

**418 IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRA S-3298 - SB of 2012 (O&M)
Decided on : 14.10.2015.**

Lakhan

...Appellant

Versus

State of Haryana

...Respondent

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

**Present : Mr. Sanjay Vashisth, Advocate
for the appellant.**

Mr. Arun Luthra, AAG, Haryana.

JITENDRA CHAUHAN, J.

The present appeal is directed against the judgment of conviction and the order of sentence dated 3.10.2012, passed by the Additional Sessions Judge, Bhiwani, vide which the accused-appellant was convicted and sentenced as under:-

Offence	Sentence	Fine	In default
363 IPC	RI for 5 years	Rs.5000/-	3 months
366-A IPC	RI for 7 years	Rs.5000/-	4 months

Both the substantive sentences were ordered to run concurrently.

In brief, the case of the prosecution is that on 27.7.2011 complainant Deshraj father of prosecutrix made a complaint Ex.PG to the Police for taking action against accused Lakhan, Dhola

Devi, Sonu, Vinod and Manju. The complainant alleged that his daughter Ritu was a student of class 6th and her age was 13 years. On 22.7.2011, she was kidnapped by accused Lakhan by alluring her. He further alleged that Dhola Devi mother of Lakhan, Gharsi Ram father, Sonu, Vinod and Anju brothers of Lakhan were also involved in that act. They were giving threat to him for not launching any criminal case against them otherwise, the complainant would face dire consequences. On the basis of complaint Ex.PG, FIR Ex.PM was registered against the accused. Statement of prosecutrix was got recorded under Section 164 Cr.P.C. The medical examination of the prosecutrix was conducted. On completion of investigation, challan/report under Section 173 Cr.P.C was presented against the accused-appellant.

After compliance of Section 207 Cr.P.C., the case was committed to the Court of Sessions. Charges under Sections 363, 366-A and 376 IPC were framed against the accused to which he did not plead guilty and claimed trial.

In order to bring home the guilt of the accused, the prosecution examined PW-1, ESI Prem Singh with whom the case property remained deposited, PW-2, EHC Ramphal, who deposited the case property in the FSL in intact condition, PW-3, Lady Constable Kailash Devi, in whose presence the prosecutrix was recovered and was taken to Civil Hospital, Bhiwani for medico-legal examination, PW-4, Kanta Devi, Headmistress, Government Girls Middle School,

Haluwas, who proved Ex.PE, the certificate issued by the school, PW-

5, C. Dharam Singh, delivered the special report to the Area Magistrate, ASP and SP Bhiwani, PW-6, Desh Raj, father of the prosecutrix proved complaint, Ex. PG, given to the Police and narrated the version as given in the complaint, PW-7, the prosecutrix was declared hostile and cross examined by the Public Prosecutor, PW-8, Mukesh, deposed that the custody of the prosecutrix was handed over to her parents in his presence, PW-9, Dr. Ramesh Lamba, Medical Officer, Govt. Hospital, Bhiwani, conducted medico-legal examination upon the prosecutrix, again PW-9, Sub Inspector Attar Singh, was the Investigating Officer of the case, PW-10, Inspector Mauji Ram, accompanied the IO for searching the prosecutrix, PW-11, Vikas, Civil Registration Assistant Birth and Death Branch Officer of Civil Surgeon, Bhiwani, brought the record pertaining to date of birth of the prosecutrix, again PW-10, Ms. Sangeeta Rai, ACJM, Bhiwani who recorded the statement of the prosecutrix under Section 164 Cr.P.C and PW-14, Dr. Agya, Medical Officer, General, Hospital, Bhiwani who medico-legally examined the prosecutrix and closed its evidence.

The accused was examined under Section 313 Cr.P.C and all the incriminating circumstances appearing in the prosecution evidence were put to him to which he denied and pleaded false implication.

No defence evidence was led by the accused.

After appraisal of the evidence, the learned trial

Court convicted and sentenced the accused vide judgment and order of

sentence dated 03.10.2012. However, the accused was acquitted of the offence punishable under Section 376 IPC.

Aggrieved against the impugned judgment and order, the accused-appellant has preferred the present appeal which was admitted on 20.11.2012.

