

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO.95 OF 2019.

STATE THR. POLICE
INSPECTOR, VASCO
POLICE STATION
VASCO GOA.

... Petitioner.

Versus

SHRI RAJESH BIND

... Respondent.

Mr. P. Faldessai, Addl. Public Prosecutor for the Petitioner.
None for the respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.
Reserved on:-30th September, 2019.
Pronounced on :-4th October, 2019.

ORDER

By this petition, the State of Goa, through Police Inspector, Vasco Police Station has invoked writ jurisdiction of this Court, *inter alia* challenging the order dated 23.06.2017 passed by Children's Court in Bail Application No.53 of 2017 in Crime No.65 of 2017 under Section 363 of IPC and Section 8(2) of the Goa Children's Act wherein it is observed by the learned Children's Court that no offence has been committed by the respondent under Section 363 of IPC and Section 8(2)

of the Goa Children's Act.

2. Briefly stated the facts are that a complaint came to be lodged by one Mrs. Chandrawa Pujari at Vasco Police Station on 12.5.2017 wherein she alleged that respondent had kidnapped her minor daughter aged about 14 years without her consent from her lawful guardianship. An offence came to be registered under Section 363 of IPC and Section 8(2) of the Goa Children Act.

3. During the course of investigation, the victim girl and the respondent were traced at Virar East, Mumbai who were brought to Vasco Police Station, Goa on 20.6.2017. Respondent applied for bail before the Children's Court, Panaji. The learned Children's Court by the impugned order released the respondent on bail, *inter alia* observing that the victim voluntarily accompanied with the respondent and since now they are married and there was sexual intercourse thrice between them, the Investigating Officer was directed to do the needful. It is also observed that offence appears to have been committed beyond the

jurisdiction of the Children's Court, Goa.

4. I heard Mr. Phaldessai, learned Addl. Public Prosecutor for the petitioner. Despite due service none appeared for the respondent.

5. At the outset, it is apparent from the record that the victim was a minor on the date of commission of the offence. It is also not in dispute that the victim and the respondent got married and had sexual intercourse which finds support from the medical evidence on record.

6. It seems that the learned Children's Court has failed to appreciate that kidnapping of minor girl is a serious offence and so also having sexual intercourse with her for which consent is immaterial. Consent or willingness of the victim is not even an aspect which is required to be taken into consideration while determining an offence under Section 361 of IPC. At the time of incident the victim was 13 years 3 months old and, therefore, by no stretch of imagination it can be said that she was fully grown up and matured enough to understand the

consequences of the act. The learned Children's Court has failed to appreciate the ratio laid down by the Supreme Court in case of *S. Varadarajan Vs State of Madras*¹. The victim in the said case though was a minor girl at the time of offence, however, she was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was not 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.

7. The learned Children's Court has, thus, committed a grave error in law and facts in not taking cognizance of the offence punishable under Section 363 of IPC read with Section 8(2) of the Goa Children's Act. Indeed, it is an offence against the society and there is no question of free consent of the victim for her being taken away by the respondent and their subsequent marriage.

¹ AIR 1965 SC 942

8. Mr. Phaldessai, has, therefore, rightly placed useful reliance on the following judgment in the case of ***State of Haryana Vs Raja Ram***². The Hon'ble Supreme Court in paragraph 8 has stated thus:-

“8. *The approach and reasoning of the learned single Judge is quite manifestly insupportable both on facts and in law. It clearly ignores important evidence on the record which establishes beyond doubt that the prosecutrix had been solicited and persuaded by Raja Ram to leave her father's house for being taken to the Bhishamwala well. Indeed, earlier in his judgment the learned single Judge has himself observed that according to the statement of the prosecutrix, on receipt of Raja Ram's message as conveyed through his daughter Sona, she contacted Raja Ram during day time in his house and agreed with him that she (the prosecutrix would accompany him (Raja Ram) to go to Bhishamwala well at midnight to meet Jai Narain, as the other members of her family would be sleeping at that time. If, according to the learned single Judge, it was in this background that the prosecutrix had left her father's house at midnight and had gone to the house of Raja Ram from where she accompanied Raja Ram to the Bhishamwala well, it is difficult to appreciate how Raja Ram could be absolved of his complicity in taking the prosecutrix out of the keeping of her father, her lawful guardian, without his consent. It was in our opinion, not at all necessary for Raja Ram, himself to go to the house of the prosecutrix at midnight to bring her from there. Nor does the fact that the prosecutrix had agreed to accompany Raja Ram to Bhishamwala well take the case out of the purview of the offence of kidnaping from lawful guardianship as contemplated by*

2 CDJ 1972 SC 479

s. 361, I.P.C. This is not a case of merely allowing the prosecutrix to accompany Raja Ram without any inducement whatsoever on his part from her house to Bhishamwala well. Section 361, I.P.C. reads:

"361. Kidnapping from lawful guardianship:

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. Explanation.--The words 'lawful guardian' in this section include any 'person lawfully entrusted with the care or custody of such minor or other person.

Exception.-This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

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 s. 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."

9. Thus, is it manifest that the object of Section 361 of IPC is 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.

10. In the case of ***Satish Kumar Jayanti Lal Dabgar V/s State of Gujarat***³ the appellant was charged for the offences under Sections 307, 363, 375 and 376 of IPC. The complainant's daughter was missing. On inquiry it revealed that the appellant had been to their house and had a talk with the prosecutrix. Since prosecutrix could not be traced, a complaint was registered. The appellant surrendered himself before the

3 CDJ 2015 SC 185

police and stated that he and prosecutrix were in love with each other and had tied nuptial knot with free consent of the prosecutrix. Prosecutrix was 16 years of age at that time. The trial Court convicted the appellant which was confirmed by the High Court and modified the sentence by reducing the same. It is held by the Supreme Court that merely because the appellant subsequently married with the prosecutrix hardly becomes a mitigating circumstance.

11. The Supreme Court did not interfere with the quantum of sentence on the point of any mercy and dismissed the appeal. This ratio would squarely applicable to the present set of facts.

12. As a matter of fact aforesaid decisions of the Hon'ble Supreme Court were on merits after the trial whereas, in the instant case learned Children's Court declined to take cognizance of the offence itself on an erroneous interpretation of provisions of Goa Children's Act as well as IPC. I have not expressed anything on the merits of the material which Investigating Agency had collected.

13. Conspectus of the aforesaid discussion is that the impugned order dated 23.6.2017 needs to be quashed to the extent it directs the Investigating Agency to do the needful as it reveals that the Children's Court found that it was a *coram non judice*. The Children's Court shall take cognizance of the offence and shall proceed further with the matter in accordance with law.

14. Criminal Writ Petition stands disposed of in the aforesaid terms with no order as to costs.

PRITHVIRAJ K. CHAVAN, J.

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