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**(2015) 03 GAU CK 0073**  
**In the Gauhati High Court**  
**Case No : Criminal Appeal No. 124(J) 2014**

Nasib Hussain

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

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**Date of Decision :** 25-03-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 164, 374(2)  
Penal Code, 1860 (IPC) — Section 361, 366, 366(A), 366A, 376

**Citation :** (2015) 3 GLT 89

**Hon'ble Judges :** Rumi Kumari Phukan, J

**Bench :** Single Bench

**Advocate :** Z. Hussain, Amicus Curiae, for the Appellant; B.J. Dutta, APP,  
Advocates for the Respondent

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## Judgement

Rumi Kumari Phukan, J—I have heard Mr. Z. Hussain, learned amicus curiae, for the appellant and Mr. B.J. Dutta, learned Addl. P.P., Assam.

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973, preferred against the judgment & order dated 14.03.2014 passed by the learned Assistant Sessions Judge, North Lakhimpur, in Sessions Case No. 137(NL)2013, convicting the accused Md. Nasib Hussain, u/ss. 366(A) and 376 IPC and sentencing him u/s. 366(A) IPC to undergo rigorous imprisonment for 1 year, and also sentencing him to rigorous imprisonment for 9 years and 6 months along with a fine of Rs. 12,000/- u/s. 376 IPC, and in default of payment of fine, further rigorous imprisonment for 1 year and 3 months.

3. The accused was behind the bar and so he preferred the appeal from inside the jail and accordingly, the appeal was registered. The prosecution case, in nut shell, is that 2 victim girls namely R & T(name withhold) aged about 12 years and 17 years went together on 20.04.2013 to the house of their teacher, Sri Pradip Sharma to fetch books. On the way to Barpathar, the accused Nasib Hussain along with one Mukut Ali took both the victims on a vehicle(Mini Truck) bearing Reg. No. AS-07-C/3921 and thereafter, both the accused persons

committed rape upon both the victims and the villagers in the quarry, at the river Gabhuru, caught the accused persons and handed them over to the police. The father of the victim girl lodged the FIR before the Narayanpur Police Station on the same day and accordingly, a police case was registered vide Narayanpur P.S. 63/2013 u/ss. 366(A)/376(2)(f) IPC. After completion of the investigation, police submitted the charge-sheet against the present accused person as well as the other accused persons u/ss. 366/376/511 IPC. (As the present accused has preferred the appeal, so we will discuss about the involvement of the said accused only). The accused person stood the trial and after examining the prosecution witness as well as the victim's evidence, the Court hold the accused guilty, as mentioned above. Being aggrieved with the judgment and order of conviction, the present appeal has been preferred by the accused, from inside the jail.

4. It appears that the learned court below has took following points for determination as below:

"(i) Whether the accused persons on 20.04.2013, at 10.30AM, induced two minor girls namely R & T to go from the house of accused Pradip Sarma of village Barpathar, with the intent that the said girls be compelled to marry them and forced them to illicit intercourse with them and thereby, committed the offence u/s. 376(A) IPC.

(ii) Whether the accused persons, on the said date, committed rape, upon the victim girls, R & T, in the jungle of Kachajuli and thereby, committed u/s. 376 IPC."

5. The learned amicus curiae, in his argument, has pointed out certain aspects, the evidence of the victim as well as other evidence on record whereby it has been submitted that the learned Court below has arrived about the guilt of the accused in an erroneous manner, without proper appreciation of the evidence of the victim as well as other attending facts and circumstances. The learned Court below has also failed to appreciate the medical evidence having regard to the assertion made by the parents of the victim girls namely R & T. On the other hand, the learned Addl. P.P, Assam, has submitted that the learned Court below has rightly convicted the accused persons and there is nothing to disbelieve the testimony of the victim girls.

6. Let us appreciate the evidence on record. Both the victim girls were examined u/s. 164 of the Code of Criminal Procedure, 1973. The victim girls who have implicated the present accused, have stated that they were taken by the accused on TATA truck on the way and forcibly took her to Kachajuli and the accused tried to rape her but could not succeed as she protested and when they returned back, village people apprehended and assaulted them and handed them over to police. The said witness, while giving evidence, as PW-2, has stated something differently, in course of trial that the accused after taking her to inside the jungle, committed rape upon her and thereafter, they return back with the

accused and on the way, local people caught hold all of them. In her cross-examination, she has stated that they were taken by the accused in a truck and there was none in the said truck except them. They were taken to Kachajuli through Banderdewa and the vehicle was stopped at Banderdewa for taking some articles by the accused but they made no hue and cry at that time. She has also stated that the accused committed rape inside the vehicle and also inside the jungle where she was taken. So there appears sharp contradiction in the evidence of the victim herself because at times, she stated that accused attempted to commit rape upon her and at other times, she narrated that the accused committed rape upon her.

