

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

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CRIMINAL REVISION CASE No.51 of 2013

ORDER:

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The present revision is filed under Sections 397 and 401 Cr.P.C. aggrieved by the judgment dated 31.12.2012 passed in CrI.A.No.13 of 2011 on the file of the III Additional Sessions Judge, Kadapa at Rajampet, wherein the learned Sessions Judge while confirming the sentence disposed of the appeal by altering the conviction from 366-A IPC to 363 IPC passed by the learned Assistant Sessions Judge, Rajampet in S.C.No.248 of 2009.

The case of the prosecution is as under:

PWs.1 and 2 are parents of PW.4, who is the victim in the case. The evidence on record reveals that PW.4 developed friendship with accused Nos.1 and 2, who were residing behind her house. PW.4 was aged about 14 or 15 years at the time of occurrence. On 28.07.2008 PWs.1 and 2 went to Kanipakam, Chittoor District and on return to their village on 30.07.2008 found their daughter missing. Their enquiries could not reveal the whereabouts of PW.4 and ultimately on suspicion, a report came to be lodged on 16.08.2008 which came to be registered as Crime No.80 of 2008 of Mannuru Police Station, for the offences punishable under Sections 363, 366-A and 376 IPC. On coming to know that accused Nos.1 to 4 have taken a room on rent at Pulavanikunta near Renigunta cotton mill, PW.10 along with the raid party surrounded the room and took accused Nos.1 to 4 and the victim girl into custody. Accused Nos.1 and 2 were sent to judicial custody. On 21.08.2008, PW.8 the Civil Assistant Surgeon, Government Hospital, Rajampet, examined PW.4 and issued Ex.P3 wound certificate. According to the doctor, libre viscera and majora are well developed, hymen ruptured, no apparent discharge or venereal diseases and there are no psychic cause. According to the doctor, the victim is apta vera i.e. capable of taking part in sexual intercourse. Dr. A.Sesidhar, Tutor in the

Department of Forensic Medical College, Kadapa (LW.11), examined the victim girl and opined that her age was 14 or 15 years. Ex.P4 is the age certificate. On 25.08.2006 PW.9-Dr.C.A.Anand Babu, Civil Assistant Surgeon, examined the accused and gave a certificate stating that accused No.1 is not capable of performing sexual act. Ex.A6 is the potentiality certificate.

Thereafter PW.11 took up further investigation and after collecting all the necessary documents filed charge sheet against accused Nos.1 and 2 only for the offences punishable under Sections 363, 366-A and 376 IPC.

After appearance of the accused, the case was committed to the Court of Sessions, which after made over came to be numbered as S.C.No.248 of 2009 on the file of the Assistant Sessions Judge, Rajampet.

The trial Court framed charges against the accused for the offences punishable under Sections 363, 366-A and 376 IPC read over and explained to him, for which they denied and claimed to be tried.

In support of its case, the prosecution examined PWs.1 to 11 and got marked Exs.P1 to P7.

After closure of the prosecution evidence, the accused were examined U/s. 313 Cr.P.C. where they denied the evidence on record. The accused examined DW.1 and got marked Exs.D1 to D4.

After appreciating the oral and documentary evidence on record, the learned trial Judge while acquitting the accused for the offences punishable under Sections 363 and 376 IPC, convicted them for the offence punishable under Section 366-A IPC and sentenced the accused to undergo Rigorous Imprisonment for a period of five years and to pay fine of Rs.1,000/- each in default simple imprisonment for three months. Aggrieved by the same, the accused preferred Crl.A.No.13 of 2011 on the file of the III Additional Sessions Judge, Kadapa at Rajampeta. By its judgment dated 31.12.2012, the learned Sessions Judge altered the conviction, by convicting the accused under Section 363 IPC instead of 366-A IPC but however maintained the quantum of sentence and fine. Challenging the same the present revision is filed.

Before appreciating the rival contentions and the evidence on record, it may be appropriate to narrate few facts as culled out from the evidence of

witnesses.

