IN THE COURT OF THE SPECIAL JUDGE AT JORHAT

Present:- Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS Special Judge, Jorhat

JUDGMENT IN SPECIAL CASE NO. 54 OF 2016 (G.R. Case No. 1603 of 2016) Jorhat P.S. Case No. 1149 of 2016

Committing Magistrate:-

Smt. Sharmila Bhuyan, Chief Judicial Magistrate, Jorhat District

State of Assam

Versus

Sri Keshab Chetry, Son of Sri Amardeep Chetry, Resident of Jungle Bori Gaon, P.S. Jorhat, District-Jorhat.

.... Accused

APPEARANCES:

For the State : Sri M.R. Barooah,

Learned Senior Advocate-cum-Special P.P., Jorhat

For the Accused: Smt. Sangeeta Sahewalla,

Learned State Defence Advocate, Jorhat

CHARGE FRAMED UNDER SECTION 366 [A] OF INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 17-08-2016

Date of prosecution evidence: 30-08-2016; 16-09-2016; 29-09-2016;

07-10-2016; 18-01-2017 & 30-01-2017

Statement of Accused

Recorded on : 28-02-2017

Date of Argument : 07-03-2017 & 16-03-2017

Date of Judgment : 17-03-2017

JUDGMENT

1). The prosecution story, in brief, is that **Jorhat P.S. Case No.** 1149/2016 under Section 366 [A] of IPC was registered on the basis of an F.I.R. lodged by Sri Deep Jyoti Rajbongshi, elder brother of the victim girl [hereinafter referred to as 'X'].

In the aforesaid F.I.R. dated 10/06/2016 **[Exhibit-3]** the informant Sri Deep Jyoti Rajbongshi [PW-4] alleged, inter-alia, that on 05/06/2016 his younger sister came out of the house for marketing and on the way she went on missing. The informant telephoned his younger sister on her mobile phone bearing No. 7662986415 but he could not succeed in his attempt as the mobile phone was switched off. It is alleged in the ejahar that he suspects accused Keshab Chetry who was working in the Anamika Building located at Doctor's Lane, Jorhat, to have induced and kidnapped his younger sister.

On receipt of the ejahar by the Officer-in-charge, Jorhat P.S. the same was registered as Jorhat P.S. Case No. 1149/2016 under Section 366 [A] of IPC and investigation ensued.

During the course of investigation, the victim girl was recovered from the conscious possession of accused, her statement was recorded by the I.O. of the case. The victim girl was medically examined by the doctor, her statement under Section 164 of Cr.P.C. was also recorded by the learned Magistrate. Police on completion of investigation filed charge-sheet in the case against the above named accused Keshab Chetry u/S. 366 [A] of IPC vide Charge-sheet No. 517/2016 dated 30-06-2016.

2). The learned Chief Judicial Magistrate, Jorhat after furnishing copies of the relevant documents to the accused u/S. 207 of Cr.P.C., committed the case to this Court for trial.

As accused was unable to engage any counsel to defend him so learned Advocate Smt. Sangeeta Sahewalla was appointed to defend him on state expenses.

3). Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the

prosecution in this behalf, finding ground for presuming that the accused has committed offences under Section 366 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012, the charges were framed, read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4). During the course of trial, **08 [eight]** numbers of witnesses including the victim, her elder brother as well as parent, the Medical Officer and the I.O. were examined on behalf of the prosecution to prove the charge against accused.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. The accused stated that he did not kidnap the victim girl; that the victim girl had love affairs with him and she on her own volition eloped with him. It is further version of the accused that he has been falsely implicated in the case. The accused pleaded innocence. No witness was adduced by the accused in his defence.

- I have heard Mr. Mukti Ranjan Barooah, learned Senior Advocate-cum-Special Public Prosecutor for the State as well as Smt. Sangeeta Sahewalla, learned State Defence Counsel for the accused who is facing trial for commission of offence u/S. 366 [A] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012.
- **6).** Now the points for determination before this Court are as follows:-
 - 1) Whether on 05/06/2016 at about 4.00 P.M. at Rupahi Ali Doctor's Lane, Jorhat Town under Jorhat P.S., the accused named above, induced the minor victim to leave her parent's house to go with you or to do any act or acts with intent that she will be forced or seduced to illicit intercourse against her will and consent and thereby committed an offence punishable under Section 366 [A] of IPC?
 - 2) Whether on the date of occurrence the accused named above committed penetrative sexual assault upon the victim girl and

thereby committed an offence punishable under Section 4 of The Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF:

7). First of all, let us see the definition of relevant provisions of law to the charged sections against accused which states:

Section-366 [A]—Procuration of minor girl — Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Section-4 — Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

8). To decide the above points and sections of law against accused in this case, let me examine, analyze and appreciate the evidence of the witnesses alongwith the exhibited documents.