Learned counsel for the appellant contends that without there being any evidence on record with regard to the age of the prosecutrix, the learned trial Court has erred in law and fact by assuming the age of the prosecutrix below 18 years. He further contends that the basic criminal jurisprudence has been given a go-bye by the trial Court. In fact, it is for the prosecution to establish the necessary ingredients of an offence alleged. The failure of the accused to prove the age of prosecutrix beyond 18 years, does not relieve the prosecution from the liability of proving its case. The prosecution has to stand on its own legs. It cannot take benefit from the weakness of the case of the accused. It is next contended that the trial Court has committed grave error in convicting and sentencing the appellant after observing that the prosecutrix accompanied the accused voluntarily and with her own will and subsequently in holding that the accused was guilty of kidnaping the prosecutrix. Once the finding of fact of prosecutrix voluntarily accompanying is established, in such circumstances, offence of kidnapping is not made out allegedly when the prosecution has failed to fully establish its case with regard to the age of the prosecutrix.

On the other hand, learned State counsel contends that the accused has been rightly convicted and sentenced by the trial Court for kidnapping the prosecutrix. The prosecutrix being minor, even if, she consented, the offence of kidnapping is made out. He supports the judgment and order passed by the trial Court.

I have carefully considered the submissions made by both the parties and have gone through record of the case.

Initially, the accused-appellant was charged for the commission of offences under Sections 363, 366-A and 376 IPC, however, he was acquitted of the offence under Section 376 IPC and was convicted under Section 363 and 366-A IPC. Now, let us see what is the requirement of the provision. Section 361 IPC is reproduced as under:-

“Whoever takes or entices any minor under 16 years of age if a male, or under 18 years of age if female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.”

The Hon'ble Supreme Court in **S. Varadarajan vs. State of Madras, 1965 AIR (SC) 942** while explaining the meaning of 'taking' in reference to offence under Section 361 IPC 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 Section 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".

Let us examine the facts of the present case on the touchstone of the law enunciated aforesaid. The star witness of the present case is the prosecutrix herself, who appeared as PW-7, and deposed that the accused, Lakhan, the brother-in-law of one Vinod, a resident of Bhiwani, used to visit her house. She was neither kidnapped nor raped. In her statement under Section 164 Cr.P.C before the Chief Judicial Magistrate recorded on 3.8.2011, she has stated that on 22.7.2011, when she was alone in the house, her cousin Dharambir gave a slap to her, on that she went to the house of the appellant,

Lakhan, where her cousin Vinod reached to take back her but she refused to accompany him, on that, he slapped her, whereupon, some altercation took place between the appellant, Lakhan and her cousin Vinod. Thereafter, she along with Vinod boarded a tampo but her father sent 2-3 boys for chasing her, therefore, they alighted from the tampo in the fields and reached at a brick-kiln. The appellant, Lakhan saved her from 2-3 boys and she remained with Lakhan for 9-10 days as she wanted to marry with him. She further stated that Lakhan did not commit any wrong with her and he was innocent because she went with him with her own free will.

The statement of the prosecutrix leaves no room for doubt with regard to the fact that she herself accompanied the accused voluntarily as she wanted to marry him. The reasoning assigned by the trial Court that since the prosecutrix was minor so her consent did not matter and that it was a case of kidnapping and thus, proceeded on wrong premises. The offence of kidnapping is made out only when there is either 'taking' or 'enticement' of the minor. As laid down by the Hon'ble Supreme Court in S. Varadrajani's case (supra), there is a difference between 'taking' and allowing a minor to accompany. In the former case, he is liable but in the latter, though he is morally bound to restore her to her parent's custody but legally, he is not liable for any offence. As per prosecution, the age of the prosecutrix was between 17 to 18 years. That means, she was mature enough to understand the repercussions of her doings. She remained with the accused for 8/9

days voluntarily. She even wanted to marry with the accused. It is not the case of the prosecution that immediately prior to the minor leaving the father's custody, any active part was played by the accused or he had at some earlier stage solicited or persuaded the minor to do so. So, by no stretch of imagination, the accused Lakhan, could be said to have taken her away or enticed the prosecutrix. Therefore, the charge of kidnapping falls to the ground. Consequently, the appeal is allowed and the impugned judgment of conviction and order of sentence stand set aside and the accused-appellant is acquitted. He was ordered to be released on bail on 24.09.2014, therefore, the bail bonds and surety bonds are discharged.

14.10.2015.
SN

(JITENDRA CHAUHAN)
JUDGE