

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 704 of 2013

Sunil Kumar Singh

-Vs-

The State of West Bengal

With

C.R.A. 771 of 2013

Sabita Mondal

-Vs-

The State of West Bengal & Ors.

For the Appellant : Mr. Sekhar Kumar Basu
Mr. Antarikhya Basu

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 15.12.2023, 24.01.2024, 20.03.2024,
05.04.2024, 20.05.2024, 30.09.2024

Judgment on : 07.05.2025

Ananya Bandyopadhyay, J.:-

1. Both the appeals are disposed of by a common judgment.
2. The appeals are preferred against the judgment and order dated 31.07.2013 passed by the Learned Additional Sessions Judge, 2nd Court at Nadia in Sessions Case No.23(5) of 2013 corresponding to Sessions Trial No.II(May)2013, arising out of Kotwali Police Station Case No.98/2013 dated 26.01.2013 thereby convicting the appellant for commission of the offence

punishable under Section 363 of the Indian Penal Code and sentencing him to suffer imprisonment for 5 (five) years and also to pay a fine of Rs.2,000/-, in default, to suffer imprisonment for a further period of 6 (six) months.

3. On 26.01.2013 one Dilip Mondal (PW-9) father of the victim (PW-6) lodged a written complaint at Kotwali Police Station precisely stating on 25.01.2013 the daughter of the complainant (PW-6) and the daughter of Biren Biswas (PW-2) the next door neighbour of the complainant (PW-7) went missing. They were aged about 14 and 15 years respectively. On 26.01..2013 at about 10/11 a.m., the complainant got the information that the victim girls were with Sabita Mandal (co-accused), daughter of Sudhir Biswas. Thereafter, the complainant along with his neighbours and members of the local club went to Bhimpur Bazar bus stand, and apprehended them when they were about to board a bus. The unknown person was with them. It was further disclosed that the victim girls had informed the complainant that the previous night they were taken to Sadka, Majdia and different places by Sabita Mondal (co-accused) and the unknown person. They were enticed with a good job in Delhi by the said Sabita Mondal (co-accused) and the unknown person. Sabita Mondal (co-accused) and the unknown person also stated that they were taking the girls to Delhi to sell them.
4. On receipt of the said complaint, Kotwali Police Station Case No.98/2013 dated 26.01.2013 under Sections 363/366A of the Indian Penal Code was registered for investigation against the unknown person and one Sabita Mondal.

5. On conclusion of investigation, PW-13 the Investigating Officer of the instant case submitted charge-sheet being Charge-sheet No.157/13 dated 28.02.2013 under Sections 363/366A/34 of the Indian Penal Code against the unknown person and one Sabita Mondal.
6. Charges under Sections 363 and 366A of the Indian Penal Code were framed against the unknown person and one Sabita Mandal to which they pleaded not guilty and claimed to be tried.
7. In course of trial the prosecution examined as many as 13 witnesses and exhibited certain documents.
8. On conclusion of trial, the Learned Additional Sessions Judge, 2nd Court at Nadia in Sessions Case No.23(5) of 2013, convicted the appellant and other accused namely Sabita Biswas for commission of the offence punishable under Section 363 of the Indian Penal Code and sentenced them to suffer imprisonment for 5 (five) years and to pay a fine of Rs.2,000/-, in default, to suffer simple imprisonment for further period of 6 (six) months. The Learned Trial Judge recorded the submission made by the Learned Public Prosecutor that there was no evidence to substantiate the charge under Section 366A of the Indian Penal Code and evidently exonerated the appellant from the said charge.
9. The Learned Advocate representing the appellants submitted that the recovery of the victim could not be proved through any independent witnesses. Moreover, the evidences of the victims did not reveal that they had been forcibly confined for illegal purpose by the appellants enticing them beyond the jurisdiction and control of lawful guardianship. Further

the place of recovery was not distinct and ambiguous with apparent variations on the face of the record. The Investigating Officer did not conduct proper investigation concerning the age of the victim to be minor, the actual place of recovery, the examination of independent witnesses, the place of interception. The evidence adduced by the prosecution witnesses suffered from inherent infirmities since the victims had left their respective houses at their own volition without being wrongfully instigated or enticed for unlawful purpose to their predicament and to the wrongful gain of the appellants.

