

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

% *Judgment Reserved on: May 17, 2016*
Judgment Delivered on: May 18, 2016

+ **CRL.A.1000/2013**

VIKAS KUMAR Appellant
Represented by: Mr.Anwesh Madhukar, Adv.
DHCLSC.

versus

STATE Respondent
Represented by: Mr.Ravi Nayak, APP for State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the instant appeal the appellant Vikas Kumar challenges the impugned judgment dated 28th February, 2013 whereby he has been convicted for the offences punishable under Sections 363/366 IPC and the order on sentence dated 8th March, 2013 directing him to undergo Rigorous Imprisonment for a period of four years for the offence punishable under Section 363 IPC along with a fine of ₹3,000/-, and in default of payment of fine to undergo Simple Imprisonment for a period of three months and Rigorous Imprisonment for seven years for the offence punishable under Section 366 IPC with a fine of ₹ 5,000/- in default of which he shall undergo Simple Imprisonment for a period of six months.

2. The brief facts of the prosecution case are that on 21st May, 2012 at 4.05 PM the complainant informed that her granddaughter aged 14½ years resident of House No.623, K-Block, Jahangir Puri, height 5 ft, fair complexion, round face, slim body, wearing cream colour top and black

pant, whose upper front teeth was broken, was missing from her house since 4.00 A.M. She has been enticed by some unknown person and taken to some unknown place. On the basis of this statement, FIR under Section 363 IPC was registered at PS Jahangir Puri and investigation was handed over to SI Balwant Singh, PW-10 who transmitted messages (Ex.PW-10/A) to all SSPs of India and all SHOs of Delhi. During investigation, he came to know that the prosecutrix and the accused were in District Muzaffarpur, Bihar. SI Balwant Singh along with HC Netra Pal PW4 reached PS Shakra, District Muzaffarpur, Bihar on 29th May, 2012 along with Deepa PW-7 mausi of the prosecutrix. Vikas was arrested on 29th May, 2012. Both of them were identified by Deepa. Statements of prosecutrix, Deepa and Head-constable Netra Pal were recorded. Prosecutrix and Vikas were taken for medical examination to Dr. Krishna Singh, PW-8. In the medical examination, no external and internal injuries were found on the body including private parts of the prosecutrix. On a transit custody remand, Vikas was brought to Delhi.

3. Statement of the prosecutrix was recorded under Section 164 Cr.P.C by learned Metropolitan MagistratePW-9 vide Ex.PW9/A. An enquiry regarding age of Vikas was conducted and he was found to be aged between 20-22 years vide Ex.PW-10/E. After the investigation, Vikas faced trial for offences punishable under Sections 363 and 366 IPC.

4. Learned counsel for the appellant contends that the learned Trial Court failed to appreciate the contradictions in the statement of prosecutrix recorded under Section 164 Cr.P.C. and her deposition in the court. She had categorically stated that it was not the appellant who enticed her to go with him rather it was the prosecutrix who called the appellant and insisted him to

take her to his native village. Learned Trial Court also failed to appreciate that the essential ingredients of enticement and allurement by appellant have not been proved by the prosecution. The prosecutrix herself consistently stated that she was not lured by the Appellant. Learned counsel further contends that the age of prosecutrix has been ascertained in a routine and mechanical manner. He further states that there are material contradictions as regard to the date of adoption of prosecutrix in the statements of PW-7, PW-5 and PW- 6 and the real mother of the prosecutrix has not been examined as a witness.

5. Learned APP for the State on the other hand contends that the prosecutrix herself stated that she was below 18 years of age and thus a minor at the time of the offence. Therefore her consent is immaterial. There is no error in the impugned judgment of conviction and order on sentence.

6. The Supreme Court in the decision reported as AIR 1965 SC 942 S.Varadarajan Vs. State of Madras held that taking or enticing away minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping and where no inference can be drawn on the facts of the case that the accused is guilty of taking away the girl out of the keeping of her father and she willingly accompanied him, the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany her. Drawing a distinction between "*taking and allowing a minor to accompany a person*" the Supreme Court held:

"7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary

for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. 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."

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. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishment or anything like that. On the other hand the

evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision *In re : Abdul Sathar* 54 M.L.J. 456 in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of s. 363 and expressing agreement with this statement of the law observed : "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon

any evidence direct or otherwise. In Abdul Sathar's case 54 M.L.J. 456 Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed :

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself; it was she who telephoned to the appellant and fixed the rendezvous she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him."

7. In the subsequent decision of the Supreme Court reported as AIR 1973 SC 2313 Thakorlal D.Vadgama Vs. The State of Gujarat the Supreme Court reiterating the law laid down in Varadarajan (supra) distinguished the fact situation where there was ample material to show earlier allurements in which case the girl going voluntarily on the day of occurrence with the accused would be no defence and held:

“9. The legal position with respect to an offence under Section 366, I.P.C. is not in doubt. In State of Haryana v. [Raja](#) : AIR 1973 SC 819 this Court considered the meaning and scope of Section 361, I.P.C. It was said there :-

“The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor . . . out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control : further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.