PW-1 is the **victim girl** of the instant case. During her testimony she divulged that on the relevant day she came out of her house for marketing and thereafter went with the accused to the house of his [accused] maternal uncle located at Shillong, Baruanihat. She did not inform her parent that she will accompany the accused. It is her further version that in the house of the maternal uncle of accused she resided alongwith the accused as husband and wife for about five days. The accused disclosed to his uncle and family members that he had accepted her as his wife. Later on, she was recovered by police from the house of the maternal uncle of accused alongwith him [accused]. Further version of this witness is that her elder brother lodged ejahar before police

regarding her missing from their house. She was produced before a doctor for medical check-up. It is further stated by her that she was produced before the learned Magistrate by police to record her statement under Section 164 Cr.P.C. She also disclosed that she indulged in sexual intercourse with the accused for those five days of her stay with him.

During cross-examination, she stated that she had love affair with the accused for about one year. She further stated that on the date of incident she came out of her house informing her parent that she will proceed to the house of her friend to take one book which was in her [friend's] custody. Thereafter, she went with the accused to Shillong. It is her further version that she did not shout for help when she proceeded with the accused to Shillong as the accused threatened her with dire consequence. She gave statement before the Magistrate and police that she had love affair with the accused and on her own she eloped with the accused on the date of incident. She further stated that once she failed in Class-X.

Defence tried to shake her credibility by questioning her that she did not raise shouts for help while proceeding with the accused. To the query, the victim girl categorically stated that she did not shout for help while proceeding with the accused as she was threatened by the accused with dire consequence.

9). PW-2 is **Smt. Kalpana Rajbongshi** who is the mother of the victim girl. This witness during her deposition in Court stated that on the date of incident her daughter went on missing from the house after disclosing to her that she will go outside to meet her friend. Her son Sri Deep Jyoti Rajbongshi [PW-4] lodged ejahar before police. Her daughter was recovered from the possession of accused at Shillong. It is her further version that police seized one birth certificate of her daughter vide seizure-list [Exhibit-2] wherein Exhibit- 2[1] is her signature.

During cross-examination, she categorically stated that her daughter [PW-1] is aged 16 years & 4 months. The birth certificate of her daughter was handed over to police but police returned the same to her after obtaining one Xerox copy of the aforesaid birth certificate. She denied that her

daughter on the date of incident eloped with the accused as per her free will and consent.

Prosecution side re-examined PW-2. During re-examination she exhibited the original birth certificate of victim [X]. Material Exhibit-1 is the said certificate.

10). The evidence of **Sri Phukan Rajbongshi** [**PW-3**] who is the father of victim girl is almost alike as that of Smt. Kalpana Rajbongshi [PW-2].

During cross-examination, he admitted that his daughter did not consent to return back home but later on she agreed but the accused did not allow his daughter to return back. He further stated that he does not know if his daughter had love affair with the accused for which she on the date of incident eloped with him.

11). Sri Deep Jyoti Rajbongshi, the elder brother of the victim girl **[PW-4]** is the informant of the instant case. He deposed during his testimony that on the date of incident the victim [PW-1] who was a student of Gitarthi School and aged about 16 years went on missing from the house. He searched for his younger sister but could not find her. He returned back home and came to know that the accused who worked as a worker in the locality had kidnapped his sister. He then lodged ejahar before police which he exhibited as Exhibit-3 wherein Exhibit-3 [1] is his signature. It is his further version that his sister was recovered by police from Shillong, Boranihat. His sister was taken before a doctor for medico legal check-up and thereafter produced before the learned Magistrate for recording statement under Section 164 Cr.P.C.

During cross-examination, he admitted that he did not state before police that he went to the shop to obtain the photo of the accused which he had given to the owner of the shop for obtaining a Sim Card in his name. He further stated that he does not know if his younger sister had eloped with the accused on her free will and consent. Further, he stated that he does not want to proceed with the accused as his younger sister had her own fault to the alleged incident.

12). Sri Lalit Kumar Yadav [PW-5] is the friend of accused as the accused used to work with him as cook. It is his further version that on the date of incident in the evening hour his owner searched for the accused but could not find any trace of his whereabout. After 3/4 days the accused was caught by police alongwith a girl. The girl is not known to him.

During cross-examination, he stated that police did not visit his owner's house and further that he does not know anything about the incident.

13). The evidence of **Md. Siraj Daulla [PW-6]** is to the effect that he knows accused as the accused was cook in the house of Sri Raju Goel. It is his further version that on the date of incident he came to know from the informant who was a tenant near his house that his daughter was missing from the house.

