

**IN THE COURT OF THE SESSIONS JUDGE, SONITPUR
AT TEZPUR**

PRESENT : **Sri A. Borthakur**
 Sessions Judge, Sonitpur
 Tezpur

JUDGMENT IN SESSIONS CASE NO. 199 OF 2012

Under Section 366 /34 of the Indian Penal Code
(Arising out of G. R. Case No. 1045 of 2011)

State of Assam

–Versus–

- 1. Md. Faijul Haque @ Rahman**
Son of Late Samed Ali
Resident of Toripam, Borsola
Police Station – Dhekiajuli
District – Sonitpur, Assam

- 2. Md. Piyarul Islam**
Son of Md. Faizul Haque @ Rahman
Resident of Toripam, Borsola
Police Station – Dhekiajuli
District – Sonitpur, Assam

[Committed by Sri R. Lal, Sub-Divisional Judicial Magistrate, (S), Tezpur,
Sonitpur]

A P P E A R A N C E

For the State	:	Sri D. C. Borah Public Prosecutor Sonitpur District
For the Accused person	:	Md. M. Islam Advocate
Date of framing of charge	:	10– 09–2012
Date of prosecution evidence	:	04– 10–2012, 30– 10–2012 20– 11–2012, & 22– 01–2013
Date of Argument	:	24– 01–2013
Date of Judgment	:	13– 02–2012 (Reason – due to absence of accused)

J U D G M E N T

In this case, the accused persons, who are father and son, have been charged with the offence under Section 366 /34 IPC. The evidence shows that the victim was a major and she, on her own accord, went to the house of the accused persons, who are adjacent residents, from where the police recovered her. She does not want to proceed with the case.

PROSECUTION CASE :

The prosecution case, in brief, is that one Md. Zakir Hussain, son of Late Ramjan Ali, resident of Toripam Gaon, under Dhekiajuli Police Station had lodged an ejahar, on 23-05-2011, before the Officer-in-charge of the said Police Station, alleging that on 22-05-2011, Sunday, at about 8-30 p.m., the accused Piyarul Islam entered into his dwelling house and forcibly took away his sister Musstt. Sajida Khatun to his house. Thereafter, he learnt that the accused Piyarul Islam in connivance with the accused Md. Faijul Haque, his father, moved Sajida to some secret place.

INVESTIGATION :

Based on the above FIR, Borsola Out Post, GD Entry No.380, dated 23-05-2011, was made and on being forwarded, registered as Dhekiajuli PS Case No.193/2011, dated 24-05-2011, u/s 448/366/34 of IPC. The Officer in-charge, Dhekiajuli PS, entrusted ASI Sahabuddin Ansari to take preliminary steps and SI Dilip Bania, in-charge, Borsola OP, to complete the investigation. After completion of investigation, the police submitted charge-sheet u/s 448/366/34 of IPC against the accused.

In course of the preliminary investigation, ASI Sahabuddin Ansari visited the place of occurrence, recovered the victim girl from the house of the accused persons, examined witnesses, sent the victim for medical examination and got her statement recorded u/s 164 CrPC. He tried to arrest the accused persons, but they could not be located. Therefore, after completion of preliminary investigation, he handed over the case diary to the I/C, Borsola OP for further investigation, if warranted. Thereafter, Sri Manik Rajbongshi, his successor

Investigating Officer, arrested the accused persons, on their surrender on 08-06-2011, and submitted the charge-sheet u/s 448/366/34 IPC against the accused persons.

TRIAL :

Since the charge-sheeted offence, u/s 366 IPC is exclusively triable by the Court of Sessions, the Learned sub-Divisional Judicial Magistrate, (Sadar), Tezpur, Sonitpur, vide order, dated 18-06-2012, passed, in GR Case No.1045/2011, committed the case to this Court of Sessions for trial, after observing necessary formalities, u/s 209 CrPC.

Upon perusal of the materials on record and hearing the learned counsel for both the sides, a formal charge u/s 366/34 IPC, was framed against the accused persons, vide order, dated 10-09-2012. The charge, aforementioned, was read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried.

In order to prove the charge, above mentioned, the prosecution has examined seven witnesses including the IO, while the defence cross-examined six witnesses.

On closing the case for the prosecution side, the statements u/s 313 CrPC were recorded, vide order, dated 24-01-2013. The accused persons pleaded not guilty and declined to examine witnesses in defence.

I have heard the argument advanced by the learned counsel for both the sides. I have gone through the entire evidence proffered by the prosecution and the statements of the accused, recorded u/s 313 CrPC.

