exhibit 5** : Chargesheet.
- Exhibit 6** : Sketch Map.

(I.Barman)

**SESSIONS JUDGE,
Sonitpur, Tezpur**