

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.A. 8 of 2020

Guma Gurung @ Goma Khawas
versus
The State of West Bengal

For the Petitioner : Mr. Arjun Chowdhury
Ms. Pratusha Dutta Chowdhury
Ms. Riya Agarwal.

For the State : Mr. Aditi Shankar Charkraborty
Mr. Subhasish Mishra
Mr. Ujjal Luksom

Heard On : 04.10.2023 & 05.10.2023.

Judgement On : 05.10.2023

Tirthankar Ghosh, J. :

The present appeal has been preferred against the Judgment and Order dated 30.1.2020 passed by the Ld. Sessions Judge, Kalimpong in Sessions Case No. 01 of 2019 corresponding to Sessions Trial No. 04 of 2019 (arising out of Gorubathan P.S. Case No. 40 of 2014) dated 31.10.2014), wherein the appellant was held to be guilty for commission of offence under Section 363 of the IPC and sentenced to rigorous

imprisonment for seven years and pay fine of Rs.50,000/-, in default, to suffer further rigorous imprisonment for six months.

The genesis of the case was on the basis of a complaint lodged by one Harish Roy to the officer-in-charge of Gorubathan P.S., wherein it was alleged that the complainant's sister-in-law, namely, Anuja Chettri along with Mira Sarki and Anjali Chettri went on missing from 8th of October, 2014, which was earlier informed to the police Station. Later, on 18th of October, 2014, the officers of the P.S. went on to Jalandhar, Punjab and after reaching there on 21.10.2014, the three missing girls were rescued and on being asked, it was revealed that a woman namely Guma Gurung (the appellant herein), a resident of Jaldhaka along with some other persons allured them with money and job and thus the three minors were trafficked from Gorubathan. The minors were told that they would earn lot of money for doing any kind of job and were taken to Jalandhar, Punjab. They were kept for 12 days and they were engaged with a job.

The minors along with the complainant safely reached to Gorubathan from Jalandhar. But, it has been alleged that the accused/appellant may be engaged in trafficking several other minors in future. Accordingly, steps may be taken against her.

On the basis of such complaint, Gorubathan P.S. Case No. 40 of 2014 dated 31.10.2014 was registered for investigation under Sections 363/366A/370/370(5) of the IPC.

The investigating agency on completion of investigation submitted charge-sheet under the same sections and, subsequently, the case was transferred from the Court of the Ld. CJM, Kalimpong to the Court of the Ld. District and Sessions Judge, Kalimpong and charges were framed under Sections 363, 366A and Section 370(5) of the IPC.

The contents of the charge were read over to the accused/appellant to which she pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 15 witnesses and also 11 documents which were marked as exhibits.

The witnesses relied upon by the prosecution are PW 1, Anuja Chettri; PW 2, Mira Sharki; PW 3, Anjali Chettri; PW 4, Harish Roy, complainant; PW 5, Uma Chettri, mother of PW1; PW 6, Krishna Sharki, father of PW 2; PW 7, Arjun Tamang, the scribe of FIR; PW 8, Fulmaya Sharki, mother of PW2; PW 9, Anupa Chettri Roy, sister of PW1; PW 10, Purnima Chettri, mother of PW 3; PW 11, Kumar Chettri, father of PW 3; PW 12, Dr.Sudipta Mahato, Medical Officer who conducted examination in respect of PWs.1, 2 and 3; PW 13, First Investigating Officer of the case; PW 14, Second Investigating Officer of the case; PW 15, Third Investigating Officer of the case who submitted charge-sheet.

In this case, PWs.1, 2 and 3 have been projected to be victim girls who were minor at the relevant point of time and it has been alleged that the appellant has lured them for job.

PW 1, Anuja Chettri in her evidence before the court deposed that on or about October, 2014 she along with PWs. 2 and 3 and the appellant had been to Jalandhar. She identified the accused in court. She deposed that she along with PWs.2 and 3 studied together at Youdhbir School at Mal Busty, Gorubathan. Her elder sister used to work with the appellant at Punjab. The elder sister of PW 3 returned to her house at Gorubathan along with the appellant and then PW 3 informed her and PW 2, that the said elder sister had been working with the accused in Punjab and they were receiving good remuneration for their work. She then along with her two friends contacted the appellant over phone and asked her to take them to Punjab for work. However, she did not inform her parents. On October, 2014 she along with her friends PWs. 2 and 3 went to Punjab along with the appellant by train and before leaving Gorubathan all of them did not inform their parents. After reaching Jalandhar all of them started residing at rented house of the appellant and the appellant arranged temporary work for helping them. They were engaged as assistants/helping hands during marriage ceremonies and stayed at Jalandhar for 12 days. After the complainant along with police had been to Jalandhar and arrived at Jalandhar she along with her friends contacted with the parents over phone and thereafter they had to return with the police. They were taken to Gorubathan Police Station where they saw their family members and then they returned to their house. She gave her statement to a Magistrate at Gorubathan Court. She identified her signature in the statement which was recorded in Gorubathan Court. She categorically sated that except doing

the temporary work at marriage celebration, she did not do any work at Jalandhar. She was examined by the doctor at Gorubathan Hospital.

