

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

CRL.M.C. 5050/2018 and Crl.M.A.No.33438/2018

Reserved on : 12.03.2020

Date of Decision : 17.03.2020

IN THE MATTER OF:

MADHURI BANDOONI

..... Petitioner

Through; Mr.Mahesh Thakur and
Ms.Sheffali Chaudhary,
Advocates.

versus

STATE (NCT OF DELHI) and Ors.

..... Respondents

Through: Mr.Mukesh Kumar, APP for State
with SI Davender Kumar, P.S.
Chhawla, Delhi.
Mr.Anand Mishra, Adv. for R2 &
R3.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present petition has been filed impugning order dated 30.07.2018 passed by Addl. Sessions Judge in Crl. Revision No.42/2017 whereby the charge framed by the Trial Court against the present petitioner under Section 363/374 IPC was modified to Section 368 read with Section 363 IPC.

2. Briefly, the facts of the present case are that FIR bearing No.111/2012 under Section 363 IPC, Police Station Chhawla came to be registered on 25.05.2012 on the complaint of one Bablu Tiwari. In the complaint, he stated that his daughter Somya Tiwari aged 15 years had

not returned back to her home after she had gone to check her class 10th result at about 9 a.m. on 25.05.2012.

3. Later, on 08.07.2012, the complainant produced his daughter in the Police Station. The statement of prosecutrix was recorded under Section 161 Cr.P.C. and her medical examination was also conducted. Subsequently, on 10.07.2012, her statement was also recorded under Section 164 Cr.P.C., wherein she stated as follows:-

“My name is Somya Tiwari. I study in Sarvodaya Kanya Vidyalaya, Dharampura, Najafgarh, New Delhi. This year itself, in the month of March, 2012, I had given my 10th class exams. On 25.05.2012, I had gone to check my 10th class results in cyber café nearby. I felt highly disappointed after seeing my marks/percentage 6.8% as I had done lots of hard work, I started feeling frightened to go back home. Then in order to go to my aunts (maasi) home I reached Uttam Nagar by bus. I did not know my aunts (maasi) home from there and while roaming like this I reached a market and sat outside a doctor’s clinic. The name of that clinic as Mehta nursing home. After sometime an old lady aged about 60 years came out of that clinic and started talking to me. When I told her everything she asked me not to fear and not to go back home and she will send me at such place where no one will scold me. She said you will get to study as well as money there. The name of that lady was V.Mehta. I went with that lady at her home and lived there for 4-5 days. That lady was a doctor. After 4-5 days she sent me to a lady named Madhuri, to work. I don’t know that place but that lady Madhuri lived in a flat in Lajwanti Apartment. I was told that I will have to do household work for which I will get Rs.4000/- per month. I worked in that home for 20-22 days thereafter Madhuri sent me to her mother’s house which is in ‘A’ Block, Shyam Vihar, Najafgarj. There I worked for about 10 days and one day finding opportunity without informing anybody I came back

home. Nothing wrong has happened with me and I don't have anything further to say....”

4. The statement of the prosecutrix recorded under Section 164 Cr.P.C. was on the same lines as her statement under Section 161 Cr.P.C.

5. Learned counsel for the petitioner contended that neither the ingredients of the offence under Section 363 IPC nor for the offence under Section 368 IPC are made out against the present petitioner. It was contended that the offence under Section 363 IPC is not a continuing offence. In support, he has placed reliance on the decision in S.K.Yusuf v. State reported as **1988 SCC OnLine Cal 41** and Sau. Banu Ram Chandra Borgaonkar v. State of Maharashtra reported as **2015 SCC OnLine Bom 6380**. So far as the offence under Section 368 IPC is concerned, it was contended that it has not been shown that the petitioner had the requisite knowledge of the prosecutrix being kidnapped. In support, he has placed reliance on the decision in Brahm Dutt v. State of Punjab reported as **1999 SCC OnLine P&H 566**.

