

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

PRESENT : Sri M. Kalita,
Assistant Sessions Judge,
Sonitpur, Tezpur.

SESSIONS CASE NO. 69 OF 2008

GR Case No. 2101/ 2007

Under Section 366 of Indian Penal Code

State of Assam **Complainant**

–Versus –

Md. Zakir Hussain
Son of Md. Sekhbor Ali,
Village-Khonamukh
PS – Tezpur.
Dist – Sonitpur, Assam **Accused Person**

ADVOCATES APPEARED:

For the State : Sri Mahendra Bora,
Additional Public Prosecutor

For the accused person : Sri S.C. Acharyya,
Advocate

Date of Argument : 24-04 – 2012 & 26-06-12

Date of Judgment : 26 -06 – 2012.

J U D G M E N T

1. The case set up by the prosecution is that the informant Musstt. Jamila Khatoon, resident of village Khanamukh under Tezpur Police station lodged the FIR on 26-12-2007 before Mahabhoirab Police Out Post under Tezpur PS against the accused Zakir Hussain along with two other persons stating inter-alia that on the previous night at about 12 O' clock her minor daughter aged 12 years had come out from the house for discharging urine. At that time the accused along with two other persons whose name were mentioned in the FIR, forcibly took away the said minor daughter of the informant. The accused being already married person was living by earning the livelihood by selling the blood. Though the accused had come earlier to the residence of informant with a proposal to get married with the daughter of informant but the informant turned down the proposal. Hence, the accused committed the occurrence to take the revenge. So, the informant prayed in her FIR to accept her FIR for recovering her daughter and also prayed for taking necessary action against the accused. Hence, the prosecution case.

2. After receiving the FIR vide G.D.E. No. 563 dated 29-12-07, the Incharge of Mahabhoirab Police Out Post forwarded the FIR to Tezpur Police Station for registering a case. The Incharge of Mahabhoirab Police Out Post took the task of investigation of the case. And after receiving the FIR, the Officer-in-Charge of Tezpur PS registered a case bearing Tezpur Police Station Case No. 948/07 u/s 366 A/34 of IPC. During the course of investigation, the Investigating Officer inspected the place

of occurrence and drew up a sketch map and interrogated the witnesses. The victim was referred for medical examination by doctor. The victim was also produced before the Magistrate for recording her statement u/s 164 CrPC. Investigating Officer also arrested the accused during the period of investigation in connection with the case. Then after completing the investigation, the Investigating Officer submitted the Charge sheet against the accused u/s 366 (A) of IPC. Hence the prosecution case.

3. After appearance of the accused person before the Court, the learned Judicial Magistrate committed the case to the learned Sessions Judge, Sonitpur, Tezpur. Then the case was made over to this Court for trial. Accordingly, this Court took up the trial of the case. Considering the materials on case record, the charge was framed against the accused under Section 366 (A) of IPC. Then the contents of charge was read over and explained to the accused to which the accused pleaded not guilty and claimed to be tried. After recording the evidence, another charge u/s 376 of IPC was framed against accused. The contents of that charge was also read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

4. During the trial the prosecution has examined as many as six PWs including the victim girl, Medical Officer and the learned Judicial Magistrate who had recorded the statement of victim u/s 164 Cr.P.C, in support of the prosecution case. Then the accused has been examined u/s 313 CrPC, wherein he has denied the prosecution case totally. No witness has been examined by defence. After close of trial, the Judgment was delivered

by my predecessor with conviction of accused with sentence to undergo Rigorous Imprisonment for a term of 5 (five) years and a fine of RS. 1000/- (Rupees one thousand) in default Simple Imprisonment for further period of 6(six) months for the offence committed U/s. 366 of IPC. The accused was also convicted with sentence to undergo Rigorous Imprisonment for a term of 7(seven) years and the fine of RS. 5000/- (Rupees five thousand) only in default Simple Imprisonment for 12(twelve) months for the offence committed U/s. 376 of IPC.

Learned Appellate Court remanded the case to this trial court with a direction to write a judgment afresh on the basis of the evidence already on the record by observing that there is a confusion regarding the offence for which the accused was convicted and for which he was sentenced when accused preferred appeal being aggrieved with the said Judgment passed by this Court against him.

So, after receiving back the case record, the argument has been heard from learned Addl.Public Prosecutor and also from learned defence counsel. And after close of trial, the judgment is accordingly delivered.

