

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.REV.P. NO.55 OF 2010

Abdul Matlib @ Mati Miah,
Son of Late Abdul Mannan of
Village Jhumtilla, P.O. & P.S. Churaibari,
District North Tripura.

.... Convict-Petitioner.

-- Vrs --

The State of Tripura
Represented by the Secretary to the
Govt. of Tripura, Home Department,
Agartala.

.... Respondent.

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

For the Petitioner : Mr. A.K.Bhowmik, Sr. Advocate.
Mr. R. Dutta, Advocate.

For the Respondent : Mr. A. Ghosh, P.P.

**Date of hearing & : 13.08.2015.
delivery of judgment &
Order.**

Whether fit for reporting : **Yes**

JUDGMENT & ORDER (ORAL)

In Sessions trial No.44(NT/D) 2008, learned
Assistant Sessions Judge, Dharmanagar, North Tripura,
framed charges against accused-petitioner Abdul Matlib @ Mati
Miah for commission of offence punishable under Sections 366

and 376(1) of IPC to which the accused pleaded not guilty and claimed to be tried.

2. In course of trial prosecution examined 12 witnesses to prove the charges and after closure of the prosecution evidence, the accused petitioner was examined under Section 313, Cr.P.C. and in his turn he declined to adduce any defence evidence.

3. Prosecution case is that the accused-petitioner used to work in a stone quarry adjacent to the house of informant Niranjana Malakar (P.W.1) and the accused used to frequently visit the house of the informant for drinking water as well as on other pretext. Taking the opportunity of such visit of the house of informant, the accused-petitioner on 08.01.2008 at about 7/7-30 p.m. kidnapped minor daughter of the informant (name kept withheld and hereinafter mentioned as the victim prosecutrix) and took her to Karimganj District of Assam at a village named Kanishail and kept her there in a rented house belonged to Abdul Khalek @ Pakhi Miah(P.W.12) and in that house the accused committed rape on the victim prosecutrix. Niranjana Malakar, the father of the victim prosecutrix lodged FIR on 13.01.2008 before the O.C., Churaibari P.S. and thereafter the police officer recovered the victim prosecutrix from the house of P.W.12 on 27.01.2008 and the accused had

absconded from the house of P.W.12 at the time of recovery of the victim prosecutrix. After recovery the victim prosecutrix was brought back to Churaibari and was handed over to the informant i.e. her father. Medical examination was done in the course of investigation and the statement of the victim prosecutrix was recorded under Section 164 of Cr.P.C. Police also seized the school certificate in the name of the victim prosecutrix showing that she was aged about 14 years at the time of occurrence being her date of birth on 03.10.1993.

4. Defence case so far suggested at the time of cross examination of P.Ws 1 and 2 is that the victim prosecutrix was mentally imbalanced and that she used to go inside the jungle with some young people and that the accused reported such facts to the informant and therefore, the informant got irritated and threatened to file a false case against the accused to teach him a good lesson and to refrain him from spreading defamatory statements in the name of victim prosecutrix. It is contended by the accused that the case was false.

5. The trial Court considered the evidence on record and at the conclusion of trial hold the accused-petitioner guilty of both charges framed against him and sentenced him to suffer R.I. for 5 (five) years and to pay a fine of Rs.1000/- in default of payment of fine to further undergo S.I. for 2 (two)

months for commission of offence punishable under Section 366 of IPC and again sentenced him to suffer R.I. for 7 (seven) years and to pay a fine of Rs.1000/- in default of payment of fine to suffer further S.I. for 2 (two) months under Section 376(1) of IPC. Both the sentences were directed to run concurrently.

6. Aggrieved the convict-accused preferred Criminal appeal No.13(4) of 2009 in the court of learned Addl. Sessions Judge, Dharmanagar, North Tripura and the learned Addl. Sessions Judge by judgment dated 25.06.2010 dismissed the appeal and upheld the judgment and order of conviction and sentence. Hence, the present revisional application has been filed by the convict-accused-petitioner.

7. Heard learned Sr. counsel Mr. A.K.Bhowmik for the accused-petitioner and learned P.P., Mr. A. Ghosh for the State-respondent.

