

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 151 of 2003

**Rupnarayan Maji
-Vs-
The State of West Bengal**

For the Appellant : Mr. Bibaswan Bhattacharyya

For the State : Mr. Narayan Prasad Agarwala
Mr. Pratick Bose

Heard on : 22.03.2023, 19.04.2023, 08.06.2023.

Judgment on : 29.09.2023.

Ananya Bandyopadhyay, J.:-

1. The instant criminal appeal is preferred by the appellant against a judgment and order dated 05.04.2003 passed by the Learned Additional Sessions Judge, 6th Court, Midnapore, in Sessions Trial Case No. 27/February, 2000 convicting thereby the appellant under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7(seven) years with a fine of Rs.5,000/- in default to suffer rigorous imprisonment for six months.
2. On the basis of a complaint lodged by P.W.1 Swapan Panda, Sutahata Police Station Case No. 113/97 dated 30.12.1997 was started against the accused/appellant, Monoranjan Maji and one Narayan Chandra Pramanick under Sections 363/366/34 of the Indian Penal Code.

3. The averments made in the F.I.R, were to the effect that Kumari Pampa Panda aged about 18 years, daughter of the complainant left her house on 27.11.97 at about 8.00 hours but she did not return. In this regard P.W.1 lodged a missing diary with Sutahata Police Station vide Sutahata Police Station G.D.E. 941 dated 28.12.97. Subsequently the complainant learnt that one Rupnarayan Maji (Accused/Appellant) kidnapped said Pampa Panda compelling her to marry him. The accuseds Monoranjan Maji and Narayan Chandra Manick helped Rupnarayan in the process.
4. After the completion of investigation charge-sheet was filed against Monoranjan Maji and Narayan Pramanick under Sections 363/366/34 of the Indian Penal Code. Against the accused/appellant charge-sheet was submitted under Sections 363/366/420/376 of the Indian Penal Code.
5. Accused/appellant pleaded not guilty and claimed to be tried.
6. In order to prove its case prosecution examined twelve witnesses including Swapan Panda (P.W.1, father of the victim girl as well as the another of the F.I.R.), Rajaram Panda (P.W. 2 uncle of the victim girl), Smt. Shipra Panda (P.W. 3 mother of the victim girl), Joynab Ali (P.W. 4 Sk. Joynab Ali), Smt. Ashalata Panda (P.W. 5, aunt of Pampa Panda), Smt. Pampa Dhar (Panda) (PW 6 the victim girl), Biswanath Das (P.W. 7- Manager of Ashoke Lodge, Durgachak), Sankar Sau (P.W. 8 a neighbour of the victim girl), Swadesh Ranjan Das (P.W. 9 a primary teacher who turned hostile), Naren Chandra Roy (P.W. 10 A.S.I. of Police P.S. Marichda), Akinchan Pal (P.W. 11, Investigation Officer), Dr. Santi Purakait (P.W. 12 Doctor who examined the victim girl) and exhibited certain documents.
7. Learned Advocate for the appellant submitted that:-

- i. The impugned order of conviction and sentence recorded by the Learned Additional Sessions Judge, 6th Court, Midnapore was a result of non appreciation of the evidence on record.
- ii. The Learned Judge did not take into account with regard to the actual age of the victim girl in a case under section 376 of the Indian Penal Code. Prosecution could not file any birth certificate though in the F.I.R. it was mentioned that victim was 18 years whereas the victim herself stated her age as 16 years and as per report of the Radiologist her age was 20 years.
- iii. The victim girl was major at the time of occurrence and she went with the accused/appellant on her own, staying with him from 25.12.97 to 28.12.97 at different places at her own will. No evidence transpired that she tried to escape. It could surely be that she consented to every action of the accused/appellant who should be held not guilty of kidnapping and rape in view of the facts and circumstances of the case when she was quite major who was habituated in sexual intercourse in view of the medical evidence.
- iv. The Learned Judge failed to apply his judicious mind though it transpired from Ext. B (series of love letters written by the victim to the accused/appellant) that the victim being a major voluntarily went with the Accused/Appellant at her own will.
- v. The version of the victim did not tally with the report of the doctor and no external injury was found and moreover the

doctor opined that victim was habituated to sexual intercourse since long back.

- vi. The Learned Sessions Judge ought to have appreciated that instances of contradictions and discrepancies in the evidence and other materials on record were sufficient to discard the prosecution case, over-board.

