

**IN THE COURT OF THE SESSIONS JUDGE SONITPUR:: TEZPUR**

**SESSION CASE NO. 34 of 2019**

Under section 366/376(1) of I.P.C  
(Arising out of G. R Case No. 2035 of 2017)

**State of Assam**

**-Vs-**

Pinku Borah

...Accused Person

**Present : Smti I. Barman,  
Sessions Judge,  
Sonitpur, Tezpur.**

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

For the accused : Mr. G. Sarkar, Advocate.

Date of Argument : 26-06-2020

Date of Judgment : 06-07-2020

**J U D G M E N T**

**1.** The prosecution case in brief is that on 31<sup>st</sup> May, 2017 the informant's daughter (victim) aged about 17 years was kidnapped by accused Pinku Borah a married person when she was proceeding from Dhekiajuli towards home.

**2.** On receipt of the ejahar on 01-06-2017 from PW1 the informant father of the victim girl, the Incharge of Salonibari Out Post entered the GD Entry No. 13 dated 01-06-2017 and forwarded the same to the Officer-in-charge of Tezpur PS. Accordingly, the O/C, Tezpur police station registered the case being Tezpur PS case No. 1045/17 u/s 366(A) of IPC and launched investigation of the same by endorsing the

case to ASI Sarat Ch Das of Salonibari Out Post. The Investigating Officer recorded the statement of the witnesses, got recorded the statement of the victim u/s 164 Cr. P.C. and on completion of the investigation not finding the accused, submitted charge-sheet against the accused Pinku Borah u/s 366 of the IPC showing him as absconder.

**3.** Accused was produced before Court on the strength of NBWA and the learned Judicial Magistrate 1<sup>st</sup> Class, Tezpur after 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 IPC exclusively triable by the Court of Session.

**4.** Accordingly, on producing the accused before this Court from jail, after hearing both sides, charge u/s 366/376(1) of the IPC was framed against the accused Pinku Borah and particulars of the charge on being read over and explained to the accused, he pleaded not guilty and claimed for trial. Later on the accused was enlarged on bail.

**5.** To substantiate the case, prosecution examined as many as six witnesses. In statement recorded u/s 313 Cr. P.C., the accused denying all the allegations levelled against him, pleaded that not himself, but the victim girl compelled him to take her.

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

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

***(i) Whether the accused Pinku Borah on 01.06.2017 at Singimari, under Dhekiajuli Police Station, abducted the victim girl with intent that she might be compelled to marry the accused against her will or in order 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 ?***

***(ii) Whether the accused Pinku Borah in between 01-06-2017 – 10-06-2017 at Jorhat committed rape on the victim girl and thereby committed an offence punishable u/s 376(1) of the IPC ?***

**Discussions, Decisions and reasons thereof :**

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

**9.** The informant as well as the father of victim girl deposing as PW 1 stated that on the day of incident his victim daughter went to his elder brother's house at Singimari, Dhekiajuli to attend a function and when she did not return therefrom, he went to Salonibari Out Post and informed the matter, however, the police personnel of Salonibari Out Post asked him to lodge an FIR prepared from home. Then he returned home. At that time accused Pinku Borah informed him that he had taken away his daughter. Then he questioned the accused as to why he being a married man had taken away his daughter and also asked to give the phone to the victim girl. Then his daughter over phone told him that the accused by threatening had taken her away. Regarding the incident he lodged the FIR (Ext. 1).

During cross by defence he stated that the teacher Babul Karmakar wrote the FIR as per his instruction. He denied the suggestion that at the time of incident his daughter was above 18 years.

**10.** PW2 is the victim herself. She stated that on the day of incident she went to her uncle's house at Dhekiajuli to attend a function and at around 2/3 PM when she was about to return home, accused Pinku Borah had taken her away forcefully by a scooty to Mission Chariali and thereafter took her to Jorhat by bus. The accused kept her there at one person's house for 10 days and raped her there in those days. Thereafter, knowing about the lodging of the FIR by her father, the accused brought her to Mission Chariali and left her there. She further

stated that prior to the incident the accused used to say her that if she did not go with him he would die and would do something to her parents. Hence inspite of knowing the fact that the accused is a married person, she went with him. She proved her statement u/s 164 Cr.P.C. as Ext. 2.

