HIGH COURT OF TRIPURA
AGARTALA

Crl. A (J) No. 55 of 2016

Sri Manindra Sarkar,
son of Shri Rajani Sarkar,
resident of R.K. Nagar,
Rajarbadh, Kali Tilla,
P.S. Bodhjungnagar,
District-West Tripura

Appellant(s)

Vs

State of Tripura

Respondent(s)

For appellant (s)	:	Mr. S Lodh, Advocate
For Respondent(s)	:	Mr. S Ghosh, Addl.PP
Whether fit for reporting	:	**YES**

HON'BLE THE JUSTICE MR. S. TALAPATRA

Judgment & Order (Oral)

10/03/2020

Heard Mr. S Lodh, learned counsel appearing for the appellant as well as Mr. S Ghosh, learned Addl. PP appearing for the State.

2. The appellant was charged under Sections 376/511 and 354 of the IPC, which he had denied and after regular trial the appellant has been convicted under Section 366 of the IPC for committing offence of kidnapping/abducting or inducing women to compel her for marriage etc. Pursuant to the said conviction the appellant has been sentenced to suffer five years rigorous imprisonment and to pay fine of Rs.1000/- with default

stipulation. The said judgment of conviction and order of sentence are under challenge in this appeal.

3. The prosecution as launched against the appellant is based on the complaint (Exhibit-2) filed by one Purnima Debnath(PW-6), the mother of the victim, who revealed that on 25.12.2013 when the victim (aged about 15 years) went out of the home to reach her brother's house but she did not go there. As her whereabouts could not be gathered, on 16.12.2013, PW-6 lodged the said complaint to the Officer-in-Charge, Bodhjungnagar Police Station by suspecting the appellant to be involved in kidnapping of her daughter.

4. Accordingly, the police registered a case being BJN PS case No. 87/13 under Section 366A of the IPC and taken up for investigation. On completion of the investigation, the final report was submitted sending the appellant to face the trial. The trial was conducted by the Addl. Sessions Judge, West Tripura, Agartala. When the police papers reached to the Addl. Sessions Judge, West Tripura, Agartala on commitment, the charge was framed by him which was squarely denied by the appellant.

5. In order to substantiate the charge, as many as 11 witnesses and 7 documentary evidence including the statement of the victim recorded under Section 164(5) CrPC were adduced by the prosecution. After the prosecution evidence was recorded, the appellant was examined under Section 281/311 of the CrPC for having his response on the incriminating materials

those surfaced in the evidence. During the examination, the appellant has reiterated his plea of innocence and stated that the evidence as laid by the prosecution are fabricated to implicate him falsely in the case but no specific plea has been projected by the appellant. Even though during the examination under Section 313 CrPC, the appellant had stated that he would adduce evidence in defence but finally he did not adduce any evidence.

6. After appreciation of the evidence, the trial court convicted the appellant under Section 366 of the IPC. Abduction with intent to compel the victim to marry or to seduce illicit intercourse or the likelihood of being forced or seduced to illicit intercourse is *sine qua non*. Unless it is proved that abduction is for the purpose mentioned in Section 366 IPC, the court cannot hold the accused guilty and punish him under Section 366 of the IPC. [***Kavita Chandrakant Lakhani Vs. State of Maharashtra & Ors.: (2018) 6 SCC 664***].

7. Mr. S Lodh, learned counsel appearing for the appellant has argued before this Court that from a reading of the victim's evidence it would be apparent that there was no attempt to force marriage or illicit relationship. Mr. Lodh, learned counsel has further submitted that the victim had voluntarily accompanied the appellant and that is the reason why all through particularly during the course of transfer she did not raise any alarm to attract the attention of the people.

8. That apart, Mr. Lodh, learned counsel has submitted that the prosecution has miserably failed to prove the minority or non-attainment of the consenting age by the victim. For this purpose, the prosecution has fundamentally relied on a certificate issued by the school where supposedly the victim studied.

9. Mr. Lodh, learned counsel has referred PW-1 and PW-10 who came to depose as regards the school register (Exhibit-4). PW1, Dipankar Munsi has categorically stated that he does not know anything about the register (Exhibit-4) and he had no access to that register. The other witness, i.e., PW10, Smt. Palasi Roy has stated that the victim's date of birth has been recorded in the said register as 26.10.1999. But she cannot say on what basis the date of birth of …… (name withheld) was entered in the school admission register.

