

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 72 of 2009

Bharat Jana

-Vs-

The State of West Bengal

For the Appellant : Mr. Milan Mukherjee, Sr. Adv.
Mr. Amal Krishna Samanta

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 13.09.2023, 20.09.2023, 12.12.2023

Judgment on : 15.12.2023.

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 19.01.2009 and 20.01.2009 passed by the Learned Additional Sessions Judge, 1st Court, Purba Medinipur, Tamluk convicting the appellant and sentenced him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 5,000/- in default to rigorous imprisonment for another 6 months for the offence under Section 363 of the Indian Penal Code and rigorous imprisonment 7 years and to pay a fine of Rs. 5,000/- in default to rigorous imprisonment for another 6 months for the offence under Section 366 of the Indian Penal

Code. Both the sentences shall run concurrently and also directed the entire amount of fine of Rs. 10,000/- if realised, be delivered to the victim Banashree Pandit, daughter of Basudev Pandit as compensation and acquitted the other five accused persons from that case in S.T. Case No. 4(7)04 arising out of G.R. Case No. 259/2000 giving rise to Tamluk P.S. Case No. 80 of 2000 dated 23.04.2000 under Sections 363/366/120B of the Indian Penal Code.

2. The prosecution case in short was that one Basudeb Pandit, son of Late Adhor Pandit of village – changra, Kalaganda, P.S. – Tamluk, was called on at Tamluk P.S. and submitted a written F.I.R. on 23.04.2000 at Tamluk P.S. intimating that on 21.04.2000, Friday, at 7 p.m. in the evening his minor daughter Banashree Pandit was found missing. Her age that time according to the Horoscope was 15 years 10 months and 18 days.

After rigorous search, her said daughter was not available and he came to know that one accused Bharat Chandra Jana @ Jali, son of Gostha Behari of village – Ghoalchak, P.S. – Tamluk, with the assistance of other accused persons kidnapped his minor daughter for an ill-motive. The other accused persons besides Bharat Chandra Jana are Alope Middya and Shankar Middya all sons of Sadhan, Lakshman Jana, son of Gostha Behari, Kalipada Middya and Ananda Middya, both sons of Late Girish.

3. On the basis of said F.I.R. the police started the case being Tamluk P.S. Case No. 80 of 2000 dated 23.04.2000 under Sections 363/366/120B of the Indian Penal Code against the six accused persons including the appellant.

4. After completion of investigation the police submitted the charge-sheet before the Learned Sub-Divisional Judicial Magistrate, Tamluk against the six accused persons being Charge-Sheet No. 128 of 2000 dated 09.09.2000 under Sections 363/366/120B of the Indian Penal Code.
5. The Learned Magistrate took cognizance of the offence and on the materials on record being satisfied that the instant case was exclusively triable by the Court of Sessions and the case committed to the Learned Sessions Judge, Midnapore on 08.02.2002.
6. The Learned Sessions Judge received the case record on 22.03.2002 and after taking the cognizance offence transferred the case to the present Court for trial.
7. On 29.07.2004 charges were framed under Sections 363/366/120B of the Indian Penal Code against all the accused persons and the same was read over and explained to them in Bengali. The accused persons pleaded not guilty and claimed to be tried.
8. The prosecution examined as many as 9 witnesses to prove the case and on the contrary the defence examined none.
9. Learned Advocate for the appellant submitted that –
 - i. The Learned Additional Sessions Judge, 1st Court, Tamluk, Purba Medinipur failed to apply his judicial mind properly and minutely at the time of passing the impugned order and judgment and as such the conviction and sentence is liable to be set aside.
 - ii. The Learned Judge did not consider that all witnesses except Doctor, Head Master and Police, are the interested witnesses and as such depending

upon such deposition order of conviction and sentence dated 19.01.2009 and 20.01.2009 liable to be set aside.

- iii. The Learned Judge failed to realise the age of the victim girl and discussion about age in F.I.R., School Certificate, Statement by the girl and Ossification test are at variance with each other and depending upon such consideration of age application of Section for minority is defective and as such the order dated 19.01.2009 and 20.01.2009 liable to be set aside.
- iv. The Learned Judge did not at all consider the statement by the victim girl under Section 164 of the Code of Criminal Procedure where she stated, that she left her house according to her own Will and also stated about her age and without considering those, the order of conviction and sentence is not proper and as such the order and judgment dated 19.01.2009 and 20.01.2009 is liable to be set aside.
- v. The marriage the couple was legal and valid and as such without going through the judicial consideration, the application of sections and order conviction and sentence is quite defective.
- vi. The Learned Judge is not consistent with the evidence of the prosecution witnesses and those are based upon the hyphesis, surmises and conjectures and as such the impugned judgment and order is liable to be set aside.
- vii. Examination of the accused under Section 313 of the Code of Criminal Procedure having not been done in accordance with law, the conviction and sentence is liable to be set aside.

viii. The framing of charges having not been made in accordance with law, the conviction and sentence is liable to be set aside.

ix. The conviction and sentence is otherwise bad in law.

