
(2022) 05 GAU CK 0025
In the Gauhati High Court
Case No : Criminal Appeal No. 347 Of 2018

Manik Sheikh @ Mohidul Islam

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 11-05-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313, 374(2)
Indian Penal Code, 1860 — Section 34, 90, 361, 363, 366A, 375
Protection Of Children From Sexual Offences Act, 2012 — Section 2(1)(d), 3, 4, 7, 8

Citation : (2022) 05 GAU CK 0025

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : M Hussain, D Das

Final Decision : Disposed Of

Judgement

1. Heard Mr. M. Hussain, learned counsel appearing for the accused appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor, Gauhati High Court. None appeared for the respondent No. 2/informant.

2. This appeal under Section 374 (2) of the Cr.P.C. is preferred against the judgment and order, dated 16.08.2018, passed by the learned Special Judge (POCSO Act), Dhubri in Special Case No.26/2016 whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for 3 (three) years and to pay fine of Rs.5,000/- (Rupees Five Thousand), in default to suffer imprisonment for 2 (two) months under Section 363 of the IPC and also to undergo rigorous imprisonment for 7 (seven) years and to pay fine of Rs.10,000/- (Rupees Ten Thousand) only, in default to suffer rigorous imprisonment for 3(three) months only under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short).

PROSECUTION STORY:

3. The prosecution story, in brief, is that an F.I.R. was lodged on 18.04.2016

before the Officer-in-Charge, Golokganj Police Station with an allegation that on 17.04.2016 at about 7 p.m., taking the advantage of absence of the informant in the house, the accused appellant and another namely Rohidul Hoque (not charge-sheeted) kidnapped his minor daughter aged about 16 years. After getting information about it, he returned to his house from Tamarhat Bazar and as he did not find his daughter, he searched and on 18.04.2016, received information from reliable sources that the appellant and his said associate kidnapped his daughter and hid her at an unknown place. The informant suspected that they kidnapped his daughter to sell her to a racket of woman traffickers. His said associate namely Rohidul Hoque disclosed the matter of kidnapping of his daughter before the villagers.

INVESTIGATION:

4. Based on the above F.I.R., Golokganj P.S. Case No.278/2016 under Section 366A/34 of the IPC, dated 18.04.2016, was registered and after completion of investigation, the police laid a charge-sheet under Section 366A of the IPC and under Section 4 of the POCSO Act against the present accused appellant.

TRIAL & CONVICTION:

5. The learned Special Judge (POCSO Act), Dhubri, after examining the materials on the case diary, on being prima facie satisfied, framed charges under the penal provisions as charge-sheeted, against which the accused appellant pleaded not guilty. The said learned trial Court after closing the evidence of the prosecution side, recorded the statement of the accused appellant under Section 313 Cr.P.C. The defence declined to examine any witness. Thereafter, upon hearing the arguments of both sides and appreciation of evidence, oral and documentary, having found the accused appellant guilty of the offences, convicted and sentenced him as stated above.

6. In order to establish the charges framed against the accused appellant, the prosecution examined as many as 10 (ten) witnesses.

EVIDENCE:

7. Now, let us look into the evidence on record.

8. P.W. 1 is the father of the victim and informant in this case. His version is that at the time of the alleged occurrence, his daughter was aged about 16 years. According to him, on 17.04.2016 at around 7 p.m., his victim daughter went off missing from house. He searched for her but did not find any trace of her. Therefore, he filed Ext. 1, the F.I.R. Thereafter, the police recovered his daughter along with the accused. In cross-examination, he, inter-alia, stated that he did not see wherefrom the police recovered his daughter along with the accused and denied the defence suggestion that at the time of the alleged occurrence his daughter was more than 18 years old.

9. P.W. 2 is the victim girl, a student of class X. According to her, on the day of

the occurrence, at around 7.00- 8.00 p.m., she went out to the road in front of her house to take fresh air. At that time, a brother of the accused came in a tempo and told her that the accused wanted to talk with her and asked her to sit in the tempo. Accordingly, the victim sat in the tempo. The accused took her to Targhat, and from there, they went to the house of his maternal uncle in a night super bus. In the house of his maternal uncle, the accused committed rape on her and thereafter, confined her in the house for two nights. On the third night, the police came and rescued the victim from the clutches of the accused. In her cross-examination, the victim stated that the accused threatened her by showing a dagger and pushed her inside the night super bus. She denied the defence suggestion that the accused had land dispute with her father and hence, she deposed falsely against him.