PW.1 is the father and PW.2 is the mother of the victim, who was examined as PW.4. Their evidence show that accused Nos.1 and 2 were residing in an upstairs portion in the house belonging to one Jayamma. At the time of incident PW.4 was studying 9th class in Zilla Parishad School, Mannur. On 28.07.2008 PWs.1 and 2 and their another minor child, who was aged about 5 years went to Kanipakam and returned to Mannur on 30.07.2008 at 11.00 p.m. and could not find the victim in the house. Their enquiries with the neighbours and also their mother did not reveal any clue. PW.3, who is a resident of Mannur, in his evidence, stated that accused No.1 was working in the welding shop of Narasimhulu. Accused and PW.4 were having friendly talks. According to him on 30.07.2008 night PWs.1 and 2 informed him about the missing of PW.4 and as such all of them searched for her. They also noticed that room of the accused was locked. PWs.1 to 3 were cross examined at length but nothing useful was elicited to discredit their testimony with regard to missing of the victim girl from the house on 28.07.2008. However, their evidence discloses that a report came to be lodged on 16.08.2008 i.e. about 17 days later, against the accused.

PW.4 in her evidence stated that both the accused were residing at the house of one Jayamma behind their house and they have been friendly with her. She admitted that at the time of occurrence she was studying 9th class in Z.P. School, Mannur and was aged about 14 years. She deposed that on 30.08.2008 at about 8.00 p.m. while she was standing in front of the house, accused Nos.1 and 2 came to her and took her to their room and on the same night her parents returned from Kanipakam. Afraid of the parents and the instance made by accused No.1 to marry her, she is alleged to have accompanied accused Nos.1 and 2 to Renigunta near Tirupati. Her evidence disclose that she along with accused Nos.1 and 2 stayed in a room of one Arava Vijay for nearly 20 days. The accused took her to cinemas during day time and in the night they used to stay in the room at Renigunta. It is stated that on one day accused No.1 on a promise to marry her is alleged to have enjoyed her sexually in spite of her protest and thereby committed rape on her. It is said that though he promised to marry her, he failed to do so. Her evidence

discloses that accused No.1 sexually enjoyed her for about 20 days without her consent. On the 21st day police from Mannuru noticed them and arrested accused Nos.1 and 2. In the cross examination, she admits that whenever she used to talk with the accused, her parents used to warn her, asking her not to talk with the accused. She also admits that she used to go to the room of the accused, but they never visited her house. She admits that she does not know the area and also door number of the house in which she was kept by the accused at Renigunta. It has been elicited in the cross examination that accused No.1 without her consent forcibly had sexual intercourse by cheating her and because of that she sustained injuries on her body. To a suggestion that she is deposing false due to pressure of her parents was denied by her.

From the evidence of PW.4 it appears that on a promise to marry her, the accused forcibly had sexual intercourse with her for nearly 20 days. It is also elicited from her that during the said process the accused caused injuries by beating her with hands. Appellate Court found that the version of PW.4 with regard to sexual assault is false in view of the evidence of PW.5. The acquittal of the accused under Sections 376 and 366-A IPC was not challenged by the State, hence the said findings have become final.

Therefore, the short question that arises for consideration in this appeal is whether the ingredients constituting an offence punishable under Section 363 IPC is made out or not.

Section 363 IPC reads as under:

363. Punishment for kidnapping.—Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

In order to appreciate as to whether an offence under Section 363 IPC is made out or not, it is to be noted that in the charge sheet which has been filed by the police, there is no reference to accused taking away or enticing the victim from the lawful guardianship on a promise to marry her. Though PW.4 in her evidence stated that whenever she used to talk with the accused, her parents used to warn her but PW.2 in her evidence did not depose the said fact. Her evidence does not anywhere indicate the meeting of the accused and PW.4

on earlier occasions. Apart from that, the evidence of PW.4 would show that she voluntarily used to go to the room of the accused and that accused never came to her house. Further, accused No.1 is alleged to have made a promise to marry her after the act of alleged abduction from Mannuru and thereafter he is alleged to have cohabitated with her. The evidence of PW.4 discloses that prior to abduction accused Nos.1 and 2 took her into their room while she was standing in front of her house and being afraid of her parents, she is alleged to have been gone along with the accused, who promised to marry her, but that is not the case of the prosecution at the earliest point of time. The averments in the charge sheet does not anywhere disclose about the accused taking the victim girl to their house and then taking her to Renigunta on a promise to marry her. Further, even now it is not the case of the prosecution that both the accused have promised to marry her. If the said version of PW.4 is exculpated from consideration, the only other material which remains is the alleged promise made by accused before abduction and before having sexual intercourse with her.