10. The Learned Advocate for the State submitted that on the basis of the evidence of independent witnesses with the corroborative medical report the prosecution had been successful in proving its case and as such the appeal shall be dismissed.

11. A circumspection of the prosecution witnesses revealed as follows:

- i. PW-1 and PW-3 the father and mother of the victim girl reiterated the narrative of the complaint concerning the kidnap of their daughter, the victim PW-2.
- ii. PW-2 in her deposition inter alia stated that Bharat proposed him to go with him and she accepted his proposal. Then she came back to her own home at Changrakalaganda. Thereafter she went to the bus stoppage of her village. While she was standing therein Bharat Jana – the accused called to go with him. Therefrom she went to Milannagar along with Bharat Jana by a cycle. From Milannagar Bharat Jana took him to kulgachi by bus. The villagers suspected and challenged Bharat Jana and they told that he has kidnapped him. On the same afternoon Bharat Jana took him to Nasik. Bharat Jana kept him there in the custody of one of his Boudi in the Military Cantonment and therefrom Bharat Jana went to Military Cantonment. The Jawans in the Military Cantonment also suspected about the acts of Bharat and told him to go away therefrom as they suspected that Bharat had kidnapped him.

From Military Cantonment, Nasik Bharat took him to Bombay. Bharat Jana kept him in the house of his maternal uncle in Bombay and their marriage took place therein by way of registration. At the time of their marriage Bharat showed her age as 19 years. After about 15 days from the date of going with Bharat Jana, she came back to her home. Bharat, his maternal uncle and many others accompanied her at the time of return to her paternal home. Bharat Jana used to work in the Military Cantonment at Nasik, but she cannot state the actual job he used to perform therein. She stayed in Bombay with Bharat Jana as his duly married couple. Bharat Jana – the accused in this case is only present here (identified). The other accused persons present on dock today were not present at the time of my kidnapping by Bharat Jana. After return to the home police forwarded him to the court of Ld. S.D.J.M., Tamluk. After her production in the court of the Ld. S.D.J.M., Tamluk she was taken to the Tamluk Hospital for my ossification test. She was medically examined in the hospital at Tamluk and thereafter she put her signature in the ossification test report. While she was taken to Tamluk Hospital her father accompanied him. The signature of P.E.2 was marked exhibit. 2/1. She was examined by the police officer who recorded her statement. She narrated the entire incident to the police officer what she deposed in her examination-in-chief before this Court.

She further deposed that in fact there was no bus stoppage in their village and at the relevant point of time she was standing in her house. She did not state to I.O. of this case that she was standing in her

own house on that day in the evening hours at about 7:00 p.m. I did not state to the I.O. of this case that Bharat gave him signals and she went along with him to Milannagar by riding a Cycle, nor did she say from Milannagar. They went to Kulgachi by a bus. In fact she did not state to the I.O. of this case that from kulgachi, Bharat (the accused) took him to Nasik and therefrom to Bombay where he married him by registration showing her age as 19 years. She also did not state to I.O. of this case that Bharat kept him in the Military Cantonment at Nasik and in the said Cantonment the other Jawans suspected Bharat to kidnap him from her lawful custody and thereafter they went to Bombay. I also did not state to the I.O. of this case that Bharat kept him in the house of his maternal uncle in Bombay. She also did not state to the I.O. of this case that in Bombay she started living with accused Bharat Jana as duly married couple. She did not make any complaint to her parents or to any other person regarding the eve-easing made by Bharat Jana (the accused). She did not tell the I.O. of this case that while she went to her maternal uncle's home Bharat (the accused) disbursed him therein also. After her return from my maternal home she did not state anything either to her parents or to anybody else about feeding of some intoxicate food-stuffs by two girls appointed by the accused Bharat. She did not state about the incident to anybody else save and except the I.O. and my making deposition before the court. We do belong to general caste and while the accused person was a man of fisherman community.

- iii. PW-4 and PW-5 had been the relatives of the victim i.e. her own brother and cousin brother respectively who stressed on the date and time the victim went missing and her subsequent recovery.
- iv. PW-6 the Radiologist opined the age of the victim to be within 16 to 17 years on the date of the ossification test on or about 12.06.2000. He identified the medical examination report marked Ext.-2.
- v. PW-7 the Headmaster of Chakgarupota S. S. High School who identified the document marked as Ext. 4 whereby the date of birth of the victim was mentioned as 02.05.86 on the date of her admission in the register.

During his cross-examination PW-7 stated to have learnt from PW-1, the father of the victim that the victim had eloped with someone.

