(2006) 11 CAL CK 0061

Calcutta High Court

Case No: Criminal Application No. 231 of 2002

Saroj Mondal and Others		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: Nov. 30, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 157(1), 161, 164, 313, 464
- Evidence Act, 1872 - Section 63
- Penal Code, 1860 (IPC) - Section 323, 34, 363, 365, 366

Hon'ble Judges: Dipankar Datta, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Shibadas Banerjee, Y. Dastoor, P. Majumdar, Sudipto Maitra, S.G. Mukherjee and Debobrata Mondal, for the Appellant;L.M. Dutta, for the Respondent

Judgement

Dipankar Datta, J.
The six appellants [Saroj, Abhimanya, Abani, Sagar, Shyam @ Shyamal and Dinesh (hereafter A-1, A-2, A-3, A-4, A-5 and A-6 respectively)] were arraigned in Sessions Trial No. VII (March) of 2001 before the learned Additional Sessions Judge, 2nd Court, Krishnagar, Nadia to answer the following charges:

First-That you, on or about the 2.1.97 at about 10.45 p.m. at Ratanpur, P. S. Karimpur, District Nadia she may be forced to illicit intercourse and thereby committed an offence punishable u/s 366 of the Indian Penal Code, and within my cognizance.

Secondly-That you, on or about the 2.1.97 at about 10.45 p.m. at Ratanpur, P. S. Karimpur, District Nadia in furtherance of the common intention of you all, voluntarily caused hurt to Mahadev Mondal and Sudhamoy Mondal and thereby committed an offence punishable u/s 323 / 34 of the Indian Penal Code, and within my cognizance.

2. The trial originated from a written complaint dated 3.1.1997 lodged by Bhupendra Nath Mondal P.W. 1 [scribed by Madan Mohan Mondal (P.W. 6)] before the Officer-in-Charge, Karimpur Police Station, District Nadia which was treated as the First Information Report (Ext. 1/1). It appears from the endorsement made thereon that it was received by the concerned police officer at 3.45 a.m. pursuant whereto Karimpur Police Station Case No. 2/97 dated 3.1.97 under Sections 363 / 366 / 323 / 34 of the IPC was started. It was alleged therein that on 2.1.1997 at about 10.45 p.m., A-1 to A-6 along with 5/6 unknown persons had forcibly taken away his daughter Jagati Mondal (P.W. 8), aged about 16 years, from his house with ill-motive. The wife of P.W. 1, Sudhamoyee Mondal (P.W. 5) and their son, Mahadeb Mondal (P.W. 7) tried to resist them when A-1 struck P.W. 5 on her head and P.W. 7 on his forehead. Despite thorough search conducted soon thereafter, P.W. 8 could not be traced out.

3. Although the complaint was lodged in the early hours of 3.1.1997, it appears from perusal of the records that the same was transmitted to the Court of the concerned Sub-Divisional Judicial Magistrate only on 10.1.1997. In the meantime, A-1 and P.W. 8 were recovered from Sahebnagar, on 9.1.1997. One version (that of P.W. 3, the Investigating Officer) is that recovery was made from the house of one Sukhen Mondal of Sahebnagar, whereas another version (that of P.Ws. 8 and 5) is that it was from the house of A-6, also of Sahebnagar. A-1 was immediately arrested and P.W. 8 was sent to a Rescue Home. On 10.1.1997, the P.W. 3 recorded the statement of P.W. 8 u/s 161 of the Code of Criminal Procedure (hereafter the Cr. PC). On the same day, P.W.8''s statement was recorded by a Magistrate u/s 164 of the Cr. PC (Ext. A) on the prayer of the P.W. 3. It was her version (as found from Ext. A) that she had a love affair with A-1 and had eloped with him. It was her further version that her parents were not agreeable to her marriage with A-1 and had fixed her marriage with someone else to be solemnized on 2nd of Magh and for this purpose the parents had paid Rs. 5,100/- to the would be groom''s family, and that consequently having voluntarily left her paternal home, she had married A-1. On the basis of another prayer made by the P.W. 3, an ossification test of P.W. 8 was conducted.

4. A-1 to A-6 having pleaded not guilty to the charges, they faced trial. The prosecution examined 11 witnesses and exhibited a number of documents in support of its case. The defence did not adduce any evidence. From the trend of cross-examination and examination of the accused u/s 313 of the Cr. PC, it appears that voluntary leaving of her parental house by the P.W. 8, an adult, as a result of her love affair with A-1, and A-1 to A-6s'' non-involvement in the entire episode was the stand of the defence. Upon consideration of the evidence on record, the learned Judge by her judgment dated 28.5.2002 was pleased to record conviction u/s 366 of the Indian Penal Code (hereafter the IPC) against A-1 to A-6 and by order dated 29.5.02 sentenced them to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 2,000/- each, in default to suffer further rigorous imprisonment for 2 months. Although charge was framed against all the appellants u/s 323 / 34 of the

IPC the learned Judge returned the finding that "prosecution has failed to prove the allegation against the accused Saroj Mondal as per provisions of Section 323 / 34, IPC:

5. Feeling aggrieved by the conviction recorded against them and the consequent sentence as noted above, A-1 to A-6 as appellants have questioned the legality and/or propriety of the judgment and order passed by the learned Judge by preferring the present appeal.

