

District : Bongaigaon

IN THE COURT OF ASSTT. SESSIONS JUDGE ::::::::::: BONGAIGAON.

Present:- Smti M.C. Bordoloi, M.A, LL.B (AJS)
Asstt. Sessions Judge,
Bongaigaon.

Sessions Case No.143 (B)/2013.

U/S 366 AIPC (Arising out of G.R
case no.301/2013.)

State

Vs.

Mithun Sarkar.... Accused

Committed by : Smti T.Hussain, Sub-Divisional Judicial Magistrate,
Bijni.

Appearance : Mrs. C. Choudhury,
Additional Public Prosecutor for the State.
Mr. Pankaj Baiday,
Advocate for the accused.

Date of Charge : 12.11.2013.
Date of Commitment : 10.9.2013.
Date of evidence : 7.1.14, 20.3.14, 30.8.14.
Statement recorded on : 29.10.2014.
Date of argument : 10.11.2014.
Date of judgment : 19.11.2014.

J U D G M E N T

1. One Kamal Sarkar, son of late Jatindra Ch Sarkar, resident of Chatianguri under Bijni police station, district Chirang lodged an 'ejahar' with the Bijni police station on 13.7.2013 alleging inter-alia that his daughter Dipti Sarkar aged 14 years went missing from his house and that accused Mithun Sarkar had kidnapped his daughter. The Officer In-charge of Bijni upon receipt of the ejahar registered a case vide Bijni police station case no.156/2013 U/S 366 A IPC and caused the investigation of the case.

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2. Upon completion of investigation charge sheet being no.118 dated 31.8.13 U/S 366 (A) was laid before the learned SDJM (M), Bijni. It is worthwhile to mention herein that the accused Mithun Sarkar was arrested during the course of investigation.

3. Cognizance of offence was taken and accused was caused to be produced before the learned Sub- Divisional Judicial Magistrate(M), Bijni from judicial custody who after due compliance of the formalities U/S 207 Cr.P.C, the learned Sub-Divisional Judicial Magistrate(M), Bijni having found that the case was one being exclusively triable by the Court of Sessions committed the case to the Court of Hon'ble District & Sessions Judge, Bongaigaon vide order dated 10.9.13.

4. Upon receipt of the case record from the trial Court the Hon'ble District & Sessions Judge, Bongaigaon enlarging the accused to go on bail granting him liberty to face trial, transferred the case record to the instant Court for trial and disposal.

5. Upon hearing the learned counsel of both sides and upon perusal of the documents and materials available on record my learned predecessor-in-chair vide order dated 12.11.13 having found materials U/S 366 A IPC being made out against the accused, framed a charge under the aforesaid section of law. The charge so framed was read over and explained to the accused to which the accused pleaded not guilty and claimed to be tried.

6. Prosecution in order to establish its case examined 7 number of witnesses and also adduced documentary evidence. The defence side cross-examined the witnesses but declined to adduce any evidence.

7. The statement of the accused U/S 313 Cr.P.C was recorded wherein the accused reiterated his innocence. The accused submits

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that the informant's daughter on her own accord accompanied him to Chennai when they were apprehended at Bhubaneswar by concerned police. The accused also submits that he used to work at Chennai and he had only a single ticket in his name to board the train to Chennai and the informant's daughter on her own will boarded the train to Chennai and he had never induced her to accompany him. The accused also submits that after the informant's daughter was rescued by the police and given in custody of her parents she again ran away to the house of the accused whereupon the accused's family members called upon the informant's party and handed over the informant's daughter to them. The accused pleads that he is completely innocent.

8. Heard arguments adduced by the learned counsels of both sides. Learned Additional Public Prosecutor submits that it is a fit case for conviction as the accused has been caught red handed with the victim girl who was a minor and the question of consent of the minor is immaterial.

9. Controverting the submissions of learned Additional Public Prosecutor, the learned defence counsel submits that the accused is innocent and that the victim was above 16 years of age and had exercised her own discretion and that there was no inducement on the part of the accused and hence accused deserves to be acquitted.

10. Upon hearing the learned counsel of both sides and on perusal of the case record the following point for determination is framed in the instant case :

11.

