

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 149 of 2004

**Buddhu Momin
-Vs-
The State of West Bengal**

For the Appellant : Mr. Rana Mukhopadhyay

For the State : Ms. Antarikhya Basu

Heard on : 26.09.2023, 06.12.2023

Judgment on : 12.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction dated 07.02.2004 passed by the Learned Additional Sessions Judge, 3rd Fast Track Court, Malda in Sessions Trial No. 1(7)/2003 arising out of Sessions Case No. 186/2001 and sentenced the appellant to suffer rigorous imprisonment for 1 year along with a fine of Rs. 500/- in default to suffer simple imprisonment for 3 months for the offence punishable under Section 363 of the Indian Penal Code and to suffer rigorous imprisonment for 3 years with a fine of Rs. 1000/- in default to suffer simple imprisonment for six months for the offence punishable under Section 366 of the Indian Penal Code.

2. The prosecution case in brief was that on 30.01.99 the minor daughter of the de-facto complainant, the victim girl aged about 14 years was kidnapped by the appellant Buddhu Momin on her way to school with the help of Fekna Momin, Kurban Momin and Kaila Momin who were closely related to Buddhu Momin. On 30.01.99 the de-facto complainant diarised the entire incident with English Bazar Police Station. On 31.01.99 the villagers recovered his minor daughter from the house of Buddhu Momin and handed over to him. The de-facto complainant informed the matter to English Bazar Police Station on 01.02.99 and requested him to take action against the accused persons. On 03.02.99 a petition of complaint was also filed by the victim girl but in vain. On 10.03.99 the accused persons being armed with deadly weapon by force tried to take away his daughter from his house but they failed to do so as they were resisted by the local people. On 12.03.99 by G.D. Entry No. 784 the de-facto complainant narrated the entire facts to the Officer-in-Charge, English Bazar Police Station and thereafter he lodged a complaint with the Officer-in-Charge, English Bazar Police Station on 30.03.99.
3. Based on said complaint, English Bazar Police Station Case No. 146/99 dated 31.03.1999 under Sections 363/366/34 of the Indian Penal Code was initiated against Buddhu Momin, the present appellant and three others and investigation ensued.

4. After completion of investigation, charge-sheet was submitted under Section 363/366/34 of the Indian Penal Code against the appellant Buddhu Momin along with Fekna Momin, Kurban Momin and Kaila Momin.
5. Charges under Sections 363/34 and Sections 366/34 of the Indian Penal Code was framed against the appellant and three others to which they pleaded not guilty and claimed to be tried.
6. At the trial 11 witnesses were examined on behalf of the prosecution and several documents were exhibited.
7. Learned Advocate for the appellant submitted that the age of the victim could not be proved to be a minor. The victim had eloped with the appellant at her own will and volition and subsequently got married to the victim. The family members of the victim was against such marriage and they forced the victim to sever such marital relationship and compelled the victim to adduce false evidence to implicate the appellant. The ingredients to constitute the offence under Section 363 and 366 of the Indian Penal Code were not established and the appellant should be acquitted.
8. The Learned Advocate for the State submitted that the victim affirmed her age to be 14 years when she was kidnapped by the appellant. It was further submitted that the minor's consent was not tenable under Section 90 of the Indian Penal Code.
9. The Learned Advocate for the State further submitted the specifications under Section 94 of the Juvenile Justice Act in order to prove age of a minor. The evidence of PW-8 relied upon to be independent witness who had gone to

the house of the appellant to rescue the victim. The Learned Advocate for the State further relied on the presumption with regard to the age of the victim as calculated by the Learned Trial Judge in the impugned judgment in the following manner:-

“Each and everywhere in the deposition Jhumi has stated her age as 14 years. Her mother and father are also stated that her age was 14 years at the time of the incident. The certificate by which she was admitted to Bartitari High School by a transfer certificate from Monoharpur Balika Bidyalaya her date of birth is shown as 1.1.85 which is also recorded in the admission register of the school where she was admitted in class six. It is found that the certificate was received from Rejaul Karim who is the elder brother of victim Jhumi Yasmin.

If we calculate the age of the victim as on 30.1.99 on the date of the incident from her date of birth 1.85 it will be 14 years 1 month. The I.O. has done lady a mistake by not making any arrangement for the oscification of the victim girl to ascertain her real age.