8. The revisional application is filed against concurrent finding of two Courts below. It appears that the trial Court as well as the appellate Court have meticulously appreciated the evidence on record and arrived at a concurrent finding in respect of the charges framed against the accused. Learned Sr. counsel Mr. Bhowmik has submitted that since it is a revisional application against a finding of conviction in a criminal offence

it should be attached with utmost importance and the evidence should be re-appreciated like an appeal. I cannot agree with the submission of learned Sr. counsel Mr. Bhowmik on this score. While exercising power of revision, this Court is to see the correctness, legality and propriety of the judgment/order passed by the inferior Court and regularity of the proceeding before such Court. This Court is not ordinarily required to re-examine and re-appreciate the evidence unless it is shown that there is perversity in the appreciation of the evidence or that the finding is based on no evidence. This is a case of kidnapping of a minor girl from the lawful custody for the purpose of illicit intercourse and in fact allegation is that the accused after kidnapping the girl took her to Karimganj in a village named Kanishail and kept her there in a rented house and it is alleged that the accused committed rape on the victim girl till she was recovered by the police on 27.01.2008.

9. Learned Sr. counsel, Mr. Bhowmik concentrated his argument on some specific points. It is first argued by learned Sr. counsel that the alleged incident of kidnapping held on 08.01.2008 whereas the FIR was lodged on 13.01.2008. No explanation given in respect of delay in lodging the FIR which vitiates the prosecution case.

10. Learned P.P. on the other hand, has submitted that in such cases of kidnapping of a young girl normally the parents will be slow to report it to the police and it is quite natural that the parents and relatives searched for the girl here and there and when they suspected that the accused kidnapped the girl they reported it to police and police recovered the girl from the custody of the accused at Kanishail, Karimganj in Assam. The delay is not fatal in this case and the prosecution has not taken any advantage of the delay in lodging the FIR.

11. It is true that according to the prosecution, the alleged kidnap was occurred on 08.01.2008 at about 7/7-30 p.m. and the FIR was lodged on 13.01.2008. The informant in the FIR stated that when the victim was found missing from the house, he and other members of the family together conducted search and could not trace out the victim. After some inquiry they came to know that the accused kidnapped her and thereafter he lodged the FIR. In his deposition also except that he and other members of the family made search for the victim prosecutrix there is no other explanation given.

12. In a given case delay in lodging FIR may be fatal but nothing can be fixed as a rule that delay in lodging FIR in each

and every case shall be treated as fatal unless it is found that there is scope of exaggeration or embellishment because of the delay. The law has not fixed any time for lodging FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that give the prosecution twin advantages. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity of any possible concoction of a false version. It is a settled law that when there is a criticism on the ground of delay in lodging the FIR, the Court has to look into the reasons for such delay.

13. The Supreme Court in the case of ***State of Himachal Pradesh V. Gian Chand*** reported in **(2001) 6 SCC 71: 2001 AIR SCW 1903** has held—

“Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.”

14. In the case of ***Ramdas & Ors. V. State of Maharashtra*** reported in **(2007) 2 SCC 170**, the Supreme Court in para 24 of the judgment has observed thus-

“Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may

affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See Pandurang v. State of Hyderabad : (1955) 1 SCR 1083 : AIR 1955 SC 216). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.”

15. In the case of **State of Punjab V. Gurmit Singh** reported in **(1996) 2 SCC 384: AIR 1996 SC 1393**, the Supreme Court has held thus—

“In sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the

reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter.”

16. In the case of **Karnel Singh v. State of M.P.** reported in **1995 Cri. L.J. 4173**, the Supreme Court has held that delay in lodging complaints in such cases in India does not raise inference that complaint was false. Reluctance to go to police is because of society’s attitude towards such women, victims.

17. The Supreme Court in the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat** reported in **AIR 1983 SC 753** has held---

“A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had even occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If he is unmarried, she would apprehend that it would be difficult to secure an

alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.”

18. In the case at hand the victim prosecutrix was missing from the evening of 08.01.2008. The parents and other members of the family searched for her here and there and on enquiry could learn that the accused had kidnapped her and took her to Assam. Thereafter they lodged the FIR for the recovery of the victim from the custody of the accused and police registered the case on 13.01.2008 and in the course of investigation recovered the victim prosecutrix from the custody of the accused on 27.01.2008. There is nothing to show that there was any development made in the story during the period from the date of occurrence till the date of lodging the FIR. Therefore, I am in considered opinion the delay in lodging the FIR is insignificant in the present case.