The issue as to whether the said act amounts to enticing or taking away the victim girl, who is a minor, came up for consideration before the Apex Court in ***S.Varadarajan v. State of Madras*** wherein the Apex Court held as under:

“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 circumstance 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. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the

minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

Admittedly the victim is aged about 14 or 15 years by the date of alleged incident. The evidence on record establishes that the accused never induced the victim girl with a promise to marry her and then pursuant to the said inducement took her to Renigunta. It appears to be a case where the victim girl used to go to the room of the accused on her own and she voluntarily accompanied the accused to Renigunta without any inducement from their side.

The counsel for the accused by placing on record Exs.D1 to D4 submitted that the victim moved along with the accused on her own. Ex.D1 is the F.I.R. which came to be registered on 28.01.2010 vide Crime No.15 of 2010 of Mannur Police Station, under Section 174 Cr.P.C. pursuant to a suicide committed by PW.4 in this case. Ex.D2 is the inquest report, Ex.D3 is the statement of PW.1 and Ex.D4 is the requisition sent to the Mandal Executive Magistrate, requesting him to treat the case as "AD" and issue necessary proceedings. The said report clearly reveals that Rajeswari, was aged about 16 years at the time of elopement with accused No.1. After the arrest of the accused, the police handed over the victim to the parents and accused No.1 was sent to jail. Since then, PW.4 (deceased) was in depressed mood. While things stood thus, somebody informed PW.4 that accused No.1 would be punished by the Court, for which deceased (PW4) got vexed, disgusted in her life and committed suicide by hanging herself to the roof of house. From this circumstance, learned counsel for the petitioners tried to submit that if really there was any enticement by the accused while taking her away from the lawful guardianship on some false promise, definitely she would not have resorted to the extreme step of committing suicide within two years after the incident.

According to him, a reading of Exs.D1 to D4 show that on some false promise, the deceased was brought back to their house and thereafter the parents did not keep their word. The said argument cannot be brushed aside as Ex.D4 categorically refers to deceased committing suicide when it was informed to her that accused No.1 would be convicted.

In ***F.Nataraja v. The State*** the Apex Court held as under:

“The offence under Section 363 IPC and the one under Section 376 IPC cannot be held to be ‘cognate offences’ and, therefore, the accused herein cannot be convicted for the offence under Section 363 IPC in the absence of charge framed against him for the said offence. Besides this, no material is placed on record by the prosecution through evidence of any of the witnesses examined for it that the accused kidnapped the prosecutrix PW.2, the father of the prosecutrix, who filed the complaint Ex.P3 alleging that he suspected that the accused might have kidnapped the prosecutrix, has turned hostile and has stated in his evidence that he does not know the contents of Ex.P3 complaint. Therefore, the accused cannot be alternatively convicted for the offence under Section 363 IPC.

As stated earlier the accused are already acquitted for the offence under Section 366-A and 376 IPC. In order to convict the accused for the offence punishable under Section 363 IPC, the prosecution has to prove that both the accused should either induce or entice the victim girl while taking her away from the custody of lawful guardian.

In the absence of any conclusive and positive evidence with regard to accused No.1 promising to marry the victim prior to abduction and there being no enticement, it cannot be said that the offence under Section 363 IPC is made out.

As held by the Apex Court merely because the victim is a minor as on the date of abduction does not by itself making the accused guilty for the said offence, unless the prosecution establishes other elements of Section 363 IPC. In view of the above, the accused can be acquitted by extending benefit of doubt.

Accordingly, the Criminal Revision Case is allowed.

Miscellaneous petitions, if any, pending in this revision shall stands closed.

JUSTICE C. PRAVEEN KUMAR

02.04.2015

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