6. Before adverting to the rival submissions raised at the Bar, it is noticed that there is on record the evidence of two hostile witnesses (P.Ws. 1 and 2), four eye-witnesses (P.Ws. 4, 5, 7 and 8), one post-occurrence witness (P.W. 6) two formal witnesses (P.W. 3, the Investigating Officer and P.W. 10, the Medical Officer) and two other witnesses (P.Ws. 9 and 11, Headmaster and Sanitary Inspector respectively) who sought to prove documents in support of the prosecution contention that the P.W. 8 was a minor on the date of the incident. It would be profitable to bear in mind the oral testimony of those prosecution witnesses having a bearing in the present case, which is noted below:

P.W. 1, Sukhendu Mondal, a relative of A-1 had been permitted to be cross-examined by the prosecution. However, before such permission was granted, P.W. 1 deposed that 3/4 years back at about 8 a.m. he had met A-1 accompanied by P.W. 8 at Sahebnagar. On being asked, P.W. 8 had told that she had voluntarily left the house with A-1.

P.W. 3, had received the written complaint from P.W. 4, filled up the formal FIR and initiated investigation. P.W. 8 was recovered by him from the house of Sukhen Mondal at Sahebnagar and was thereafter produced in Court. He collected the birth certificate of P.W. 8 from P.W. 4. On his prayer dated 10.1.1997, statement of P.W. 8 was recorded u/s 164 of the Cr.PC. He had examined Sukhen Mondal u/s 161 of the Cr. PC when Sukhen had stated that P.W. 8 had told him that she had been forcibly taken away from her house by A-1 and that on his asking A-1 and P.W. 8 told him that they would leave his house next morning but they did not leave and on 9.1.1997 the police recovered them from his house. He had submitted the chargesheet on 18.8.1999 but before such submission he could not collect the ossification test report. He also did not get P.W. 9 medically examined by a doctor.

P.W. 4 deposed that while he was lying on his bed, he had heard at about 11.00 hours at night an alarm raised by P.Ws. 8 and 5, who were lying at a distance of about 8/10 cubits. He rose from his bed and after focusing his torch he found the accused persons dragging his wife and daughter. The accused persons captured him. He found A-1 to hit P.W. 5 on her head with an instrument which he could not see. P.W. 7 was also assaulted by A-1. The accused persons had dragged away P.W. 8, who was 15 years old. P.W. 8 was recovered after 8 days of the incident from the house of A-6. It took 10/15 or 20/25 minutes to complete the operation. The

neighbouring people had assembled there but out of fear they were looking from a distance. After the accused persons left, the neighbours came to his house. The accused persons were chased by him, Rabin (not examined) and others for about 200/400 yards but P.W. 8 could not be rescued. In the last part of night (may be at 3.00 hours) he had been to the police station accompanied by some people (none except P.W. 6 examined) where the FIR was scribed by P.W. 6 at 3.00/4.00 hours. His wife and son were sent to hospital from the police station around 3.00/4.00 hours. He denied the suggestion that A-1 had business of paddy with his sons or that A-1 had visiting terms with his family or that P.W. 8 had left voluntarily. He also deposed that P.W. 8 was now married and was residing in his house, having given birth to a baby. Brindaban, Laxminarayan, Sashadhar and Sunil (none examined) have their houses near to his house. After some days of the incident he had filed a civil suit against A-1 for a declaration that the marriage between A-1 and P.W. 8 was a no-marriage.

P.W. 5 stated that P.W. 8 had raised alarm when A-1 dragged her, catching hold of her hand. She woke up and saw the accused persons. Hearing the hue and cry, P.W. 4 came there but he was caught hold of by the accused persons. She was assaulted by one of the accused persons with some instrument but could not see who assaulted her and with what instrument. She suffered bleeding-injury. Her son was also assaulted by the accused persons. Attracted by her shout, neighbouring people (none examined) came who tried to resist the accused persons. The resistance did not yield any result and P.W. 8 was forcibly taken away by them. That night she went to the police station and from there she and P.W. 7 were taken to Karimpur Hospital for treatment. She also stated that P.W. 8, who was 15 years old at the relevant time when she was forcibly taken away, was recovered from the house of A-6 and that P.W. 8 is now married and staying in her house with her baby. She denied that A-1 and P.W. 8 had any relation of love with each other.

P.W. 6 was a neighbour and uncle of P.W. 4 by distant relation. His house and P.W. 4''s house was intervened by 15/16 houses. Hearing the hue and cry, he came to the house of P.W. 4 and saw that 20/30 persons (none examined) had already assembled there. He found P.Ws. 5 and 7 sitting in the courtyard with bleeding injuries. He did not have any discussion with any other villager except P.W. 4 and his family members. He stated that at night there was search to trace out P.W. 8 and he along with others (none examined) had been to the house of A-1 for searching her but they did not enter into his house. He denied the suggestion of commotion when they went to the house of A-1 or that he along with P.W. 4, other members of his family, and other villagers had attacked the house of A-1. He stated that A-1 and his elder brother had remained outside the village for about one year but other inmates of his house had remained in their house ,at the village. Search for P.W. 8 was made for an hour and after searching, he along with P.Ws. 4, 5 and 7 and 10/15 other persons had been to the police station at about 2.00/2.30 hours at night. He stated that P.W. 7 has business of jute with A-1.

