

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.A.No. 461/2005**

% Reserved on: 5th March, 2010
Date of Decision: 9th March, 2010

AZIM Appellant
! Through: Ms. Anu Narula, Adv.

versus

\$ STATE Respondent
^ Through: Mr. Jaideep Malik, APP

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **V.K. JAIN, J.**

1. This is an appeal against the judgment dated 1st December 2004 and Order on Sentence dated 2nd December 2004 whereby the appellant was convicted under Section 366 of IPC read with Section 34 thereof as well as Section 372 read with Section 511 and 34 of IPC and was sentenced to undergo

R.I. for 10 years and to pay fine of Rs.5,000/- or to undergo S.I. for one year in default under Section 366/34 of IPDC and was further sentenced to undergo R.I. for 5 years and to pay fine of Rs.5,000/- or to undergo S.I. for one year in default under Section 372/511/34 of IPC. Both the sentences were directed to run concurrently.

2. On 3rd December 2000, the complainant Mool Chand came to Police Station Welcome and lodged FIR stating therein that his daughter aged about 13 years and her friend aged about 14 years were missing since 2 PM. He also stated that Mani Ram, who was residing in his neighbourhood, was a frequent visitor to his house. He suspected that Mani Ram has taken his daughter, whereas Azim has taken her friend with him by inducing them.

The case of the prosecution is that during investigation, the daughter of the complainant was recovered from the appellant Azim on 5th December 2000.

3. The prosecution examined 18 witnesses in support of his case. No witness was examined in defence. The daughter of the complainant came in the witness box as PW-3 and has stated that Mani Ram used to tease her by giving signals to her

and pelting stones on her. He had also expressed his love for her. She, however, spurned the gesture made by Mani Ram. She further stated that on 1st December 2000, when she had gone to Pili Mitti for stitching work, both the accused kept handkerchief at her mouth as well as at the mouth of her friend and took them to the sister of Azim in Delhi. From there, she was taken to Railway Station, Nizamuddin along with her friend. From there, Azim brought them to his village in Aligarh. From that village, he took them to the house of his brother where Azim separated from her and Mani Ram took her to his village in District Badayun. She was taken to the house of the sister-in-law of Mani Ram and was locked in a room by his brother. Mani Ram then returned to Delhi. After two days, he again came back along with his friend and told his sister-in-law that he would bring some more girls. She further stated that Mani Ram did not misbehave with her and did not commit any wrong with her. She claimed that Mani Ram had taken her for the purpose of selling her to someone. She also stated that since her father had threatened Mani Ram, he brought her back to Delhi from, where she was recovered by police. According to her, it was Mani Ram's

mother, who handed her over to police.

4. The other girl came in the witness box as PW-3 and has stated that the appellant Azim was a tenant in their house and he took her to his village in U.P. when she was aged about 14 years. In the night they stayed at the house of his sister, where he had forcible sexual intercourse with her. On the next day, police brought her to Delhi. She further stated that Azim, Mani Ram as well as her friend (PW-4) had gone together from Delhi.

5. PW-1 Gopi Ram has stated that the appellant Azim was his tenant and on 1st December 2000 his daughter (PW-3) disappeared from the house when she was aged about 14 years. The appellant Azim was also found missing from his house. He searched for his daughter for two days and, thereafter, lodged FIR in the Police Station. After some days, his daughter was recovered from the possession of the appellant Azim.

6. PW-2 Mool Chand is the father of PW-4. He stated that on 1st December 2000 his daughter (PW-4) was found missing from the house. The appellants Mani Ram and Azim were also found missing from their house. He, thereafter, lodged FIR in

the Police Station against Mani Ram. According to him, his daughter was recovered on 17th December 2000 from the possession of Mani Ram.

