

CRIMINAL REVISION
C.R.A. No.383 of 2007

PRESENT :THE HON'BLE MR. JUSTICE **PRASENJIT MANDAL**

Judgement On: June 21, 2010.

Amal Talukder

Versus

State of West Bengal.

POINTS

KIDNAPPING, RAPE – Victim, a 16 years girl and a student of class XI, had a long journey with the appellant from Naihati to Bangladesh without any protest- Accused married the Victim and stayed at Bangladesh for 9 months and got conceived- Evidence adduced by other persons are contrary to the evidence of the Victim under section 164 whether can be accepted- Whether Victim is a consenting party- Code of Criminal Procedure, 1973, Ss.164,363,366,376

FACTS

The father of the victim lodged an ejahar with the Chinsurah P.S. on December 1, 2003 stating, inter alia, that on November 7, 2003 early morning his daughter Purnima Singha Mahapatra went out for private tuition. But, she did not return from the house of her private tutor and then he lodged one G.D. entry on December 10, 2003. On enquiry, he came to know that appellant / Amal Talukdar took his daughter to Bangladesh. He also stated in the ejahar (exhibit P.-2) that his daughter was born on August 9, 1987 and thus, she was 16 years and three months of age on that day. Thus, on scrutiny of his ejahar, he had no direct knowledge about the allegation against the appellant on December 1, 2003. As per evidence on record, the victim, Purnima Singha Mahapatra,

returned to her father's house in August, 2004, i.e., after 9 months from the date of occurrence. Thereafter, within three or four days police interrogated her and the victim gave statement to the learned Magistrate under Section 164 of the Cr.P.C. On perusal of the statement of the victim under Section 164 of the Cr.P.C (marked exhibit 9), she stated in her statement that the appellant worked in their house and thus they were acquainted each other. There was deep relation between the two. Long days thereafter, the appellant eloped her to Bangladesh on the plea that she was taking her to an outing. On reaching Bangladesh, marriage between the two was held and she stayed at his house in Bangladesh for nine months. Thereafter on return to India, the appellant sent her to her father's house. She also admitted that there was relationship of husband and wife between the appellant and her.

HELD

If there was any situation that the victim was not agreeable with the steps taken by the appellant, she would have protested and raised objection to the members of the family of the appellant's father. She did not do so. On the other hand, she stayed there for nine months. In the meantime, she was conceived. Therefore, this could happen when the victim was only a consenting party and when the victim had voluntarily come to the house of the father of the accused in Bangladesh all along. It can well be presumed that during the long journey from Chinsurah to Rajapur, District – Khulna in Bangladesh, the victim accompanied the appellant on her own free will. Otherwise, she would have protested to the public at large at Naihati railway station or co-passengers of the vehicles and the train. It may be noted here that the victim is not an illiterate lady; but she was a student of class XI aged about 16 years and 3 months at the time of occurrence. The petitioner could know very well where she was going along with the appellant. So the inevitable conclusion

that could drawn from such facts is that such type of incident could happen when the victim went to the paternal house of the father of the appellant in Bangladesh on her own accord. So, it is difficult to believe that the accused took her or enticed her or allured to go to Bangladesh. Para 8

Any evidence adduced by the other witnesses which is contrary to the evidence adduced by the victim in her statement under Section 164 of the Cr.P.C., cannot be accepted because all the other witnesses had no direct knowledge about going away with the accused and the incidents that happened afterwards. They heard everything from the victim and then they deposed before the Court. As the victim herself is not complaining of kidnapping by the appellant and as she was a consenting party to go to Bangladesh and over the incidents happened thereat such as marriage, cohabitation, stay, etc. the evidence adduced by the other witnesses contrary to the statement adduced by the victim in her statement under Section 164 of the Cr.P.C cannot be accepted and acted upon. Para 11

Cases cited

1. *(2010) 1 SCC Cri 1445 (Mussauddin Ahmed Vs. State of Assam)*
2. *(2006) 2 Calcutta Cr. LR (SC) 297 (Gabbu Vs. State of M.P.)*
3. *(2007) 1 Calcutta Cr. LR (Cal) 249 (Sajoj Mondal & Ors. Vs. State of West Bengal)*

For the petitioner: Mr. Siladitya Sanyal,
Mr. Srijan Chatterjee.

