

Present:
Mr. Justice Mohammad Marzi-ul-Huq
and
Mr. Justice Md. Ruhul Quddus

Jail Appeal No.1310 of 2005

Abul Khayer
... Appellant
-Versus-
The State
...Respondent
Mr. Md. Khabir Uddin Bhuiyan, Advocate
... for the appellant
Mr. Md. Yousuf Mahmud Morshed, A.A.G.
í for the respondent

Judgment on 19.1.2012

Md. Ruhul Quddus, J:

This appeal under section 420 of the Code of Criminal Procedure is directed against judgment and order dated 2.9.2001 passed by the Additional Sessions Judge, Third Court, Sylhet in Session Case No.60 of 1998 arising out of Bianybazar Police Station Case No.22(5)98 corresponding to G. R. No.63 of 1998 convicting the appellant in absentia under section 364A of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for seven years with a fine of Taka 2000/- (two thousand) only, in default to suffer rigorous imprisonment for another one year.

Informant Md. Abdul Mannan produced the arrested appellant to Bianybazar Police Station, Sylhet on 29.5.1998 and lodged an *ejahar* alleging, *inter alia*, that one year before the appellant Abul Khayer used to work at his uncle Sonai Miah's house as a monthly salaried worker. The appellant had come to visit his (Sonai Miah's) house on 27.5.1998. On the next day i.e

28.5.1998 the informant's minor son Fakhrul Islam was missing. On inquiry he came to know from his neighbours Faezul Huq, Afzal Ahmed and Iqbal Hossain that the appellant along with his son had gone towards the south by a rickshaw. He recorded general diary No.937 dated 28.5.1998 with Bianybazur police station to that effect. Subsequently the police along with the informant rescued his son from custody of the appellant at his village-home at Sunamganj.

Police recorded the *ejahar* as Bianybazur Police Station Case No.11 dated 29.5.1998 and after investigation, submitted charge sheet on 18.6.1998 under section 364 A of the Penal Code against the sole appellant.

The case, after being ready for trial, was sent to the Sessions Judge, Sylhet and was registered as Session Case No.16 of 1998. Subsequently the case was sent to the Third Court of Additional Sessions Judge, Sylhet for hearing and disposal. Learned Additional Sessions Judge by his order dated 18.8.1998 framed charge against the appellant under section 364 A of the Penal Code, to which he pleaded not guilty and claimed to be tried. During trial the appellant was released on bail, but subsequently did not turn up to face the trial.

Prosecution examined seven witnesses. Among them the informant Md. Abdul Mannan (P.W.1) deposed in full support of the *ejahar*. The victim Fakhrul Islam Shipu stated that he knew the appellant. At afternoon on the date of occurrence he was playing at the courtyard, when the appellant gave him chocolate and *chanachur* and took him away crossing a canal. Initially he was taken by a rickshaw and thereafter by an auto rickshaw. Subsequently the police along with his father went to the appellant's house and rescued him.

P.W.3 Afzal Ahmed, an eyewitness stated that on the date of occurrence at about 2 p.m he saw the victim Fakhrul Islam to go with the appellant by a rickshaw. P.W.4 Md. Nuruddin, a close door neighbour to the appellant stated that on the date of occurrence he (appellant) brought a child from Bianybazar. P.W.5 Md. Shafiqul Islam is the then Officer-in-charge of Bianybazar police station and one of the Investigating Officers, who submitted the charge sheet. He deposed in support of lodgment of *ejahar* by the informant and holding of investigation of the case to the extent of his part. He proved the *ejahar* and his signature thereon. P.W.7 Md. Atiqur Rahman, the first Investigating Officer and Commander of the rescue party stated that on 29.5.1998 he had arrested the appellant from his village-home and rescued the victim. He also deposed in support of investigation to the extent of his part and proved the sketch map with index and his signature thereon. Thus it appears that all the six witnesses supported the prosecution case and have corroborated each other. There is no contradiction in their evidence on material particulars. P.W.6 Iqbal Hossain was tendered by the prosecution and the defense declined to cross-examine him.

In view of the evidence as discussed above, prosecution case of kidnapping the victim-boy appears to have been proved. But from the *ejahar*, charge sheet and depositions of the witnesses it does not appear that the appellant had kidnapped the victim for murder, or to grievously injure or hurt him, or to engage him in slavery as contemplated under section 364A of the Penal Code. Therefore, the offence committed by the appellant does not fall under section 364 A of the Penal Code. It clearly falls within the definition of kidnapping from lawful guardianship as defined under section 361 of the Code.

Under the above, we are inclined to alter the conviction and reduce the sentence.

In the result, the jail appeal is dismissed. The conviction of the appellant under section 364 A of the Penal Code is altered to that under section 361 of the Code and his sentence is reduced to rigorous imprisonment for five years with fine of Taka 500/- (five hundred) only, in default to suffer rigorous imprisonment for another six months. The impugned judgment and order is modified accordingly. Since the appellant Abul Khayer was arrested and produced to jail on 26.9.2005 and in the meantime has already served out the sentence, the concerned jail authority is directed to set him at liberty forthwith, if he is otherwise not wanted.

Send down the lower Court's record.

Mohammad Marzi-ul-Huq, J:

I agree.