

GAHC010009772013



2024:GAU-AS:10366

**THE GAUHATI HIGH COURT AT GUWAHATI  
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)**

**PRINCIPAL SEAT AT GUWAHATI**

**CRIMINAL APPEAL NO. 241/2013**

Anujoy Das,  
S/o Late Atiranjan Das,  
Resident of Village No. 1 Bhairabpur,  
P.S.- Silapathar, District-Dhemaji

.....Accused/Appellant  
(In Jail)

-Versus-

State of Assam,

.....Respondents.

Advocates for the appellant: Mr A Ahmed,

Advocate for the respondent: Mr K Baishya, Addl. P. P, Assam

**BEFORE**  
**HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

Date of hearing : 23.10.2024

Date of judgment : 23.10.2024

**JUDGEMENT AND ORDER (ORAL)**

Heard Mr A Ahmed, learned counsel for the appellant, and Mr K Baishya, learned Additional Public Prosecutor for the State of Assam.

2. This appeal is directed against the Judgment and order dated 09.07.2013, passed by the learned Sessions Judge, Dhemaji, in connection with Sessions Case No. 87(DH)/2011, convicting Sri Anujoy Das (hereinafter referred as the appellant), under Section 363 of the Indian Penal Code, 1860 (IPC, for short) and sentencing him to undergo Simple Imprisonment for 4 years and to pay a fine of Rs. 5,000/-, with default stipulation, with a direction to pay the fine amount as compensation to the victim, as per provisions of Section 357 of the Code of Criminal Procedure, 1973 (CrPC, for short).

3. The genesis of the case is that the minor victim who was 15 years old was kidnapped by the appellant while she came out of the house to answer nature's call. An FIR regarding this incident was lodged by the father (also referred to as -'Y' or informant). Investigation commenced and after recovery of the victim (also referred to as-'X'), she was forwarded to the Magistrate for recording her statement under Section 164 CrPC and for medical examination by the doctor.

4. On completion of investigation, charge sheet was laid against the appellant under Section 366 (A) of the IPC. At the commencement of trial, a formal charge was framed under Section 366 IPC and the appellant pleaded not guilty and claimed to be tried. To substantiate its stance, the prosecution adduced the evidence of 8 (eight) witnesses and defence cross-examined the witnesses to refute the charges. On the incriminating materials projected by the prosecution through the evidence of the witnesses, several questions were asked to the appellant under Section 313 CrPC. The answers to the questions under Section 313 CrPC were evasive in nature and he denied all the incriminating materials against him.

5. Learned counsel for the appellant laid stress in his argument that the format of the FIR clearly reveals that the victim was found missing from her house on 05.02.2011 at about 07:30 pm and the FIR was lodged on 06.02.2011, at about 11:30 pm, but before informing the Police the victim was forwarded for medical examination, which appears to be sketchy. The findings of the Medical Officer (MO, for short), clearly reveals that the victim was examined at about 05:20 pm, on 06.02.2011, which casts a shadow of doubt as to why the victim was forwarded for medical examination even before the FIR was lodged with the Police. The other major discrepancy in the evidence is that the victim's uncle has categorically stated that the victim was recovered from the house of Batharam Taw, but this person was not examined as a witness.

6. It is further submitted that the evidence of the witnesses are contradictory. Two witnesses have stated that the victim was found in the house of Batharam Taw, whereas two witnesses have deposed that the victim was found and confined with the appellant on the village road.

7. The remaining part of the argument of the learned counsel for the appellant will be discussed at the appropriate stage.

8. The learned Additional Public Prosecutor has submitted that the statement of the victim can be relied upon, as her evidence is consistent to her statement under Section 164 CrPC.

9. The learned Additional Public Prosecutor laid stress in his argument that the time recorded in the format of the FIR as 11:30 pm has been erroneously recoded as 'pm' instead of 'am'. The remaining part of the argument of the learned Additional Public Prosecutor will be discussed at the appropriate stage.

10. The learned trial Court delineated the following point while deciding this case:-

1. *Whether the accused Anujoy Das on 05.02.2011 at about 07:30 pm kidnapped the victim 'A', a minor girl aged about 16 years taking her away out of her lawful guardianship without the consent of the guardian with intent to compel her to force or seduce illicit intercourse and he thereby committed an offence punishable under Section 366 of IPC?*

11. Now, the question that falls for consideration is whether the learned trial Court has erred while convicting the appellant under Section 363 IPC.

