

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
Criminal Revisional Jurisdiction
Appellate Side**

Present:
The Hon'ble Justice Rai Chattopadhyay

CRR 141 of 2023

**Bishnu Prasad Jaiswal @ Bisnu Prasad Jaiswal
Vs.
The State of West Bengal & Anr.**

For the Petitioner : Mr. Arjun Chowdhury,
: Ms. Pratusha Dutta Chowdhury,
: Ms. Riya Agarwal,
: Mr. Kaushik Kr. Khan,
: Ms. Tulip Saha.

For the State : Mr. Aditi Shankar Chakraborty,
: Mr. Ujjal Luksom.

Heard on : 02/09/2024
Judgment on: 12/09/2024

Rai Chattopadhyay, J.

1. By dint of a judgment dated December 20, 2022, the Judicial Magistrate, 1st Class, Garubathan, has convicted and sentenced the present petitioner, for offence under sections 363 and 365 of the Indian Penal Code. The same was affirmed by the Sessions Judge in Criminal Appeal No 1 of 2023, vide judgment dated May 31, 2023. The petitioner, being aggrieved with the judgment of the appeal bench, as mentioned above, has challenged the same in the present case. He has challenged the findings of the Court regarding his guilt under the said provision of law. He has also challenged the sentence imposed by the Court.
2. Mr. Chowdhury appears for the petitioner. He would submit about the inconsistency and incoherence in the evidence adduced in the case. He

would submit that the trial Court as well as the first appellate Court have erred by relying on such inconsistent evidence, which otherwise could not have been relied on by the Courts, to come to the finding of guilt of the petitioner/accused person. He mentions about the victim's statement and evidence, which according to the petitioner, has not brought on record any material to consider such allegations of the complainant to have been proved beyond scope of any reasonable doubt. On the contrary, the complainant having deposed about her voluntary and willing participation in the alleged act, has herself transformed the allegations made, to an act based on consensus of the parties, he would submit. In that event, evidence of the other witnesses would have been considered as unnecessary and impeachable in nature. Thus, the Court should have concluded about innocence of the petitioner, in the impugned judgment, he says further. But instead, the Court has come to the finding of guilt, which, he says, is erroneous and liable to be set aside, having not been based upon any reliable evidence on record.

3. During the course of his argument Mr. Chowdhury has relied on the following judgments, to buttress his submissions :

- (I) ***S. Varadarajan vs. State of Madras*** reported in ***AIR 1965 SC 942***;
- (II) ***Moniram Hazarika vs. State of Assam*** reported in ***(2004) 5 SCC 120***;
- (III) ***Amal Talukdar vs. State of West Bengal*** reported in ***2010 (4) CRIMES 432***;
- (IV) ***Mafat Lal vs. The State of Rajasthan*** reported in ***(2022) 6 SCC 589***.

4. Mr. Chowdhury has urged that the judgment of conviction and sentence of the present petitioner, as mentioned above, be set aside.
5. State has been represented by Mr. Chakraborty in this case. He would on the other hand support the impugned judgment, addressing the same to be just, legal and proper. He would indicate about the gravity of the offence and also that not only the evidence of the victim but also all other witnesses have been sufficient, to bring home the charges levelled against the accused person. Hence, Mr. Chakraborty would insist not to interfere as to the judgment and sentence granted by the Magistrate, subsequently affirmed by the Sessions Judge.
6. This is a case under sections 363 and 365 of the Indian Penal Code, against the petitioner, vide the FIR being Jaldhaka Police Station Case No. 8 of 2021 dated 15/03/2021. Mother of the victim is the complainant who writes in the said FIR that on March 15, 2021, her 14 years old daughter, though started from home to school, but did not return back at the usual time, after the school was over. The complainant has mentioned the name of the petitioner in the complaint as the kidnapper of her daughter, who had allegedly taken the victim, to an unknown destination, with some malafide motive.
7. During investigation, victim's statement has been recorded by the Magistrate, under section 164 of the Cr.P.C. There the victim has stated inter alia that, while she was on her way to school, the petitioner took her and her brother in a car. The brother was dropped at his school, whereas the girl was taken to Siliguri. She has stated further that thereafter, she was recovered from the bus stand by the members of a NGO and taken to the police station. That, from there she was taken to the shelter home (CINI) at Siliguri, from there to Kalimpong for medical examination, on the next

date and after that, she was brought to BSA. She has also stated that the petitioner was arrested by police.

8. At the evidence stage, prosecution has examined 13 witnesses whereas the defence has also examined 3 witnesses. Before entering into the evidence, let the statutory provision be considered.
9. Section 363 of the IPC is the penal provision for the offence of kidnapping. It has prescribed punishment of imprisonment of either description for a term extending to seven years and also fine, for an offence of kidnapping. The offence of kidnapping is provided in section 359 of the IPC to be of two kinds. We are concerned in this case about one of its kind, that is '*kidnapping from lawful guardianship*' of a female person of sound mind. For this one has to look into section 361 of the IPC which has provided that '*whoever takes or entices any minor girl under eighteen 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 from lawful guardianship*'.

