

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 35 of 2010

Sonu Das @ Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Amarta Ghosh
Mr. Sanat Kumar Das
Mr. Sujan Chatterjee
Mr. Rohan Barishi

For the State : Mr. Avishek Sinha

Heard on : 10.10.2023, 08.01.2024, 19.01.2024,
02.02.2024, 19.02.2024, 05.03.2024,
12.06.2024

Judgment on : 19.09.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 12.11.2009 passed by the Learned Additional Sessions Judge, Fast Track Court – II, Baruipur, South 24 Parganas in Sessions Trial No. 10 (4) 2007/Sessions Case No. 22 (1) 2007, thereby convicting the appellants for the offence punishable under Section 363/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 5 years each and to pay a fine of Rs.5000/- each in default to suffer rigorous imprisonment for further 6 months each, furthermore the appellants were acquitted from the charge

under Section 366A/34, 372/34 of the Indian Penal Code. Two accused persons namely Juli @ Subha Das and Sanju Das @ Sanjoy Mondal were acquitted from the charges framed against them under Section 366A/34, 372/34 of the Indian Penal Code.

2. The prosecution case precisely stated one Sabina Khatun lodged a written complaint at Baruipur Police Station which was received on 01.02.2005 at about 12:30 hours and Baruipur Police Station Case No. 28 of 2005 dated 01.02.2005 under Sections 363/366/372 of the Indian Penal Code was instituted against the appellants and two others namely, Sanju Das @ Sanjoy Mondal and Juli @ Subha Das narrating the daughter of the complainant aged about 13 years was missing since 07.01.2005 and the complainant, lodged a missing diary being No. 1800 dated 17.01.2005. Through a secret information the complainant learnt that the appellants and Juli das, Sanju @ Sanjoy Mondal trespassed the daughter of the complainant and the second daughter of Bapi Das viz. Soma Das and her husband Hari Om Kumar of Uttar Pradesh came to his house and trespassed her daughter on behalf of the aforesaid persons and in reply they assured to return her. On 29.01.2005 the victim was at the police station. The complainant was informed by the police of the ill motive of the accused persons.
3. On completion of investigation charge-sheet was filed and charges were framed under Sections 363/34, 366A/34 and 372/34 of the Indian Penal Code against the appellants and others by the Learned Trial Court, to which they pleaded not guilty and claimed to be tried.

4. The prosecution cited 9 witnesses and exhibited certain documents.
5. The Learned Advocate for the appellants submitted that the FIR was dated 01.02.2005 being Baruipur P.S. Case No. 28 of 2005 instituted under Sections 363/366/372 of the Indian Penal Code, however, the said FIR did not mention the date on which the victim was recovered. The offence stated to have occurred on 07.01.2005 and the time of the same was not noted. The de-facto complainant did not endeavour to lodge the missing diary immediately after the victim went untraced. The complaint did not mention the reason for the delay to lodge the same. The age of the victim could not be proved in accordance with the provisions under Section 35 of the Indian Evidence Act.
6. The signature of any public servant to endorse probative and evidentiary value of the school register was absurd. Moreover, the school register was interpolated and manufactured for the sake of adducing evidence in the instant case. The prosecution did not produce any valid birth certificate and pray for ossification test. During the process of examination of the appellants under Section 313 of Code of Criminal Procedure, question with regard to admission register was not asked.
7. The victim being an adult left the society and custody of her house at her own will and could not have been claimed to be trespassed forcibly against her desire for achieving illegal goal, since the prosecution failed to cite any instance that the victim girl was subjected to or even comprehended with any illegal act for accomplishing ulterior motive, condemning and deprecating, the conviction should be set aside.

8. The Learned Advocate for the State submitted though the cause for delay to lodge the complaint was not specifically narrated in the complaint but the victim vividly described the incident of kidnapping and that she was told of her possibility to sing and dance at Uttar Pradesh by the appellant Sonu Das and her husband Hari Om which inferred the illegal motive to kidnap the victim. PW-4 and 5 being the neighbours tried to shield the appellants, belonging to the same village. Minor lapses on the part of the investigating agency cannot be fatal for the prosecution case. The victim being a minor was removed from her lawful guardianship for dubious intentions and illegal gratification as revealed by the victim to the police, since, she heard a conversation to sell her and the prosecution was able to prove its case and the appeal should be dismissed.