7. PW-5 Const. Pushpinder Kumar has deposed that on 6th December 2000, while they were searching the daughter of the complainant Gopi Chand and reached Seelampur Bus Stand, the appellant Azim was found present there with a girl. The appellant was apprehended and the prosecutrix was recovered. PW-14 SI R.K. Meena has stated that on 5th December 2000, complainants Mool Chand and Gopi Chand came to him in the Police Station and told him that both the prosecutrix and both the accused will come to ISBT. They went to ISBT but, could not find them. When they were returning and reached Shashtri Park, the complainant Gopi Chand pointed out towards the appellant Azim and his daughter, who was standing with Azim. Azim was apprehended and the prosecutrix (PW-3) was recovered. He further stated that on 17th December 2000, the complainant Mool Chand came to the Police Station and informed that his daughter was present in the house of the appellant Mani Ram. He reached there but, did not find the prosecutrix present there. When they were

returning and reached Bus Stand, 'T' Point, Usmanpur, the complainant Mool Chand pointed out towards appellant Mani Ram and the prosecutrix (PW-4), who was present with him. Mani Ram was apprehended and the prosecutrix was recovered.

8. PW-15 Dr. Raj Pal examined X Ray Plates of PW-4 and opined that her age was above 14 years but below 16 years. PW-17 Dr. Vineeta examined the X Ray Plates of PW-3 and was of the opinion that her age was between 14-16 years.

9. In their statement under Section 313 of Code of Criminal Procedure, the appellants denied the allegations against them and stated that they have been falsely implicated in this case.

10. There are serious contradictions and discrepancies in the case set up by the prosecution. In her statement recorded under Section 164 of the Code of Criminal Procedure, the prosecutrix (PW-3), whom the appellant Azim is alleged to have taken with him, stated that she had gone with Azim of her own as she wanted to marry him. On the other hand, when she was examined during trial, she denied having voluntarily gone with the appellant. In her statement under Section 164 of the Code of Criminal Procedure, she gave her age as 18 years

whereas when she was examined during trial she claimed that she was 14 years old at the time she went with the appellant. In her statement under Section 164 of the Code of Criminal Procedure she stated that the appellant had not done anything wrong with her. On the other hand, when she was examined during trial, she alleged that the appellant had forcible intercourse with her.

11. The other prosecutrix (PW-4), in her statement under Section 164 of the Code of Criminal Procedure, stated that it was her friend (PW-3), who took her from her house by telling a lie to her. During trial, she claimed that the appellant and his co-accused Mani Ram had put a handkerchief on her mouth as well as on the mouth of her friend and then taken them to the sister of the appellant Azim in Delhi. On the other hand, there was no allegation of handkerchief having been put on the face of either of the girl, in the statement made by these witnesses under Section 164 of the Code of Criminal Procedure.

12. According to PW-4, Mani Ram had brought her to Delhi and had taken her to the house of his mother, who handed her over to police. The case of the prosecution, however, is that

she was found in the company of Mani Ram at Bus Stand 'T' Point, Usmanpur and was recovered from there at the pointing out of the complainant Mool Chand.

13. According to PW-3, the police had gone to the house of Azim and had brought her to Delhi from there. This is contrary to the case of the prosecution that she was found in the company of the appellant Azim at Shashtri Park.

14. The contradictions and discrepancies noted above are not minor in nature and cannot be attributed to or poor retention or recollection of facts, due to lapse of time. The discrepancies founding this case pertain to the core part of the testimony of these witnesses and are not confined to peripheral aspects of the case. The impression one forms on assessment of their evidence is that they are not reliable witnesses. In fact, it is on account of the serious discrepancies in the version given by them in the Court on one hand and the version given by them to the Magistrate on the other hand that the appellant has been acquitted of the charge under Section 376 of IPC. As I would be discussing in the later part of this judgment, the facts and circumstances of the case leave no reasonable doubt that both the girls had left Delhi on their own without any kind

of pressure, inducement, coercion, etc. from the appellant or his co-accused Mani Ram, whereas the stand taken by them during trial was that they were forced to accompany the appellant Azim and his co-accused Mani Ram. Taking all the factors into consideration, it will not be safe to rely upon the testimony of these two witnesses.