The point for determination is :

1) Whether on 13.7.2013 at about 4.00 p.m the accused induced the informant's minor daughter Dipti Sarkar aged 14 years to go from her house to an

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unknown place with intent that she may be forced to illicit intercourse with another and thereby committed an offence U/S 366 A IPC ?

12. My decision on the above point for determination so framed with the reason are given hereunder :

Discussion, Decision and Reasons therefor

13. For addressing the point for determination so framed it is incumbent to peruse the evidence available on record meticulously.

14. PW 1 Kamal Sarkar is the informant of the instant case. He has deposed that on the relevant time i.e 12.7.13 he was at Jorhat when he was informed by his wife that their daughter Dipti went missing and that after thorough search they could learn that accused Mithun Sarkar had kidnapped their daughter. PW 1 after his return from Jorhat lodged the ejahar vide Ext 1 wherein Ext 1(1) is his signature. PW 1 further stated that his daughter alongwith the accused was recovered from Bhubaneswar and he accompanied the police personnel of Bijni police station to Bhubaneswar brought his daughter back. PW 1 further stated that at the relevant time his daughter was reading in class X and in his presence the police seized the birth certificate of his daughter vide Ext 2 wherein Ext 2(1) is his signature. PW 1 identified his daughter's birth certificate as Ext 3. PW 1 also stated that on enquiry his daughter revealed that accused had lured her to accompany him.

When put to cross-examination PW 1 stated that he had not submitted any documents in respect of his daughter's studying in class X at the relevant time. PW1 also disclosed that accused is residing at a distance of 2 KM from his house and he had not seen the accused at his house at any prior time and he was ignorant if his daughter had any love affairs with the accused. PW 1 admitted that during the pendency of the instant case his daughter on 10.12.13 went to the house of the accused whereupon he was called by the accused's parents and his daughter was

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handed over to him. PW 1 denied the defence suggestion that at the relevant time his daughter was above 18 years of age.

15. PW 2 Dipali Sarkar is the mother of the victim. She deposed in her evidence-in-chief that on 12.7.13 at about 4 p.m her daughter Dipti Sarkar went for stitching her clothes and when her daughter did not return she searched here and there and after enquiry from the people who resides near the railway station she could learn that accused has caused her daughter to board the Chennai express. PW 2 further stated that she informed about the occurrence to her husband who was at Jorhat and on her husband's return he lodged the case against the accused and thereafter her husband accompanied the police to rescue their daughter from Bhubaneswar. PW 2 also stated that the police had seized her daughter's birth certificate vide Ext 2 in her presence wherein Ext 2(2) is her signature. PW 2 added that at the relevant time her daughter was studying at class X.

When put to cross-examination PW 2 admitted that on enquiry at the Bijni railway station she could learn that there was no train to Chennai from Bijni station. PW 2 denied the defence suggestion that she omitted to state before the police that at the relevant time her husband was at Jorhat and she had reported about the incident over phone to her husband. PW 2 also admitted that her daughter during the pendency of the instant case had gone away to the house of the accused and was subsequently handed over by the parents of the accused. PW 2 disclosed that her daughter had no love relationship with the accused.

16. PW 3 Dipti Sarkar is the victim in the instant case. In her evidence recorded her age to be 16 years of age, she having deposed before this Court on 20th March, 2014. PW 3 testified that she was a student of class X at the relevant time and that on the fateful day at about 3.30 p.m she went out to the market with prior information to the accused that she would meet him there and consequently she met the accused on the road and thereafter the duo went to Chennai. PW 3 stated that as her father failed to trace her he lodged the instant case and thereafter the police at Bhubaneswar

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railway station caused her and the accused to de-board the train and took them thereafter to police station and also detained her at ' safe custody '. PW 3 stated that her father thereafter got her back to Bijni and police at Bijni police station produced her before the concerned Court and caused her statement to be recorded by the learned Magistrate at Bijni. PW 3 identified her statement U/S 164 Cr.P.C as Ext 4 and her signatures thereon as Ext 4(1) and Ext 4(2) respectively. PW 3 disclosed that she went alongwith her father from the Court and that accused has not committed any ' bad work' with her.

