

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

Present:

The Hon'ble **Justice Prasenjit Biswas**

**C.R.A. 21 of 2015**

**Balai Kule @ Surajit Kule**

**-Versus-**

**The State of West Bengal**

For the Appellant : **Mr. Swapan Kumar Mallick,  
Ms. Sudeshna Das.**

For the State : **Mr. Saibal Bapuli, Ld. APP  
Mr. Bibaswan Bhattacharya**

Hearing concluded on : **20.03.2025**

Judgment On : **02.04.2025**

**Prasenjit Biswas, J:-**

1. The challenge in this appeal is to the judgment and order dated 22.12.2014 and 23.12.2014 passed by the learned Additional Sessions Judge, 3<sup>rd</sup> Court, Tamluk, in Sessions Trial No. 1(07) of 2014 arising out of

Sessions Case No. 217(April) 2014 thereby convicted the appellant Balai Kule @ Surajit Kule for the offence punishable under Section 363 of the Indian Penal Code and sentencing him to suffer simple imprisonment for five years and to pay fine of Rs. 2000/- in default to suffer simple imprisonment for two months.

- 2.** This appellant (herein) along with two others namely, Dilip Kule and Suchitra Kule were arrayed to face charge under Section 363/366/34 of the Indian Penal Code to which they pleaded not guilty and claimed to be tried. As a result, trial commenced against them. The co-accused persons were found not guilty and were acquitted from the charges. The present appellant was found guilty of offence under Section 363 of the Indian Penal Code and accordingly his conviction and sentence was recorded by the judgement which is impugned in this appeal.
- 3.** Succinctly, the case before the learned Trial Court was that Arabinda Kule, the father of the victim girl lodged a written complaint before the Kolaghat Police Station through Kolaghat Beat House on 19.11.2011 to that effect that on 10.11.2011 in the morning at about 6.30 A.M. his minor daughter (victim) went to take tuition but she did not return and as such, a GD Entry being no. 299 dated 10.11.2011 was lodged and his daughter was recovered. It is further stated in the written complaint that on 10.11.2011 in the night at about 7 P.M. in absence of his family members the appellant entered inside his house and by enticing her and by using force her daughter was kidnapped once again. Other two accused persons

namely, Dilip Kule and Suchitra Kule had taken part in the said offence and assisted this appellant.

4. Over the complaint lodged by the de-facto complainant the concerned Police Station started a case being Kolaghat P.S. Case No. 319 of 2011 dated 19.11.2011 under Sections 363/366/109 of the Indian Penal Code against this appellant and other two accused persons. After completion of investigation charge-sheet was submitted by the Investigating Agency under Sections 363/366/109 of the Indian Penal Code against all the accused persons.
5. In order to prove the case prosecution has cited 11 (Eleven) witnesses and documents were marked as exhibited being exhibit no(s) 1 to 8/1. Neither, any oral nor any documentary evidence was adduced by the side of the defence.
6. Mr. Swapan Kumar Mallick, learned Advocate for the appellant submitted that in the written complaint two dates have been mentioned i.e. 10.11.2011 and 18.11.2011. In the formal FIR the date and hour of occurrence relates to date 18.11.2011 at about 19.00 hours. Although, in the formal FIR date of occurrence of the offence is mentioned as 18.11.2011 but in the written complaint the date of incident are mentioned as 10.11.2011 and 18.11.2011. It is further submitted by the learned Advocate that in cross examination PW1/ de facto complainant stated in his examination in chief that it is not written in the written complaint that the appellant on 18.11.2011 entered in his house and by

putting fear and force, he told his daughter that she would act as per his direction, otherwise this appellant would kill her.

