

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 235 of 2009

Md. Ashauddin & Anr.

-Vs-

The State of West Bengal

For the Appellants : Mr. Imtiaz Ahmed
Ms. Ghazala Firdaus
Mr. S.K. Saidullah
Mr. Md. Arsalan
Mr. Mitun Mondal
Mr. Shibasish Banerjee

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 10.08.2023, 06.10.2023, 12.10.2023

Judgment on : 17.01.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against order and judgment dated 26.2.2009 passed by the Learned Additional District & Sessions Judge, Fast Track, 1st Court, Malda, in Sessions Trial No. 7(11) of 2003 arising out of Sessions Case No. 49 of 2003, in Ratua Police Station Case No. 94 of 2000 dated 04.8.2000 (G.R. Case No. 1201 of 2000), convicting the appellants for alleged offence punishable under Section 363 and 365 of the Indian Penal code and sentenced to suffer simple imprisonment for four(4) years and to pay a fine of

Rs.1000/- each in default to suffer further simple imprisonment for one(1) month each for the offence under Section 363 of the Indian Penal Code and each of the convicts are sentenced to suffer simple imprisonment for 4(four) years and to pay a fine of Rs.1000/- each in default to suffer further simple imprisonment for one month for the offence under Section 365 and 34 of the Indian Penal Code.

2. The prosecution story precisely stated on 30.7.2000 at about 10 a.m. the minor daughter of the complainant went missing from his house. He searched for her and at last on receiving information he went to Tulshighat under Harishchandrapur Police Station and found his daughter is in the house of one Ashauddin. He tried to get back his daughter but Ashauddin and his family members obstructed the de-facto complainant and threatened him. Thereafter on 02.8.2000 they returned to Harishchandrapur Police Station and on 04.8.2000 with the help of Police he recovered his daughter from the house of Ashauddin i.e. appellant No.1 herein.
3. The de-facto complainant lodged a written complaint stating the above facts. On the basis of the said written complaint a First Information Report was drawn up being Ratua Police Station Case No. 94 of 2000 dated 04.8.2000 for alleged offence punishable under Sections 363/365 and 366 of the Indian Penal Code.
4. After completion of investigation the charge-sheet was submitted by the police against both the appellants under Sections 363/365/366 and 34 of the Indian Penal Code. Charges were framed to which the appellants pleaded not guilty and claimed to be tried.

5. The prosecution to prove its case examined 11 (eleven) witnesses and exhibited certain documents. The witnesses were as follows:-

- i. PW-1/Jhalo Khatun, the victim girl
- ii. PW-2/Naimuddin, the father of PW-1 and defacto complainant of this case.
- iii. PW-3/Amina Bibi, the mother of PW-1.
- iv. PW-4/ Md. Ali, uncle of PW-1, he became hostile.
- v. PW-5/Abdus Sattar, the brother-in-law of PW-1
- vi. PW-6/Dr. P. Sikdar, doctor who medically examined the PW-1
- vii. PW-7/Abdul Rahim, maternal uncle of PW-1, he became hostile.
- viii. PW-8/Md. Manik, cousin brother of P.W-1 who became hostile at the time of his evidence.
- ix. PW-9/ Abdul Halim, maternal uncle of PW-1.
- x. PW-10/Md. Nowsa Ali, the teacher-in-charge of Bhagabanpur High Madrasah. He proved the school certificate.
- xi. PW-11/S.S. Chatterjee, I/O. of the case.

6. The Learned advocate for the appellants submitted that :

- i. The Learned Additional District & Sessions Judge, Fast Track First Court, Malda erred in relying on the evidence to incriminate the accused without citing such evidence to the accused while examining them under Section 313 of the Code of Criminal Procedure.
- ii. Entire evidence and materials on record were not considered in its entirety.

- iii. The witnesses had stated that Nazrul, PW-1 went to the house of Ashauddin via Samai and certain witnesses stated that Ashauddin kidnapped the PW-1 and she was recovered from the house of accused Ashauddin. However, the fact remained that in spite of some laches on the part of prosecution, it had at least brought on record two accused persons involved in the alleged offence of kidnapping Ashauddin.
 - iv. The Learned Judge failed to appreciate that the witnesses are closely related to PW-1 and as such they should be disbelieved.
 - v. Upon a proper appreciation of the evidence on record and applying the provisions of law rightly judicially and reasonably and the Learned Additional District Sessions Judge, Fast Track, 1st Court, Malda ought to have held that prosecution has failed to prove the case against the appellant and not entitled to, as a matter of right to an order of acquittal.
7. The Learned Advocate for the State submitted that the victim was recovered from the house of the appellants and she herself stated to have kidnapped against her will and her sole testimony was sufficient to prove the prosecution case.
8. A circumspection of evidence of the prosecution witnesses revealed as follows:
- i. PW-1 the victim narrated the incident which took place 4 years prior to the date of her adducing evidence while she was 14 years of age. She related that on the fateful date at 10 a.m. being a student of class –

VIII she was on her way to her school, i.e. Bhavanipur High Madrasah while she was intercepted by the accused Nazrul who took her from Samshi to Tulshighat by a taxi against which she protested and raised alarm but in vain since her voice could not traverse the window pane of the taxi.