10. The evidence of P.W. 3, Nur Islam shows that on a day, in the year 2016, he heard that the victim was missing. On the next day, the elder brother of the accused told him that the accused appellant had kidnapped her. In his cross-examination, he stated that he did not know the fact of the incident.

11. P.W. 4 is the mother of the alleged victim girl. Her version is that in the year 2016, her daughter was studying in Class IX. One day, at about 7 p.m., her daughter went off missing from house, after which, they launched search for her but could not trace her out. Therefore, her husband lodged an ejahar at Golokganj P.S. After seven days, Golokganj P.S. informed them about the recovery of her daughter. On being asked, her daughter told her that the accused appellant had kidnapped her and took her to Guwahati where she was kept for four days and then, she was brought to Golokganj and that she was kept for three days in the house of a relative of the accused and ultimately police recovered her. In her cross-examination, P.W. 4 stated that she had not seen how and who kidnapped her daughter.

12. P.W. 5 is the brother of the victim girl. According to him, on 17.04.2016, his sister went off missing from their house and they could not trace her out despite search being made. Therefore, his father lodged an FIR and after three days of the incident police recovered his sister. In his cross-examination, he stated that after two months from the date of the incident, marriage of his sister was solemnized with another person.

13. P.W. 6 is a co-villager of the informant. His version is that on a day in the year 2016, he came to know from the villagers that the accused kidnapped the informant's daughter and after few days, police recovered her. He did not know wherefrom the victim girl was recovered.

14. P.W. 7 is the brother of the informant. He deposed that on a day in the year 2016, his niece went off missing from her house for which, his elder brother lodged an F.I.R. at Golokganj P.S. After three days, police recovered his niece and on being asked, his niece told her that the accused had kidnapped her.

15. P.W. 8, Insan Ali, is the driver of the tempo vehicle. He stated that about 3

years back, the accused along with one girl boarded his tempo vehicle at Balajan and travelled up to Gauripur.

16. P.W. 9, Dr. (Mrs.) Muskura Ahmed is the doctor, who examined the victim on 23.04.2016. According to her, the victim told her that she had gone with a boy and got registered their marriage, but her parents caught her and brought to their house. On examination of the victim, she found the victim to be normal and found no mark of injury on her body. She also did not find any evidence of rape on the body of the victim girl. She stated that as per radiological report, the age of the victim was 16 to 17 years.

17. P.W. 10, ASI Abdus Sabur, the investigating officer stated, inter-alia, that in course of investigation, he seized the birth certificate of the victim girl vide the seizure memo Ext. 3 and gave it in zimma to the informant. He further stated that on 23.04.2016, he recovered the victim girl along with the accused appellant from Gauripur bus stand. The statement of the victim girl was also recorded under Section 164 Cr.P.C.

ARGUMENTS:

18. Mr. M. Hussain, learned counsel for the accused appellant submitted that the learned trial Court misread Section 375 of the IPC because the victim girl on the date of alleged occurrence, as per birth certificate, was 17 years 1 month 24 days and the case came under exception 6 of Section 375 of the IPC. Mr. Hussain further submitted that the falsity of the case is apparent from the fact that when the victim girl was medically examined on 23.04.2016, no incriminating evidence of alleged rape was found by the attending doctor and before they were apprehended by police, the marriage between the accused appellant and the said victim girl was solemnized. Mr. Hussain emphatically submitted that the impugned judgment is bad in law as the offence u/s 363 of the IPC and the offence u/s 4 of the POCSO Act cannot go together. In addition, Mr. Hussain submitted that in her statement u/s 164 Cr.P.C., the alleged victim girl unequivocally stated that there was voluntary physical relationship between her and the accused appellant, but the learned trial Court wrongly interpreted the same as amounted to penetrative sexual assault. Her statement u/s 164 Cr.P.C., Mr. Hussain submitted, in all possibility was the consequence of tutoring as she was a child witness. Summarising his submission, Mr. Hussain submitted that the alleged act of the accused appellant was consensual as the victim girl voluntarily accompanied with the accused appellant by public mode of conveyance without raising any protest against him to the persons whom she came across. Mr. Hussain relied on the judgments rendered in- 1) *Jaya Mala -Vs- Home Secretary, Government of J. and K. and others*, reported in AIR 1982 SC 1297; 2) *State of U.P. -Vs- Munni Ram and Ors.*, reported in AIR 2011 SC(Supp) 573; 3) *Kavita Chandrakant Lakhani -Vs- State of Maharashtra and anr.*, reported in (2018) 6 SCC 664; 4) *Nasib Hussain (Md.) -Vs- State of Assam and Ors.*, reported in 2015(3) GLT 89; 5) *Yakub Ali @Nanoi and Anr. -Vs- State of Assam*, reported in 2016(3) GLT 671.

