IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Before: Hon'ble Justice Sugato Majumdar

CRA 226 of 2015

Mangal Das Adhikary

Vs.

The State of West Bengal

With

CRA 210 of 2015

Smt. Rita Jana

Vs.

The State of West Bengal

For the Appellant	:	**Mr. Himangsu De,** **Mr. Suprakas Misra,** **Mr. Subir Sabud.**
For the State	:	**Ms. Sreyashee Biswas.**
Hearing concluded on	:	**26/07/2022**
Judgment on	:	**08/08/2022**

Sugato Majumdar, J.:-

Both the appeals are directed against the judgment of conviction dated 26/03/2015 and order of sentence dated 27/03/2015 passed by the Additional Sessions Judge, 2nd Court, Tamluk, Purba Medinipur in S.T. No. 05 (04) 2014 whereby the Appellant of CRA 226 of 2015, Mangal Das Adhikari (hereinafter mentioned as "Appellant no. 2") was convicted under sections 363/365/366 of the Indian Penal Code and the Appellant of CRA 210 of 2015 namely Rita Jana (hereinafter

mentioned as “Appellant no. 1”) was convicted under section 363/120B of the Indian Penal Code. The Appellant no. 2 was sentenced to suffer imprisonment for five years along with a fine of Rs. 5000/-, in default, a further simple imprisonment of one and half years for commission of offence under section 366 of the Indian Penal Code. The Appellant no. 2 was also sentenced to suffer imprisonment of four years with fine of Rs.2000/-, in default, a simple imprisonment of one year, for offences under section 363/365 of the Indian Penal Code. The Appellant no. 1 was sentenced to suffer imprisonment of four years with fine of Rs. 2000/-, in default, a simple imprisonment of one year, for commission of offences under section 363/120B of the Indian Penal Code.

Genesis of the case was the written complaint dated 24/06/2011 of the victim girl. It was stated in the written complaint that on 15/05/2011, at about 01:00 P.M., the Appellant no. 1 called her near Hari Mandir of the locality. When the victim went there, she found the Appellant no. 2 was present with a motor cycle. She was forcibly seated by the Appellant no.1 on the motorcycle on the pretext of visiting a local fair. In spite of hue and cry of the victim and resistances made, the Appellant no. 2 took her to an unknown destination where she was kept inside a room. She was given food but was put on threat by the Appellant no. 2 that her parents would be killed had she been disobedient. Three or four days thereafter, with help of other persons, the Appellant no. 2 put vermilion on her forehead and compelled her to wear conch bangles. Some photographs were also taken. The Appellant no. 2 also took away her golden ear rings. The parents and other relatives of the family of the victim traced out her in the residence of the Appellant no. 2. Initiatives were taken by the local people of the village of the Appellant no. 2, organized a *“salishi”* after which she returned

home with her father. Her father also put his signature on a blank paper. It was also stated in the written complaint that the Appellant no. 2 with five to seven persons had been loitering about the residence of the victim frequently in motor cycles and had been threatening her and abusing using filthy language. They had also been threatening the other family members.

The written complaint was received on 25/06/2011 at 13:35 hours in Tamluk Police Station and was registered as Tamluk Police Station Case No. 311 of 2011 dated 25/06/2011 under sections 363/365/366/354/506/34 of the Indian Penal Code. Formal F.I.R was drawn up and investigation of the case was initiated. In course of investigation, the Investigation Officer visited the place of occurrence, prepared rough sketch map with index, examined the witnesses, got the statement of the victim girl recorded under section 164 of the Code of Criminal Procedure, 1973 before the magistrate, seized the admit card of the victim from her mother, which was subsequently returned to the father of the victim on execution of zimmanama and all other incidental things. On completion of the investigation charge sheet was filed against both the Appellants under sections 363/365/366/354/506/34 of the Indian Penal Code.

Before the Trial Court charges were framed against the Appellant no. 1 under sections 363/365/366/120B of the Indian Penal Code whereas charges against the Appellant no. 2 were framed under sections 363/365/366/354/506 of the Indian Penal Code. Charges were read over and explained to the Appellants to which they pleaded not guilty and claimed to be tried.