- ii. The Trial Court observed a peculiarity with regard to the conduct of the victim who was warned to speak aloud but a maintained a low pitch of voice and remain silent for a while before answering the question put to her. She further continued to have been taken to the house of accused Ashauddin at Tulshighat. On the next day her father reached the house of Ashauddin to escort her back which was declined by the accused Ashauddin who left their house and further reappeared along with the police to rescue her from the house of the accused persons. During her cross-examination, she deposed accused Nazrul was the son of her own uncle. She further could not recollect whether she mentioned the name of accused Ashauddin as one of the guilty persons before the Learned Magistrate. She claimed her ignorance with regard to her date of birth as recorded in her school register and affirmed to have heard from her father to be aged 14 years on the date of incident. She stated on interrogation by the Investigating Officer she had divulged that she went to Samshi accompanied by a girl of Ratanpur on foot along the bank of a tank. She further stated that the girl was not known to her. However, the said girl was not examined. She further could not recollect whether the girl called her from her

house to be taken to her house. The members of the house of the unknown girl and her parents, brothers and sisters were present at her house. PW-1 did not disclose any incident before any member of her house regarding her presence in the house of the unknown girl. At about 10 a.m. she started from the house of that girl in order to go to Samshi. From the house of that girl, the victim accompanied by the unknown girl and another unknown person not being the accused went to Tulshighat by a taxi. This episode was narrated by PW-1 for the first time before the Court which was neither stated in the statement recorded under Section 164 of the Code of Criminal Procedure or before the Investigation Officer. The statement of the victim during cross-examination contradicted her version in examination-in-chief. Moreover, there had been variance in her statement before the Learned Magistrate under Section 164 of the Code of Criminal Procedure, wherein she stated that the villagers of the Tulshighat had shown pistol to her threatening to kill her if she revealed the incident to anybody.

- iii. PW-2 /father of the victim reiterated his statement in the complaint and identified the F.I.R. marked as Exhibit-1. He stated to have been accompanied by the villagers to the house of the accused persons to retrieve his daughter. However, none of the accompanying villagers were examined. PW-2 further stated that daughter narrated that the accused Nazrul took her away to Samshi by a taxi wherein accused Ashauddin was seated and thereafter she was taken by another taxi to

Tulshighat contrary to the statement of the victim girl whereby she stated to have been accompanied by an unknown girl to Samshi therefrom covered certain distance on foot along the bank of the tank and subsequently boarded a taxi with an unknown person. During his cross-examination PW-2 denied that accused Ashauddin was his relative to be in visiting terms and he further could not remember whether he had lodged any G.D.E. at Harishchandrapur Police Station or not. Moreover after the recovery of his daughter the Darogababu did not produce any paper in regard to the search. The daughter was recovered by the police in absence of anyone from the locality. The police did not obtain the signature of his daughter or the villagers on any of the papers.

- iv. PW-3 the mother of the victim conceded to the deposition of PW-1 and PW-2 further stated that the accused Nazrul had taken her daughter on her way to school by a taxi to Tulshighat in order to get her married to the accused Ashauddin. She further denied to reveal the date of the birth of the victim.
- v. PW-4 was declared hostile by the prosecution.
- vi. PW-5 stated that the accused Nasiruddin had enticed the victim to Tulshighat in order to marry her. Subsequently the victim was recovered from the house of Ashauddin. PW-5 along with his parents-in-law and others went for such recovery. He further stated that the village people tried to help at the first instance which prompted them to see the help of Harishchandrapur P.S. During his cross-

examination, PW-5 stated to have revealed the incident for the first time before the Court and he was not examined by the Investigating Officer.

- vii. PW-6 the Medical Officer opined that the victim was not ravished with her physical parameters intact.
- viii. The evidence of PW-7, 8 and 9 was based on hearsay.
- ix. PW-10 being the Teacher-in-Charge of Bhagavanpur High Madrasa exhibited a certificate issued by the aforesaid school mentioning her date of birth to be 22.04.1984 marked as Exhibit-4. The register of the said school recording the date of birth at the time of the admission was not produced before the Court. Such a certificate can be issued by anybody and becomes insignificant unless and until the admission register is produced to corroborate the statement in the certificate so issued based on the date of birth recorded in the admission register. PW-10 further stated that he did not compare the school admission register and could not say what was the basis of the age of the victim to have been recorded in the school admission register. He further could not state the name of the institute from which Jhalo Khatun took transfer and further got admission in the said school. PW-10 was not the person who issued the aforesaid certificate and therefore the author of the certificate was not examined. The validity of the certificate is inconsequential to the instant case with regard to its legality.

9. Section 363 of the Indian Penal Code states as follows:-

“Punishment for kidnapping.- Whoever kidnaps any person from 1 [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

10. Section 365 of the Indian Penal Code states as follows:-

“Kidnapping or abducting with intent secretly and wrongfully to confine person. - Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

11. The age of the victim could not be proved through proper documentation.

The Investigating Officer did not seek proper direction from the Court for conducting an ossification test. There are inconsistencies in the evidence of the victim herself as well as the parents being PW-2 and PW-3. It could not be established that the victim was unlawfully withdrawn from the custody of her guardian or to be precise her parents in the instant case. PW-2 on being refused the custody of the victim on the very first night should have immediately informed the same to the police station. It was not explained as to why the victim's father waited for two days to recover the daughter being aware of her presence in the family of the accused persons which therefore cannot be termed to be secret confinement. The father of the victim left her at the peril of the family of the accused for two days without taking necessary legal help and, therefore, discarded his own rights and responsibilities abdicating the same without adequate reasons. The medical report established the fact that the victim was not subjected to physical exploitation. None of the parties agitated that the victim was or attempted to

have been physically violated for unlawful purpose against her willful desire. The necessary ingredients to constitute the offences under Section 363/365 of the Indian Penal Code are absent.

12. In view of the above discussions, the instant appeal being CRA 235 of 2009 is dismissed.
13. Let the copy of this judgment be sent to the Learned Trial Court as well the police station concerned for necessary information and compliance.
14. All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

(Ananya Bandyopadhyay, J.)