

(2020) 03 GAU CK 0021

Gauhati High Court

Case No: Criminal Appeal No. 120 Of 2010

Muslim Ali

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision: March 2, 2020

Acts Referred:

- Indian Penal Code, 1860 - Section 361, 363, 366(A)
- Code Of Criminal Procedure, 1973 - Section 361

Hon'ble Judges: Mir Alfaz Ali, J

Bench: Single Bench

Advocate: N Hassan

Final Decision: Allowed

Judgement

1. Heard Mr. N Hassan, learned Amicus Curiae appearing for the appellant and Mr. BJ Dutta, learned Addl. Public Prosecutor, Assam.

2. This appeal is directed against the judgment and order dated 30.03.2010 passed by the Deputy Commissioner, Karbi Anglong functioning as learned

Sessions Judge, Karbi Anglong in Sessions Case No.33/97, whereby the appellant was convicted under section 363 IPC and sentenced to

imprisonment for 3 (three) years and fine of Rs.2,000/- with default stipulation.

3. As per the allegation made in the FIR, the daughter of the informant who was aged about 13 years at the relevant time was kidnapped by the

present appellant from the house of her (informant's) sister. An FIR was lodged by the mother of the victim on the basis of which, Diphu PS Case

No.149/1997 was registered under section 366(A) IPC. During the course of investigation, the alleged victim was recovered from the house of the

present appellant and on conclusion of investigation charge-sheet was laid against the appellant under section 366(A) IPC.

4. During the course of trial, learned Deputy Commissioner cum Sessions Judge framed charges against the appellant under section 366(A) IPC, to

which they pleaded not guilty. Six witnesses were examined by the prosecution in order to bring home the charges and on appreciation of evidence,

learned Sessions Judge convicted the appellant under section 363 IPC and awarded sentence as indicated above.

5. Aggrieved the appellant preferred the instant appeal.

6. I have considered the submissions made by the learned Amicus Curiae as well as learned Addl. PP and scrutinised the evidence brought on record.

7. On perusal of the record, it appears that neither the victim nor her mother, the first informant was examined in this case. As per the allegation made

in the FIR, the victim was kidnapped from the house of Sheela Mazumder, sister of the informant, who has been examined as Pw-2.

8. Pw-2 Sheela Mazumder deposed in her evidence that at the time of occurrence, she was pregnant and therefore, the victim being her niece

(daughter of elder sister) was brought to her house to take care of her (Pw-2). On the day of occurrence, the victim was found missing from the

house and later on, they came to know that the present appellant has abducted the victim and accordingly, they went to the house of the appellant, but

the appellant refused to hand over the victim to them and thereafter, police was informed by lodging the FIR and police recovered the victim from the

house of the present appellant.

9. Uttam Mazumder, the husband of Sheela Mazumder has been examined as Pw-3, who testified that the victim was the niece of his wife, who was

aged about 13-14 years at the time of the occurrence and was staying in his house to support his wife who was at the advanced stage. According to

him, at the time of occurrence he was not available in the house and has gone to Guwahati. On his return from Guwahati, he came to know that the

victim was missing. He further stated that having come to know that the victim was in the house of the appellant he sent Bijoy Das (Pw-1) to bring

the victim back, however, the accused/appellant refused to send her back and therefore, FIR was lodged and eventually the police recovered the

victim from the house of the appellant.

10. Pw-1 Bijoy Das testified that the victim was missing from the house of Pw-2 & Pw-3 and later on, they came to know that the victim was in the custody of the present appellant. He further stated that when they went to the house of the appellant to bring back the victim, he refused to release her and thereafter the FIR was lodged.

11. Pw-4 & Pw-6 were the Investigating Officers who investigated the case and submitted charge-sheet.

12. Pw-5 Dr. Ruplal Nunisa who examined the victim opined that the victim was above 16 years and below 17 years. He further opined that there was no sign of penetration found in the private parts of the victim.