P.W. 7 stated that while he was lying on his bed at about 10.30/11.00 hours at night, he heard P.W. 8 and P.W. 5 to raise an alarm and woke up. Having opened the door he found the appellants and others were dragging his sister. With the focus of his torch he could identify the accused persons. P.W. 4 then came from his room and when he resisted he was confined by them. He along with P.W. 5 resisted the accused persons when A-1 hit his head by a sharp , cutting weapon leading to bleeding injury. P.W. 5 was also assaulted by A-1. P.W. 8 was forcibly taken away from the house by the accused persons. Despite being searched by P.W. 4, P.W. 8 could not be traced out. At the late hours of night he along with P.Ws. 4, 5 and 6, Atma Ram Mondal (not examined) and many others (not examined) went to the police station. Thereafter, he and P.W. 5 were taken to hospital for treatment. In course of cross-examination he stated that there is no electric connection in their house and that by focusing torchlight he could identify the accused persons. He stated about his brother (not examined) and father shouting at the time of the incident and that when P.W. 8 was being dragged, none of their neighbours came to the spot. He further stated that when P.W. 8 was taken away by the accused persons, a few minutes later some neighbours came. He also named Atma Ram, Paritosh, Narod, Haradhan, Rabin, Ganapati and Kestopada (none examined) who had accompanied P.Ws. 4 and 6 to the house of A-1. He denied that A-1 and P.W. 8 had any relation of love with each other.

P.W. 8 deposed that at about 16.30 /11.00 hours of night she had been sleeping along with her mother. Suddenly she found that the accused persons and others were trying to drag her. She woke up and saw that the accused persons had torchlight with them and while they were focusing their torchlight she found that they were trying to take her away from that place. She and P.W. 5 had raised alarm when P.W. 7 and P.W. 4 rushed there with a torchlight in his hand. A-1 hit P.Ws. 5 and 7 on their heads with weapons resulting in injuries. P.W. 4 was confined in a place when P.Ws. 5 and 7 had been assaulted by A-1. Having been dragged out, her face was tied with cloth and she was forcibly taken away. At first, she was taken to an unknown place and thereafter to the house of A-6 at Sahebnagar, on a bicycle by A-1 when her mouth was tied with a cloth. Other accused persons had also accompanied them. She could not recollect how much time it took to reach the house of A-6 and further as to the nature of the road since she was taken to the house of A-6 at about 1.00/1.30 hours at night. There was no man, pedestrian, bus or taxi on the road. After some days, police recovered her from that place. She admitted having made statement before the learned Magistrate but volunteered to say that out of fear and threat given by the accused persons, such statement was made. She denied that her marriage with A-1 had been registered or that she began to live with A-1 as his wife. Although she was examined by the police after her recovery, she did not state that she was either threatened by the accused persons or that she was forcibly taken away but she volunteered to say that out of fear she could not state it. She denied that A-1 was her lover and that she also loved her very

much. She denied having voluntarily left her house or that she was adult at that time.

P.W. 9, Khagendra Nath Biswas, who was the Headmaster of Narayanpur High School sought to prove the age of P.W. 8, a student of the said school. For this purpose the Admission Register (Ext. 5) was produced in Court wherein against SI. No. 85 the name of P.W. 8 appeared with 2.12.81 as her date of birth. P.W. 8 was admitted on 15.5.91 in Class-V of the said school as per Transfer Certificate of Ratanpur Primary School. He came to learn about her date of birth from this certificate. The date of birth of P.W. 8 was inserted on the basis of duplicate of Transfer Certificate of Ratanpur Primary School as produced at the time of admission by P.W. 8.

P.W. 10, as noted above, was the medical officer posted at Karimpur Rural Hospital at the relevant time. He stated to have examined P.W. 7 at about 3.45 a.m., and P.W. 5 at about the same time. He proved the injury reports being Exts. 6 and 7. Before him, P.W. 7 had represented that dacoits had assaulted him between 10.45 and 11.00 p.m. on 2.1.97.

P.W. 11, Somenath Bagchi, was the Block Sanitary Inspector of Karimpur Blocks I and II. He maintained Admission Register of date of birth of Karimpur since 5.4.95. He sought to prove xerox copy of birth certificate of P.W. 8 issued by him containing his signature. As per this certificate, date of birth of P.W. 8 was 2.12.81. Prior to issuance of such certificate, P.W. 11 received from the party concerned affidavit regarding date of birth and on the basis thereof conducted enquiry at Ratanpur. He admitted that the said certificate was not issued upon report of health officer of (illegible) but was issued as per affidavit by parties and also after proper enquiry. Rules and regulations permitted receiving of affidavits from parties, but he could not remember either the provision of law or the date when he received such affidavit.

7. It is to be noted that though copy of one Certificate of Birth dated 27.6.97 certifying the date of birth of P. W. 8 as 2.12.1981 is found in the records but the same does not appear to have been marked as an exhibit. The original of the said certificate is not to be found with the records.