8. The Learned Advocate for the appellant further submitted that –

- i. In course of his deposition before the Learned Trial Court, P.W.-1 had categorically stated that on December 25, 1997 itself, the P.W.-3 had specifically and unambiguously informed him that the P.W.-6 had gone to take her tuition classes at the residence of the present Appellant, a fact that had been unquestionably admitted by the P.W.-3 in course of her testimony and duly corroborated by the P.Ws-2 & 5. Nonetheless, at the time of his lodging of the F.I.R. on December 30, 1997, the P.W.-1 had only stated that the P.W.-6 had left their house at around 08.00 AM on December 25, 1997 and since she did not return, they had lodged a Missing Diary before the concerned Police Station that too after almost 3 full days on December 28, 1997 and in spite of their apparent specific knowledge about the P.W.-6 visiting the house of the present Appellant, such fact was never previously disclosed before the Police Agencies at any prior point of time and it was only at the time of lodging of the instant F.I.R. that the alleged involvement of the present Appellant was mentioned for the very time. Which raised serious doubts regarding the very genesis of the alleged incident sought to be depicted by the Prosecution.

- ii. Even though in course of his deposition, P.W.-1 had stated that after the P.W.-6 did not return from her tuition classes, they had gone to the house of the present appellant in search for her, but did not find them there, such fact was never earlier stated in his Written Complaint treated as the F.I.R. in the instant case, but rather, in his cross-examination, he had admitted to have never visited the house of the present appellant. Additionally, the P.W.-2, who had apparently accompanied P.W.-1 while searching for P.W.-6, also mentioned to have gone to the houses of Gour Ghorai, Badal Ghora, Tapan Chanak (none of whom were ever examined) only and not that of the present appellant, which further cast a cloud of suspicion and dubiety over the entire prosecution story.
- iii. The present appellant was a teacher of Uttar Basulia Primary School and used to give private tuition classes to at least 10/12 students (both boys and girls) at his residence, including P.W.-6, but none of the said (independent) students were ever examined in course of the instant proceedings which could have otherwise revealed the actual and indispensable circumstances of the instant case, including the nature of relationship between the P.W.-6 and the present appellant.
- iv. As per the depositions of both the P.Ws.-3 & 6, on the fateful date, the P.W.-6 had supposedly left her house for taking tuition classes at the residence of the present appellant along with her books, but the said books were never recovered nor was any attempt ever made to recover or search for the same, considering the fact that her crucial Madhyamik Examinations were fast approaching. It raised serious suspicion over the very contended fact that on the fateful date, P.W-6 had gone to the

residence of the present appellant for taking her tuition classes, but rather bolstered and reinforced the contrary notion that she had voluntarily eloped with the present appellant and had stayed together as husband and wife, before finally returning and upon being abused by the wife of the present appellant and also pressurized by her parents, she had eventually come up with the instant concocted and fabricated story, solely to implicate the present appellant.

- v. In course of her deposition, P.W.-6 had stated that on December 30, 1997, she had alone gone to her school for the purpose to fill-up form in connection with her upcoming Madhyamik Examination and her friends, classmates and teachers were teasing her, yet in spite of such accessible and convenient opportunity, she had never disclosed her purported ordeal and anguish to anyone nor informed about her being forcibly abducted and restrained by the present appellant and never even attempted to return to her house. It clearly raised serious questions about the credibility and genuineness of the said witness and her contended version.
- vi. Apparently, Gita Majhi, the wife of the present appellant had arrived and started assaulting her with slippers for enticing and beguiling away her husband in spite of her full knowledge that the present appellant was a married man with children. It exposed the circumstances under which P.W-6 had subsequently come up with a fabricated version to falsely implicate the present appellant.
- vii. P.W.-6 had admitted the various love letters, marked as Exhibit-B series, were in fact addressed to none other than the present appellant, although his name was not specifically mentioned therein and they precisely and

downright revealed her inner feelings and sentiments towards the present appellant, which she, in course of her cross-examination, had claimed to have been forced to write, although such fact was never previously stated to the Investigating Agency in course of investigation in the instant case. The said love letters along with the extracts from her personal diary unearthed the nature of her relationship with the present appellant along with her inner intimate feelings and fondness towards him, all of which had been eventually veiled in a deceptive manner solely to implicate the present appellant in certain fictional offences.