10. '*Keeping*', in the context of this section, is the charge, protection, maintenance and control of the lawful guardian of the minor. Therefore, section 363 of the IPC should be read with section 361 of the Code, to understand the purport thereof, as to what should constitute to be an offence of kidnapping.
11. According to Mr. Chowdhury the victim has voluntarily joined the petitioner having understood the import of her action. Hence, no offence is constituted. For this he has relied on the judgment of **S. Varadarajan (supra)**. He relies on the finding of the Court there that some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian, would be an essential element. The Court has held further that

the minor if voluntarily joins the accused person having capacity to know the full import of her action, then no offence under section 361 or 363 of the IPC, is committed. This judgment of the Supreme Court has been relied on a later judgment of the same, of **Moniram Hazarika (supra)**, where in the Supreme Court has held that unless the evidence of role of the accused person is forthcoming, that he has either solicited or persuaded the minor to abandon the legal guardianship, he cannot be held guilty of the offence of kidnapping. Similar view has been taken by the said Court, in the case of **Mafat Lal (supra)**. Mr. Chowdhury would place sufficient reliance on the defence witness's evidence, which also, according to him, has not been considered by the two Courts, while coming to the decision of guilt of the accused person. He says, otherwise the defence witness also could have shown no role of advancing any inducement to the victim, being played by the present petitioner.

12. The law being settled in that way, as held in **S. Varadarajan's case (supra)**, and also thereafter, this Court has to consider the evidence in the light of the said settled principles of law.
13. The victim (P.W.2) has stated that while she was proceeding to the school on the date of the incident and crossing a jungle in the midway, the accused person came in a vehicle, stopped it and took her and her brother, on board. The brother was dropped at the school, but she was not and taken to Siliguri. The accused informed her that she was being so taken for the purpose of education. The accused bought her new cloths. She has been prevented by the accused from talking to the volunteers from NGO, who had approached her, while she was waiting at the stand. From there she was taken by the NGO. In the cross-examination the victim states that the petitioner/accused person has been a teacher of her erstwhile school with whom she had a regular contact over phone. That she was not taken by the

accused forcefully and she has not raised any alarm, at the material point of time.

14. An independent witness is P.W.11 who is a member of NGO, who claims to have recovered the victim. From her evidence, however, one can notice about the accused having divulged about his plan to go to Uttar Pradesh, from there. The accused appear to have informed the said witness about financial crisis of the family of the victim and therefore taking the girl for further studies to the other state. The victim was questioned separately, when she informed about the previous incidents as to how the petitioner/accused person has taken her, with him. The victim was recovered thereafter. Evidence of P.W.11 corroborates with that of P.W.12, who is also a member of the NGO and was involved in the rescue operation of the victim. The additional fact she has deposed is with regard to the victim having asserted before them that she was being taken to Uttar Pradesh, without consent or knowledge of her family members.

15. The brother of the victim girl has been examined as P.W. 13. His evidence is vital for the reason that at the time when the victim was taken in car by the petitioner/accused person, the said boy was the only accompaniment with the victim and is an eye witness of the entire incident. He has stated that one vehicle came and two persons were riding the same, including the Driver. He has stated further that the said persons proposed to drop them to school. At school, the boy was dropped, but the girl was taken away by those persons in the car. He says that he has informed the incident to his teacher.

16. After the relevant prosecution witnesses, let us see what the defence witnesses have stated in trial, upon which the petitioner in this case has reposed enormous reliance. D.W.1, 2 are the brothers of the petitioner/accused person. D.W.1 has stated to have accompanied the

petitioner on the date of incident, to Siliguri for the purpose of buying books, for the school. He has mentioned about another person namely, Suraj, to have accompanied them to Siliguri. In answer to the question No. 4., he says that, *“one call was received from the student of the accused. My mother told me to take back the said student. I agreed.”*. In the cross-examination he has stated that the student was present in the bus stand from the time before he and his brother reached there. D.W.2 has asserted the fact of D.W.1 having accompanied the petitioner/accused person to Siliguri on the date of the incident and by bus. He also says that books were bought from Siliguri, by the person namely Suraj Tamang.

