

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 719 of 2009

Ashish Ghosh @ Ashis Ghosh @ Rohit

-Vs-

The State of West Bengal

For the Amicus Curie : Ms. Pallavi Priyadarshee

For the State : Ms. Faria Hossain

Heard on : 02.02.2023, 02.03.2023, 03.08.2023.

Judgment on : 10.08.2023.

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of conviction dated 31.08.2009 passed by Learned Additional Sessions Judge, Fast Track Court, 1st Court, Siliguri in Sessions Trial No. '27/08' arising out of Sessions Case No. 121 (S) 2007 convicting the appellant under Section 363 of the Indian Penal Code sentencing him to rigorous imprisonment for 3 years and to pay a fine of Rs.1000/-, in default to suffer further rigorous imprisonment for 3 months.
2. The prosecution case originated on the basis of a complaint filed by the mother of the victim precisely stating that her daughter aged about 13 years

being a student of class -VII had gone to attend tuition classes on 22.05.07 at 5 p.m. at Indirapally. Her daughter was called by one Shrimati Bela at 6:30 p.m. from her teacher's house. At the relevant time the appellant was present at the place and forcibly taken her minor daughter to Bhujiapani alluring her to marry him.

3. Based on this written complaint Matigara P.S. case no. 68/2007 dated 23.5.2007/24.5.2007 was filed under Section 363/366A of Indian Penal Code. Investigation was initiated which culminated in submission of Charge-Sheet under Section 363 of Indian Penal Code. Charge was framed to which the appellant pleaded not guilty and claimed to be tried.
4. The prosecution in order to prove its case cited 8 witnesses and exhibited certain documents.
5. The Learned Amicus Curiae representing the appellant stated as follows -
 - i. Out of love affair between the appellant and the victim girl, they out of desire wanted to spend a day together at some safe place without having any desire to get attached physically.
 - ii. The appellant and victim girl played a silly trifle and had not committed any offence or there was at least no *mens rea* to commit any offence.
 - iii. Though such type of silly trifles, keeping the elderly members of the family in anxiety is not desirable and acceptable at this stage, still since no offence have been committed the quantum of punishment awarded was too severe.

- iv. P.W. 1 the victim girl had expressed in her statement before the Learned Magistrate under section 164 of the Code of Criminal Procedure, 1973 and also in her evidence that she had love affair with the appellant and after she came out of her tuition class they both went to the house of the aunt of the appellant and thus she went out of her own desire.
 - v. The victim girl had emphatically stated in her evidence that there was “no bad thing” happened with her and that had been confirmed by the medical officer P.W. 8.
 - vi. The prime witness of the case who could have thrown the maximum light as to what was the actual state of affairs, was one Bela, who was actually on the spot and who actually took part in the transaction and who was alleged to have asked the victim to go from her tuition was not examined by the prosecution and there was no reasonable explanation from the side of the prosecution for not examining this witness.
6. The Learned Advocate for the state submitted the consent of the victim is immaterial in view of the ingredients of section 361 of the Indian Penal Code.
7. A circumstances of the prosecution witnesses reveal P.W. 1, the victim in her deposition to state that-

“She was a student of Class-IX at Atharokhai Balika Bidyalaya. Bhojmaya Sarki is her mother. She was sixteen years old at present.

The incident took place on 29/05/07. She went to attend her tuition in the house of Bapi sir in Indira Pally at about 5.00 p.m.

While She was taking tuition, one aged lady came there and told her that the condition of her father was serious. She knew that woman, her name was Bela and she resides in her village. 'Her Sir' gave him permission to leave the tuition and so she came out with her. Accused Ashish stood outside. She boarded auto rickshaw with him and proceeded toward her house at Gate no.2 of North Bengal University. Accused took her to Bhujipani. It was dark and she could not locate the stoppage of her house. Herself and accused got down at Bhujipani. Accused took her to the house of her aunty in Bhujipani. In the house of her aunty, the accused tried to put his hand on her breast and other private parts but she did not permit him to do so.

In the night she stayed in the house of her aunty and in the morning, she telephoned at her house finding an opportunity. Police came at about 12.00 in the noon and police took her and the accused from there to the P.S.

During cross-examination of P.W. 1 stated as follows:

She know the accused for the last 3/4 years. He resides in the village Narayanpally. She went to see him on one occasion when he was suffering from 'Mumps'.

She used to love him for the last two years.

She stated to the Ld. Judicial Magistrate that one Bela Mashi came to her at the time of my taking tuition and told her that the condition of her father was serious. She was grandmother of her friend Payal. She had acquaintance with her previously.

She stated to the Ld. Judicial Magistrate that the accused who was her lover called me from the tuition through the grandmother of Payal. She also stated before the Ld. Magistrate that she took the permission of her 'sir' and came out. She then went with the

accused to the house of his aunty and spent a night in the house of his aunty. No bad incident took place about her during her stay in the night in the house of the aunty of the accused. She stated to the aunty of the accused that she loved him. Her parents and other members of her house also knew about their love affairs. Her parents told him that they would give her marriage with the accused later on.

She went with the accused to his aunty's house without knowing the consequences on her own violation. She stated to police and also to the Ld. Judicial Magistrate that she went with the accused voluntarily.

She stated to the police and also to the Ld. Judicial Magistrate that she wanted to marry the accused.

The incident took place for their foolishness and none of us was responsible for the incident.

She used to take tuition with other 9/10 students in a group at the house of her 'Bapi Sir' in Indirapally. One/Two of them knew their love affair. Rupali, Puja and Dalia knew about their love affairs.

