

Form J(2)

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

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

C.R.A. 440 of 2018

**Irfan Alam
Vs.
State of West Bengal & Anr.**

**For the Appellant : Mr. Mohinoor Rahaman, Adv.
Ms. Maria Rahaman, Adv.
Ms. Iqra Rahaman, Adv.**

For the State : Mr. Avishek Sinha, Adv.

Heard on : 06.06.2022

Judgment On : 06.06.2022.

Bibek Chaudhuri, J.

This is an appeal filed by the convict of Special Case No.5 of 2018 assailing the order of conviction dated 30th July, 2018 for committing offence under Section 363 of the Indian Penal Code and the order of sentence of rigorous imprisonment for 3 years with fine and default clause for the offence punishable under Section 363 of the Indian Penal Code.

Ultadanga Police Station Case No.15 dated 15th January, 2018 was registered on the basis of a written complaint filed by one Rani Begam,

mother of the minor victim girl stating, *inter alia*, that the victim being her daughter was aged about 14 years and a student of Class-VI on the date of lodging F.I.R. Since 14th January, 2018 she was missing. The de-facto complainant conducted search at all possible places but could not find her. It is alleged in the written complaint that one Irfan Alam used to reside in their house on rent and the said Irfan tried to develop some relationship with the said daughter of the de-facto complainant with ill motive. The de-facto complainant suspected that her daughter was enticed by the said Irfan Alam and he took her away to some unknown place with ill motive. The materials on record shows that initially the case was registered under Section 366 A of the Indian Penal Code. However, charge-sheet was submitted against the accused under Section 366A/376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act. During trial, the learned Special Judge, First Court at Sealdah found on appreciation of evidence that prosecution failed to bring home the charge under Section 366A/376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act.

However, the learned Trial Judge came to this conclusion that the prosecution was able to prove ingredients of offence of kidnapping contemplated in Section 361 of the Indian Penal Code and applying Section 222 of the Code of Criminal Procedure, the appellant was convicted for committing offence under Section 363 of the Indian Penal

Code. He was accordingly sentenced to suffer rigorous imprisonment with fine and default clause.

At the outset I like to record that the State has not come up with a counter appeal assailing the judgment and order of acquittal passed in favour of the accused under the charge of Section 366A/376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act. Therefore, the duty of this Court is limited to consider as to whether the learned Trial Judge correctly recorded the order of conviction and sentence against the appellant for the offence under Section 363 of the Indian Penal Code.

It is not in dispute that the victim girl went away with the appellant on 14th January, 2018 at about 7:30 p.m. from her house and also from the lawful custody of her guardian with the appellant to Digha. Both of them took accommodation in a hotel, under the name and style of hotel 'Mayuri' at Digha.

It is also admitted that the brothers of the appellant were informed that the victim girl and appellant were in Digha and immediately they went to Digha, took both of them under their custody and produced them before the police attached to Ultadanga P.S. without any delay. Immediately after the victim being produced, on the prayer of the Investigating Officer her statement was recorded under Section 164 of the Criminal Procedure Code on 17th January, 2018. In her statement she stated that she did not like to stay in her house and she voluntarily

left her house. Nobody took her away to anywhere. Thus, in her initial statement recorded under Section 164 of the Criminal Procedure Code, the victim girl did not implicate the accused for committing offence under Section 361 of the Indian Penal Code.

It appears from the record that the victim was subsequently sent to the Child Care Home by the C.W.C. Subsequently, after a lapse of 12 days on 29th January, 2018 she was again brought before the learned Magistrate for recording her statement under Section 164 of the Criminal Procedure Code for the second time. In the second statement, the victim stated on oath that the accused threatened her with dire consequences and being afraid she went to Digha with the accused. Both of them stayed in a hotel and the accused committed sexual intercourse with her.

During trial, prosecution examined as many as 10 witnesses, amongst them the victim deposed in the Trial Court as P.W.1. P.W.2 is the mother of the victim. P.W.3 is her father. P.W.4 is the owner of the hotel Mayuri at Digha. P.W.5 and P.W.8 are Medical Officers who medically examined the victim girl on 30th April, 2018 and 16th January, 2018. P.W.6 is another Doctor who examined the accused to ascertain as to whether he is capable for sexual intercourse or not. P.W.7 is a neighbour of the family of the victim and P.W.10 is the Investigating Officer of the case.

Amongst the witnesses, the most important witness is P.W.1, the victim of the case.

