

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction**

**Present :
The Hon'ble Justice Prasenjit Biswas**

C.R.A. 137 of 2010

**Md. Faruk @ Faruk Momin
Vs.
State of West Bengal**

**For the Appellant : Mr. Abhimanya Bannerjee
Mr. Arnab Saha
Ms. Priyanka Yadav**

For the State : Mr. Avishek Sinha

Heard on : 21.03.2025

Judgment On : 26.03.2025

Prasenjit Biswas, J.

1. The present appeal is directed against the judgment and order dated 24.02.2010 passed by the learned Additional District and Sessions Judge, Fast Track 2nd Court, Malda in connection with Sessions Case No. 220 of 2009 arising out of G.R. Case No. 436 of 2008 corresponding to Gazol P.S. Case No. 33 of 2008 dated- 25.02.2008 for the offence punishable under Sections 363/366 of the Indian Penal Code and thereby convicted the appellant and sentenced to suffer simple imprisonment for five years along with fine of Rs.3,000/- , in default, simple imprisonment for three months more for the offence punishable under Section 366 of the Indian Penal

Code. The appellant is further sentenced to suffer simple imprisonment for three years and fine of Rs. 1,000/-, in default, simple imprisonment for one month more for the offence punishable under Section 363 of the Indian Penal Code.

2. Being aggrieved by and dissatisfied with the said impugned judgment and order of conviction, the present appeal is preferred at the behest of the appellant/convict.

3. In short campus the story of the prosecution is delineated herein below.

It is stated in the written complaint by the defacto complainant that on 18.02.2008 in the evening at about 5 P.M. her daughter who was aged about 15 years at that point of time, the appellant Md. Nurul Islam forcibly took her away. After receiving the said information, the defacto complainant went to lodge a written complaint before the Gazol P.S., but the then O.C. of Gazol P.S. declined to take any written complaint. Thereafter the defacto complainant again went to Gazol P.S. to lodge FIR against the accused, but the P.S. personal concerned again declined to take any complaint. After that the defacto complainant lodged written complaint before the Superintendent of Police, Malda with the above allegation.

4. By filing the written complaint to the Superintendent of Police, Malda, the O.C. of Gazol P.S. started a case being Gazol P.S. Case No. 33 of 2008 dated- 25.02.2008 under Sections 363/366 of IPC and endorsed one

Sub-Inspector of Police to investigate the case. Thus, the criminal law was set in motion.

5. Police investigated the case and submitted charge sheet against the accused persons under Sections 363/366/109 of IPC on 28.03.2008. Charge was framed by the Trial Court against the accused persons under Sections 363/366/109 IPC.

6. Eleven witnesses were examined on behalf of the prosecution including the defacto complainant and the victim girl and documents were marked as exhibits 1 to 6 in this case on behalf of the prosecution.

7. No witness was examined on behalf of the defence and no document was exhibited on behalf of the accused persons.

8. Mr. Abhimanya Bannerjee, learned advocate on behalf of the appellant said that the present judgment and order of conviction passed by the learned Trial Court is not sustainable under the eye of law. There are so many contradictions in respect of the evidences of the witnesses cited on behalf of the prosecution. It would appear from the evidence of P.W. 1, the father of the victim girl who stated that the appellant took away his daughter from their village and he heard that incident from the local villagers. P.W. 8 the victim girl stated that at the time of recording her statement under Section 164 of the Criminal Procedure Code by the learned Magistrate that she was 18 years old and she voluntarily married with the appellant Faruk. She admitted that she was taken away by Faruk to marry her and Faruk did not take away her forcibly and subsequently the victim married with the appellant.

9. At the time of her examination-in-chief, the victim girl totally deviated from the statement recorded by the Magistrate under Section 164 Cr.P.C. and stated a different story that on the relevant date when she was going through the road then the appellant and his friend forcibly took away her from the place by a motor cycle and thereafter, they took her to Gazol and thereafter to Sambalpur at a house of one friend of the appellant. This witness further stated that the appellant called a “Kaji” at Sambalpur and forcibly married her and kept her confined for 8 days in the friend’s house at Sambalpur.

10. It is said by the learned advocate for the appellant that the age of the victim was not ascertained by the evidences of the witnesses as well as by filing any document to that extent. It is further said by the learned advocate that the Investigating Officer although prayed for ossification test and ossification test of the victim was done, but he did not collect the said report. Admission register in respect of the victim girl was called for from the concerned school, but it would be appeared from the deposition of P.W. 10 that there was overwriting in the date, dated 18.5.1998 in the relevant entry and before the page no. 23 of the said register, there is page no. 17 and the relevant entry relating to date of admission mentioned as 20.5.1996. As per submission of the learned advocate this creates serious doubt about the entries in the relevant record of the school. Moreover, the concerned I.O. did not collect the ossification test report of the victim which might indicate the age of the victim at the relevant point of time.

11. Learned advocate for the State Mr. Avishek Sinha submits that there is no illegality or irregularity in the impugned judgment and order of conviction of the appellant. Learned Trial Court passed the said impugned judgment and order of conviction after appreciating all the evidences, which were brought on record by the side of the prosecution. So, it is said by the learned advocate that there is nothing to interfere with the said impugned judgment and order and the appeal preferred by the appellant may be dismissed outright.