12. To decide this case in its proper perspective, the evidence is reappreciated.

13. The informant Y deposed as PW-1 that on 05.02.2011, at about 07:00 pm, the victim went outside to answer nature's call, but she did not come back. A frantic search was made, but they could not trace his daughter, i.e., the victim. Then he lodged the ejahar (FIR) with

the Police. On 06.02.2011, his younger brother Biswajit Das and some of his friends recovered the victim from the house of a person at Rupohimukh village. On being confronted, his daughter, the victim replied that the appellant forcefully took her away to Rupohimukh village.

14. In his cross-examination, he deposed that the FIR was lodged on the following day, but he failed to mention in the FIR that his daughter was recovered from Rupohimukh village. He has also admitted that he did not mention before the IO that the victim was recovered by Biswajit from Rupohimukh village. He has proved the FIR as Exhibit-1 and his signature on the FIR as Exhibit- 1 (1).

15. It is true that before the FIR was lodged at 11:30 pm, the victim was taken for medical examination. The MO Dr Chandrakanta Mili deposed as PW-7 that on 06.02.2011, he examined the victim at about 05:20 pm and found the following:-

*“General Examination*

- 1) *No external Injury was found.*
- 2) *On genital examination, no violent mark was found.*
- 3) *Hymen was not intact.*
- 4) *The age of the girl was 15 years as per birth certificate.*

*Opinion- There was no sign of recent sexual intercourse.”*

*Exhibit-3 is the report and Exhibit-3(1) is his signature.*

16. By drawing the attention of this Court to the Medico-Legal Report, marked as Exhibit-3, learned counsel for the appellant laid stress in his argument that the age of the victim was

not determined conclusively. According to the opinion of the MO, the victim's age was 15 years as per her birth certificate. This birth certificate was not exhibited in the Court. The cross-examination of the MO reveals that he suggested X-Ray, but no X-Ray report was submitted. As the age of the victim was not conclusively decided, the appellant deserves a benefit of doubt.

17. I, therefore, find substance in the argument of the learned counsel for the appellant.

18. The victim's age has not been proved by proper documents nor the victim was forwarded for ossification test. Moreover, the victim was examined by the MO before the FIR was lodged with the Police. The victim herself deposed as PW-2 that on 05.02.2011, at about 7/8 pm, while she went out to excuse herself, the appellant gagged her. She became senseless. On the following morning, she regained her senses and found herself in a stilt house. Her paternal uncle Biswajit (PW-7) recovered her and brought her to their house and handed her to the Police. The Police forwarded her for medical examination and for recording her statement.

19. Contrary to her evidence-in-chief, the victim deposed in her cross-examination that she could not recognize the appellant when the appellant took her away. She also deposed that it was dark at the time of the incident. She did not know from whose stilt house her uncle recovered her. She has also admitted in her cross-examination that she did not mention in her initial statement before the Police and the Magistrate that she was recovered from a stilt house and she also did not mention before her father that she was recovered from a stilt house.

20. The evidence of the victim does not inspire confidence. She stated that she became unconscious as she was gagged by the appellant. It is not fathomable that a person may become unconscious if a person is gagged. Moreover, the appellant gets the benefit of doubt when the victim has stated in her cross-examination that she could not recognize the appellant when he took her away.

21. On the contrary, the evidence of PW-3, Shyamal Kumar Das depicts that on 06.02.2011, he along with the victim's uncle Biswajit (PW-7) went to Rupohimukh village and found that the appellant and the victim were apprehended by the villagers and were kept confined on a road of the Rupohimukh village. Both the appellant and the victim were then recovered and the victim told them that the appellant had taken her away.

22. Similarly, Mohan Taw also deposed as PW-4 that while searching for the victim, he found the victim with the appellant on a road and asked the villagers to confine the couple on the road of the village. PW-4 further deposed that the victim's uncle Biswajit (PW-7) informed him that they handed over the couple to the Police.

23. On the contrary, Biswajit Das deposed as PW-7 that on the relevant day, at about 07:30 pm, the victim was found missing from her house. They set out on a frantic search and on the following day, the victim was recovered from the house of Betharam Taw, along with the appellant. They were then brought and handed over the Police. Thus, it is clear that the evidence of PWs-1, 2 and 3 reveals that the victim was recovered from Betharam Taw's house, but Betharam Taw was not examined as a witness, which thwarts the evidence.

24. On the contrary, the evidence of the other witnesses, PWs-3 and 4, depicts that the

victim was found along with the appellant on the road, confined by the villagers, whereas the evidence of Hirakjyoti Tayung, PW-5, depicts that the victim was recovered at 09:00 am, on 06.02.2011 by the public in the courtyard of Biswajit (PW-7).