19. The next argument advanced by learned Sr. counsel Mr. Bhowmik is that even if the story as narrated by the prosecution is believed, the victim prosecutrix is a consenting party and she voluntarily went away and therefore, the ingredients of kidnapping cannot be said to have proved and so, punishment under Section 366 of IPC cannot sustain.

20. P.W.2 the victim prosecutrix in her deposition made categorical statement that at about 7-30 p.m. when she came out of her dwelling hut for natural call, the accused Abdul Matlib suddenly grabbed her, pressed her mouth and forcefully lifted her inside a Max vehicle which was kept at a distance from their dwelling hut and thereafter he took her to Karimganj by the said Max vehicle and kept her in a rented house at Kanishail. The accused forcefully committed rape on her against her will for 10/12 days in that house. She was recovered by police of Churaibari P.S. along with her father and brother and brought her to Churaibari P.S. The accused managed to flee away before arrival of police in the said rented house. So the accused could not be detained by the police personnel. Darogababu sent her to Kadamtala PHC for her medical examination and thereafter she was handed over to her parents. During investigation Darogababu produced her before the SDJM, Dharmanagar and she narrated the fact to the SDJM and she proved her statement as Exhibit 2. She was a student of Class-VI at that time.

In cross examination she stated that the accused was known to her from before as he was working in a stone quarry adjacent to her house. She denied the suggestion that she was mentally imbalanced and used to go inside the jungle with some youths. She also denied the suggestion that the

accused reported the fact to her father and her father threatened the accused to file a false case against the accused to give him good lesson to prevent the accused from speaking any defamatory statement against her. The Max vehicle was parked about one mile away from her house and in that vehicle there were other passengers. Before lifting her inside the Max vehicle she reached there with the accused on foot. She denied the suggestion that the accused did not kidnap her and did not take her to Karimganj and did not commit rape on her.

21. The above evidence of the victim prosecutrix has been carefully appreciated by both the trial Court as well as the appellate Court and I find that the evidence of the victim prosecutrix has not been shaken in any manner. P.W.7 the I.O. of the case made consistent statement that he recovered the victim prosecutrix on 27.01.2008 at about 3-50 p.m. from a rented house at Kanishail. P.W.12 a resident of Kanishail, Karimganj stated that his tenant Abdul Kalam allowed a boy and a girl belonging to State of Tripura to stay in his house and when police went there he had shown the boy and girl to the police.

22. Police recovered the victim from the house of P.W.12 and took her to Churaibari. Consistent story narrated by the

prosecution witnesses and the sequence of events established the prosecution case that the accused kidnapped the victim girl from her house and took her to Karimganj at Kanishail and kept her in the house of P.W.12 and according to the victim she was raped there.

23. In the FIR the informant, father of the victim stated that the victim was aged 14 years at that time. P.W.8 a teacher of Thakur dayananda Sanskrita Vidyapith in Churaibari proved a school certificate and copy of the admission register issued in the name of victim girl. The relevant pages of admission register has been proved as Exhibit-8 and the school certificate proved as Exhibit-9 and the evidence of P.W.8 has not been shaken in any manner. Exhibit-8 shows that the victim was a student of the school admitted on 21.01.2000 and her date of birth was 03.10.1993 as per the school certificate. It shows that the victim girl was aged 14 years at the time of occurrence.

24. P.W.9, the Medical Officer has examined the victim girl on 27.01.2008 on production by the I.O. immediately after her recovery from Karimganj and in his deposition he stated that he found that the victim girl had a developed and normal sexual organ. He did not find any mark of violence in her body. He also did not find any bleeding in her private parts. Her breasts were found large and flabby which indicated frequent

handling of the breasts. Her hymen was found ruptured and the opening was enlarged. It indicated that there was a regular intercourse. Vaginal wall and labia lose their tone. All these indicated repeated intercourse. No foreign body was found inside her vagina. This evidence of P.W.9, the medical officer has not been shaken in cross examination which proves that the victim girl was subjected to intercourse immediately before she was recovered by police.

