

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

Present :

The Hon'ble Justice Bibek Chaudhuri

CRA 642 of 2018

Alif Hossain & Anr.

-Vs.-

State of West Bengal & Anr.

CRA 236 of 2018

Ahamad @ Ahammad Hossain @ Gama Master

-Vs.-

State of West Bengal & Anr.

For the appellants : Mr. Arindam Jana, Adv.,
In CRA 642 of 2018 Mr. Jakir Hossain, Adv.

For the appellant : Mr. Sourav Chatterjee, Adv.,
In CRA 236 of 2018 Mr. Shibaji Kumar Das, Adv.,
Mr. Ahshan Ahmed, Adv.,
Ms. Rupsa Sreemani, Adv.

Heard & Judgment on : 13.12.2021.

Bibek Chaudhuri, J.-

As a first Court of appeal, it is the duty of this Court to apprise the evidence independently and afresh to come to an independent finding as to whether the decision of the Trial Court, either conviction or acquittal is just, proper and sustainable according to both procedural and substantive penal provisions. However, at times the

Appellate Court comes across various related issues cropped up in an appeal. In the instant case, the question that becomes predominant to adjudicate is as to whether the Trial Court is under obligation to record acquittal for absolutely perfunctory investigation.

Facts, in a nutshell, involved in the instant appeal are as follows:-

One Smt. Mamata Basak lodged a written complaint to the Officer-in-Charge, Tufanganj Police Station on 2nd September, 2011 stating, *inter alia*, that her daughter, Rumu Basak, aged about 19 years was missing from her house since 17th August, 2011. On 18th August, 2011, her husband lodged a missing diary in the Police Station. Thereafter, while searching for her daughter, the *de facto* complainant and other family members came to know that accused Alif Hossain/appellant no. 1 with the aid of other accused/appellants had enticed her daughter away with ill motive. The *de facto* complainant apprehended that the accused persons may traffic or commit murder of her daughter.

On the basis of the said complaint dated 2nd September, 2011 police registered Tufanganj Police Station Case No. 219 of 2011 dated 6th September, 2011 under Sections 366/34 of the Indian Penal Code and took up the case for investigation. Investigation ended in submission of charge-sheet against the accused/appellants under

Sections 366/34 of the Indian Penal Code. The case was committed to the Court of sessions. Subsequently, it was transferred to the Court of the learned Additional Sessions Judge, Tufanganj at Cooch Behar for trial and disposal.

The learned Trial Judge after receiving the case record framed charge under Sections 366/34 of the Indian Penal Code against the above-mentioned appellants. As they pleaded not guilty, trial of the case commenced.

In order to bring home the charge against the accused persons prosecution examined five witnesses. P.W. 6, Rumu Basak was examined as a Court witness after the examination of the Investigating Officer of this case. The accused persons were examined under Section 313 of the Code of Criminal Procedure. However, they did not adduce any evidence in support of their defence.

The defence as disclosed from the trend of cross-examination of the witnesses on behalf of the prosecution and examination of the accused persons under Section 313 of the Code of Criminal Procedure is that of innocence and denial of the prosecution case.

The learned Trial Judge on appreciation of evidence, both oral and documentary, convicted the appellants and sentenced appellant no. 1 to imprisonment for seven years with fine and default clause for

committing offence punishable under Section 365 of the Indian Penal Code.

The father of the appellant no. 1 who is appellant no. 2 in CRA No. 642 of 2018 and appellant of CRA No. 236 of 2018 were convicted and sentenced to suffer imprisonment for seven years with fine and default clause for committing offence under Section 120B read with Section 365 of the Indian Penal Code.

Assailing the impugned judgement and order of conviction and sentence, Mr. Jana, learned advocate for the appellants in CRA No. 642 of 2018 first draws my attention to the evidence of the witnesses on behalf of the prosecution during trial of the case. P.W. 1, Smt. Mamata Basak is the mother of the victim girl and the *de facto* complainant of this case. It is found from her evidence that her daughter was missing from her house and on the next day of her missing, a missing diary was lodged in Tufanganj Police Station on 18th August, 2011. She further stated that after her daughter went missing she and other family members conducted search at all possible places to find out her daughter. Then a phone call was received after few days and they were informed that a girl was found and was kept at Rajib Bhavan, Cooch Behar. They went to Rajib Bhavan to see as to whether the said recovered girl was their daughter or not being accompanied by some Police personnel attached to Tufanganj Police