15. PW-3 claims that she was forcibly taken to a railway station in a four seater. Admittedly, she did not raise any alarm either at the time of boarding the four-seater or anywhere on the way to railway station. Had she not been a consenting party to accompany the appellant, she would definitely have raised alarm and in that case the appellant as well as the companion would have caught and handed over to police by the driver of the vehicle in which they had travelled to railway station. This is not the case of PW-3 that the appellant or his companion was armed and had threatened them with a weapon. Admittedly, she did not raise any alarm at the railway station. Had she not been a consenting party she would have definitely raised alarm at railway station, where a number of people, including police officials, always remain present. Had she raised alarm at the railway station, it would

not have been possible either for the appellant or his co-accused to cause any harm to her or to her friend on account of presence of a large number of persons at the railway station and both of them would have been handed over to the police. Admittedly, she did not raise any alarm while travelling in train. Had she not been a consenting party, she would have raised alarm on seeing a large number of persons in the compartment, and in that case it would not have been possible for the appellant and his co-accused to run away and not only would they have been rescued, the appellant and his co-accused had been handed over to the police by their co-passengers.

16. Admittedly, no alarm was raised by the prosecutrix or her friend at Etah railway station, where they reached at about 5 PM and where a large crowd was present as admitted by her. From railway station, they went to the house of the sister of the appellant in a bus. There were other persons in the bus as admitted by her in the cross-examination. Admittedly, she did not raise any alarm even while travelling in the bus. Had she not been a consenting party, she would not have simply accompanied the appellant without any resistance and would

definitely have raised alarm in the bus, and in that case the appellant as well as his co-accused would have been apprehended by other passengers travelling in the bus and both the girls would have been rescued by them.

17. According to the prosecutrix, the appellant had brought her to the house of her sister. In her cross-examination, she admitted that she did not complain to the sister or brother-in-law of the appellant that he had forcibly brought her to their house. Had she not been a willing party, she would definitely have complained to the sister and brother-in-law of the appellant. According to her during night she, the appellant, his sister and his brother-in-law all had slept in the same room and during night she was raped. Admittedly, she did not raise any alarm at that time. Had she not been a consenting party, she would at least raised alarm at the time of rape, as sister as well as brother-in-law of the appellant were sleeping in the same room. According to the prosecutrix, she did not complain about rape with her, even next day morning, to the sister and brother-in-law of the appellant, though the sister of the appellant was previously known to her. Her conduct at every stage, coupled with her own statement before the

Magistrate to the effect that she had herself gone with the appellant to Eta as she wanted to marry him, leaves no reasonable doubt that she was carrying an affair with the appellant and that is why she had gone with him. It would not be pertinent to note here that in her cross-examination, the prosecutrix herself has stated that she used to talk to the appellant at the roof. This is yet another indicator that she was a consenting party and had eloped with the appellant.

18. According to PW-4, from Route No.65, which is also called Pili Mitti, she was taken to Naya Pul, to the house of the sister of Azim but, she did not raise any alarm. She claims that she was unconscious at that time. I fail to appreciate how an unconscious girl could have been taken in a three wheeler/four wheeler and then from the vehicle to the place of the sister of the appellant Azim without other persons, including passersby, getting suspicious and questioning the appellant and his co-accused. If two young girls, who are unconscious or semi-conscious, are taken from a main road to a three wheeler/four wheeler and after getting down from the vehicle they were taken to a house, it is bound to create suspicion in the mind of passersby and other members of the

public, who would definitely question the persons taking two young girls with them in an unconscious or semi-conscious state.

19. Though the case of the prosecution is that both the girls, i.e., PW-3 and PW-4 were about 14 years old when they left the house of their respective parents, no documentary evidence has been produced by the prosecution to prove their age. The Investigating Officer has admitted that no document pertaining to age of the prosecutrix was given to him. PW-3 has admitted that she had studied in a school. Her father, PW-1, Gopi Ram, has also admitted that her date of birth was got recorded in the school. Despite documentary proof in the form of record of the school being available, the prosecution has neither produced that record nor given any explanation for not producing the same during trial. Hence, an adverse inference must be drawn against the prosecution that had the record of the school pertaining to the age of PW-3 been produced, that would not have supported the case set up by the prosecution as regards her age. In fact, when she was examined before the Magistrate under Section 164 Cr.P.C., PW-3 gave her age as 18 years. According to PW-17 Dr. Vinita Rathi, who examined the