- 7.** Learned Advocate further assailed that it would appear from evidence of the victim girl that she told the police that in the morning on 10.11.2011 she voluntary left her house and they did marriage in a temple and thereafter, came back to their house but her parents did not accept their marriage. Attention of this Court is drawn by the learned Advocate regarding the statement of the victim recorded under Section 164 of Cr.P.C. which is marked as Exhibit 5 in this case. It is said by the learned Advocate that during cross-examination the victim girl admitted that she made statement before the learned Magistrate and told that she had love affairs with the appellant and against the will of her parents she left house with the appellant. The victim girl further stated that she told before the Magistrate that she had love relation with the appellant for last two years and her parents knew about their love relation but they did not accept their relation. The said fact as deposed by the victim girl would be corroborated from the evidence of PW11 (I.O.) of this case. It is said by the learned Advocate that the victim girl during her examination-in-chief stated another story contrary to the statement made before the Magistrate.
- 8.** It is further submitted by the learned Advocate for the appellant that during cross-examination PW11 deposed that PW1/de-facto complainant during her interrogation stated that the victim girl and the appellant had love relation and they married out of their own volition and after said marriage the victim girl came back to this house. It is said by the learned

Advocate that the prosecution failed to prove the age of the victim and the evidence of PW1 and PW2 who happen to be the parents of the victim girl does not corroborate the testimony of the victim girl (PW3). As per statement of the victim girl recorded under Section 164 of the Cr.P.C. she went to the appellant voluntarily. Prosecution is failed to prove any case either commission of offence under Section 363 or Section 366 of IPC. Moreover, the prosecution has to prove that at the time of alleged incident the victim girl raised alarm while she was taking away by the appellant and in absence of such evidence culpability of accused for committing any offence cannot be said to be proved. Evidence of victim girl is totally different from her earlier statement given under Section 164 of Cr.P.C. and this victim girl prevaricated it stands on different points of time and as such, there is doubt in respect of credibility and trustworthiness of the evidences of the victim girl. As the prosecution failed to prove the very ingredient to Section 361 of IPC i.e. taking away or enticing the victim by any evidence and, as such, it cannot be said the offence under Section 363 has been proved beyond reasonable shadow of doubt.

9. The learned Advocate for the State said that there is no illegality and irregularity in the impugned judgment and order of conviction passed by the Trial Court. It is said that the prosecution has proved his case beyond all reasonable doubt and as such, there is nothing to interfere with the impugned judgment and order. It is said that PW1, the father of the victim girl and the de-facto complainant had categorically corroborated the contents of the written complaint and stated as to how the present

appellant in due connivance with the other co-accused person has forcibly taken away the victim girl twice. The involvement of this appellant cannot be ruled out. Although, it is admitted by the learned Advocate the entirety of the contents of the testimony of PW1 was not elaborately stated in the FIR but he had denied the various suggestions advanced on behalf of the defence. Moreover, the written complaint should not be an encyclopaedia wherein every minute and details of the incident is needed to be incorporated/ stated. It is further said that PW3 the victim girl stated in her deposition that this appellant took away the victim with him to one of his relative's house at some unknown place. The attention of this Court is drawn to that part of the deposition of the victim girl wherein it is stated that she never made any statement before the Magistrate voluntarily and freely and she made those statements owing to the tremendous pressure that was exhorted upon her by the appellant and his family members during her stay at their house.

- 10.** It is said by the learned Advocate that the victim girl in her deposition abundantly explained the circumstances under which the coerced and fictitious judiciary statement was made by her under the direct influence, threat and intimations of the present appellant and, as such, the statement of the victim recorded under Section 164 Cr.P.C. cannot be relied upon. It is said by the learned Advocate that undoubtedly (PW3) victim girl was aged about 13 years at the time of alleged incident as it appears from Exhibit 5 which is the birth certificate of the victim. So, the victim girl being a minor, her consent and/or voluntariness is not of much

consequence in the eyes of law, The appellant took the victim girl from her lawful guardians being the parents i.e. PW1 and PW2. So, it is said by the learned Advocate that the essential and fundamental ingredients for attracting and sustaining offence punishable under Section 363 of the Indian Penal Code, 1860 have been well established against the present appellant. Moreover, PW4, PW5 and PW8 support the case of the prosecution. The entire evidences brought on record on the side of the prosecution shows the involvement of the present appellant in the offence alleged beyond all reasonable doubt and, as such, the impugned judgment and order passed by the learned Trial Court may not be interfered.