8. Mr. Banerjee, learned Senior Counsel assisted by Mr. Dastoor, learned Advocate by placing the evidence on record has contended before this Court that the conviction recorded by the learned Judge against all the appellants is unsustainable in law. He has assailed the conviction by raising the following points:

(1) There is no explanation for the delay of 8 days in sending the FIR to the Court of the concerned Magistrate and there is good reason to believe that the FIR is ante-dated;

(2) The P.Ws. 5 and 7 allegedly being struck on their head and forehead respectively had been to the Karimpur Rural Hospital, Nadia for treatment. It appears from the injury reports dated 3.1.1997 (Exts. 6 and 7) prepared by the Medical Officer, Dr. Manoj Mohan Pal (P.W. 10) that he attended to P.W. 7 and P.W. 5 at 3.45 a.m. and 3.50 a.m. respectively, and P.Ws. 5 and 7, thus, could not have been present at the police station, as stated by them, when the FIR was lodged by P.W. 4 and received by the concerned police officer at 3.45 a.m. There is thus reasonable ground to believe that the FIR was prepared after much deliberation subsequently in order to rope in the appellants.

(3) The FIR does not disclose user of torch lights by either P.W. 4 or by the appellants and the evidence in Court in this respect suffers from embellishment.

(4) Although it was the evidence of P.Ws. 5 and 7 that on being struck on the head and forehead respectively by A-1 they were bleeding profusely leading to soaking of their wearing apparels with blood, the same were not seized. It was also their evidence that blood fell in the courtyard but bloodstained earth was not seized. There was thus sufficient room to disbelieve the evidence of P.Ws. 5 and 7.

(5) Before the P.W. 10, the P.Ws. 5 and 7 stated that they had been attacked by dacoits as a result of which they suffered head injuries. Had it been the fact that P.Ws. 5 and 7 had suffered the said injuries while trying to resist the appellants from forcibly taking away P.W. 8, there was no reason as to why the P.Ws. 5 and 7 had to resort to the story of being assaulted by dacoits. This was another good ground to believe that the version in the FIR was a concocted one.

(6) The investigating agency, after P.W. 8 was recovered, did not subject her to any medical examination. Although an ossification test of P.W. 8 was conducted, yet, report thereof was not produced. An adverse inference ought to be drawn that in the event the examination results had been produced in Court the same would have demolished the prosecution case and as such were withheld.

(7) The charge framed against the appellants u/s 366 of the IPC was defective.

(8) The Investigating Officer was examined as P.W. 3. Since P.Ws. 1 and 2 had been declared hostile, the Investigating Officer in effect became the first witness for the prosecution as a result of which the defence was deprived of the opportunity to extract contradictions from him in respect of the evidence of the other prosecution witnesses.

(9) Retraction of P.W. 8, long 41/2 years after recording of statement u/s 164 of the Cr. PC cannot be considered trustworthy. Immediately after recovery of P.W. 8 and A-1 on 9.1.1997, P.W. 8 was sent to rescue home and A-1 was arrested and as such on and from that date P.W. 8 could not be said to be within the clutches of A-1. Question of the A-1 or his associates having threatened her to make statement before the Magistrate or she having made such statement out of fear, as

volunteered by her in course of her examination in Court, is anything but reliable.

(10) There were a number of discrepancies in the versions of the P.Ws. 4, 5, 6, 7 and 8 which had the effect of shaking the basic substratum of the prosecution case and no conviction ought to have been recorded based on such version.

(11) There was absolutely no evidence adduced by the prosecution that P.W. 8 was abducted with intent to compel her to marry any person against her will, or to force or seduce her to illicit intercourse. The ingredients of Section 366 of IPC were thus absent and thus the charge thereunder could not have been held to be proved.

(12) Examination of the appellants u/s 313 of the Cr.PC was manifestly defective in that the circumstances by which the age of P.W. 8 was sought to be proved were not put to the appellants to their utter prejudice and detriment.

9. Learned Senior Counsel cited various authorities in support of his submissions, which are:

i) Balaka Singh and Others Vs. The State of Punjab, ;

ii) Ishwar Singh Vs. State of U.P., ;

iii) Ram Kumar Pandey Vs. State of Madhya Pradesh, ;

iv) Lakshmi Singh and Others Vs. State of Bihar, ;

v) Shwe Pru v. King AIR 1941 Rangoon 209;

vi) Sharad Birdhichand Sarda Vs. State of Maharashtra, .

Based on his abovenoted submissions, learned Senior Counsel urged this Court to set aside the conviction and to acquit the appellants.

10. Mr. L.M. Dutta, learned Advocate representing the State submitted at the outset that there was no evidence on record regarding the ingredients mentioned in Section 366, of the IPC but the fact that the appellants had forcibly taken away P.W. 8 in the dark of night and had kept her confined for more than 8 days clearly proved that the appellants were at least guilty of commission of offence u/s 365 of the IPC, and accordingly urged this Court to record conviction against the appellants u/s 365 of the IPC and to impose appropriate sentence. He further submitted that the contradictions in the evidence of the prosecution witnesses were minor and cannot be said to have the effect of shaking the basic substratum of the prosecution case, as submitted on behalf of the appellants. Regarding the statement made by P.W. 8 before the concerned Magistrate u/s 164 of the Cr. PC, he submitted that the same was recorded only a day after her recovery by the police and her evidence in Court that she had made such statement out of fear and being threatened by the appellants while in their custody for 8 long days could not be disbelieved. There being no merit in the appeal, he prayed for dismissal of the same.

11. Mr. Maitra, learned Advocate assisted by Mr. Mukherjee, learned Advocate appeared for the de facto complainant. He very fairly submitted that he could not claim a right of audience but was prepared to render assistance to this Court, if called for, which would be in addition to the submissions made by Mr. Dutta. In its discretion this Court thought it proper to seek the assistance of Mr. Maitra and, accordingly, he was heard.

