

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 229 of 2004

**Manoranjan Pal
-Vs-
The State of West Bengal**

For the Appellant : Ms. Monami Mukherjee

For the State : Mr. Avishek Sinha

Heard on : 13.09.2023, 29.11.2023, 08.02.2024,
25.04.2024

Judgment on : 22.05.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 09.03.2004 passed by the Learned Additional District & Sessions Judge, 1st Fast Track Court, Hooghly in Sessions Trial Case No. 8/2003 arising out of Sessions Trial No. 59/96 convicting the appellant under Sections 366/109 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1000/- in default to suffer further rigorous imprisonment for 6 months.
2. The prosecution case emanated on the basis of a complaint lodged one Nilima Chatterjee, inter alia stating that on March 26, 1991 at around 11:00 a.m. - 11:30 a.m., the eldest daughter of the complainant, a student of class - VIII of Siksha Mandir Balika Vidyalaya went to her friend's house at

Kamarpara. However, the victim girl (PW-6) did not return to her house which made the complainant (PW-1) worried and went to Chinsurah Police Station for lodging a verbal complaint. Subsequently, the complainant found a piece of paper kept inside the books of the victim lady and it was written that the principle accused namely Tusthu Bera wishes to abscond with the victim lady (PW-6). On March 27, 1991, the complainant went out to search for the victim lady in the house of the principle accused and there they came to know that the victim girl was taken away by the accused person to give her marriage with the principle accused. Meanwhile, the victim girl was kept secretly at the house of the principle accused. Thereafter, the father of the victim girl (PW-3) went to the house of the elder sister of the principle accused (acquitted) to get back the victim lady but she refused to return back the victim girl and informed about the ensuing marriage between the victim girl and the principle accused.

3. Based on the aforesaid complaint, Chinsurah Police Station Case No. 107 dated 02.05.1991 under Sections 363/366/120B/34 of the Indian Penal Code was instituted.
4. On completion of the investigation, the charge-sheet was filed subsequent to which charges were framed and the appellant pleaded not guilty and claimed to tried.
5. The prosecution, in order to prove its case, cited 8 witnesses and exhibited certain documents and the defence examined none.
6. Learned Advocate for the appellant submitted that –

- i. The charge was framed under Section Sections 363 and 366 of the Indian Penal Code and the appellant was convicted under Sections 366 and 109 of the Indian Penal Code for abetment of the offence, without the involvement of the appellant in the alleged offence.
- ii. In the petition of complaint the de-facto complainant did not state that her daughter was last seen with Tusthu Bera in a Rickshaw and the complaint was written by the lawyer of the de-facto complainant.
- iii. The Investigating Officer did not prepare any Sketch Map to state the place of occurrence and whether at all the victim girl was taken away by the principle accused from that spot or not cannot be ascertained.
- iv. The Investigating Officer was never examined by the prosecution which created a material lacuna raising suspicion regarding the process of investigation in the prosecution case. The appellant was deprived of cross-examining him relating to the reliability of the alleged eye-witness i.e., the sister- in-law of the complainant (PW-2) who had allegedly last seen the victim girl and the principle accused together at Tolaphatak at Chinsurah.

The Hon'ble Supreme Court in the case of Munna Lal V. State of Uttar Pradesh, reported in (2023) SCC OnLine SC 80, observed in Paragraphs 38 and 39-

“Statement of PW-3 under section 161, Cr. P.C. was recorded nearly 24 days after the incident. Since the Investigating Officer did not enter the witness box, the appellants did not have the occasion to cross-examine him and thereby elicit the reason

for such delay. Consequently, the delay in recording the statement of PW-3 in course of investigation is not referred to and, therefore, remains unjustified. The possibility of PW-3, being fixed up as an eye-witness later during the process of investigation, cannot be totally ruled out.”

“It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the Investigating Officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non-examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.”

