

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

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.R.A. 230 of 2016

Kamal Ghorai & Ors.

-Versus-

The State of West Bengal

For the Appellants : **Mr. Asraf Ali**

For the State : **Mr. Binay Panda,
Mr. Subham Bhakat**

Hearing concluded on : **03.04.2025**

Judgment On : **10.04.2025**

Prasenjit Biswas, J:-

1. The instant appeal is preferred at the behest of the appellants challenging the impugned judgment and order dated 28.01.2016 and 29.01.2016 passed by the learned Additional District and Sessions Judge, 3rd Court, Tamluk, Purba Medinipur in connection with Sessions Case No. 217(April) 2014 corresponding to Sessions Trial No. No. 06(08)2014 whereby and whereunder these appellants were found guilty for the Commission of the offence punishable under Section

363/34 of the Indian Penal Code and sentenced them to suffer simple imprisonment for five years along with a fine of Rs. 2000/- each i.d. to suffer simple imprisonment for two months for the offence punishable under Section 363/34 of the Indian Penal Code. These appellants/convicts were sentenced to suffer simple imprisonment for seven years along with a fine of Rs. 2000/- i.d. to suffer simple imprisonment for two months for the offence punishable under Section 366/34 of the Indian Penal Code.

- 2.** The story of the prosecution is briefly delineated hereunder-
Tuhin Mondal brother of the victim lodged a written complaint with Kolaghat P.S. on 27.07.2012 to that effect that on 25.07.2012 his younger sister/victim who was aged about 13 years at that point of time went to her school but did not return after school hours. The de-facto complainant and the family members caused enquiry here and there but could not find the victim and for that reason a missing diary being G.D. No. 766 dated 25.07.2012 was lodged before the police station. On enquiry the complainant came to know that this appellant seduced and kidnapped his daughter and compelled her to marry. The friend of the appellant namely, Kamal Ghorai also helped him for the said illegal purpose.
- 3.** Over the receipt of the complaint concerned P.S. started Kolaghat P.S. Case No. 238/12 dated 27.07.2012 for the offence punishable under Sections 363/366/34 of the Indian Penal Code against the accused persons. Thus, the criminal law was set in motion. Police investigated the case and submitted charge-sheet against the accused persons for the offence punishable under Sections 363/366/34 of the Indian Penal Code.
- 4.** Charge was framed by the Trial Court against the accused persons under Sections 363/366/34 of the Indian Penal Code by the Trial

Court, which the accused persons pleaded and not guilty and claimed to be tried.

5. In this case, five witnesses were examined by the side of the prosecution and documents were marked as exhibits 1 to 5 in this case. Neither any oral nor any documentary evidence was cited by the side of the defence.
6. Mr. Asraf Ali, learned Advocate for the appellant submitted that the prosecution has failed to prove the charge levelled against this accused person. The prosecution also failed to prove the age of the victim at the relevant point of time. Learned Advocate further assailed that the evidences of PW1 and PW2 do not corroborate the contents of the written complaint and as such, the prosecution has hopelessly failed to prove the charge against the accused persons beyond all reasonable shadow of doubts. The attention of this Court is drawn to the evidences of PW1 and PW3 and particularly PW2 the victim. It is said that it would be appeared from the evidence and the statement given by the victim that she went with this appellant voluntarily and, therefore, there is no case under Section 363 or under Section 366 of Indian Penal Code. It is further said that the marriage between the appellant and the victim was solemnized in the year 2012 and presently the victim is residing in the house of the accused persons and they were blessed with a child. If any order is passed against these accused persons the future life of the girl and their child will be doomed. It is further said by the learned Advocate that there are contradictions and omissions in the evidences of the witnesses which throw grave shadow of doubt upon the prosecution case and as such, the conviction and sentence is wholly illegal and liable to be set aside. Lastly, the learned Advocate said that the examination of the appellants under Section 313 of the Code of Criminal Procedure has not been done in conformity with

the provision of the said section and on that score the impugned judgment and order does not stand under the eye of law.