13. Evidently, there was no direct evidence regarding kidnapping of the victim, inasmuch as, the victim has not been examined in the instant case, even

the informant, the mother of the victim was also not examined. Apparently, the FIR was lodged on 01.06.1997 after 13 (thirteen) days of the

occurrence. It is in the evidence of Pw-2 & Pw-3 that the victim, who happens to be their niece was brought to their house to help Pw-2 who was in

her advanced stage. It is also in the evidence of Pw-1, Pw-2 & Pw-3 that they were aware, that the victim was in the house of the appellant and they

tried to bring her back but the accused allegedly did not allow her to come back. Surprisingly, even having come to know that the victim was with the

accused immediately after she went missing and accused prevented the victim to leave his house, no FIR was lodged for 12 days. Even in the FIR no

explanation has been given for the twelve days in lodging the FIR. True it is, delay in lodging the FIR per se is not fatal, what is fatal is absence of

satisfactory explanation. It also may not be necessary, that the explanation must be given in the FIR itself. Explanation may even be inferred or

discernible from the materials on record. However, in the present case no explanation has been given nor any explanation is discernible. Rather, in the

facts and circumstances of the case as indicated above inordinate delay in lodging the FIR raises a doubt about the veracity of the prosecution version.

14. The offence of kidnapping as defined in Section 361 IPC is as under:

361. Kidnapping from lawful guardianship.â€"Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under

2[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.

15. As per the definition of the offence of kidnapping under section 361 IPC, in order to convict a person under section 363 IPC, the prosecution is required to prove firstly that the victim has been a minor girl of below 18 years of age or a boy below 16 years and secondly, he/she had been enticed or taken away by the appellant, thirdly the taking or enticing has been made out of the keeping of the lawful or de facto guardian without consent of such guardian.

16. Apparently the victim was not examined and there was also no direct evidence to show that the appellant had enticed or taken away the victim by any deceitful means. Only evidence brought on record is that after the victim gone missing she was found in the house of the appellant. It must be borne in mind that in a criminal trial to convict a person each and every ingredient of the offence is required to be proved beyond reasonable doubt. If it is found that the victim voluntarily accompanied the accused without any inducement or force such act of the victim voluntarily accompanying the accused shall not come within the purview of "enticing" or taking unless there is element of force or deceitful inducement. In the present case, evidently there is no evidence on record to show that the accused enticed or took away the victim. Therefore, in my considered opinion the vital ingredient to constitute the offence under section 361 Cr.P.C., is absent.

17. Another aspect of the matter is that though, the age of the victim has been stated to be 13-14 years by Pw-2 & Pw-3, there was no other evidence except the medical opinion as to the age, inasmuch as the informant or the mother of the victim has not been examined. According to Pw-5, the doctor, her age was in between 16-17 years which transpires that the victim was a grown up girl at the time of occurrence and if the error of two years is taken into consideration, the age of the victim may be 18 years or above. This being the position, the prosecution evidence is also not conclusive to establish that the victim was below 18 years at the relevant time.

18. Having taken into consideration the evidence in its entirety, more particularly the absence of conclusive evidence as to the age of the victim to

prove that she was below 18 years at the time of occurrence, absence of any satisfactory explanation for an inordinate delay of 12 days in lodging the

FIR as well as absence of any evidence to show that victim was enticed or taken by the accused, and the facts and circumstances as indicated above,

I am of the view that the prosecution evidence was grossly inadequate to establish a charge under section 363 IPC against the appellant or at least the

appellant is entitled to benefit of doubt and as such, the conviction under section 363 IPC is not sustainable. Accordingly, the conviction and sentence

of the appellant under section 363 IPC is hereby set-aside and the appeal stands allowed.

19. Appreciating the assistance rendered by Mr. N Hassan, learned Amicus Curiae, it is provided that he will be entitled to professional fees of

Rs.7000/-. Upon production of a copy of this judgment Guwahati High Court Legal Services Committee shall pay the fee to Mr. Hassan.

20. Send down the LCR along with a copy of this judgment.