5. Points for determination of the case:

(1) Whether the accused person induced the victim girl who is a minor under the age of eighteen years to go out from her residence at the time of occurrence ?

(2) If so, whether the accused did such act with intent to force or seduce her (victim) to illicit intercourse with him ?

(3) If so, whether accused committed rape on victim after detaining her ?

Discussion, Decision and reasons for Decision:-

6. The prosecution has examined altogether 6 PWs including the victim and the Medical Officer to establish the charge against accused. So, before deciding the above points, I deem it necessary to briefly discuss the evidence adduced by PWs first.

7. PW-1 is the informant Jamila Khatoon, who is also the mother of the victim. She has deposed that on the date of occurrence at about 12 O' clock at night she was sleeping along with her victim daughter at her residence. In the morning of next day while she awoke up then she did not find the victim in the house. Then she searched for her daughter. Then she came to know from one Nurun Nahar that the accused had taken away her daughter and then she lodged the ejahar after three days. Then the police recovered her daughter from the residence of a near relative of accused Zakir Hussain. Then her daughter was referred for medical examination. She was also produced for recording her statement by Magistrate.

In the cross-examination, PW 1 has stated that she got married about 20 years ago and victim is her 5th child. She has no knowledge about the age of victim but her age may be 13/18 years. PW 1 has also denied some suggestions put to her by defence. She did not know how her daughter came out from house though the door of house remained closed.

8. PW 2 is the victim. She has stated in her evidence that on the date of occurrence at 10 p.m. while she came out from the house for discharging urine then the accused along with two other persons came suddenly and gagged her mouth with his hand took away her. Then she was brought to Raghu Tiniali and thereafter to Orang by bus. She was detained at the residence of his maternal uncle for 3 days. At that period the accused committed sexual intercourse with her forcefully. Thereafter the maternal uncle of accused handed over her along with accused to Gaonburha. And Gaonburha handed over them to police. Then Police referred her for medical examination. She was also produced before Magistrate for recording her statement. At the time of occurrence her age was 14 years.

In the cross-examination of PW 2 (Victim) has stated that she did not submit any age proof certificate. She had no any intimacy with the accused. Her mouth was gaged by accused during the journey by bus from Raghu Tiniali. She stated before her parent regarding the act of forceful sexual intercourse committed by accused with her. Th PW 2 (victim) has denied the fact that she eloped with accused as she had developed love affairs with him. She has also denied some suggestions put to her by defence dring her cross-examination.

9. PW 3, Hasen Ali, the father of victim has deposed that at the time of occurrence her daughter's age was 12/13 years. On the date of occurrence he found missing his daughter abut 3.4 a.m. Then he left for working. As his daughter was missing and accused Zakir was also found missing so he apprehended that accused

had taken away his daughter. His wife lodged the ejarah. After 3 / 4 days his daughter along with accused were handed over to police by Gaonburha.

In the cross-examination, PW 3 has stated that he has no knowledge about the actual age of victim. During childhood time accused and victim had good relation each other.

10. PW 4 is the Medical Officer. He has stated that on 31-12-07 he examined the victim Minara Begum in reference to Tezpur PS Case No. 948/07. During examination he found as follows :

“She was average built. Her secondary sexual characters- breast well developed, axillary and pubic hair developed. Vulva and Vagina developed and healthy. Hymen absent. There were no marks of violence on the private parts as well as other parts of body. Vaginal smear for spermatozoa – absent. X-ray was done on 31-12-07.

Epiphyseal plates of iliac crest are yet to be fused with corresponding bones.

Epiphyseal plate around left elbow joints are completely fused with corresponding shafts.

Epiphyseal plate at the distal ends of radius and that of left ulna are not fused with corresponding shafts.

Opinion : There were no sign that suggest rape. Age of the victim girl was below 18 years.”

Medical Officer has proved the medical report submitted by him as Ext.1.

In the cross-examination, the Medical Officer has stated that the age of victim may be varied by two years in either side.

