

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 104 of 2021

Tapas Mahata & Anr.

Vs.

The State of West Bengal

For the Appellants:	Mr. Himanshu De, Adv., Mr. Subhabrata Das, Adv., Mr. Navanil De, Adv., Mr. Rajeshwar Chakraborty, Adv., Mr. Subhrajit Dey, Adv.
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For the State:	Mr. Ranabir Roy Chowdhury, Adv., Ms. Faria Hossain, Adv., Mr. Aniket Mitra, Adv.
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Heard on: 01 December, 2021.

Judgment on: 07 April, 2022.

BIBEK CHAUDHURI, J. : –

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure against the judgment and order of conviction dated 23rd February, 2021 passed by the learned Additional Sessions Judge, Khatra, Bankura thereby convicting the appellant No.1 under Section 376/366/363 of the IPC and sentencing him to suffer rigorous imprisonment for seven years with fine and default clause for the offence punishable under Section 376 of the IPC. Seven years with fine and default clause for the offence punishable under Section 366 of the IPC and also sentencing him for committing offence under Section 363 of the

IPC for rigorous imprisonment for five years with fine and default clause. Appellant No.2 was also convicted and sentence to suffer imprisonment for five years with fine and default clause for committing offence under Section 363 of the IPC. Substantive offence of rigorous imprisonment was directed to run concurrently, however, sentence of imprisonment for non-payment of fine was directed to run separately.

2. A minor girl of the de facto complainant was found missing since 8 pm on 23rd April, 2012. The parents of the said minor girl along with other people conducted search throughout the night of 23rd April, 2012 for their minor daughter. However, they did not find her. The father of the victim girl lodged a missing diary at Ranibandh P.S in the district of Bankura. After returning home from the police station the de facto complainant came to know that one Sonali Mahata wife of Sudhir Mahata told the nephew of the de facto complainant that her son took the daughter of the de facto complainant away and the de facto complainant could take any step against her son whatever he liked. On further enquiry he came to know that one Tapas Mahata and his friend Jayanta Mahata kidnapped the minor daughter of the de facto complainant on 23rd April, 2012 at about 8 pm. The parents of Tapas Mahata, namely Sudhir Mahata and Sonali Mahata helped Tapas to kidnap the minor daughter of the de facto complainant.

3. On the basis of the said complaint Ranibandh P.S Case No.32 of 2012 dated 24th April, 2012 was registered under Section 363/366/109 of the IPC and finally police submitted charge-sheet against accused Tapas

and Jayanta Mahata under Section 363/366/376 of the IPC. Accused Sudhir Mahata, Sonali Mahata and Jayanta Mahata were further charged under Section 109 read with Section 363/366 of the IPC.

4. The learned Additional Sessions Judge, Khatra, convicted accused Tapas and Jayanta Mahata and sentenced them accordingly. Hence the instant appeal challenging the order of conviction and sentence.

5. In order to bring home the charge against the accused persons prosecution examined as many as 12 witnesses. Amongst them, the victim of this case was examined as PW7. PW1 Ashok Mahata is the father of the victim girl and de facto complainant of this case. PW4 is the mother of the victim girl. PW8 Kurma Mahata is the nephew of PW1. PW10 Dr. Dipankar Sarkar was a Medical Officer attached to the Forensic Science Medicine at Bankura Sammilani Medical College and Hospital. He holds ossification test of the victim girl on 10th May, 2012 and submitted charge on 19th May, 2012. PW11 is the Investigating Officer of this case and PW12 is the scribe of the written complaint. Other witnesses are not the material witnesses for the purpose of adjudicating the instant appeal, being hearsay in nature.

6. I propose to start with the evidence of the victim girl. It is found from her evidence that on 23rd April, 2012 at about 7 pm she was reading a book in her room. After sometime she came out of her house. Thereafter Tapas Mahata and Jayanta Mahata came to the spot. Seeing her Tapas grabbed her mouth and Jayanta Mahata dragged her to the primary school of the village. Then they brought her to Khatra by a motorcycle.