- v. All the accused persons including the appellant were charged under Sections 363/366 of the Indian Penal Code but they were not charged under Section 109 of the Indian Penal Code. However, the appellant was convicted under Sections 366/109 of the Indian Penal Code which was defective charge. Thus, the appellant had been seriously prejudiced for non-framing of charge under Section 109 of the Indian Penal Code as the appellant could not defend himself against such charge.

The Hon'ble Supreme Court in the case of *Sou. Vijaya v. State of Maharashtra*, (2003) 8 SCC 296 observed the following in Paragraph 10:

“Though in a given case defective charge does not vitiate trial in terms of Section 464 of the Criminal Procedure Code, 1973 (for short “the Code”), where the omission is vital and even the substance of accusations is totally different from what is sought to be established by the prosecution, and there is no evidence on record to attribute knowledge of commission of the offence by the other accused that can be an additional factor for acquitting the accused.”

- vi. As per written complaint: *“She (victim girl) went out to go to her friend's house at Kamarpara on 26/03/91 around 11-11:30 A.M. But, she did not return to her parents which made them worried”.*

As per evidence of PW1 (De-facto Complainant/Mother of Victim Girl): *“On 26/03/1991 at about 11:30 AM, while my said daughter was appearing in the exam of Class VIII in Siksha Mandir Balika Vidyalaya, Kamarpara, Chinsurah, Tusthu Bera took my daughter inside a rickshaw. I was waiting for my said daughter after her final examination was over. My said daughter did not return till 11:30 AM, my “Jaa” namely Sandhya Chatterjee while returning from school leaving her son in a different school found my said daughter along with Tusthu Bera.”*

As per evidence of PW-2 (Aunt of Victim Girl): *“On 26/03/1991, when I was returning after dropping my son in school, I found Tusthu and Mithu are travelling in one rickshaw. When Mithu's mother Nilima Chatterjee was searching for her daughter, I intimated the same to Nilima Chatterjee.”*

As per evidence of PW-6 (Victim Girl): *“On the previous day of starting of my examination of Class VIII, I went to shop of Shyamal requesting him to*

send the brequat coal for fuel. While I was returning from shop of Shyamal, Tusthu Bera restrains me on the way and asked me to accompany him as my father became ill at the said "Balikhad". Hearing this I accompanied him and he started for said "Balikhad".

There were serious discrepancies as regard to the place of occurrence. The written complaint lodged by PW-1, PW-1's evidence before the Court and PW-6's evidence before the Court does not corroborate each other at all. The statements of the witnesses were in complete contradiction with regard to the place of incident and therefore, the version of the prosecution witnesses does not inspire confidence. Also, no Sketch Map has been prepared by the Investigating Officer to show the actual place and location of incident where the victim girl was allegedly last seen with Tusthu Bera and thereafter, taken away by Tusthu Bera and also sketch map was more than a necessity in the present case as all the witnesses differed from each other with regard to the place of incident. In absence of the sketch map, the prosecution has not been able to prove the case beyond reasonable doubt with regard to the actual place of occurrence.

- vii. All the prosecution witnesses were interested and related witnesses. No independent witnesses were examined by the prosecution.
- viii. As per the written complaint: *"Her mother found a little piece of paper kept inside her books. There the principle accused Tusthu Bera is unveiling his wish to abscond with the daughter of the complainant."*

As per evidence of PW-1, mother of victim girl: *"In my written complaint I state that search on the books of Mithu I came across a letter of Tusthu Bera asking my daughter to meet him and so Mithu met Tusthu while he was waiting at Tolaphatak more. The said letter was written by Tusthu Bera."*

As per the evidence of PW-6, the victim girl: *"No letter written by Tusthu Bera was sent to me on the day of occurrence, asking me to come to Tolaphatak more."*

PW-6, being the victim girl is the best witness to say and as such the above statement by the victim girl clearly shows that no such letter was ever sent by the principle accused to the victim girl and thereby such statement is totally contradictory to the statement of PW-1, who is the complainant and mother of the victim girl. Thus, there remains discrepancy regarding the alleged letter written by the principle accused.

