

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.146 of 2011**

Nooradhan, son of Parmanand Bariha, aged about 23 years, resident of Gram Lanti, Police Station Saraipali, District Mahasamund, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Police Station Saraipali, District Mahasamund, Chhattisgarh

--- Respondent

For Appellant	:	Shri Trivikram Nayak, Advocate
For Respondent	:	Shri Ajay Kumrani, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

23.8.2019

1. The instant appeal has been preferred against the judgment dated 25.1.2011 passed by the Sessions Judge, Mahasamund in Sessions Trial No.58 of 2010, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 4 years and fine of Rs.2,000/- with default stipulation
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 4 years and fine of Rs.3,000/- with default stipulation

2. Facts, in brief, are that on the relevant date, age of the prosecutrix (PW4) was about 17 years and 4 months. Allegations against the Appellant are that on 8.3.2010, he enticed her on the pretext of marriage and took her away from the keeping of her lawful guardian. He also made sexual relation with her against her will.

On 8.3.2010, her father Punit Das (PW5) lodged a report of her missing. During the course of inquiry, she was recovered from possession of the Appellant. Her statement was recorded and on the basis of her statement, First Information Report (Ex.P14) was registered. Regarding date of her birth, birth-death report form was seized from the village Kotwar vide Ex.P8. She was medically examined by Dr. Kiran Rohetkar (PW7). Statements of witnesses were also recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellant. Charges were framed against him for offence punishable under Sections 363, 366 and 376(1) of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 10 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded false implication. No witness has been examined in his defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court acquitted the Appellant of the charge under Section 376(1) of the Indian Penal Code, but convicted and sentenced him as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submits that without there being any clinching evidence on record, the Trial Court has wrongly convicted the Appellant. The Trial Court has failed to appreciate that the prosecutrix herself has not supported the case of the prosecution and also failed to appreciate that the evidence adduced by the prosecution as regards age of the prosecutrix is not just and sufficient to arrive at any conclusion regarding her age.

It is further submitted that as defined in Section 361 of the Indian Penal Code, there is nothing on record on the basis of which it could be said that the Appellant took away the prosecutrix from her lawful guardian and enticed her. Therefore, no offence is made out against the Appellant.

6. Learned Counsel appearing for the State opposes the above submission and supports the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. As regards her age, in her Court statement, the prosecutrix (PW4) has not stated anything regarding her date or year of birth. Her father Punit Das (PW5) has stated that on the date of incident, age of the prosecutrix was about 17 years and 3 months. The above statement of Punit Das (PW5) is not duly rebutted during his cross-examination. As per the Kotwari entries, date of birth of the prosecutrix is 3.11.1992. In the birth certificate (Ex.P18) also, date of birth of the prosecutrix is mentioned as 3.11.1992. Though in the birth certificate and in the Kotwari register who got the relevant entries recorded has not been stated nor has any witness been examined in this regard. As stated by Punit Das (PW5), age of the prosecutrix being 17 years and 3 months is not duly rebutted. Thus, it is established that on the relevant date, age of the prosecutrix was below 18 years. Therefore, the finding of the Trial Court in this regard is in accordance with the evidence available on record.
9. As per the statement of Punit Das (PW5), father of the prosecutrix, the prosecutrix had gone out of home and her missing report was

lodged by him. 3 months thereafter, she was recovered along with the Appellant. This witness has not further supported the case of the prosecution and has stated that he does not know that from whose possession the prosecutrix was recovered.

10. The prosecutrix (PW4), in her Court statement, has only stated that her parents were fixing her marriage against her will and, therefore, she asked the Appellant to take her to the house of her *fufa* and *fufi* (uncle and aunt). The Appellant took her there. There she lived for about 1 month and the Appellant also lived there along with her. She denied the suggestion put before her that the Appellant took her away from the lawful guardianship of her parents. From the statement of the prosecutrix, it is only established that the Appellant took the prosecutrix to the house of her *fufa* and *fufi* on being asked by the prosecutrix herself.

11. In **S. Varadarajan v. State of Madras, (1965) 1 SCR 243**, it was observed in paragraph 9 as under:

“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 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.”

12. Relying upon the above judgment of the Supreme Court, Punjab and Haryana High Court, in **Vinod v. The State of Haryana, 2010 SCC OnLine P&H 4431**, also observed thus:

“14. The next question that arises for consideration, is as to whether, the accused committed offence, under Sections 363 and 366 IPC, especially when the prosecutrix was below 18 years of age, at the time of the alleged occurrence. The offence of kidnapping, from lawful guardianship, is defined in the first paragraph of Section 361 of the Indian Penal code, which reads as under:-

“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.”

14-A. It is apparent, from the provisions of Section 361 of the Indian Penal Code, that taking or enticing away a minor out of the keeping of a lawful guardian, is an essential ingredient of the offence of kidnapping. It is to be determined, as to whether, the part played by the appellant amounts to “taking” out of the keeping of the lawful guardianship of the parents of the prosecutrix. It has been held above, that the prosecutrix, of her own, went to meet Vinod; accompanied him to various places; as she was having love affairs with him, which fact is evident from letters Ex.DB and DC; and performed marriage with him voluntarily. From the circumstances, narrated above, it could not be said that she was taken out of the keeping of the lawful guardianship of her parents by the accused. No evidence was also produced by the prosecution that immediately prior to the alleged occurrence, some active part was played by the accused, or he had at some earlier stage, solicited or persuaded the minor to leave the house of her parents. Thus, the essential ingredients, required for constituting the offence, punishable under Section 363

of the Indian Penal Code, that the prosecutrix was taken or enticed away out of the keeping of lawful guardianship, were not proved. Since it was not proved that the prosecutrix was enticed away by the accused, the question of seducing her to illicit intercourse, did not at all arise. There is no evidence, on record, that the accused ever committed sexual intercourse with the prosecutrix or even made an attempt to do so.”

13. Facts of the case in hand are also similar to that of **Varadarajan case** (supra). In the instant case also, the prosecutrix (PW4) has only deposed that the Appellant had taken her to the house of her *fufa-fufi* on being asked by her. The facts of the present case do not go to show that the Appellant took the prosecutrix away from the keeping of lawful guardianship of her parents without their consent and enticed her as defined in Section 361 of the Indian Penal Code. Therefore, no case under Section 363 of the Indian Penal Code is made out against the Appellant. Since the prosecutrix has not stated anything that the Appellant did anything wrong with her, no case under Section 366 of the Indian Penal Code also is made out against the Appellant.
14. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charges framed against him.
15. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
Judge