- 11.** It is revealed from the certificate of the birth of the victim girl which is marked as Exhibit 5 in this case that the date of birth of the victim girl is 06.12.1999. So, admittedly at the time of alleged offence the victim girl was aged about 13 years. It is also admitted position that she made statement before the Magistrate that she had a love relation with the appellant and against the order of her parents; she wilfully left her house with the appellant. She stated before the Magistrate that at that time her parents did not accept relation with the appellant and her love relation with the appellant was continued for last two years. PW3 (victim girl) admitted that she made statement before the Magistrate that on 10.11.2011 at about 6.30 AM she left out her house and thereafter, along with the appellant she reached to the house of the friend of the appellant and on that date the appellant married her in a temple and thereafter, she informed to her parents about the said marriage and subsequently came

to our house. The Exhibit A, the statement of the victim girl under Section 164 of the Code of Criminal Procedure clearly discloses that she voluntarily left her house as there was a love relation between her and the appellant and she subsequently, married with the appellant.

12. PW1/de facto complainant mentioned two dates in the written complaint i.e. 10.11.2011 and another is 18.11.2011, but in the formal FIR the date and hour of occurrence was mentioned as 18.11.2011 at about 19.00 hours. PW1 and PW2 stated that on 18.11.2011 the appellant entered into their house and had taken away the victim girl from their house. On the other hand, PW3 the victim girl stated that on 10.11.2011 she was taken to Kolaghat Outpost by the appellant and 19.11.2011 police recovered her from the house of the accused. On cross-examination this witness stated that she did not state the police on interrogation that on 18.11.2011 in the evening this appellant by giving threat and fear kidnapped the victim girl from her house and took her to his house.
13. It appears from deposition of PW3 that she prevaricated her stand on different point of time. So, there is a question of credibility upon the evidence adduced by the victim girl (PW3). PW7, one of the villager namely, Reba Kule deposed that there was a love relation between the victim girl and the appellant. PW11 in his cross-examination stated that PW1 told him during his interrogation that his daughter and the appellant had a love relation and for that reason she married with the appellant on her own volition and after marriage her daughter came back to his house. PW11 further said in his deposition that PW2 (mother of victim girl) during

interrogation stated to him that she came to know that her daughter out of love went along with the appellant and married the appellant. Her daughter came back to her house along with her husband.

- 14.** It is revealed from the evidence of PW3 that in cross-examination she stated that she told the police that in the morning of 10.11.2011 she voluntarily left her house with the appellant and they did marriage in temple and thereafter, came back to their house but her parents did not accept such marriage. She further deposed that she told Magistrate at the time of giving her confidential statement that she had love relation with the appellant and she left the house with the appellant wilfully. The victim girl and the appellant had love affairs since from the last two years and her parents were aware about such love relation. The said statement of the victim gets corroboration from evidence of PW11 (I.O) of this case. PW11 further stated that at the time of interrogation the mother of the victim (PW2) told them that she came to know that her daughter out of love went along with the appellant.
- 15.** It appears that the victim has categorically stated in her statement recorded under Section 164 of the Code of Criminal Procedure that she voluntarily accompanied the appellant. Kidnapping would necessarily involve entice or take away any minor under 18 years of age from a family for the offence under Section 363 of the Indian Penal Code. In the present case, the victim girl had clearly deposed that she stated before the Magistrate that she was neither taken away nor enticed and she had left her home on her own very will.