- 7.** Mr. Binay Panda, learned Advocate appearing on behalf of the State submitted that there is no illegality or irregularity in the impugned judgment and order of conviction. All the witnesses cited by the prosecution corroborated the contentions of the written complaint. At the time of alleged incident, the victim was minor and it would appear from Exhibit-3 (birth certificate). According to him, the ingredients of Section 363/366 of Indian Penal Code is well proved and the accused persons are rightly held guilty for the charge. As per submission of the learned Advocate as the victim was minor and as such, her so called consent given for marriage is of no consent under the eye of law. The evidence laid by the prosecution is clear, cogent and reliable and as such, there is nothing to interfere with the impugned judgment and order passed by the learned Trial Court.
- 8.** I have considered the rival submissions advanced by both the parties. Perused the materials gathered in the record.
- 9.** PW1, Tuhin Mondal, brother of the victim and the de-facto complainant said that the incident was happened about two years ago from the date of his giving deposition. Save and except, he could not remember anything. This witness stated that at the time of the incident his sister was aged about 13 years. In cross-examination, this PW1 stated that on guess he said that the victim was aged about 13 years at the time of the incident. This witness further said that her daughter married the appellant and presently he had no grievance against the appellant.
- 10.** PW2 is the victim girl and was the star witness of the prosecution. The age of the victim girl was written on the deposition sheet as 22 years and she said that two years ago when the incident was happened, she was 17 years old and was a student of class VIII. This witness stated that she left her school along with the appellant Tapas Ghorai and went

to Salt Lake and had taken shelter in a rented house for five days and on sixth day she came back from Salt Lake. This witness proved her statement made before the Magistrate which was marked as Exhibit 2 in this case. On cross-examination, this PW2 stated that on consent of her parents and family members she came back to the house to the appellants and at present she is residing and leading her conjugal life with the appellant therein. On asking by the Court this witness stated that her marriage was solemnized on 19th Aghayan and it was 2012 of English calendar. This witness further answered on the questions put by the Court to her that their marriage was solemnized in Kali Temple in Panskura and in that marriage one of the accused Kamal Kanta Ghorai and 'pisemosai' of the principal accused Tapas Ghorai were present. It appears from Exhibit-2 i.e. statement of the victim before the Magistrate wherein she stated that she had a love relation with the accused Tapas Ghorai for two years and her parents did not accept such love relation and as such, on 25.07.2012 in the morning at about 10.30 AM she left her house and went along with the accused Tapas Ghorai and thereafter, they went to Salt Lake, Kolkata and she informed her parents about her marriage with the accused Tapas Ghorai. So, PW2 victim stated that she left with the accused Tapas Ghorai voluntarily and after that she married with him.

11. PW3, Pratima Mondal, mother of the victim stated that the incident was happened on 25.07.2012 and at that time the victim was the student of class IX, but PW2 stated that she was a student of class VIII at the time of alleged incident. This PW3 further stated that her daughter fled away from the school with the accused Tapas Ghorai. This witness also said that the appellants did not kidnap or take away her daughter. This witness further said that at the time of incident her daughter was aged about 17 years and at present the victim is residing in her conjugal house. On cross-examination, this witness stated that subsequent to

the incident the victim went to the house of the accused person and at present she does not have any grievance or allegation against the appellants.

- 12.** Now, come to the evidence of PW4 who happens to the father of the victim. This witness stated that the incident was happened in the year 2012 when his daughter/victim was a student of class V. This witness further stated that her daughter/victim fled away from her school on the date of the alleged incident. On cross-examination, this witness stated that there was a love relation in between the accused Tapas Ghorai and her daughter. He further said that the victim fled away along with the accused Tapas Ghorai and got married and now, the victim is residing in her conjugal house with the appellant Tapas Ghorai and they are leading happy conjugal life. This witness stated that he does not have any allegation against the accused persons at present.
- 13.** PW5, Naru Gopal De is the I.O. of the case who after completion of the investigation submitted charge-sheet against the accused persons.
- 14.** It would appear from the Exhibit-3 which is the certificate of the birth of the victim that the date of birth of the victim is mentioned thereon as 09.09.1998 and the alleged incident was happened on 25.7.2012, so at the time of the alleged offence victim was aged about 14 years.
- 15.** PW1 stated at the time of giving deposition before the Court on 9th April, 2015 that two years back from that date she was 17 years old. On the other hand, in deposition sheet her age was mentioned as 22 years. PW 3, mother of the victim stated that at the time of alleged incident her daughter was 17 years old. But the de-facto complainant, brother of the victim stated that at the time of incident his sister/victim was aged about 13 years. It appears from the certificate of birth of the victim (exhibit-3) that at the relevant point of time she was aged about 14 years. So, the victim has attained the age of discretion. She was