11. PW 5 is the Investigating Officer. He has stated that on 29-12-07 while he was working as Incharge of Mahabhoirab Police Out Post on that day he received the ejahar from the informant Musstt Jamila Khatoon. Then he made a GD Entry and started to investigate the case by forwarding the ejahar to Tezpur Police Station for registering a case. Thereafter during the period of investigation, the I.O inspected the place of occurrence and prepared the sketch pay. He interrogated the witnesses also. He referred the victim for medical examination. He also produced the victim for recording her statement U/s. 164 Cr.P.C. During that period he arrested the accused and forwarded th accused to Judicial custody. And after completing the investigation he submitted the chargesheet against the accused U/s. 366 (A) IPC. He has proved the chargesheet as Ext. 5, the sketch map as Ext. 4.

In the cross-examination, the PW 5 (I.O.) has stated that though the ejahar was shown as written on 26-12-07 but he received the same on 29-12-07. The accused was produced before him by the guardian of accused.

12. PW 6 is the learned Judicial Magistrate who had recorded the statement of victim U/s. 164 Cr.P.C. He has deposed that he recorded the statement of victim on 31-12-07 on being referred by Chief Judicial Magistrate, Sonitpur, Tezpur. He has proved the statement as Ext.7.

In the cross-examination, the learned Judicial Magistrate has stated that the victim was escorted by WPC. The thumb impression of victim on the statement was not endorsed by anybody.

13. After discussion of evidence adduced by PWs it comes to light that the informant's contention is that when she found her daughter missing at her residence at midnights, she immediately started to search the victim. Then she came to know that accused Zakir Hussain had kidnapped her daughter. Then after 3 days she lodged the ejahar. The victim has claimed in her evidence that at night while she was coming for discharging urine then accused along with two other persons came and took her away by gagging her mouth. At first she was brought Raghu Tiniali. Then she was taken away by boarding a bus. She was detained at the residence of maternal uncle of accused for 3 days. And during that period the accused forcefully committed sexual intercourse with her. She was 14 years at the time of occurrence.

PW 3, the father of victim has also contended that he came to know after the occurrence that accused Zakir Hussain had taken away his daughter as the accused also found missing from his residence.

The Medical Officer has given his opinion that during examination he did not find any sign that suggests the rape. The victim was found below 18 years of age. The I.O has also revealed that he received the ejahar on 29-12-07 though the occurrence took place on 25-12-07.

In this context, I like to discuss the fact stated by victim in her statement recorded U/s 164 Cr.P.C. In that statement she revealed that she went away with accused and stayed at resident of "Nana". She had stayed 5 days there.

The accused person denied the prosecution story during his examination u/s 313 Cr.P.C. He has further denied the fact that on the night of occurrence he kidnapped the victim who was a minor and brought her to Orang and detained the victim for 3 days there and during that period he forcefully committed sexual intercourse with her.

14. The learned Addl. Public Prosecutor has submitted that the prosecution has established the charge against the accused with the material of beyond reasonable doubt. There is no major contradiction in the evidence of PWs to discard their evidence. So, the accused can be convicted on the basis of material found on the record.

15. Countering the above submission of learned Addl.P.P, the learned defence counsel has submitted that the prosecution has totally failed to prove the case with material of beyond reasonable doubt. Because the PWs have stated some contradictory fact for which the evidence of PWs is found reliable.

The learned defence counsel has also placed reliance on following decisions :

1. 2008(2) GLT 682
2. 1977 CrL.L.J. 1512
3. 2007 (2) GLJ 530,
4. 2001 CrL.L.J. 2799
5. 2007 (1) GLJ 592
6. 2005 (3) GLT 501
7. 2003(2) GLT 394,
8. (2008) 3 Supreme Court cases (CrL) 381 and
9. 2007 (3) GLT 481.

16. On the backdrop of aforesaid material, I deem it necessary to discuss the material on record in the light of points for determination of the case for coming to just and proper conclusion.

17. In regards to first point for determination of the case it is found from the meticulous examination of the material on record that the informant lodged the ejahar after finding her daughter disappearing from the residence at night. And after search conducted by her she came to know that accused had taken away her daughter. The informant has substantiated the fact of ejahar by evidence. The victim has also substantiated the said fact by her evidence. In her evidence she (victim) has claimed that she was taken away by the accused while she came out for discharging urine by gagging her mouth. The PW 3 has also substantiated the fact of ejahar by stating in his evidence that he also came to know that accused Zakir Hussain had taken away his daughter.

