

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.45175 of 2012

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Mahesh Chaudhary, Son of Sri Ganesh Chaudhary, Resident of Village
Gondapur, P.S. Nawada Town, District Nawada.

.... Petitioner

Versus

1. The State of Bihar.
2. Shilpi Kumari, Wife of Mahesh Chaudhary, Daughter of Ganesh Prasad, Resident of Village Gondapur, P.S. Town Police Station, Nawada, District Nawada. At present residing at H/o.- Mahesh Chaudhary, Son of Sri Ganesh Chaudhary, Resident of Village Gondapur, P.S. Nawada Town, District Nawada.
3. Ganesh Prasad, Son of Late Ganga Prasad, Resident of Village Gondapur, P.S. Nawada Town, District Nawada.

.... Opposite Parties

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Appearance :

For the Petitioners : Shri Rajeev Nayan, Advocate

For the State : Shri Uma Shankar Pd. Singh, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA
ORAL ORDER

4 07-05-2015

In spite of having been served notice issued by the Court, the informant who had been impleaded as opposite party no. 3 did not chose to appear. I have heard Shri Rajeev Nayan, the learned counsel appearing on behalf of the petitioner and Shri Uma Shankar Prasad Singh, the learned Additional Public Prosecutor appearing for the State.

2. Opposite party no.3 was the father of opposite party no.2 and he alleged that the accused persons named in his written report held out threats that if he dared deposing in the criminal case against them, they will cause the disappearance of his daughter and accordingly, on 12.01.2012 they entered inside the house of the informant, dragged out his daughter and took her

away along with an attache-case containing four *bhar* of gold, thirty *bhar* of silver and Rs. 6500/- in cash besides some clothes.

3. On the basis of the written report, Nawada Town P.S. Case No. 27 of 2012 was registered. It appears that during investigation, opposite party no. 2 the daughter of the informant was recovered and her statement was recorded under Section 164 Cr.P.C. by a Judicial Magistrate. The copy of that statement has been enclosed with the present petition as Annexure-2.

4. It was stated by the victim that she had never been taken away by any one from her father's house rather she had herself gone out to Biharsharif with the present petitioner Mahesh and both of them stayed in a hotel and got themselves married to each other. The lady stated that she neither had been taken away nor was she enticed away by the present petitioner and that her father had lodged a false case. The lady expressed her desire to live with the present petitioner. It further transpires from Annexure-3 the copy of the medical report that on medical examination, the victim was found about 17 to 18 years of age on account of fusion of epiphyses though the dental surgeon had assessed her to be 16 years of age. The lady was found habituated to sexual intercourse and there was not recent evidence of rape upon her.

5. On conclusion of the investigation, the police



submitted charge sheet reporting that offences under Sections 366, 380, 452 and 323/34 of the Indian Penal Code were made out. Accordingly, the learned Chief Judicial Magistrate, Nawada by order passed on 20.09.2012 took cognizance of the above noted offences against the present petitioner and two others and directed the issuance of summons so that the case could be committed to the court of sessions.

6. Submission was that the very statement of the lady was the ultimate fact of the case and that indicated two things – firstly no offence under Section 366 of the Indian Penal Code was made out nor any other offence of which the learned Chief Judicial Magistrate took cognizance, were also constituted. The other aspect of the statement indicated that she was a major in the light of the medical report and she was competent enough to take her own decisions as regards her life and her own statement indicated that by taking such a decision, she had gone out of her parents' house being accompanied by the present petitioner so as to getting married to him and to live with as his legally wedded wife.

7. If one could consider the definition of kidnapping from lawful guardianship contained in Section 361 of the Indian Penal Code, one may find that enticing any minor under sixteen years of age if a male, or under eighteen years of age if a female,