25. It is proved with overwhelming evidence that the victim prosecutrix was a minor girl at the time of occurrence. Section 361 of IPC defines kidnapping from lawful guardianship which reads as follows:-

“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 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.”

26. The object of this Section is to protect the minor children from being seduced for illicit purposes and also to protect rights and privileges of guardians having lawful custody of their wards. So far as kidnapping a minor girl from lawful guardianship is concerned, the ingredients are:

- (i) that the girl was under 18 years of age;
- (ii) such minor girl was in the keeping of lawful guardian;
- (iii) the accused took or enticed such person to leave out of such keeping and such taking was done without the consent of the lawful guardian.

27. In the present case the victim prosecutrix was a minor aged 14 years. She was under the lawful guardianship of her parents i.e. P.Ws 1 and 3. The accused took her to his custody without the consent of the parents. Whether the victim was a consenting party or not is quite immaterial in the given facts of the case since she was a minor girl of 14 years and the accused had no right to take her with him without the consent of her guardian. Learned Sr. counsel Mr. Bhowmik referring to the statement of P.W.2 i.e. the victim prosecutrix in her cross examination, that she walked with the accused upto the Max vehicle, has submitted that she voluntarily went with the accused. The victim prosecutrix in her examination-in-chief stated that she was forcefully taken out of the house and in cross she stated that she walked with the accused upto the Max vehicle. So, it is apparent that she went with the accused and initially accused applied force and thereafter she walked with the accused upto the vehicle and that with that vehicle

she was taken to Karimganj by the accused. This fact makes it quite clear that the accused taken her to Kanishail from the house of the victim without the consent of the parents of the victim. Such taking of the minor girl from the custody of her lawful guardian definitely amounts to the offence of kidnapping and nothing else.

28. Learned Sr. counsel Mr. Bhowmik in support of his argument referred the observation of the Apex Court in the case of **S. Varadarajan V. State of Madras**, reported in **AIR 1965 SC 942** and he referred to para 19 of the judgment which reads as follows:-

“As against this Mr. Ranganadham Chetty appearing for the State has relied upon the, decisions in Bisweswar Misra v. The King ILR (1949) 1 Cut 194: (AIR 1949 Orissa 22) and In re, Khalandar Saheb, ILR 1955 Andhra 290. The first of these decisions is distinguishable on the ground that it was found that the accused had induced the girl to leave the house of her lawful guardian. Further the learned Judges have made it clear that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to "taking" within the meaning of s. 361. In the next case, the act of the accused, upon the facts of the case was held by the Court to fall under s. 366, I.P.C. and the decision in AIR 1949 ALL 710 on which reliance has been placed on behalf of the appellant is distinguished. Referring to that case it was observed by the Court :

"Reliance is placed upon the decision of Mustaq Ahmed J. in AIR 1949 All 710 wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under section 361, Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused..... In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and, thereafter, the accused took her with him."

After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State."

29. The fact of that reported case was related to a college going girl who was on the verge of majority and the facts are quite distinguishable to the fact of the present case. However, in my considered opinion the observation made by the Apex Court in that case do not in any way help the accused-petitioner of this case rather the observation that the word “take” means to cause to go, to escort or to get into possession, supports the fact of the present case that the accused taken the victim prosecutrix and caused her to go with him to Kanishail where she was kept in a rented house and were subjected to illicit intercourse.

30. Learned Sr. counsel also referred the decision of the Gauhati High Court in **Mihir Das V. State of Tripura**, reported in **2006 Cr.L.J. 1500** and the case of **Shambhu Chakraborty V. State of Tripura**, reported in **(2013) 1 TLR 535** but on perusal of both the judgments, I am of the considered opinion that those judgments are quite distinguishable to that of the fact of the present case and hence, the ratio cannot be applied in the facts of this case.

31. The charges framed against the accused-petitioner have been proved with the evidence adduced by the prosecution and the trial Court rightly convicted the accused which was

upheld by the appellate Court and I find no reason to interfere in the judgment and order of conviction and sentence.

32. There is no question of giving the accused benefit of the Probation of Offenders Act.

33. The revisional application, therefore, stands dismissed.

34. Send down the L.C. records along with a copy of this judgment.

JUDGE