

IN THE COURT OF THE SESSIONS JUDGE SONITPUR::
TEZPUR

SESSION CASE NO. 98 of 2019

Under section 366 A of I.P.C
(Arising out of Chariduar PS Case No. 103 of 2018)

State of Assam

-Vs-

Nur Salam

...Accused Person

Present:

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

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

For the accused : Mr H.P. Sedai, Advocate.

Date of Argument : **17-02-2021**

Date of Judgment : **17-02-2021.**

JUDGMENT

1. The prosecution case in brief is that on 04.04.2018 at around 7 P.M., accused Nur Salam had abducted the informant's daughter victim 'X' aged about 16 years by enticing to marry her.

2. Based on the ejahar received on 07.04.2018 from the father (PW 1) of the victim, the Officer-in-charge of Chariduar PS registered the case being Chariduar PS Case no. 103/2018

u/s 366/376 r/w section 4 of the POCSO Act and endorsed S.I. A.K. Faruki to investigate the case. In course of 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 Nur Salam u/s 366 (A) of the IPC.

3. On appearance of the accused person, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and after going through the police report and having heard both parties, Charge for offence u/s 366 (A) IPC was framed against accused Nur Salam. Particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.

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

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

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

(1) Whether accused Nur Salam on 04.04.2018 at Vill Kekokoli Nepali, under Chariduar PS, induced the victim under the age of eighteen years to go with him with intent that she might be or knowing that it is likely that she might be forced or seduced to illicit intercourse with others and thereby committed an offence punishable under section 366 A 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. PW1 is the victim herself. She testified that on the day of incident accused Nur Salam had taken her to his elder brother's house at Bhojkhuwa and after one day had taken her to his house at Bhomoraguri and kept her there for three days. Thereafter the father of the accused by assaulting took her back to her house. Though her father asked the father of the accused to give a writing that at her attaining majority, marriage will be solemnised between her and the accused, but accused's father refused to give the writing. Then her father lodged the FIR. She proved her statement u/s 164 Cr.PC as Ext.1.

During cross, she stated that her cousin brother married the elder sister of the accused and for that relation they used to visit each other's house. In cross examination she admitted that before Magistrate she stated that on the day of the incident she voluntarily went with the accused to visit her sister at Bhojkhuwa Chapori and then her father lodged the case alleging that she eloped with the accused.

10. Testimony of PW2 the informant/ father of the victim disclosed that accused Nur Salam had taken away his 17 years old daughter and after three days accused and his father dropped the girl at his house. Then he called a meeting to settle the matter. In the meeting the villagers asked the accused's father to perform marriage between the accused and the victim but accused's father did not accept the proposal, hence as per advice of the villagers he filed the FIR.

During cross, he stated that he did not know whether his daughter had love affairs with the accused since 2 ½ years prior to the incident. He admitted that before the Officer-in-charge, Chariduar PS, he submitted an affidavit (Ext.B) alongwith a petition (Ext.A) declaring that due to misconception, he lodged the FIR.

11. PW 3 Abdul Kadir stated that on the day of the incident the victim girl went on missing and after three days the victim alongwith the accused returned home. With regard to the incident a meeting was convened in the village where on being asked, the accused replied that he had taken the girl for outing only. Though the accused's father proposed to solemnize the marriage between the girl and the boy but the the villagers did not agree due to under age of the girl and informed police.

During cross-examination he stated that he did not know if out of love affair, the victim voluntarily went with the accused.

12. PW 4 Sadiqul only heard that victim girl went on missing from home for three days and thereafter she with the accused returned back.

13. PW 5 Rafiqul Islam stated that accused had taken away the victim girl aged about 17 years from her home and after three days accused and his father dropped the victim girl at her home. In cross examination he stated that he guessed the age of the girl as 17 years, she may be 19 years also.

14. PW 6 Dr Jharna Kakoti, the medical officer deposed that on the day of the incident she examined the victim 'X' and found hymen present, no injury or marks of violence was found on her body or private part and also found no sign of recent sexual intercourse and the age of the victim is just below 18 years as per ossification test. She proved the medical report as

Ext.2, advice slip as Ext.3, X-ray report as Ext.4, urine for HCG as Ext.5 and vaginal smear report as Ext. 6.

15. In this case the father of the victim (PW2) claimed the age of his victim daughter as 17 years at the time of the incident, but regarding the age of the victim no document was produced by him. Though as per evidence of the victim, she read upto Class V, but the investigating officer also did not collect any document regarding age of the victim. No PWs mentioned the exact age of the victim in their evidence except the Medical officer who stated that as per the ossification 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.

16. 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.

17. 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.

18. 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".

19. Now coming to the facts of this case, the victim around whom the entire episode revolves is that on the day of the incident the accused had taken her to his elder brother's house at Bhojkhuwa and therefrom to his house at Bhomoraguri and kept her there for three days and thereafter the father of the accused brought her back to her house. PW2 is the father of the victim who lodged the case against the accused alleging that accused had abducted his daughter by inducement. He also stated that after three days of missing of his daughter, accused and his father dropped the victim girl at his house. After her return a meeting was called where the villagers asked the accused to marry the victim to which the father of the accused refused and left the meeting and thereafter as per advice of the villagers he lodged the FIR against the accused. So, it can be easily comprehensible from the version of the informant that he lodged the case against the accused only because the father of the accused refused to marry his daughter with the accused. Moreover, the victim in her statement u/s 164 Cr.PC (Ext.1) , clearly stated that she had love affairs with the accused and on the day of the incident she voluntarily went with the accused to her sister's house for outing. In deposition before court as well as in statement u/s 164 Cr.PC the victim never stated that the accused had

forefully taken her or made any inducement to accompany him. She never alleged that she was put under threat when she was taken away. Being a full grown girl at the verge of her majority, she was in the age of discretion, sensible and aware of the happenings in and around her. The evidence of the PWs does not suffer from any ambiguity in that respect. The victim without raising any objection or without any struggle accompanied the accused. All indicates that she was a consenting party in the entire episode.

21. 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 A IPC. The ingredients of offence u/s 366 A IPC is missing in this case and I am constrained to hold that accused cannot be held guilt for the alleged offence. Accordingly, accused Nur Salam is acquitted from the charge u/s 366 A IPC and set him at liberty forthwith. His bail bond shall extended till next six months in view of section 437 A of Cr.P.C.

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

23. Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **17th** day of **February, 2021.**

(I.Barman)

Sessions Judge,
Sonitpur, Tezpur.

APPENDIX

Prosecution Witness

1. **PW 1** :- The victim.
2. **PW 2** :- Father of the victim / informant.
3. **PW 3**:- Abdul Kadir.
4. **PW 4**:- Sadiqul.
5. **PW 5**:- Rafiqul Islam.
6. **PW 6**:- The medical officer.

EXHIBITS.

Exhibit 1 : Statement of the victim u/s 164 Cr.P.C.

(I.Barman)

**SESSIONS JUDGE,
Sonitpur, Tezpur**