During cross-examination, he stated that informant did not state before him that accused had kidnapped his daughter on the date of incident.

14). Smt. Arpana Das [PW-7] who is the neighbour of informant stated that she came to know that victim went missing from her house on the date of incident.

During cross-examination, she categorically stated that she does not anything regarding the incident.

15). Sri Sunthoron Shyam [PW-8] is the investigating officer of the instant case deposed about the routine steps taken by him after lodging of the ejahar by the elder brother of the victim before the Officer-in-charge, Jorhat P.S. He was entrusted with the charge of investigation. He exhibited the ejahar as Exhibit-3 wherein Exhibit-3 [2] was the endorsement with signature of Sri Kamal Chandra Rajbongshi, the then Officer-in-charge, Jorhat P.S.

During investigation, he recorded statement of the informant at the police station itself. Thereafter he visited the place of occurrence, examined witnesses who were acquainted with the fact and circumstance of the case. He further stated that victim girl was recovered from Baruanihat in the State of Meghalaya under the conscious possession of accused. He thereafter recorded statement of the victim, took her before a doctor for medico legal check-up. The

victim was produced before the learned Magistrate for recording statement under Section 164 Cr.P.C. He further divulged that he drew Sketch-map of the site of occurrence with index vide Exhibit-4 wherein Exhibit-4 [1] is his signature. Further version of this witness is that after completion of investigation he submitted charge-sheet against the accused under Section 366 [A] of IPC.

During cross-examination, he denied that he investigated the case in a perfunctory manner and submitted charge-sheet against the accused without any basis.

- **16).** From a close perusal of the evidence on record, more particularly, the evidence of victim [PW-1], it is seen that the victim knew the accused from before as she had love affair with him prior to the incident for about last one year.
- **17).** The accused during his statement under Section 313 Cr.P.C. stated that victim came to him voluntarily.
- **18).** In the present case, birth certificate of the victim was seized by the I.O. as disclosed by the mother of victim namely Smt. Kalpana Rajbongshi [PW-2], according to which, the age of the victim was above sixteen years but below eighteen years at the relevant time. PW-2 during her re-examination exhibited the original birth certificate of victim [X] as Material Exhibit-1. The said birth certificate shows that date of birth of victim as 13/06/1999. Incident of the case in hand, took place on 05/06/2016 which shows that victim was aged almost 17 years.
- **19).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of **Datttu Ramrao Sakhare-versus-State of Maharashtra**, reported in **[1997]** 5 SCC 341, the Hon'ble Apex Court has held that — "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other

words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

- 20). In another case, i.e., *Pancchi –versus- State of Uttar Pradesh, AIR 1998 SC 2726*, the Hon'ble Apex Court has held that "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it is found reliable, The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this child witness is easy prey to tutoring".
- **21).** The ration as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that it attached to the statement of any other witness if the testimony is consistent.

In the present case, the victim has been consistent on the material particulars with regard to the incident which is supported by her family members, i.e., PW-2, PW-3 and PW-4.

22). On appreciation of the evidence on record as well as other facts and circumstances of the case, it is found that there allegation of forceful abduction of the victim girl by the accused which can be seen from the evidence of victim girl [PW-1] itself. The parents of the victim [PW-2] and [PW-3] divulged that on the date of incident their daughter went on missing from the house school after she came out to meet her friend who had borrowed one book from her prior to the date of incident. From the evidence of Sri Deep Jyoti Rajbongshi [PW-4] who is the elder brother of victim girl it is seen that he later on came to know that the

accused had taken away his younger sister [PW-1]. After knowing that the accused had kidnapped his younger sister he lodged ejahar before police.

Similarly, the victim girl has narrated the fact during examination that as on the relevant day she accompanied the accused to the house of his maternal uncle situated at Baruanihat, Shillong in the State of Meghalaya where they resided as husband and wife.

- 23). The aim of the provisions of Section 366 [A] of IPC is to prevent immorality and the provisions are framed more with the desire of the safeguarding the public interest of morality than the chastity of one particular woman. The consent therefore of the minor against whom the offence is committed is immaterial. The consent might have been induced and any reason given by the accused to move the girl from one place to another is sufficient inducement. Once the offence of inducement is proved, the girl's subsequent willingness will neither prevent the offence nor reduce the gravity of the offence. [Bhagawati Prasad-versus-Emperor, AIR 1929 All 709: 119 IC 14: 30 Cri.L.J. 985].
- In the case of *Prakash-versus-State of Haryana as reported in* [2004] 1 SCC 339: 2004 Cri.L.J. 595, the Apex Court held that the words "takes or entices any minor out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of word "keeping" connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement of the minor, the guardian's protection and control of the minor being available, whenever necessity arises. It was held "on plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview". There is essential distinction between "taking" and "enticing". In the case of State of Kerala-versus-Rajayan as reported in 1996 Cri.L.J. 145 [supra] it was held that the mental attitude of the minor is not of relevance in the case of taking and the word "take" means to cause to go, to escort or to get into possession.