- ix. The petition of complaint was filed only on April 02, 1991 and the date of incident was on March 26, 1991. Thus, the complaint was filed 8 days after the date of incident without any explanation for such delay. The same was treated as F.I.R. on May 02, 1991.
- x. PW-1 in her cross-examination by defence that in the first part of the year 1991 (Date of Incident: 26/03/1991) there was a dispute as regards the financial matter between Tusthu Bera and PW-3, the father of the victim girl.
- xi. PW-3 has specifically stated in his examination-in-chief that there was a strained relation between the father of the victim girl and Tusthu Bera, the principle accused over Balikhad business at Rasulpur. Therefore, false

implication of the principle accused along with the appellant by PW-1 and PW-3 cannot be ruled out completely.

- xii. The Hon'ble Supreme Court in the case of Kavita Chandrakant Lakhani v. State of Maharashtra, (2018) 6 SCC 664 observed in Paragraph 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.”

- xiii. As per evidence of PW-6, the victim girl: *“I did not make any complain to the local persons when I realised that instead of Balikhad, I had been taken*

to a different place. I could not shout while vermilion was put on my forehead. I visited different places from there by bus. I did not take help from the co-passengers from bus. I stated before the Investigating Officer that I was availing express bus. I first went to Champadanga, then to Rasalpur and then Neota. I could not disclose to the local people that Tusthu abducted me. I stated before the Learned Magistrate that Tusthu introduced me as his wife and I did not protest while staying at different places.” The above deposition of the victim girl shows that she was neither compelled nor induced to go from one place to another and that she was a consenting party to the alleged act. It is also surprising that the victim girl did not shout or scream while travelling with the principle accused namely Tusthu Bera or disclose it to anyone else. The victim girl also remained in the company of the principle accused for 4 months before she was recovered on July 22, 1991, and she did not complain of any criminal act on the part of the principle accused or the appellant.

xiv. As per evidence of PW-1 (De-facto Complainant/Mother of Victim Girl):

“Kumari Mithu Chatterjee is my eldest daughter, who was born on 5th April, 1977.”

xv. As per evidence of PW-3 (Father of Victim Girl): *“The original birth certificate of my daughter Mithu issued by Hooghly Chinsurah Municipality which was kept in my jimma has been produced in the court today. This is the said certificate of birth (Exbt.- 3) issued on October 09, 1991.”*

xvi. As per evidence of PW-7 (Conducted Ossification Test on the Victim Girl):

“From radiological finding I opined that Mithu Chatterjee has completed 16

years of age and is under 16½ years of old on the day of X-Ray examination i.e., 27/09/1991." PW-1, mother of victim girl stated victim girl's age to be 14 years, PW-3, father of victim girl stated that the Birth Certificate was issued only on October 09, 1991 which is 7 months after the date of incident. So, there is a high probability that the document (Birth Certificate) could be a manufactured or tailored one. With regard to the evidence of PW-7, doctor who conducted ossification test on the victim girl to determine her age, stated that she has completed 16 years of age. Now applying the margin of error principal, if a margin of plus 3 years be applied then it can be emphatically stated that the victim lady was nearly 19 years of age. Therefore, the benefit of the aforesaid doubt, naturally must go in favour of the accused.

xvii. As per evidence of PW-1: *"No marriage according to Hindu rites and customs was held between Mithu and Tusthu Bera. There was registered marriage between them I learnt."*

xviii. As per evidence of PW-3: *"Previously, I was not aware about the marriage of Mithu with Tusthu Bera but subsequently I came to know that their marriage has been registered before the Marriage Registrar."* However, PW-6, the victim girl deposed totally different to that of the other prosecution witnesses and thereby the versions of the prosecution witnesses does not inspire confidence at all. It also casts a grave doubt on the genuineness of the prosecution case as to whether there was a social marriage or registered marriage between the victim girl and Tusthu Bera and in case

there was a registered marriage then the age of victim girl was above 18 years of age.