- vi. The evidence of PW-8 is based on hearsay.
- vii. PW-9 in his deposition stated that during investigation he visited the P.O. i.e. the dwelling house of Basudeb Pandit of village – Changrakalaganda under P.S. Tamluk. He prepared hand-sketch map and index of the said P.O. in my hand-writing and signature in two sheets. (Hand-sketch map and index dt. 23.04.200, marked as Exbt. 6 and 6/1 respectively). He examined available witnesses and recorded their statements under Section 161 Cr.P.C. He seized one date of birth certificate issued by Chakgarupota S.S. High School dt. 24.04.2000. Subsequently, he arrested four of the accused persons and forwarded them to Court. On 05.06.2000 on the basis of information by the complainant we recovered the victim girl from Maniktala-morh. He examined the victim girl and recorded her statement under Section 161

Cr.P.C. He prayed for recording statement of the victim girl under Section 164 Cr.P.C. and her statement was recorded by Ld. Magistrate. He collected the copy of 164 Cr.P.C. statements. On prayer by him before the Ld. Magistrate for medical examination of the victim girl. The victim girl refused to be examined medically on 10.06.2000. That was the statement of the victim girl recorded under Section 164 Cr.P.C. recorded by the Ld. Magistrate dt. 06.06.2000. (The statement under Section 164 Cr.P.C. of victim girl dt. 06.06.2000 was marked Exbit. 7). He also collected the ossification test report for determination of the age of the victim, identified Exbt. 2. On completion of investigation and in consultation with my superior he submitted charge sheet under Section 363/366/120B of I.P.C. against all six accused persons.

During cross-examination he further stated that One P.S.I.- Atanu Santra recorded statement of the victim girl under Section 161 Cr.P.C. on 05.06.2000. He failed to collect the Birth Certificate or the Horscope of the victim girl as her parent failed to provide me such. He did not collect any primary School Certificate showing date of birth of the victim. PW-4 did not state before him that he came to know that accused Bharant Jana and others took away his sister from his lawful custody. He did not visit Nasik to ascertain to whether victim was confined therein.

12. Primarily this is an exemplary case of conflict and opposition between the parents and the victim girl who on her own accord left the lawful guardianship of the parents without being enticed or allured by the appellant

for wrongful gain. It is a fact that the victim was a minor at the time of the incident. The provisions under Section 363/366 of the Indian Penal Code states as follows:-

- i. **“Section 363. Punishment for kidnapping.**—Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
- ii. **Section 366. Kidnapping, abducting or inducing woman to compel her marriage, etc.**—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in the Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.”

13. In Section 363 I.P.C. the word used is ‘kidnaps’ and the word kidnapping is defined under Section 359 I.P.C. and kidnapping from lawful guardianship is defined under Section 361 I.P.C.

14. The case of **S. Varadarajan v. State of Madras**¹ the Hon’ble Supreme Court has acquitted the appellant, when the girl was college going student and she was on verge of attaining majority, and the appeal was allowed. The observations made in para-7, 9, 13, 19 and 20 of the said case are quoted below:-

¹ 1965 AIR (SC) 942

- i. *The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal Code:*
 - i. *"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."*
- ii. *It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful L2Sup./64—3 guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan, she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or*

blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision in re : Abdul Sathar(1) in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of S. 363 and expressing agreement with this statement of the law observed: "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In Abdul Sather's case(I) Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed:

- i. *“If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband’s house herself and that her leaving was in some manner caused or brought about by something that the accused did.”*
- iii. *In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself: it was she who telephoned to the appellant and fixed the rendezvous, she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant’s wife and thus be in a position to be always with him.*

It must, however, be bone in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father’s protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her

lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would, however, be sufficient if the prosecution establishes that through immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

15. In **Mafat Lal & Anr. vs The State of Rajasthan**² the Hon'ble Supreme Court observed as follows :-

"Kidnapping would necessarily involve enticing or taking away any minor under eighteen years of age if a female for the offence under

² 2022 Live Law (SC) 362

Section 363 Indian Penal Code. In the present case, the abductees had clearly stated that she was neither taken away nor induced and that she had left her home of her own free will. Section 366 Indian Penal Code would come into play only where there is a forceful compulsion of marriage, by kidnapping or by inducing a woman. This offence also would not be made out once the appellant no. 2 the abductees has clearly stated that she was in love with the appellant no. 1 and that she left her home on account of the disturbing circumstances at her parental home as the said relationship was not acceptable to her father and that she married appellant no. 1 on her own free will without any influence being exercised by appellant no. 1.”

16. In the statement under Section 164 Cr.P.C. PW-2, the victim stated of her affection towards the appellant for about 3 to 4 years prior to the incident. Her father being aware of the fact tried to get her married elsewhere, for which she eloped with the appellant and admitted of her registered marriage with the appellant. She further stated that she went with the appellant at her own volition without being induced or for any ill motive.
17. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
18. Accordingly, the judgment and order dated 19.01.2009 and 20.01.2009 passed by the Learned Additional Sessions Judge, 1st Court, Purba Medinipur, Tamluk is set aside.
19. Accordingly, the instant criminal appeal being CRA 72 of 2009 stands disposed of.
20. There is no order as to cost.

21. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
22. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)