or any person of unsound mind, out of the keeping of the lawful guardianship of such a minor without the consent of such guardian amounts to the commission of the offence of kidnapping. Section 366 of the Indian Penal Code punishes act of kidnapping or abducting or inducing woman to compel her marriage etc. On consideration of that particular provision, it may be found that mere kidnapping or abduction not by itself is punishable under Section 366 of the Indian Penal Code unless the acts are blended with certain intentions or knowledge, like, the lady kidnapped and abducted was to be compelled to marry any person against her will or she may be forced or seduced to illicit intercourse. In any case the offence under Section 366 of the Indian Penal Code may not be relatable to the age of the victim as in the case of kidnapping where the lady must be under eighteen years of age and if it could be the case of abduction then there could not be any limits of age for committing the offence in respect of such a lady above eighteen years of age which could be punishable under Section 366 of the Indian Penal Code. On perusal of the provisions of Sections 361 or 366 of the Indian Penal Code, what may appear further is that in a case where a victim is alleged less than eighteen years, the Court has also to hold an enquiry as to what was the age of the victim. In addition to the above, the Court must also launch itself on holding an enquiry as to whether

it was really a case of taking, or enticing away or inducing a lady under eighteen years of age from her lawful guardianship or could it be a case otherwise than that which is a defined offence under Section 361 of the Indian Penal Code.

8. For the above purposes, the statement of the victim under Section 164 Cr.P.C. or recorded under Section 161 Cr.P.C. in the case diary may be the relevant consideration in addition to the medical report which could have been furnished by the board of doctors after examining the victim of the offence. I find on perusal of the medical report that the epiphyses on most of the joints which were x-rayed by the board of doctors were found fused. On finding epiphyses having fused, the age of the lady was determined somewhere around seventeen to eighteen years. In the light of the opinion rendered by the medical report, this Court has no hesitation in recording that the lady must not be below eighteen years and should have been even above eighteen years of age. So far as her own statement under Section 164 Cr.P.C. is concerned, it is indicated that she had neither been taken away nor any one had enticed her away rather she had herself walked out of her parents' house to go to Biharsharif with the present petitioner where both of them stayed in a hotel. They also got married to each other. Taking away or enticing away pre-supposes two things. In a case of taking away, there is necessary use of force



while in the case of enticing away, there could be some sort of fraud played upon the victim by misrepresenting some facts so as to leading her to come out of her lawful guardianship in order to accompany the accused to any particular destination. The Supreme Court in the case of *S. Varadarajan Vs. State of Madras* reported in *AIR 1965 SC 942* had drawn the line of distinction between an act of taking away and enticing away and that of elopement. While elaborating upon taking and enticing away, the Supreme Court had held that even giving blandishments to the victim in order to encouraging her to leave her parents' house for joining the company of the accused could constitute enticing her away. As against that if the lady who could either be eighteen or above years of age or who could be at the verge of majority was getting out of her parents' house to go into the company of the accused out of her own free will then it could not be a case covered by the definition of Section 361 of the Indian Penal Code rather such facts would constitute a simple case of elopement and, as such, no offence punishable under Section 366 of the Indian Penal Code is made out. The Supreme Court stated further that the victim who was at the verge of majority could be held to be competent enough to take her own decisions as regards her life and if she had herself moved with the accused person then the accused could not be convicted of any offence.



Here, in the present case the lady had herself stated in her statement under Section 164 Cr.P.C. that she out of her own volition left her parents' house and joined the present petitioner in going to Biharsharif where they got themselves married to and lived together in a hotel. The facts stated by the lady do not indicate that any blandishment was given to the lady to come out of her parents' house, that is to say, out of the keeping of her lawful guardian so as to be taken away to a destination against her will. It appears the act committed by the lady out of her own volition that she was eloping with the present petitioner to Biharsharif where they got themselves married and stayed together in a hotel. Under the facts of the case as narrated above as also in the light of the medical evidence, this Court finds that the facts could not constitute an offence under Section 366 of the Indian Penal Code.

9. The lady had stated in her statement that no offence was committed by the accused persons and in fact her father had filed a false case. This Court does not have any reason to disbelieve even at this preliminary stage of enquiry and this Court is very clear headed in holding that the allegations of trespassing inside the house for lifting the attache-case carrying ornaments, cash or clothes could be additional facts inserted in the First Information Report so as to giving a graver look to the

allegations with an ulterior motive to ensure that other accused are duly harassed and humiliated. On this score also the prosecution appears not fit to be allowed to stand.

10. In the result, the petition succeeds and the same is allowed. The prosecution initiated by order of cognizance dated 20.09.2012 passed in Nawada Town P.S. Case No. 27 of 2012 (G.R. No. 112 of 2012) by the learned Chief Judicial Magistrate, Nawada is hereby quashed.

(Dharnidhar Jha, J.)

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