She was a student of Class-VII at the time of incident.

She has no grievance against the accused. She also stated to the police that she has no allegation against the accused. She also stated about it to her parents. She has stated everything to police what she has deposed before court today."

8. The evidence of P.W. -2, the father of the victim asserted the narrative of the complaint which was corroborated by evidence of PW-3, PW-4, PW-5 in unison. PW-6 the tuition teacher proclaimed the victim to be present at her house on the relevant date and time, confirming a woman namely Beladi

informing the victim of her father's serious illness and requesting PW-6 to be excused.

9. PW-8 the doctor who examined the victim opined as follows:

"The subject was brought and identified to him by S.I. Gour Ch. Roy of Matigara P.S. The consent has been taken in prescribed form from the subject and also from Bhojmaya Sarki, mother of the V.G. The subject was examined by him in presence of Lady Constable no. 1366 Rajani Chhetri of Matigara P.S.

The following queries of the I.O. were made to which the answers as follows:

i. Whether the V.G. was sexually assaulted or not?

Ans. From the clinical examination, no injuries detected to suggest sexual assault.

ii. Whether the V.G. was raped or not?

Ans. From the clinical examination, no injuries detected to suggest possible sexual intercourse has occurred.

iii. Whether the hymen of the V.G. was ruptured or not?

Ans. On clinical examination hymen was intact admitting tip of the little finger.

That was the consent form duly prepared and signed by him. Ext. 1/2.

That was the report of medical examination duly prepared and signed by him. Ext. 2/2.

During cross-examination of P.W. 8 stated as follows:

He did not take on any test for ascertaining the age of the V.G. The age as mentioned in his report was stated by the victim and her mother.

Not a fact Mithula Sarki @ Kabita was minor on the date of the incident. Not a fact he did not examine the said V.G. on 20/06/07."

10. The victim in her statement recorded under Section 164 of the Cr.P.C. marked as exhibited 3/1 stated to have escaped with the appellant at her own will and volition, further declaring her desire to marry the appellant. The evidence of the victim before the court corroborated her statements recorded under Section 164 of the Cr.P.C. which did not disclose an element of compulsion or force being administered to her or even to entice or take her away against her will for unlawful gain at her expense. During her cross examination she stated that she was known to appellant for 3/4 years prior to the incident and she used to love the appellant for last 2 years. She even stated to have known the lady namely Bela Mashi who was the grandmother of her friend Payal with whom she had previous acquaintance. She further stated that she went to the appellant's aunt's house being unaware of the consequences of such act and expressed the fact that the incident took place out of their foolishness and none of them was responsible for the incident. She further declared that she loved the appellant which was known to her parents and other family members and her parents agreed in getting her married to the appellant and she did not bear any grievance against the appellant.
11. The document marked as exhibited 6/1, 7/1 and 8, documents relating to date of birth unequivocally stated the date of birth of the victim 08.11.1993. The incident took place on 23.5.2007 establishing the fact of the victim being a minor of 13 years of age.

12. The provisions under Section 359 of the Indian Penal Code states as follows:

“359. Kidnapping.—*Kidnapping is of two kinds: kidnapping from [India], and kidnapping from lawful guardianship.”*

13. The provisions under Section 363 of the Indian Penal Code states as follows:

“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.”*

14. In Section 363 of the Indian Penal Code the word used is ‘kidnaps’ and the word kidnapping is defined under Section 359 of the Indian Penal Code and kidnapping from lawful guardianship is defined under Section 361 Indian Penal Code.

15. 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:-

a. *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:*

¹ 1965 AIR (SC) 942

- 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.”*
- b. *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."
- c. 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 borne 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".

16. 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.”

17. This is an instance out of the innumerable circumstances that are enlivened due to the irrational, reckless, negligent and emotional acts on the part of minor children and or a minor victim and an adult accused in their endeavour to fructify and accomplish their love affair being ignorant of the legal consequences as well as the age of majority to get married. In many such instances to escape from the fear, agony, restriction, disagreement and reprimand of the parents, the minor victims resort to aggression and defiance voluntarily, even to the extent of persuading other party to elope, i.e. the male accused to his detriment giving rise to unwarranted precarious situation wherein not only the male accused but his entire family gets roped in the commission of u/s 363 of the Indian

² 2022 Live Law (SC) 362

Penal Code, wherein many a time the family members of the male accused are unaware or not even involved or do not encourage such abrupt ,drastic, impulsive act of the victim as well as alleged perpetrator. The instant case is exemplary of such a situation where the victim at her own volition and consent eloped with the appellant herself stating to be in love with him and intending to marry him. She was not subjected to any kind of coercion, threat, pressure, harassment or illegal advantage. The victim herself stated to have been in relationship with the appellant for 3/4 years. It is the undeniable that the victim has been a minor and her consent has no value in the eyes of law however the absence of mens rea or absence of guilty motive on the part of the appellant shall also be taken into consideration. The victim did not state that she was compelled by the appellant to accompany him to satisfy his illegal and inappropriate objectives.

18. Considering the facts and circumstances of the instant and the decisions cited above the appeal is allowed.
19. The appellant is acquitted of the charges. The appellant if in custody, be released forthwith if not required in connection with any other case.
20. CRA 719 of 2009 is disposed of accordingly.
21. I record my appreciation for the able assistance rendered by Ms. Pallavi Priyadarshee, Learned Advocate, as Amicus Curiae in disposing of the appeal.

22. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
23. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.
24. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)