- viii. Apparently P.W.-6 was in one dress from December 25 till December 27, 1997 and during such period, supposedly she was repeatedly and forcibly violated causing severe bleeding from her private parts, which smeared her wearing apparels and also in the bed and mattress of the Ashoka Lodge, yet such wearing apparels of P.W.-6 or the mattresses of the Ashoka Lodge were never seized, nor any of the employees of the said Lodge ever deposed to have found any blood stained mattresses. It totally negated the version of P.W.-6 beyond all reasonable doubt, rendering the same unfit and incongruous to be relied upon.
- ix. In spite of ample opportunities, P.W.-6 never informed anyone at the Ashoka Lodge anything about the entire alleged incident, rather voluntarily stayed there with the present appellant together as husband and wife, Such fact was duly substantiated by P.W.-7, who admitted that P.W.-6 and the present appellant came to their Lodge left the same voluntarily, and identified themselves as husband and wife. Apparently,

they had voluntarily visited the said Lodge and had stayed there as husband and wife with full consent.

- x. Although P.W.-6 claimed to have been taken and restrained at the house of P.W.-9, such claims were blatantly refuted by the PW-9.
- xi. In her examination-in-chief, P.W.-6 had stated that the present appellant had threatened to murder all her family-members unless she agreed to marry him while in her cross-examination, she had changed her story altogether and had gone on to depose that the present appellant had provoked and instigated her that if she married him he would deposit money in her name, which, in turn, would secure her future and success in life. although none of this was ever stated to P.W.-11 in course of his investigation in the instant case. There had been gross discrepancies and irregularities in the deposition of the apparently most vital witness for the Prosecution, which downright rendered her entire deposition faulty, blemished and distorted and hence liable to be discarded and scrapped altogether.
- xii. P.W.-6 admitted to have wrongly stated before the Learned Judicial Magistrate in course of recording of her Judicial Statement that after purchasing books she had gone to meet her ill friend Krishna Das at Haldia Township, while actually, according to her, she was forcibly taken to the house of co-accused Narayan Pramanik, when she had gone to the residence of the present appellant to inform him about her unwillingness to continue her tuition classes. It raised serious questions about the credibility and genuineness of the said witness, who was evidently

changing her versions voluntarily, spontaneously and frequently, as per the demands of the prosecution story.

- xiii. Additionally, as per the version of P.W.-6, while she was restrained at the house of the co-accused Narayan Pramanik, his wife and children were also residing there. Patently absurd and illogical assertions made solely to implicate the co-accused person.
- xiv. Although deposing for the very time during the instant trial proceedings, P.W.-8 had stated that when he first found P.W.-6 along with the present appellant at the shop of the co-accused, she was openly gossiping and was never seen to be under any form of compulsion or force. Which clearly depicted the unnatural behaviour of an alleged victim of abduction, forceful restraint and sexual assault, who was making no efforts whatsoever to escape from the clutches and grasp of the supposed offender, rather was standing and publicly gossiping with him.
- xv. None of the students, classmates or teachers at the school of the P.W.-6 herein was ever examined in course of investigation in the instant case.
- xvi. P.W.-5 had stated that the present appellant used to come their house to teach P.W.-6 and they were found gossiping whenever she visited the house of P.W.-6 and on seeing her, both of them used to become silent and act as if they were attentive to their lessons. It goes on to reveal the existing relationship between the Victim Girl herein and the present appellant, which she has subsequently gone on to deny and disavow, while coming up with the instant alleged delusive and fanciful story.
- xvii. The Medical Report revealed that the P.W.-6 herein was habituated to sexual intercourse, even prior to the alleged occurrence.

xviii. While medically examining P.W.-6, P.W.-12 never found any sign of external injury whatsoever, either over her body or her external genitalia: no foreign body was found over her external genitalia, her hymen was found to be ruptured, the same being old and accordingly, she had opined that sexual intercourse was done several times for several months and years and P.W.-6 was habituated to sexual intercourse: furthermore, in course of her medical examination, P.W.-6 had never stated anything before her and she could not find any injury surrounding her private parts and there were no nail marks on any part of her body. There is no medical evidence to support the atrocious, loathsome and fictional claims of the P.W.-6 with regard to her being purportedly subjected to forcible sexual intercourse against her will by the present appellant during the final week of December, 1997.