- xix. As per the evidence of PW-8, the Medical officer who examined the victim girl, stated in his examination-in-chief that hymen of the victim girl was ruptured. He further stated in his cross-examination that hymen may be ruptured due to several reasons such as riding a bicycle, horse or performing sports, falling on a projected substance as well as slip in certain cases, etc. He failed to mention in his report as to how and by whom the victim girl was raped. He also did not mention as to whether there was any injury on the inner side of thigh. He found gait of the victim girl to be normal. He did not find any injury either on the private parts or on other body parts of the victim.

This goes to show that the victim girl had consensual sex and was not forced to have sexual intercourse with the principle accused namely Tusthu Bera, which is an essential criteria to constitute an offence under Section 366 of the Indian Penal Code. Also, the exact reason for rupture of hymen was not stated by the doctor.

- xx. The victim girl was recovered from the house of the principle accused namely Tusthu Bera and not from the house of the present appellant. The victim girl was recovered by the police personnel on July 22, 1991 which is after 4 months from the alleged date of incident.

The Hon'ble Apex Court in the case of Rajak Mohammad v. State of Himachal Pradesh, (2018) 9 SCC 248 observed in Paragraphs 4-11:

“The prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be ruled out altogether and the appellant deserves to be acquitted on the benefit of doubt.”

xxi. PW-6, the victim girl stated that she did not state before the Investigating Officer that she went to her friend's house and she returned. She also did not state before the Investigating Officer that she was returning from the shop of Shyamal and requested him to deliver briquette. She also did not ask Shyamal to inform at her house that she was accompanying the principle accused.

So, this was her maiden statement before the Court and cannot be relied upon at all. Thus, the Trial Court has erred in relying upon the version of PW-6 as this very fact was crucial to link the principle accused and the appellant with the alleged offence committed.

The Hon'ble Supreme Court in the case of Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Anr., (2003) 3 SCC 175 observed in Paragraphs 16, 18 and 21:

“The evidence of this witness is of no significance and also appears to be untrue. He was confronted with his statement made before the police in the course of investigation, but this fact was not stated by him in his statement made before the police. It, therefore, appears that the only fact which was sought to be proved through this witness was not stated by him in his statement recorded in the course of investigation.”

“On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that PW- 1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement. We, therefore, find no reason to disagree with the finding of the High Court in an appeal against acquittal. The view taken by the High Court is a possible, reasonable view of the evidence on record and, therefore, warrants no interference. This appeal is dismissed.”

7. The Learned Advocate for the State submitted altering of the charge from Section 366 IPC to Section 366/109 by the Ld. Trial Court, convicting the present appellant if the commission of the said offence was not erroneous since Section 109 of the IPC had been a cognate offence. The Ld. Advocate for the State emphasized the evidence of PW-1 where PW.1 recounted that her daughter did not return till 11:30 am. PW-1 further submitted that his sister-in-law had seen her daughter along with Tusthu Bera commuting on a rickshaw near Tolaphatak Chinsura.
8. The learned Advocate for the State further submitted that the victim was last seen together with the accused Tusthu Bera.
9. Considering the rival contentions of the Ld. Advocate for the Appellant as well as the State:-

- a) PW-1 stated that Tusthu's sister, Tusthu's brother-in-law/appellant disclosed that they would arrange marriage of the victim girl with Tusthu.
- b) PW-3 stated that he did not find the appellant and his wife at their house at Neota.
- c) PW-6 stated that the appellant forcibly made the victim girl to wear the conches in both her hands.