During cross by defence she stated that her house is situated near the house of the accused. Her family was regular customer of the grocery shop of the accused and they had cordial relation with the accused. She again stated that on the day of incident when she along with her friend Maina and one another went to her uncle's house, she met the accused at Dhekiajuli Centre. She stated that as soon as the accused reached Dhekiajuli centre, at 2/ 3 PM, Maina and the other girl left the place and at that time many persons were present at Dhekiajuli centre. She admitted that in the way from Dhekiajuli centre to Mission Chariali, they crossed many persons including police personnel and at Mission Chariali there were police as well as Army personnel. She stated that in the house at Jorhat where she with the accused stayed, one couple and their five children resided there and in those days she had done all her daily works as usual. She further stated that after coming from Jorhat, they got down in Mission Chariali and therefrom she went home by a tempo. She admitted that in statement before police and Magistrate she stated that at Jorhat she stayed with the accused but not stated that the accused raped her. She also admitted that as a neighbour as well as a regular customer of the shop of the accused, she knew well that the accused was a married person at the time of the incident.

**11.** PW 3 the mother of the victim girl testified that on the day of incident her victim daughter went to her uncle's house at Singri to attend a function and since then she did not return. Hence, she along with her husband went to Salonibari Out Post to lodge an FIR and when police of Salonibari Out Post asked them to prepare the FIR at home not in Thana, they returned back home. At that time accused Pinku Borah informed her husband that he had taken away their daughter. Then her husband

lodged the ejahar. After ten days the victim returning home reported that the accused had taken her away from Dhekiajuli to Jorhat and kept her there for ten days and did have physical relation with her. The victim also told her that from Jorhat the accused had brought her back to Mission Chariali and left her there.

During cross by defence she stated that they did not contact with the victim girl over phone when she was in Jorhat. She also admitted that before police she did not state that the accused over phone informed that he had taken away their daughter.

**12.** PW-4 Raghu Munda the neighbour of the parties deposed that the accused offered his love to the victim for which her parents kept the victim at her grandmother's house at Dhekiajuli. On the day of incident when the victim along with her friend came to Dhekiajuli Centre from her grandmother's house, the accused had taken her away and after four days she herself returned home. He heard that the victim eloped with the accused.

During cross by defence he stated that he heard about the affair between the accused and the victim.

**13.** PW-5 Dr Tutumoni Handique, the Medical Officer examined victim girl on 11-06-2017 at 3.45 PM and found hymen absent and no injury mark was found on her body as well as in private part.

The doctor opined as follows:

- (1) Age of the victim appears to be just over 18 years.
- (2) No sign and symptom suggestive of recent sexual intercourse.
- (3) No mark of injury on her body as well as private parts.

She proved the report as Ext. 3.

**14.** The evidence of ASI Sarat Ch Das (PW 6), the Investigating Officer is formal in nature. He visited the place of occurrence, drew the sketch map of the place of occurrence (Ext. 4), recorded the statement of witnesses and on 10-06-2017 at around 5.00 PM the victim along with her mother came to the Out Post. Then, he recorded the statement of the victim, sent her for medical examination, got recorded her statement u/s 164 Cr.P.C. and on completion of investigation, he submitted the charge sheet (Ext. 5) against the accused Pinku Borah u/s 366 of IPC.

