

**(2013) 09 CAL CK 0025**

**Calcutta High Court**

**Case No:** C.R.A. No. 328 and 318 of 2008

Bulbuli Adhikary Mahanta @  
Mamoni

APPELLANT

Vs

State <BR> Gour Mahanta Vs  
State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 18, 2013

**Hon'ble Judges:** Mrinal Kanti Sinha, J; Ashim Kumar Roy, J

**Bench:** Division Bench

**Final Decision:** Allowed

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### **Judgement**

1. The husband Gaur Mahanta and his wife Bulbuli Adhikary Mahanta @ Mamoni were jointly tried on a charge for committing offence punishable u/s 363/366A/34 IPC and against the accused Gaur Mahanta there was an additional charge u/s 376 IPC. In the said trial both of them were convicted of the said charges and while they were sentenced to suffer R.I. 5 years and 7 years respectively with fine and default clause for their conviction u/s 363/366A/34 of the Indian Penal Code. The accused Gaur Mahanta was sentenced to suffer rigorous imprisonment for 8 years and to pay fine with default clause.

While in C.R.A. No. 318 of 2008 the convict Gaur Mahanta challenged his conviction in C.R.A. No. 328 of 2008 the convict Bulbuli Adhikary Mahanta @ Mamoni challenged her conviction.

Both the aforesaid appeals when were listed since none appeared on behalf of the appellant a Division Bench of this Court directed both of them to be produced in Court in person. Accordingly, they were produced in Court in person when they expressed their disability to engage any lawyer to defend them in the said appeal against the order of conviction and requested the Court for engaging a lawyer for conducting the appeal on their behalf at the cost of the State. This Court engaged Ms. Sreyashee Biswas to appear on behalf of the appellant in C.R.A. No. 318 of 2008 and Mrs. Debjani Sahoo Banerjee in C.R.A. No. 328 of 2008.

2. It is the case of the prosecution at the time of the incident the victim girl was about 14 years and a student in class IX of Harirdhampur High School, Tufangange. The appellant Gaur Mahanta used to work in cable line and that is how he became acquainted of the victim and through him his wife Bulbuli Mahanta. It is the further case that both the husband and wife were involved in trafficking girls and it is true Bulbuli the victim girl was allured. On May 28, 2007 the accused Bulbuli took away the victim girl from the school while she was in class on the pretext that accused Gaur was seriously ill. Although initially the victim girl was not agreed to go with her but after prolonged insistence she left with her and reached their residence. There Gaur Mahanta proposed her to accompany him to Ludhiana and the victim left for Ludhiana with him via Siliguri and Delhi. Since she did not return home after school hours her father lodged a missing diary with the local police station. Sometime thereafter her father received a call from her when it was disclosed that she was at Siliguri and would be returning within 10/12 days and when it was discovered some phone calls coming from Ludhiana suspicion arose and the police with her father and two brothers of the accused Gaur have been to Ludhiana and rescued her. After her recovery she disclosed that during the period she was detained at Ludhiana the accused Gaur Mahanta regularly used to have sexual intercourse with her.

3. In the trial prosecution examined total 10 witnesses to establish the charge against the appellant. Out of those witnesses PW/2 was the key witness. The PW/1 is her father, PW/3 Rahim Sekh is the rickshaw puller in whose rickshaw the victim was taken from the school, PW/4 Nikhil Sarkar the night guard of Harirdhampur High School was declared hostile during the trial, PW/5 Bhakti Mohanti accompanied the party to Ludhiana for recovery of the victim girl, PW/6 Dilip Kr. Roy is the doctor who examined after her recovery, PW/7 Avijit Das is the doctor who examined the accused Gaur Mahanta, PW/8 Kamal Kanti Roy was scribe of the FIR, PW/9 H.K. Sharma is the Investigating Officer of the case and PW/10 Sri Sudip Bhattacharjee is the Judicial Magistrate who recorded the statement of the victim u/s 164 CrPC.

4. It is the rival submission from the parties the questions arise for our decision are as follows:

a) Whether at the time of the incident the victim was under the age of 16 and if not whether she was under 18 years?

b) Whether she left the custody of her guardian voluntarily and the accused Gaur had sexual intercourse with her against her will?

