

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 2378 of 2000**

Sukhlal S/o Mahesh Ram Barman, aged about 29 years, Resident of Kotara Thana Kotwali Raigarh District Raigarh, Madhya Pradesh (Now Chhattisgarh).

---- Appellant**Versus**

The State of Madhya Pradesh (Now Chhattisgarh) Through District Magistrate Raigarh (Madhya Pradesh) (Now Chhattisgarh).

---- Respondent

For Appellant	:	Smt. Indira Tripathi, Advocate.
For Respondent/State	:	Smt. Smita Ghai, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board**Per Navin Sinha, Chief Justice****17/08/2015**

1. The Appellant stands convicted under Section 305 IPC to life imprisonment and 363 IPC to seven years rigorous imprisonment with fine of Rs. 500/- each failing which he was required to undergo six months further rigorous imprisonment on each count. He has further been convicted under Section 309 IPC with fine of Rs. 500/- failing which he was required to undergo two months simple imprisonment as ordered on 30.8.2000 by the Second Additional Sessions Judge, Raigarh in Sessions Trial No. 128 of 1998.

2. On 6.12.1997 at about 8:30 am, the body of the deceased Premlata, aged about 15 years was found on the Railway track in a badly mutilated condition leading to information by PW-4, Balmukund, uncle of the deceased and lodgment of Merg (Exhibit P-4) followed by formal FIR (Exhibit P-13) on 9.12.1997 at 10:30 am. The postmortem of the deceased (Exhibit P-8) was

conducted by Dr. M.D.Joshi (PW-7). The Appellant is also alleged to have sustained injuries on the Railway track with regard to which he took a defence under Section 313 CrPC that he had injured himself while operating a hand-mill and cutting cattle fodder.

3. Learned Counsel for the Appellant submitted that even if the Appellant was known to the victim girl and allegedly would tease her, the prosecution has not been able to establish the basic ingredients under Section 361 IPC with regard to kidnapping of a female below 18 years of age by 'enticing' or 'taking' her away from lawful guardianship. Far less then that, there is absolutely no evidence led by the prosecution that the Appellant was seen with her in the village at any earlier time or on the fateful day had either come to her house to take her away wrongfully or even that they were seen together loitering near the Railway line or in the village. In absence of any evidence with regard to 'taking' or 'enticing' by the Appellant, no charge was made out under Section 361 IPC and conviction under Section 363 IPC was bad in law. For the same reasoning, it was submitted that there is absolutely no evidence led by the prosecution of any action by the Appellant amounting to abetting suicide by a minor girl to attract the provisions of Section 305 IPC. Referring to Section 107 IPC, it was submitted that it was for the prosecution to lead some evidence that the Appellant had instigated or persuaded by any act or omission and pursuant to which the deceased had gone and committed suicide on the Railway track. The conviction under Section 305 IPC was therefore also not sustainable. It was lastly submitted that in absence of any evidence that the Appellant had taken or enticed the minor or that they were seen together near the Railway line, his defence under Section 313 CrPC that he had injured himself on the fodder cutting machine, there was absolutely no material to convict him under Section 309 IPC. The Trial Court has completely erred in appreciation of evidence by merely coming to the conclusion on presumptions and assumptions because the Doctor had opined that the

injuries on the deceased as also the Appellant could have been caused on a Railway track. If the deceased and the Appellant were known to each other and she had accompanied him voluntarily the offence of kidnapping could not be made out. The possibility that in the darkness of the night, she may have been near the Railway track and may have been overrun by a train cannot be ruled out. The defence under Section 313 CrPC has not been considered at all. There is no consideration whatsoever of DW-1, Meghnath Yadav, who had deposed that the Appellant had suffered injuries on the fodder cutting machine.

4. Learned Counsel for the State opposing the appeal submitted that more than one witness has stated of a boy and a girl found injured on the Railway track. The girl had died and the boy was injured and was taken away to the hospital. If the Appellant and the deceased were found injured on the Railway track at night and the deceased was a minor, quite apparently he had taken her away from lawful guardianship as it was not a normal conduct for them to be wandering around in the night near the Railway track. It has come in evidence that the Appellant would harass and tease the deceased. It has also come in the evidence of PW-7, Dr. M.D.Joshi that mutilation of the body was possible if a person lay on the Railway track. PW-9, Dr. M.M.Vase who examined the Appellant deposed that the injuries found on the legs of the Appellant could not have been caused by a fodder cutting machine or by falling from the tree. The left leg was badly crushed and the bones were fragmented which itself is evidence of injuries caused after being hit by the train.

5. We have considered the submissions on behalf of the parties and also perused the evidence on record.

6. A cumulative reading of evidence of PW-1, Sundro, PW-2, Sanat Kumar, PW-3, Sudhiyarin Bai, PW-6, Nutan Prasad and PW-10, Kumar Singh reveals that none had seen the Appellant and the deceased together. The body of the

deceased alone was found lying on the Railway Track. They had heard that a boy had also been injured who had been taken to the hospital. None of them have stated that the boy injured in the accident was the Appellant. Let alone, any witness stating that they had seen the Appellant and the deceased together in the night, there is no evidence also at what distance the body of the deceased and the injured were lying on the Railway track.