capable of knowing what was good or what was bad for her and cannot be said to be a victim of inducement particularly, when she stated that it was on her initiative and on account of her voluntarily act, she had gone away with the accused Tapas Ghorai and got married to him. The same fact gets corroboration from the evidence of PW3, mother of the victim wherein she stated that her daughter fled away from the school with the accused Tapas Ghorai. The victim made statement before the Magistrate recorded under Section 164 of Cr.P.C. which is marked as exhibit 2 in this case. It was stated by the victim that she left her house and went along with the accused Tapas Ghorai and thereafter went to Salt Lake, Kolkata and informed her parents about her marriage with the accused. It is specifically stated by the victim girl that she left with the accused Tapas Ghorai and went to Salt Lake and took shelter in a rented house for five days and on sixth day she came back from Salt Lake.

- 16.** PW1 (the de-facto complainant), PW3 (mother), PW4(father) and the victim herself (PW2) stated that marriage was solemnized between the victim and the accused Tapas Ghorai and they are leading their conjugal life. In such circumstances, desire of the victim is required to be considered. Ingredients of Section 361 IPC are required to be considered accordingly and not in mechanical or technical interpretation.
- 17.** In order to address the submission made on behalf of the appellants it would be appropriate to notice the definition of kidnapping as defined in Section 359 of the Indian Penal Code as well as Section 361 of the Indian Penal Code which provides for kidnapping from lawful guardianship and Section 366 of the Indian Penal Code which prescribes punishment for kidnapping. Kidnapping from lawful guardianship has been defined in Section 361 of the Indian Penal Code. The offence under the Section may be committed in respect of either a

minor under 16 years of age, if a male or under 18 years of age, if a female or person of unsound mind. There is a distinction between “taking” and “allowing” a minor to accompany a person. The two expressions are not synonymous. I would limit myself to a case like a present one where the minor alleged to have been taken away by the accused persons who knew or had capacity to know the full import of what she was doing and voluntarily joined the accused persons. It would appear from the statement of the victim as well as her deposition that she had love affairs with the appellant Tapas Ghorai and as such, she fled away with him voluntarily. In such case, I do not think that the accused persons can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in case of this kind and that is some kind of inducement held out by the accused persons or an active participation by them in the formation of the intention of the minor to leave the house of the guardian. The case would be otherwise if the prosecution establishes that immediately prior to the minor leaving the guardian’s protection active part was played by the accused persons and they had at the some earlier stage solicited or persuaded the minor to do so. In my opinion, if evidence to establish one of these things is lacking it would not be legitimate to infer that the accused persons are guilty of taking the minor out of the keeping of the lawful guardian. Merely because she had actually left her guardian’s house and joined the accused is not sufficient to prove the charge levelled against the accused persons.

- 18.** Kidnapping would necessarily involve enticing or taking away any minor under 18 years of age if a female for the offence under Section 361 IPC. In the present case, the abductee had clearly stated in his evidence as well as in the statement recorded by the Magistrate that she was neither taken away nor induced by the accused persons and she had left her home of her own free will and married the accused

Tapas Ghorai. The intention of the accused is the basis of the offence under Section 366. Kidnapping is an offence if it consists of enticing or removing the girl from the keeping of lawful guardians without their consent.