In course of the trial prosecution examined as many as ten witnesses including the victim girl and produced various documents which were marked and exhibited. On behalf of the Appellants one document was produced in course of the cross-examination of the witnesses which was also marked and exhibited.

The Appellants' defense was false implication. In course of examination of the Appellant no. 2 under section 313 of the Code of Criminal Procedure, 1973, he stated that he had love affairs with the victim but the parents of the victim were not willing to accept him. He further stated that his wages were due and payable by the father of the victim. For all these reasons he was falsely implicated.

The Trial Court, in terms of the impugned judgment convicted the Appellants and sentenced them accordingly.

On being aggrieved and dissatisfied, the instant appeals were preferred separately by the respective Appellants.

Mr. De, the Learned Senior Counsel appearing for the Appellants submitted first that the Trial Court committed serious error both in law as well as in fact in arriving at the conclusion that the victim was minor. Nowhere in the written complaint, according to him, it was mentioned that the victim was minor. Neither the victim nor her parents deposed to the effect that she was minor at the time of commission of the alleged offence. The Trial Court made serious error in relying upon the seizure list to come to a conclusion that the victim was minor. According to him, the finding of the Trial Court suffers a serious infirmity. In consequence, conviction under section 363 of the Indian Penal Code is not tenable. Mr. De relied upon the decisions of **State of Karnataka vs.**

Sureshbabu [(1994) C. Cr. L.R (SC) 63] and Shyam & Anr. vs. State of Maharashtra [1995 SCC (Cri.) 851].

The next point argued by Mr. De is that there was delay in lodging the written complaint by one month which was unexplained. Unexplained delay in lodging F.I.R makes the prosecution case suspicious. The Trial Court ignored this issue in deciding the case as a result of which the impugned judgment suffers from serious infirmity. He relied upon the decisions of **Ramji Surjya & Anr. vs. State of Maharashtra (AIR 1983 SC 810), Munna vs. State of Rajasthan (2008 CR. L.J 3975)** and **Rajesh Patel vs. State of Jharkhand [2013(2) AICLR 677].**

Next Mr. De argued that the Trial Court, in course of examination of the Appellants failed to place incriminating material before them in order to enable them to explain the incriminating circumstances. In particular, the evidences of P.W. 9 and P.W. 10 were not put to the Appellant no. 1. According to him, these omissions vitiated the trial. He relied upon the decisions of **Sharad Birdhi Chand Sarda vs. State of Maharashtra (AIR 1984 SC 1622), Ajay Singh vs State of Maharashtra (AIR 2007 SC 2188) and Harka Bahadur Rai vs. State of West Bengal [2003 C. Cr. L.R (Cal.) 346].**

Per contra Ms. Biswas, appearing for the State submitted that delay was sufficiently explained before the court. Delay in this case is not of such nature as to vitiate the trial.

Next, Ms. Biswas argued that failure to put the incriminating materials before the accused persons does not, *ipso facto,* vitiates the trial. It is necessary to show that such omission caused prejudice to the accused.

Ms. Biswas, however, candidly agreed upon that the prosecution evidences suffers from contradictions.

I have heard rival submissions.

The Prosecution case is that the Appellants conspired to kidnap the victim for which Appellant no. 1 asked her to come near a local temple. She was kidnapped therefrom by the Appellant no. 2 with assistance of the Appellant no. 1. The victim was taken to an unknown destination where she was confined in a room. She was provided with food. After couple of days, the Appellant no. 1 forced her to wear conch bangles and wear vermillion on forehead symbolizing marriage. Her father rescued her later from the residence of the Appellant no. 2. He also signed a blank paper. Since they waited for *salishi,* there was delay in lodging the written complaint in the local police station.