Ms. Biswas appearing on behalf of the appellant Gaur Mahanta at the very outset vehemently contended that even accepting the allegation that during the period the victim was at Ludhiana and on every day the accused Gaur had regular intercourse with her still there cannot be any rape because she was a consenting party and there cannot be any question of kidnapping because she voluntarily left her guardian. In this regard Ms. Biswas took us to the cross-examination of the victim

girl and submitted that several letters were exhibited being marked Ext.-A series. She then pointed out that the victim admitted that those letters were written by her and the content of letter goes to show the victim had a love affairs with the accused Gaur and expressed his desire to go with him. She then draws our attention to Ext.-B series which was also marked during investigation with the negatives and submitted that those photographs clearly shows that victim was very much closed to the accused Gaur. She then submitted that her cross-examination goes to indicate that she had an affairs with Gaur before she left with him and after the victim was taken out from school she had to travel both in train and in other conveyance for long time but made no complaint against the accused to any one although she has sufficient opportunity. She then draws attention to the evidence of the doctor who examined her soon after her recovery and pointed out according to the evidence of the doctor it cannot be said that she was forcibly raped by the appellant against her will. She further submitted although it is claimed that the appellants were engaged in trafficking in girls but except some bold allegations nothing forthcoming in support of the same. Next she contended her age was not proved during the trial. She submitted that the prosecution attempted to prove her age by Ext.-4 a purported Birth Certificate issued by Public Health Department, Assam Government. She then contended that the said Birth Certificate was not authenticated during the trial and even if the same is admitted into evidence, the content thereof i.e. the entries are to be proved by the person who issued it and in his absence by any person who is acquainted with his handwriting. She then submitted that authenticity of the entries in the register at whose information such entries was recorded and what is his source of information not stated. In this regard she relied on a decision of the Hon"ble Apex Court in the case of [Madan Mohan Singh and Others Vs. Rajni Kant and Another,](#) . Then she submitted that although the PW/1 claimed that the Xerox copy of the birth certificate was handed over to the PW/10, the investigation officer of this case but PW/10 denied seizure of any such document. Moreover, it is a case where at the time of alleged incident the victim was reading in Harirdhampur High School at Tufangange and police could have easily seized the admission register of the school or other school documents to prove her age. She further submitted that the investigating officer admitted in his cross-examination that he did not record the statement of the Head Master or any teacher of the Harirdhampur High School. She further pointed out the investigating officer also admitted that he has not even ascertained in which primary school she studied nor made any prayer for ossification test of the victim. It is vehemently contended her ossification test was not done nor the school record was seized only because if the same were produced during the trial that would have demolished the prosecution case that victim was either below 18 years or 16 years and as such the trial Court should have drawn an adverse presumption u/s 114(g) of the Evidence Act against the prosecution on its failure to do the same. She contended no explanation is forthcoming from the side of the prosecution why they have not examined anybody from the school where she was reading at the material time or school record

containing her date of Birth was not seized. She lastly contended the Ext.-4 the purported Birth Certificate of the victim girl has to be excluded for consideration because the same was not brought to the notice of his client during his examination u/s 313 CrPC.

Mrs. Debjani Sahoo Banerjee, the learned Counsel appearing on behalf of the appellant Bulbuli Adhikary Mahanta adopted the above submissions of the learned Counsel of the appellant Gaur Mahanta and also relied on the decision of the Apex Court in the case of Madan Mohan Singh and Ors. Versus Raju Kant (supra). She vehemently contended that the trial Court illegally acted on Ext.-4 which was never proved in accordance with law and during the examination of her client no question was put to her with reference to that. She contended that victim was allegedly taken all the way from Tufangange to Ludhiana via Siliguri and Delhi. They moved some time in bus and some time in train and if it is true that she was forcibly taken she had every opportunity to inform the co-passengers. She added that Ext.-A series and Ext.-B clearly shows that as she fell in love with the husband of Bulbuli she on her own went with him. She further submitted it is not at all believable that a wife will allow and enable her husband to enjoy a girl.