If the victim's evidence is found to be trustworthy, unblemished, cogent and truthful, on the basis of sole testimony of the victim Court can record the order of conviction against the appellant. In the instant case it appears from the impugned judgment that Trial Court was not in a position to accept the evidence of the victim girl as trustworthy and truthful account of the incident. For this reason he recorded the order of acquittal of the charges under Section 366A/376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act. However, the Trial Court found on appreciation of evidence that the prosecution was able to prove that the appellant had committed an offence under Section 361 of the Indian Penal Code.

Surprisingly enough the learned Trial Court failed to consider that Section 366A is also a kind of kidnapping under special circumstances when a minor girl is induced by the offender with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. The learned Trial Judge disbelieved the case of the prosecution that the victim was induced to illicit intercourse by the appellant because of the fact from the medical evidence it was ascertained that the victim was habituated to sexual

intercourse. Thus, it was not proved that the appellant seduced her to illicit intercourse.

Be that as it may, in order to bring home the charge under Section 366A of the Indian Penal Code, the prosecution has the bounden duty to prove the initial ingredient of offence under Section 361 of the Indian Penal Code. In the instant case, the victim unequivocally stated in her statement under Section 164 of the Criminal Procedure Code that she left her house on her own accord and nobody induced her to leave the custody of her lawful guardian.

In ***State of Haryana Vs. Raja Ram*** reported in ***AIR 1973 SC 819***, the Apex Court had the opportunity to discussed the scope and ambit of the words "take out of keeping". According to the Hon'ble Supreme Court, persuasion by the accused persons which creates willingness of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section and consent of such minor is immaterial. Paragraph 8 of **Raja Ram's** judgment (supra) is relevant and reproduced below:-

"8. The approach and reasoning of the Learned Single Judge is quite manifestly insupportable both on facts and in law. It clearly ignores important evidence on the record which establishes beyond doubt that the prosecutrix had been solicited and persuaded by Raja Ram to leave her father's house for being taken to the Bhishamwala

well. Indeed, earlier in his judgment the Learned Single Judge has himself observed that according to the statement of the prosecutrix, on receipt of Raja Ram's message as conveyed through his daughter Sona, she contacted Raja Ram during day time in his house and agreed with him that she (the prosecutrix) would accompany him (Raja Ram) to go to Bhishamwala well at midnight to meet Jai Narain, as the other members of her family would be sleeping at that time. If, according to the Learned Single Judge, it was in this background that the prosecutrix had left her father's house at midnight and had gone to the house of Raja Ram from where she accompanied Raja Ram to the Bhishamwala well, it is difficult to appreciate how Raja Ram could be absolved of his complicity in taking the prosecutrix out of the keeping of her father, her lawful guardian, without his consent. It was in our opinion, not at all necessary for Raja Ram, himself to go to the house of the prosecutrix at midnight to bring her from there. Nor does the fact that the prosecutrix had agreed to accompany Raja Ram to Bhimshamwala well take the case out of the purview of the offence of kidnapping from lawful guardianship as contemplated by Section 361, I.P.C. This is not a case of merely allowing the prosecutrix to accompany Raja Ram, without any inducement whatsoever on his part, from her house to Bhimshamwala well, Section 361 I.P.C. reads:

"361 : Kidnapping from lawful guardianship :

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.- The words 'lawful guardian' in this Section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

That object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.....out of the keeping of the lawful guardian of such minor"

in S. 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section."

In the instant case, there is absolutely no evidence that the victim girl was induced or enticed by the appellant.

It is true that in her subsequent statement recorded under Section 164 of the Code of Criminal Procedure the victim girl stated that the accused forced and threatened her to go away with him. But this Court is not in a position to accept such statement made by the victim after 12 days of her recovery specially when she was staying at the relevant point of time under the care of C.W.C. The Court must accept the statement made by the victim immediately after her recovery recorded

under Section 164 of the Criminal Procedure Code. Moreover, in course of evidence she clearly stated that she wanted to marry the appellant. In view of such circumstances, the Court can well presume that there was a relationship between the victim and the accused and the victim on her own accord went away with the accused to Digha.

For the reasons stated above, I am not in agreement with the findings of the Court below and the impugned order of conviction and sentence is liable to be set aside.

Accordingly, the instant appeal is **allowed** on contest. The judgement and order of conviction passed by the learned Additional District & Sessions Judge, First Court, Sealdah, South 24-Parganas cum-Special Judge under POCSO Act, 2012 in Special Case No.05 of 2018 is set aside.

The accused is acquitted from the charge and discharged from his bail bond.

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

(Bibek Chaudhuri, J.)