9. A circumspection of the prosecution witnesses revealed as follows:-

i. PW-1 deposed the victim being her daughter embroidered jari on clothes.

On 7th January, 2005 at 02:00 p.m. during her absence in the house being at the Baruipur Hospital the victim engaged in embroidery on the clothe went missing from their house as detected by PW-1 on her return. PW-1 searched for the victim in their locality, but in vain. On the next date of the incident, she was informed by the relatives and neighbours that her said daughter did not go to the houses of the relatives. One neighbour, Alok Roy told to have seen the victim to gossip with Kishor Das, Basanti Das, Juli Das, Sanju Das, Sonu Das. She submitted one missing diary at Baruipur P.S. Police arrested Basanti Das and Sonu Das and took them to the P.S. and one being asked, police came to know the

whereabouts her daughter and three days thereafter, the accused persons namely Sonu Das and Basanti Das brought the victim at Baruipur P.S. After recovery of the victim PW-1 was called by police of Baruipur P.S. and accordingly went to the said P.S. at 2 p.m. Two days after the recovery of the victim, she narrated the incident to have been by the accused persons and took her to Uttar Pradesh for illegal activities and to sell her. Thereafter, she lodged one written complaint at Baruipur P.S. scribed by Gulami Sardar with her LTI on it.

- ii. During her cross-examination PW-1 stated 2½ months after the incident the victim got married to Safikul and subsequently gave birth to a child. PW-1 did not know as to whether Sonu Das was married or not or as to whether any of the accused persons resided at Uttar Pradesh. She could not recollect how many days after submitting missing diary. She lodged written complaint 4 days after taking her daughter to Alipore Court.
- iii. PW-2 deposed to have scribed the complaint according to the instruction of Sabina Bibi marked as Exhibit No.1.
- iv. PW-3, the victim deposed on 7.1.2005, she was at her residence busy with setting jari on the clothes. On the date of incident, her mother was not at her residence and she went to their relative's house. Somu Das came to their house in absence of her mother and told her to accompany her. She was taken by Somu Das from her residence on 7.1.2005 and was kept in the house of Pinki at Mallickpur, Salepur for 3 days. After 3 days, she was taken to Sealdah. Thereafter, from Sealdah she was taken by train to another place unknown to her. After breakfast, she was taken

to Baruipur P.S. All the accused persons threatened her with dire consequences and she was tutored by them and according to the instruction of the accused persons she stated before police of Baruipur P.S. that she went along with the accused persons voluntarily and none of the accused persons kidnapped her. She was taken by her mother from the P.S. Then she was taken to Alipore Court by her mother.

- v. PW-3 further stated that at the time of making statement before the Learned Judicial Magistrate, Alipore she did put her signature on the said statement.
- vi. She did not state to her parents that accused Sonu Das visited their dwelling house in absence of her mother and requested her to accompany her for work. PW-3 did not state to the police that Sonu Das told her not to disclose anything to anyone regarding her visit to the residence of PW-3. PW-3 stated to the police at the time of interrogation that Sonu @ Sona and her husband Hari Om told her that after going to U.P., she can sing and dance. Police did not take her to any place to ascertain the facts. She had no personal knowledge as to whether police visited the residence of Pinki and any place of U.P., during the period of investigation of the case. Sonu was her best friend. Barring herself nobody knew the house of Pinki in U.P.
- vii. PW-4 and PW-5 were declared hostile by the prosecution.
- viii. PW-6 in his deposition stated that he was posted at Jaynagar P.S. as A.S.I. On 01.02.05, he was posted at Baruipur P.S. in the same capacity. On that day, he was the duty officer of Baruipur P.S., and he received

one written complaint from Sabina Bibi and on receipt of written complaint and as per direction of the then O.C. of Baruipur P.S., he started Baruipur P.S. Case No. 28/05 dated 01.02.05 under Sections 363/366/372 of I.P.C. The written complaint which was prepared by him in his own handwriting bearing his signature with date was marked as exhibit-1/2.