In the case cited reference has been made to some English decisions in which it has been stated that forwardness on the part of the girl would not avail the person taking her away from being guilty of the offence in question and that if by moral force a willingness is created in the girl to go away with the former, the offence would be committed unless her going away is entirely voluntary. Inducement by previous promise or persuasion was held in some English decision to be sufficient to bring the case within the mischief of the statute. Broadly, the

same seems to us to be the position under our law. The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words "takes" and "entices", as used in Section 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him. The question truly falls for determination on the facts and circumstances of each case. In the case before us, we cannot ignore the circumstances in which the appellant and

Mohini came close to each other and the manner in which he is stated to have given her presents and tried to be intimate with her. The letters written by her to the appellant mainly in November, 1966 (Exhibit p. 20) and in December, 1966 (Exhibit p. 16) and also the letter written by Mohini's mother to the appellant in September, 1966 (Exhibit p. 27) furnish very important and essential background in which the culminating incident of January 16th and 17th, 1967 has to be examined. These letters were taken into consideration by the High Court and in our opinion rightly. The suspicion entertained by Mohini's mother is also, in our opinion, relevant in considering the truth of the story as narrated by the prosecutrix. In fact, this letter indicates how the mother of the girl belonging to a comparatively poorer family felt when confronted with a rich man's dishonourable behavior towards her young, impressionable, immature daughter; a man who also suggested to render financial help to her husband in time of need. These circumstances, among others, show that the main substratum of the story as revealed by Mohini in her evidence, is probable and trustworthy and it admits of no reasonable doubt as to its truthfulness. We have, therefore, no hesitation in holding that the conclusions of the two courts below with respect to the offence under Section 366, I.P.C. are unexceptionable. There is absolutely no ground for interference under Article 136 of the Constitution.”

8. Thus the test law laid down by the Supreme Court is to determine firstly whether the prosecutrix voluntarily went with the accused and if so was the willingness of the prosecutrix created by moral force, i.e. it cannot be termed to be entirely voluntary. However, the facts of the present case demonstrate that it was the prosecutrix who called the appellant and compelled him to accompany her.

9. In her statement under Section 164 Cr.P.C. Ex.PW-9/A the prosecutrix stated that on May 21, 2012 at about 5.30 AM she went out of her house. Her family members used to beat her. In the house her two

maternal aunt, maternal grand-mother, maternal uncle, mother, two brothers and two children of maternal uncle were residing. She knew Vikas who used to reside near her house for the last two years and they both loved each other. She made a phone call from her maternal aunt's phone to Vikas. Thereafter they went to the village of Vikas at Chambaji Bihar by a train where they stayed with his mother. Vikas had refused to take her alone as she was a minor, however the prosecutrix did not agree. They both married in a Mandir in the presence of family members of Vikas. Her Mausi came with the Police to the village. She reiterated that Vikas had taken her on her saying and she wanted to reside with Vikas.

10. In her deposition before the Court the prosecutrix PW-6 deposed that at the time of incident she was staying in 7th standard. On May 21, 2012 she left her house at around 4.00 AM without telling anybody. She had called Vikas outside her house as all her family members had come to know regarding her conversation with Vikas on telephone. Vikas came outside her house and took her to Anand Vihar ISBT in a TSR from where he took her to his house somewhere in Bihar. After her aunt came to know about the prosecutrix missing from the house, she started searching. After 4-5 days of her remaining with Vikas at his house in Bihar, the local Police took both of them to the concerned Police Station where after they were brought to Delhi. Prosecutrix was cross-examined by the learned APP and in cross-examination she categorically stated that she was not enticed away by Vikas. She stated that Vikas was known to her prior to the incident as they used to meet outside the school. She denied that Vikas used to tease her. She reiterated her statement made under Section 164 Cr.P.C. and that she was in love with Vikas and that Vikas as well as his mother advised her not to live

in the village with them as she was a minor, however she did not pay any heed to their advise. She also reiterated about the marriage being performed in the temple with Vikas in the presence of family members.

11. On the basis of the statements of the witnesses and the statement of Sub-Registrar MCD PW-11 who brought the birth register where date of birth of the prosecutrix was registered as October 21, 1997 it is proved beyond reasonable doubt that the prosecutrix was a minor below 18 years of age at the time when the alleged incident took place. However, as noted above, neither was the prosecutrix enticed nor was there any kind of moral persuasion which forced her to accompany the appellant rather she compelled the appellant to accompany her. From the deposition of the prosecutrix made before the Court neither the ingredients of enticement nor of any moral pressure persuading her to accompany the accused can be deciphered. The ingredients of kidnapping having not been proved by the prosecution, the appellant is entitled to be acquitted of the charge under Sections 363 and 366 IPC.

12. Consequently, the impugned judgment of conviction and order on sentence are set aside. Vikas Kumar is in custody. He be released forthwith by the Superintendent Tihar Jail, if not required in any other case.

13. Appeal is disposed of.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 18, 2016/‘vn’