5. The learned Public Prosecutor in his usual fairness submitted that Ext.-A and Ext.-B indicates that the victim girl had a love affairs with the appellant Gaur Mahanta and she expressed her desire to leave with him. But he vehemently contended that Ext.-4 is a Birth Certificate issued by Public Health Department of Assam Government and therefore, there is nothing to disbelieve its content. He further submitted that at the time of admitting the said documents no objection was raised from the side of the accused person therefore, the admissibility of the said document cannot be challenged at this stage. He submitted non-seizure of school records is a lapse on the part of the investigating officer and for the same the case of the prosecution is not liable to be disbelieved.

6. Considering the rival submissions of the parties we find the Ext.-4 series are the letters addressed to the accused Gaur Mahanta by the victim. The victim has not disputed her handwriting nor she disputed the content thereof. It was not the case of the prosecution that she under influence or under coercion wrote those letters. Now going through those letters we have no doubt the victim was in love with the accused Gaur and she repeatedly expressed her desire to leave with him. Therefore, one thing is very clear that it is not a case where she was taken out of the custody of her parent, lawful guardian against her own volition. Furthermore, we find she was taken from Tufangange to Ludhiana via Siliguri and New Delhi and she along with the accused travel mostly in train and also in public buses. There were other passengers in the train as well as in the buses therefore, she had every opportunity to seek their help but her inaction clearly goes to show she was accompanying the accused voluntarily. Now going through the evidence of the doctor PW/6, we find he examined the victim girl on 15th of July, 2007 and after she was rescued by the

police on 12th of July, 2007 and she alleged that before that for 10/12 days she was regularly forcibly raped by the appellant against her strict resistance. We further find the PW/6 examining the victim girl found no sign of physical injury over her breast and private parts and no sign of injury on perineum but hymen was ruptured. In his cross-examination PW/6 further disclosed that hymen may be ruptured for cycling, exercise and due to fall and also for various other reasons. According to the said witness if a victim is raped violently against her will, old scar marks would have been present in her hymen. We therefore on perusal of the evidence are of the opinion that the victim was a consenting party both in leaving the custody of her guardian and also in sexual intercourse with the accused Gaur.

Next most vital issue we have now to address is what was her age on the date of the occurrence. We find in this case no ossification test was done and admittedly the investigating officer of the case made no prayer for her ossification test. We further find it is a case at the time of the occurrence victim was a student of Class-IX of Harirdhampur High School, Tufangange and according to the prosecution case she was kidnapped from her class. Therefore to prove her actual age the investigating agency should have made necessary inquiry in the school and to prove that she was aged below 18 years or 16 years the school registers containing her age or date of birth should have been seized and exhibited during the trial. Certainly this is a lapse on the part of the investigating officer but this is not such a lapse which can be ignored because the prosecution case of course hinges on the age of the victim on the date of the occurrence. The learned Counsel for the appellant very rightly pointed out that non-seizure of those documents and withholding of the same the trial Court should have drawn an adverse inference u/s 114(g) of the Evidence Act against the prosecution. The prosecution to prove her age exhibited, a Birth Certificate issued by the Department of Public Health, State of Assam which was marked as Ext.-4. It is although before us, the admissibility of the said document was challenged but we have no doubt that once the document has been admitted into evidence without objection, the question of admissibility cannot be gone into the appeal. We have no doubt the contention of the learned Public Prosecutor has sufficient force and he very rightly relied on the decision of the Apex Court in the case of Madan Mohan Singh and Ors. Versus Raju Kant (supra) However, we are of the opinion when a document is produced for the first time in Court by the de-facto complainant and not by the investigating agency after seizure such document cannot be accepted by the Court as genuine without its genuinely being ascertained by the investigating agency. In such a case to do the real justice the Court must insist for examining a witness from the side of the issuing authority. It is very correctly argued from the side of the appellant that even if the document is admitted into evidence but the content thereof will not go automatically and its probative value has to be proved by the prosecution by examining the witnesses who either issued the same or the person recorded the entries in the books and on the strength of which such certificate was issued. However, in this case question of

acting on Ext.-4 does not at all arise for the reason during the examination of the appellant no question was put to them with reference to the same.

For the reasons stated above it must be held the case against the appellant has not been proved and the order of conviction and sentence is therefore liable to be set aside.

In the result, the appeal stands allowed and order of conviction and sentence passed against the appellant is set aside.

The appellants who are now in jail at once be released if not detained in connection with any other case.

The office is directed to send down the Lower Court Records.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.