

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

% *Date of Judgment :08.09.2015*

+ CRL.A. 556/2013
SHAHANWAJ ALAM

..... Appellant

Through Mr. Rajender Chhabra, Adv.
versus

STATE (GNCT OF DELHI)

..... Respondent

Through Mr. Tarang Srivastava, APP for
the State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1. This appeal is directed against the impugned judgment and order on sentence dated 11.02.2013 and 14.02.2013 respectively wherein the appellant stands convicted under Section 363/366/376 of the IPC. The maximum sentence which has been awarded to him is RI 8 years. This is for his conviction under Section 376 of the IPC. He has also been sentenced to pay a fine of Rs.8,000/- and in default of payment of fine to undergo SI for 18 months. For his conviction under Section 366 of the IPC, he has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.7,000/- and in default of payment of fine to undergo SI for 18 months. For his conviction under Section 363 of the IPC, he has been sentenced to undergo RI for a period of 5 years and to pay a fine of

Rs.5,000/- and in default of payment of fine to undergo SI for 12 months. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted to the appellant.

2. The version of the prosecution was unfolded in the testimony of the prosecutrix 'SY' examined as PW-1. She had deposed that on 01.08.2011, when she was talking to the accused on the phone at night, he asked to her come down stating that he had some work. At that point of time, her family members were sleeping. The accused caught hold of her hand and got her to board an auto. He took her to Nangloi where the brother of the accused Sonu was residing and thereafter he took her to Bihar. She was finally recovered from his company on 09.08.2011 i.e. after a gap of 6-7 days. She reported the matter to the police.

3. A missing report was recorded through her brother-in-law Dharmender examined as PW-5. He had deposed that the victim was found missing on 01.08.2011. She was 17 years and 9 months of age; her date of birth was proved as 10.10.1993. Chandragupt Narain, Administrative Officer, UP Board, Meerut examined as PW-12 had also produced her birth certificate substantiating her date of birth as 10.10.1993.

4. FIR was accordingly registered. The victim was recovered in Delhi and recovery memo was prepared by WHC Ranjeeta examined as PW-4. It was pursuant thereto that her MLC was conducted. It was conducted through Dr. Sruthi Bhaskaran and the MLC Ex.PW-2/A had found that her hymen was ruptured. The statement of the victim was recorded by the learned MM under Section 164 of the Cr.PC and has been proved as Ex.PW-3/A.

5. The Investigating Officer WSI Usha was examined as PW-13.

6. In the statement of the accused recorded under Section 313 of the Cr.PC, he had stated that the victim had voluntarily accompanied him and they had gone to Bihar where they stayed together; this case is false and he has been falsely implicated. No evidence was led in defence.

7. On the basis of the aforementioned evidence, both oral and documentary, the accused was convicted and sentenced as aforementioned.

8. The main thrust of the argument of the learned counsel for the appellant is that the victim was admittedly 17 years and 9 months of age as on the date of the offence. This has come in the version of the prosecution itself. She was at the age of discretion. She knew the repercussion of her act. She voluntarily accompanied the accused and

stayed with him for 6-7 days. For this purpose, attention has been drawn to the testimony of the victim who has been examined as PW-1. Submission being that voluntary accompaniment of the victim with the accused and the girl being at the age of discretion, the conviction of the accused for all the aforementioned offences is ill-founded.

9. Needless to state that these arguments have been refuted.

10. The star witness of the prosecution was PW-1. She was the prosecutrix. Her testimony has been examined. She has on oath deposed that she knew the accused who is present in Court. On 01.08.2011, she was talking to the accused on the phone; this was at night. Her other family members were sleeping. The accused asked her to come down stating that he had some work; she went down after opening the door; the accused caught hold of her hand and got her to board an auto and he then took her to Nangloi where his brother Sonu was residing; she stayed in the house of Sonu for about 6 days. He performed marriage with her; he committed rape upon her without her consent. Thereafter the accused took her to Bihar where they stayed up to 09.08.2011. Her further deposition was that on 09.08.2011; when she saw two police officials she reported the matter to them pursuant to which they were