Since the Trial Court convicted the Appellants under section 363 of the Indian Penal Code, it is necessary to examine whether the Trial Court rightly inferred that the victim was minor at the material point of time. It is neither in the written complaint nor in the deposition of the victim or her parents nor in the statement of the victim recorded under section 164 of the code of Criminal Procedure, 1973 (Ext. 2) that she was minor at the material point of time. Admit card was seized by the Investigating Officer in terms of the seizure list (Ext. 4) which was returned to the father of the victim under one zimmanama (Ext. 8). In both the documents, date of birth appears to be 9th June, 1993. The original admit card was not adduced in evidence. There is no explanation why the same was not produced before the court. Seizure list is neither primary evidence nor secondary evidence so far as date of birth of the victim was concerned. Date of birth was noted from the

original document in both the seizure list (Ext. 4) and the zimmanama (Ext. 8). Therefore, so far as date of birth of the victim is concerned, both documents are inadmissible to prove such date of birth. The Trial Court committed grave error in relying upon Ext. 4 and Ext. 8 to prove the age of the victim and in coming to a conclusionthat the victim was minor at the material point of time. In **State of Karnataka vs. Sureshbabu [1994 C. Cr. L.R (SC) 63]**, referred to by Mr. De, it was observed by the Supreme Court of India that when the age is in doubt, then the question of taking the victim away from lawful guardianship does not arise. Therefore, conviction under section 363 of the Indian Penal Code is not sustainable and is liable to be set aside.

It is both in the written complaint and in the evidence of the victim that at the time of alleged offence of abduction, no other persons were present except the victim herself and the Appellants. Therefore, the testimony of the victim is important. The victim stated in the written complaint that the Appellant no. 1 forced her to sit on the motor cycle. In examination-in-chief, she stated that it was the Appellant no. 2 who forcefully took her in the motor cycle. In course of cross examination she stated that the Appellant no. 2 was on the motor cycle and the Appellant no. 1 caught hold of her and placed her on the motor cycle. In her statement recorded under section 164 of the Code of Criminal Procedure, 1973 (Ext. 2) she stated that she was forced to inhale some perfume after which she became senseless. Statements of the victim suffer from serious contradictions. In particular, what she stated in Ext. 2 undermines the probability of the incidence. Such contradictory and inconsistent statements hardly inspire confidence to rely upon. P.W. 3 stated in examination-in-chief that on the day of the incident he found the victim along with the Appellant no.1 going towards Hari Mandir. He

heard hue and cry from that place. In cross examination he stated that he did not go to that place. It is also in his evidence that he never gave this statement to the Investigating Officer previously. It is clear from his evidence that he was not an eye witness. His statement cannot conveniently be relied upon for corroboration.

The victim stated in cross-examination that after forcefully taking her, the Appellant no. 2 took her to high way wherefrom she was taken by a bus to unknown destination. She is a grown up girl. She did not raise any hue and cry or ask for rescue to any person of the bus including the conductor. She explained her conduct by saying that she was put on threat. Again she stated in cross-examination that she was taken to kheyaghat. In **Shyam & Anr. vs. State of Maharashtra [1995 SCC (Cri) 851],** relied upon by Mr. De, in a similar factual situation where the victim was alleged to be kidnapped by bicycle, the Supreme Court of India observed that in absence of any resistance or alarm to protect heror asking for help, it cannot be said that she was kidnapped. Rather, she was willing participant.Contradictory statements of the victim are hardly believable. She was grown up at that material point of time. Absence of raising any alarm in bus raises serious doubt as to veracity of her statements. Such statements can hardly be relied upon to convict the Appellants. Further, P.W. 6 went along with the father of the victim to the residence of the Appellant no. 2. He found there the victim as married. She did not disclose to them whether she was abducted, forcefully taken away by the Appellant no. 2 or she came with him on her own accord. This appears in the statement of P.W. 6 also who also escorted the father of the victim to the residence of the Appellant no. 2. He stated in course of cross-examination that when for the second time he went with the father of the victim to the residence of

the Appellant no. 2, the victim was found wearing vermillion but she did not disclose as to whether she was forcefully taken away by the Appellant no. 2. Conduct of the victim, as stated by these witnesses belies the prosecution case of forceful abduction. Had that been so, the victim should have immediately stated them and complained about.