10. The Learned Advocate representing the State submitted as follows:-

- i. The Learned Trial Court had passed an order of conviction and sentence for the offence punishable under Section 363 of the Indian Penal Code against the appellants and the same had been assailed before this Hon'ble Court.
- ii. The main ingredients of Section 363 of the Indian Penal Code which needed to be proved by the prosecution to bring home the charge were the victim who had been kidnapped if a female must be under the age of 18 years.
- iii. The victim was in a lawful guardianship.
- iv. The accused had enticed her or took away the victim from such lawful guardianship.
- v. The accused did not take any consent from the legal guardian to take away the victim.

- vi. In this present case the victim girls +were examined as PW-6 and 7. Both of them had disclosed their age to be 14 and 15 years respectively. The birth certificates were seized by the Investigating Agency. In fact, the seizure lists were marked as exhibits.
- vii. The accused had failed to put any question during the cross-examination about the age of the victims.
- viii. The fathers of both the victims were examined at length, yet no question was put to them regarding the age of the victims.
- ix. Both the fathers had deposed that the victims were taken away on the allurement of jobs at Delhi by the appellant Sabita.
- x. Both the victims had also deposed that they were asked to leave the house so that good job could be arranged at Delhi and hence they left without informing the guardians.
- xi. The appellants had taken a ground that although the FIR was registered at 1:35 P.M on 26.01.2013, but in the evidence they stated that the appellants were caught with the victims at 3 P.M. In fact, PW-9 and 11 the fathers of the victims had explained that they were searching for the girls and when they reached the Bhimpur Bus stand in the early afternoon, they caught all of them and made them sit and went to the police station to inform and then the police came and he submitted the FIR. So the discrepancy in the narration of the time by the witnesses could be condoned as the entire incident went for quite some time.

- xii. The recovery memo Exhibit-2 would clearly show the time at which the girls were recovered and hence only because the witnesses being rustic villagers failed to state the exact time, the entire prosecution case should not fall.
 - xiii. Another point had been taken by the appellants that in the formal FIR, the place of occurrence had been shown as Dhakuriapota and not Bhimpur Bus Stand, but it had to be remembered that the victims were taken away from Dhakuriapota and recovered from Bhimpur Bus Stand, hence all the places where the victims had travelled with the accused after being kidnapped should have the territorial jurisdiction as per Section 177 of the Code of Criminal Procedure, 1973.
 - xiv. The prosecution had been able to prove its case beyond all reasonable grounds and hence the judgment and order of conviction and sentence should be affirmed and upheld.
11. A scrutiny of the evidence of witnesses conspicuously revealed inconsistencies in the prosecution case as follows:-
- i. It had been claimed by PW-9 (the complainant) that his daughter (PW-6) along with PW-7, the daughter of the neighbour of the complainant namely, Biren Biswas (PW-2) were found missing on and from 25.01.2013, but no effort was made either by PW-9 or by PW-2 to inform the police authorities about their daughters missing. Thereafter PW-9 stated on 26.01.2012 at about 3 p.m, i.e. on the very next day of the missing of the girls, he found them at

Bhimpur Bazaar under the custody of one Sabita Mondol and the unknown person, and then only he went to the police station and lodged the complaint. No action was taken by PW-9 in regard to the missing of his daughter before any authority whatsoever. During the entire course of the trial, it could not be satisfactorily explained by the prosecution why no effort was immediately undertaken by PW- 9 and also by PW- 2 to inform the local police station after the incident.

