

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 457 of 2002

**Rahul Amin @ Rahul Haque
-Vs-
The State of West Bengal**

For the Appellant	: Mr. Sekhar Pal Mr. Md. Mozammel Hossain
For the Respondent	: Mr. Anand Keshari
Heard on	: 28.11.2023, 26.02.2024, 08.04.2024, 06.08.2024
Judgment on	: 05.11.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 27.09.2002 passed by the Learned Additional Session Judge, 3rd Court, Burdwan in Session Case No.2 of 1996 convicted the appellant under Section 363 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 4 years and also to pay a fine of Rs.2000/- in default to suffer rigorous imprisonment for further a period of 4 months for commission of offence under Section 363 of the Indian Penal Code.
2. The prosecution case precisely stated the complainant in his written complaint dated 19.06.1993 addressed to the Officer in-charge of the

Bhattar Police Station stated that on 19.06.93, his fifteen-year-old daughter was returning home from her school, Karjona Chati School at 2 pm with other students. On her way home, she passed a Maruti car parked on the road near Mirpara bridge. Rahul Haque, who was sitting inside the car with other men asked his daughter to stop and come inside the car. When she refused, they forced her inside and drove to Burdwan. He stated that Rahul Haque eloped with his daughter. The accused used to work with the complainant's brother as a laborer and would often visit their house and was thus acquainted with the members of their family.

5. On the basis of the aforesaid complaint, Bhatar Police Station Case No.49/93 dated 19.06.1993 under Sections 363/366 of the Indian Penal Code was initiated against the appellant.
6. Charges were framed against the appellant under Sections 363/366 of the Indian Penal Code against the appellant to which he pleaded not guilty and claimed to be tried.
7. In order to prove its case, the prosecution cited 12 witnesses and exhibited certain documents.
8. Considered the submissions of the Learned Advocate for the appellant as well as the State.
9. A circumspection of evidence of the prosecution witnesses revealed as follows:-
 - i. PW-1, the father of the victim being the de facto complainant had identified the copy of the complaint which was marked as Exhibit 1/1. In his testimony PW-1 stated the appellant to have been known

to him 7/8 years prior to the date of occurrence who worked as a mason in constructing several houses in their village. The appellant had been regular visitor to his house and the relationship in respect of affection developed between the appellant and his family members. On one occasion the victim accompanied by the appellant had been to his house and was subsequently brought back by the younger brother of PW-1 namely Sabuj who had on another occasion stayed at the house of the appellant for two days. Prior to the incident of kidnapping the appellant had cordial relationship with the de facto complainant with a reliable impression. The appellant addressed PW-1 and his wife as his parents with immense respect who reciprocated similar affection towards the appellant. The daughters of PW-1 addressed the appellant as elder brother who considered them to be his sisters. Despite such indelible affinity the appellant forcibly took his daughter into a Maruti car to a certain distance from his house and thereafter diverted its route towards Burdwan. The victim was aged 13 to 14 years at the relevant time.

- ii. PW-2 deposed to have been reported the incident of kidnapping by the daughter of PW-1 on her way to return from the school by the appellant. PW-2 disclosed on interrogation to the police whatever was reported to him by PW-1 and his wife.
- iii. PW-3, the uncle of the victim reiterated the evidence of PW.-1.
- iv. PW-4, PW-5, PW-6 and PW-7, the students of Jhikardanga High School in unison deposed to have witnessed the victim boarding a

Maruti Car which abruptly halted on the road on their way back from the school at about 2/2.30 p.m.

v. PW-8 the victim initially stated that she was not taken away by anyone. Subsequently, she stated at the insistence of the Learned Public Prosecutor to have been forcibly taken to the house of the appellant on her way back home from school. There had been a cordial relationship of the appellant with the family members of the victim and the de facto complainant. On earlier occasion the victim had been to the house of the appellant. However, it had not been stated by the prosecution as to whether the victim reached the house of the appellant with the permission of the parents of the victim or not. The victim did not state to have been kidnapped with a malicious intent rather she was provided with books to help in her studies. However, the victim had been a minor.

vi. In the opinion of PW-9 who conducted radiological examination, age of the victim was between 13 to 14 years.

10. The consent of the victim is immaterial and the subsisting family bond cannot be an excuse for an escape of the victim from the parental custody at the pretext or behest of pleasant and affable relationship or to justify an act of removing a minor from the custody of her legal guardian and further does not absolve the appellant from being indicted of the offence under Section 363 of the Indian Penal Code.

11. The Hon'ble Supreme Court held the following in **Sannaia Subba Rao v.**

State of A.P.¹:-

“50. The ingredients of Section 363 IPC involve an act of kidnapping of any person from the lawful guardianship. Kidnapping from the lawful guardianship is defined under Section 361 IPC, where it is stated that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, a case of kidnapping is made out.”

12. The following was held by the Hon'ble Supreme Court in **Anversinh v.**

State of Gujarat²:-

“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].”

¹(2008) 17 SCC 225

²(2021) 3 SCC 12

13. The Hon'ble Supreme Court observed the following in **William Stephen v. State of T.N.**³:-

“Our view

8. We have carefully considered the submissions. Firstly, we may refer to Section 361IPC which defines “kidnapping from lawful guardianship”. It provides that whoever takes or entices any minor male child under sixteen years of age, out of the keeping of the lawful guardian of such minor, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. In this case, there is no dispute about the lawful guardianship of PW 1 and PW 3. The kidnapping from lawful guardianship is made punishable under Section 363IPC and the maximum punishment is imprisonment of either description which may extend to seven years.”

14. In **Parkash v. State of Haryana**⁴ the following was held by the Hon'ble Supreme Court:-

“7. Section 361 IPC reads:

“361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words ‘lawful guardian’ in this section include any person lawfully entrusted with the care of custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate

³(2024) 5 SCC 258

⁴(2004) 1 SCC 339

child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of 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 of 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 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.”

15. In view of the above discussion and the decisions cited, the impugned judgment and order dated 27.09.2002 passed by the Learned Additional Sessions Judge, 3rd Court, Burdwan in Sessions Case No.2 of 1996 is affirmed. However, considering the gravity of the offence the sentence is modified to the extent of imprisonment undergone by the appellant.

16. There is no order as to costs.
17. The Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
18. 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.)