12. At the outset it was submitted by Mr. Maitra that the charge of forcibly taking away P.W. 8 was sufficiently proved by the P.Ws. 4, 5, 6, 7 and 8. The further fact that P.Ws. 5 and 7 were inflicted injuries at the time of the occurrence was proved by the doctor, P.W. 10. Also recovery of P.W. 8 together with A-1 from the residence of A-6 went a long way to prove the charge framed against the appellants. He submitted that the delay in despatch of the FIR to the concerned Magistrate could not have the effect of scuttling the prosecution case. It was his further submission that seizure of blood stained earth and blood soaked apparels were not relevant in the present case. Since age of the victim in respect of a charge u/s 366 of the IPC is not so important and having regard to the further fact that there was no cross-examination of prosecution witnesses on the point of age of P.W. 8, as spoken by them, the evidence stood unchallenged, and as such the submission on behalf of the appellants regarding defective examination of the appellants u/s 313 of the Cr. PC was without merit. Regarding non-disclosure of the names of the appellants before P.W. 10 at the time of medical examination, he submitted that a grown up girl having been kidnapped from her residence, it was natural and prudent for the inmates not to disclose fact of such kidnapping for fear of being ridiculed by co-villagers. The appellants having been identified by P.Ws. 4, 5, 7 and 8 as the persons who had kidnapped P.W. 8 and such identification remaining undisturbed even after thorough cross-examination of the said witnesses, the learned Judge did not commit any error in recording conviction against the appellants. He invited the attention of this Court to the provisions of Section 464 of the Cr. PC and submitted that defective framing of charge is of no consequence and the Court can proceed even in a case where charge has not been framed.

13. He referred to the decision in Santenu Mitra v. State of W.B. 1998 SCC 1381 and submitted that entry in Register of Births and Deaths in performance of official duties by a public servant was admissible in evidence and having regard thereto, the learned Judge was justified in accepting the version of P.W. 11 insofar as he testified regarding the date of birth of P.W. 8 as entered in the Birth Certificate.

He also cited Bhushan Lal v. State of M.P. 1988 SCC 50 and submitted that the facts and circumstances of the present case were similar to the one under consideration of the Apex Court and as such one of the ingredients of Section 366 of the IPC, i.e. to compel P.W. 8 to marry A-1 was made out.

14. By referring to the decisions reported in

i) 19 Cri. LJ 645: Har Kesh v. Emperor,

ii) AIR 1930 Lah 52: Haidar Shah v. Emperor,

iii) AIR 1938 Lah 474: Mohammad Sadiq v. Emperor,

iv) Nirmal Kumar Bhowmik and Others Vs. Emperor, ,

he submitted that in respect of a charge u/s 366 of the IPC, the Court could infer the intention from the surrounding circumstances.

15. Lastly, he submitted that even if the charge u/s 366 of the IPC fails, on the basis of the evidence on record the Court would be justified in recording conviction u/s 365 thereof and in support he cited the decision reported in 50 CWN 348 ; Brij Bhushan Singh v. King Emperor and Faiyaz Ahmed and others Vs. State of Bihar, .

16. This Court has heard learned Counsel for the parties at length, examined the evidence on record and the judgment under appeal and considered the various authorities cited by learned Counsel. Having regard to the facts and circumstances of the present case as well as the materials placed before it vis-a-vis the law applicable thereto, it is now for this Court to decide as to whether the learned Judge was justified in returning the finding that the prosecution had been successful in bringing home the charge u/s 366 of the IPC against the appellants, whilst holding that the charge under Sections 323 / 34 of the IPC was not proved.

17. Elaborate arguments were made by learned Senior Counsel for the appellants on the point of delay in sending the FIR to the concerned Magistrate. In reply, he had even pointed out to this Court that the submission made by him in this behalf has not even been countered either by the Counsel for the State or the de facto complainant.

18. It is the considered view of this Court that delay in sending FIR to the Court of the concerned Magistrate, per se, would not have a deleterious effect on the prosecution case if the evidence adduced by the witnesses is considered by the Court to be trustworthy. Whether or not unreasonable delay in sending FIR to the Court of the concerned-Magistrate was due to manipulations in the FIR, after deliberations and consultations, to falsely implicate innocent persons would ultimately depend on the appreciation of evidence in the facts and circumstances of a given case, and it would be too broad a proposition to lay down that whenever there is delay the prosecution case has to be thrown out. The legislative mandate in Section 157(1) of the Cr. PC has to be complied with but one cannot lose sight of the fact that for very many reasons there might occasion delay in sending FIR to the concerned Magistrate. The expression ''forthwith'' in Section 157(1) of the Cr.PC, in the humble opinion of this Court, would connote ''at the earliest'' and not ''at once''. Reasons which prevented the police to send the FIR to the concerned Magistrate at the earliest can be explained and if the Court is satisfied with such explanation, no adverse inference can be drawn in respect of veracity of the prosecution case. In the

event, however, the evidence of the witnesses does not inspire confidence and the Court is faced with a situation where it finds that fabrication and/or concoction has been resorted to for falsely implicating the accused, inordinate delay in sending the FIR to the concerned Magistrate which remains unexplained by the prosecution could be treated as an additional ground for disbelieving the prosecution story. In such cases, it would be open for the Court to doubt the veracity of the prosecution case and to treat it as one of the grounds to rule against the prosecution.