For the State: Mr. Debatrata Roy.

Prasenjit Mandal, J:

THE COURT 1. This appeal is directed against the judgment and order dated May 12, 2005 passed by the learned Assistant Sessions Judge, Second Court, Hooghly in Sessions Trial Case No.1 of 2005 thereby convicting the appellant for offences punishable under Sections 363/366/376 of the I.P.C.

2.The fact of the case in short is that one Ashoke Kumar Singha Mahapatra lodged an ejahar with the O.C., Chinsurah P.S. on December 1, 2003 to the effect that his minor daughter, namely Purnima Singha Mahapatra aged about 16 years went to the house of her private tutor on November 7, 2003 at 6.35 a.m. But, since then, his daughter did not return home. For that reason, he lodged a missing diary with the said police station on November 10, 2003. Later, on enquiry, he learnt from the elder brother of the appellant, Niranjan Talukdar, that appellant Amal Talukdar took his daughter to Bangladesh and kept her confined in the house of his father. Police investigated the case as usual and upon completion of investigation, submitted chargesheet against the appellant under Sections 363/366/376 of the I.P.C.

3.On the basis of materials on record, the learned Assistant Sessions Judge framed charge under Sections 363/366/366A/376 against the appellant to which the appellant pleaded not guilty. The prosecution examined 13 witnesses and marked certain documents as exhibit. The appellant did not adduce any D.W. Upon consideration of the evidence on record, the learned Assistant Sessions Judge convicted the appellant for the offences punishable under Sections 363/366/376 of the I.P.C. and awarded different punishments for the offences. Being aggrieved by the said judgment and order impugned, the appellant has preferred this appeal.

4.Mr. Sanyal assailed the judgment of conviction by submitting that the victim lady, P.W. 11, did not tell the true statement at the time of her deposition and so her statement ought to have been discarded totally by the learned Trial Judge. He also contended that the victim being about 16

years of age on the date of occurrence as per school certificate and also being a consenting party, there is no ingredient of rape. He also contended that the evidence of the P.Ws. suffers from gross contradiction and embellishments and so conviction could not be on such evidence.

5. On the other hand, the learned Advocate for the State supported the conviction stating, inter alia, that the charge had been duly proved by evidence on record.

6. Now the point to be considered is if the learned Trial Judge is justified in passing judgment and order of conviction and sentence.

7. Having considered the submission of the learned Counsel for the parties and after going through the materials on record, I find that the de-facto complainant, i.e., the father of the victim lodged an ejahar with the Chinsurah P.S. on December 1, 2003 stating, inter alia, that on November 7, 2003 early morning his daughter Purnima Singha Mahapatra went out for private tuition. But, she did not return from the house of her private tutor and then he lodged one G.D. entry on December 10, 2003. On enquiry, he came to know that appellant / Amal Talukdar took his daughter to Bangladesh. He also stated in the ejahar (exhibit P.-2) that his daughter was born on August 9, 1987 and thus, she was 16 years and three months of age on that day. Thus, on scrutiny of his ejahar, I find that he had no direct knowledge about the allegation against the appellant on December 1, 2003. As per evidence on record, the victim, Purnima Singha Mahapatra, returned to her father's house in August, 2004, i.e., after 9 months from the date of occurrence. Thereafter, within three or four days police interrogated her and the victim gave statement to the learned Magistrate under Section 164 of the Cr.P.C. Therefore, victim Purnima is the best witness to say about the allegation against the appellant. On perusal of the statement of the victim under Section 164 of the Cr.P.C (marked exhibit 9), I find that she stated in her statement that the appellant worked in their house and thus they were acquainted each other. There was deep relation between

the two. Long days thereafter, the appellant eloped her to Bangladesh on the plea that she was taking her to an outing. On reaching Bangladesh, marriage between the two was held and she stayed at his house in Bangladesh for nine months. Thereafter on return to India, the appellant sent her to her father's house. She also admitted that there was relationship of husband and wife between the appellant and her. This is the sum and substance of the statement of the victim under Section 164 of the Cr.P.C at the earliest point of time. Naturally, all other witnesses had heard the incident from her and they have deposed accordingly before the Court. Thus, I find that the victim did not state in her statement under Section 164 of the Cr. P. C. that the accused had kidnapped her.