19. In the present case, the age of the victim appears on the basis of Exhibit-3 i.e. the certificate of birth was about 14 years at the time of alleged incident. Ingredients of Section 361 IPC cannot be said to be satisfied in case where the minor having attained age of discretion, alleged to have been taken by the accused persons, left her guardian's protection knowingly and voluntarily joined the accused person. In such case, it cannot be said that the victim had taken or enticed away out of the keeping of lawful guardianship of her parents. So, as to say an act of criminality on the part of the accused, some kind of inducement might be held out by the accused person or an active participation by him, in the formation or the intention of the minor to leave the house of the guardian, is required to be shown. When the above situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim was a few months short of attaining age of 14 years. However, she did not reach the age of majority but had attained age of discretion. The victim in her statement recorded under Section 164 of Cr.P.C. clearly demonstrated that she went out of her free will on the date of incident with the accused Tapas Ghorai without any coercion and stayed with him in the Salt Lake and got married to him in a temple willingly. It is a conscious act on the part of the victim all through. As it appears from the statement recorded by the victim under Section 164 of Cr.P.C. as well as from her deposition that she made it evident that the accused Tapas Ghorai cannot be attributed with coercing the victim, inducing her or kidnapping or abducting her in the offence alleged. The Trial Court has not shown any material which would indicate coercion, inducement, a

forceful act on the part of the accused Tapas Ghorai so as to conclude that the offence has been committed by him.

20. It is clear from evidence of PW2 that she had herself gone with the accused Tapas Ghorai with her free consent and without any threat, pressure, coercion or influence. When she deposed on 9th April, 2015 it is stated by her that she left her school along with the accused Tapas Ghorai and went and took shelter in a rented house for five days. In these circumstances, in the absence of an active role having been played by the accused the allegations levelled against the accused persons stand ruled out altogether. There is no material to conclude that the accused Tapas Ghorai along with other accused persons had used force and had enticed her. The evidence of the prosecution especially the victim girl (PW2) is in favour of the accused. It can be assessed from the evidence of the prosecutrix that she had gone out of her free will and consent with the accused. She did not raise any alarm while she was allegedly taken away by the accused persons. She also did not ask for help at the time of alleged taking by the accused Tapas Ghorai. She has not deposed about any alleged force, allurement from the part of the accused person. From these circumstances, no inference can be drawn that the accused is guilty of taking away the victim girl out of keeping of her guardians. She has willingly accompanied the accused appellant Tapas Ghorai and there is nothing incriminating on the record against the accused.
21. Therefore, the role of the accused at best can be stated as facilitator and cannot be held that he (Tapas Ghorai) either took the victim or enticed her away from lawful guardianship of her parents. The initiative is lying at the end of the victim and not on the accused.
22. The statutory language says that in a situation if the minor leaves her parental home completely uninfluenced by any promise, of her inducement emanating from the guilty party, then the later cannot be

considered to have committed the offence as defined in Section 361 of the Indian Penal Code. The materials collected by the Investigating Agency as well as from the evidences cited by the prosecution it would appear that the accused persons did not make any inducement for taking the victim girl from the custody of the lawful guardian i.e. PW3 and PW4. In the absence of any inducement or any allurement on the part of the accused persons for taking away the minor victim girl from the lawful guardianship of the PW3 and PW4 and in view of the specific statement given by the victim girl before the Magistrate that she voluntarily accompanied the accused Tapas Ghorai, then in the instant case I am opinion that no offence is made out.

- 23.** Now, on the basis of foregoing discussions, this Court is of considered opinion that preponderance of probabilities indicated that the victim girl (PW2) had voluntarily gone with the accused Tapas Ghorai and in the process the accused persons did not play any active role. Therefore, the charges framed under Section 363 IPC cannot be said to have been proved against the appellants and conclusion is reached, the offence under Section 366 is automatically becomes false as the victim has not levelled any allegations of malafide intent against the accused. Consequently, it is held that the prosecution failed to prove its case against the accused persons beyond all reasonable shadow of doubt.
- 24.** In view of the discussions, the appeal is allowed.
- 25.** The conviction and sentence passed against the appellants under Sections 363 and 366 of the Indian Penal Code is set aside and the appellants are acquitted from both the charges as same are not found to be proved against them as beyond reasonable shadow of doubt. The fine if realised be refunded to the accused persons forthwith.
- 26.** The accused persons are on bail, their bail bonds are to be discharged and they will be set at free if not wanted in connection with the any other cases.

- 27.** Thus, the criminal appeal being no. 230 of 2016 is hereby allowed.
- 28.** Trial Court Records along with a copy of this judgement is to be sent down to the Trial Court immediately
- 29.** Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)