19. In view of the above discussion, this Court is disinclined to agree with learned Senior Counsel for the appellants that on the ground of inordinate delay in sending the FIR to the Court of the concerned Magistrate the prosecution case is to be disbelieved. This Court, however, hastens to add that this point of delay might assume some significance if the evidence adduced by the prosecution is considered unreliable by this Court.

20. This Court is also not in agreement with learned Counsel for the appellants that defective framing of charge u/s 366 of the IPC and examination of P. W. 3 at the commencement of the trial had the effect of vitiating the trial. The accused persons understood the charge and thus question of being prejudiced does not arise, though this Court deprecates the slipshod framing of charge against the accused in the present case. This Court is also of the view that if felt necessary, the defence could have recalled P.W. 3 to extract contradictions but the same not having availed of, any grievance at this stage would be of little consequence, Also, non-seizure of blood-stained earth and wearing apparels by the investigating agency would not be so relevant as in case of an offence of murder.

21. Now this Court proceeds to embark on an analysis of the evidence led during the trial. From the conspectus of evidence and appreciation thereof, the position that emerges is as follows:

(i) Although the FIR makes no mention of user of torch by any one present at the place of occurrence, P. Ws. 4, 7 and 8, in their evidence in Court, have referred to such user. P. Ws. 4 and 7 deposed that by focusing their respective torches they could identify the appellants. However, none corroborated the user of torch by the other. P.W. 5 did not at all refer to any torch being used by anyone. How in the dark she could identify the appellants is conspicuous by its absence. P.W. 8 came out with a partly different and a partly corroborative story. She corroborated user of torch by the P.W. 4 but said that she realized being dragged by the appellants to take her away as they (appellants) were using torches, importantly, no torch was seized. It is on record that there was no electricity in the house of P.W. 4. The FIR, as noted, did not refer to user of torch. It was a winter night, the month being Poush. Some protective measures against cold had to be taken, it would be preposterous to assume that the appellants would come to the house of P.W. 4 for forcibly taking away P.W. 8 baring their faces to facilitate identification. In such circumstances, firstly, user of torch as told by the witnesses raises grave suspicion, and secondly,

identification of A-4.A-5 and A-6 by P.Ws. 4, 5 and 7 (leaving aside A-1, A-2 and A-3 for the present who are brothers and being the neighbours of P.W. 4 must have been known to each other) as co-accused (with whom the said witnesses apparently had no interaction at all previously) leads one to believe that they have been falsely roped in. Conceding that village people are used to absence of electricity and the sense of urban people to perceive things in the dark cannot be equated with people living in the rural area, and thus the possibility of identifying the appellants even in the dark without sufficient light cannot be totally ruled out, yet, having regard to the different versions of the prosecution witnesses which are contradictory, the evidence fails to inspire confidence in the Court''s mind and leads the Court to form an opinion that user of torch was introduced for the first time as evidence in Court in order to support the version of identification of the appellants in the dark and in particular to counter the fact of absence of electricity in the house of P.W. 4. The evidence in this respect warrants to be discredited.

(ii) It is in the evidence of P.W. 4 that Brindaban, Laxminarayan, Sashadhar and Sunil had their respective houses near his house. Being the close neighbours of P.W. 4, it was possible for them to throw some light regarding the incident in question. P.W. 7 stated that on witnessing the incident of dragging of P.W. 8 by the appellants, inter alia, his brother had shouted. P.W. 4 searched for P.W. 8 with Rabin and others. He was accompanied to the police station by P.W. 6, Atma Ram and others. Although P.W. 6 did not disclose the names of the persons who accompanied him to the house of A-1, P.W. 7 deposed that Paritosh, Narod, Haradhan, Rabin, Ganapati and Kestopada had accompanied P.W.6 to the house of A-1 for tracing out P.W. 8. None of these persons [viz. Brindaban, Laxminarayan, Sashadhar, Sunil, Rabin, brother of P.W. 7, Paritosh, Narod, Haradhan, Ganapati and Kestopada and others (not named)] was examined to corroborate the version of the P.Ws. 4, 6 and 7. Their non-examination, in the humble view of this Court, renders the prosecution case suspect.

(iii) It is also in the evidence of P.W. 4 that the neighbouring people had assembled near or at his house, but out of fear they looked from a distance. The entire operation of forcibly taking away P.W. 8 lasted 10/15 or 20/25 minutes. They came to his house after the appellants left. His evidence is corroborated by the P.W. 7 to the extent that the neighbouring people came after the appellants left. He, however, did not corroborate P.W. 4''s version that neighbouring people had assembled outside but did not come forward out of fear. The version of the third eye-witness, i.e. P.W. 5 is, however, absolutely different. Not only did she say that the neighbouring people came (without naming any of them) but she also found them to resist the appellants but such resistance did not yield any result and the appellants were successful in taking away P.W. 8. The version of P.W. 8, the fourth eyewitness, however, is silent with regard to the role of the neighbours. There being material contradictions in the versions of the P.Ws. 4 and 7 on the one hand and the P.Ws. 5 and 8 on the other with regard to the role of the neighbours, the evidence adduced fails to appeal to

this Court as it is considered not creditworthy.

