

CRIMINAL APPEAL**PRESENT: THE HON'BLE JUSTICE KALIDAS MUKHERJEE****CRA NO 550 OF 2007
WITH
C.R.R. NO 3899 OF 2007****JUDGMENT ON: 21.4.2010.****Trinath Saha
Vs.
The State of West Bengal****POINTS:**

ABDUCTION, COMPELLED MARRIAGE-Victim girl, a minor-Enticed away by accused- Nobody present in the house- Accused put Sankha & Sindur on victim- Provisions of Section 366A I.P.C.attracted-Sentence passed against accused according to his financial conditions-Trial Judge, whether justified in passing such judgment- Indian Penal Code Section 363/366A-Code of Criminal Procedure, S.164

FACTS:

This appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, thereby sentencing the appellant to suffer rigorous imprisonment for three years under Section 363 of the Indian Penal Code and also to suffer rigorous imprisonment for five years under Section 366A of the Indian Penal Code with a fine.

HELD:

From the evidence of the victim girl and her statement recorded under Section 164 Cr.P.C. by the learned Magistrate it is clear that when she was alone in her house the accused went there and enticed her away. As per her statement under Section 164 Cr.P.C. she was taken to "Madanbari" on Sunday and there the accused had put "Sankha & Sindur" on her. When there was none in the house the accused had taken her away. It is also clear that the victim girl was recovered and

released to the custody of her father. It is also clear that the accused put “Sankha & Sindur” upon her and took her to his house wherefrom she was recovered. The putting of “Sankha & Sindur” on her, clearly indicates that it was known to the accused that she would be seduced to illicit intercourse attracting thereby the provisions contained in Section 366A I.P.C. The evidence on record is sufficient to warrant conviction of the appellant. The Court finds that the learned Trial Court was justified in recording the conviction of the appellant. Para-21

The learned Trial Court after hearing the appellant on the question of sentence has recorded that considering the financial condition of the appellant, the lesser sentence was passed. The Court finds that the learned Trial Judge after due consideration of the submission made by the appellant on the question of sentence rightly recorded the sentence and there is no ground to interfere with the findings of the learned Trial Judge. Para-22

It appears that at the time of admission of this appeal a suo moto Rule was issued upon the appellant to show cause as to why the sentence of imprisonment imposed upon him by the learned Trial Judge should not be enhanced. Having regard to the materials on record and the discussion made the Court finds that there is no ground to interfere with the findings of the learned Trial Judge so far as the sentence is concerned. Para-23

CASE CITED:

Mousam Singha Roy and others Vs. State of West Bengal (2003) 12 SCC 377, para 25

FOR THE PETITIONER: Mr. Fazlur Rahman

FOR THE STATE: Mr. Abhijit Adhya

THE COURT:

1. This appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, Third Fast Track Court, Cooch Behar in sessions case No. 59 of 2005 sentencing thereby the appellant to suffer rigorous imprisonment for three years under Section 363 of the Indian Penal Code and also to suffer rigorous imprisonment for five years under Section 366A of the Indian Penal Code with a fine of Rs.1,000/- in default to suffer simple imprisonment for three months with the further direction that all the sentences will run concurrently.
2. The case of the prosecution, in short, is that on 21.10.2003 the defacto-complainant Ranjit Biswas lodged complaint with the O.C. Kotwali P.S., Cooch Behar, alleging that on 18.10.2003 at about 3.00 P.M. his minor daughter aged about 13 years was missing from his house. On 20.10.2003 at about 11.00 A.M. the informant came to learn that Sri Trinath Saha of Kalabagan, Cooch Behar enticed away the victim girl with the intention to marry her. After the receipt of complaint, the Kotwali P.S. Case No. 366 dated 21.10.2003 was started under Section 363/366A I.P.C. After completion of investigation the charge sheet was submitted.
3. The charges were framed under Section 363 and 366A I.P.C. to which the appellant pleaded not guilty and claimed to be tried.
4. The learned Trial Judge upon consideration of the materials on record was pleased to record the conviction and sentence holding that the victim girl was below 18 years of age; that she was taken away from the house of her lawful guardian and 'sindur and sankha' were put on her knowing that she was likely to be forced or seduced to illicit intercourse with him. The learned Judge further held that the accused enticed away the girl. The learned Judge

ultimately held that the charges were proved beyond reasonable doubt and recorded the sentence as stated above.

