

Form J(2)

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

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 544 of 2018

**Suraj Singh
Vs.
State of West Bengal & Anr.**

**For the Appellant : Mr. Debangana Bhattacharjee, Adv.
Ms. Swarnali Saha, Adv.
Mr. Rajdeep Sinha, Adv.**

**For the State : Ms. Anasuya Sinha, Adv.
Mr. Pinak Kr. Mitra, Adv.**

Heard on : 19.04.2022, 25.04.2022, 05.05.2022.

Judgment On : 05.05.2022.

Bibek Chaudhuri, J.

A minor girl who was a student of Class-VII in the year 2012 was found missing on and from 15th November, 2012. She used to stay with her mother, younger brother and grandmother. The father of the said missing girl had expired. When the family members of the said girl could not find her in spite of thorough search, her mother lodged a missing diary on 15th November, 2012 at Burtolla Police Station. However, the police failed to find out the said missing girl.

Subsequently, the mother of the victim girl came to know from the friends of her daughter that one Suraj Singh eloped her and took her to some unknown place. Suraj was actively aided and abetted by his uncle, Sanjay Singh.

After getting such information, the unfortunate mother lodged a complaint before the police on 7th December, 2012 on the basis of which a case being Burtolla Police Station Case No.565 dated 14.12.2012 was registered against Suraj Singh, Sanjay Singh and others.

The accused persons were arrested during investigation. The victim girl was recovered while she was in association with accused Suraj Singh. Police submitted charge-sheet against the above-named two accused persons under Section 366 read with Section 120B of the Indian Penal Code. Since the offence under Section 366 of the Indian Penal Code is exclusively triable by the Court of Sessions, the case was committed to the learned Chief Judge, City Sessions Court who, in turn, transferred the said case to the 2nd Fast Track Court of the learned Additional Sessions Judge at Bichar Bhawan, Kolkata.

The learned Trial Judge framed charge under Section 366 read with Section 120B of the Indian Penal Code against both the accused persons and took up the case for trial, when the accused persons pleaded not guilty. The trial of the case concluded with conviction of Suraj Singh for committing offence punishable under Section 366 of the

Indian Penal Code. The learned Trial Judge handed down sentence of simple imprisonment for a term of 2 years and also to pay a fine of Rs.5,000/- only, in default, to suffer simple imprisonment for another term of 3 months for the offence punishable under Section 366 of the Indian Penal Code.

Being aggrieved, convict Suraj Singh has preferred the instant appeal assailing the order of conviction and sentence.

In course of trial, prosecution examined 13 witnesses. Amongst them, the victim girl deposed as P.W.10. P.W.1 is the mother of P.W.10 and the de-facto complainant. P.W.2, Puja Sonkar is a friend of the victim girl. P.W.3, Neelam Pandey is a local resident to whom the victim girl calls "Bhabi". Both P.W.3 and the victim had friendly relation. P.W.4, Chandan Khatick and P.W.5, Rupa Das are residents of the said locality where the victim girl used to reside. P.W.6, Dr. Mukul Sarkar is a Medical Officer at Calcutta Medical College & Hospital in the year 2013 in the department of Radio Diagnosis. P.W.7, Dr. Nabanita Adhikari conducted medico legal examination of the victim girl. P.W.9, Dr. Biplab Shee examined the appellant and submitted his report stating, *inter alia*, that there is nothing to suggest that the patient is incapable of sexual intercourse. P.W.11 was posted as Metropolitan Magistrate, 4th Court at Kolkata on 26th December, 2012. She recorded the statement of the victim girl under Section 164 of the Code of Criminal Procedure. P.W.12,

Manoj Kumar Das was the Teacher-in-Charge of Balkrishna Vidyalaya. In course of his evidence on 23rd September, 2015, he produced the Admission Register of the school where victim girl used to read. He also submitted photostat copy of birth certificate of the victim girl, which was produced by her guardian at the time of admission in school. P.W.13 is the Investigating Officer of the case. The written complaint, medico legal examination report, formal FIR, Admission Register of the school, photostat copy of the birth certificate of the victim girl were also exhibited during trial.

It is needless to record that in order to prove charge under Section 366 of the Indian Penal Code, the evidence of the victim girl is of prime importance. Though the de-facto complainant alleged in the FIR that Neelam Pandey and some others were instrumental in aiding or abetting kidnapping of her minor girl and they allowed the victim to go away with the appellant, the said fact was not corroborated by the de-facto complainant in her evidence.