19. Mr. D. Das, learned Addl. Public Prosecutor, Gauhati High Court, submitted that in this case, the entire prosecution case basically rests on the solitary witness of the victim girl who on the date of the alleged occurrence was a minor being aged about 17 years 1 month 24 days as per her birth certificate and as such, her consent to accompany with the accused appellant, if at all believed, amounted to no consent and as such, amounted to kidnapping from the custody of her legal guardian. Mr. Das further submitted that the criminal intention of kidnapping of the said girl is ascertainable from the evidence itself and that after so kidnapping of the victim girl the accused appellant entered into marriage contract with her. Therefore, Mr. Das submitted that the impugned judgment and order being well- reasoned, no interference is called for in appeal.

20. I have carefully considered the respective submissions of both sides. Also perused the case records.

THE REASONS FOR CONVICTION:

21. A perusal of the impugned judgment and order shows that the learned trial Court found from the evidence that the alleged victim girl was a minor being below the age of 18 years and the accused appellant compelled her to go from her house to another place, but the intention of the appellant was not to hand over her to another person to do sexual intercourse with her. Accordingly, the learned trial Court held that the main ingredient that the girl would be forced or seduced for illicit intercourse with someone other than himself is absent and as such, the prosecution failed to establish the charge against the accused appellant under Section 366A of the IPC. The learned trial Court observed that as per Section 361 of the IPC, if the accused takes or entices away a minor girl below the age of 18 years without the consent of her guardian, then it amounts to kidnapping from lawful guardianship and in the instant case, the victim girl was taken away without the knowledge or consent of her parents. As such, the learned trial Court held that the accused appellant clearly committed the offence punishable under Section 363 of the IPC. So far the alleged offence of commission of penetrative sexual assault is concerned, the learned trial Court held that the victim girl is a child as defined under Section 2(1)(d) of the POCSO Act. The learned trial Court has observed that the victim (P.W. 2) in her deposition in clear terms has stated that the accused committed rape on her and it can easily be presumed that the victim being a girl of 16 or 17 years knows the meaning of the word 'rape' and therefore, the victim's statement under Section 164 Cr.P.C. to the effect that the accused appellant established physical relationship with her indicated that she was subjected to rape as defined in Section 375 of the IPC. Adding further to it, the learned trial Court has observed that the consent of the victim was not material as on the date of the alleged occurrence, she was a minor and if the accused sexually exploited her on 17.04.2016 or 18.04.2016, it was quite natural that the doctor, who examined her on 23.04.2016 at about 12 noon could not detect anything in support of the aforesaid allegations.

ANALYSIS OF EVIDENCE:

22. Before focusing on the other details of the allegations, this Court finds it expedient to ascertain the age of the victim girl first on the date of the alleged occurrence on 17.04.2016. The victim girl (P.W. 2) in her examination-in-chief stated that at the time of occurrence, she was reading in class X. Neither party, however, enquired her about her date of birth or age while her evidence was recorded. Her father (P.W.1) and mother (P.W. 4) in their evidence, inter-alia, stated that their daughter (P.W. 2) was aged about 16 years, but neither party enquired them about her exact date of birth. It is noticed from the evidence of P.W. 5, the brother of the victim girl that his alleged victim sister's birth certificate was seized by the investigating officer vide Ext. 3, the seizure memo and after two months of the said incident, she solemnized marriage with another person. P.W. 10, ASI Abdus Sabur, the investigating officer, has corroborated his (P.W. 5) testimony by deposing that the birth certificate of the victim was seized by Ext.3 and then delivered the same in zimma of her father (P.W. 1). On the other hand, P.W. 9, Dr. (Mrs.) Muskura Ahmed, the doctor, who examined the victim girl (P.W. 2) on 23.04.2016 stated that as per the radiological report vide Ext. 5, the age of the victim girl was 16 to 17 years. A perusal of the seizure memo vide Ext. 3, it is revealed that the date of birth certificate seizing police officer (P.W. 10) mentioned her date of birth as 23.02.1999 on the seizure memo, but the prosecution failed to exhibit this most vital document without any explanation so as to enable the Courts to ascertain beyond doubt the actual age of the victim girl on the said date of alleged occurrence and to verify the authenticity of the aforesaid entry of date of birth in Ext. 3, the seizure memo.