8. During deposition, the victim/P.W.11 admitted that there were love affairs. She stated in details that on the date of occurrence she went out for her teacher's house for private tuition. While she was standing at the autorickshaw stand near the Chinsurah railway station, the appellant came to her and told her to go with him for an outing to a beautiful place. The victim did not read with her teacher on that very day and on taking permission from her teacher that she would not read with the tutor, she went to Naihati with the appellant. Thereafter on boarding different vehicles and one train, she went to Bangladesh with the accused via Naihati railway station. Therefore, the fact remains that the victim went to the house of the father of the appellant in Bangladesh by availing different vehicles and a train. The victim made embellishment in her deposition. The victim had the opportunity to tell to the public or co-passengers if there was any act of kidnapping. But the victim did not do so. On the contrary, she admitted that the appellant purchased shari, etc. for her and then he married her at his father's house. It is to be noted here that as per her evidence the parents, elder brother and his wife reside in the house of the father of the appellant in Bangladesh. So, if there was any situation that the victim was not agreeable with the steps taken by the appellant, she would have protested and raised objection to the members of the family of the

appellant's father. She did not do so. On the other hand, she stayed there for nine months. In the meantime, she was conceived. Therefore, I am of opinion that this could happen when the victim was only a consenting party and when the victim had voluntarily come to the house of the father of the accused in Bangladesh all along. It can well be presumed that during the long journey from Chinsurah to Rajapur, District – Khulna in Bangladesh, the victim accompanied the appellant on her own free will. Otherwise, she would have protested to the public at large at Naihati railway station or co-passengers of the vehicles and the train. It may be noted here that the victim is not an illiterate lady; but she was a student of class XI aged about 16 years and 3 months at the time of occurrence. The petitioner could know very well where she was going along with the appellant. So the inevitable conclusion that could be drawn from such facts is that such type of incident could happen when the victim went to the paternal house of the father of the appellant in Bangladesh on her own accord. So, it is difficult to believe that the accused took her or enticed her or allured to go to Bangladesh.

9. It is evident from the evidence of the wife of the appellant that one girl came to her house in Chinsurah and her husband worked in the house of that girl. There is over-whelming evidence that the appellant worked as mason in the house of the father of the victim at the relevant time for a long period. So it is apparent that the wife of the appellant wanted to mean the victim by the expression of a 'girl'. Moreover, during her long stay in the paternal house of the appellant in Bangladesh, the victim could have known very well whether the appellant was married or not. So it could well be presumed that in spite of knowing everything, the victim accompanied the appellant to Bangladesh and she stayed there for nine months after marriage and they cohabitated. The Victim being an educated lady over 16 years of age, it could well be presumed that the victim

was a consenting party with regard to going out of her house, marriage and living with the appellant as husband and wife.

10.The members of the family of the victim such as father (P.W.3), mother (P.W.7), elder brother (P.W.8) and the victim herself (P.W.11) are the material witnesses with regard to the offences alleged against the appellant. The rest witnesses are most formal or the witness who did not support the prosecution case at all. The victim and the inmates of her house stated in one voice that the appellant took the victim to Bangladesh. The father has stated that he came to know about the fact from the elder brother of the appellant, but the elder brother of the appellant P.W.4 denied such statement. The P.W. 4 was declared hostile, but the I.O., P.W.13 was not confronted as regards such denial. So such consistent statement carries no evidenciary value. The mother of the victim stated that on knowing from the elder brother of the appellant about taking by the appellant, she sent one person to the house of the appellant in Bangladesh to take her daughter back to their house but he failed to take her back. But the victim herself has stated, on oath, that no person came to the house of the appellant in Bangladesh to take her back. Thus, I find that there are contradictory statements. In consideration of the totality, it can well be presumed that such statements are exaggerated subsequently to implicate the appellant over the charge framed against him. So the statement of the other inmates of the house of the victim that the appellant used threat or coercion to compel the victim to go to Bangladesh cannot be believed.