Thus, the only role attributed to the appellant is that he had forcefully put the conches in the hands of the victim girl. It has to be looked into as to whether such act of putting conches in the hands of the victim girl by the appellant would come under the purview of Section 109 of the Indian Penal Code or not as Section 109 Indian Penal Code only speaks of abetment of the actual offence committed. And, if carefully scrutinised, it would be evident from the evidences on record that the prosecution has failed to prove the actual offence committed under Section 366 of the Indian Penal Code. In such an event, whether the conviction of the appellant under Sections 366/109 of the Indian Penal Code would at all sustain or not. Also, the appellant was acquitted under Section 363 of the Indian Penal Code but was convicted under Sections 366/109 of the Indian Penal Code.

10. The following Sections of the Indian Penal Code, 1860 are given below:-

“109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—Whoever abets any offence shall, if the act

abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

1. Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in S. 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder”

xxx

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code

or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].”

11. The Hon’ble Supreme Court in **Somasundaram v. State**¹, observed the following:-

“52. *Section 109 IPC provided for the punishment of abetment if the act abetted is committed and where there is no express provision made for punishment. It provides that where no express provision is made for the punishment of the abetment, the punishment will be the same as is that which is provided for the offence. The Explanation provides as follows:*

“Explanation.—An act or offence is said to be committed in consequence of abetment when it is committed in consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment.”

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54. *In order that the act or offence, be committed within the meaning of Section 109 IPC, in consequence of the abetment, it must be as a consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment. Explanation to Section 109 IPC must be read in conjunction with Section 107 IPC which creates the offence of abetting. As far as instigating any person to do an act, it is relatable to the first part of Section 107 which declares that abetment is done when the person who abets instigates any person to do that thing.*

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¹ (2020) 7 SCC 722

56. *As far as the last part of the Explanation to Section 109 IPC is concerned, which speaks about an act or offence being committed in consequence of abetment being committed with the aid which constitutes abetment, it is relatable to thirdly under Section 107 IPC. Section 107 IPC under this head requires intentional aiding by the act or illegal omission. Instigation takes place in terms of Explanation 1 to Section 107 IPC when (i) a person by wilful representation; (ii) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures or attempts to causes or procure a thing to be done and he would be guilty of instigating the doing of that thing. Explanation 2 to Section 107 declares that whoever, either prior to or at the time of the commission of the act, does anything in order to facilitate the commission of that act and thereby facilitate its commission, is said to aid the doing of that act. Thus, anything done which facilitates the commission of the criminal act and promotes the commission of the act, would bring the person within the scope of abetment.*

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58. *In order to attract Section 109 IPC, the act abetted must be committed in consequence of the abetment. Sections 115 and 116 IPC deal with punishments for abetment of offences when the offence is not committed in consequence of the abetment and where no express provision is made in the IPC for the punishment of such abetment.*

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60. *Thus, to sum up, abetment, as defined is a substantive offence. The punishment for it varies according to different circumstances. If the act which is abetted is done in pursuance of the abetment, the punishment is graver, as can be seen from Section 109 IPC, as the punishment is for the offence which is committed based on the abetment. The offence of abetment is punishable even if the act which is abetted is not committed. As noted, Sections 115 and 116*

provide for punishment in such cases. There are several other aspects relating to offences including Section 114 IPC which provides cumulative punishment for the act abetted and also for the act done.”

12. In ***Kishori Lal v. State of M.P.***² the Hon’ble Supreme Court held the following:-

“6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word ‘instigate’ literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. ‘Abetted’ in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.”

13. The Hon’ble Supreme Court held the following in ***Ranganayaki v. State***³:-

“11. Under Section 109 the abettor is liable to the same punishment which may be inflicted on the principle offender : (1) if the act of the

² (2007) 10 SCC 797

³ (2004) 12 SCC 521

latter is committed in consequence of the abetment, and (2) no express provision is made in IPC for punishment for such an abetment. This section lays down nothing more than that if IPC has not separately provided for the punishment of abetment as such then it is punishable with the punishment provided for the original offence. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of (a) instigation, (b) conspiracy, or (c) with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend upon facts of each case....”