POINT FOR DETERMINATION :

On going through the evidence on record and hearing the learned counsel of both the sides, the following point emerged for consideration in this case :

Whether the accused persons, in furtherance of their common intention, on 22-05-2011, at about 8-30 p.m., at Toripam, under Dhekiajuli Police Station, kidnapped / abducted Mustt. Sajida Khatun, the younger sister of the informant Md. Zakir

Hussain, with intent that she might be forced to marry him or seduce her to illicit intercourse against her will ?

THE DECISION AND THE REASONS THEREOF

In order to sustain the charge u/s 366 IPC, the prosecution must prove (i) kidnapping by the accused ; or abduction by him, (ii) that the person so kidnapped or abducted is a woman ; (iii) that the accused intended, or knew that it was likely, - (a) that such woman might or would be compelled to marry a person against her will, or she might or would be forced or seduced to illicit intercourse. On the other hand, Section 34 IPC lays down that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner, as if it were done by him alone. What is essential is participation in action. The element of common intention prescribes the condition under which one is criminally liable for acts of other actors.

Now, in the context of the above requirements of the facts to be proved, let us look at the evidence, on record.

EVIDENCE:

PW-1 Md. Zakir Hussain is the brother of the victim woman (PW-3) and the informant. His evidence is that the occurrence took place on a day, at about 8 p.m., about one year ago, near their house in village Toripam. At that time, he was away in Borsola Bazar. When he returned home, his mother Johura Khatun (PW-2) informed him that his sister Sajida (PW-3) was taken by Piyarul to his house. On receipt of the said information, he lodged an FIR before the in-charge of Borsola OP and after sometime, Sajida returned home. He recognised Ext.1, the FIR. Police sent Sajida for medical examination and to get her statement recorded by a Magistrate. At the relevant time of the occurrence, Sajida was aged about 18 years 6 months. In cross-examination, he has, inter-alia, deposed that their house and the house of the accused are situated adjacently. Both his sister Sajida used to move around together as they were brought up in the same locality. Both the families are on visiting terms. In the relevant evening of the occurrence, the accused visited their house normally, as visited earlier. Sajida got married about six months ago. The dispute that arose between their families has been amicably settled at the intervention of

the villagers and as such, he does not want to proceed further with the case.

PW-2 Musstt. Johura Khatun is the mother of PWs 1 (informant) and 3 (the victim). Her version is that the occurrence took place in the evening of a day, about one year back. At that time, she was at their house. Accused Piyarul Islam came and took away her daughter Sajida from her house to his house, situated nearby. After sometime, his son Zakir Hussain (PW-1) arrived home and she told him about the incident. Zakir lodged the FIR at Borsola OP. After about 3 (three) days, her daughter (PW-3) returned home. Sajida is now married. In cross-examination, she has, inter-alia, deposed that the house of Piyarul is situated adjacent to their house with common boundary. Both the families have visiting terms and accordingly, Sajida also used to visit the house of the accused frequently. Sajida, on her own volition, went to the house of the accused. However, they suspected that she was forcibly taken away by the accused to his house. The present age of Sajida is about 19 years. Since the incident has already been compromised between both the families, they do not want to continue with the case any further.

PW-3 Musstt. Sajida Khatun is the alleged victim. Her evidence is that the occurrence took place, on a day, about two years back. Accused Piyarul forcibly took her away from her parental house to his house. She had love affairs with accused Piyarul for about two years. Piyarul kept her in his house for one day. Thereafter, the villagers went to the house of the accused and took her away back and then, gave her in marriage to her present husband Islamuddin. Since then, she has been residing with her present husband. Her brother Zakir Hussain (PW-1) filed the ejahar. After two days of taking her back by the villagers, the police produced her in the Court and got her statement recorded and sent her for medical examination. Her present age is about 20 years. At the time of the occurrence, she was aged 18 years. The Magistrate recorded her statement, Ext.2. In cross-examination, she has deposed that the house of accused Piyarul is situated adjacent to their house. She has visiting terms with his family since her childhood and often stayed in his house. She voluntarily went to the house of the accused. Her elder brother Zakir lodged the ejahar at the instigation of the villagers. The case was the result of misunderstanding. She does not want to proceed further with the case since the matter has already been amicably settled between their two families and she got married to another person.

PW-4 Musstt. Nuresa Begum is the sister-in-law of PW-3 Sajida. According to her, the occurrence took place on a day, at about 7 p.m., about one year back, at her house. She heard hue and cry outside the house. On enquiry, she learnt from the villagers that Sajida (PW-3) was taken away by Piyarul Islam to his house. Sajida stayed for one night in his house and then, she was taken back home. Sajida is now married to another person. The incident has already been settled between the two families. In cross-examination, she has, inter-alia, deposed that at the relevant time of the occurrence, as she was inside her matrimonial home, she did not witness the occurrence. At present, Sajida resides with her husband at her matrimonial home and that the incident has already been amicably settled between the two families.