Therefore, in order to come to a conclusion as to whether the learned Court below correctly decided the case against the appellant or not, I intend to deal with the evidence on record primarily with the evidence of P.W.10, the victim girl. The victim girl stated in her evidence that on 15th November, 2012 at about 6:30 p.m., when she was strolling with her friend, Puja, a taxi stopped by their side. She

noticed the accused persons with two other persons inside the taxi. They opened the door of the taxi and forcibly took her inside the said taxi and left the place. She was forcibly fed something in the taxi and she lost her sense. When she regained her sense, she found herself at Mumbai in association with the appellant. The appellant forcibly raped her. She was locked inside the room for 10/15 days. Suraj brought her to Kolkata from Mumbai. Police apprehended them at Howrah station. She was medically examined by the Medical Officer at Calcutta Medical College and Hospital. She also admitted that she narrated the incident to the learned Magistrate who recorded her statement during investigation under Section 164 of the Code of Criminal Procedure.

When the statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure, the victim narrated that her mother used to abuse her and assault her regularly. She did not have the mere patience to bear the victim girl with her. So, she voluntarily left her home with her boy friend. They had been to Mumbai and started staying together there. She stayed there on her own accord. Subsequently, she came to know that her mother lodged a complaint against her boy friend. So they were compelled to return Kolkata from Mumbai. The victim girl further stated that she wanted to stay with her boy friend leaving her mother. Thus, the victim girl gave completely different account of incident and clearly stated to the

learned Magistrate that she left her matrimonial home with her boy friend, the appellant herein and she wanted to stay with the appellant leaving her mother.

It is urged by the learned P.P.-In-Charge that the statement of the victim girl under Section 164 of the Code of Criminal Procedure has no substantive value. Though the statement is recorded by a Judicial Magistrate, the evidentiary value of such statement is only corroborative one. The evidence of a witness which he deposed in Court on oath is the substantive evidence. He/she may be contradicted with her previous statement recorded under Section 164 of the Code of Criminal Procedure. The victim girl in her statement on oath before the Trial Court stated that she was taken away from her neighboring locality forcibly by the appellant and others by a taxi. She was compelled to consume something inside the taxi and she lost her consciousness. When she regained her sense, she found herself at Mumbai. She also stated on oath that she was repeatedly raped by the appellant at Mumbai.

The learned P.P.-In-Charge submits that the evidence given by the defacto complainant in Court being substantive in nature ought to be considered by this Court at the time of judicial scrutiny as to whether the judgement passed by the learned court below is correct or not.

It is further submitted by the learned P.P.-In-Charge that the defacto complainant being mother of the victim corroborated the evidence of her daughter in her evidence so far as it relates to "taking away" the victim girl from the lawful guardianship of PW-1.

Learned advocate for the appellant, on the other hand, submits that solitary evidence of the victim girl in a case under Section 366 of the IPC may be the basis of conviction if her statement inspires, confidence, trustworthy and unblemished. In the instant case, there is every occasion to raise doubt against the evidence of the victim girl because of the fact that the victim immediately after arrest voluntarily made statement before the learned Magistrate that she on her own accord went away with the appellant to Mumbai.

They lived together in Mumbai and also she wanted to stay with the appellant leaving her mother's residence. After lapse of about one and half year, the victim narrated completely different story, implicating the appellant in a case under Section 366 of the Code of Criminal Procedure.

The victim's statement under Section 164 of the Criminal Procedure gets corroboration from the evidence of PW-2, Puja Sonkar who deposed on oath that the victim had a love affair with the appellant and over the said relationship, the mother of the victim used to abuse her and occasionally assaulted her. So, the victim

wanted to flee away with the appellant. In the last part of November 2012, the victim went away by a taxi with the appellant. PW-3, Nilam Pandey also deposed in similar fashion. Thus, there is every reason to hold that the evidence of the victim girl is not reliable, trustworthy, cogent and unblemished. Her evidence on oath is not of "sterling quality". Therefore, the learned Trial Judge committed error in convicting the accused for the offence under Section 366 of the I.P.C.

In reply to such argument advanced by the learned Counsel for the appellant, it is submitted by the learned P.P-In-Charge that even if, the victim made contradictory statement at different stages of investigation and trial of the case, it is not in dispute that the victim was a minor aged about 14 years and 2 months on the date of commission of offence. Even assuming that the victim went away with the appellant on her own accord, such consent cannot be held to be a free consent because a minor cannot give consent as per the provision of Section 361 of the IPC.