Station. Seeing the said girl, they found that she was not the daughter of P.W. 1. At Rajib Bhavan she met a person named, Ahammed Hossain who told her that her daughter had gone away with one Alif Hossain. The *de facto* complainant requested Ahammed Hossain to take her to her daughter but Ahammed Hossain did not take her to her daughter. Then, she came to know from the neighbours of Ahammed Hossain that her daughter was kept confined at Jaigaon. Subsequently, she received a phone call from her daughter. She informed the matter to the Police and went to Jaigaon to bring her daughter. The *de facto* complainant found out her daughter at Jaigaon and then lodged complaint to the Officer-in-Charge of Tufanganj Police Station. Referring to the deposition of P.W. 1 it is submitted by the learned advocate for the appellant no. 1 that the *de facto* complainant lodged the complaint after recovery of her daughter but in the written complaint she did not state as to how she received the information that her daughter was wrongfully confined at Jaigaon. She also did not divulge the role of other two appellants in committing such offence. The *de facto* complainant never stated that the accused persons conspired together to traffic the victim girl to some other State. Subsequently, however, the witnesses on behalf of the prosecution tried to develop the case in course of evidence. In her cross-examination, she stated that she came to know 7/8 days after

missing of her daughter from appellant Ahammed Hossain that she was kidnapped by Alif Hossain. It is also ascertained from his cross-examination that Police personnel of Tufanganj Police Station accompanied her to Rajib Bhavan, Cooch Behar after she got an information that one girl was recovered and kept at Rajib Bhavan. Even assuming that at Rajib Bhavan she came to know from the appellant of CRA 236 of 2018 that her daughter was abducted by accused Alif Hossain, she did not make any such complaint then and there to the Police of Tufanganj Police Station or at Kotwali Police Station, Cooch Behar. In her cross-examination, P. W. 1 candidly admitted that her daughter was acquainted with Alif Hossain at her tuition class. Both of them used to take tuition from one and the same Teacher at Cooch Behar. In her cross-examination, she also admitted that Police did not interrogate her during investigation of the case and she was making her statement about the incident for the first time in Court.

Mr. Jana further submits that the neighbours of Ahammed Hossain from whom the *de facto* complainant allegedly came to know about the incident were not examined either by the Investigating Officer or by the Court during trial of the case. From her cross-examination, it is further learnt that she along with her husband and one Uttam went to Jaigaon and recovered her daughter from a house.

Only at that point of time, her daughter told her that Alif Hossain had brought her to Jaigaon by pressing her mouth. The witness, however, failed to state the names and identity of other persons who conspired together with Alif for kidnapping of her daughter.

Mr. Jana next refers to the evidence of P.W. 3, Rabindranath Basak who is the husband of the *de facto* complainant. In his evidence, he also stated that when he went to Rajib Bhavan to find out his daughter, accused Ahammed Hossain told her that her daughter was kept confined at a distant place three hours away from Cooch Behar. It is submitted by Mr. Jana that P.W. 3 narrated a different story about the reason of abduction of his daughter which he allegedly came to know from Ahammed Hossain. According to him, when they came to know from Ahammed Hossain that their daughter was kept confined at a place away from Cooch Behar they repeatedly requested Ahammed to assist them to find out their daughter. After getting repeated phone calls, Ahammed Hossain became irritated and threatened him that he would traffic his daughter to Bangladesh. On the next day, the written complaint was lodged. Subsequently, they came to know from some persons that his daughter was kept confined at Jaigaon. Then P.W. 3 requested one Uttam, one of his distant relatives to conduct a search for his daughter at Jaigaon. Uttam identified the house where the victim was kept confined. On the next

day, P.W. 1, P.W. 3 and the said Uttam went to the said house. Seeing them Alif Hossain fled away and they recovered their daughter. Subsequently, he came to know from his daughter that she was abducted from the road running behind the Police line of Cooch Behar town at about 10.30 a.m. Mr. Jana, the learned advocate for the appellants, submits that P.W. 3 also stated in his cross-examination that he lodged the complaint against the accused persons to the Officer-in-Charge of Tufanganj Police Station.

P.W. 4, Jiban Krishna Basak is the uncle of the victim girl. He corroborated the evidence of P.W. 1 and P.W. 3 in her deposition.