16. It is profitable to quote the observation of the Hon'ble Apex Court in case of **Vijaya Singh and Another vs State of Uttarakhand** reported in **2024 SCC On Line SC 3510**. In that report Hon'ble Apex Court observed at paragraphs 28 and 31 interalia that-

*“28. Considering the conceptual requirement of recording a statement before a Judicial Magistrate during the course of investigation and the utility thereof, as prescribed in Section 157 of Evidence Act, it could be observed that a statement under Section 164, although not a substantive piece of evidence, not only meets the test of relevancy but could also be used for the purposes of contradiction and corroboration. A statement recorded under Section 164 CrPC serves a special purpose in a criminal investigation as a greater amount of credibility is attached to it for being recorded by a Judicial Magistrate and not by the Investigating Officer. A statement under Section 164 CrPC is not subjected to the constraints attached with a statement under Section 161 CrPC and the vigour of Section 162 CrPC does not apply to a statement under Section 164 CrPC. Therefore, it must be considered on a better footing. However, relevancy, admissibility and reliability are distinct concepts in the realm of the law of evidence. Thus, the weight to be attached to such a statement (reliability thereof) is to be determined by the Court on a case-to-case basis and the same would depend to some extent upon whether the witness has remained true to the statement or has resiled from it, but it would not be a conclusive factor. For, even if a witness has retracted from a statement, such retraction could be a result of manipulation and the Court has to examine the circumstances in which the statement was recorded, the reasons stated by the witness for retracting from the statement etc. Ultimately, what counts is whether the Court believes a statement to be true, and the ultimate test of reliability happens during the trial upon a calculated balancing of conflicting versions in light of the other evidence on record.*

*31. Having said so, we deem it fit to observe that a statement under Section 164 CrPC cannot be discarded at the drop of a hat and on a mere statement of the witness that it was not recorded correctly. For, a judicial satisfaction of the Magistrate, to the effect that the statement being recorded is the correct version of the facts stated by the witness, forms part of every such statement and a higher burden must be placed upon the witness to retract from the same. To permit retraction by a witness from a signed statement recorded before the Magistrate on flimsy grounds or on mere assertions would effectively negate the difference between a statement recorded by the police officer and that recorded by the Judicial Magistrate. In the present matter, there is no reasonable ground to reject the statements recorded under Section 164 CrPC and reliance has correctly been placed upon the said statements by the courts below."*

- 17.** In the present case, the statements of PW-3 was recorded by the Judicial Magistrate immediately after the alleged incident. Thereafter PW-3 remained with her family and she may be tutored during this period. In fact, the retraction of these statements by PW-3 before the Court appears to be a result of tutoring and manipulation as the said witness could have easily been won over by their family members during the intervening period. In the present matter, there is no reasonable ground to reject the statements recorded under Section 164 CrPC. which is marked as Exhibit A on admission.
- 18.** There is a distinction between "taking" and allowing a minor to accompany a person. In this case, the minor alleged to have been taken away by the appellant and the victim girl left her father's protection without raising alarm. In such a case I do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more

has to be shown in a case of this kind and that is 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. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In my opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place.

- 19.** On carefully reading of the Section 361 of the Indian Penal Code it can well be understood that the main ingredient of the offence is to take or entice out of the keeping of the lawful guardianship. Therefore, in order to convict the accused under Section 363 of the Code of Criminal Procedure, prosecution must prove that there was of "taking away" or "enticement" on the part of the accused until and unless this essential ingredient is established, the offence of kidnapping cannot be said to have been committed whether the victim was a minor or not. In this case, there was no evidence of enticement of the victim by the appellant and no such evidence is brought on record on behalf of the prosecution. That being the fact it can hardly be said that the essential ingredients i.e. "taking" or

“enticement” on the part of the appellant was present and, therefore, it can hardly be said that this appellant committed any offence under Section 361 of the Indian Penal Code.

- 20.** Taking everything into consideration this Court finds that no offence of kidnapping is established against the appellant and as such, he is liable to be acquitted from the charges.
- 21.** The judgment impugned, therefore, is set aside and the appeal is allowed. Accordingly, appeal succeeds;
- 22.** The appellant is acquitted from the charge under Section 363 of the Indian Penal Code. He is on bail. His bail bonds are cancelled and sureties stand discharged. Interim order if there be any stands vacated.
- 23.** There will, however, be no order as to costs.
- 24.** Urgent Photostat certified copy of this order, if applied for, be given to the learned Advocate of the parties upon compliance of necessary formalities.

**(Prasenjit Biswas, J.)**