12. The instant case was started by the concerned P.S. over the complaint lodged by the defacto complainant in which it is stated by him that his daughter (victim girl) was forcibly taken away by the appellant and his daughter was aged about 15 years on the relevant date i.e., 18.02.2008. He heard it from the local villagers. So, at the time of alleged incident, P.W. 1 was not present at the spot. P.W. 2, the mother of the victim, stated that at about 1 ½ years back at about 5 P.M. her daughter was taken away by the appellant from the village path and subsequent to that date her daughter was found missing for about 8/9 years. So, PW2 is also not the witness to the incident. In her cross examination this witness stated that the villagers said that they would amicably compromise the matter and as such, the delay was caused in lodging the FIR. PW3 Md. Borjahan who happens to be the uncle of the victim stated that he came to know from 'para people' that the appellant with the help of one Abdul Sahid kidnapped and took away the victim girl by a motor cycle and immediately thereafter

they went to “Samaj” and informed about the said matter of kidnapping of the victim girl. He is also not the eye witness to the incident.

13. PW4 stated nothing about the incident but in cross examination he stated that the age of the victim at the time of his giving deposition i.e. in the year 2010 is 20 years.

14. PW6 stated that his ‘bhagni’ went away with the appellant and lived together and subsequently married. In cross examination he stated that the age of the victim at the time of his giving deposition was about 20/22 years.

15. It is stated in the written complaint by the defecto complainant that his daughter was minor at the time of alleged commission of offence. The admission register of the school in which the victim studied was called for by the prosecution. The said school admission register was marked as (exhibit-5) in this case. But in cross examination, P.W. 10 who was the Head Teacher of the said school i.e., Khardhahil S.P. Primary School stated that the said admission register itself did not disclose that whether it is the genuine school admission register or not. This witness further stated that the serial number of the entry in the admission register was not noted and there is overwriting in the date, dated 18.5.1998 in the relevant entry. In the said admission register before the page no. 23, there is a page no. 17 and the relevant entry relating to date of admission mentioned in that page is written as 20.5.1996. As there are discrepancies, overwriting in the said admission register, the reliance cannot be placed solely upon it.

16. P.W. 11, I.O. of this case stated that he got ossification test of the victim girl done at Malda Sadar Hospital, but in cross examination it is said by the said witness that he did not collect the ossification test report of victim girl. The best reason known to him as to why the said ossification test report was not brought in the record on behalf of the prosecution.

17. P.W. 8 (victim girl) stated in her cross examination that at the time of recording her statement by the Magistrate, she said that she voluntarily married with the appellant and she took away this appellant to marry her and nobody took away her and subsequently she married with the appellant. It is further said by this witness that the appellant and his family members did not use any force in respect of her marriage with Faruk. Victim girl further stated that a case of restitution of conjugal rights was filed by the appellant and he appeared in that case and filed written statement. The statement of the victim girl under Section 164 Cr.P.C. by the Magistrate was marked as (exhibit- 2) in this case. But at the time of giving evidence this witness in her examination in chief totally deviated from the statement made in the statement recorded under Section 164 Cr.P.C. The victim girl has categorically stated in her statement recorded under section 164 of the Code of Criminal Procedure that she voluntarily accompanied the appellant without any inducement on his part. So, the veracity and trustworthiness of this vital witness is doubtful.

18. Moreover, the defacto complainant stated that he heard the incident from the local villagers. P.W. 2 mother of the victim girl is also not the witness to the said incident and stated that after 8/9 days of the said

incident, her daughter was traced out and the police recovered her daughter from the house of Faruk. But immediately after the incident, no written complaint was lodged and she stated before the police which is revealed from her cross examination that the village people told them that they would amicably compromise the matter and as such, there is a delay in lodging the FIR.

19. If I hold for a moment that the victim was minor at the time of incident then also in the absence of any inducement or allurement on the part of the appellant for taking away the victim girl from the lawful guardianship and in view of the specific statement given by the victim girl that she voluntarily accompanied the appellant, then it would be also of no offence as defined in Section 361 of the Penal Code, 1860.

20. After scanning of the entire evidences both oral and documentary which was brought by the side of the prosecution it would appear that the age of the victim at the time of commission of the alleged offence was not ascertained by the prosecution rather the Investigating Officer stated that ossification test of the victim was done but he could not collect the said report. It appears from the statement of the victim girl recorded by the Magistrate as well as her cross examination that she voluntarily left with the Faruk and subsequently married with him. So, all the evidences which were brought on record by the prosecution could not bring home the charge leveled against this appellant. There is a serious doubt and discrepancies about the commission of the alleged offence and the involvement of this appellant with the offence alleged rather it would

appear that the victim girl left with the appellant voluntarily and they subsequently married.

21. It would further appear from the evidence of P.W. 8 that the appellant has filed a case of restitution of conjugal rights against the victim girl and in that case, the victim girl entered appearance and contested the same. An offence punishable under Section 361 IPC would be made out only when a person takes or entices any minor under the age of 16 years, if he is a male or under 18 years, if female. Section 361 IPC, defines kidnapping from lawful guardianship and Section 363 IPC provides a sentence for the offence of kidnapping a person from lawful guardianship. The defacto complainant stated in the written complaint that the appellant took the victim girl forcibly but on the other hand, the statement of the victim is quite different. She stated that she voluntarily left with the victim and subsequently married with her. The prosecution helplessly failed to prove that at the time of alleged offence the victim girl was below the age of eighteen years. Anyway, the entire evidences brought on record by the prosecution do not inspire confidence of this Court to sustain the judgment and order of conviction of the appellant and as such it is liable to be set aside.

22. Accordingly, the appeal is hereby **allowed**.

23. The impugned judgment and order passed by the learned Trial Court dated 24.02.2010 in connection with Sessions Case No. 220 of 2009 convicting the appellant under Sections 363/366 of the Indian Penal Code and sentenced under those two sections are hereby set aside.

24. Bail bond furnished by the appellant is hereby discharged.
25. Let a copy of this judgment along with the Trial Court Records be sent down to the Trial Court forthwith.
26. Urgent photostat certified of this judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Prasenjit Biswas, J.)