X-ray plates of PW-3, in her opinion, her bony age was between 14 to 16 years. There can be variation of up to two years on either side, in the age determined by Ossification Test. Hence, the age of PW-3 could be anywhere up to 18 years. The onus was on prosecution to prove that the age of the prosecutrix was less than 18 years when she went with the appellant. The prosecution has failed to discharge the onus placed upon it and the inevitable conclusion is that PW-3, whom the appellant is alleged to have been taken with him, could be 18 years old at the relevant time. As regards PW-4 also, no documentary proof of her age has been produced by the prosecution. Neither any birth certificate nor any record of her school has been produced to prove her date of birth. This is also not the case of the prosecution that she had not gone to any school. As per the opinion of PW-15 who examined her X-ray plates, her age could be above 14 years and below 16 years. Since there can be variation of up to two years in the bony age, determined by examination of X-ray plates, the age of PW-4 could be up to approximately 18 years at the time she left the house of her parents. Thus, the evidence produced on record shows that as far as PW-3 is concerned, she was 18

years old, whereas PW-4 could be somewhere near 18 years of age when they left with the appellant and his co-accused Mani Ram.

20. In order to establish charge under Section 366 of IPC, the prosecution was first required to prove that the appellant had taken or enticed a girl out of the keeping of her lawful guardians. The object behind Section 361 of Indian Penal Code, which defines kidnapping, is to protect the minor children from being seduced for improper purposes and to protect the rights and privileges of guardians having lawful charge or custody of their minor wards. What is necessary is either taking or enticement, of the minor. 'Taking' would include causing to go or getting into possession whereas enticement involves an idea of inducement, by igniting hopes or desire in the other. One does not entice other, unless the latter attempts to do a thing which he or she would not otherwise have done. In order to bring home conviction for kidnapping, there must be proof of the accused having done something which led to the girl going out of the keeping of her guardian. The words 'takes' and 'entices' as used in Section 361 of Indian Penal Code need to be read together so as to take

colour and content from each other.

21. If the minor leaves her parental home without any promise, offer or inducement from the accused, it cannot be said that an offence of kidnapping is made out. Of course, if the accused lays a foundation by inducement, allurement etc. and that influences the minor or weighs with her in leaving her guardian's custody and keeping and going with the accused then it is difficult to accept that the minor had voluntarily come to the accused.

22. In **Shyam and Another versus State of Maharashtra**, 1995 Criminal Law General 3974, the prosecutrix had put blame on the appellants and had deposed that she was threatened right from the beginning while being kidnapped and was kept till police recovered her. It was found by Supreme Court that she was not truthful as regards the manner of the so-called taking. The prosecutrix in that case was a grown up girl, though she had not touched 18 years of age but was still in the age of discretion. She was found going on the bicycle of the appellant. Supreme Court noted that it was not unknown to her with whom she was going and therefore, it was expected of her then to jump down from the

bicycle or put up the struggle and in any case raise an alarm to protect herself. As no such steps were taken by her, the Supreme Court felt that she was a willing party to go with the appellants of her own and, therefore, there was no taking out of the guardianship. The appellants were acquitted of the charge under Section 366 of IPC.

23. In **State of Karnataka vs. Sureshababu**, 1994 CrL.L.J.1216(1), it was found that the girl went with the accused voluntarily. It was held by the Supreme Court that the requirement of Section 366 of IPC is that taking or enticing away a minor out of the keeping of the lawful guardianship was an essential ingredient of the offence of kidnapping. It was held that in such a case, it is difficult to held that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature, like inducement.

24. In the present case, there is no evidence of either the appellant or his co-accused having enticed either PW-3 or PW-4. There is no evidence of either of them having extended any promise to them. This is not the case of prosecution that the appellant had promise to marry PW-3 or had held out any