7. PW-4, Balmukund, the uncle of the deceased who lodged the Merg and the FIR deposed that he had heard of the Appellant teasing the deceased saying that he would take her away and therefore suspected the Appellant. They had gone in the night to the house of the Appellant where they did not find the deceased. The Appellant was however at home about 10:30 pm. He also deposed that he did not see the Appellant either in the evening or night coming to their house and had never seen the Appellant and the deceased moving around together or talking to each other. In his cross-examination, he admitted that the amputated fingers and hand found at the spot could have belonged to any boy. Similarly, PW-5, Dhanau Ram, father of the deceased deposed that when he came in the morning after duty, he was told by his wife that the Appellant had taken away his daughter but the wife of the witness has not been examined and no explanation has been given with regard to the same. He also only deposed that the Appellant would tease the deceased.

8. PW-8, Ram Kumar, brother of the deceased deposed that his mother woke him up in the night and told him that the deceased was not at home. He went to the house of the Appellant because he suspected him on account of his teasing the deceased at times. The witness later came to know that they had both got injured on the Railway track and the left hand and left leg of the Appellant had been injured, though, he did not go to the Railway track in the night, but only in the morning. He had never seen the Appellant teasing the deceased. In his cross-examination, he acknowledged that he had not seen the Appellant taking away the deceased.

9. PW-7, Dr. M.D.Joshi proved the postmortem report with regard to mutilated body of the deceased opining that it was possible due to the injury on the Railway track. PW-9, Dr. M.M.Vase who examined the Appellant acknowledged that the fingers of the left hand of the Appellant could have been chopped off while operating a fodder cutting machine. The mere expression of an opinion by him that the injuries on the left leg could not have been caused by a fodder cutting machine or by wheel of a bullock cart etc. is merely an opinion and not cannot lead to a final conclusion in absence of any specific evidence led by medical jurisprudence that it was necessarily caused by injuries on the Railway track only.

10. PW-11, C.L.Sidar, the Investigating Officer simply deposed that the deceased had committed suicide and that she had left home with the Appellant in a suicide pact. No evidence was led by the prosecution to prove any suicide pact.

11. The evidence of DW-1, Meghnath Yadav that he had seen the Appellant getting injured while operating the fodder cutting machine, has not been considered by the Trial Court at all.

12. The discussion of the aforesaid evidence leads us to the conclusion that the prosecution has not led any evidence to invoke Section 361 IPC by any act on part of the Appellant active or passive for having 'taken' away or 'enticed' the deceased from her house at night. There is not even an iota of any evidence of any persuasive role played by the Appellant leading the deceased to leave her home to qualify any act of the Appellant as having 'taken or 'enticed' the deceased. On the contrary, the evidence of PW-4, Balmukund, uncle of the deceased is that when he went to the house of the Appellant at 10:30 pm, the deceased was not there but the Appellant was at home. Unless and until the prosecution first establishes any act on part of the Appellant in having taken away or enticed the deceased, the offence under Section 361 IPC will not be made out. No evidence has been led by the prosecution of the

Appellant and the deceased having been seen together at night either near the Railway track or any other place. The conviction under Section 363 IPC is therefore not sustainable. The mere suspicion because the Appellant teased the deceased earlier at times cannot take the place of proof for taking away or enticement which has to be established by the prosecution first to attract Section 361 IPC. Likewise, no evidence has been led by the prosecution at all of any conduct or course of conduct by the Appellant for abetment to suicide as required under Section 107 IPC by instigation or by any other intentional act or omission to persuade the deceased to commit suicide.

13. The deceased was a school going girl who had reached the age of discretion as discussed in AIR 1965 SC 942 (S. Varadarajan vs. State of Madras) observing as follows:

"9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

14. Likewise, the prosecution has not led any evidence whatsoever in support of the charge under Section 309 IPC that the Appellant attempted to commit suicide when there is no material to even prove that he was present on the Railway track with the deceased let alone the remains of the fingers found at the place of occurrence were his. PW-11, C.L.Sidar, the Investigating Officer has also deposed that he did not make any seizure of the alleged

fingers or any part of the human anatomy stated to have been lying at the place of occurrence.

15. A cumulative assessment of the entire prosecution evidence even it be considered and the case of the prosecution placed at the highest pedestal, all that it could lead to the conclusion is that the Appellant may have been with the deceased who came from home voluntarily and both may have accidentally got injured on the Railway track in the darkness of the night.

16. In conclusion, we find it difficult to uphold the conviction of the Appellant on all counts. The order of conviction is set aside and he is acquitted subject to the conditions under Section 437A of the CrPC.

17. The appeal is allowed.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE