

IN THE HIGH COURT AT CALCUTTA

Criminal Appellate Jurisdiction

Appellate Side

Before :

The Hon'ble Mr. Justice Bibek Chaudhuri.

C.R.A./718/2014

**Sk.Sajid @ Sk.Sagir @ Pancha
Vs.
State of West Bengal**

For the appellant : Mr. Kusal Kumar Mukherjee, Adv.

For the State : Mr. Arijit Ganguly, Adv.
Mr. Avik Ghatak, Adv.

Heard on : 15.01.2021, 27.01.2021 &
04.03.2021.

Judgment on : 04.03.2021.

Bibek Chaudhuri, J. :

The judgment and order of conviction and sentence dated 18th September, 2014 passed by the learned Additional Sessions Judge, 17th Court at Alipore, South 24 Parganas, in Sessions Trial No.3(3) of

2013 convicting the appellant for committing offence punishable under Section 366A of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years with fine of Rs.25,000/-, in default, rigorous imprisonment for six months is assailed in the instant appeal.

One Tarak Bag lodged a written complaint on 24th November, 2012 stating *inter alia* that on 23rd November, 2012 there was emersion of the Goddess "Jagadhatri". In order to see the emersion, his minor daughter went to Rajabagan Ferry Ghat of his locality. However, she did not return home till 11 p.m.. The de-facto complainant being the father of the said minor girl conducted search for his daughter. He also informed his matrimonial home over telephone about the incident. His matrimonial relations informed him that his minor daughter was in the house of the appellant at Budge Budge, D.N.Ghosh Road within police station Budge Budge near Queen Cinema Hall.

After getting such information the matrimonial relations of the de-facto complainant went to the house of the appellant and asked him as to whether the daughter of the de facto complainant was under his custody. The appellant replied that if the daughter of the de facto complainant was given marriage with the appellant, then only she would be returned to her father. Her father was not agreeable to such

proposal as he and the appellant belong to different regions. Then the informant lodged a complaint before the Officer-in-Charge, Rajabagan Police Station.

On the basis of the said complaint police registered Rajabagan Police Station Case No.135 of 2012 dated 24th November, 2012 under Sections 366A/120B of the Indian Penal Code and took up the case for investigation. On completion of investigation, investigating officer submitted charge-sheet against the accused/appellant namely, Sk.Sajid.

The case was committed to the learned Court of Sessions and subsequently it was transferred to the 9th Fast Track Court at Alipore for trial and disposal.

The lower court record suggests that the learned Additional Sessions Judge, 9th Fast Track Court framed charge against the accused Sk.Sajid under Section 366A of the Indian Penal Code.

Subsequent to the framing of charge, the case was again transferred to 17th Court of the learned Additional Sessions Judge at Alipore for trial. During trial, prosecution examined seven witnesses. Amongst them P.W.1, Tarak Bag is the de-facto complainant, P.W.3 Tandra Bag is the daughter of P.W.1. All other witnesses are either relatives or neighbours of Tarak Bag excepting P.W.6 and P.W.7.

P.W.6, Dr.Tapan Kanti Roy medically examined the daughter of the de-facto complainant and the appellant. The Medico-legal examination report has been marked as Exhibit.7. It is ascertained from the said report that the daughter of the de-facto complainant was accustomed to sexual intercourse.

P.W.7, Prem Sankar Ojha is the Investigating Officer of the case who submitted charge-sheet on completion of the investigation.

After examination of the witnesses on behalf of the prosecution, the accused was examined under Section 313 of the Code of Criminal Procedure while giving answer to question No.4 made by the learned Trial Judge, he admitted that he had love affairs with the daughter of the de-facto complainant.

On the basis of the evidence on record, the learned Trial Judge held the accused guilty for committing offence under Section 366A of the Indian Penal Code and convicted and sentenced him accordingly.

Section 366A of the Indian Penal Code is a penal provision for procuration of minor girl. The Section runs thus:-

"Section 366-A. Procuration of minor girl.-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be,

forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

On plain reading of the aforesaid provision shows the following ingredients to be proved by the prosecution in order to bring home the charge under Section 366A of the Indian Penal Code:-

- (1) there must be inducement of a minor girl by the accused;
- (2) the girl must be under the age of 18 years and
- (3) the inducement shall be to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

The de-facto complainant in his written complaint did not state anything about illicit intercourse committed by any person other than the accused upon her daughter.

Statement of the minor girl of the de facto complainant recorded under Section 164 is of great importance in the instant case. In her statement under Section 164 of the Code of Criminal Procedure, she stated before the learned Magistrate that she used to love Sk.Sajid. On 23rd November, 2012 she fled away voluntarily with him without intimating anything to her family members. Then both of them

married in a Mosque. Thereafter, they stayed in the house of the elder sister of the appellant as husband and wife. When they were staying together, they had sexual intercourse.