- ii. The witnesses deposed that the girls were allegedly recovered at 3 p.m. There was divergent evidence with regard to the place of recovery and the evidence of Investigating Officer (PW-13) adduced in this regard rendered the confusion worse confounded. Regardless of these facts what was to be considered was how could there be lodging of the complaint at 1:35 p.m. on 26.1.2013 on recovery of victim girls when the evidence suggested that they were recovered at 3 p.m on the even day. Moreover the prosecution did not examine the police officer who drew up the complaint.
- iii. PW-1, who happened to be the son-in-law of PW-2 and also the scribe stated in his cross-examination that on 25.01.2013 i.e. the day of missing of PW-6 and 7, he found both the victim girls along with one Sabita Mondol and the unknown person at a place called Dafarpota and that day he informed this to his father-in-law i.e. (PW-2). From the evidence of PW-2 it was evident that he deliberately suppressed the above mentioned facts deposing before

the Court. In spite of getting this information from PW-1 and PW-2 being one of the aggrieved of the alleged incident did not make an effort to inform the police authority regarding the same. The Learned Judge did not consider this vital aspect of the case and thereby convicting the appellant caused serious prejudice.

- iv. It was evident from the depositions of the victim girls who had been examined as PW-6 and PW-7 in the instant trial stated in their chief that on 25.01.2013, both of them left their house in order to meet one Sabita Mondol at Dafarpota Bazaar for going to Delhi for a job. Accordingly, they came to Dafarpota Bazaar and met one Sabita Mondol and there they found the unknown person accompanying her. It was also stated that on 25.01.2013 the unknown person and the said Sabita Mondol kept them in a room at an unknown place and told them not to disclose their destinations to their respective parents. However, it was evident from the cross-examination of these two vital witnesses of the instant case that they did not divulge such vital facts neither before the Investigating Officer (PW-13) nor before the Learned Magistrate while giving their testimonies under Section 164 of the Code of Criminal Procedure. This embellishment was enough to discredit these two witnesses on the aspect of "kidnapping" and "enticement".
- v. Major contradictions writ large in the statement of witnesses with regard to the alleged place of recovery of the two victim girls. PWs-

2, 3, 6, 7, 9, 11 and 12; all the witnesses stated that the victim girls were recovered from Bhimpur Bazaar whereas it was evident from the formal part of the complaint that the Recording Officer of the concerned Police Station, namely S.I. Shaktipada Ghosh (not examined by the prosecution) recorded the name of the place of recovery as Dhakuriapota Gournagar. However, it was evident from the depositions of the Investigating Officer (PW-13) in his cross-examination, that the alleged place of recovery of the victim girls was somewhere else. Thus it was apparent that the prosecution had suppressed the very genesis of the occurrence. The alleged recovery led to the registration of the case if recovery itself being doubtful, the substratum of the prosecution failed.

- vi. PW-11, who was the mother of one of the victim girl (PW-6) stated in her evidence that on 26.01.2013 she along with her husband and the members of the local club went to Bhimpur Bazaar and rescued the two girls from the custody of the unknown person and Sabita Mondal. However, it was evident from the depositions of the two victim girls, i.e. PW-6 and PW-7 that at the time of their recovery they only found their respective fathers, i.e. PW-2 and PW-9 and the members of a club of their locality. This vital contradiction was clearly suggestive of the facts that the version of this witness was totally embryonic and embellished.
- vii. In the instant case the recovery of the victim could not be proved by the prosecution through any independent witnesses. It had

been stated by all the prosecution witnesses that while boarding a bus at Bhimpur Bazar, the victim girls were recovered. PW-13, the Investigating Officer stated in his evidence that after reaching the place of recovery, he found the victim girls along with the two accused persons in front of a shop of one Sunil Biswas. It was evident from his cross-examination, that neither he examined any local witnesses of Bhimpur Bazar area including the said Sunil Biswas (shop owner) nor he tried to ascertain the name, number and the destination of the bus which the victim girls along with the unknown person and one Sabita Mondol tried to board.

viii. There was nothing in the evidences of PW-6 and 7 to show that they had been forcibly confined for illegal purpose by the appellant at any point of time.