14. In **Emperor v. Abdur Rahman**⁴, the Hon’ble High Court of Allahabad held the following:-

“The question whether the offence of kidnapping is completed the moment the girl is taken out of the custody of her lawful guardian, or

⁴ 1916 SCC OnLine All 63

is a continuing offence until she returns back to her guardian has been the subject of consideration in several recent cases. In *Nemai Chatteraj v. Queen-Empress* [(1900) I.L.R., 27 Calc., 1041.] , a Full Bench of the Calcutta High Court (RAMPINI, J., dissenting) held that the offence was not a continuing one, but became complete the moment the girl was taken, or enticed out of the custody of her lawful guardian. The only case in support of the contrary view is that of *Regina v. Samja Kaundan* [(1876) I.L.R., 1 Mad., 173.] , in which the accused was charged with the offence of kidnapping a minor out of British India. In that case the offence was not completed until the minor crossed the limits of British India. This case was referred to in two cases of this Court, viz., *Queen-Empress v. Ram Dei* [(1898) I.L.R., 18 All., 350.] and *Queen-Empress v. Ram Sundar* [(1896) I.L.R., 19 All., 109.] and not followed. The judgement of this Court is on the same lines as the judgement of the Full Bench of the Calcutta Court already referred to. In a later case in the Madras Court, *Chekutty v. Emperor* [(1902) I.L.R., 26 Mad., 454.] , the Chief Justice Sir Arnold White observed as follows:—"In support of the conviction it was argued that the offence of kidnapping was continuous and that the assault on the mother having been committed during the continuance of the kidnapping the two offences were committed in one series of acts so connected together as to form the same transaction. It has recently been held by a Full Bench of the Calcutta High Court in *Nemai Chatteraj v. Queen-Empress* [(1900) I.L.R., 27 Calc., 1041.] , that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship and that it is not an offence continuing as long as the minor is kept out of such guardianship. The case in I.L.R., 1 Mad., 173, was distinguished on the ground I have already indicated. In a very similar case which came up before the Punjab Chief Court, Sir MEREDYTH PLOWDEN and Mr. Justice ROE held that "speaking generally, the keeping of the

guardian came to an end when the person of the minor had been transferred from the custody of the guardian, or some person on his behalf, in the custody of some person not entitled to the custody of the minor.” They further observed, at page 21:—“But there can be no abetment of taking by conduct which commences only after the minor has once been completely taken out of the keeping of the guardian, and the guardian's keeping of the minor is completely at an end. Whether the taking was or was not complete is a question for determination with reference to the circumstances proved in the particular case”; Chanda v. Queen-Empress [Punj., Rec., 1904, Cr. J., 19.] .”

15. In **Anversinh v. State of Gujarat**⁵, the Hon’ble Supreme Court held the following:-

“13. *A perusal of Section 361 IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such “enticement” need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. [Thakorlal D. Vadgama v. State of Gujarat, (1973) 2 SCC 413, para 10 : 1973 SCC (Cri) 835] However, mere recovery of a missing minor from the custody of a stranger would not ipso facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in King Emperor v. Gokaran [King Emperor v. Gokaran, 1920 SCC OnLine Oudh JC 32 : AIR 1921 Oudh 226] and Emperor v. Abdur Rahman [Emperor v. Abdur Rahman, 1916 SCC OnLine All 63 : AIR 1916 All 210] .*

⁵ (2021) 3 SCC 12

16. In **Kavita Chandrakant Lakhani v. State of Maharashtra**⁶, 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 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

⁶ (2018) 6 SCC 664

in Section 366 IPC, the court cannot hold the accused guilty and punish him under Section 366 IPC.”