It is urged by Mr. Jana that in the instant case charge was framed against the accused persons under Sections 366/34 of the Indian Penal Code. They were convicted and sentenced to suffer imprisonment for committing offence under Section 365 of the Indian Penal Code. Surprisingly enough, the Investigating Officer did not examine the victim girl or that she was not cited as witness in the charge-sheet. In this regard, he refers to the charge-sheet from the lower Court record. On perusal of the charge-sheet I find that the victim girl was not cited as a witness in the charge-sheet.

From the evidence of the Investigating Officer it transpires that he recovered the victim from her house at Tufanganj on 19th December, 2011 at about 11.30 A.M. on being produced by her father.

Thus, it is absolutely clear that the Investigating Officer did not take any step for recovery of the victim girl or carry out the investigation in proper manner. Surprisingly enough, according to the evidence of P.W.1, P.W.3 and P.W.5 the victim girl was kept confined in a house at Jaigaon but the Investigating Officer during investigation prepared a rough sketch map of the place of occurrence showing the house of the victim girl as the place from where she was kidnapped.

Thus, the prosecution case is absolutely at variance with the evidence adduced by the witnesses on behalf of the prosecution. At the risk of repetition it is pertinent to mention that according to the victim girl she was kidnapped from the road running behind the Police Line of Cooch Behar town. Therefore, the place of occurrence might be the place where the victim was allegedly kidnapped or abducted or the place where she was allegedly kept confined wrongfully.

Though the victim girl was not cited as a witness the learned trial Judge issued summons upon her and she appeared before the trial Court as a "Court witness" and deposed during trial as P.W.6. Mr. Jana vehemently urged that the learned trial Judge did not follow the provision of Section 311 of the Code of Criminal Procedure while calling the victim girl to depose during trial of the case. It is submitted by him that even if the learned trial Court called her as a 'Court witness' to depose, there must be some order of satisfaction by the

Court itself that her evidence appears to the Court to be essential for the just decision of the case. The learned advocate for the appellant No.1 draws my attention to the order dated 11th August, 2017 wherefrom it is ascertained that after examination of all the charge sheeted witnesses, the learned Trial Judge fixed 16th September, 2017 for evidence of the victim and issued summons. In the said order or in earlier order it is not stated by the trial Court that her evidence is absolutely essential to the just decision of the case. Without clear finding by the trial Court to this effect, a witness cannot be examined under Section 311 of the Code of Criminal Procedure as a 'Court witness'.

In ***Rajaram Prasad Yadav versus State of Bihar*** reported in **(2013) 14 SCC 461** the Hon'ble Supreme Court culls out the underlying principles of Section 311 in the following words:-

- "1. *Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?*
2. *The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive and*

speculative presentation of facts, as thereby the ends of justice would be defeated.

3. *If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.*
4. *The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*
5. *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
6. *The wide discretionary power should be exercised judiciously and not arbitrarily.*
7. *The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

8. *The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.*
9. *The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*
10. *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*
11. *The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice*

at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

12. *The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.*
13. *The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.*
14. *The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right”.*

It is true that as per point No.14 of the aforesaid guideline the power under Section 311 of the Code of Criminal Procedure shall be invoked by the Court in order to meet the ends of justice for “strong

and valid reasons” and must be exercised with care, caution and circumspection. The Court should bear in mind that the fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper principles to the persons concerned, must be ensured being a constitutional goal as well as human right.

In the instant case the learned trial Judge has not stated any reason, far less strong and cogent reason, while issuing summons upon the victim girl to adduce evidence during trial of the case. In such view of the matter, the order dated 11th August, 2017 is far from happily recorded.

Be that as it may, the victim girl appeared on dock. The defence never raised any objection as urged by Mr. Jana. On the contrary, she was cross-examined at length. The trial Court has also examined her.

In view of such circumstances, at this stage of appeal, I have no other alternative but to consider her evidence and weigh the same in the touchstone of reliability and corroboration with other witnesses.