18. On appreciation of evidence of PWs, it is found that the victim has stated with unequivocal words that at first she was taken away by accused by gagging her mouth with help of two other persons. Then she was taken away to Raghu Tiniali. Thereafter she was taken to Orang by bus. She was detained at the residence of "nana" of accused for 3 days. Accused committed forceful sexual intercourse with her during her detention. Moreover, the victim has stated that at the time of occurrence her age was 18 years. The informant who is also the mother of the victim has claimed in the ejahar as well as in the evidence that at the time of occurrence her daughter's age was 12 years. So, considering the above fact stated by

victim and her mother it can be gathered that the victim was minor at the relevant point of time. Moreover, the victim has categorically denied the suggestion put to her by defence that at the time of occurrence her age was above 18 years. On the other hand the Medical Officer has also opined the age of victim as below 18 years. So, the evidence of victim has been corroborated by evidence of PW 1 and Medical Officer in regards to the age of victim as below 18 years. The defence has also failed to bring out major contradiction in the evidence of PWs 1,2 and 4 (M.O) to discard their evidence. Hence, their evidence is found very much corroborative, cogent, trustworthy and reliable. And such evidence inspires the confidence to hold the opinion that the victim was minor at the relevant point of time. There is also no any infirmity or contradiction in the evidence of PWs 1, 2 and 3 in regards to fact that the victim was taken away by accused by gagging her mouth at the time of occurrence. Hence, the evidence adduced by these PWs is found reliable and cogent in this point. And such evidence also inspires the confidence to hold the opinion that accused kidnapped the victim by gagging her mouth when she came out for discharging urine. By doing such acts the accused kidnapped the victim at the time of occurrence.

19. In regards to the second point for determination of the case, it is found from meticulous examination of the material on record that the victim has categorically stated in her evidence that the accused committed forceful sexual intercourse with her during her confinement at the residence of "Nana" of accused. The PW 1, the mother of victim has not stated anything regarding sexual assault.

20. It is also pertinent to mention one fact that appears on the material on record is that the informant alleged in her ejahar that the accused earlier approached to them and offered the proposal to get the victim married. But the informant turned down the proposal. And out of revange the victim was kidnapped. The PW 3, the father of victim has stated that during childhood there was good relation between his daughter and accused. So, on appreciation of evidence of PW 1, PW 2 (victim) and PW 3 it clearly shows the evil intention of accused for taking away the victim. Considering evidence of these PWs in its entirety and also considering the fact that by victim in her statement recorded U/s 164 Cr.P.C, I am of the considered opinion that the accused kidnapped the victim only to compel her marriage with him. Such evidence inspires the confidence to hold the opinion that it was none but accused who had kidnapped the victim to compel her marriage with him. Though the defence has denied such fact but the defence has failed to bring any major contradiction to discard the evidence of PWs in this point. Hence, the evidence of these PWs remains unshakened.

21. On the basis of above discussion, it is found that the prosecution has become able to establish with reliable and cogent evidence that the accused kidnapped victim (the victim being a minor) with the intention to compel her marriage with him. No such materials are there in the record to establish that the accused induced the victim (the minor girl) to go out from her residence with intent to force or seduce to illicit intercourse. So, it is evident from material on record that the accused is only found guilty for committing offence U/s. 366 IPC. And in view of provision of Section 222 Cr.P.C there is no bar to

convict the accused U/s. 366 IPC though the charge was initially framed u/s 366 (A) IPC.

22. In regards to the third point for determination of the case it is found from meticulous examination of material on record that the victim has contended in her evidence that the accused committed sexual intercourse with her forcefully at the time of her confinement at the residence of "Nana" of accused. But the victim remained silent about this fact in her statement recorded U/s. 164 Cr.P.C. No such fact was also stated by her in the statement recorded by I.O u/s 161 Cr.P.C. So, it is evident that the victim has disclosed such fact in her evidence first time. The Medical Officer stated in the Medical report (Ext.1) that there are no sign that suggest rape.

23. The learned defence counsel has vehemently submitted that the victim has stated first time about the sexual assault committed by accused. So without sufficient corroboration the accused can not be convicted for the offence U/s 376 of IPC. As the medical evidence is also completely silence about the fact of sexual assault.

24. So, upon the above backdrop of materials on record, I am to decide whether the sole evidence of victim is sufficient to establish the charge U/s. 376 of IPC.