It is in the written complaint that the father of the victim signed a blank paper. This appears in the deposition of the victim, P.W. 1 (father of the victim) and P.W. 5 (mother of the victim). On the other hand P.W. 7 stated in evidence that he drafted Ext.A as per version of the father of the victim. Ext.A, being an undertaking was signed both by him and P.W. 6 as witness as well as by the father of the victim. Ext.A contains statement that there was a marriage between the victim and the Appellant no. 2 and that the marriage was accepted by the father of the victim. Conspectus of facts, so discussed, strongly indicate that the victim willingly went away with the Appellant no. 2 undermining the very basis of the allegations against the appellants.

Much stress was laid by Mr. De on delay in lodging the written complaint. Principle of law is no longer *res integra*. In **Thulia Kali vs. State of T.N., (1972) 3 SCC 393** it was observed by the Supreme Court of India that delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In **Ram Jag v. State of U.P., (1974) 4 SCC 201** it was observed whether the delay is so long as to throw a cloud of suspicion on the seeds of the

prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution. The same principle was reiterated and applied in **Ramji Surjya's** case (supra).

In the case in hand, explanation for delay made by the victim is that they waited for salishi. This is corroborated by other evidences on record. Contrary to that the father of the victim stated that because of fear and threat written complaint was lodged belated although he admitted that he did not make any complain to the police station alleging the same. On the one hand there are contradictory explanations for delay. On the other hand, in the facts and circumstances of the case discussed above, delay clearly imports a strong suspicion of concoction and afterthought developed after *"salishi"*. The delayed written complaint, delay being variously explained,creates strong suspicion in the prosecution case.I agree with the submission of Mr. De in this regard.

Mr. De argued also that evidences of P.W. 9 and P.W. 10 were not put to the Appellant no. 1 in course of his examination under section 313 of the Code of Criminal Procedure which vitiated the trial.

In **Sharad Birdhi Chand Sharda's case**(supra) various incriminating circumstances were not at all put to the accused person. Facts of the present case are different. In **Ajay Singh's case** (supra) kerosene was found on accused's dress. No question was put in this

regard to the accused in course of his examination under section 313 of the Code of Criminal Procedure. Similarly in Harka Bahadur Rai's case (supra) it was observed by a Division Bench of this Court that there was no beginning of examination of accused under section 313 of the Code of Criminal Procedure, nor was there any end of such examination. It was observed that the learned Judge did not follow the provisions of section 313 of the Code of Criminal Procedure. Factual backgrounds of these cases were different.

In the present case P.W. 9 was the Investigating Officer and the P.W. 10 was the Judicial Magistrate who recorded the statement of the victim under section 164 of the Code of Criminal Procedure, 1973. P.W. 9 in course of deposition identified, among others, the seizure lists (Ext. 4 & 5). P.W. 10 identified the statement of the victim recorded under section 164 of the Code of Criminal Procedure, 1973. The Trial Court invited attention to the Appellants in respect of the F.I.R (Ext. 1), statement recorded under section 164 (Ext. 2) and the seizure lists (Ext. 4 & 5) and asked whether they would like to say anything on the contents of the said documents. Therefore, in view the settled principles of law, mere omission to put before the Appellants the depositions of P.W. 9 and P.W. 10 cannot be said to cause prejudice to the Appellants.

Evidences adduced on behalf of the prosecution suffer from serious contradictions, incongruences and inconsistencies which the Trial Court failed to take notice. There was a flawed appreciation of evidence on the part of the Trial Court. Therefore, the findings demands interference of this Court and are liable to be set aside.

In nutshell, the instant appeals are allowed. The impugned judgment of conviction and order of sentence is hereby set aside. The Appellants are set at liberty and they are released from their bail bonds.

Copy of the judgment along with Lower Court Records be send back to the Trial Court.

Both the appeals are accordingly disposed of along with pending applications, if any.

(Sugato Majumdar, J.)