It is not in dispute that the victim, being minor girl was taken away from her lawful guardianship. As soon as the victim was taken away from the custody of her lawful guardianship, the offence under Section 361 of the IPC is complete.

So far as the offence under Section 366 of the IPC, the prosecution requires to prove in addition to the ingredients of Section

361 of the IPC that the victim was kidnapped in order that she may be forced or seduced to illicit inter-course. The medical examination of the victim girl is sufficient enough to hold that the victim was subjected to illicit intercourse while she stayed in Mumbai association with the appellant. Therefore, the learned Trial Judge did not commit any error in appreciating the case of the prosecution to arrive at her conclusion during trial of the case and there is no ground to interfere with the finding of the trial court.

It is already recorded that the Trial Court framed charge against the accused/appellant under Section 366 of the Indian Penal Code. To bring home the guilt of the accused under Section 366, it is necessary for the prosecution to prove that the accused induced the prosecutrix or compelled her by force to go from any place; that such inducement was by deceitful means; that such kidnapping or abduction took place with the intent that the prosecutrix may be seduced to illicit intercourse and/or that the accused knew it to be likely that the prosecutrix may be seduced to illicit intercourse as a result of her abduction or kidnapping.

Kidnapping a girl by the accused and forcing her to marry the accused comes within the purview of the offence under Section 366 of the Indian Penal Code. But, if the girl voluntarily left with the accused, stayed with him and have sexual intercourse as a consenting partner, there will be no offence, provided she was then not below 16 years of

age. The decision of the Hon'ble Supreme Court in ***State of Himachal Pradesh –Vs.- Suresh Kumar*** reported in **(2008) 10 SCC 104** may be relied on in this regard.

From the statement of the victim girl, it is ascertained that there was a love relationship between the victim and the appellant. On 15th November, 2022 at about 6.30 p.m. she went away with the appellant by a taxi. In her statement under Section 164 she stated that she did not like to stay with her mother who used to abuse her and frequently assaulted her. Therefore, she voluntarily went away with the appellant and stayed with him in Mumbai for about 15/20 days. Subsequently, she came to know that her mother lodged a complaint with the jurisdictional Police Station. Then both the appellant and the victim returned to Kolkata. The victim completely resiled from her previous statement during her evidence in Court. She for the first time deposed in Court that she was forcibly taken away by the appellant. Therefore, the evidence of the victim girl (P.W. 10) cannot be accepted without corroboration because it is proved that the victim was in the habit of narrating the incident differently at different stages of investigation and trial. Admittedly, P.W. 2, Puja Sarkar and P.W. 3, Nilam Pandey are the friends of the victim girl. It is ascertained from their evidence that the victim girl had love affair with the appellant and she voluntarily left her home with the appellant on 15th November, 2012. The above-named

two witnesses were not declared hostile by the prosecution. If the evidence of P.W. 2 and 3 are compared with the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure, it would be found that the victim deposed falsely in the instant case.

Neither the victim girl, nor the *de facto* complainant made any allegation against the appellant to the effect that the victim girl was compelled to marry any person against her will or that she was forced or seduced to illicit intercourse. In the absence of such allegation, an accused cannot be convicted under the charge of Section 366 of the Indian Penal Code. The victim girl stated in her evidence that the accused committed rape upon her. However, such evidence cannot be considered in the absence of any charge under Section 376 of the Indian Penal Code. The aforesaid evidence can also not be used to prove the charge under Section 366 of the Indian Penal Code holding, *inter alia*, that the victim was induced for the purpose of illicit intercourse by the appellant.

With regard to the age of the victim there are three different evidences-on-record. During investigation, ossification test of the victim girl was held. The Medical Officer who submitted ossification report on the basis of development of bones of the victim girl stated that the age of the victim was between 15 years and 17 years on the date of ossification test. The Teacher-in-Charge of Bal Krishna Vidyalaya was

examined during trial as P.W. 12. He produced the admission register of the said school where the date of birth of the victim girl was recorded as on 12th August, 1998. Thus, as per the admission register she was aged about 14 years and two months on the date of alleged kidnapping. The extract of admission register and the original application form for admission of the victim girl in the said school were marked as exhibits 6 and 8 respectively. Photocopy of birth certificate of the victim girl was marked as exhibit 7. On careful perusal of the above-mentioned exhibits this Court is of the view that the entry of date of birth in the admission register of the school should be regarded as the best evidence under the facts and circumstances of the case. Thus, this Court holds that the victim was 14 years and two months on the date when she was kidnapped.