**15.** In the present case the alleged offence is kidnap of the minor victim girl by accused Pinku Borah who was a married person at the time of incident. Regarding age, the father (PW 1) of the victim in deposition claimed the age of the victim as 16 years at the time of the incident i.e. in the month of June, 2027 but in the ejahar, he mentioned the age of his victim daughter as 17 years whereas her mother (PW 3) at the time of deposition after two years of the day of incident mentioned her present age as 16 years. So, as per mother's evidence, the victim was 14 years old. So, the parents of the victim girl who are the best persons to know the age of their child, mentioned different age of the daughter at different time. On the other hand, as per medical report (Ext. 3), she was just above 18 years old on the day of examination. Police did not seize any document with regard to the age of the victim girl. In the above evidence, it cannot be safely held that the victim girl was below 18 years of age at the time of alleged offence.

**16.** In such circumstances, let us consider other facts of the case. In the given case admittedly the accused is a neighbour of the victim and she knew well prior to the incident that he is a married person. The victim in deposition once stated that on the day of incident she went to her uncle's house at Dhekiajuli to attend a function and in the afternoon at around 2/3 PM when she was about to return home, accused had taken her forcefully by scooty to Mission Chariali and thereafter took her to Jorhat by bus and in the same breath again in

cross examination she stated that on the day when she with one of her friend and one another went to her uncle's house at Dhekiajuli, she met the accused at Dhekiajuli centre, at that time, her two companions left the place and the accused took her to Mission Chariali. On the other hand in statement u/s 164 Cr.P.C. (Ext. 2) she stated that on 30-05-2017 she went to Dhekiajuli to her uncle's house to attend a function and on 01.06.2017, accused came to Dhekiajuli on which day she with her friends went to Dhekiajuli Centre, where she met the accused and then the accused asked her to accompany him, otherwise he would die. As on one earlier occasion, the accused consumed phenyl, hence she out of fear went with the accused. Her statement u/s 164 Cr.P.C. does not indicate forceful abduction by the accused. Further, the victim's evidence that the accused told her that if she does not go with him, he would die and would do something with her parents was not stated in statement u/s 161 Cr.P.C. which was confirmed by the Investigating Officer. She gave different version in deposition as well as in statement u/s 161/164 Cr.P.C. Further the evidence of the father (PW1) that the victim over phone told him that the accused by threatening had taken her away was not supported by the victim's mother, she totally denied contacting with the victim over phone. On the other hand the independent witness PW 4, the neighbour of the accused as well as the victim stated another version that on the day of incident the victim with her friend came to Dhekiajuli Centre and eloped with the accused.

**17.** From the evidence of the victim it transpires that the accused had taken her at first to Mission Chariali by a scooty and then to Jorhat by bus. She admitted that at Mission Chariali there were many persons including police personnel when they reached there. It is not believable that at Dhekiajuli centre which is a busy area at about 2/3 PM, one can take away a girl by scooty forcefully without her consent and without noticing by any other person. Moreover, in the journey from Mission Chariali to Jorhat by bus, it takes about 4 hours. During this journey, she met many passengers in the bus as well as in the bus stations but she neither raised any alarm to draw attention of others nor reported them

that the accused had taken her forcefully. She could inform police present at Mission Chariali also. There was ample opportunity for her to tell at least some people about the kidnapping but, she silently went with the accused. Her evidence also reveals that in the house where she stayed in Jorhat, one couple with their 5 children resided but admittedly she did not report them about the incident and stayed there doing all usual works normally. During those ten days in Jorhat neither she was confined in a room nor her legs and hands were tied up.

**18.** The evidence as discussed above, it is found that the victim being a full grown girl have the capacity to know the full import of what she was doing and in absence of cogent evidence, it cannot be said to have taken away her or induced her to go with the accused rather she accompanied the accused person voluntarily. The evidence of the victim girl clearly shows that right from her going with the accused person to Mission Chariali and Jorhat till residing with him in Jorhat for 10 days, she was in full sense and aware of the happening in and around her during that period. She appears to have taken a voluntary part in going with the accused. The evidence on record discussed above, I am constrained to hold that the prosecution failed to prove the essential ingredients of offence punishable u/s 366 IPC, she was not at all forcibly taken away, rather she voluntarily accompanied the accused.