In the case of *In re Khalandar Saheb* as reported in *AIR 1955 Andhra 59*, it was held that when the accused took the minor with him, whether she was willing or not, the act of taking was complete and the condition was satisfied. In the case of *Shabir Rashid-versus-The State* as reported in *1969 Cri.L.J. 1282 [Delhi High Court]* it was held that as the prosecutrix was a minor girl of thirteen and half years old, her consent was not material and as such the conviction under Section 366/376 of IPC was maintained.

- **25).** In the instant case, though the victim girl went out voluntarily with the accused but the fact remains that she was a minor at the time of occurrence, which has been duly proved by the prosecution. Victim in her cross-examination clearly deposed that she could not shout for help as accused threatened him with dire consequence. Moreover, on a plain reading of the section 366 [A] of IPC, the consent of the minor who has been induced to go from any place, is wholly immaterial.
- **26).** The learned State Defence Counsel for the accused has placed reliance on a case law which is as follows:

1]. Dinesh Kumar -versus-State of Himachal Pradesh, 2012 Cri.L.J. 228

- I have perused the abovementioned case law and on perusal of the same I found that the relevant case law as cited by the learned counsel for the accused deals basically on circumstantial evidence which has no bearing in the instant case.
- **28).** In view of the above discussion, I am of the considered view that prosecution has considerably been able to prove the case against accused Sri Keshab Chetry under Section 366 [A] of IPC, as victim was a minor at the time of incident.
- **29).** The victim during her evidence as well as her statement under Section 164 Cr.P.C. categorically stated that she had physical relationship with the accused. But prosecution failed to examine the doctor for the reason best

known to him to prove that accused had physical relationship with the accused, for which, no case has been made out against accused Sri Keshab Chetry to warrant his conviction under Section 4 of The Protection of Children From Sexual Offences Act, 2012, beyond reasonable doubt, for which, I am of the opinion that the accused is entitled to acquittal under benefit of doubt which I accordingly do.

- **30).** Accused Sri Keshab Chetry is heard on the point of sentence. The accused has submitted that he resides with his parent and there is none to look after them in his absence. He further submitted that if he is sent to jail hajot, then his life will be destroyed. Hence, the accused prayed for leniency.
- **31).** I have heard Smt. Sangeeta Sahewalla, learned State Defence Counsel for the accused as well as Sri Mukti Ranjan Barooah, learned Senior Advocate-cum-Special Public Prosecutor, Jorhat.

Considering the nature of offence the accused **Sri Keshab Chetry** is sentenced to undergo **SIMPLE IMPRISONMENT** for **4** [four] years and also to pay a fine of **Rs. 5,000/-** [Rupees Five Thousand], in-default of payment of fine, to suffer further **SIMPLE IMPRISONMENT** for **3** [three] months.

The period of detention already undergone by the accused during investigation and trial shall be set off from the period of imprisonment imposed on him.

The accused is acquitted from the charge under Section 4 of The Protection of Children from Sexual Offences Act, 2012, as said, hereinbefore, under benefit of doubt.

- **32).** Free copy of the judgment be furnished to the accused immediately. Send a copy of this judgment to the District Magistrate, Jorhat, under Section 365 Cr.P.C.
- **33).** Given under my hand and seal of this Court on this **17th** day of **March 2017**.

Special Judge, Jorhat

ANNEXURES:-

PROSECUTION WITNESSES:-

PW-1	Victim girl.
PW-2	Smt. Kalpana Rajbongshi, mother of victim girl.
PW-3	Sri Phukan Rajbongshi, father of the victim girl.
PW-4	Sri Deep Jyoti Rajbongshi, elder brother of the
	victim-cum-informant of the case.
PW-5	Sri Lalit Kumar Yadav, neighbour.
PW-6	Md. Siraj Daulla, businessman.
PW-7	Smt. Arpana Das, neighbour.
PW-8	Sri Sunthoron Shyam, I.O. of the case.

COURT WITNESS:- NIL

EXHIBITS FOR THE PROSECUTION:-

Exhibit-1	Statement of the victim recorded by the Magistrate under Section 164 Cr.P.C.
Exhibit-2	Seizure-list
Exhibit-3	Ejahar
Exhibit-4	Sketch Map of the place of occurrence with index

MATERIAL EXHIBIT NO-1: Birth certificate.

DEFENCE WITNESSES:- NONE

Special Judge, Jorhat.

Typed & transcribed by:

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)