IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA,
MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR BENCH
NAHARLAGUN

CRL. APPEAL NO. 04(AP)2008

Sanjiv Baidya
S/o Montu Baidya
Resident of Chowkham
P.O. & P.S. : Chowkham,
District : Lohit, Arunachal Pradesh.

..... *Appellant*

- Versus –

The State of Arunachal Pradesh

.....*Respondent*

Advocates for the appellant :- Mr. P. K. Tiwari
Mr. J. Purkayastha
Mr. L.. Tenzing

Advocate for the respondent :- Mr. I. Basar, Addl. P.P., Arunachal Pradesh

PRESENT
THE HON'BLE MR. JUSTICE P. K. MUSAHARY

Date of hearing : **20.05.2010**
Date of Judgment & order: **20.05.2010**

JUDGMENT AND ORDER(ORAL)

Heard Mr. L. Tenzing, learned counsel appearing on behalf of the accused appellant. Also heard Mr. I. Basar, learned Addl. Public Prosecutor, for the State of Arunachal Pradesh.

2. This appeal has been preferred against judgment and order dated 22.12.2006 rendered by the learned Additional District & Sessions Judge, Fast Track Court, Namsai, in Sessions Case No. 02/2002 convicting the accused appellant under Section 366 I.P.C. and sentencing him to undergo R.I. for 3 years and 6 months with a fine of Rs. 1,000/-.

The case of the prosecution, in brief, is that on 23.01.2002, an FIR was lodged by PW-1 of village Patirgaon to the effect that his 16 years and 3 months minor daughter ('Pina' real name withheld) was missing since the afternoon of 18.01.2002 and it was reported that she had left her village in company of one Sanjiv Baidya(present appellant) of Chowkham. On the basis of the said FIR, the police registered Namsai P.S. Case No. 03/2002 under section 366 I.P.C.. On completion of the investigation, the I.O. of the case submitted charge sheet against the accused appellant under Section 366 I.P.C.. The case was committed to the court of learned Addl. District & Sessions Judge, Fast Track Court, Namsai, for trial, as the alleged offence was exclusively triable by the court of Sessions. On consideration of the materials on record, the learned trial court framed charge under Section 366(A) I.P.C. against the accused appellant, to which, on being read over and explained, he pleaded not guilty and demanded to stand the trial.

The prosecution, in order to prove its case, examined as many as 7(seven) witnesses including the victim girl and the medical officer. The defence, on the other hand, examined 2(two) witnesses.

3. Mr. L. Tenzing, learned counsel appearing on behalf of the accused appellant submits that at the time of the incident, the age of the victim girl was above 18 years and she had accompanied the accused appellant voluntarily and thereafter, she had been staying and moving with him till she was recovered from his custody. Mr. Tenzing, learned counsel for the accused appellant, further submits that since the victim girl was above 18 years of age and was staying and moving with the accused appellant on her own volition, no case under Section 366 of I.P.C. is made out or proved against the accused appellant and as such, the accused appellant is entitled to acquittal.

4. Mr. I. Basar, learned Additional Public Prosecutor representing the State of Arunachal Pradesh, submits that at the time of the incident, the victim girl 'Pina' was below the age of 18 years as per the Birth Certificate dated 20.09.2000 issued by the Registrar, Registry of Death & Birth, Govt. of Arunachal Pradesh, Namsai Circle, Lohit District, wherein the date of birth of the victim girl has been shown as 20.03.1985. The learned Addl. Public Prosecutor has shown the aforesaid certificate from the records of the case. According to him, the prosecution has been able to prove the age of the victim girl as below 18 years of age and thereby, proved its case, on the basis of which, the learned trial court rightly convicted the accused appellant, as stated above, calling for no interference in appeal.

5. I have perused the said birth certificate shown by the learned Addl. Public Prosecutor. It is seen that it is merely a photocopy of the Birth certificate issued by the

Registrar of Death & Birth, Govt. of Arunachal Pradesh, Namsai Circle, Lohit Circle, without being accompanied by the original one. It is further seen that the said certificate was not proved by the prosecution before the learned trial court inasmuch as the same has not been marked as an Exhibit. In my considered view, such a document without being proved and/or exhibited before the trial court, cannot be treated as a valid piece of evidence and no finding, whatsoever, on the basis of such a document, can be recorded by the trial court, as regards the age of the victim girl. Even if the original document of the aforesaid birth certificate was produced before the trial court, the same should have been proved by the Officer concerned who issued the said certificate. Further, even if the issuing Officer has been produced as a witness, he must also produce the relevant Register/record maintained by his office and the same should be proved and exhibited before the concerned trial court. No such procedure in proving the aforesaid document/certificate has been followed/adopted by the prosecution. As per the evidence of P.W.-7, I.O. of the case, the said photo copy of the birth certificate was seized by him. If the prosecution wanted to prove the same, it could have made an application before the learned trial court for production of the original birth certificate and the learned trial court could have also summoned the issuing authority to prove the certificate, in question. The prosecution did not do so although it was incumbent upon them to do so for proving its case.