**19.** So far the allegation of rape, the victim in deposition stated that the accused committed her rape in Jorhat during the period she resided in Jorhat i.e. for about 10 days. Admittedly in the house in Jorhat, where she was kept, one couple with five children stayed. Being a major girl or in the verge of majority, she could resist the accused in committing her rape. Had she raised alarm, it must be heard by the couple resided in the house. But, neither she raised alarm nor resisted the accused in committing her rape. Even after the alleged rape, she did not bother to disclose the same to the occupants of the house, until she deposed before Court. She remained with the accused at Jorhat for ten days without raising any objection. Though in evidence she stated that

the accused raped her but in statement u/s 164 Cr.P.C. as well as before police admittedly she did not mention about commission of rape by the accused except the statement that the accused stayed with her. In statement u/s 164 Cr.P.C. (Ext.2) though she stated that the accused did have physical relation with her, but nowhere she alleged that the accused did have physical relation forcefully whereas in course of trial, she has substantially developed the case and has given an exaggerated version that the accused committed rape upon her in those days in Jorhat.

**20.** Another vital aspect of the present case is that before the Medical Officer (PW 5), she gave the history of elopement with the accused on 01-06-2017 and rescued on 10-06-2017. She returned home on 10-06-2017 and was medically examined on 11-06-2017 on the very next day. But the Medical evidence does not suggest of any injury on her private part or other parts of the body. It is true that in a rape case sole testimony of the prosecutrix can be the basis of conviction if her testimony inspires confidence of the court. Here in the present case, the version given by the victim regarding rape have been belied by medical evidence is as much as no such injury was found on her private parts. Besides she gave different versions regarding rape as discussed above. Even the parents of the victim did not mention about rape by the accused. The whole surrounding circumstances discussed above, raises serious doubt and belie the case set up by the victim that she was raped by the accused. Having meticulously scanned the evidence of the PWs particularly the evidence of the victim and the medical evidence, it transpires that the evidence of the victim is not inspiring and the same could not be accepted.

**21.** On an overall appreciation of the evidence of the victim and her conduct, I held that she is not a reliable witness and the case of the prosecution regarding alleged rape remained to be unbelievable and unacceptable. She was a major girl as per medical evidence or as per oral evidence she being a girl of 16/17 years attained the age of

discretion when the incident took place. I have found that sexual encounter, if any which the accused had with the victim, were all consensual ones.

**23.** Above being the situations, in my considered opinion the prosecution failed to prove the guilt of the accused Pinku Borah for the alleged offences of kidnapping and rape beyond all reasonable doubt and he is entitled to benefit of doubt. Accordingly, accused Pinku Borah is acquitted from the charge u/s 366/376(1) IPC and set him at liberty forthwith. His bail bond shall extended till next six months in view of section 437 A of Cr.PC.

**24.** Send back the GR case to the learned committal court.

**25.** Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **06<sup>th</sup> July, 2020.**

(I.Barman)  
Sessions Judge,  
Sonitpur, Tezpur.

Dictated and corrected by me.

(I.Barman)  
Sessions Judge,  
Sonitpur, Tezpur.

## **APPENDIX**

### **PROSECUTION WITNESSES:**

Prosecution Witness 1	:	Informant/father of the victim
Prosecution Witness 2	:	Victim
Prosecution Witness 3	:	mother of the victim
Prosecution Witness 4	:	Sri Raghu Munda
Prosecution Witness 5	:	Dr. Tutumoni Handique (M.O)
Prosecution Witness 6	:	ASI Sarat Chandra Das (I.O.)

### **EXHIBITS :**

Ext. 1	:	FIR
Ext. 2	:	Statement of the Victim u/s 164 Cr. P.C.
Ext. 3	:	Medical report.
Ext. 4	:	Sketch map
Ext. 5	:	Charge sheet.

(I.Barman)  
Sessions Judge,  
Sonitpur :: Tezpur.