The evidence of PW 2 is in tune as deposed by PW 1 and she only stated that she worked twice in a marriage party and showered flower and served plate to the guests.

PW 3 also narrated the incident which happened after she along with her other friends left from Gorubathan and arrived at Jalandhar and worked with them at Jalandhar. All the three witnesses were medically examined and they gave their statement under Section 164 of the Code of Criminal Procedure before the learned Magistrate which will be dealt with later.

PW 4 deposed that PW 1 is his sister-in-law and she was found missing from her house and could not be traced after being searched at every possible places, as such, missing diary was lodged at Gorubathan Police Station. He also learnt that two other friends of PW 1 were also missing. As such, a complaint was prepared by an acquaintance who was working as civic police (P.W.7). The contents of the complaint was read over to him and he signed the same. He identified his signature which was marked as Exhibit 5. After about two weeks it was informed by Gorubathan Police Station that the three girls have been located at Jalandhar and he was asked to accompany them for rescuing the girls. At Jalandhar the victim was contacted. However, the victim failed to give exact location and then at a park the victim along with two other girls came down and from

there they were taken to Jalandhar Police Station. Police interrogated the victim girls and on enquiry the girls stated that they had come at their own free will and nobody forced them to come to Jalandhar.

The victim girls were thereafter brought to Gorubathan Police Station and from there, they were taken to their house by the family members. The complainant stated that the victim narrated to him that at Jalandhar she was engaged for showering flowers on guests.

PW-5 mother of PW-1 stated that the victim was born in the year 1996 and she was a student of Class-VIII of Youdhbir School. She narrated the incident of disappearance of her daughter in the same manner as PW-4 and also stated that her daughter divulged that she had been working at Jalandhar and was engaged for showering flowers on the guests. She also signed in the seizure list dated 16.12.2014 which was marked as Exhibit. According to her after 15 days of her daughter being missing, she was rescued by the police authorities. Additionally, she stated that her daughter narrated that due to financial problem in the house, she wanted to earn some money and for this reason, she went to Jalandhar.

PW-6 happens to be the father of PW-2 who stated that his daughter was born on 03.12.1995. He deposed that she was missing before Dashera in 2014. She narrated the fact in the same manner as PWs 4 and 5 and categorically stated that his daughter divulged that except showering flowers on guests, she did not do any other work at Jalandhar.

PW-7 is the scribe of the FIR. He identified his signature and address which was marked as Exhibit.

PW-8 is the mother of PW-2 who narrated the incident of her daughter along with her friends leaving for Jalandhar in the month of October 2014 in the same manner as that of PWs. 4, 5 and 6. Additionally, she stated that as she was not informed, out of her concern for her daughter, the FIR was lodged and her daughter was rescued within five days and she was brought back to home and she categorically stated that she was only engaged for the purposes of showering flowers at marriage party.

PW-9 is the elder sister of PW-1. She narrated the incident in the same manner as PWs 4, 5, 6 and 8. Additionally, she stated that all the victim girls i.e. PWs 1, 2 and 3 categorically stated to her that they were never forced to do any unlawful/illegal act at Jalandhar at the instance of the appellant.

PW-10 is Purnima Chettri, mother of PW-3. She narrated the incident in the same manner as PWs 4, 5, 6, 8 and 9 and she also categorically stated that her daughter divulged to her that she got a decent job at Jalandhar and she used to shower flowers on guests at the marriage ceremony.

PW-11 is the father of PW-3 who narrated the incident in the same manner as PWs 4, 5, 6, 8, 9 and 10. Additionally the witness stated that on

being asked, his daughter categorically stated that she had been to Punjab out of her own freewill and none forced her to go there and she was never forced to do any illegal work.

PW-12 is a medical officer at Sukna BHPC, Darjeeling. He examined the victim girls PWs 1, 2 and 3. He identified the injury reports which were marked as Exhibits 7, 7/1 and 7/2 which will be dealt with later.

PWs. 13, 14 and 15 are investigating officers who have narrated the chronology in which they have carried out the investigation starting from visiting Jalandhar, recovering and rescuing the PWs 1 and 2, recording of the statement of the witnesses, sending the victim for medical examination, collecting the medical reports as also tendering PWs. 1, 2 and 3 for their statements to be recorded by a Judicial Magistrate, collecting the same and on an analysis of whole of the evidence so collected submitted the report under Section 173 of the Code of Criminal Procedure.