Both Jayanta Mahata and Tapas Mahata threatened her and told her not to shout. From Khatra, Tapas Mahata brought her to Kolkata by a night service bus. He took the victim girl to an unknown house and confined her. She was crying and wanted to return to her parents. But Tapas threatened her and did not pay any heed to her request. On that date at about 8 - 8.30 pm Tapas committed rape upon her. The petitioner protested and tried to save her but failed. Tapas Mahata then took her to several places at Kolkata and committed rape upon her several times against her will and consent. She also declared that he would marry her but the victim girl was not willing to marry the appellant No.1. But he told him that she was agreeable to marry appellant No.1 if he would take her to her parents. Then Tapas Mahata brought her to Bankura on 4th May, 2012 at about 4.30 pm and all reached Ranibandh and police arrested Tapas Mahata and took charge of the victim girl. When Tapas Mahata was arrested the victim girl was with her. It is also ascertained from the evidence of the victim girl that on 18th May, 2012 she made a statement before learned Judicial Magistrate Khatra under Section 164 of the Code of Criminal Procedure the said statement made by the victim girl before the learned Magistrate was marked as Exhibit-3 during trial.

7. Medico Legal Examination of the victim and appellant No.1 as well as ossification test of both of them were conducted by PW10 Dr. Dipankar Sarkar who at the relevant point of time was posted as Medical Officer, demonstrator of Bankura Sammilani Medical College and Hospital. He submitted his report on 19th May, 2012.

8. From the evidence of PW1 Ashok Mahata who is the father of the victim girl it is ascertained that about three years before the date of his deposition on 10th Baisakh accused Tapas and Jayanta Mahata kidnapped his minor daughter being aided and abated by Sonali Mahata and Sudhir Mahata, the parents of Tapas Mahata. They conducted search for their daughter throughout the night on the date of occurrence but did not find her. Then he lodged a missing diary at Ranibandh Police Station. Subsequently, on the same date he came to know from Sonali, the mother of appellant No.1 that the appellant had eloped his daughter. She also stated that PW1 was at liberty to do whatever he would like. She also abused PW1 and others. After hearing the incident from the mother of the appellant No.1, he again went to the local police station and lodged a complaint against the accused persons. The written complaint was marked as Exhibit-1 during trial of the case. PW1 also stated on oath that his daughter was aged about 14 years at the time when she was kidnapped and was a student of class-X. Mother of the victim deposed during trial as PW4. In her evidence she stated that at the time of the alleged incident the victim was 13 and ½ years old. On the date of occurrence at about 8 pm PW4 was watching television. Subsequently, she did not find her daughter in the house. She, her husband and other relatives and people of the locality conducted search for her daughter but could not find her. On 11 Baisakh, Sonali Mahata mother of appellant No.1 told that Tapas had taken away her daughter with a view to marry her. Father of Tapas Mahata abused them. Then her husband lodged a

complaint against the accused persons. On 21st Baisakh, they came to know that victim girl and Tapas Mahata surrendered before police at Ranibandh Police Station. On 22nd Baisakh father of the victim girl brought her back on the basis of an order passed by Khatra Court. The victim girl told PW4 that Tapas and Jayanta Mahata had kidnapped her and from home to Khatra by a motorcycle then Tapas took her to Kolkata by bus and he committed rape upon her every night without her consent. It is important to know that he cross examined PW4 and was not asked any question with regard to age of the victim girl at the relevant point of time.

9. Learned Advocate for the appellants submits that the allegation against the appellants is that they forcibly took the victim girl away by a motorcycle to Khatra and from Khatra bus stand appellant No.1 and the victim girl boarded a Kolkata bound bus and came to Kolkata on 24th April, 2012. The victim girl in her evidence stated that when she came out of her house on 23rd April, 2012 at about 8 pm accused Tapas Mahata grabbed her mouth and Jayanta Mahata dragged her to the primary school of the village so the victim girl could not raise any alarm when the accused persons kidnapped her. The prosecution case is that the victim girl was taken to Khatra bus stand by the accused persons. Obviously, there were many people in the bus stand without making any allegation against the accused persons, she and appellant No.1 went to Kolkata by a bus. There was bus driver, conductor and other passenger but the victim

girl did not state to anybody that the accused forcibly kidnapped her or she was taken away forcibly by the accused.