23. The Hon'ble Supreme Court in Jaya mala Case (Supra) held that the radiological test report as to age of a person, the margin of error is two years on either side. The parents of the victim (P.Ws 1 and 4) put the age of their victim daughter at about 16 years on the date of occurrence and on the other hand, it has also come in the evidence of her brother (P.W. 5) that after about 2(two) months of the incident, she was given in marriage to another person indicating thereby her attainment of majority. The Apex Court in Munni Ram Case (Supra) held that the view which is favourable to the accused is normally to be adopted. Therefore, keeping apart the general statement of P.Ws 1 and 4 that on the date of occurrence their victim daughter (P.W. 2) was a minor cannot hold the field in view of her (P.W. 2) radiological test report vide Ext. 5 showing her approximate age as 16-17 years and if marginal error of 2(two) years is added to it, her age shows to be major on the date of occurrence. Thus, taking into consideration of these aspects on evidence and in absence of any documentary evidence, it can safely be said that on the date of alleged occurrence, the victim girl (P.W. 2) in all probability attained the age of majority, that is, 18 years or more.

24. The next pertinent question is was the alleged victim girl (P.W. 1) kidnapped by the accused appellant. Section 361 defines what is kidnapping from lawful guardianship and Section 363 of the IPC prescribes the punishment for

kidnapping.

25. Section 361 of the IPC reads as hereunder-

"361. Kidnapping from lawful guardianship .-Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception)- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

26. Section 363 of the IPC reads as follows-

"363. Punishment for kidnapping .- Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

27. A perusal of the above two statutory provisions indicate commission of an offence of unlawful taking and carrying away of a person by force or fraud against the free consent or will of the victim. In this context, it is noticed from the evidence of P.W. 2, the alleged victim girl, that when she went out of home towards the frontal road, the brother of the accused appellant (not examined) came in a tempo vehicle and told her that the accused appellant wanted to talk to her and accordingly, she readily accompanied him in the said tempo and then, the accused took her by the same tempo to Targhat, wherefrom both of them boarded one night super bus to his maternal uncle's house, where she was allegedly confined for two nights. Here it is interesting to note that she (P.W. 2) alleged that she was forced to board the public night super bus at dagger's point and by pushing into it is hard to be believed in normal course. During the aforesaid period of alleged confinement, the accused appellant 'committed rape' on her. In the third night, the police, however, recovered her from the accused appellant. P.W. 10, the investigating officer categorically stated that she was recovered from Gauripur Bus Stand with the accused appellant, which is a public place. In this regard, if one peruses the statement of the victim girl, recorded under Section 164 Cr.P.C. vide Ext. 2, it is clearly noticed that she, in fact, pre-planned with the accused appellant to move away by public mode of conveyance for the purpose of entering into their marriage without raising any protest or hue and cry. However, after two months of the incident, she contracted marriage to some other person. It may be mentioned here that there is no documentary evidence to show that the accused and the victim had actually entered into any

marital tie.

28. Therefore, this Court finds that in the facts and circumstances that transpire from evidence on record, the victim girl's (P.W. 2) consent being not vitiated by fear, fraud or immaturity, her consent was voluntary and as such, it does not attract Section 90 of the IPC.

29. Further, as the alleged victim girl (P.W. 2) was being not a 'child' within the meaning of Section (2)(d) of the POCSO Act, and further, as P.W. 9, the doctor, who examined her on the date of her recovery on 23.04.2016 itself, having not found any mark of injury on her body or any evidence of rape, this Court is of the opinion that in the absence of any convincing evidence, the accused appellant cannot be held guilty of the offence for forcible 'penetrative sexual assault' defined in Section 3 or 'sexual assault' defined in Section 7 which is punishable under Sections 4 and 8 of the POCSO Act respectively. Therefore, the plea of innocence of the accused appellant under Section 313 Cr.P.C. cannot be disbelieved.

30. For the above stated reasons, the appeal stands allowed setting aside the impugned judgment and order and accordingly, the accused appellant is acquitted of the offences and set at liberty.

Return the LCR.

Appeal stands disposed of.