In addition to the oral evidence as has been stated earlier, the statement of three of the victim girls i.e. PWs. 1, 2 and 3 under Section 164 of the Code of Criminal Procedure requires to be taken into account.

PW-1 before the learned Magistrate under Section 164 of the Code of Criminal Procedure narrated as follows:

“Anjali gave Priyanka’s mobile no. to me. I called up Priyanka in the month of July and I told her that I would like to work and she told me that she would go to Punjab the next week and she told me that I could go along with her. But at that time I was not in a convenient position to

travel with her so I told her that I would go later and she then told me that she would give my no. to Goma. Subsequently, Goma called me up and it was fixed that I would go on 8th October. Anjali, Meera and myself decided to run away from home because our parents would not allow us to work. Goma came to Gorubathan on 8th October, and we went alone with Goma. When nobody was at home I left the house with my clothes and I met Goma and we, i.e., Anjali, Meera, myself and Goma we sent to Siliguri and from there we went to Jalandhar.

At Jalandhar we used to work at marriage parties. Our work was to give flowers to the guests and to serve the plates at the dining table. If the place of marriage was near by we were given Rs. 400/- and if the place of marriage was far then we were paid Rs.500/- to Rs.600/- I went only on one day and I got Rs.400/-.

Subsequently, on 21st October, Police went and brought us back.”

P.W.2 before the learned Magistrate under Section 164 of the Code of Criminal Procedure narrated as follows:

“Anjali, Anuja and myself we are very good friends and we decided to work. But I did not know anybody and Anjali said that she knew one Priyanka who works at some place. Anjali gave Priyanka’s no. to Anuja and Anuja spoke to Priyanka over the phone. Priyanka gave Anuja’s no. to Goma and Goma called up Anuja and spoke to her. Subsequently, on the 8th October, Anuja, Anjali and myself we went to Siliguri along with Goma. Goma had come to Garubathan to pick us up. I had kept some clothes in my friend’s house and I collected the clothes from my friend’s house and I went off. I

did not inform my parents because I was afraid. I knew that they would not allow me to work.

From Siliguri we went to Jalandhar. At Jalandhar we used to work at marriage parties. We used to welcome the guests with flowers and we also used to take food for the members of the family of the bride and the bride groom who were inside. It was the duty of the waiters and waitresses to ask for the supply and it was my duty to pass the bottles of hard drinks and soft drinks to the them so that they could serve to the guests.

We were paid to Rs.400/- to Rs.500/- per day. I worked at two marriage parties.

P.W.3 before the learned Magistrate under Section 164 of the Code of Criminal Procedure narrated as follows:

“Priyanka is my Ganga Aunty’s husband’s first wife’s daughter. Priyanka used to work with Goma Gurung. Priyanka used to live at Gairibas. Priyanka told me that Goma would provide job for us. I gave Priyanka’s no to Anuja. Anuja spoke to Priyanka and Priyanka gave Anuja’s no. to Goma. Goma called up Anuja in the month of July. Goma had fixed up 8.10.2014 to take Anuja along with her to Punjab. Anuja told this to me in school. Then I also told her that I would go along with her and on the 8th of October, 2014 Goma came to Gorubathan and Anuja, Meera and myself went along with Goma.

I had lied to my mother and I told her that I was going to my friend’s house. We went to Siliguri and from there we went to Punjab.

On 21st October, police and NGO came to the place where we were living and they brought us back to Gorubathan.”

In respect of P.W.1, it has been observed by the Medical Officer, who conducted the examination as follows:

“After careful examination, in my opinion:

- i) There are no signs of recent forceful sexual intercourse and there are no signs of penetration of the hymenal orifice.*
- ii) No signs of injury could be detected over the genitalia or over the body of the subject.*
- iii) As mentioned in the page overleaf the hymen is intact and there are no signs of injury over the hymen.”*

In respect of P.W.2, it has been observed by the Medical Officer, who conducted the examination, as follows:

“After careful examination, in my opinion:

- 1.) there are signs of penetration of the hymenal orifice but there are no signs of recent forceful sexual intercourse.*
- 2.) there are no signs of injury over the body or over the genitalia except the old healed hymenal tears as mentioned in the page overleaf.*
- 3.) there are old healed tears at 30’ clock and 50’ clock position over the hymen.”*

In respect of P.W.3, it has been observed by the Medical officer, who conducted the examination, as follows:

“After careful examination, in my opinion:

- 1) there are no signs of penetration of the hymenal orifice and there are no signs of recent forceful sexual intercourse*

*2) No injury could be detected over the genitalia or over the body of the subject and
3) the hymen is healthy and intact.”*

I have considered the evidence which was deposed in Court as well as the documentary evidence which the prosecution has relied upon to prove its case.