10. Mr. Lodh, learned counsel has further submitted that the mother of the victim and the informant (PW6) did not say a single word in the examination in chief, but when she was suggested that her daughter was not 14 years of age, she, at that time, volunteered to state that her daughter was born in the year 1999. Mr. Lodh, learned counsel has submitted that the said statement was also confronted by the defence by stating that such statement has no basis. Even though PW6 has denied that statement but Mr. Lodh has contended that the mother could not state any specific date of birth. Even the admission

register was not seized during the investigation. It was summoned during the trial through PWs 1 & 2 and as such it may appear that the entire exercise was orchestrated to suit the game plan of the police and as such, unless there is reliable and solid evidence in respect of age of the victim, on the basis of the statement of the mother or the register, her age may not be determined by the court.

11. Thereafter, Mr. Lodh, learned counsel has again taken this Court to the statement of the victim in the cross-examination where she has categorically stated as under:

"……. My marriage was solemnized on 31st July, 2015. ……"

12. According to Mr. Lodh, it has to be presumed under Section 114(g) of the Indian Evidence Act, that in view of the Child Marriage Restraint Act, 1958 that no girl can be given marriage if she does not attain the age of 18 years.

13. Mr. Lodh, learned counsel has further submitted that this shows that the mother was not telling the truth in the trial and therefore on her statement no reliance can be placed. In order to buttress her contention, Mr. Lodh has relied on a decision of the apex court in ***Alamelu & Anr. Vs. State represented by Inspector of Police,*** reported in ***(2011) 2 SCC 385***. In ***Alamelu*** (supra) the apex court has unequivocally stated the law that a transfer certificate even though would be admissible in the evidence under Section 35 of the Indian

Evidence Act, 1872 but admissibility of such document would be of not much evidentiary value to prove the age of the victim girl in absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person who made the entry and who gave the date of birth are examined.

14. From the evidence of PWs 1 and 10 these elements did not surface in the evidence. Nobody does know that how the date of birth has been recorded in the register (Exhibit-4) and who supplied the date of birth. Even those witnesses have denied of any personal knowledge, even PW1 has stated that he had no access to the said register.

15. Mr. Lodh, learned counsel has also relied on a decision of the apex court in ***Jarnail Singh Vs. State of Haryana*** reported in ***(2013) 7 SCC 263*** where the apex court has observed that even the trial court may take recourse to the procedure as laid down in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 or its amended version, if any. The apex court has categorically observed that that method can unwaveringly be applied in determining the age of the victim. The relevant passage can gainfully be reproduced hereunder:

> ***"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a***

> ***victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion."***

16. Mr. Lodh, learned counsel has submitted that the apex court has categorically applied Rule 12 for depicting the various stages or the option that can be exercised and in absence how to go to the next option. The first option, therefore is the certificate of Madhyamik examination. No such certificate has been brought on record by the prosecution for obvious reason.

17. For purpose of reference, Rule 12(3) is extracted hereunder:

> ***"(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –***

> ***(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;***
>
> ***(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;***
>
> ***(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;***
>
> ***(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.***
>
> ***and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."***

18. Mr. Lodh, learned counsel has been relentless and referred a decision of the apex court in ***Shyam & Anr. Vs. State of Maharashtra*** reported in ***AIR 1995 SC 2169*** for a different purpose. When the victim is a full-grown girl, may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused and the accused was not unknown to her with whom she was going in view of his earlier proposal may be treated as competent to consent.

19. The apex court in ***Shyam*** (supra) has exonerated the accused on the view that leaving from the custody was voluntary and not attaining the consenting age will not be insisted upon in view of maturity that the victim has demonstrated.

20. Mr. Lodh, learned counsel has referred a decision of the apex court in ***Jinish Lal Sah Vs. State of Bihar*** reported in ***(2003) 1 SCC 605*** where the apex court had occasion to observe as follows:

> ***"……. We have already referred to the evidence of the father, according to whose evidence PW-1 was 19 years of age when she left the house of the father. In such situation, we think it not safe to come to the conclusion that PW-1 was less than 18 years of age on the date when she left the house of her father. While discussing this part of the prosecution case, the Trial court in its judgment has not considered the evidence of PW-6 the father at all. It merely relied upon evidence of PW-10 accepting the same on its face value, without discussing the other material that was available on record. Even the High Court in this regard in its judgment merely stated "Dr. who examined the prosecutrix found her age to be 17 years….." the High Court has not independently given any finding either accepting this evidence or not."***