But I am not unmindful to consider the certificate for which the defence relies the age of the victim girl i.e. Exbt. ‘A’ marriage certificate of Jhumi Yasmin with one Masidur Rahaman held on 15.11.2000 where the age of Jhumi Yasmin is shown 19 years. If we calculate the age from the age of Jhumi Yasmin from this document her under age will be 17yrs. 1 month which falls under the minor age group to consider a case of kidnapping u/s 361 I.P.C. Moreover, it is found that Exbt.-6 the admission register when Jhumi was admitted on 13.5.98 and the transfer certificate from Monoharpara Nebedita Balika Bidyalaya was taken on 28.4.1998 so that her date of birth is 1.1.85. Therefore, it may be preseumed Jhumi was not admitted to the school on 13.5.98 taking a transfer certificate on 28.4.98 Exbt-6 & 5 (a) assuming that it will be

helpful to calculate the age of the victim as minor in any case which will occur in future for the offence punishable u/s 363 and 366 I.P.C.”

10. The Learned Advocate for the State further relied on the opinion of the Learned Trial Court with regard to the veracity of the offence committed by the appellant in the following manner:-

“Now we find from the evidence of the victim girl Jhumi Yasmin, her parents and brother that Buddhu Momin by false story induced Jhumi or enticed her to go with him at Malda thereafter at Bhakharpur stating that her elder brother was seriously ill and she was taken at first at Malda and then Bakharpur where by threatening with murder Buddhu managed to obtain signature on the marriage form of Jhumi Yasmin which she has stated severally to the other pw's when she came back to her house from the house of Buddhu Momin. It is a fact that Jhumi was recovered from the house of Buddhu Momin on the next day of the date of incident of this case i.e. on the date when she was taken away or her whereabouts were not found. She has admitted that she gave statement to the Judicial Magistrate, Malda which was recorded u/s 164 Cr.P.C. On the statement she has signed admitting that the statement recorded, was according to her sayings and admitting the contents of the statements she signed on it. Her signature on the statement are marked as Exbts- 8/1 and 8/2. In such statement she has stated the facts which she has deposed before the court.

Though Ld. Magistrate, who was not examined due to his absence for several days but the statement recorded are admitted by the victim girl herself, Jhumi Yasmin. Therefore we cannot ignore the statement of V.G. recorded u/s 164 Cr. P.C. at all”.

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

- i. PW-1 Badal Sk. was the brother-in-law of the de-facto complainant in his evidence had stated that on 30th January, 1999 the victim girl did

not return home. At that time she was aged about 14 years. He stated that on the same evening mother of the victim girl informed him over telephone regarding the missing of her. Pursuant to the telephone call he reached there and made a search for the victim girl at different places but with no result. He stated that on the following day accused along the victim girl uncle had been to the house of Buddhu Momin and at the intervention of the villagers, they brought back the victim girl in her own house.

- ii. PW-2 Rabeya Begum was the mother of the victim girl. She in her evidence had stated that on 30th January, 1999 as her daughter did not return home from school they tried to find out the where about her daughter but with no result. She stated that on the following day she could come to know that Buddhu Momin had taken away her daughter and that he had married her. She had stated that they were not agreed to give such marriage. On the following day at the intervention of the villagers the victim girl was brought back to her father's house. During cross-examination she failed to state the date of birth of the victim girl.
- iii. PW-3 Abdul Rajjak was the Marriage Registrar who during his cross-examination had stated that both victim girl and accused signed in his presence and that victim girl signed on her won will by declaring that she was aged about 18 years. She further stated that maternal uncle of the victim girl was present at the time of the marriage.

- iv. PW-4 was Shyamal Prasad Sarkar, the then Officer-in-Charge of English Bazar Police Station, Malda who received the F.I.R. and started the case. The formal F.I.R. was written by him but thereafter he had endorsed the case to a Lady Sub-Inspector.
- v. PW-5, Jamaluddin father of the victim girl and the de-facto complainant of the case in his evidence had stated that the victim girl eloped from the school on 30.01.99 on which date his daughter was 14 years old. He stated that on that day at the time of returning from the school Buddhu Momin kidnapped her for the purpose of marrying her Fekna Momin, Kaila Momin and Kurban Momin helped the accused. He could come to know the entire incident from his daughter right from the beginning till her recovery. He further stated that over the issue they have made several correspondences with the police right from the date of missing of his daughter i.e. from 30.01.99 to 30.03.99. This witness for the first time had stated in court that Buddhu took her daughter at first to Malda Sadar Hospital and then to the Kabiraj at Bakharpur stating that the elder brother of the victim girl had falling ill however this has not been mentioned in the F.I.R. This witness did not mention in the F.I.R. that by force and threatening his daughter. Buddhu obtained the signature of the victim girl on the marriage paper.
- vi. PW-6, Suresh Chandra Mandal, Teacher-in-Charge of Bhartitari Junior High School proved the admission register of the Victim Girl of their school which was marked as exhibit-6. He issued another certificate