12. PW-1 recounted to have known both the victims and their respective fathers. PW-1 had met both the victims along with the appellant Sabita Mondal and an unknown person on 25.01.2023 and learnt that the same were going to Bhimpur. At about 03:00 P.M. on the same day, PW-1 came to know that the victim girls were missing and continued to search them till the next morning. At about 03:00 P.M., the aforesaid four persons were located at Bhimpur Bazar and were restrained to board a bus. Subsequently the police was informed and PW-1 scribed the complaint marked as Exhibit-1. PW-1 happened to be the son-in-law of PW-2 Biren Biswas the father-in-law of one of the victims. PW-1 further deposed to have seen the victims at Dafarpota on 25.01.2013 and on enquiry his sister-in-law one of the victims

replied that they were going to the market. PW-1 further stated to have been acquainted with the appellant Sabita Mondal though he could not identify the unknown person. The evidence of PW-1 weirdly referred to the conviction of PW-1 devoid of any suspicion, alarm, anxiety or worry regarding the safety of the minor victims to accompany both the appellants contrary to their interest and well-being both physically and mentally being a close relative of one of the victims. PW-1 claimed to have written the complaint at a shop located at Bhimpur Bazar. However, his presence at the Bhimpur Bazar along with the recovered victims could not be proved by the prosecution since PW-13 the Investigating Officer, during his cross-examination, stated *“There was a whisper of a bus which was related to the alleged occurrence. I did not ascertain what was the name or number of the said bus and what was its destination. I did not go to Sakda or Majdia or other places with the victim girls as they could not tell me the names of the places. Fact in the FIR the Recording Officer recorded the place of occurrence as Dhakuriapota Gournagar but in course of investigation I found another place of occurrence. As the shop was closed at the relevant point of time, I did not examine Sunil Biswas and Uttam Biswas. I did not go to any shop of Bhimpur Bazar. I examined those persons who were present there without knowing their occupation.”*

13. PW-2 the father of one of the victims in his cross-examination failed to state the number or name of the bus as well as the name of the club. He could not state whether he had been examined by the Investigating Officer and admitted to adduce evidence with regard to the incident for the first time

before the Court. PW-2 deposed to have informed the local club that on 25th of January, 2013, the victims went to the market in the evening and did not return.

14. PW-3 being one of the members of Gournagar Yuba Sangha being requested by the fathers of the victim girls accompanied them to trace the victim girls as faoresaid. PW-3 along with PW-4, PW-8 and PW-10 went on the mission. On 26th of January they were informed of the presence of the victim girls at Bhimpur station and were apprehended on their way to board a bus. At the intervention of the police, the victims along with the appellants were intercepted. PW-3 further recounted that the victims were taken to Delhi on the pretext of affording job. PW-3 too could not provide the details of the bus being boarded by the victim girls as well as the appellants.
15. PW-5 a member of the aforesaid club reiterated the evidence of PW-3.
16. PW-6 one of the victims deposed appellant Sabita Mondal a neighbour known to her having offered to provide a job for them in Delhi without disclosing the same to their parents. Both the victims arrived at Dafarpota Bazar and met the appellants. Boarding a bus they went to an unknown place in order to board a train from Howrah station. On 26.01.2013 at 02/03:00 P.M., they returned to Bhimpur Bazar and on their way to board a bus were apprehended by their respective fathers and the club members. PW-6 did not mention to have been enquired about their whereabouts by PW-1 on the earlier date. During cross-examination, PW-6 stated *“fact that I did not tell the police that on the relevant date I along with Bandana left our house, came to Dafarpota bazaar together and met Sabita and the unknown*

man. Fact that I did not tell the police that on 25.01.2013 we were kept in a room of the house in an unknown place. Fact that I did not tell the I.O. that at about 2/3 p.m. on the following day we were brought to Bhimpur bazaar by Sabita and with unknown man. Fact I did not tell the I.O. that Sabita and unknown man forbade us to disclose our destination to my parents. Fact that I did not tell the learned Magistrate that Sabita and the unknown man told me not to disclose our destination to my parents. Fact that I have not told the Magistrate that I along with Bandana met Sabita and the unknown man at Dafarpota Bazar and from there we were to an unknown place by bus. Fact that I have not stated before the learned Magistrate that Sabita told me that we would be taken to Delhi by train from Howrah Station.”