other promise to her. The case of the prosecution is that the appellant and his co-accused had threatened both the girls and being afraid they had accompanied them out of Delhi. That part of the deposition of PW-3 where she claimed that she was taken under threat of life cannot be believed in the facts and circumstances of the case as discussed in the preceding paragraphs. Similarly, the deposition of PW-4 to the effect that the appellant and his co-accused had put handkerchief on their mouth and had thereby made them unconscious/semi-conscious has not found to be correct. In fact, in her statement to the Magistrate under Section 164 of Cr.P.C., PW-3 specifically stated that she, of her own, had gone with the appellant as she wanted to marry him. The truth of the matter appears to be PW-3 and PW-4 being previously known to the appellant and his co-accused had become friendly to them and that is why both of them of their own and without any inducement, coercion or influence from the appellants or his co-accused abandoned the guardianship of their respective parents and eloped with them. Since the girls were about 18 years old at the relevant time, it cannot be said that they were not capable of knowing what they were doing. They were not

of such age so as to be unable to decide what was good and what was bad for them. In my view, the facts and circumstances brought on record leave no reasonable doubt that both the girls had the capacity to know the full import of what they were doing and had willingly accompanied the appellant and his co-accused and had stayed with them till the time they were caught by the police.

25. In the present case there is no evidence of either of the appellants having even made an attempt to compel the prosecutrix to marry him. The deposition of the prosecutrix to the effect that she was subjected to intercourse under intimidation cannot be belied in the facts and circumstances of this case. Therefore, it cannot be said that the appellants took the prosecutrix with them so as to force or seduce her to illicit intercourse.

In the present case, there is no evidence of either the appellant or his co-accused having even made an attempt to compel either of the girls to marry them. Therefore, it cannot be said that the appellant and his co-accused taken the girls with them so as to force or seduce them to illicit intercourse. The facts and circumstances of the case indicate that both of

them were consented party to accompany the appellant and his co-accused. The offence under Section 366 of IPC, therefore, does not stand established against them.

26. Coming to the charge under Section 372 of IPC read with Section 511 thereof, in order to succeed, the prosecution was required to prove the following essentials:

- (i) that there was attempt to sell or let to hire or dispose of a person;
- (ii) that the person attempted to be sold, let to hire or disposed of was under 18 years of age;
- (ii) that the attempt to sell, let to hire or dispose of was with intent or knowledge of likelihood that the person shall at any stage be employed or used for: (a) the purpose of prostitution, or (b) illicit intercourse with any person, or (c) any unlawful and immoral purpose.

27. In the present case, the prosecution has miserably failed to prove the above-referred ingredients. There is absolutely no evidence of either the appellant or his co-accused having attempted to sell or let to hire or dispose of either PW-3 or PW-4. Though it has come in the testimony of PW-4 that Mani Ram, co-accused of the appellant had taken them for the

purpose of selling, she does not claim that any attempt was made by Mani Ram or by the appellant. She does not tell the Court on what basis she inferred that Mani Ram had taken her for the purpose of selling her to someone. She made a bald statement that Mani Ram had sold two other girls, but did not tell the Court, who those girls were, to whom they were sold, when they were sold and how she came to know that they had been sold by Mani Ram. She stated that appellant Azim had also taken PW-3 for selling her. But, no such allegation against the appellant was made by PW-3 either during trial or in her statement to the Magistrate under Section 164 of Cr.P.C. PW-4 does not even say that she had seen Mani Ram talking to someone for the purpose of selling her.

28. Section 372 of IPC contemplates a case of letting or hiring or other similar transaction where the possession of girl is obtained with the intention of employing her for the purpose of indiscriminate sexual intercourse or with the intention of subjecting her to an isolated act of sexual intercourse. The term 'dispose of' has been defined in Webster's Dictionary as *(a) to determine the fate of, to exercise the power of control over, to fix the condition, employment, & c, of, to direct or assign*

for a use; (b) to exercise finally one's power of control over, to pass over into the control of someone else as by selling, to get rid of

In the present case, there is no evidence of the appellant or his co-accused having attempted to transfer the control of PW-3 or PW-4 to some other person or even attempting to pass them over to some other person. Therefore, the prosecution has miserably failed to prove these essential ingredients of Section 372 of IPC.

For the reasons given in the preceding paragraphs, the prosecution has failed to prove any charge against the appellant. He is given benefit of doubt and is, hereby, acquitted.

Crl.A. 461/2005 stands disposed of.

(V.K.JAIN)
JUDGE

MARCH 09, 2010

Ag/BG