

GAHC010159452023



2025:GAU-AS:2274

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./276/2023

NASIB ALI
S/O ABDUL WAHAB,
R/O NO. 1 NACHANGURI,
P.O.- GORAIMARI, P.S.- MANIKPUR, DIST.- BONGAIGAON, ASSAM, PIN-
783390.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE P.P., ASSAM.

2:DULU MIYA
S/O LATE HANIF ALI

R/O BARBILA
P.O.- MANIKPUR
P.S.- MANIKPUR
DIST.- BONGAIGAON
ASSAM
PIN- 783392

Advocate for the Petitioner : MR. M U MAHMUD, MR S ISLAM,MR S AFRIDI,MR. S.
SUR,MR S H MAHMUD

Advocate for the Respondent : PP, ASSAM, MR DIKSHIT GOGOI (R-2)

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant : Mr. M.U. Mahmud,
Advocate.

For the Respondents : Mr. D. Gogoi,
Advocate.

Date of Hearing : 24.09.2024.

Date of Judgment : 05.03.2025.

JUDGMENT AND ORDER (CAV)

Heard Mr. M.U. Mahmud, learned counsel appearing for the appellant. Also heard Mr. D. Gogoi, learned counsel representing the respondents.

2. This is an appeal under Section 374 (2) of the Code of Criminal Procedure against the judgment and order dated 06.07.2023 passed by the learned Special Judge (P), Bongaigaon in Special (P) Case No.12(M)/2021, arisen out of G.R. Case No.1429/2020.

3. On 01.12.2020, an FIR was lodged before police alleging that on 30.11.2020 at about 5 P.M., the 17 year old daughter of the informant went missing. The father of the girl searched for her, but she could not be found.

4. During the period of investigation, police recovered the girl and she gave a statement before the Magistrate under Section 164 of the CrPC. Before the Magistrate, she claimed to be 14 years old. She said that the present appellant was unknown to her. According to the girl, the present appellant picked her up in a car and after that her mouth was gagged and she was taken to Tezpur. She shouted for help, but nobody heard her. She had to spend the next two days in a Maruti Car. The present appellant provided her with food. Subsequently, she stopped shouting for help.

Afterwards, she was taken to the house at Tezpur. The appellant threatened her and told her that she must not disclose before the inhabitants of that house that she was in fact kidnapped by him. On the next Saturday, she was brought to her village by the appellant and she was dropped near her house.

5. The victim girl stated before the Magistrate that during stay with the appellant on those days, they had physical relations.

6. On conclusion of investigation, police filed the *charge sheet* against the appellant under Sections 366(A), 376(1) of the Indian Penal Code read with Section 4 of the POCSO Act.

7. During the trial of the case, 10 number of prosecution witnesses were examined. The appellant also examined 1 witness.

8. On the basis of the evidence on record, the trial court passed the impugned judgment.

9. I have heard the learned counsel of both sides. I have also gone through the evidences available in the record.

10. The first prosecution witness was the victim herself. She claimed that after she was taken to Tezpur in a Maruti Car, the appellant had forcible sexual intercourse with her inside the car. She said that the car was driven by a driver. While she was with the appellant in the house of his relative at Tezpur, the appellant had forcible sexual intercourse with her. Finally, she was dropped at Gerukabari. She informed her father and he took her home.

11. During cross-examination, the girl stated that while she was kept in the house of the relatives of the appellant at Tezpur, she never told the inhabitants of the house that she was raped by the appellant.

12. Now, I shall take up the evidence of Mustafijur Rahman. He has stated in his evidence that on the day of occurrence at about 4 P.M., he was sitting near a bamboo

bridge situated at Barbila Village. He saw that a car was coming from the western side and also saw that the girl got into the said car. After that incident, this witness came to know from the brother of the girl that she was in fact kidnapped.

13. The witness Sanidul Islam has stated in his evidence that on the day of occurrence at about 4 P.M., he was also sitting near the bamboo bridge at Barbila Village and saw that a car had taken away a girl. At that time, he could not recognize the girl.

14. The witness Hamed Ali has stated in his evidence that on the day of occurrence, he had seen the appellant taking away the victim girl in a Maruti Car. Hamed Ali further stated that the appellant kept the victim for a period of 1 year 3 months and thereafter he ran away. According to this witness, the victim girl returned home on her own.

15. The witness Ramjan Ali has stated in his evidence that on the day of occurrence, the appellant borrowed his car on rent for going to Nayahat, Bilasipara. At about 5.30 P.M., the appellant brought a girl from her house and dropped her at Nayahat Market. After that, the appellant gave ₹2000/- to this witness. According to Ramjan Ali, the appellant was married and he had a son at that time.

16. During cross-examination, this witness stated that the girl was travelling in the car did not tell anything to him.

17. The Medical Witness Dr. Hafija Ahmed stated in her/his evidence that the X-Ray showed that the girl was between 18 to 19 years of age. The doctor could not ascertain as to whether the victim girl was raped.

18. Apart from these witnesses, the prosecution side examined both the parents of the victim girl. The prosecution also examined the Head Mistress of a School to prove the age of the girl.

19. The last witness to be examined was the Investigating Officer who spoke about

the investigation.

20. The lone Defence Witness Santanu Sarkar was examined to prove a document. This document was intended to prove that the victim girl was above 18 years of age. But this document did not match with the Birth Certificate (Ext.B) which was proved by prosecution.

21. None of the prosecution witnesses, except the victim herself, have supported the fact that she was forcibly taken away by the appellant. From the evidence of Mustafijur Rahman and Sanidul Islam, it appears that the victim girl was a consenting party. The prosecution witness Hamed Ali has stated in his evidence that the victim girl was kept by the appellant for a period of 1 year and 3 months and after that she returned home on her own.

22. In criminal jurisprudence, it is compulsory on the part of the prosecution that in order to hold a person guilty of an offence, the offence must be proved beyond all reasonable doubt against that person. Here, in this case, two eye witnesses stated in their evidence that the victim girl, on her own, got into the car of the appellant. One witness has stated that the victim girl had stayed with the appellant for a long period of 1 year 3 months and after which she returned home on her own. There is no evidence in this case, except the evidence of the victim girl herself, to prove that she was forcibly taken away by the appellant.

23. Moreover, the POCSO Act, 2012 has defined sexual assault as whoever with sexual intent commits the offence against the child, it amounts to sexual assault. So, in order to constitute the offence of sexual assault, there must be a sexual intent proved. Except the evidence of the victim girl, there is no other evidence to prove this fact. Even the medical evidence was against the victim. In spite of presence of other people in the house at Tezpur, where she was kept by the appellant, the victim girl never disclosed before anyone that she was raped by the appellant.

24. The prosecution evidence on one side shows that the victim was a consenting

party, and the other side shows that the victim was not a consenting party. It is the cardinal principle of criminal jurisprudence that when two views are possible, the view which goes in favour of the appellant should be accepted.

25. The aforesaid facts are sufficient to hold that the offence of kidnapping, rape and sexual assault upon a child are not proved against the appellant beyond all reasonable doubt. The learned trial court erroneously appreciated the prosecution evidence and arrived at an incorrect finding.

26. For the aforesaid premised reasons, the appeal is allowed.

27. The impugned judgment and order dated 06.07.2023 passed by the learned Special Judge (P), Bongaigaon in Special (P) Case No.12(M)/2021, arising out of G.R. Case No.1429/2020, is set aside. The appellant Nasib Ali is found not guilty and he is acquitted accordingly. If the appellant is still in custody, he shall be set at liberty forthwith.

Send back the LCR.

JUDGE

Comparing Assistant