25. In this context, I like to cite the decision in the case of **Dwarika Bhuyan Vs State of Assam** reported in **(2007) 1 GLR 281** regarding the importance of Medical evidence to prove the offence of rape. In **para 18** the Hon'ble Gauhati High Court has observed that -

“a victim of sexual assault is not an accomplice and her evidence needs no corroboration from any kind of evidence, medical or otherwise, the facts remains that in order to enable a court to base, in a case of sexual assault, conviction of an accused on the sole testimony of the victim of assault, the court must be satisfied that the victim’s testimony has withstood the test of cross - examination and inspires confidence of the court”

26. On the other hand, though the learned defence counsel has cited some decision of Hon’ble High Court regarding the appreciation of evidence in reference of offence U/s 376 IPC but the story of prosecution case of those decisions are not identical with the story of prosecution of instant case. So, I feel it not necessary to cite such decision.

27. But on appreciation of evidence of victim, it is found that there is no ground to be satisfied that the victim’s testimony has withstood the test of cross-examination and inspires confidence of the Court. Because the victim has stated first time in her evidence about the fact of sexual assault committed by accused. The medical evidence has also not supported this fact. So, on the sole basis of evidence of victim without sufficient corroboration it is quite unsafe to convict the accused for such a grievous offence u/s 376 of IPC. Even the victim did not disclose such fact before her mother (informant) after recovery as it is evident from the material on record/ So, considering the material on record in its entirety, I am of the considered opinion that the evidence of PWS is not

sufficient and reliable to prove the charge u/s 376 of IPC. So, it found that the prosecution has failed to prove the ingredient of offence of rape with the material of beyond reasonable doubt.

28. So, in the result of discussion above it is found that the prosecution has proved the ingredient of offence u/s 366 of IPC only with the material of beyond reasonable doubt. Hence, the accused is liable for conviction under said provision of law only. The accused is entitled to acquittal for the offence U/s 376 of IPC for the reasons stated above.

29. Considering the fact and circumstances of the case and also considering the gravity of offence, I am of the considered opinion that it is not a fit case to invoke the provision of section 360 of Cr. P. C. Because the accused has committed a heinous offence.

30. Heard from accused on point of sentence u/s 235 (2) CrPC. The accused has stated that he committed no wrong. But such plea of accused is not acceptable because it has been already decided that accused committed the grievous offence by kidnapping the victim with the intention to compel her marriage against her will.

ORDER

31. As the prosecution has proved beyond reasonable doubt against the accused for committing offence u/s 366 of IPC only, so he is convicted with sentence of Rigorous imprisonment for 5 (five) years and a fine of Rs.2,000/- (rupees two thousand) in default of fine, Simple Imprisonment for another 2 (two) months for the offence committed u/s. 366 of IPC.

32. It is also ordered that the period of detention, if any, shall be set off from the period of imprisonment.

33. The fine, if realised, shall be given to the victim as compensation.

34. Let a copy of judgment be furnished to the accused with free of cost as per section 363 of CrPC.

35. Let a copy of judgment also be furnished to the District Magistrate, Sonitpur, Tezpur.

Given under my hand and seal of this Court on this day, the 26th day of June, 2012.

(M. Kalita)
Assistant Sessions Judge,
Sonitpur, Tezpur.

Dictated and corrected by me.

(M. Kalita)
Assistant Sessions Judge,
Sonitpur, Tezpur.

Dictation taken and
transcribed by me :

(R. Hazarika)
Steno.

A P P E N D I X**Prosecution witnesses :**

PW 1 : Smti Jamila Khatoon, informant.
 PW 2 : Miss Minara Begum Tunima(Victim)
 PW 3 : Hasen Ali,
 PW 4 : Dr. Ranjan Kr. Das,
 PW 5 : S.I. Somesar Boro,Investigating Officer.
 PW 6 : Mr. N.A. Ahmed, Judicial Magistrate,

Defence Witness : Nil

Court Witness : Nil

Prosecution Exhibits: :

Exhibit 1 : Medical Report.
 Exhibit 2 : Radiological Report.
 Exhibit 3 : FIR
 Exhibit 4 : Sketch Map
 Exhibit 5 : Chargesheet
 Exhibit 6 : GR Record.
 Exhibit 7 : Statement.

Material Exhibits: : Nil

Defence Exhibit : Nil

Court Exhibit : Nil

Exhibit produced by witness : Nil

(M. Kalita)
 Assistant Sessions Judge,
 Sonitpur : Tezpur.