(iv) As has been noticed above, the FIR was received by the police station on 3.1.97 at 3.45 a.m. in the presence of, inter alia, P.Ws. 4, 5, 6 and 7. From Exhibit 6 it appears that P.W. 10 had attended to the injury of P.Ws. 7 and 5 at 3.45 a.m. and 3.50 a.m. respectively. It appears to be strange that at least P.Ws. 7 and 5 were allegedly present at the same time at two different places. Further, before the P.W. 10 it was disclosed by P.W. 7 that the injury received by him was the result of assault by dacoits. If it was the fact that P.W. 8 had been forcibly taken away by the appellants, it is incomprehensible as to why the P.W. 7 would resort to a story of being attacked by dacoits. Argument of learned Counsel for the de facto complainant that P.W. 7 did not intend to make it public that his sister had been forcibly taken away by A-1 and his associates cuts no ice since about 20/30 villagers had assembled at the house of P.W. 4 and a number of them had chased the appellants, if the version of P.W. 6 is to be believed, and therefore the fact that the P.W. 8 had been forcibly taken away from her home was already known to the co-villagers. There was thus nothing to hide. The discrepancies noted above clearly cast a shadow of doubt on the veracity of the prosecution case. (v) One cannot lose sight of the fact that the appellants were found not guilty in respect of the charge u/s 323 / 34 of the IPC. Forcibly taking away of P.W. 8 and in the process hurting P.Ws. 5 and 7 formed part of the same operation. In view of the finding returned by the learned Judge regarding the charge u/s 323 / 34, IPC, what remains of the prosecution case is that A-1 to A-6 along with 5/6 other persons came to the house of P.W. 4 and after some initial resistance put up by P.Ws. 4, 5 and 7, in the shape of raising alarm attracting the neighbours who either stood silently outside (P.W. 4''s version) or put up abortive resistance (P.W. 5''s version), took away P.W. 8 without feeling any need to harm anyone physically. Since falsus in uno falsus in omnibus is not an accepted principle in this country, one has to sift the evidence to separate the grain from the chaff. But where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply [see Balaka Singh (supra)]. On facts and in the circumstances of the present case this Court is satisfied this is a case where the grain cannot be separated from the chaff, and the conclusion is inevitable that the appellants have been falsely implicated and the FIR is nothing but an act of P.W. 4 and his family members to wreak vengeance against A-1 with whom P.W. 8 had decided to tie the marital knot much to the dislike of P.W. 4.

(vi) That P.W. 8 had not attained majority on the date of occurrence i.e. 2.1.97 was sought to be proved by the prosecution by producing P.Ws. 9 and 11. The documentary evidence to which each of these witnesses referred to for proving that 2.12.1981 was the date of birth of P.W. 8 can hardly be termed legal evidence. Entry

of date of birth of P.W. 8 in the Admission Register of Narayanpur High School was on the basis of a duplicate transfer certificate issued by Ratanpur Primary School wherein the date of birth was mentioned as 2.12.1981. Copy of the purported Transfer Certificate referred to by P.W. 9 although appears in the records of the case, but does not appear to have been brought on record in a legal manner. It is thus inadmissible evidence. The recording of date of birth in the Admission Register of Narayanpur High School not being based on any authentic document certifying the date of birth of P.W. 8 but being based on a duplicate copy of Transfer Certificate, the original whereof was not looked into while making the subject entry in the Admission Register, no credence can be attached thereto. After all what was referred to as transfer certificate appears to be photocopy of Primary School Leaving Certificate. No one having testified having seen the original of such School Leaving Certificate, photocopy cannot be treated as secondary evidence as defined in Section 63 of the Evidence Act. Also, the certificate of birth purportedly issued by P.W. 11 was brought into existence in June, 1997 when investigation of the case was in progress. The said document is clearly suspect in view of the fact that the same was issued based on an affidavit filed by the party praying for it and on the basis of enquiry, permissibility of which could not be substantiated by referring to the relevant rules. That P.W. 8 was a minor on the date of the incident, as sought to be proved by the prosecution, thus could not be proved on the basis of legally admissible evidence. On the contrary, this Court finds sufficient force in the submission of learned Counsel for the appellants that the Investigating Officer, P.W. 3 although took a reasonably long time of about 20 months to submit chargesheet against the appellants, yet, no suitable explanation was given by him as to why despite holding of ossification test of P.W. 8, the report thereof could not be collected. This Court would, in the circumstances, be left with no other option but to draw adverse inference that had the ossification test report been produced the same would have shown P.W. 8 as one having attained majority and was thus withheld.

(vii) Next in line comes the evidence of P.W. 8 in Court regarding the incident in question. Her version was a complete volte face of what was recorded by the concerned Magistrate as her voluntary statement u/s 164 of the Cr.PC on 10.1.1997. The question is how far her evidence in Court can be believed. It is on record that she had been married to a person residing in the adjacent district of Murshidabad, had given birth to a baby and at the time of deposing in Court was residing in her paternal home. She being in her family way, having been married elsewhere and having a little child of her own, and being under the influence of the P. Ws. 4, 5 and 7 at the time when she deposed in Court, it would be absurd to expect that she would stand by her earlier statement recorded by the Magistrate and thus rupture her marital life. No one, far less a rustic village girl, would invite a jinxed matrimony. It seems unlikely that the P.W. 8 would, in the situation she found herself while being in Court, disclose what actually happened and stand by her statement

recorded before the Magistrate on 10.1.1997 risking her marital life and putting it in jeopardy. In view of the facts and circumstances of the present case, this Court is unable record its satisfaction that the evidence of P.W. 8 is credible based whereon a conviction can be recorded.