Shortly speaking, it is the evidence of P.W.6 that on 17th August, 2011 while she was going to Thakur Panchanan Mahila Mahavidyalaya at about 10/10.30 A.M., she met the appellant No.1 Alif Hossain of CRA No.642 of 2018. On the road behind the Police Line at Coochbehar. She and Alif went together some distance. Suddenly, Alif Hossain pressed her mouth with a handkerchief and she became

unconscious. Then she found confined in a room in an unknown place. There was a lady who used to look after her. She was administered some medicine with water and most of the time she became drowsy. One day she did not take the said medicine and came to know from the discussion between Alif, Ahammed Hossain alias Gamamaster and father of Alif that they would sell her to Bikanir. They also took her signature on some papers. One day Alif Hossain went to bring food for her leaving her mobile phone. Then she got the opportunity to contact her mother over the said mobile phone and informed everything. Subsequently, she was recovered by her parents and one Uttam and brought to Tufanganj. She was produced before the learned Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure.

All such facts were not brought on record during investigation of the case. The house at Jaigaon where the victim girl was allegedly confined was not visited by the Investigating Officer of this case. The neighbouring persons of the said house at Jaigaon were also not examined by the Investigating Officer. The victim herself stated that she was neither abused nor attempted to be trafficked. Therefore, charge under Section 366 or 366A of the Indian Penal Code could not lie.

The witnesses were absolutely silent about any conspiracy being hatched up by the father of Alif Hossain and the said Ahammed Hossain during her alleged confinement.

The entire incident and the missing links between the circumstances to make a complete chain may also reveal an alternative story. Both the victim and Alif Hossain were the students of the same class. The victim was aged about 19 years at the relevant point of time. So, is Alif.

It is important to note that the victim left the house with all her academic documents on 17th August, 2011 and came to Cooch Behar. She was allegedly abducted from the road running behind the police line at about 10:30 a.m. It is a busy road of a district town. The date of abduction was on a weekday. It is very natural and probable that if a girl of 19 years is abducted by a young man making her unconscious putting a handkerchief on her face, it is not only a surprising but also highly improbable circumstance that nobody saw the victim and accused Alif in such condition on the road behind the police line. Admittedly, Jaigaon is situated at a distance at about 3 hours away from Cooch Behar. According to the victim and her parents, she was taken to Jaigaon and kept confined in a room. The victim stated that she regained her sense at Jaigaon. Is it naturally believable that an unconscious girl of 19 years would be taken by a public vehicle to a

place situated about 3 hours away distance without being noticed by any other person. These missing links raise a doubt in the mind of the Court as to whether the victim girl and Alif went away voluntarily and stayed in a room at Jaigaon for quite some days. It is also important to note that the victim was not abused. Therefore, culpable intention of the appellants to cause any harm to the victim has not been proved.

Last but not the least, involvement of Ahammed Hossain and Pasiruddin Mia in criminal conspiracy for committing offence under Section 365 of the Indian Penal Code has not been proved at all. In case of Pasiruddin Mia, no witness except the victim stated anything. The victim girl's evidence cannot be considered because of her non-examination by the Investigating Officer under Section 161 of the Code of Criminal Procedure and thereby taking away a most important tool of criminal jurisprudence from the defence. The role of Ahammed Hossain as found from the evidence is that he informed the parents of the victim girl that he would be able to tell the place where the victim girl was kept confined.

In order to prove criminal conspiracy, agreement of mind is the gist of the offence and a common design and a common intention in furtherance of common scheme is necessary. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. There is absolutely no evidence that Alif, Pasiruddin

and Ahammed had ever met together before abduction of the victim girl and there was an agreement of mind on the issue of abduction of the victim for the purpose of wrongful confinement. In the absence of such evidence, the learned Trial Judge was not justified in holding the accused Pasiruddin Mia and Ahammed Hossain guilty for committing offence of Sections 365/120B of the Indian Penal Code.

For the reasons stated above, I am not in agreement with the finding made by the learned Trial Judge and the judgment and order of conviction and sentence against the appellants is liable to be set aside.

In view of the above discussion, the instant appeal is **allowed** on contest.

The judgment and order of conviction passed by the learned Additional Sessions Judge, Tufangunj, District – Cooch Behar in connection with Sessions Trial No. 02(07) of 2017, Sessions Case No. 28 of 2017, G. R. No. 372 of 2011 is set aside.

The appellants be discharged from the bail bonds.

Let a copy of this judgment be sent to the learned Trial Court along with lower court records.

The parties are at liberty to act on the server copy of the judgment.

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

(Bibek Chaudhuri, J.)

Srimanta/Suman/Mithun
A.Rs. (Court)