- ix. The column no. 14 of the formal F.I.R. was left blank. Due to his mistake, he did not take LTI or signature of the informant on column no. 14 of formal F.I.R. He had no independent knowledge regarding that case.
- x. The evidence of PW-7 was based on hearsay.
- xi. PW-8, the father of the victim reiterated the evidence of PW-1. He accompanied his wife to Baruipur P.S. and his wife lodged one written complaint to Baruipur P.S.
- xii. During his cross-examination PW-8 stated that his daughter was recovered three days after the arrest of the accused persons. He disclosed the incident to the neighbours but he could not recollect their names. He could not recollect the name of the minor boy from whom he heard the incident but he could identify him if he was available before him. He did not state the police that he heard the incident from minor body of their locality.
- xiii. PW-9 in his deposition stated that at present she was teacher-in-charge of G.S.F.P Vidyalaya, Baruipur. She had been working in G.S.F.P. Vidyalaya, Baruipur as teacher-in-charge from April, 2008. She came

before the Court after receiving summons and as per instructions of the Court she came alongwith an admission register for the year 1999-2000. It appeared from the admission register of the school for the year 1999-2000 that the victim D/o. Md. Abdul Latif Molla of Subdhipur, Baruipur, South 24-Parganas was admitted in their school in Class – XI on 12.5.99. Admission of the victim had been mentioned in serial no.8 of their school register for the year 1999-2000. From serial no.8 of the said register it appeared that the date of birth of the victim was on 12.11.91. Xerox copy of the said register which was marked as Ext.4 after tallying the same with the original register. The school certificate of the victim D/o. Abdul Latif Molla of Subdhipur, Baruipur, regarding her date of birth mentioned in their school register, was issued by her in her own hand writing, bearing her signature and seal was marked as Ext.5.

- xiv. During cross-examination PW-9 stated it was a fact that in serial no.8 of Ext.4 the date and month of the victim had been over written apart from the year. Barring serial no.8 the date of Anjali Naskar noted in serial no.3 had been over written. It was a fact that column of age in serial had been over written. There was no direction given by the Court to come with certificate. She did not mention the date below her signature on the certificate as the date had been mentioned in the upper portion of the certificate and the date mentioned in the certificate had been over written. The register was closed for the year 1999-2000 though many pages of the said register had been kept blank. She could not state who

prepared Ext.4. The column signature of guardian in serial no.8 as well as other serials had been kept blank.

10. Right from her alleged departure at the instance of the appellant to handing her over at Baruipur Police Station nowhere it was divulged by the victim girl as to whether she was compelled to do any heinous act or any other alleged activities. Moreover, before police she had stated that out of her own accord and volition she accompanied the appellants although subsequently she retracted from her earlier stance and reviled an inconsistent version before the police. Such deviations are untrustworthy and discredited.
11. Since the victim girl volunteered before the police in the presence of her parents that no force was applied by the appellants at the time of her departure, the victim being compelled under duress became nugatory. The victim girl did not narrate any prior incident of inducement or enticement by the appellants to entrap her consequently.
12. From the facts and circumstances of the instant case it could safely be presumed that at the time of occurrence of the alleged incident the victim had already attained the age of discretion and she willfully accompanied the appellants and as such the allegation of taking away of the victim girl from the lawful custody of the parents was quite absurd and improbable.
13. The delay in lodging the complaint was unexplained as the alleged date of occurrence was on 07.01.2005 and the written complaint was lodged only on 01.02.2005.
14. The missing diary being No. 1800 dated 17.01.2005 was not exhibited by the prosecution during trial.

15. The prosecution failed to examine Aloka Roy/Pinki though she was a cited witness in the charge-sheet.
16. The age of the victim girl had not been proved since PW-9 appeared before the Trial Court with original register as well as the attested copy of the school admission register wherefrom the date and month recorded in Exhibit-4 was found to be over-written and the signature of the guardian of the victim was kept blank along with interpolation in the school admission register, without any signature to validate the same. The prosecution failed to prove the age of the victim girl and any circumstance of enticement as well as common intention, premeditated and pre-motivated.
17. Ossification test was not done to verify the age of the victim girl in case of divergent views concerning the age of the victim.
18. The Hon'ble Supreme Court in the case of ***Ishwari Lal Yadav v. State of Chhattisgarh***¹ held the following:-

“23. To prove the charge of kidnapping and conspiracy, there is no acceptable evidence on record. In absence of any corroborative evidence for kidnapping of the deceased boy by Hemant Sahu and another, the evidence on record cannot be accepted. Even to prove the common intention to attract the provision under Section 34 IPC, it requires a pre-arranged plan and prior concert. Therefore, there must be prior meeting of minds. The common intention must exist prior to the commission of the act in a point of time. The burden lies on the prosecution to prove that participation of more than one person for commission of criminal act was done in furtherance of common intention....”