apprehended. She was medically examined. In her lengthy cross-examination, she admitted that she had a friendship with the accused in the year 2011 and she was speaking to him on 01.08.2011. The telephone from which she used to make calls to the accused was given to her by him. This was in the form of a gift. It was without any reason. She used to keep that mobile phone in the almirah. She was free to talk with the accused on that mobile phone at any time. The accused and the victim were living in the same house which was a double storey house. There were three rooms on the first floor. In one room, she along with her sister and brother-in-law used to reside whereas in another two room accused along with other tenants was residing. Her room was having an iron door. When she opened the door, the iron door made a sound. She went down the stairs where accused was standing with the TSR driver. She sat in the TSR and went with the accused. She did not raise any alarm on the way. She did not try to get the TSR stopped as the accused had gagged her mouth. They reached Nangloi where they stayed for 6 days. The accused had told her that he would marry her. She did not make any hue and cry while they were in the TSR; they thereafter purchased railway tickets and went to Bihar. She did not raise any alarm

at the railway station; the accused and she boarded the train together. She stayed in Bihar up to 09.08.2011 when she was finally brought to Delhi by the Bihar police. She denied the suggestion that she was in love with the accused and the accused has been falsely implicated.

11. The medical examination of the victim was conducted through PW-2. Her MLC Ex.PW-2/A opined that her hymen was torn and there were no injury marks. Submission on this count being that no injury mark was noted in the MLC as it was a voluntary consensual relationship that the parties had with one another.

12. As noted supra, it is the testimony of PW-2 which is highlighted largely by the learned counsel for the appellant to substantiate his argument that the victim had voluntarily accompanied the accused. The overall reading of the version of this witness persuades this Court to accept this submission. PW-1 admittedly knew the accused as they were both residing in the same house; it was also on the same floor but in different rooms. She had a telephone which was given to her by the accused; it was in the form of a gift; this enabled her to speak with the accused freely. On the fateful day i.e. on 01.08.2011 after having had a conversation with him, she went downstairs to meet the accused where

the TSR was standing; she boarded the TSR while going with the accused; she did not raise any hue and cry. They reached Nangloi at the house of Sonu (the brother of the accused) where they stayed for about 6 days. Thereafter they bought tickets to travel to Bihar where they stayed for 2 days i.e. upto 09.08.2011; Even there, she did not raise any hue and cry. It was only on the way to Delhi when she saw two police officials and reported the matter to them. Further part of her deposition was that the accused had performed marriage with her.

13 This deposition clearly deciphers that the victim had voluntarily accompanied the accused and it was a clear case of consent and a willing friendship which led her to accompany the accused not only in the TSR but also stay with him at her brother's house for 6 days and thereafter even travelled outstation in a train where they again stayed for 2 days. This was a clear case of assent on the part of the victim.

14. However, the next question, which arises for decision, is whether the victim who was 17 years and 9 months of age could have given her consent as she was minor for the purpose of offence under Sections 366/376 of the IPC.

15. In this context, the observations of the Apex Court in AIR 1965
Crl. Appeal No.556/2013

SC 942 S Varadarajan Vs. State are relevant. They are extracted herein as under:-

"The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal code :

"Whoever takes or entices 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 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."

8. It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping.....

.....11. 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.

12. 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". "

16. The facts of the instant case show that there was no active persuasion on the part of the accused which can in any manner amount to 'taking' or 'enticing' as is the language contained in Section 361 of the IPC. She had accompanied the accused voluntarily in a TSR and at the cost of repetition not only stayed with him in Nangloi for 6 days but also boarded a train to Bihar where she stayed with him for two days i.e. 09.08.2011. By no stretch of imagination, can this amount to a 'taking' or 'enticing'.

17. The offence of rape has been defined under Section 375 of the IPC. For the purpose of rape to qualify as a minor, the victim should be less than 16 years. Admittedly in this case, the victim was 17 years and 9 months on the date of the offence. The victim having accompanied the accused of her own accord, the offence of rape as defined under Section

375 of the IPC is clearly not made out.

18. This Court notes that the victim was at the age of discretion which is about 3 months short of having become a major for the purpose of the offence under Sections 363/366 of the IPC. She was fully conscious of her act in accompanying the accused. There was no force upon her. 'Taking' or 'enticing' from lawful guardianship is not made out.

19. The accused is accordingly acquitted of the charge under Sections 363/366 as well. He be released forthwith, if not required in any other case.

20. Appeal disposed of.

INDERMEET KAUR, J

SEPTEMBER 08, 2015

A