25. The dissimilarities between the evidences of PWs-1, 2, 3, 4 and 5, extends the benefit of doubt to the appellant.

26. The submission of the learned Additional Public Prosecutor that the evidence of the victim is sufficient to bring home the charges levelled against the appellant, can be safely brushed aside, as in the instant case, the victim's evidence is not found to be creditworthy. There is no evidence relating to the age of the victim.

27. The learned counsel for the appellant has drawn the attention of this Court to the cross-examination of the IO, Sarat Kathar, PW-8, that no documentary evidence was collected by him. The MO determined the age of the victim on the basis of the birth certificate.

28. The IO is the official witness and he deposed as PW-8 that on 06.02.2011, while serving as SI at Silapathar Police Station, he was entrusted to investigate this case by the OC of Silapathar Police Station. On completion of investigation, he submitted charge sheet against the appellant. He has proved the charge sheet as Exhibit-4 and his signature on the charge sheet as Exhibit- 4 (1). IO has admitted that no document was seized by him.

29. Learned trial Court has acquitted the appellant from the charges under Section 366 IPC as the prosecution failed to prove that the appellant abducted the victim with intent to compel her to marry against her will or force her to illicit intercourse, as there is no evidence that the victim was subjected to illicit intercourse or sexual assault, but the learned trial Court

has erroneously held the appellant guilty of offence under Section 363 IPC. The learned trial Court relied heavily on the testimony of the victim, but has ignored the fact that the victim has mentioned in her cross-examination that she could not recognize the appellant when she was taken away by the appellant. The victim has categorically stated that she came to her senses in the stilt house, thus exonerating the appellant and casting a shadow of doubt that the appellant is the same person who had gagged her and made her unconscious and then carried her to the stilt house. If the victim did not see the person in the dark who allegedly gagged her and kidnapped her, how could she pin the blame on the appellant. There is no direct evidence, what led the victim to implicate that the appellant kidnapped her. Moreover, it would be apt to reiterate that the person in whose house the victim was found was not produced as a witness. The discrepancies in the evidence of the witnesses does not prove beyond a reasonable doubt that the appellant kidnapped the victim as he was found along with the victim in Batharam Taw's house. Moreover, PW-3 and PW-4 deposed that both the appellant and the victim were confined by the villagers on the village road.

30. Learned counsel for the appellant has relied on the decision of this Court in ***Manirul Islam –Vs- State of Assam & Another;*** reported in **2021 (3) GLT 128**, wherein it has been held and observed that-

*27. From a close scrutiny of the materials available on record, we find that Ext-A is the photocopy, compared with original, of the Birth Certificate issued by the Department of Health Services, Govt. of Assam, certifying that the accused was born on 25/08/2001. This certificate was apparently seized by the IO in presence of two seizure witnesses, viz. Usman Gani and Habibur Rahman. However, none of the seizure witnesses have been examined by the prosecution during the course of the trial. The Birth Certificate (Ext.-A) was, in fact, exhibited by the informant (PW-1), who is the uncle of the victim. The prosecution had*

*neither examined the parents of the prosecutrix nor called any official from the Health Department so as to prove the contents of Ext-A. There is also no explanation for not doing so.*

*28. A Birth Certificate issued by the Health Department of the State Government is a part of the public record. Section 35 of the Evidence Act, 1872 deals with relevancy of entry in public record which reads as follows :-*

*"35. Relevancy of entry in public record [or an electronic record], made in performance of duty.--An entry in any public or other official book, register or record [or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record [or an electronic record] is kept, is itself a relevant fact."*

*29. From a plain reading of Section 35, it would be apparent that an entry made in any public or other official book/register or record is required to be proved by a public servant who had made the entry in discharge of his official duty or by any other persons, in performance of his duty, especially enjoined by law. In the instant case, as noted above, no such officer of the department was summoned by the prosecution as a witness to prove Ext-A."*

31. Relying on this decision, learned counsel for the appellant has submitted that in the instant case, even the document was not produced for verification of the age of the victim.

32. As it has not been proved beyond a reasonable doubt that the victim was a minor, a benefit of doubt is extended to the appellant. Due to the differences between the evidence of the witnesses, benefit of doubt is also extended to the appellant. The discrepancies in the evidence relating to the lodgment of the FIR after the victim was produced for medical examination also causes a dent in the evidence.

33. In the wake of the foregoing discussions, it is thereby held that the appellant deserves

a benefit of doubt. Thereby, the Judgment and Order dated 09.07.2013, passed by the learned Sessions Judge, Dhemaji, in connection with Sessions Case No. 87(DH)/2011, convicting the appellant under Section 363 IPC, is hereby set aside.

34. However, keeping in view the provisions of Section 437-A Cr.P.C./481 BNSS, the accused appellant is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

35. Send back the Trial Court Record.

**JUDGE**

**Comparing Assistant**