5. Being aggrieved by the said judgment of conviction and sentence, the appellant has preferred the instant appeal. The learned Counsel appearing on behalf of the appellant submits that there was no eyewitness in this case and the case is based on circumstantial evidence. It is submitted that the evidence of the victim girl is doubtful and no reliance can be placed on her testimony. It is submitted that victim girl was allegedly taken to the bus stand, but, she did not raise any hue and cry which was not in consonance with the ordinary human conduct. It is contended further that from the evidence on record it would appear that no resistance was offered by the victim girl. The learned Counsel submits that Section 366A I.P.C. is not attracted at all in the circumstances of the case.
6. The learned Counsel appearing on behalf of the State placed reliance on the evidence of P.W. 1, P.W. 2 and P.W. 9. It is submitted that P.W. 9, that is, the I.O. recovered the victim girl from the house of the accused. As regards the age of the victim girl, the learned Counsel has referred to the evidence of the headmaster (P.W. 8) and submits that from his testimony it would appear that the victim girl was aged about 14 years at the time of the incident. It is submitted that the statement of the victim girl was also recorded under Section 164 Cr.P.C. wherein she has categorically stated that she was forcibly taken away by the accused. The learned Counsel submits that from the evidence on record it would appear that the victim girl was forcibly taken away from the lawful custody and there is no ground to interfere with the findings of the learned Trial Court.
7. As regards the age of the victim girl, P.W. 1, that is, the father has stated that his daughter was a student of class-VII of Putimari Primary School at that time. P.W. 2, that is, the

victim girl has stated that she was 13 years old when the incident happened and at that time she was a student of class – VI at Putimari Junior High School. The Radiologist (P.W. 7) has stated that after ossification test he opined that the age of the victim girl was above 15 years and below 17 years. In the cross-examination he has stated that the age of the victim girl may be varied by maximum three years; the age of the victim girl may be about 18 years at the time of examination. He has further stated that the ossification test was not conclusive in the determination of the age.

8. The headmaster of Putimari, Boxirbash No. 2 C.S. Primary School has stated that as per the school register the date of birth of the victim girl was on 20.5.1989. He has proved the certificate issued by him (exhibit – 5). In the cross-examination he has stated that the birth certificate issued by Pradhan was also produced at the time of her admission in the school. From the evidence of the witnesses as discussed above, it is clear that the evidence of the headmaster (P.W. 8) is worthy of credence, inasmuch as, he deposed as to the date of birth of the victim girl on the basis of the entries in the admission register of the school. In view of such documentary evidence as to the date of birth recorded in the admission register of the school, the oral evidence and the ossification test being corroborative in nature relegate to insignificance. It can, therefore, be reasonably said that the victim girl was about 14 years of age at the time of the alleged occurrence.
9. As to the alleged occurrence, it is the prosecution case that on the date of occurrence the accused came to the house of the informant where none of the inmates except the victim was present and taking advantage of that situation the accused forcibly took her away and at the temple the accused put ‘snakha and sindur’ on her. As to the taking away from lawful guardianship, P.W. 1 being the father has stated that on Saturday two years ago he left home

for his business and returned home in the evening on Sunday. He came to learn that his daughter, that is, the victim girl was taken away by Trinath Saha; police arrested Trinath and he went to the police station and thereafter by order of the Court he took release of her daughter to his custody. It is in the evidence of P.W. 1 that the accused Trinath Saha was married with another daughter of P.W. 1 named Kalpana. P.W. 1 in his cross-examination has stated that the marriage of Kalpana took place about eight months before her death and they had no visiting terms with the accused after the demise of Kalpana.

10. P.W. 2 is the victim girl who has stated that Trinath is her brother-in-law who married her elder sister Kalpana; Kalpana Biswas expired 1/2 years ago. P.W. 2 has stated further that on the date of incident she was alone in the house at about 3.00 P.M. when the accused visited her house and enticed her away from her house to the house of the accused. It is in her evidence that she could not raise 'halla' when she was taken away by accused, as he did not allow her to protest against his act. She has further stated that her brother-in-law and the other inmates of his house approached her to marry her brother-in-law; but she did not agree with the said proposal. She has stated that she raised 'halla' and then cried; on hearing her cry village people informed the police who came to the house of the accused. It is in her evidence that she made statement to the Magistrate over the incident and her statement was recorded. It is also in her evidence that the police took her to the hospital for medical examination. In the cross-examination she has stated that the accused took her away from the house by dragging up to 1/2 mile on the way and then she raised 'halla'. It is also in her evidence that after dragging her 1/2 mile away she was taken to a bus stand and there were many houses on both sides of the road; she did not raise 'halla' as the accused threatened to kill her by throttling. It is also in her cross-examination that after the death of

her elder sister (didi) there was no visiting terms between both the houses and after the expiry of her elder sister the relation with her brother-in-law was cut off.

11. The learned Counsel for the appellant submits that no 'halla' was raised by the victim girl when she was allegedly taken away to the bus stand and this was not in consonance with the ordinary human conduct. In this connection, the learned Counsel has referred to and cited the decision reported in *(2003) 12 SCC 377, para 25 [Mousam Singha Roy and others Vs. State of West Bengal]*. In the aforesaid decision it has been held that choosing a busy place to commit crime (murder) was opposed to ordinary human conduct. It has been held by the Hon'ble Apex Court in the aforesaid decision in para 25 as follows.

".....There is another major doubt as to the place of incident as projected by the prosecution which has alleged that the incident took place at about 9 p.m. on Howrah Bridge at a time, according to PWs 3, 13, 22 and 25, there were hundreds of pedestrians and vehicular traffic, according to PW 22, there were many police personnel also present on the bridge. Then will it be reasonable for the court to accept that these accused chose such a busy place to commit the crime? We think not. In our opinion, even this part of the prosecution case is totally opposed to ordinary human conduct."

