

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present : **The Hon'ble Mr. Justice Bibek Chaudhuri**

IA No.: CRAN/1/2018 (Old No.: CRAN/82/2018)
in
CRA 14 of 2018

Amirul Mondal @ Aminul
-Vs.-
State of West Bengal

For the appellant : Mr. Arnab Chatterjee, Adv.,
Mr. Jisan Iqubal Hossain, Adv.

For the respondent : Mr. Saswata Gopal Mukherjee, Ld.P.P.,
Ms. Faria Hossain, Adv.,
Ms. Ayantika Ray, Adv.

Heard & Judgment on : 30.11.2021.

Bibek Chaudhuri, J.:

Judgment and order of conviction and sentence dated 15th September, 2017 and 18th September, 2017 passed by the learned Additional Sessions Judge, 3rd Fast Track Court, Berhampore convicting the appellant under Sections 366/34 of the Indian Penal Code is under challenge in the instant appeal.

During night of 8th/9th April, 2004 at about 1.00 a.m., minor daughter of the *de facto* complainant was kidnapped by the appellant and one Abdus Salam forcibly on gunpoint. The daughter of the victim girl could not raise any hue and cry out of fear.

The father of the victim girl lodged a written complaint to the Officer-in-Charge, Domkal Police Station on 9th April, 2004. On the basis of the said complaint, police registered Domkal Police Station Case No. 72 of 2004 under Sections 363/366 of the Indian Penal Code and took up the case for investigation.

During investigation, the victim girl was recovered by police on 11th April, 2004. She was medically examined. Her statement was got to be recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure. The Investigating Officer examined the witnesses under Section 161 of the Code of Criminal Procedure. Wearing apparels of the victim girl were seized. She was medically examined. A motor bike on which the accused persons allegedly kidnapped the victim girl was seized. Then, on completion of investigation police submitted charge-sheet against the appellant and his elder brother, namely, Abdus Salam under Section 366 of the Indian Penal Code.

As the offence under Section 366 of the Indian Penal Code is exclusively triable by the Court of Sessions, the case was transferred to the Trial Court for trial and disposal.

The learned Judge in Court below framed charge against the accused persons under Section 366 of the Indian Penal Code. As the accused persons pleaded not guilty trial of the case commenced.

In order to bring home the charge against the accused persons, prosecution examined 10 witnesses. Amongst them, P.W. 6 is the victim girl, P.W. 1 is the father of the victim, other witnesses being P.W. 2, P.W. 3 and P.W. 4 are the close relatives of the victim girl, P.W. 8 and P.W. 9 are the Medical Officers and P.W. 10 was the Investigating Officer of this case.

The learned Trial Judge on appreciation of evidence on record found the appellant and the said Abdus Salam guilty for committing offence under Sections 366/34 of the Indian Penal Code and convicted and sentenced accordingly.

The said judgment and order of conviction is assailed in the instant appeal.

Before dealing with the ingredients of offence under which the appellant was convicted, let me consider the evidence on record independently because this Court of appeal is the last Court of finding of fact. From the Cross-examination of the father of the victim girl, it

is ascertained that he gave marriage of his daughter with one Hasibur and on the date of cross-examination, i.e., on 15th May, 2010, the victim girl used to reside with her husband, Hasibur. It is admitted by the father of the victim girl that before Hasibur, she married to one Sentu Mondal and prior to her marriage with Sentu Mondal, the victim girl was allegedly kidnapped by Amirul Islam in the year 2004.

Learned advocate for the appellant tries to impress upon this Court on production of the evidence of father and mother of the victim girl that initially, the victim girl was given marriage to the appellant. However, this Court does not find any such evidence on record. During cross-examination of P.W. 1 and 2, a question was put to them as to whether they could mention the date of pronouncing 'talak' to Amirul. Both of them answered in the negative. However, no suggestion was put by defence that initially, marriage between Amirul and the victim girl was held according to Mohammedan rites and customs.

In the instant case, the evidence of P.W. 6, i.e., the victim girl is of prime importance. According to her, on the date of her alleged kidnapping she was aged about 15/16 years and a student of class – IX. On the date of occurrence, the appellant and his brother came to her house in a motor cycle and brandishing a pistol took her away in the said motor cycle and confined her in a house. She was recovered

after 2/3 days by police. In her cross-examination, she admitted of making a statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure. Thus, the statement of the victim girl under Section 164 was brought to the evidence on admission by the victim girl. In her statement recorded under Section 164 of the Code of Criminal Procedure, she candidly admitted that she had love affair with the appellant. The appellant wanted to marry her but she refused her proposal on the ground that she would first complete her studies and then marry the appellant. Subsequently, the appellant and his brother forcibly took her away to another place. However, she further admitted that she was not subjected to illicit intercourse or any improper behaviour by the appellant and his brother. In cross-examination, the victim girl also stated that the appellant forcibly took her signature on a 'kabilnama' on 9th April, 2004. The said fact was not narrated by her to the learned Magistrate or to her father when he lodged written complaint against the appellant and his brother in the local Police Station. Therefore, execution of 'kabilnama' not being stated in the FIR or the previous statement made by her, such statement can conveniently be held to be an afterthought and ought not to have been considered by the Trial Court.