When put to cross-examination PW 3 disclosed that she was aged about 16 years and that she had love affairs with the accused since 8/9 months and both of them after due discussion had gone to Chennai. PW 3 discloses that accused had not forced her to accompany him and she had gone on her own accord with the accused. She also admitted that even during the pendency of the instant case she had gone to the accused's house but was sent back by the elders.

17. PW 4, Bapan Sarkar is the brother of the informant who also deposed in tune with the PW 1 and PW 2. PW 4 in his cross-examination admitted that the accused and his sister had love relations.

18. PW 5, Raju Sarkar deposed that he was reported by PW 1 that PW 3 went missing and that she was subsequently rescued from Bhubaneswar. PW 5 in h his cross-examination revealed that she has ignorant as to with whom the informant's daughter had eloped.

19. PW 6, Aditya Prakash Dewri is the Investigating Officer of the instant case. His evidence is of a formal character. He deposed that upon receipt of an ejahar on 13..7.13 the Officer In-charge of Bijni police station registered the same vide Bijni police station case no. 156/13 U/S 366 A IPC and endorsed him for carrying out the preliminary investigation consequent to which he visited the place of occurrence, drew sketch map of the place of occurrence, recorded the statement of the witnesses and

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searched for the where about of the victim girl and after receipt of source information he alongwith the informant rescued the victim girl from Bhubaneswar with the co-operation of GRP staff at Bhubaneswar. PW 6 also stated that after rescuing the victim girl alongwith the accused she was produced before the learned SDJM, Bijni for recording her statement U/S 164 Cr.P.C and thereafter the victim was handed over to her guardian as per Court's order. PW 6 arrested the accused and seized 3 (three) Mobile hand sets and train ticket from the custody of the accused vide Ext 5. PW 6 identified the sketch map as Ext 6 and his signature thereon as Ext 6(1).

When put to cross-examination PW 6 revealed that he had not seized the birth certificate of the victim nor the train ticket chart of the victim. PW 6 proved the fact that PW 2 had omitted to state the fact that her husband was at Jorhat at the relevant time and she had informed about the alleged incident to him over phone and that PW 2 had omitted to state before him that after search at the railway station she learnt that her daughter had gone away from the Chennai express.

20. PW 7 is Suren Baruah who was the Investigating Officer subsequently took up the investigation of the case after PW 6 was transferred. PW 7 identified the seizure list vide which birth certificate of the victim was seized as Ext 2 and his signature thereon as Ext 2(3). PW 7 also exhibited the charge sheet as Ext 6 and his signature thereon as Ext 6(1).

When put to cross-examination PW 7 admitted that after seizure of the birth certificate he had not produced the same before the Court for endorsement.

This in nut shell is the evidence available on record.

21. Perusal of the evidence on record especially the statement that of the victim discloses that she was a student of class X at the relevant time and that she had gone out of her house with prior intimation to the accused and thereafter meeting the accused she and the accused went away to Chennai. PW 3 victim clarified in her cross-examination that she

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was aged about 16 years at the relevant time and that she had love affairs with the accused.

22. Now, perusal of Ext 3 which is the birth certificate of the victim issued by the office of the Directorate of Health Services which has been proved in original and admitted in evidence without any objection from the defence side, discloses that the date of the birth of the victim was 30.5.1998. The genuineness of Ext 3 has not been disputed by the defence. Situated thus, the Ext 3 coupled with the averment of PW 3 in respect of her age goes on only to show that the victim/PW 3 was a minor at the time of the alleged occurrence. Again from the perusal of the statement of the victim recorded U/S 164 Cr.P.C being Ext 4 discloses that she was 15 years of age when she deposed on oath before the learned SDJM, Bijni. Accordingly, the fact that the victim girl/PW 3 was under the age of majority is but proved.

23. Now, re-visiting the evidence of PW 1 who is the informant it is seen that he had lodged the ejahar being Ext 1 upon information of the alleged occurrence received from his wife.

24. PW 2, the mother of the victim has clearly deposed that she had reported the alleged incident to her husband consequent to which her husband has lodged the instant case with the Bijni Police Station. Therefore, the factum of forwarding of the information to PW 1 by PW 2 stands proved. Now, it is required to see the veracity of the said factum of information.