17. The specific role attributed to the present appellant by the victim PW.6 was to the extent of forcibly making her wear the conches in both of her hands. The present appellant was the second brother-in-law of the principle accused.
18. The victim deposed that while proceeding on her rickshaw she did not see any known faces on the road of the shops and she did complain to the to the local people when she realized. She could not shout when vermillion was being put on her head. She visited various places from there by bus however she did not take any help from the co-passengers in the bus. She was not aware of the address of the *balikhad* of her father. She deposed to the I.O that she first went to Champadanga, then to Rashulpur then to Neota on the express bus. She, however, does not remember that at Neota when some people objected to the illegal affair, they had left the place. She was unable to recall whose place she stayed at Champadanga and they stayed as a tenant. She could neither recall the distance between the rented house and the bus stand, nor the neighbours of the rented house. She could not disclose to the local people that Tusthu had abducted her. She could not recall what other places Tusthu had taken her apart from Champadanga and Burdwan. She had stated before the Ld. Magistrate that Tusthu used to introduced her as his wife and she did not protest while staying at different places with them. She denied that before the Ld. Magistrate she had told the local persons of the different places she visited

that she had voluntarily married Tusthu. She did not remember whether she had stated before I.O and Magistrate that she was rescued from a locked house. After being rescued, she was carried in a police jeep where she wiped off the vermilion from her forehead and she broke the conches off her wrists. She deposes that in between putting vermilion and putting on the conches and wiping off the vermilion and breaking of conches, she did not wear vermilion on her forehead.

19. She was forced to wear a sari, blouse, brassier and saya at the house of Tusthu's second sister after removing the *churidar-punjabi* and under garments she had originally worn. No letter written by Tusthu was sent to her on the day of the occurrence, asking her to come Tolaphatak More. She denied that she was in a love affair with Tusthu and that she had voluntarily left with Tusthu. There was a dispute relating to monetary matters between her father and Tusthu. She denied that in order to harass the family of members of Tusthu, her father had lodged a false case through her. She denied that for decision she could not state the incident to my present husband. She denied that Tusthu had no connection/relation with her family members at the relevant time. She denied that Tusthu used to stay in our house and look after my father's *balikhad*.
20. Apart from the victim deposing a single sentence inferring the name of the present appellant, none of the prosecution witnesses indicated his presence at the place where the victim was taken by the principle accused. The deposition of the victim in the examination-in-chief as well as in cross

are contradictory to each other indented with inconsistencies with regard to the place she was taken to by the principle accused. It is weird that the victim travelled to several places with the principle accused without raising an alarm or seeking for an aid to free herself from any kind of captivity.

21. The inconsistencies and contradictory evidence of the victim relating to vague, unassorted and confusing instances is paradoxical and ambiguous. The victim herself narrated to have been unceremoniously and coercively dragged by the principle accused on false pretext. The victim did not raise any protest and was ensconced with the principle accused on the rickshaw plying to the destination as witnessed by PW-2.
22. PW-2 being a close relative of the victim casually accepted the victim to accompany the principle accused without objecting to the same and obstructing their onwards journey on broad daylight amidst a busy road. The composure of PW-2 inferred the relationship of the victim and the principle accused to be normal which did not raise any suspicion suggesting a possibility of elopement of the victim with the principle accused.
23. The offence under Section 336 of the Indian Penal Code, 1860 was not a continuing one in view of the decision cited above. The present appellant evidently did not instigate or abet the act of kidnapping or abducting the victim for the purpose of marrying Tusthu Bera. During the cross examination, P.W-1 stated to have learnt her daughter undergoing a registered marriage. Presumably from the assessment of evidence on

record, the victim voluntarily eloped with the principle accused against the desire and knowledge of her family with whom Tusthu Bera had developed an estranged and hostile relationship. Subsequently the criminal case was instituted compelling the victim to part ways and indict the principle accused and his family members.

24. The present appellant to have been instrumental in compulsive act of inducement or coercively getting the victim to wear conches for the purpose of marriage are unbelievable and untrustworthy. The evidence of the victim and her family members lack inherent credibility.
25. Under the current circumstances, the prosecution has failed to prove its case beyond reasonable doubt.
26. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
27. Accordingly, the instant criminal appeal being CRA 229 of 2004 is disposed of.
28. There is no order as to costs.
29. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
30. 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.)