(viii) It would appear from the evidence of P.W. 1, who turned hostile, that he had seen, about 3/4 years back, A-1 accompanied by P.W. 8 at Sahebnagar and that P.W. 8 had told him that she had voluntarily left the house with A-1. The law relating to appreciation of evidence of hostile witness is well-settled [see State of Rajasthan Vs. Teg Bahadur and Others,] and following the law laid down therein, since the evidence which favours the defence could be considered, the evidence of P.W. 1 definitely creates a dent in the prosecution case.

(ix) Mr. Maitra for the de facto complainant has rightly argued that the defence did not by putting any question to the prosecution witnesses suggest that P.W. 8 at the relevant point of time was not a minor and in the circumstances the evidence adduced in this respect went unchallenged. Learned Judge in her judgment held:

In the instant case, we find that prosecution is able to prove that accused persons kidnapped the woman namely Jagati Mondal who was the minor girl at the time of incident as per evidence of prosecution and....

It would appear from the above extract that the learned Judge relied on the evidence adduced by the prosecution to hold that P. W. 8 was a minor on the date of the incident. The defence having not put any suggestion to the prosecution witnesses regarding the age of P.W. 8, it was all the more necessary for the learned Judge to apprise the appellants, in course of examination u/s 313 of the Cr. PC, regarding the circumstance appearing in the evidence in respect of age of P.W. 8 which, if believed, would suggest that she was a minor on the date of the incident. Having perused the record, this Court finds total absence of any circumstance regarding the age of P.W. 8 having been put to the appellants and this Court is satisfied that prejudice to the appellants occasioned thereby. Following the decision of the Apex Court cited by the learned Counsel for the appellants, it has to be held that the evidence insofar as it relates to proof that P.W. 8 was a minor on the date of the incident could not have been acted upon and ought to have been excluded altogether from consideration.

(x) The learned Judge returned a finding in the judgment under appeal that:

it appears from the cross-examination of P.W. 4 that after some days of the incident he filed a civil suit against accused Saroj Mondal which is still pending and it is a suit for declaration of no marriage of his daughter. So, it is crystal clear that Jagati Mondal was kidnapped or abducted by the accused persons with intention to marry her against her will.

This Court is in agreement with the submission of learned Counsel for the appellants and the State that there is no evidence on record which would suggest, even remotely, any intention on the part of any of the appellants either to compel P.W. 8 to marry against her will or to force her to illicit intercourse. The evidence of P.W. 8 in Court is clear on this point and, if believed, would at best suggest taking her away forcibly and to wrongfully confine her. Regard being had to the same, definitely the ingredients of Section 366 of the IPC were not proved and as such the finding returned by the learned Judge in this respect appears to be perverse.

22. The relationship between P.Ws. 4, 5 and 7 on the one hand, and A-1 on the other was anything but cordial. Having been faced with a situation where a grown up girl had either eloped or had been forcibly taken away resulting in lodging of the FIR, it is quite natural that P.W. 4 and his family members would feel inclined to have the FIR reach its logical conclusion, i.e. conviction and punishment of the accused. P.Ws. 4, 5 and 7, apart from being related to P.W. 8, were obviously interested witnesses. Although it was the version of P.W. 3 that P.W. 8 was recovered from the house of Sukhen Mondal, (P.W. 1), P.Ws. 8 and 5 were quite assertive in saying that P.W. 8 was recovered from the house of A-6. There appears to be material contradiction in this respect but having regard to the fact that P.W. 3 had arrested A-1 immediately on recovering him and P.W. 8, his version would be acceptable. Roping in A-6, a resident of Sahebnagar, only because he was related to A-1 to record conviction against him has to be deprecated. This Court is conscious of the rule that evidence of witnesses who are interested or are related to the victim must not be discarded altogether, but it requires scrutiny with more care, caution and circumspection to ensure that the guilty does not escape and at the same time the innocent is not wrongly convicted, and, where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. In the considered view of this Court, for the reasons aforementioned, corroboration of material particulars are lacking and it is felt that it would be extremely unsafe to record a conviction against the appellants based on such quality of evidence.

23. In the background of the above, belated sending of the FIR to the Court of the concerned Magistrate for which there was no explanation from the side of the prosecution assumes importance and linked with the discrepancies, ''contradictions and omissions in the version of the witnesses, which are indeed vital, provides an additional ground for disbelieving the prosecution case.

24. On the basis of a wholesome appreciation of the evidence on record this Court is of the clear opinion that possibility of P.W. 8 having eloped with A-1 cannot be ruled out and the nature of evidence led in the trial is insufficient and inadequate to return a finding beyond reasonable doubt that A-1 to A-6 were guilty of the charge u/s 366 of the IPC.

25. On such consideration, the judgment and order of the learned Judge recording conviction and imposing sentence on the appellants stand set aside. The appellants are entitled to an order of acquittal and it is ordered accordingly. The appeal stands allowed. The appellants are discharged from their bail bonds.

26. Prior to commencement of hearing of the present appeal, an application had been filed on behalf of the appellants praying for an order permitting them to lead additional evidence being C.R.A.N. No. 1476 of 2006. For the view this Court has taken on the basis of the evidence on record, additional evidence as sought to be adduced on behalf of the appellants was not considered to be necessary. The said application would stand-disposed of, but without any order passed thereon.

Amit Talukdar, J.

27. I agree.