9. The Learned Advocate for the State submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.
10. The assessment of the evidence of the prosecution witnesses is delineated as follows:

P.W.1- Swapan Panda

PW 1, the father of the victim, Pampa Panda, lodged a complaint at Sutahata P.S. on 28/12/97 inter alia stating that his minor daughter was missing. On 25/12/97 at 8am, the daughter aged 17 years had been to the house of the appellant, Rup Narayan Maji, who was her private tutor. (The age stated here contradicts PW12's statement)

PW 1 deposed that on the same day, 25/12/97 at 11:30am, he went to the house of the appellant in search of his daughter, but could not find her. (This statement contradicts his cross examination). Thereafter on 28/12/97, he lodged the missing diary. (The reason for the 3 days gap is not mentioned in his deposition).

PW 1 filed an FIR on 30/12/97 at Sutahata P.S. stating that the appellant had kidnapped his daughter, the victim. This complaint was marked as Ext.- 1.

PW 1 stated that the father of the appellant, Manoranjan Majhi and one Narayan Ch. Pramanik, both accused, claimed that the appellant did not know the whereabouts of the victim.

The victim was found from a shop at Sutahata Marketing Society on 31/12/97. (This statement contradicts his cross examination). This information was delivered to PW 1 by PW 8, Sankar Sau. [These statements were corroborated by PW 2 and PW 3] (This shop was claimed to be the shop of the father of the accused by PW 2 and PW 6).

The seizure of 'sankha' and 'pola' from the victim, PW 6 was done by the Sutahata police in presence of PW 1 and PW 2, his younger brother Rajaram Panda. This seizure list along with the signature of PW 1 was marked as Ext. 2. The 'sankha' and 'pola' was marked as Mat. Ext. 1. The seized admit card of the victim, PW 6, was marked as Ext. 2/1.

PW 1 stated that he accompanied PW 6, the victim to the ossification and medical tests. He claimed to have gotten custody of PW 6, the victim after a 3/4 day delay from Tamluk Criminal Court.

Cross examination of P.W. 1 :-

PW 1 mentioned that the appellant was a private tutor for at least 10/12 male and female students who visited his house for coaching purposes. (None of these students were examined as witnesses). PW1 admitted that he did not know whether a Sudhanshu Ponda, student of Class XI, was among those being tutored by the appellant. PW 1 admitted that he had mentioned the victim's age to be 18 years in the FIR. He could not recall the age of the victim mentioned in the missing diary. Furthermore, he failed to mention details about his search for the victim in the FIR. PW 1 provided two photographs of the victim, one taken at Tarun Sangha and the other at Arya Sanatan Sangha, marked as Ext. A and A/1, respectively. Notably, the appellant was the founder member of Arya Santan Sangha and another accused, Narayan Ch. Pramanik, served as the Secretary of the same organization.

PW 1 stated that the police had taken custody of the victim when she visited her school for filling up her Madhyamik Test Form on 31/12/97. (This statement contradicts his deposition) (This statement contradicts PW 2's statement)

PW 1 stated that the victim occasionally attended music functions until 2am, but could not confirm whether she was accompanied by anyone during these functions. He stated that on 25/12/97, the victim did not leave with her friends for any music festival.

PW 1 mentioned that the victim had not signed the seizure list dated 31/12/97. PW 1 admitted that he could not provide the victim's birth certificate.

PW 1 expressed doubts about the alleged marriage between the appellant and the victim, asserting that the appellant was already married and had a child (son).

PW 1 stated that he had never visited the appellant's house. (This statement contradicts his deposition).

PW 1 mentioned that he had accompanied the victim during her deposition before the Ld. Magistrate.

P.W.2- Rajaram Panda

PW 2 deposed that he went to search for the victim in the houses of Gour Ghorai, Badal Ghora and Tapan Chanak on 25/12/97 at 12:30/1 pm. Subsequently, he continued the search in Sutahata village, Durgachak village on 26/12/97 and Haldia Township on 27/12/97, but the victim could not be found. (This statement was corroborated by PW 3 and PW 5). PW 2 accompanied PW 1 to Sutahata P.S. to lodge a missing diary and FIR on 28/12/97 and 30/12/97 respectively.

Cross examination of P.W. 2 :-

PW 2 stated that PW 8, Sankar Sau had reportedly witnessed the appellant and the victim at the shop on 31/12/97 at 11:30am/12pm. (PW 1 neither mentioned in his deposition that PW 3, his wife, Shipra and PW 2 was also present with him at the shop, nor did he mention that the appellant was also found along with the victim from the said shop).