6. Confronted with such a queer situation, Mr. Basar, learned Addl. Public Prosecutor, submits that since

the photocopy of the aforesaid birth certificate is on record of the case and the learned trial court having mentioned about the same in its judgment and order, it can be treated as a valid piece of evidence and on the basis of the same, the conviction and sentence can be maintained. In this regard, the learned Addl. Public Prosecutor, would rely on the ***State of Maharashtra –vs- Gajanand,*** reported in ***(2008) 8 SCC 38*** *and* ***Moniram Hazarika –Vs- State of Assam,*** *reported in* ***(2004) 5 SCC 120.***

7. I have gone through the judgment in ***Gajanand's*** case(supra). It is a case where the prosecution produced the Headmaster of the School apart from the medical evidence to prove the age of the victim girl. In the said case, the concerned High Court discarded the documentary evidence even when the Headmaster of the said School deposed and produced the records on the ground that entry on the School's Register was not in the handwriting of the Headmaster and he could not have deposed the date of birth of the victim girl and it was, therefore, held by the Supreme Court that there was no basis for the High Court to conclude that the entry cannot be taken to be above suspicion. However, in the instant case, as already stated earlier, neither the School Headmaster and/or the Admission Register of the School were produced nor the Registrar of the Registry of Death & Birth, who issued the said certificate, has been examined as a witness by the prosecution. In my considered view, the aforesaid case is not to the help of the prosecution in any manner with regard to the instant case. The case of ***Moniram Hazarika*** (supra) does not deal with the age of

the victim girl and as such, it has no relevance to the present case.

8. In view of the above position, I am unable to accept the submissions of Mr. I. Basar, learned Additional Public Prosecutor, Arunachal Pradesh, to treat the aforesaid Birth certificate which was seized by the I.O. and kept on record but was not proved or exhibited, as a piece of legal evidence. It is the settled position of law that unproved or unexhibited document cannot be treated as a piece of legal evidence and the lapse on the part of the prosecution cannot be condoned and for that matter, prosecution could not be allowed to prove the document on remand to the trial court, moreso, when the prosecution, on record, did not make any application before the trial court for giving it chance to prove and exhibit the document by examining the concerned witnesses.

9. The learned Addl. Public Prosecutor, as a last resort, made a prayer before this court that the matter may be remanded back to the trial court below thereby providing an opportunity to the prosecution to prove the age of the victim girl by producing and exhibiting/proving the birth certificate and prove the age of the victim girl through the issuing authority of the said certificate. I am afraid that such an opportunity could be given to the prosecution at this stage inasmuch as acceding to such request would provide the prosecution a chance to mend the lapses committed by them in proving the case during trial.

10. It has already been discussed and found that the victim girl accompanied the appellant voluntarily. The prosecution was required to prove the willingness or voluntariness of the victim girl if she was found below 18 years at the time of occurrence. In this regard, I may again refer to the evidence of P.W.-4, mother of the victim girl, who deposed very clearly that at the time of the incident, the victim girl was aged about 18 years. The medical officer, P.W.-6, who examined the victim girl medically, on police requisition, stated in his cross-examination that both the accused and the victim girl were major being in the age group of 23 plus. Moreover, P.W.-3, in whose house, the accused appellant took shelter with the victim girl, stated in her evidence that the victim girl was aged about 20 years. There was nothing on record to show that ossification test was conducted on the victim girl to ascertain the age but the P.W.-2, Doctor who examined the victim girl, had the opportunity to closely examine the victim girl physically and medically and could only roughly estimate the age of the said girl which has been more or less supported by the estimation of age of the victim girl by P.W.-3. Even the ossification test, in the eye of law, is not a sure test to ascertain the age of the victim girl inasmuch as it gives only an approximate age which may vary by 2 years on either side as it was held so by the **High Court of Delhi** in ***Chidda Ram –vs- The State,*** reported in ***1992 Crl. L. J. 4073.***

11. The error margin in the estimation of age of the victim girl as per the evidence of PWs-3 and 6 is only 3 years. If the age of the victim girl is taken as 20 years, as

per the evidence of P.W.-3, the error margin of the victim girl on the basis of evidence of P.W.-4, mother and P.W.-3, is only 2 years. The margin of error may be narrowed to 1 year and it would stand at 19 years or 18 plus. No fault could be found if the age of the victim girl is taken as 18 plus. This calculation of age of the victim girl would find support from the evidence of P.W.-1, father of the victim girl, who deposed that she married after 1 year and 8 months of the incident. The controversy regarding the age of the victim girl found resolved and can safely be held that she was above 18 years at the time of incident.

12. In the light of the foregoing discussions and findings on the age of the victim girl who was above 18 years and being a major, accompanied the accused appellant voluntarily and was moving/staying with him for 5 days from one place to another without any objection or resistance, it can be held that the ingredients of offence under Section 366 I.P.C. are lacking and the prosecution miserably failed to prove the charge under Section 366 I.P.C. against the accused appellant. Therefore, in my considered view, the conviction and sentence as inflicted by the learned trial court on the accused appellant is liable to be set aside and quashed. The same is accordingly set aside and quashed. The accused appellant, is, thus, acquitted.

13. Send down the lower court records to the court below immediately.

JUDGE

Bikash