10. The Investigating Officer of the case did not try to find out the registration number of the bus on which they travelled. No bus ticket was seized from the accused No.1 and the victim girl. The motorcycle, by which the victim girl was taken to Khatra, was not seized. Therefore, the basic ingredient of offence under Section 363 of the IPC was not proved.

11. It is submitted by the learned Advocate for the appellants that Section 361 of the IPC as the following essential ingredients:-

- i) The accused took or enticed away a minor or a person of unsound mind.
- ii) Such minor, if male, must be under 16 years of age and if female under 18 years of age.
- iii) The act must be one of taking or enticing out of the keeping of lawful guardian of such minor or person of unsound mind.
- iv) The act of taking or enticing away must be done without consent of the lawful guardian.

12. The chain of circumstances leads one to hold that the victim girl on her own went away with appellant Tapas Mahata. The prosecution cannot dispel out the circumstances as to why the victim girl came out of her room at about 8 pm on 23rd April, 2012. Secondly, it is not believable unless it was informed to appellant No.1 that the victim girl would come out of her room at about 8 pm. So that the appellant No.1 may

accompany her and take her away. It is also surprising that the victim girl was allegedly enticed away from her house by appellant No.1 and 2 at about 8 pm but nobody in the village saw them. Thirdly, the victim did not shout or raised any protest after she was taken to primary school of the village and then to Khatra bus stand and from Khatra bus stand to Kolkata. The conduct of the victim girl undoubtedly leads a man of ordinary prudence to raise a suspicion as to whether she voluntarily left her house with the appellant or not. In his evidence the de facto complainant stated that the victim was 14 years of age when she was kidnapped and she was a student of class-X. The mother of the victim girl also stated that her daughter was aged about 13 and ½ years on the date of her kidnapping. However, during trial of the case prosecution failed to produce any document in order to prove the age of the victim girl. Ossification test of the victim girl was done on 11th May, 2012. The ossification test report is marked Exhibit-4 collectively during trial of the case. The Medical Officer opined on the basis of ossification test, physical development data, dental data and radiological findings that the victim was above 15 years of age but below 17 years of age on the date of her radiological examination. According to Mr. Dey, learned Advocate for the appellant, ossification test report is not a conclusive document of proof of the age of a subject and it varies by two years on both sides. When the Medical Officer opined that the victim was above 15 years of age but it was 17 years of age, she may either be 15 years of age or 19 years of age at the relevant point of time when the incident took place. Thus, it is

submitted by Mr. Dey when the evidence shown that the victim went with the accused voluntarily and the age of the victim at the time of incident is in doubt, then the question of taking her away from lawful guardianship does not arise. In support of his contention he relies on a decision of the Hon'ble Supreme Court in the **State of Karnataka vs. Sureshabu Puk Raj Porral** reported in **1994 C Cr LR (SC) 63**. It is further submitted by Mr. Dey that the learned court below erred in convicting the accused Tapas Mahata under Section 376 of the IPC. In this regard it is urged by Mr. Dey that a minor girl was allegedly raped against her will for consecutive days but surprisingly did not sustain any injury on her private parts. The Medico Legal Examination of the victim girl was held on 10th May, 2012. The victim girl was allegedly kidnapped on 23rd April, 2012. It is stated by the victim girl in her evidence that on the days when she had to stay with accused Tapas Mahata, the accused regularly raped her against her will. The accused and the victim girl surrendered before the police at Ranibandh on 4th May, 2012. Therefore, according to the victim, she was raped during the period between 24th April, 2012 to 3rd April, 2012. When Medico Legal Examination was done on 10th May, 2012, the Medical Officer found old healed tear at 2, 5, 7, 9, 11 O' Clock position of the hymen of the victim girl. If the victim girl is subjected to rape from 24th April, 2012 to 3rd May, 2012, there would not be old healed tear in hymen. The Medical Officer, therefore, opined that the victim girl had sex experience earlier. The Medical Officer did not find any injury on her private parts or any other part of her body. Therefore, the court below

failed to consider the Medico Legal Examination of the victim girl and wrongly convicted the accused persons.