PW 2 recounted that the victim, cried and narrated to her mother, PW 3 that the appellant and the accused, Narayan Ch. Pramanik, had detained her at different locations, where she was allegedly raped by the appellant. (This statement was corroborated by PW 3). Thereafter, the victim was rescued

from the accused persons by the police from the said shop. (This statement contradicts PW 1's statement)

PW 2 mentioned that they had found the victim wearing symbols of marriage, including vermilion and sankha, when she was taken into custody at the Sutahata P.S. A seizure list detailing a red pola and white sankha made in PW 2's presence was marked as Ext. 2/2. The said sankha and pola was marked as Mat. Ext. I, and the admit card was marked as Ext. 2/3.

PW 2 stated that the victim and appellant visited each other's house for tutoring purposes. (This statement was corroborated by PW 3) .The date 25/12/97 was a holiday due to Christmas and various music functions were held at Haldia and other places.

P.W.3- Shipra Panda

PW 3 was the mother of the victim, PW 6.

PW 3 deposed that on 26/12/97 and 27/12/97, PW1 and PW2 went on a search for the victim. (Though this statement was not mentioned in the written complaint, it was corroborated by PW 2). She recounted that Indra Pramanik, Gour Pali and PW 8, Sankar Sahoo had informed her of the victim's whereabouts, where she was seen with the appellant in various places. PW3 stated that, upon arrival at the said shop on 31/12/97, the victim narrated that from 25/12/97 till 31/12/97, the appellant had taken her to various places, including Ashoka Lodge and his friend's houses, where she was raped and forced into marriage with the appellant. Subsequently, police arrived at the said shop on the same day and detained the victim. (This statement contradicts PW 1's statement). PW 3 further stated that she

had found the victim wearing conches, bangles and vermilion on her forehead.

PW 1 and PW 3 were granted custody of the victim on 3/1/98.

Cross examination of P.W. 3 :-

PW 3 stated that she was not interrogated by the police and did not make any statements to the police regarding her court deposition. PW 3 mentioned one Ekram Rasul, who was related to her by courtesy and had some relation with her elder sister, Sandhya Sengupta. She indicated that she could not produce any documents proving that the victim had gone to the appellant's house for tuition on 25/12/97. Additionally, she noted that there were no witnesses who could confirm the victim's presence at the appellant's house on the said date. She mentioned one Sima Das, who also used to visit the appellant's house for tuition. (Sima Das was not examined). Furthermore, she did not verify the victim's whereabouts from Sima Das.

PW 3 stated that the victim was supposed to get married to one Samir Dhar and mentioned one Samiran Panda as the brother of the victim.

PW 3 mentioned that the victim went to her tuition at the appellant's house with some books on 25/12/97, but these books were neither recovered nor sought. (These books were claimed to be required for the victim's Madhyamik Exams).

PW 3 claimed to have no knowledge about the missing diary lodged by PW 1.

PW 3 mentioned to the court that the victim got married in March, 2002.

P.W.4- Joynab Ali

PW 4 was considered hostile.

P.W. 5- Ashalata Panda

PW 5 is the wife of PW 2. She deposed that PW 1, PW2 and PW 3 searched for the victim. (This statement is corroborated by PW 2 and PW 3 in substance).

Cross examination of P.W. 5 :-

PW 5 stated that she had not been examined by the police and therefore did not narrate about this incident to them. She also stated that she did not mention to the police that the appellant regularly visited the victim's house to tutor her. However, she stated that she observed both the appellant and the victim gossiping whenever they were at the appellant's house, and on noticing PW 5, they would go silent and pretend to be focused on their studies. (This was corroborated by PW 11. Although, she had stated that she did not mention this statement to the police, PW 11, the S.I of the Sutahata P.S had corroborated her statement)

PW 5 could not verify the age of the victim. She mentioned that on the date of the incident, 25/12/97, she saw the victim leaving her house to attend her tuition.

P.W.6- Pampa Dhar/Panda

PW 6 was the victim. She was a student of Class X in Sutahata Labannyaprava Balika Vidyalaya. PW 6 identified accused Narayan Ch. Pramanik as a friend of the appellant.

PW 6 deposed that she went to the appellant's house for tuition at 8am on 25/12/97. The appellant had been her tutor since Class VIII. On that day, her tuition ended at 10am and they went to the Sutahata market to purchase Class X test paper. They then travelled to Sutahata bus stand where she encountered PW 4, Jainab/Joynab Ali. Together, they took a bus

to Haldia Township. In Haldia Township, the appellant took her to the quarters of accused, Narayan Ch. Pramanik, where she was threatened by the appellant and the accused, Narayan Ch. Pramanik. They forced her to choose between marrying the appellant or facing harm to her family members. (This statement contradicts her cross examination). Subsequently, the appellant took her to a house belonging to another friend of his at 10pm, where she was raped by the appellant. PW 6 mentioned that she did not know the name of the place where the said house was located or the name of the said friend of the appellant.