11.Any evidence adduced by the other witnesses which is contrary to the evidence adduced by the victim in her statement under Section 164 of the Cr.P.C., I hold, cannot be accepted because all the other witnesses had no direct knowledge about going away with the accused and the incidents that happened afterwards. They heard everything from the victim and then they deposed before the Court. As the victim herself is not complaining of kidnapping by the appellant and as

she was a consenting party to go to Bangladesh and over the incidents happened thereat such as marriage, cohabitation, stay, etc. I am of the opinion that the evidence adduced by the other witnesses contrary to the statement adduced by the victim in her statement under Section 164 of the Cr.P.C cannot be accepted and acted upon.

12. So in consideration of the material contradictions and absence of any threat or coercion on the part of the appellant to the victim for taking away or enticing the victim and embellishment in the deposition, I am of the opinion that the conduct of the prosecutrix to go to Bangladesh and subsequent events as stated earlier are nothing but voluntary on her part.

13. The learned Advocate for the appellant has relied on the following decisions in support of his contention:-

4. *(2010) 1 SCC Cri 1445 (Mussauddin Ahmed Vs. State of Assam)*
5. *(2006) 2 Calcutta Cr. LR (SC) 297 (Gabbu Vs. State of M.P.)*
6. *(2007) 1 Calcutta Cr. LR (Cal) 249 (Sajoj Mondal & Ors. Vs. State of West Bengal)*

14. The decision in the Case of Mussauddin Ahmed (supra) lays down that the prosecutrix was roaming in the city with the appellant for a long time, going to hotel without any protest, accompanying the appellant to the room, spending whole night with him, coming out of the hotel after checking out from the hotel, without raising any hue or cry or informing anybody that the appellant had misbehaved with her in any manner. Serious material contradictions were found in the deposition of the prosecutrix in Court and her statement recorded under Section 164 of the Cr.P.C. and the prosecutrix appeared to be a woman of easy virtues. Held the prosecution failed to prove its case against the appellant beyond reasonable doubt, the judgment of conviction against the appellant could not be sustained.

15.The decision in the case of Gabbu (supra) lays down that the mere taking away is not sufficient for conviction under Section 366 of the I.P.C. The prosecution has to prove that the abduction was for some illicit act. Unless it is proved, the prosecution story of abduction is not believable and so conviction cannot be sustained.

16.The decision reported in Saroj Mondal & Ors. (supra) lays down that when the allegation against the accused persons under Section 366 of the I.P.C. is not proved and the victim girl eloped with the accused no.1 voluntarily. Age of the victim girl has not been proved. False implication of the accused persons cannot be ruled out. In such circumstances, the accused persons are entitled to acquittal.

17.In an earlier decision in the case of S. Baradarajan Vs. State of Madras reported in AIR 1965 SC 942, it was held that if there was an active persuasion on the part of the accused, there could be taking. Relying on the said decision M. P. High Court acquitted the accused in the case of Baldev Singh Vs. State of Punjab reported in (1984) 1 Crimes 936 when the accused and the prosecutrix are having an affair and the prosecutrix leaves home and accompanies the accused, fully provided with clothings and ornaments, the accused cannot be convicted for kidnapping.

18.In that view of the matter, I hold that the evidence on record does not justify the conviction of the appellant under Section 363/366/376 of the I.P.C. So the judgment and order of conviction and sentence passed by the learned Trial Judge cannot be supported and they must be set aside. The appellant is, therefore, held not guilty for offences punishable under Sections 363/366/376 of the I.P.C. He is acquitted of the charge. He be set at liberty immediately.

19.The L.C.R. along with a copy of this judgment be sent to the learned Trial Judge for taking appropriate steps and for release of the appellant from the jail custody at once.

20.Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Prasenjit Mandal, J.)