13. Learned P.P-in-Charge, on the other hand, supports the impugned judgment on the ground that in a case of sexual violence the evidence of the victim girl is of utmost importance. Her evidence cannot be equated with the offence of an accomplice. She is more than injured witness. The court places reliance on the evidence of an injured witness on the ground that the injured person would not spare the real culprit and give evidence against an innocent person. In case of rape the victim does not only suffer bodily injury but also suffers from tremendous mental trauma. Therefore, the evidence of a prosecutrix should be considered in its true perspective keeping in view the above rule of prudence in the matter of appreciation of evidence.

14. Having heard the learned Counsels for the parties and on careful appreciation of evidence on record this Court states at the outset that the most crucial circumstance in the instant appeal is to find out as to whether the learned trial judge was correct in his finding as to the age of the victim girl. It is already recorded that the victim was taken away by accused Tapas Mahata and his friend Jayanta Mahata on 24th April, 2012. The victim in her statement recorded under Section 164 of the Code of Criminal Procedure on 18th May, 2012 stated that she was 15 years old on the date of recording her statement. The father of the victim (PW1) stated that his daughter was aged about 14 years at the time of commission of offence. According to the mother of the victim (PW4), she

was aged about 13 and ½ years. Exhibit-8 is a certificate issued by the teacher-in-charge, Deuli Sukla High School, Deuli, Bankura. In the said certificate the teacher-in-charge of the said school stated that as per the school register the date of birth of the victim was 15th March, 1998. The ossification test report of the victim shows that she was above 15 years but below 17 years of age on the date of her ossification test. It is observed by the Hon'ble Supreme Court in **Ravinder Singh Gorkhi vs. State of U.P** reported in **(2006) 5 SCC 584** that:-

“Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum, e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will

have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

Until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the Court must strike a balance. In case of a dispute, the Court may appreciate the evidence having regard to the facts and circumstance of the case. It would a duty of the Court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim.”

15. It is important to note that the certificate issued by the teacher-in-charge of Deuli Sukla High School states that the victim girl is a bona fide student of the said school and as per the school record her date of birth was on 15th March, 1998. The date of birth recorded in the school register supports the evidence of the parents of the victim girl. Therefore, relying on the certificate issued by the Headmaster of the concerned school which was marked Exhibit-8 without formal proof being dispense with and the evidence of the parents of the victim girl, this Court is of the view that the learned trial judge correctly held that the victim was a minor on the date of commission of offence.

16. In **Dutta Pradhan & Ors. vs. State of Orissa** reported in **1985 CRI. L.J 1842**, it was held by the Orissa High Court that when the doctor on the basis of thorough examination of the victim and noting her physical characteristic and on the basis of radiological examination determines the age of the victim to be between 15 and 17 years it was held that the age of the victim is below 17 years on the date of alleged occurrence on the basis of the opinion of the doctor.

17. In the instant case this court has no hesitation to hold that the victim was minor at the relevant point of time. It is also found from the evidence on record that both accused Tapas Mahata and victim girl were arrested together on 4th May, 2012 from Ranibandh bus stand. It is the evidence of the victim girl that on 23.04.2012 when she came out of her house while studying, accused Tapas Mahata and Jayanta Mahata gagged mouth and dragged her to the primary school of the village. Then she was taken by a motorcycle to Khatra Bus Stand from Khatra Bus Stand she was taken by Tapas Mahata to Kolkata by a bus. In cross examination the above evidence of the victim girl was not shaken and she stood by her statement made in course of her examination in chief. The said statement on oath made by the victim corroborates with the statement made by her under Section 164 of the Code of Criminal Procedure. From the Medical Examination Report it is found that the victim was subjected to sexual intercourse. The accused Tapas Mahata wanted to marry her.

18. In course of argument it is strenuously urged by the learned Counsel for the appellants that the victim girl was a consenting party.

Because, according to the prosecution case she was kidnapped at about 8 pm by the appellants and was dragged to the primary school of the village. She did not raise any alarm when she was allegedly kidnapped by the appellants. Thereafter she was taken to Khatra bus stand, both Tapas Mahata and the victim girl boarded a Kolkata bound bus and reached Kolkata on the following morning. The victim girl did not make any complaint that the appellant No.1 had kidnapped her and was taking her to some unknown place to any person present in the bus stand at Khatra. She also did not narrate the said fact to any co-passenger or the conductor or driver of the bus. On the other hand, she went away freely with appellant No.1 by bus to Kolkata. The conduct of the appellant No.1 clearly suggests that she went away with the appellant No.1 on her own accord. It is also urged by the learned Counsel for the appellants that the victim girl also did not make any complaint to any person in Kolkata where she was lodged with the appellant No.1 who kidnapped her and committed sexual intercourse with her against her will. On the other hand, the victim girl gave assurance to the appellant No.1 that she would marry her provided she was taken to her paternal home first.