7. According to the informant, the victim girl went to the house of her teacher to bring a book and on the way, the accused kidnapped her for which he filed the ejahar. Regarding the age of the victim girl, it is stated that her age may be 14 years and he could not state the age of her other daughter. No any school certificate was produced in support of the age of the victim girl. It is also stated that the victim girl went out on a bicycle when they went to bring book from the house of the teacher which is about 3 KM from his house. He has denied the suggestion in the cross-examination that his daughter kept the bicycle in the house of Putuli Borah. The other victim namely T/PW-3, in her evidence, has given same sort of evidence that when they went to Barpathar to bring book, then the accused person took them from the road by gagging their mouth in a truck. They were taken inside the jungle and the other accused Mukut Ali committed rape on her and PW-2 was raped by the accused Nasib Hussain, inside the vehicle. So while they were returning from the jungle, the local people apprehended them. In her cross examination, she has stated that the accused asked them on the way, to go for a long drive in the vehicle and the accused persons kept two bicycles taken by them outside the house of one person. The vehicle proceeded towards Kachajuli through Banderdewa and the vehicle was stopped for purchasing something but they made no hue and cry.

8. PW-4 Kaliya Phukan, PW-5 Premananda Phukan, PW-6 Bhuden Phukan, PW-7 Anil Lekharu, PW-8 Indeswar Saikia are not the eye-witness to the occurrence and they were informed about the occurrence by the father of the victim and then after asking the victim girls, they stated that the accused persons have forcefully took them to Kachajuli and committed rape on them. All those witnesses are either related to the informant or belong to the same village. PW-8 further stated that the local people observed that the accused persons had taken away the victim girls on a vehicle towards the river bank and so the people raised doubt upon the incident and thereafter, the local people apprehended the accused along with 2 girls and upon asking the victim girls, disclosed that the accused persons have picked them up by inducement.

9. PW-9 Biren Hazarika and PW-10 Pawan Hazarika, has given same sort of evidence that on the day of occurrence, they were collecting stones and sand from the river, then they saw the accused persons and the 2 victim girls

proceeding towards the river bank and again returned. Having doubt, they apprehended the accused persons along with the victims that the victim girls reported that the accused persons had taken away them. PW-11 owner of the vehicle stated about seizure of vehicle Reg. No. AS-07-C/3921, being driven by the accused, and PW-12 Dr. Kalpana Goswami, has testified about the age of the victim. According to the medical opinion, age of the victim T is above 18 years and the opinion was made on the basis of ossification test, X-ray report, etc.. Further, it is opined that there was no sign of forceful sexual intercourse. As regards the age of the victim R on the basis of the clinical examination, it has been opined that she is below 15 years of age and there is no sign of recent sexual intercourse.

10. Sri Uddab Nath, PW-13, is the I.O. of the case, who has stated about the receipt of the FIR and the seizure of the vehicle and also recording of the statement of the victim under 164 of the Code of Criminal Procedure, 1973, by the Court. It has also been admitted that on the basis of evidence of the victim girl, he filed the charge-sheet against the accused person u/s. 366/376/511 IPC. However, he has not seized any bicycle used by the victim as it was not reported to him.

11. The plea of defence was total denial and to substantiate the plea, defence has examined Smt. Putoli Bora DW-1 and Sri Samed Ali, DW-2, and Mukut Ali DW-3 who has deposed that on the day of occurrence, both victim girl went to the house of DW-1 and kept two bicycles in their house with the assurance that it will be taken back in the evening and both the victim girls went again in a truck driven by the accused person. DW-2 has stated that on the day of occurrence, the present accused person came to their shop at Harmoti and along with two girls inside the truck and they took chicken and beer bottles from him at about 11AM and went away.

12. The accused Mukut Ali examined himself as DW-3 and has stated that the victim girls were known to them since earlier and in this way, he along with accused Nasib Hussain and the said victims R & T went to Kachajuli as agreed by those victims. Those victim girls came forward on a bicycle and thereafter, went in their vehicle by keeping the bicycle in a nearby house. But on the way, people apprehended them on their return on mere apprehension but they had not raped the victim girls, as alleged. He has denied the suggestion of the prosecution that they took the girls forcefully from the road on inducement.