PW 6 stated that the appellant put vermilion on her forehead and conches on her hands against her will on 26/12/97. The appellant then took her to Ashoka Lodge at Durgachak, where she was raped again.

PW 6 stated that the appellant on 27/12/97 had taken her to a house belonging to Swadesh Das but rented by her at Khejurtala. They stayed there from 27/12/97 to 29/12/97, where she was raped again. During that period, the appellant had forced her to write some letters addressed to him. (This statement contradicts her cross examination)

On 30/12/97, they went to Sutahata bus stand, and she went to her school alone as it was the last date to fill up the said form. (This statement contradicts her cross examination). However, she left without filling her form because she was taunted and teased by her teachers and friends. She mentioned that she met PW 8, Sankar Sahoo, a local uncle at the Sutahata bus stand, but she could not tell him anything as the appellant was also present with her. Later, they went to the mentioned shop, where she encountered PW1, PW2, PW3 and one Gita Majhi, wife of the appellant, who

assaulted her with slippers. She could not discuss the incident because the police took her away to the police station. Meanwhile, the appellant escaped the police.

She was thereafter interrogated by the police and her statements were recorded by the Ld. Magistrate. She underwent examinations by doctors on two occasions.

Cross examination of P.W. 6 :-

The letters written by PW 6 was marked as Ext. B series.

PW 6 stated that the said letters addressed to the appellant did not contain his name but some letters contained her name as Pampa. The letters did not contain any dates. PW 6 could not recall the date on which the said letters were written. (This statement contradicts her deposition)

PW 6 mentioned that she did not go to the appellant's house for her tuition on both the shifts and that the appellant had never forcibly taken her anywhere before 25/12/97. She also stated that on the said date, she did not carry any money or wearing apparels while visiting the appellant's house for tuition. She mentioned that she did not change her wearing apparels from 25/12/97 to 27/12/97. On 27/12/97, the appellant brought one Sima Chitrakar, a friend of PW 6 (who was not examined), to the house of Swadesh Das. She later went to Sima Chitrakar's house at Khejurtala which is near to Swadesh Das's house, for a change of wearing apparels. Then she returned to Swadesh Das's house. (On this opportunity, the victim should have escaped)

She stated that she wore a saree of a Sampa Das on 31/12/97 to her school.

She could not verify the location of the said books, but she mentioned to the

police that she bought those books on 25/12/97 with the appellant at Sutamata market. She cannot recall whether she mentioned this statement to the Ld. Judicial Magistrate. (This statement contradicts her statements mentioned below). She also could not recall as to whether she stated to the police that she came back to her house “without protest”.

She stated that the appellant had provoked her by promising marriage, depositing money in a bank account under her name and ensuring her exam success. She claimed that she did not share these details with anyone before because the appellant had threatened her.

She (contradicts her own statements) stated that she had mentioned to the police and the Ld. Judicial Magistrate that she had gone to purchase her books at Sutamata Market, subsequently, she went to Haldia Township to visit her ill friend, Krishna Das. Later, she was forcibly taken by the appellant and his friend, Narayan Ch. Pramanik, to his house. (This statement contradicts her deposition).

She (again contradicts her statements) mentioned that she had initially gone to the appellant’s house on 25/12/97 to discontinue her tuition classes but the appellant responded by threatening her and her family with death. PW 6 stated that she usually informs about her whereabouts to her parents. She also claimed that she was about to inform her whereabouts to PW 4, Joynab Ali, who was not examined as he was declared hostile, but the bus had arrived.

She stated that the appellant, on 25/12/97 at 8 p.m., had taken her to his friend’s house where his friend resided with his wife and children, to whom she could not mention her situation as she did not get an opportunity. She

also stated that on the same night, the appellant had raped her and taken her virginity. She had desperately tried to protect her virginity being an unmarried girl, but she failed. She stated that her private parts were ruptured. She was repeatedly raped from 25/12/97 till 30/12/97. She profusely bled every time during the rape, which made her wearing apparels like the trouser of her churidar and bed sheet cover in blood. She mentioned that she had kept her used, blood soaked wearing apparel in the house of one Sima Das. (In her deposition, she had mentioned that she wore the same wearing apparel, churidar from 25/12/97 to 27/12/97 and on 27/12/97, she left the said house to go to Sima Das's house for change of wearing apparel. Since it was covered in blood as mentioned by the victim, how is it that none of the other members of the house, as well as the people on the road on the way from one house to another notice the blood. The blood soaked wearing apparel was not recovered from Sima Das's house. Sima Das was not examined.) She further stated that she had not mentioned her situation to the people in Ashoka Lodge.