25. PW 3/victim herself stated in her evidence that she boarded the train to Chennai alongwith the accused. The defence during the cross-examination by putting forward queries could unveil the blossoming of love affairs between the accused and the victim/PW 3 and their consequent elopement on the victim's own accord and volition. Further perusal of the statement of the accused U/S 313 Cr.P.C discloses that the victim accompanied the accused to Chennai boarding a train though the

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accused clarified that he had never lured the victim/PW 3 and it was that the victim's forceful discretion and insistence she had boarded the train with the accused. From the unchallenged evidence of PW 3 and the admission of the accused in his statement U/S 313 Cr.P.C the veracity of the information that the victim/PW 3 went missing is but proved.

26. ***At this stage the defence counsel submits that the victim girl having exercised her own preferential intelligence had gone with the accused and there being no allurement from the end of the accused U/S 366 A IPC is not made out.***

27. To address the above submission it will be necessary to have a look at the law relating to kidnapping as is relevant for the purpose of section 366 A IPC. Section 366 A IPC is reproduced herein for better appreciation.

Section 366 A IPC

Whoever, by any means whatsoever, induce any minor girl under the age of 18 to go from one place or to do any act with intent that such girl may be, or knowing that it is likely that she will, forced or seduced to illicit intercourse with another person shall punishable with imprisonment which may be extent to 10 years and also shall be liable to fine.

28. Now reading of the above section discloses that there are three principles ingredients of the offence contemplated by section 366 A IPC: -

(1) That a minor girl below the age of 18 years is induced by the accused ;

(2) that she is induced to go from any place to do any act and

(3) that she is so induced intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.

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29. In the case at hand, the victim apparently is aged below 18 years. Though the evidence of PW 3 discloses that she was consenting party but it requires to be borne in mind that the consent of a minor is immaterial. In fact, such consent is meaningless.

30. Now it is for us to see whether there was sufficient inducement by the accused which caused the victim girl to go from her house to some other place. It is not in dispute that the victim girl /PW 3 was found in the company of the accused on the train to Chennai at Bhubaneswar railway station. Therefore, going of the victim girl to some other place from her own parental house with the accused has come to the fore. In so far as question of inducement by the accused causing the victim girl to part company of her lawful guardian is concerned it is seen that there is no averment by the victim that she was lured by the accused or that the accused had absolute control over her senses causing her to board the train to Chennai.

31. Further in so far as third ingredients of section 366 A is concerned it is seen that PW 3/victim has not even made a whisper that she was faced with such a predicament that she was forced to or seduced to illicit intercourse with another person rather the victim clarified that the accused has not done any ' bad works' with her. Accordingly in the instant case prosecution has failed to prove the ingredients for constituting the offence U/S 366 A IPC.

32. Now, again visiting the tevidence on record it is seen that the victim girl was a minor and was found in the company of the accused at Bhubaneswar. It is incumbent upon this Court to find out whether the said situation could be one for nailing the accused under any offence under the Indian Penal Code.

33. ***Under the provision of section 222 of the Cr.P.C it is provided that in a case where the accused is charged with a major offence***

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and the said clause is not proved, accused could be convicted of a minor offence though he was not charged with the same.

34. It will be not out of place to refer to the case of Tarakeswar Sahu vs State of Bihar reported in **MANU/SC/442/2006** wherein their Lordship relying on the decision rendered in the case of Lakhjit Singh vs State of Panjab reported in **MANU/SC/0905/1994** held that if the offence committed clearly cover and have the ingredients of a minor offence in that event the Court is empowered to convict the person on the minor offence by invoking the provisions of section 222 of the Code.

35. With this proposition as laid down by the Hon'ble Supreme Court and the provisions of section 222 Cr.P.C let us again proceed to scrutinise the evidence on record. PW3/victim girl was a minor at the relevant time and that she was found in the custody of the accused at Bhubaneswar is not in dispute.