In course of argument it is frankly admitted by Mr. Ghatak that that the main ingredients of offence under Section 366A to the effect that the victim girl was induced to go to a place for illegal sexual intercourse with a person other than the accused has not been proved. Practically no such case is made out by the prosecution. So the accused cannot be convicted under Section 366A of the Indian Penal Code.

However, he submits that offence under Section 363 of the Indian Penal Code is amply proved against the accused. In order to substantiate his contention it is submitted by Mr. Ghatak that Section 361 lays down the essentials of offence of kidnapping. The prosecution is able to prove that the accused induced the minor girl under 18 years of age or took her out of keeping of the lawful guardian of such minor girl without his consent. Thus, kidnapping is proved. In such case, the accused commits an offence under Section 363 of the Indian Penal Code. Thus, according to the learned advocate for the State respondent, the accused should be held guilty for committing offence under Section 363 of the Indian Penal Code and he should be convicted accordingly. It is also pointed out by Mr. Ghatak that for

such purpose charge framed against the accused need not be altered as Section 363 is the minor offence compared to the offence under Section 366A of the Indian Penal Code.

In support of his contention Mr. Ghatak refers to a decision of the Hon'ble Supreme Court in the case of ***State of Haryana vs. Raja Ram*** reported in ***AIR 1973 Supreme Court 819***. The Hon'ble Supreme Court in the aforesaid decision had the opportunity to discuss the scope of the words "take out of the 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 minor girl of the de facto complainant clearly stated in her statement under Section 164 of the Code of Criminal Procedure that she went away from the lawful guardianship of her father with the accused. The victim girl being a minor, her consent is immaterial and when she left with the appellant, the Court has every right to presume that she was induced by the appellant.

Mr. Mukherjee, learned advocate for the appellant, on the other hand submits by referring to a decision of the Hon'ble Supreme Court in the case of ***Sat Parkash versus State of Haryana and another*** reported in ***2016(1) AICLR 27 (S.C.)*** that the appellant cannot be

held guilty for committing offence under Section 366A of the Indian Penal Code as there was no evidence on record that she seduced for illicit intercourse with another person.

Since the learned advocate for the respondent has made the same submission and with usual frankness, he submits that he does not find any reason to support conviction under Section 366A of the Indian Penal Code against the appellant, this Court is of the view that no further discussion as to whether the learned trial Judge was correct in holding the accused guilty or not for committing offence under Section 366A of the Indian Penal Code is necessary.

However, it will not be out of place to mention that I am in full agreement with the learned advocates for the parties that the learned trial Judge absolutely misconstrued the provision of Section 366A of the Indian Penal Code and passed the order of conviction and sentence under the penal provision of Section 366A of the Indian Penal Code under misconception of fact and law. Now, the discussion revolves around the question as to whether under the facts and circumstances of the case and evidence on record the accused /appellant should be held guilty for committing offence under Section 363 of the Indian Penal Code.

Paragraph 8 of **Raja Ram's** judgment (supra) is relevant and quoted 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 Bhishamwala 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 Bhishamwala 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."

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 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."

The Hon'ble Supreme Court on careful scrutiny of the evidence on record found that the prosecutrix had been solicited and persuaded

by Raja Ram to leave her father's house for being taken to the Bhishamwala well. In the instant case, it is ascertained from the statement of the minor girl of the de facto complainant as well as her evidence in Court that she left her house with the accused voluntarily on her accord.

In **S. Varadarajan versus State of Madras** reported in **AIR 1965 SC 942** under the fact of the case that a college going girl on the verge of majority contacted the accused over telephone and told him to meet her to go with her to Sub-Registrar's office for registering marriage agreement, the Hon'ble Supreme Court held that no threat or inducement on the part of the accused was proved. The girl insisted the accused to marry her. Therefore, the important ingredient of offence under Section 361 of the Indian Penal Code so far as it relates to "taking out of lawful guardianship" has not been proved.

The facts of the instant case is almost similar to the fact of **S. Varadarajan** (*supra*). In the instant case the victim girl stated that she voluntarily left her house and went away with the accused.

In her statement under Section 164 of the Code of Criminal Procedure the victim stated that she was 17 years old at the time of incident. However, the prosecution submitted her birth certificate issued by the competent authority of Budge Budge Municipality wherefrom it is ascertained that the daughter of the de facto

complainant was born on 23rd February, 1996. Therefore, she was about 16 years of age at the time of incident. 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 the accused took her away from her lawful guardianship, he cannot also be held guilty for committing offence under Section 363 of the Indian Penal Code.

For the reasons stated above, the impugned judgement and order of conviction and sentence is set aside. The appellant be immediately acquitted from the charge under Section 366A of the Indian Penal Code and he be released at once, if he is in correctional home. The appellant be discharged from his bail bond.

Let a copy of this order be sent to the learned trial Judge along with the Lower Court record.

(Bibek Chaudhuri, J.)