21. That apart, Mr. Lodh has relied on this decision for another purpose. The apex court has observed in ***Jinish Lal Sah*** (supra) that *"to establish the charge under Section 366 IPC, there should be acceptable evidence to show that either PW-1 was compelled to marry the appellant against her will and/or was forced to or induced to intercourse against her will. This would therefore, require the prosecution to prove that there was some such undue force on the PW-1 either to marry the appellant or to have intercourse with him. Therefore, it becomes necessary for us to examine the prosecution case whether there was a threat or whether there was consent as contended by the defence. While we consider this question of existence of consent or absence of it we may also consider the charge under Section 376 IPC of which the appellant is found*

guilty by the courts below because one of the ingredients necessary for establishing such a charge in regard to a girl over the age of 16 is the presence or otherwise of consent. Therefore, both for the purpose of section 366 and for the purpose of Section 376 IPC, there should be material to establish that either the alleged marriage or the intercourse has taken place without the consent of PW-1 if she is above the age of 18 years or 16 years as the case may be."

22. Another decision has been referred by Mr. Lodh, learned counsel appearing for the appellant in ***Deelip Singh @ Dilip Kumar Vs. State of Bihar***, reported in ***2004 AIR SCW 6479*** where the apex court, having considered the precedents including ***Uday Vs. State of Karnataka*** reported in ***AIR 2003 SC 1639,*** and ***State of HP Vs. Mango Ram*** reported in ***AIR 2000 SC 2798*** etc., has observed as follows:

> ***"The question of age of the victim girl is the first and foremost aspect that needs to be considered in the present appeal. On this question we are unable to concur with the finding of the trial Court as affirmed by the High Court. In our view, the finding as reached by the trial Court is based on no evidence or evidence which is doubtful. The prosecution wanted to prove her age by filing the school transfer certificate through PW13. The certificate is Ext. P4. It was purportedly issued by the Headmaster of the Primary/ Secondary School, Nawabganj. Her date of birth, as recorded in the admission register, is stated to be 4.2.1974. The date of admission is mentioned as 22.2.1980 and the date of leaving the school as 31.12.1981. It is mentioned in column 5 that the admission was given on the basis of declaration of the father i.e. PW11. By the time she left the school, she passed II Class. The date of issuance of the certificate was 7.1.1991 i.e. after the trial commenced. No explanation is forthcoming as to why the Investigation Officer did not obtain the certificate in the course of investigation and why the certificate was not produced by the father of the girl (PW11). Apparently, the age was given on the basis of the declaration made by the father. If so, the father was***

the best witness to speak about her age. However, he did not say a word about her age. "

23. Mr. Lodh, learned counsel has pointed out to this Court that her father was not examined during the trial as her father had no role either in creation of the school register or reporting the date of birth of the victim.

24. From the other side, Mr. S Ghosh, learned Addl. PP has strenuously argued before this Court that the trial court did not commit any error by relying on the school certificate (Exhibit-4) for purpose of determining the age of the victim. That apart, Mr. Ghosh, learned Addl. PP has further submitted that taking out of the victim from the custody of parents to an unknown destination, attempting rape on her and forcing her to be confined with the appellant are adequate materials to prove that force was applied for illicit relationship or for purpose of marrying the victim. In terms of the above, Mr. Ghosh, learned Addl. PP has submitted that the prosecution has successfully proved the charge punishable under Section 366 of the IPC.

25. Mr. Ghosh, learned Addl. PP has further submitted that the victim has come forward showing a bold face and stated that when the incident took place she was reading in class-VIII. As such, the statement of the mother (PW6), if read with the school register would show that the victim, at the relevant point of time, was much below the age of 18 years and as such, there is no infirmity in the judgment and no interference is called for.

26. For purpose of appreciation of the submissions made by the learned counsel appearing for the appellant and the State, this Court needs to take a short survey of the evidence.

27. PW1, Sri Dipankar Munsi has brought the register (Exhibit-4) in the trial, as stated. The original admission register contained entries, including the entry in respect of the victim but he has stated that he did not have any access to that register.

28. PW2, Suleman Reang, is a Sub-Inspector of Police posted in the Airport P.S. on 29.12.2013 and had received the information that the victim was kept in confinement in a house at MC Tilla of Gandhigram under his police station. On the tip of such information, he raided that house and recovered the victim girl and took her to the Airport PS.

29. PW3, Rakhal Nama is a distant relation of the appellant. The appellant came to his house and stayed with his wife whom he has identified as Purnima Debnath, not the victim. On the following day the police arrested the appellant from his house. In the cross-examination, he has stated that he is not sure about the name of the wife of the appellant.