13. Now, in the instant case, it is to be noted that the learned Court below has relied upon the evidence upon the victims as well as other witnesses who were told by the informant that the accused took them in the vehicle and while returning from river bank and they were apprised by the victims that accused had forcefully kidnapped her from the road. Basing upon the evidence of the victim particularly, the Court has arrived at a conclusion of the guilt of the accused person u/ss. 366A and 376 IPC. As per the version of the informant/father of the informant, the age of the victims was 14 years at the time of the

occurrence which is also supported by the medical evidence vide Ext. 7 whereby the M.O. has opined that the age of the victim girl is above 9 years but below 15 years and there is no sign of recent forced sexual intercourse. The victim was examined on the very next day of the occurrence and report has been given on the X-ray report and the other victim T is stated to be above 18 years.

14. Let us appreciate the other factual aspect of the matter. As per the record, there is no eye-witness about forceful abduction of the victims on the part of the accused persons and one of the accused, Mukut Ali, by examining himself as DW-3, has admitted that the victim girls went with them, voluntarily. So there cannot be any dispute in this aspect that on the fateful day, the victim girl was recovered from the possession of the accused person as has been unfolded in the evidence. From the facts as well as the conduct of the victim, if we gauge the matter, it will be found that the victim girls, who went on bicycle on the road, to the house of their school teacher, then how they went along with the accused by keeping the bicycle on the road or nearby the house of others, as divulged by the defence evidence is a considerable aspect. Both the victim girls without making any hue and cry, entered into the vehicle of the accused and the vehicle proceeded to a long distance towards Kachajuli through Banderdewa and they, inspite of getting chance, never tried to make any escape from the clutch of the accused persons, if they were forcefully taken by the accused. All indicates that they were very much consenting parties to the occurrence.

15. Learned Amicus Curiae has advanced his arguments pointing some glaring deficiencies in the prosecution case that the statement of the victim girl cannot be accepted in any manner as they have given different statement while in course of investigation u/s. 164 of the Code of Criminal Procedure, 1973, and in course of trial before the learned trial Court and there is no credibility in their evidence. The witnesses deliberately did not mention about the taking of bicycle on the fateful day before the police and they made no any attempt to fled away from the accused persons rather, after roaming with the accused persons while they were returning, they were apprehended by the local people. They made no complaint to any person prior to their apprehension, which indicates their voluntariness to accompany the accused persons. It is also assailed that the victim is a major girl and she indulges with the accused at her own consent so the conviction is unwarranted and liable to be set aside. As against the submission of the defence learned Government Advocate has submitted that in view of the implication of the accused by the victims, in course of trial, and in view of the age of the victim girl, the offence charged is stated to be proved.

16. While dealing with similarly situated matters regarding the dispute regarding the age of the victim, in a case reported in 2012 SCR 2723 , Smt. Kavita v. U.P. & ors., it has been held that the determination of age is on the realm of being the estimated age on account of scientific exercise. This is the reason, the Hon'ble Apex Court in a case of Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others, AIR 1982 SC 1297 : (1982) CriLJ 1777 : (1982)

1 SCALE 558 : (1982) 2 SCC 538 : (1982) 14 UJ 859 , has observed that if the age has been determined by the Doctor, medically, then 3 years have to be added to such assessed age. The judgment has consistently been followed in cases of such nature to give weightage the age of victim so as to appreciating the evidence of minority/majority of the victim in favour of the accused. In addition to that, it is trite that if the girl who is at the verge of majority walks out of her parent's house to go with any man then it could not be a case of kidnapping as the same could not be said to be act of taking away or enticing away a woman below 18 years of age. It could be a mere case of elopement. The proposition was laid down by the Hon'ble Apex Court in the case of S. Varadarajan Vs. State of Madras, AIR 1965 SC 942 : (1965) CriLJ 33 : (1965) 1 SCR 243 .

17. Now in the instant case, after scrutiny of the evidence, it is found that though the victim girl is stated to be a school going children but no school certificate has been produced to prove the authenticity of the age of the victim. It is well settled that to prove the age of school going children, the school certificate is the best evidence and prosecution has not explained any reason for non-production of such best evidence. On the other hand, as has been pronounced in the above case law 2012 SCR 2723, Smt. Kavita v. State of U.P., we can added another 3 years to the age mentioned by the medical officer in the given case and in that case, the age of the victim girl will be 18 years and it is also seen that without any ossification test, etc., the medical opinion has been given by the M.O. and his mere opinion is subject to deviation. Even if we could hold that the victim is at the verge of majority, went-out with the accused voluntarily(as discussed above), it would not amount to inducement on the part of the accused nor same could not be said to be an act of taking away.