In order to prove the charge under Section 366 of the Indian Penal Code, the prosecution is under obligation to establish –

- (1) that the accused kidnapped or abducted the woman;
- (2) the accused intended or knew it likely that –
 - (a) the woman abducted or kidnapped would be compelled to marry any person against her own will, or she would be forced or seduced to illicit intercourse.

The second part of Section 366 lays down the following ingredients-

- (1) accused induced any woman to go from certain place
- (2) accused did it by criminally intimidate her;
- (3) he did so by abuse of his authority or;
- (4) he did so by any method of compulsion;
- (5) the accused intended or knew it likely that such woman would be forced or seduced to illicit intercourse.

In the instant case, the alleged offence took place at about 1 a.m. in the night of 8th /9th April, 2004. According to the prosecution, the time was about 1 a.m. at night. It is very natural that at such late hours of night, the victim and her family members were sleeping. It is also very natural that in order to get the person of the victim girl, the appellant had to knock at the door of the house of the *de facto* complainant. Surprisingly enough, the victim girl alone got up hearing the call of the appellant and no other person in her house came to know about the said fact. Such circumstance gives rise

to a question as to whether the victim girl willingly left with Amirul specially when she admitted that she had love relation with Amirul, the appellant herein.

Another important aspect should not be lost sight of. The victim girl stated in her evidence that she was aged about 15/16 years on the date of occurrence. No birth certificate or school admission register or any other document were seized by the Investigating Officer to prove her age. On the contrary, the ossification test report of the victim girl suggests that she was aged about 20 years on the date of her examination. The ossification test was conducted on 17th June, 2004, i.e. approximately about two months after the incident. In the absence of any other documents, this Court has no other alternative but to hold that the victim was at least more than 18 years of age on the date of occurrence applying the theory of plus minus two with the ossification test report to calculate the age of the victim girl.

In such case, no charge of kidnapping stand. This would be a case of abduction. In case of abduction, prosecution requires to prove that the victim girl was forced or compelled or by any deceitful means induced to go from one place to another. Moreover, it is held by the Hon'ble Supreme Court in ***Vishwanath -Vs.- The State of Uttar Pradesh*** reported in ***AIR 1960 SC 67*** that abduction simpliciter is not an offence under the Code. Only abduction with certain intent to

specify in the Code is punishable as an offence. Coming to the instant case, it appears to this Court on holistic appreciation of entire evidence on record that the victim was abducted by the appellant and his brother with intent to wrongfully confine her in a room for two days till she was recovered by the police or produced by Abdus Salam to the police attached to Jalangi Police Station.

For the reasons stated above, the appellant cannot deny his liability for committing offence under Section 365 of the Indian Penal Code. The learned Trial Judge did not appreciate the evidence on record in proper perspective of the facts and circumstances revealed in the case. On the contrary, he narrated the evidence on record and then went on to record the established sermons regarding criminal jurisprudence and the ratio laid down in various decisions of the Hon'ble Supreme Court though such ratio is not applicable in this case.

For the reasons stated above, this Court is of the view that the learned Trial Judge erred in holding the appellant guilty for committing offence under Sections 366/34 of the Indian Penal Code. However, the evidence on record suggests that the prosecution was able to establish the ingredients of Section 365 of the Indian Penal Code against the appellant and his brother.

In view of the above discussion, the judgment and order of conviction and sentence passed by the learned Additional Sessions

Judge, 3rd Fast Track Court (In-Charge), Berhampore in Sessions Serial No.558/2006 is set aside. However, the appellant is held guilty for committing offence under Section 365 of the Indian Penal Code and he is convicted and sentenced to suffer simple imprisonment for six months and to pay fine of Rs.5,000/-, in default, to suffer simple imprisonment for one month for the offence punishable under Section 365 of the Indian Penal Code.

The fine amount, if realized, shall be deposited in the fund of the District Legal Services Authority, Murshidabad.

The period of detention, already suffered by the appellant, if any, shall be set off from the substantive sentence under Section 428 of the Code of Criminal Procedure.

A copy of the judgment be sent to the learned Court below forthwith along with the lower court below.

Let a copy of this judgment be supplied to the learned Advocate-on-record of the instant appeal free of cost duly certified to be true copy by the Assistant Court Officer of this Court.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta/Mithun
A.Rs. (Court)