17. Suraj is D.W.3, who has asserted about going to Siliguri for buying books for the school. He says that he went early by motor cycle and the petitioner and his brother came late by some other conveyance (by bus - in the cross examination). The witness has not been able to say about the number of books he had purchased that day.
18. The first ever narration of the incident by the victim is before the doctor, recorded in the report that is *“Exhibit - 5”* in the trial. The history of incident as has been recorded by the doctor is *inter alia* as follows. The victim while going to school met with the accused person. The accused person told the victim to bring Aadhaar card with her. The accused person assured her that arrangements for her studies would be made at Gorakhpur. The victim firstly was carried in an Alto car and thereafter, they took a bus to Siliguri. She was asked to change the school dress in a petrol pump toilet near Siliguri. The new clothes for changing was bought by the accused person. After changing the dress, when she has been waiting in the bus stand, she was intercepted by the members of the NGO and has been taken from there to the shelter home.

19. On the basis of the evidence as above, the petitioner has contended that so far as any inducement to the victim by him is concerned, or his active participation in formation of opinion by the minor, to leave the house of the guardian is concerned, the same would not be revealed from the evidence. That, on the contrary, the girl had voluntarily joined the accused person, having full and clear knowledge about the import of her actions. Therefore on the basis of such materials, not establishing any active part played by the petitioner in inducing the girl to leave custody and control of her legal guardian, the petitioner could not have been found guilty of an offence of kidnapping, the petitioner has argued in this case.

20. It has been a settled law that, inducement may not be imminent to the taking away of the victim from the custody of her legal guardian. It may be at any prior point of time too, to induce the victim to take a decision and execute the same at any later point of time. We find from Exhibit 5 that the victim was asked to take the Aadhar card with her. We also find from the evidence of the members of the NGO that the victim was carrying the Aadhar card with her, when she was intercepted by them. Evidence is sufficiently there to find that the petitioner has bought her new cloths to change the school dress, which she has done. No one can ignore the ample evidence available regarding assurances given by the petitioner to the victim to arrange for her proper education at Gorakhpur. Regarding all these, the victim, in her cross examination has not been suggested any adverse. As a matter of fact, admittedly, even after the victim leaving her erstwhile school, in which the petitioner has been a teacher, he has always maintained contact with the victim over phone. There is no other apparent reason for that.

21. Active inducement by the accused person may not always be through open dialogue or expressed bodily gestures. Slowly and consistently manipulating

mind of a young person, is also an act of inducement to drive her to take desperate decisions, like leaving custody and control of her legal guardian, which will be sufficient to find that an offence of kidnapping has been committed by the perpetrator, in that kind of a case. In this case, the preparedness of the petitioner to flawlessly execute a plan by firstly convincing the victim to believe about her best future prospects being educated at Gorakhpur, that too without the knowledge of her legal guardians, then asking her to take the Aadhar card with her on the date of the incident, buying her new cloths and making her to change her school dress would clearly make out those individual factors, which would lead conjointly, positively and unfailingly to the act of active involvement and positive inducement of the victim, by the petitioner, to take her out from the custody of her legal guardian.

22. The words 'taking' or 'enticing' have been discussed by the Hon'ble Supreme Court, in ***Thakorlal D. Vadgama vs. State of Gujarat*** reported in ***AIR 1973 SC 2313***, that taking or enticing need not be by means of force or fraud to constitute an offence of kidnapping. The Supreme Court went a step ahead while finding in the case of ***State of Haryana vs. Raja Ram*** reported in ***AIR 1973 SC 819***, that kidnapping within the meaning of statute is effected not only by taking or enticing away a person but also by alluring such person to go away from the protection of the guardian.
23. Defence witnesses have tried utmost to shift the focal point in trial from that of the mens rea of the accused person, to voluntariness of the action of the victim. They have tried to put forth a scene that the victim was present at the scene of occurrence from a period earlier than the time when the petitioner had reached there. However, neither they have been able to prove the relevant bus tickets in the trial nor have been able to successfully rebutting the evidence regarding purchase of new cloths by the petitioner

for the victim and making her to change her school dress near the bus stand itself.

24. Also that even if for the sake of argument, it is held that the victim reached to the bus stand earlier than the petitioner, the evidence as discussed above, which has brought on record without any iota of doubt regarding petitioner's activities on various levels to actively drive the victim towards what she has done, the same fact alone, would not wipe out the overwhelming evidence as regards petitioner's inducement and therefore taking victim out of '*keeping*', that is the charge, protection, maintenance and control of the lawful guardian of her.

25. On the premise as above, this Court is unable to find any illegality or flaw in the judgment impugned, that is dated May 31, 2023, in Criminal Appeal No 1 of 2023 by the Sessions Judge, Kalimpong.

26. Hence, the present case being CRR No. 141 of 2023 is dismissed. The judgment of the Sessions Judge, Kalimpong, in Criminal Appeal No 1 of 2023, dated May 31, 2023, is affirmed. The petitioner shall immediately surrender before the Magistrate, to undergo the sentence. LCRs be returned immediately.

27. CRR No. 141 of 2023 is disposed of.

28. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

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(Rai Chattopadhyay, J.)