17. PW-7 the second victim differed with the evidence of PW-6, inter alia, stating that they were told to be taken to Delhi by train from Sealdah contrary to the statement of PW-6 to board a train from Howrah station. During her cross-examination, PW-7 stated *“I was examined by the I.O. Fact that I did not tell the I.O. that on 25-1-2013 I along with Puja left our house. Fact that I did not tell the I.O. that we met Sabita and the unknown man at Dafarpota bus stand. Fact that I did not tell the I.O. that we were taken to an unknown place by bus and we were brought back to Bhimpur bus stand at about 2-30/3 p.m. I cannot remember if I told the Police that Sabita instructed me not to disclose our destination to our parents. Fact that I did not disclose before the learned Magistrate that on 25-1-2013 I along with Puja left our house and met Sabita and the unknown man at Dafarpota bazaar. Fact that I did not tell the Magistrate that we were taken to an unknown place by bus from*

Dafarpota bazaar. I never went out of my village alone. I know that Delhi is far off from my house. I am the third daughter of my father. I got scared when I came to know that I would be going to Delhi. Sabita is my next door neighbour. I know her from quite a long time. We came to Bhimpur bazaar from that unknown place on the following day by bus.”

18. PW-11 the mother of one of the victims failed to state the names of the persons whose houses they searched for their daughter. She was not examined by the Investigating Officer and narrated the incident before the Court for the first time.
19. PW-12 the mother of another victim was not examined by the Investigating Officer and deposed before the Court for the first time.
20. 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.”

21. 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

¹(2008) 17 SCC 225

²(2021) 3 SCC 12

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]."

22. In **Parkash v. State of Haryana**³ 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 child, or who in good faith believes himself to be entitled to the

³(2004) 1 SCC 339

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.”

23. The age of a victim is the rudimentary and cardinal element to be determined in indicting a person in offences under Section 363 as well as Section 366A of the Indian Penal Code. The documents marked as Exhibit-3 and Exhibit-4 referred to seizure of the original birth certificate of the victims respectively mentioned therein. However, the original birth certificates were not produced before the Trial Court to authenticate the

details delineated therein diminishing the probative value of the said documents in its absence, in a case where the specific issue of the age of the victims was utmost material relevant to establish the reliability of the prosecution case.

24. The evidence of PW-4 and PW-8, the seizure list witnesses concerning the documents marked as Exhibit-3 and Exhibit-4 improbabilised the prosecution case. The said witnesses were not claimed to have been related to the victims who claimed to have signed the seizure lists as aforesaid. At the instant of PW-2, the father of one of the victims, pertinently being residents of Mouza-Bhimpur and Mouza Gournagar district from Mouza-Dhakuriapota. PW-4 named the document of seizure to be birth certificate without specifying the details. PW-8 contrarily stated to be the documents being oblivious of its actual details and specification.
25. The prosecution did not cite any other corroborative evidence to establish the victims to be minor at the relevant time of the incident, either through school records, or any other oral or documentary means to significantly fortify its case where the age of the victim was crucial and a key element to be ascertained. It had been a serious weakness in the prosecution case.
26. The documents mentioned in the seizure list ipso facto will not endorse the seizure of the same unless those documents are produced before the Court to authenticate its seizure along with further corroborative evidence if necessary to legally sanctify the same as an imprimatur either through the author of the document or resorting to relevant provisions of admissibility of

the same through adducing primary and/or secondary evidence, under the appropriate law of evidence.

27. The prosecution had failed to identify the victims to be minors at the time of the incident. Both the victims left their houses to meet the appellant Sabita and the unknown person. They had divulged of going to a market. They had ample opportunity to disclose of being enticed from their lawful guardianship forcefully or collusively. There had been major deviations in the spot of interception.
28. The elements to constitute the offence under Section 363 of the Indian Penal Code were failed to be established by the prosecution.
29. In view of the above discussion, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such the instant criminal appeals being CRA 704 of 2013 and CRA 771 of 2013 are allowed.
30. Under such facts and circumstances, the judgment and order dated 31.07.2013 passed by the Learned Additional Sessions Judge, 2nd Court at Nadia in Sessions Case No.23(5) of 2013 corresponding to Sessions Trial No.II(May)2013, arising out of Kotwali Police Station Case No.98/2013 dated 26.01.2013 is set aside.
31. Accordingly, these instant criminal appeals being CRA 704 of 2013 and CRA 771 of 2013 stand disposed of.
32. There is no order as to costs.
33. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

34. 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.)