18. In a case reported in Ameerjan Vs. Abhinandan Raj and State of Karnataka , it has been held 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 circumstances, can the two be regarded as meaning the same thing for the purposes of Section 361 IPC. We would limit ourselves to a case like the present that the minor alleged to have been taken away by the accused persons, left her father's protection, knowing and having the capacity to know the full import of what she was doing voluntarily, joins the accused. In such a case, we do not think that accused can be said to have taken away her from 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 by the accused person or an active participation by him in the formation of intention of minor to leave the house of the guardian.

19. In the given case, the victim girl though has stated in her evidence that she was forcefully taken away by the accused is not supported by the attending facts and circumstances as has been discussed above. Those cannot be accepted as a reliable piece of evidence to constitute the offence under section 361 IPC and for

penalizing the accused. Similar is the status of this witness who has given evidence of double standard which is again cannot be a reliable piece of evidence to warrant conviction u/s. 376 IPC, which is serious in nature. If the victim (who is a grown-up girl) indulge into consensus sexual conduct with the accused, cannot be said to be rape in the eye of law but the more important aspect in this case is that the said victim girl in her statement under section 164 of the Code of Criminal Procedure, 1973, has clearly stated that the accused attempted to commit rape but could not succeed due to her protest. But in course of trial, she has substantially developed the case and has given an exaggerated version that the accused committed rape upon her several times on the way to Kachajuli inside the vehicle and inside the jungle and as such, her evidence is not found at all reliable. It can be safely inferred that she might have developed the story at the pressure of her family members and falsity of the evidence cannot be denied and the whole prosecution case became doubtful for such two different version of the victim herself. It is a settled law that when two different views appears in a case, one of which, leans in favour of the accused, is normally to be accepted (reliance placed on a case reported in State of U.P. Vs. Munni Ram and Others, (2010) 12 JT 180 : (2010) 11 SCALE 321 : (2010) 14 SCC 364 : (2010) 10 UJ 4951 : (2011) AIRSCW 386 . It is a cardinal principle of criminal law that prosecution is to prove the charges beyond all reasonable doubt by producing credible evidence against the accused and the prosecution is to stand on its own legs, not on the lapse of the defence story. In the given case, though one of the accused has stated that victim went to them voluntarily but the prosecution also could not brought substantive evidence to prove the ingredients of the offence charged. The statement of the victim given under section 164 of the Code of Criminal Procedure, 1973, bears much value as it is given on oath immediately after the occurrence and the victim herself contradicted her statement which cannot be allowed to prevail to prove the guilt of the accused to the hilt. The prosecution case being clouded with shadow of doubt, has lost its authenticity as regards the charge and situated thus, I am constrained to hold that the learned Court below has arrived at the guilt of the accused in a wrong application of evidence/materials on record.

20. Another vital aspect escapes the notice of the learned Court that as per the medical report, there is no sign of sexual intercourse, though the victim was examined immediately on the next date of occurrence which has negate the whole accusation of rape. Had there been forceful sexual conduct upon the victim, there must be sign of injury on the private part of the victim, and other marks suggestive of sexual intercourse. Nothing such is reflected from the medical report, which again support the statement of the victim girl u/s. 164 of the Cr.P.C. that accused committed no rape upon her, on their protest. Where is the scope to hold the accused guilty for the offence of rape? As has been discussed above, it is highly unsafe to rely upon the testimony of the victim given during trial, which is materially contradictory to that of previous statement given u/s. 164 Cr.P.C.

Further, these victims never told before other witnesses who apprehended them about why act of rape upon them, by the accused and simply told that accused took them from the road. The cumulative effects of all evidence on record is that prosecution case remain doubtful from all aspects.

21. In the result, it is held that charges u/ss. 366(A)/376 I.P.C. are not proved beyond all reasonable doubts and hence, accused Nasib Hussain is acquitted from the said charges. He be set at liberty forthwith.

22. Before parting with the case record, I appreciate the assistance rendered to the Court by Mr. Z. Hussain, learned Amicus Curiae and I direct the Gauhati High Court Legal Aid Cell to remunerate him to the extent of Rs. 5,000/-.

23. Return the LCRs.