showing the date of birth of the victim girl which was marked as exhibit -7 on being proved by him.

- vii. PW-7, Md. Rejaul Karim the elder brother of the victim girl, in his evidence he had stated that the incident took place on 30.01.99 and at that time the victim girl was 15 years old. Since the victim girl did not return home from school on 30.01.99 he lodged a missing diary at English Bazar Police Station. On the following day on coming to know that the victim girl was present in the house of Buddhu Momin. He and his maternal uncle went there to bring the victim girl but they failed. He stated that thereafter with the help of local people they recovered the victim girl. During cross-examination he stated that he cannot say whether he told the police that he along with his maternal uncle went to the house of Buddhu and asked to return his sister but they refused.
- viii. PW-8, Abdul Wahed he in his deposition had stated that when Rejaul came to him and asked to accompany him to find out the victim girl he accompanied Rejaul and on being failed to trace out the victim girl they lodged a missing diary at English Bazar Police Station. On the following day on coming to know that the victim girl was present in the house of Buddhu Momin they had been to the residence of Buddhu and with the help of local people they recovered the victim girl.
- ix. PW-9, Sri Ramashis Goswami, the private teacher of the victim girl, on 30.01.99 he went to coach some student near the house of the victim girl, where he heard from the mother of the victim girl that the victim

girl was missing. On the next day he heard that Buddhu took her from school. During cross-examination he had stated that he used to teach the victim girl for one year starting from her half yearly examination of class V.

- x. PW-10 was the victim girl who in her evidence had stated that the incident took place about 4 years back. She stated that on that day she was late in school and at about 1 p.m. Buddhu called her and told her that her elder brother was at Sadar Hospital and that he was sent by her mother to take her to Sadar Hospital. She stated that at that time she was a student of class V. Buddhu at first took her to Malda by a Maxi Taxi and at Malda Buddhu told her that her brother was at Bakharpur. Thereafter Buddhu by showing fear of killing her, forced her to sign on the marriage form. On the same day she was taken to the house of a man and on the following day Buddhu took her to Amriti where from he was taken back to her house by her elder brother and maternal uncle.
- xi. PW-11 is Atreyi Sen who in her evidence had stated that after receiving the charge of investigation she visited the place of occurrence and examined the available witnesses, recorded their statements, seized some document under proper seizure list and after completion of investigation submitted the charge-sheet.

12. In the case of **P. Yuvaprakash v. State**¹, the following was held by the Hon'ble Supreme Court:-

“13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

14. *Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered.*

¹ 2023 SCC OnLine SC 846

Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. *In a recent decision, in Rishipal Singh Solanki v. State of Uttar Pradesh,³ this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:*

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination

was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

13. The Hon’ble Supreme Court held the following in **Mafat Lal v. State of Rajasthan**²:-

“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.

10. Section 366IPC 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 Appellant 2 the abductee has clearly stated that she was in love with Appellant 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 1 on her own free will without any influence being exercised by Appellant 1.”

14. In **Kavita Chandrakant Lakhani v. State of Maharashtra**³, the Hon’ble Supreme Court held the following:-

“16. In order to constitute the offence of “abduction”, a person must be carried off illegally by force or deception, that is, to compel a person by force or deceitful means to induce to go from one place to another. The intention of the accused is the basis and the gravamen of an offence under this section. The volition, the intention and the conduct of the accused determine the offence; they can only bear upon the intent with which the accused kidnapped or abducted the woman, and the intent of the accused is the vital question for

² (2022) 6 SCC 589

³ (2018) 6 SCC 664

determination in each case. Once the necessary intent of the accused is established, the offence is complete, whether or not the accused succeeded in effecting his purpose, and whether or not the woman consented to the marriage or the illicit intercourse.