However, it would not be out of place to state over here that the FIR or the letter of complaint in this case was initiated out of an apprehension that the minor girls could have been trafficked for illegal and immoral purposes and that is why apart from Section 363 of the IPC, the case was registered under Section 366A and Section 370(5) of the IPC. The latter two sections are obviously associated with the nature of the offence which involves sexual exploitation of minor girls or procuring or selling of minor girls for the purposes of prostitution.

To that effect, charge-sheet was also filed under similar sections. The witnesses in this case happen to be the minor girls, their parents and the relatives who deposed before this Court.

However, no materials have surfaced to show that the appellant had any complicity particularly with regard to the factum of sexual exploitation of the minors and, as such, the Trial Court, at the conclusion, acquitted the appellant in respect of the charges under Sections 366A and Section 370(5) of the IPC.

However, what weighed with the Trial Court is the age of the victim girl and their removal from natural guardianship without any permission which satisfies the definition of kidnapping and, accordingly, the appellant was held to be guilty for the said offence.

In this case, the consistent factual circumstances which surfaced are that the girls out of their free will contacted the appellant and expressed their intention to work for aiding their family, who were financially distressed. Such fact has been corroborated by the minor girls, their parents and relatives. As such, the intention or motive of guilt is to be assessed in the background of the facts and circumstances of the present case.

In *Moniram Hazarika v. State of Assam*, reported in (2004) 5 SCC 120, it has been held by the Hon'ble Supreme Court that the minor, in a case, if works out of the house of the guardian without noticing or alluring from the accused, the accused cannot be held guilty of the offence under Section 363 or, Section 366 of the IPC. Such contention of the Hon'ble Apex Court, in this judgment, was on the basis of an earlier judgment being *S. Varadarajan -vs- State of Madras* reported in AIR 1965 SC 942. Paragraphs 6, 7 and 8 of the said judgment of the Hon'ble Supreme Court is set out as follows:

“6. As stated above, the learned counsel for the appellant placed strong reliance on the judgment of this Court in Varadarajan case [AIR 1965 SC 942 : (1965) 2 Cri LJ 33] . The facts of that case show that the minor in that case left the house of the legal guardian as per her own

choice and not on the basis of any enticement or persuasion on the part of the accused. This is clear from the following observations of this Court in that case: (AIR p. 944, para 7)

“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 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.”

7. It is on the basis of the said finding that the minor in that case walked out of the house of her guardian without any inducement from the accused; this Court came to the conclusion that the accused in that case was not guilty of the offence. It is also worthwhile to notice what this Court said about the act of the accused in such cases which amounts to enticement which is found in para 10 of the said judgment and which reads thus: (AIR p. 945)

“10. It would, however, be sufficient if the prosecution establishes that though 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.”

(emphasis supplied)

8. It is clear from the above observations of this Court that if the accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping.”

Reliance is also required to be made to the judgment reported in (2022) 6 SCC 589 (*Mafat Lal & Anr. –vs- State of Rajasthan*). In paragraph 9 of the said judgment, the Hon'ble Supreme Court held as follows:

“9. Kidnapping would necessarily involve enticing or taking away any minor under eighteen years of age, if a female, for the offence under Section 363IPC. In the present case, the abductee had clearly stated that she was neither taken away nor induced and that she had left her home of her own free will.”

Having regard to the proposition as has been settled by the Hon'ble Supreme Court, I am of the view that, in the present case, there being no ill intention on the part of the appellant particularly with regard to the factum of enticing and/or alluring or for exploiting the minor girls, who have on their own will and for aiding their family financially, accompanied the appellant, as such, the purpose for which Section 363 of the IPC was charged against the appellant, is not satisfied.

Accordingly, I am of the opinion that the finding of guilt arrived at by the ld. Trial Court calls for interference.

Thus the Judgment and Order of conviction and sentence dated 30.1.2020 passed by the ld. Sessions Judge, Kalimpong in Sessions Case No. 01 of 2019 corresponding to Sessions Trial No. 04 of 2019 (arising out of Gorubathan P.S. Case No. 40 of 2014 dated 31.10.2014), is hereby set aside.

The appellant is acquitted of the charges. If the appellant is on bail, she may be discharged from the bail bonds.

Accordingly, CRA 8 of 2020 is allowed.

Pending application, if any, is also disposed of.

Lower Court Records be sent back to the ld. Court below

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)