30. PW4, Tapan Debbarma is the Judicial Magistrate who recorded the statement of the victim under Section 164(5) of the CrPC in connection with Bondhjungnagar P.S. case No. 87/2013. He has admitted the recorded statement (Exhibit-1) in the trial. There was no cross examination.

31. PW5, ……(the name is withheld) is the victim and the most important witness in the prosecution quiver. She has stated that in the year 2013, the appellant used to work as a mason in a nearby house of Chabilal Sharma. Once he asked her to give him her mobile number. She gave the mobile number to the appellant. The appellant told her that he was unmarried. As such, they developed a love affair and became intimate, but later on, she came to know that the appellant was a married man. Hence, she told him to break the relation. Thereafter, the appellant started giving her threat while she used to travel for her school or for her private tution, saying that he would kill her if she would not marry him. At that time, she was a student of class-VIII. On 25.12.2013 at around 11 a.m. when she was waiting for a bus to go to her maternal uncle's house, the appellant met her there and requested her to go to his elder brother's house at Amtali and promised that after that he would not keep any relation with her.

32. Accordingly, she went with him to Amtali. After going there, the appellant kept her confined in a room in the said house and threatened her of dire consequences and to marry him. Even she was not allowed to go out of that room. On the following day at about 7-8 a.m. the appellant took her to his sister's house at an unknown place by his motor bike. According to the victim, that was somewhere in Khowai. She was under constant threat. On the following day he took her to

Gandhigram at MC Tilla in the house of his elder sister. There also he threatened her not to disclose anything. Thereafter, she made the following statement in the trial: *"…. At night he tried to commit rape upon me by removing my dress. He kissed me and also put his hand on my breast and other private parts. On the following day my uncle Jhantu Debnath, my aunt Dipti Debnath along with police came to the said house and recovered me from the said house. Police sent me to the Court where I gave my statement before a learned Magistrate which was recorded by him. The statement was recorded as per my version and I put my signature in the said statement."* She identified the said statement (Exhibit-1). She has stated that at the time of occurrence, her age was 14 years. In the cross-examination, she revealed that her marriage was solemnized on 31.07.2015 with another person. She has denied the suggestion made during the cross-examination that after reaching Khayerpur she called the appellant to come there with his motor bike for roaming with him. She denied the subsequent suggestion in respect of her voluntariness to go with the appellant or staying at various places. But in the cross-examination she has stated that she does not have any birth certificate.

33. PW6, Purnima Debnath, the mother of the victim has stated what she had earlier stated in the complaint (Exhibit-2) that one day, the victim went out to go to her maternal uncle's house at Champaknagar but she did not reach there, neither did

she come back to her home. There was a massive search and on the following day a complaint was lodged to the Bodhjungnagar PS. She denied all suggestions contrary to what she had stated in the examination-in-chief but PW6 has stated voluntarily in the cross-examination that the victim was born in the year 1989.

34. PW7, Jhantu Debnath is the uncle of the victim. He has narrated about her missing and of recovery subsequently and how he had assisted to recover the victim. Finally, the victim was recovered from one house at Gandhigram.

35. PW8, Dipti Nath is the aunt of the victim who assisted the father of the victim on 29.12.2013 in the recovery of the victim girl. PW8 is an advocate clerk.

36. PW9, Bibha Nama has stated that the appellant is her cousin. 1½ years back in the evening, he came to their house with a girl. On being asked, the appellant told her that the girl was his wife. In the night, both of them stayed at their house. On the following day, she passed the information to the house of the appellant about his stay at her house. Thereafter, the aunt of the said girl came to their house along with the police personnel and took away the girl and the appellant was arrested in their house. In the cross-examination, she has stated that she did not notice any vermilion on the forehead of the girl and also did not notice any conch shell bangle in her hands. She has stated that "the accused and the girl lived in separate bed. The girl slept with me. On the following day I asked the girl to go

back to her house. I cannot say if Manindra asked the girl to go back at her house. It is true that when police and the aunt of the victim girl tried to take her back she did not like to go to her house and they took her back by force." For this statement, the prosecution did not re-examine her.

37. PW10, Palasi Roy, a teacher of Rajiv Gandhi High School, Mandai, Jirania where the victim girl was studying. Under authorization, PW10 appeared with the register of admission in the trial. On perusing the said register, PW10 has stated, that the victim got admitted in the school in the year 2011. According to the admission register her date of birth is 26.10.1999 but in the cross-examination, as stated earlier, PW10 has stated that she cannot say on the basis of what the date of birth of the victim was entered in the school register.