¹(2019) 10 SCC 423

19. In **Krishan Kumar v. State of Haryana**² the Hon'ble Supreme Court observed the following:-

“15. *It is in the aforesaid context that the specific charges framed /against the appellants, as extracted above, would assume relevance. Evidently, the very first charge framed against the appellants, as extracted hereinbefore, was under Section 364 read with Section 34, IPC. The phrase ‘common intention’ used in Section 34, IPC implies a pre-arranged plan and acting in concert to the plan. In the decision in Badruddin v. State of UP³ this Court held thus:—*

“Though establishing common intention is a difficult task for the prosecution, yet, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the assailants to commit the offence, be it pre-arranged or on the spur of the moment but it must necessarily be before the commission of the crime.”

16. *A bare perusal of Section 364, IPC would reveal that to establish an offence under this Section it must be proved that the person charged with the offence had the intention at the time of kidnapping or abduction to murder or to dispose of as to be put in danger of being murdered. (See the decision in Gopal v. State of Tamil Nadu)⁴.*

17. *We have referred to the first charge framed against the appellants under Section 364 read with Section 34, IPC only to indicate that the case of the prosecution, going by the first charge, was that the appellants in furtherance of their common intention kidnapped Devinder to commit his murder. In the contextual situation it is apposite to refer to the decision of a Division Bench of High Court of Delhi in State v. Sushil Sharma⁵. It was held therein thus:—*

“It is well settled that in criminal cases there is no room for conjectures and surmises. The prosecution is supposed to establish its case as it put forth by it and if the case is disbelieved on any aspect by the Court then the Court cannot make out a new case on its own for the prosecution.”

20. The Hon’ble Supreme Court held the following in **Thakorlal D. Vadgama v. State of Gujarat**³:-

“10. The legal position with respect to an offence under Section 366 IPC is not in doubt, in State of Haryana v. Rajaram [(1973) 1 SCC 544 : 1973 SCC (Cri) 428] this Court considered the meaning and scope of Section 361 IPC it was said there:

“The object of this section seems as much to protect the minor children from being seduced for improper purpose as to protect the rights and privileges to guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words ‘takes or entices any minor ... out of the keeping of the lawful guardian of such minor’ in Section 361, are significant. The use of the word ‘keeping’ in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud, persuasion by the

³(1973) 2 SCC 413

accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section."

In the case cited reference has been made to some English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force of a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducements by previous promise or persuasion was held in some English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the same seems to us to be the position under our law. The expression used in Section 361 IPC is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurements by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361 IPC are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence

as defined in Section 361 IPC. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating or encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case."

21. The following was observed by the Hon'ble Supreme Court in the case of **S.**

***Varadarajan v. State of Madras*⁴:-**

"9. 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 circumstances can the two be regarded as meaning the same thing for the purposes of Section 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

⁴(1965) 1 SCR 243

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 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. 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 fulfilment 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".*

22. The complaint revealed the victim to have returned on 29th January, 2005 and the complaint to have been lodged on 02.02.2005, the delay to lodge the same was not explained. Moreover, the prosecution did not exhibit the GDE number of the missing diary lodged on 17.01.2005. The victim admitted the appellant Sonu Das to be her best friend and knowingly accompanied her without narrating any threat, coercion or compulsion inflicted on her.

23. She was seen to gossip with the accused persons which fortified her leaving the home voluntarily and not forcibly. She was recovered from the police station on 29.01.2005 and subsequently, the complaint was filed on 02.02.2005. The investigating agency did not take any steps to trace out the points and junctions of journey of the victim from place to place till Uttar

Pradesh. The victim stated to have exclusively known the house of Pinki to have sheltered her and the Investigating Officer did not trace her identity as well as her house to prove the veracity such statement.

24. The victim did not relate to have been in captivity or deprivation of any kind to have precluded her to raise alarm and/or defend herself. The victim as well as appellants arrived at the police station and such recovery process had not been described with regard to its mode and manner which improbablized the possibility of kidnapping. Moreover, on the basis of the interpolated admission register devoid of valid birth certificate, the age of the victim to be a minor could not be proved.

25. In view of the above discussions, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.

26. Accordingly, the instant criminal appeal being CRA 35 of 2010 is disposed of.

27. There is no order as to costs.

28. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

29. 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.)