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36. Now, the intention of the accused is basis and gravament of an offence U/S 366 IPC. In the case at hand, the intention of the accused could not be found out by the evidence which was adduced by the prosecution. There is also no evidence on record as to any conduct of the accused from which an inference could be drawn in respect of the intention of the accused while allowing the victim to accompany him. Hence, the facts of the case fails to show of the constituents of the offence U/S 366 IPC. Now, let us proceed again to find out whether office U/S 361 IPC punishable U/S 363 IPC will be attracted in the instant case. For the sake of addressing the above question so raised let us refer to section 361 of Indian Penal Code which is reproduced herein below :

Section 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

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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.

37. Section 361 IPC envisages that "taking" of "enticing" away a minor out of keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. As discussed in the foregoing paragraphs the case of enticement by the accused is not made out. Hence, we are not concerned with the enticement but we have to find out whether the accused was responsible for 'taking away' the victim girl out of the keeping of the lawful guardian. Even at the risk of repetition it is stated that there is no doubt that the victim girl had gone with the accused. But meticulous scrutiny of the evidence of PW 3 discloses that there is not a word in victim's deposition that she had left her parental house at the instance or even a suggestion by the accused. In fact, the victim had candidly admitted that she herself had intimated the accused to meet her and she went up to the said destination on her own accord. The admission of the PW 3 and the revelation of the accused in his statement U/S 313 Cr. P.C discloses that it was at her own instance she accompanied the accused. Accordingly, the accused by complying with the victim's wishes by no stretch of imagination be said to have "taken her" out of the keeping of the victim's lawful guardian. It has been unfurled in the evidence that the victim was not an un-lettered girl hailing from remote area rather, that she was attending school and was capable of knowing about herself is, discernable.

38. It must, however be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we guard ourselves from laying down that in no conceivable circumstances the two can be regarded as having the same meaning for the purpose of section 361 IPC. In the present case it is seen that there is no evidence led by the prosecution that there was an active participation of the accused in the formation of the

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intention of the minor victim girl/PW 3 to leave the house of the guardian. There is also nothing on record to establish that, immediately prior to the minor's/PW'3 act of leaving her parental house, active part was played by the accused or at that some earlier point of time the accused had solicited or persuaded the minor girl/PW 3 to go away from her parental house. The mere fact that the minor girl/PW 3 joined the accused and the accused allowed her to accompany him would therefore not tantamount to "taking" within the meaning of section 361 IPC. In fact, there is no evidence of any solicitation by the accused at any point of time. The omission of the accused to cause the victim to go back to her parental house also could not be said to have committed the overt act of 'taking' withing the meaning of section 361 IPC.

39. It will be apposite to refer to the case of S. Varadha Rajan vs State of Madras reported in AIR 1965 SC 942 rendered by the Hon'ble Supreme Court. The ratio of the case squarely covers the present case at hand

(Emphasized laid).

40. Accordingly, in view of the above discussions it can be safely held that accused cannot be convicted U/S 361 IPC either. In view of the above discussion, I am constrained to hold that prosecution has failed to establish the charge brought about against the accused. The accused is entitled to benefit of doubt. In the above circumstances, accused Mithun Sarkar deserves to be acquitted.

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41. In the light of the above discussions, accused Mithun Sarkar is acquitted of the charge U/S 366 (A)IPC and set at liberty forthwith.

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The bail bond of the accused shall remain in force for a period of 6(six) months from today.

Given under my hand and the seal of this Court on the 19th day of November, 2014.

(M. C. Bordoloi)

ASSTT. SESSIONS JUDGE,
BONGAIGAON.

Dictated and corrected by me

(M. C. Bordoloi)
Asstt. Sessions Judge,
Bongaigaon.

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APPENDIX

Prosecution witness :

- PW 1 - Kamal sarkar.
- PW 2 - Deepali Sarkar.
- PW 3 - Deepti Sarkar.
- PW 4 - Bapan Sarkar.
- PW 5 - Raju Sarkar.
- PW 6 - Aditya Prakash Dewri.
- PW 7 - Suren Baruah.

Prosecution exhibit

- Ext 1 - Ejahar.
- Ext 2 - Seizure List of birth certificate.
- Ext 3 - Birth certificate of the victim.
- Ext 4 - statement of victim.
- Ext 5 - Seizure list.
- Ext 6 - Charge sheet.

Defence witness

NIL

Defence exhibit

NIL

(M. C. Bordoloi)
Assistant Sessions Judge,
Bongaigaon.