12. But, in the instant case, it is in the evidence of PW 2 and also in her statement under Section 164 Cr.P.C. that when she was taken away to the bus stand she did not raise 'halla' as the accused threatened to kill her by throttling. Moreover, in the instant case the victim was a minor girl and when she was put under threat of being killed, it was not expected that she would raise hue and cry. It depends on the circumstances of each case and the circumstances of the case cited above being different from those of the instant one, the decision cited will not come in the aid of the contention of the learned Counsel appearing for the appellant.

13. P.W. 3 is a co-villager who accompanied P.W. 1 to the police station and stated that Trinath took away the victim girl with the intent to marry her.
14. P.W. 4 is the medical officer who examined the victim girl and found injuries as follows:-

“On examination no mark of injury is found in her private parts including breast, thigh at back and libia. No foreign body is found out and seen in her private parts. Vagina admits one finger. Vaginal swab preserved for chemical examination and handed over to constable (L.C.) 483.....”
15. P.W. 5 a resident of the same village has stated that Trinath took away the victim girl forcibly when her parents were not at home. However, it appears that this witness was not present at the time of occurrence.
16. P.W. 6 is an agricultural labourer who was working in the field and after returning home at 4.00 p.m. he heard ‘halla’ and came to learn from the inmates of the house of P.W. 1 that Trinath took away the victim girl.
17. P.W. 7 is the Radiologist.
18. P.W. 8 is the headmaster who has stated about the date of birth of the victim girl.
19. P.W. 9 is the I.O. who has stated that he recovered the victim girl from the house of the accused. In the cross-examination he has stated that none from the neighbouring people of the accused gathered there at the time of recovery of the girl from the house of the accused.
20. The victim girl in her statement under Section 164 Cr.P.C. before the learned Magistrate has stated that Trinath Saha is her brother-in-law (Jamaibabu); on the date of ‘mahastami’ her brother-in-law had assaulted her elder sister as a result of which she succumbed to the injuries. She has further stated that on the date of incident, that is, on Saturday there was none in her house and at that time her brother-in-law came and enticed her away to his house. She has further stated that on Sunday she was taken to ‘Madanbari’ where the

accused had put “sankha & Sindur” on her. It is in her statement that thereafter the police came and recovered her from the house of the accused. She has stated that she wants to go to her parents.

21. From the evidence of P.W. 2, that is, the victim girl and her statement recorded under Section 164 Cr.P.C. by the learned Magistrate it is clear that when she was alone in her house the accused went there and enticed her away. As per her statement under Section 164 Cr.P.C. she was taken to “Madanbari” on Sunday and there the accused had put “Sankha & Sindur” on her. From the evidence of the other P.Ws as discussed above it is evident that the incident took place in the manner as alleged and from the evidence of the I.O. (P.W. 9) and the informant (P.W. 1) it is also clear that the victim girl was recovered and released to the custody of her father, that is, P.W. 1. As to taking her away from the lawful guardianship, it has been established by the prosecution from the evidence of the P.Ws. and the statement of the victim girl under Section 164 Cr.P.C. that when there was none in the house of P.W. 1, the accused had taken her away. From the evidence of the victim girl and her statement under Section 164 Cr.P.C. it is also clear that the accused had put “Sankha & Sindur” upon her and took her to his house wherefrom she was recovered. The putting of “Sankha & Sindur” on her, clearly indicates that it was known to the accused that she would be seduced to illicit intercourse attracting thereby the provisions contained in Section 366A I.P.C. The evidence on record is sufficient to warrant conviction of the appellant. I find that the learned Trial Court was justified in recording the conviction of the appellant.

22. As regards the sentence, the learned Trial Court after hearing the appellant on the question of sentence has recorded that considering the financial condition of the appellant, the lesser sentence was passed. The learned Trial Judge sentenced the appellant to suffer R.I. for three years under Section 363 I.P.C. and the R.I. for five years under Section 366A with a fine of Rs.1,000/- in default to suffer S.I. for three months with the direction that the sentences will run concurrently. I find that the learned Trial Judge after due consideration of the submission made by the appellant on the question of sentence rightly recorded the sentence and there is no ground to interfere with the findings of the learned Trial Judge.
23. It appears that at the time of admission of this appeal on 12.10.2007 a suo motu Rule was issued upon the appellant to show cause as to why the sentence of imprisonment imposed upon him by the learned Trial Judge should not be enhanced. Having regard to the materials on record and the discussion made above I find that there is no ground to interfere with the findings of the learned Trial Judge so far as the sentence is concerned.
24. There is no merit in this appeal. The appeal, therefore, fails and the same is dismissed. The impugned judgment of conviction and sentence passed by the learned Trial Judge is hereby affirmed.
25. The suo motu Rule being C.R.R. 3899 of 2007 for enhancement of sentence is hereby discharged. Let a copy of this judgment be sent to the concerned correctional home where the appellant is now detained.

26. Let a copy of this order be sent to the learned Court below along with the L.C.R. immediately.

27. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J.)