PW-5 Dr. (Mrs) Indira Gogoi, is the doctor, who examined Miss Sajida Begum, on 24-05-2011, on police requisition, at Kanaklata Civil Hospital, Tezpur and found as follows :

“Identification mark : One back mole above left supra clavicular fossa.

The patient was examined in presence of ANM Bonti Hazarika.

On Examination :

Height - 149 cm, Weight - 45 Kgs

Gait was normal.

She was average built.

On examination of her teeth, 32 Nos teeth present.

Her secondary sexual characters are well developed.

Vulva was normal. Hymen was absent.

No sign of injury on her private as well as other parts of her body.

There was no sign suggesting of recent sexual intercourse.

Examination :

- (i) X-ray of elbow joint, wrist joint and iliac crest done.
- (ii) Vaginal smear
- (iii) USG Pelvis
- (iv) Urine for HCG

X-ray and USG done at Assam X-ray Clinic & Laboratory. Report was given by Dr. P.K. Barman, Radiologist.

Radiological Report :

Age was above 18 years and normal pelvic organ.

Vaginal smear was done at Kanaklata Civil Hospital, Tezpur. No sperm was found.

Her HCG urine test was negative.

Enclosures :

- (i) X-ray report
- (ii) HCG report
- (iii) USG report
- (iv) Vaginal smear report
- (v) OPD registration Number

OPINION :

Age of the victim was above 18 years.

There was no sign of any violence in her private as well as other parts of the body.

There was no sign of recent vaginal penetration or recent sexual intercourse.

PW-5, the doctor has recognized Ext. 3, the Medical Report where Ext.3(1) is his signature.

PW-6 Musstt. Dilwara Khatun is a neighbour. Her version is that the occurrence took place, on a day, evening, about a year back. Johura Begum, the mother of accused, came and reported her that Sajida Begum had come to her house. On receipt of the information, she went to the house of Johura Begum and found Sajida at her home. Sajida was on frequent visiting terms with the family of Johura. In cross-examination, she has stated that she has not seen the accused persons kidnapping Sajida.

PW-7 ASI Md. Sahabuddin Ansari, is the Investigating Officer. His evidence is that on being entrusted with the preliminary investigation into the case, vide Ext.1, the ejahar, he visited the place of occurrence, recovered the victim Sajida from the house of the accused persons and then sent her for medical examination and got her statement recorded u/s 164 CrPC. He recorded the statements of the

witnesses. He tried to arrest the accused persons, but they could not be located. After completion of preliminary investigation, he handed over the case diary to the in-charge of Borsola OP for further investigation. Both the accused persons surrendered at Borsola OP, on 08-06-2011. SI Manik Rajbongshi, the successor IO, submitted the charge-sheet, Ext.4, against the accused persons. In cross-examination, he has stated that he found the victim girl sitting in the house of the accused persons. At that time, the accused persons were not available at home. Mother of the accused Piyarul was only found present at home.

ANALYSIS OF EVIDENCE ON RECORD :

(A) AGE OF VICTIM :

(Attained majority)

PW-3 Musstt. Sajida Khatun, the alleged victim, has stated that at the time of the occurrence, she was aged about 18 (eighteen) years and presently her age is about 20 (twenty) years. Her brother PW-1 Md. Zakir Hussain, the informant, has stated that at the time of the occurrence, PW-3 Sajida was aged about 18 years 6 months. PW-2 Musstt. Johura Khatun, the mother has stated that the present age of her daughter (PW-3) is about 19 (nineteen) years. Supporting their evidence, PW-5 Dr. Indira Gogoi, the doctor, who examined PW-3, the victim, on 24-05-2011, has opined that her age was above 18 (eighteen) years, vide Ext.3, the medical report. The prosecution has produced neither the birth certificate nor any copy of the school admission register to prove the age of the victim (PW-3). Therefore, based on the oral evidence of PWs 1,2 and 3 (the victim) , supported by the medical evidence of PW-5, it may without hesitation be inferred that at the time of the occurrence, PW-3, the victim-woman attained majority, beyond doubt.