This Court is not unmindful to note that in spite of having love relationship with the victim the appellant had no right to take her away out of the keeping of the lawful guardian of the victim without the consent of such guardian. That the victim was tortured by her mother and she had love relation with the appellant or that she voluntarily left out of the keeping of her guardian with the appellant constitute no valid defence and would not absolve the appellant from the offence of kidnapping. Learned Advocate for the appellant placing reliance **of S. Varadarajan -Vs.- State of Madras** reported in **AIR 1965 SC 942**

submits that where facts indicate that the victim girl left her lawful guardian's protection, knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, the offence of kidnapping cannot be said to have been made out. However, the fact of the above-mentioned report is distinguishable from the facts of this case. In the above-mentioned report, the victim girl was a student of the 2nd year B. Sc. Class and on the verge of attaining her majority. In the instant case, the victim girl is aged about 14 years. Therefore, the principle laid down in **Varadarajan** case is not applicable under the facts and circumstances of the case. The Learned Advocate for the appellant also refers to an unreported judgment of this Court in **CRA 718/2014 (Sk. Sajid -Vs.- State of West Bengal, decided on 4th March, 2021)** where this Court held that the victim stated in her statement under Section 164 of the Code of Criminal Procedure that she was aged about 17 years at the time of incident. From her birth certificate it was found that she was aged about 16 years at the relevant point of time but below 18 years of age. Considering the age of the victim this Court held that though the daughter of the *de facto* complainant was under 18 years of age on the date of commission of offence, when the prosecution failed to prove that the victim was either induced to go with the accused or accused took her away from her lawful

guardianship, he cannot be held guilty for committing offence under Section 363 of the Indian Penal Code.

In ***State of Haryana –Vs.- Raja Ram*** reported in ***AIR 1973 SC 819***, the Apex Court discussed the scope of the words “take out of keeping”. According to the Hon’ble Supreme Court, persuasion by the accused persons which creates willingness of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section and consent of such minor is immaterial. In the instant case, the victim being a minor, her consent was immaterial. Paragraph 8 of Raja Ram’s judgment (supra) is relevant and reproduced below: -

“8. The approach and reasoning of the Learned Single Judge is quite manifestly insupportable both on facts and in law. It clearly ignores important evidence on the record which establishes beyond doubt that the prosecutrix had been solicited and persuaded by Raja Ram to leave her father’s house for being taken to the Bhishamwala well. Indeed, earlier in his judgment the Learned Single Judge has himself observed that according to the statement of the prosecutrix, on receipt of Raja Ram’s message as conveyed through his daughter Sona, she contacted Raja Ram during day time in his house and agreed with him that she (the prosecutrix) would accompany him (Raja Ram) to go to Bhishamwala well at midnight to meet Jai Narain, as the other members of her family would be sleeping at that time. If, according to

the Learned Single Judge, it was in this background that the prosecutrix had left her father's house at midnight and had gone to the house of Raja Ram from where she accompanied Raja Ram to the Bhishamwala well, it is difficult to appreciate how Raja Ram could be absolved of his complicity in taking the prosecutrix out of the keeping of her father, her lawful guardian, without his consent. It was in our opinion, not at all necessary for Raja Ram, himself to go to the house of the prosecutrix at midnight to bring her from there. Nor does the fact that the prosecutrix had agreed to accompany Raja Ram to Bhimshamwala well take the case out of the purview of the offence of kidnapping from lawful guardianship as contemplated by Section 361, I.P.C. This is not a case of merely allowing the prosecutrix to accompany Raja Ram, without any inducement whatsoever on his part, from her house to Bhimshamwala well, Section 361 I.P.C. 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 or 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

That 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 S. 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 in 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."

In the instant case, there is absolutely no evidence that the victim girl was induced or enticed by the appellant.

For the reasons stated above and in view of the fact that the victim was fully aware of the consequences of her going away with the appellant, the appellant cannot be held liable under Section 361 of the Indian Penal Code punishable under Section 363 of the Indian Penal Code.

For the reasons stated above, the instant appeal is **allowed** on contest. The judgement and order of conviction and sentence is set aside.

The accused is acquitted from the charge and discharged from his bail bond.

Urgent photostat certified copy of this judgment, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri, J.)