PW 6 mentioned sustaining scratch marks from nails on her private parts and the surrounding region and on her body. She was beaten by the appellant on her cheeks and breasts. She also mentioned that she had shown all the said marks to the medical examiner, PW 12. (These statements were not corroborated by the medical examiner, PW 12)

PW 6 stated that she went to her school with the appellant as a married woman. (This statement contradicts her deposition). She also stated that she was accused by the appellant's wife of stealing the appellant from her. She

mentioned that she had written 37 pages in her diary which was marked as Ext. C date wise.

She stated that she was a singer who travelled to different places at Midnapore District with her parents to perform her songs.

She stated that she did not file any complaint in the police station with regard to the appellant. She stated that she had mentioned to the police that she was forced by the appellant to write love letters to him. She could not recall as to whether she had mentioned the previous statement to the Ld. Judicial Magistrate. She claimed that she voluntarily wrote down “the expression of my mind” in the said diary. She asserted that her parents did not rebuke her or assault her with regard to her mingling with the appellant. She further asserted that she did not love the appellant nor did she ask the appellant to marry her. She also asserted that she had never written any letter addressing the appellant as her husband.

She stated that she was forced to wear conches and vermilion by the appellant at a shop in Tamluk but did not protest against the said action in front of the shopkeepers and other customers present in the shop.

P.W.7- Biswanath Das

PW 7 was the manager of Ashoka Lodge at Durgachak in Midnapore. He deposed that he had maintained a register and an entry under the name of the victim and the appellant dated 26/12/97 at 12:30pm was against Room no. 41 of the said Lodge. This entry was made by the appellant himself. PW 7 stated that the party stayed till 27/12/97. The date of departure was not entered in the register. The said entry and register was marked as Ext. 3 and

Ext. 4 respectively. The custody slip presented by PW 7 was marked as Ext. 5.

Cross examination of P.W. 7 :-

PW 7 stated that he had not known the party personally. He further stated that he allowed majors (adults) to stay and the party had claimed that they were majors and introduced themselves as husband and wife.

P.W.8- Sankar Sau/Sahoo

PW 8 was a neighbour of the family of the victim, PW 6. He deposed that he was informed by the family members of the victim that she had not returned home on 25/12/97. Then on 31/12/97, he noticed the victim and the appellant at the appellant's father's shop, where they appeared to be together as a married couple. He informed this situation to the family members of the victim. He then arrived to the said shop with the mother of the victim, PW 2 and saw that the victim was being assaulted by Gita Majhi, the wife of the appellant.

Cross examination of P.W. 8 :-

PW 8 stated that he was not interrogated by the police regarding this incident. He could not verify as to who had informed the police about the whereabouts of the victim on 31/12/97.

P.W.9- Swadesh Ranjan Das

PW 9 was considered hostile.

P.W.10- Naren Chandra Ray

Naren Chandra Ray was the A.S.I of Sutahata P.S. He had entered G.D. Entry no. 941 dated 28/12/97 filed by PW1, Swapan Kr. Panda. This was marked as Ext. 6.

P.W.11- Akinchan Pal

PW 11 was the S.I. of Sutahata P.S. He was in charge of investigating this case. He verified the signature of O.C. Somnath Chakraborty on the FIR filed by PW1 on 30/12/97 at 9:15 hrs. This was marked as Ext. 7. The written complaint filed by PW 1 was marked at Ext. 1/1. He stated that he was responsible for recording the statements of the witnesses. He also stated that he had prepared a seizure list including one Admit Card from the victim on 31/12/97, which was marked as Ext. 2/4. PW 11 stated that PW 1 had lodged another G.D. 995 dated 31/12/97, which was marked as Ext. 8. The seized conches and polas were marked as Ext. 2/5. The seized register of the Ashoka Hotel/Lodge was marked as Ext. 4/1. The sketch map of the Nandarampur village was prepared by PW 11, which was marked as Ext. 9. PW 11 stated that he had filed the FIR against 3 accused persons on 6/7/98.