17. Apart from this, to constitute an offence under Section 366 IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal section. So far as charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person 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. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the court cannot hold the accused guilty and punish him under Section 366 IPC.”

15. The Hon’ble Supreme Court held the following in **Kuldeep K. Mahato v.**

State of Bihar⁴:-

“9. As far as conviction under Section 366 is concerned, we find that the evidence of the prosecutrix in this behalf is not conclusive. Her evidence does not indicate that the appellant had kidnapped the prosecutrix with the intention to marry her against her will or in

⁴ (1998) 6 SCC 420

order that she may be forced to illicit intercourse. These two vital ingredients for upholding conviction under Section 366 are not proved and, therefore, the conviction of the appellant under Section 366 cannot be sustained.”

16. The de facto complainant stated that on 30.01.1999 the victim was kidnapped from school with intention of marrying her. Thereafter on 01.02.1999 he informed the police station that his minor daughter had been kidnapped and requested to take steps against the accused persons. Subsequently on 03.02.1999 he lodged a written complaint to the police station. However, the police did not pay any heed to it. Thereafter on 10.03.1999 the accused person had appeared to his house armed with dangerous weapons and tried to take away his daughter forcibly. Due to the presence of the local people, the de facto complainant and his daughter could not be attacked. Subsequently, the incident was reported to the police station on 12.03.1999 vide diary no. 784.

17. In the instant case, the charge was framed under Section 363 and 366 of the Indian Penal Code. However, the incident alleged to have taken place did not mention that the victim was kidnapped from the lawful guardianship on 10.03.1999. The age of the victim was not proved in terms of the statutory mandate to be a minor. The F.I.R. reported the occurrence of offence to be on 31.03.1999. On that particular day, the victim was in the custody of the de facto complainant. The evidence adduced with regard to an incident of kidnapping nearly two months prior to the complaint being lodged has been emphasized and investigated upon. It further appeared from the evidence of

PW-2 the mother of the victim that the victim had eloped with the appellant and got married to him to their disagreement. She further stated that PW-1 was not at home and they thought to take action on the arrival of her husband. PW-2 could not state the date of birth of the victim. PW-3 asserted the marriage of the victim and the appellant. He further stated *“Buddhu Mamin and Jhuma Yasmin signed before me. Jhuma at her own will signed the marriage register. She declared her age, 18 years. On the side of Jhumi Yasmin, her maternal uncle was present. My office is at Manikchalk where the said marriage was solemnized”*. PW-5 the father of the victim stated the victim to have eloped from school on 30.01.1999. Thereafter stated that the victim was kidnapped for the purpose of marriage. At the relevant time the victim was 14 years old. It was further stated that the victim was kidnapped at the pretext of her elder brother being admitted at Malda Sadar Hospital. Thereafter she was taken to Bukurpur and threatened to be killed on refusal to marry the appellant. Being frightened the victim signed the marriage paper. In the meantime, the victim was rescued and thereafter on 10.03.1999 while they were stationed at the bus stop at Amriti for going to Malda, the accused person armed with lathi and other weapons threatened them. This particular episode was not mentioned in the written complaint. PW-5 admitted to have a declaratory suit being 67 of 99 who declared that there was no marriage at all between the victim and the appellant. PW-6 mentioned of a transfer certificate from Mohonpara Nivedita Baliva Vidyalaya. The Xerox copy of the said certificate was certified by him. The

admission register was produced before the Court which mentioned the date of birth of the victim to be 13.05.1998 based on the transfer certificate. Such a document cannot be relied upon to determine the age of the victim.

18. The prosecution did not take further steps to prove the age of the victim.

There is a dichotomy with regard to the incident of offence to have been investigated upon. The complaint lodged on 30.03.1999 after a delay of two months from the date of alleged incident of kidnapping cannot be sustained through the complaint dated 31.03.1999 where the attempt of assault on the de facto complainant had been alleged. Intermittently the victim was in the custody of the lawful guardianship of the parents. The charge framed on the incident alleged to have been taken place on 10.03.1999 is not sustainable. Moreover, there had been a delay of 21 days to report such incident which took place on 10.03.1999. The entire version of the prosecution witnesses including the victim and her parents appeared to be bogus, baseless and should have been dismissed at the inception.

19. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.

20. Accordingly, the criminal appeal being CRA 149 of 2004 stands disposed of.

21. There is no order as to costs.

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.

(Ananya Bandyopadhyay, J.)