38. PW11, Mrinal Kanti Reang, who carried out the investigation and stated briefly how he had conducted the investigation by examining the witnesses and filed the charge sheet when he found a prima facie case had been made out from the materials collected during investigation. He has also made the victim to record her statement under Section 164(5) CrPC. He has admitted that he did not seize the GD Entry by which Suleman Reang went for recovery of the victim girl from the house of Rakhal Nama. He has also admitted that he could not collect the birth certificate of the victim girl. He also did not examine any inhabitant nearby Khayerupr Bridge.

39. There is hardly any discrepancy in the statement made by the victim in the trial and her statement made before the Magistrate under Section 164(5) CrPC. The entry as relied in the register of Rajiv Gandhi High School is as follows:

Serial No.	Date of Admission	Student's Name	Father's Name and address	Occupation	Guardian's Name and address	Occupation	Present Address of the student (staying with father or guardians)
10	2.1.2011	..... (name withheld) D/o Maran Debnath Purnima Debnath	-do-	Cultivation	-do-	-do-	----

40. Having appreciated the evidence, this Court is in agreement with Mr. Lodh, learned counsel for the appellant that on the basis of the entry made in the school register (Exhibit-3) the age of the victim cannot be ascertained. In this regard, the law is well carved out that under Section 35 of the Evidence Act, the register or the pages thereof can be admitted in the evidence but the content cannot have any evidentiary value unless it is placed in the evidence on the basis of whose statement the date the birth has been entered in such record. The person who makes such statement is essential witness to prove the content. The prosecution has the responsibility of producing both the school authority as well as the person who had made the statement in respect of the age of the victim. But in this case, no such initiative has been made by the prosecution. But for purpose of determination there are other materials, such as the statement of the mother of the victim

(PW6) who has categorically made the statement that the victim was born in the year 1999 and the victim has also stated about her age. Though the victim's statement hardly carries any evidentiary value but the mother's statement is very important.

41. Mr. Lodh, learned counsel has contended that the mother made such statement for the first time in the trial, which this Court will not accept. But in the complaint PW6 has made a categorical statement and the said complaint was admitted in the trial without any confrontation from the defence. In the complaint, she has asserted that the victim was aged about 15 years of age. Consenting age or the age of majority is 18 years. In the considered view of this Court, the victim was below 18 years of age. Therefore, her consent has no value. But this court has found that regarding abduction or kidnapping a woman with intent that she will be compelled to marry against her will, the prosecution has not placed any satisfactory evidence. It appears from the appreciation of the evidence, the victim girl had been voluntarily moving with the appellant. As such, this Court is of the view that the charge under Section 366 of IPC is bound to fall, even though the victim has stated that there have been some attempt to have the sexual intercourse forcefully but PW9 has categorically stated that the victim girl slept with her at night. The prosecution allowed her to remain unscathed.

42. It cannot be left unnoticed that the victim girl moved from one place to another place with the appellant by motor

bike through the main thoroughfare. She could have raised the alarm, even if there were threat. But she did not.

43. That apart, PW9 has stated that she refused to come back to her house when the police tried to recover her. The prosecution has not confronted that witness (PW9) when she made such statements. Thus, this Court is inclined to hold that the prosecution has failed to prove the charge under Section 366 of the IPC and accordingly, the conviction is set aside under Section 366 of the IPC.

44. The prosecution has proved kidnapping of the victim and as such, the appellant is punishable under Section 363 of the IPC. For this purpose, no separate charge is required to be framed as the offence punishable under Section 363 IPC is a minor offence in relation to the cognate offence punishable under Section 366 of the IPC.

45. Having observed thus, the appellant is convicted under Section 363 IPC and deserves to be sentenced under Section 363 IPC. As the appellant was heard on the sentence on Section 366 IPC no further opportunity is required to be made for imposing the sentence on the appellant and as such, it is directed that the appellant shall suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- in default to suffer simple imprisonment for one month.

46. It is further directed that the period of detention that the petitioner has suffered during investigation and trial shall be

set off from the substantive imprisonment. The appellant shall surrender before the trial court within a period of 8 (eight) weeks from today without fail, else the trail court shall take all coercive measures so that the appellant is put to suffer the imprisonment as has been awarded by this Court.

In the result, the appeal stands partly allowed.

Send down the LCRs forthwith.

JUDGE

HIGH COURT OF TRIPURA

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