Cross examination of P.W. 11 :-

PW 11 stated that he confirmed about the age of the victim on receiving the medical report, which declared the victim as a major (adult). Additionally, the medical report mentioned that PW 6, the victim was habituated to sexual intercourse prior to this incident. He did not seek the opinion of a handwriting expert to compare the signatures on the register of Ashoka Hotel/Lodge. He asserted that PW 2, Rajaram Panda, did not "state to me that Pampa was crying and stated to us, or that he saw at Sutahata P.S. that Pampa has married."

PW 11 corroborated the statement of PW 5.

PW 11 corroborated the statement of PW 6, the victim in substance. He stated that the victim had not mentioned to him that she had gone to visit her ill friend, Krishna Das in Haldia Township, or that she was forcibly taken to the house of one accused, Narayan Ch. Pramanaik by the appellant, or that she was threatened by the appellant, or that she went to the house of the appellant on the day of the incident to discontinue her tuition, or that she had met her uncle and aunt on her way to Sutahata, or that the appellant had forced her to write letters.

P.W.12- Dr. Santi Purakait

PW 12 was posted as M.O (Gynecologist) at Tamluk S.D. Hospital in Tamluk. She had examined the victim, PW 6 on 2/1/98.

PW 12 deposed that the victim was of average built and nutrition and her breasts, pubic and axillary hairs were well developed. She had neither found any external injuries on the victim's body nor on her genitalia during her vaginal examination. She had submitted a vaginal swab and urinal swab to the police. She further stated that she had not found any foreign body on her genitalia as her hymen rupture was old. She mentioned that she had referred the victim to S.D. Hospital in Contai for her ossification test.

PW 12 opinionated that the victim was habituated to sexual intercourse, whether it was consensual or not, could only be determined by further investigation and circumstantial evidences. This report was marked as Ext. 10.

Cross examination of P.W. 12 :-

PW 12 stated that any foreign body could only be present in the body of any victim if she was examined within 7 days of the incident and PW6, this

victim's hymen may have been ruptured for more than the prescribed time limit. Despite mentioning the previous statement, she also stated that the victim was habituated to sexual intercourse for a long time. She further stated that the victim did not reveal anything to her. (This statement contradicts PW6's statement). PW6, the victim had mentioned her age as 16 years to her. (This statement contradicts with PW1's statement)

PW 12 stated that she did not find any injury marks or nail marks on the victim's private parts and breasts.

11. The provisions under Section 363/366 of the Indian Penal Code states as follows:

- a. **“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.
- b. **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.”

12. 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 the said case are quoted below:-

"7. 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:

"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."

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

¹ 1965 AIR (SC) 942

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:

"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."

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.

...

9. *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.*

10. *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".

13. 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 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."

14. In ***Kuldeep K. Mahato vs. State of Bihar***³, the Hon'ble Supreme Court held as follows:

"7. ... We are unable to accept⁶ this submission because Dr. Maya Shankar Thakur, (PW-2), had emphatically stated that the age of the prosecutrix was below 18 years on the date of the occurrence. Both the courts below found that the age of the prosecutrix was below 18 years. After going through the evidence of Dr. Maya Shankar (PW-5) and the other material

² 2022 Live Law (SC) 362

³ (1998) 6 SCC 420

on record, we are of the opinion that this finding needs no interference.

...

11. Then coming to the conviction of the appellant under Section 376 of the Indian Penal Code, although both the courts below have held after accepting the evidence of the prosecutrix as being truthful that the appellant had forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr. Maya Shankar Thakur, PW-5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 of the Indian Penal Code cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstances also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

15. The victim was evidently a major at the time of the incident. The victim lady was acquainted with the appellant being aware of his marital status. She was to appear for the Madhyamik Examination and had been reasonably conscious of the consequences of being involved in a relationship with a married man. She consensually eloped with the appellant and had optimum advantageous situations to flee and rescue herself from the clutches of the appellant if she was kidnapped and captivated against her will. The victim

give prevaricated her version of evidence from time to time which could not be worthy of trust and reliance. The medical report did not support immediate violation of her body. The seizure was not proper.

16. Under the facts and circumstances of the case, any absence of proof of commission of the offence by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.
17. The appellant is acquitted of the charges. The appellant if in custody, be released forthwith if not required in connection with any other case. The appellants shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.
18. Accordingly, CRA 151 of 2003 is disposed of.
19. Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.
20. 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.)