(B) WHETHER ABDUCTED :

(Accompanied on own volition)

From Ext.1, the ejahar, lodged by the victim's brother (PW-1), it is revealed that on 22-05-2011, Sunday, at about 8 p.m., the accused Md. Piyarul Islam entered into his house and dragged his sister (PW-3) away forcibly, to his house, and the other accused Md. Faizul Haque sent them to some secret place. It is seen from the evidence of PW-3, Musstt. Sajida Khatun that she had a love affair with the accused Piyarul, who is a neighbour, for about 2 (two) years and on

the relevant day, he forcibly took her away from her parental home and kept for a day in his house. It further appears from her (PW-3) evidence that, thereafter, the villagers went to the house of the accused and after taking away from his house, gave in marriage to her present husband Islamuddin. In connection with the incident, she (PW-3) gave a statement before the Magistrate, vide Ext.2. In cross-examination, she contradicted her aforesaid evidence stating that **she voluntarily went to the house of the accused Piyarul, who is an adjacent resident and with whose family, she had visiting terms since childhood and where she often stayed**. According to her, the instant case is the result of misunderstanding and her brother Zakir (PW-1) lodged the ejahar at the instigation of the villagers. Thus, on scrutiny of her (PW-3) evidence and her statement given u/s 164 CrPC, Ext.2, it is apparent that pursuant to her love affairs, on the day of occurrence, she on her own volition, went to the house of the accused Piyarul, who is an adjacent resident. Therefore, from her (PW-3) evidence, it is crystal clear that the accused did not abduct her.

Apart from the above evidence of PW-3, the alleged victim, it appears from the evidence of PW-1 Md. Zakir Hussain that he lodged the ejahar, vide Ext.1, on the basis of information given by his mother Johura Khatun (PW-2) which is corroborated by PW-2, aforementioned, but added in cross-examination, that their house and the house of the accused are situated adjacently and further, that his victim sister (PW-3) and the accused were being brought up in the locality and as such, used to move around together. Further, from the evidence of PW-1 Md. Zakir Hussain, his mother PW-2 Musstt. Johura Khatun, PW-3 Musstt. Sajida Khatun (the victim), PW-4 Musstt. Nuresa Begum and PW-6 Musstt. Dilwara Khatun, it transpires, as a whole, that both the families of the victim and the accused are on mutual visiting terms and that the case was being the result of misunderstanding between the two families, the incident has already been amicably settled between them without intention to proceed further with the case. Added to these vital aspects of the prosecution evidence, PW-7 ASI Md. Sahabuddin Ansari, the IO, in cross-examination, has stated that he found the victim girl (PW-3) sitting in the house of the accused persons and at that time, the accused persons were not available at home indicating thereby absence of application of force on her (PW-3) in any objectionable manner by the accused, father and son, as she was capable of moving without obstruction.

Situated thus, this Court finds that the accused persons did not abduct PW-3 Musstt. Sajida Khatun by application of force or deception in any form and manner and that she herself went to the house of the accused persons voluntarily, as habituated to, beyond reasonable doubt.

F I N D I N G

For the above stated reasons, this Court is of the humble opinion that the prosecution has miserably failed to prove the charge, aforementioned, levelled against the accused, beyond all reasonable doubt.

Therefore, the accused persons, namely, (1) Md. Faijul Haque @ Rahman and (2) Md. Piyarul Islam are acquitted of the charge u/s 366/34 of IPC and set at liberty forthwith.

Accordingly, the case is disposed of.

Given under my hand and seal of this Court on this the 13th day of February, 2013.

(A. BORTHAKUR)
SESSIONS JUDGE,
SONITPUR :: TEZPUR

Typed to my dictation and corrected by me, and each page bears my signature:

(A. BORTHAKUR)
SESSIONS JUDGE,
SONITPUR :: TEZPUR

Typed by me, on dictation:

(J.K. Muru, Steno)

* * * * *

SESSIONS CASE NO. 199 OF 2012

ANNEXURE

LIST OF PROSECUTION WITNESSES

PW-1 : Md. Zakir Hussain, Informant
PW-2 : Musstt. Johura Khatun,
PW-3 : Musstt. Sajida Khatun, victim
PW-4 : Musstt. Nuresa Begum
PW-5 : Dr. (Mrs) Indira Gogoi, MO
PW-6 : Musstt. Dilwara Khatun,
PW-7 : Sahabuddin Ansari, IO

LIST OF DEFENCE WITNESSES

N I L

LIST OF DOCUMENTS EXHIBITED BY PROSECUTION

Exhibit -1 : Ejahar
Exhibit -2 : Statement u/s 164 CrPC
Exhibit -3 : Medical Report.
Exhibit -4 : Charge-sheet.

MATERIAL EXHIBIT

N I L

DEFENCE EXHIBIT

N I L

(A. BORTHAKUR)
SESSIONS JUDGE
SONITPUR :: TEZPUR