19. At the first blush, the argument advanced by the learned Counsel for the appellants appeared to be convincing. However, on careful perusal of the evidence of the victim girl (PW7) it is found, when she was kidnapped by the accused persons from the courtyard of her house, she could not raise alarm because the accused persons gagged her mouth and dragged her to the primary school. In Khatra also she could not scream or

tell the incident to other persons as she was threatened by the appellant No.1. She also could not tell that she was forcibly taken away to Kolkata to the conductor and bus driver and other passenger as she was scared. The above evidence of the victim girl was taken during her cross examination. Therefore, this court has no hesitation to hold that the victim was so afraid, scared and threatened that she could not narrate the incident to anybody after she was kidnapped till the date of her recovery. Therefore, the argument advanced by the learned Advocate advanced by the learned Advocate for the appellant that the victim voluntarily went away with the accused, stayed with him and had sexual intercourse with the appellant No.1 cannot be said to be an acceptable proposition under the backdrop of the evidence adduced by the victim girl.

20. Thus, the evidence on record establishes the essential ingredients of offence under Section 366 of the IPC, viz.; (i) Accused Tapas Mahata and Jayanta Mahata kidnapped the victim girl. (ii) Accused Tapas Mahata intended that she would be forced to illicit intercourse. From the evidence of the victim girl it is also found that the accused Tapas Mahata committed rape upon her.

21. Therefore, considering the entire evidence on record, I do not find any reason for interference with the judgment and order of conviction passed by the learned court below.

22. The appellants were rightly convicted by the learned trial court.

23. Now comes the question of sentence. The incident took place on 23rd April, 2012. The trial of the case was concluded on 23rd February,

2021. It took about nine years to complete the trial. The instant appeal was filed on 8th March, 2021. Thus, the appellants have been facing the trial of the case for approximately ten years. So far as the involvement of Jayanta Mahata in the offence it is proved by evidence that he helped Tapas Mahata in kidnapping the minor girl. There is no allegation against Jayanta Mahata excepting the allegation of rendering active help to appellant No.1 Tapas Mahata while kidnapping the victim girl. In view of such situation, this court is of the opinion that rigorous imprisonment for one year shall be just and sufficient sentence for Jayanta Mahata for the offence punishable under Section 363 of the IPC with fine of a sum of Rs.1000/-, in default to undergo further imprisonment for one month. He is sentenced accordingly.

24. Appellant No.1 Tapas Mahata is the principal offender. This court concurs with the order of conviction passed by the learned trial judge convicting him for committing the offence under Section 363/366/376 of the IPC.

25. For the offence under Section 363 of the IPC, appellant Tapas Mahata shall be adequately punished if he is sentenced to imprisonment for one year with fine of Rs.1000/- in default, further imprisonment for one month. For the offence under Section 366 of the IPC, appellant Tapas Mahata is sentenced to suffer rigorous imprisonment for three years and also to pay fine of Rs.1000/-, in default to suffer further imprisonment for one month.

26. For the offence under Section 376 of the IPC appellant No.1 Tapas is sentenced to suffer rigorous imprisonment for five years with fine of Rs.5000/-, in default to suffer further imprisonment for three months.
27. Substantive sentence of imprisonment shall run concurrently.
28. However, imprisonment for nonpayment of fine shall run separately.
29. Accordingly, the appeal is dismissed on contest.
30. Appellant No.2, Jayanta Mahata is directed to surrender before the trial court to suffer sentence within three weeks from the date of this order.
31. Let a copy of this judgment be handed over to the learned Advocate for the appellants duly signed by the ACO of this Court free of cost.
32. Appellants are at liberty to file an appeal against the judgment passed by this Court before the Hon'ble Supreme Court and they are entitled to get free legal aid from the State Legal Services Authority, West Bengal.

(Bibek Chaudhuri, J.)