6. Although learned APP for the state has opposed the petition but learned counsel for the complainant and the prosecutrix (impleaded as Respondent No. 2 & 3) have supported the petition. Infact, written replies duly supported by the respective affidavits of the complainant as well as the prosecutrix (now aged 22 years) have also been placed on record in support of the petition.

7. In the reply filed by the prosecutrix, it has been stated that while she was sitting outside the clinic of the co-accused, it was the co-accused who talked to her and took the prosecutrix to her home where she stayed

for 4-5 days. Thereafter, she went to the house of the petitioner, who was pregnant at that time. She was treated well at the petitioner's house. The petitioner looked after her and was even prepared to support her financially for her education. She stayed at the petitioner's house for about 20-22 days and helped the petitioner in household activities. The petitioner moved to her mother's house in A Block, Shyam Vihar, Najafgarh, as she needed constant care and attention due to her pregnancy. The prosecutrix also went with her. Co-incidentally, the house of the petitioner's mother was in the same locality where the house of the prosecutrix was located. The prosecutrix went back to her own house at the insistence of the petitioner. It has been further stated in the replies that both the complainant and his daughter have no objection for quashing of the FIR against the present petitioner.

8. I have heard learned counsels for the parties and have also gone through the case records.

9. The principles to be considered for proper exercise of jurisdiction under Section 482 CrPC or 397 Cr.P.C. and the criteria for quashing a charge were culled out by the Supreme Court in Amit Kapoor Vs. Ramesh Chader and Others reported as **2012 (9) SCC 460**. The relevant paragraphs of the judgment are extracted hereunder:

"27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of

the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

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*27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae* i.e. to do real and substantial justice for administration of which alone, the courts exist.*

(emphasis added)

10. The FIR in the present case was initially registered under Section 363 IPC on the basis of a missing report lodged by the complainant. Section 363 IPC provides for the punishment in an offence of kidnapping. The prosecutrix at the time of the incident was aged about 15

years. The offence of kidnapping from lawful guardianship has been defined in Section 361 IPC and it reads as follows:-

“361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under 2 [sixteen] years of age if a male, or under 3 [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.”

11. To commit an offence under Section 361 IPC, it has to be necessarily shown that, a person has “taken” or “enticed” a minor out of the keeping of the lawful guardian of such minor. A female is considered a minor, if she is under eighteen years of age.

12. The Shorter Oxford English Dictionary (Fifth Edition) defines the word “entice” as follows:

“(i) Incite (to a course of action); provoke (to anger etc.).

(ii) Persuade or attract by the offer of pleasure or advantage.”

13. The Black’s Law Dictionary (Eighth Edition) defines the verb “entice” as follows:-

“To lure or endure; esp., to wrongfully solicit (a person) to do something.”

14. The Shorter Oxford English Dictionary (Fifth Edition) defines the word “takes” as follows:

“The action or process, or an act, of taking”

15. The distinction between the word ‘taking’ or ‘enticing’ on one hand and the word ‘detaining’ on the other hand, came to be highlighted in one of the earliest decisions with respect to an offence of kidnapping in a Full Bench Reference in Nemai Chatteraj v. The Empress reported as **1900 SCC OnLine Cal 119**, where the then Chief Justice Maclean noted the distinction as follows:-

“The question, in each case, must be whether the accused did or did not actually take or entice the boy or girl, as the case may be, out of the keeping of the lawful guardian without his consent. The question is one of fact, and must in each case be decided upon the particular evidence of each particular case. The section says “taking” or “enticing” it does not say a word about “detaining” out of the keeping of the guardian, and when the legislature means “detaining” it says so, as in sec. 498. Upon the facts found in the reference, I do not see how the accused can be said to have taken or enticed the girl out of the keeping of her guardian; the act of taking was completed when the girl was actually taken out of the keeping of her guardian, and in this apparently, the accused had no part. He had nothing to do with the matter until three weeks later. The act of taking is not, in the proper sense of the term, a continuous act: when once the boy or girl has been actually taken out of the keeping, the act is a completed one. If continuous, it would be difficult to say when the continuous taking ceased: it could only be when the boy or girl was actually restored to the keeping of the guardian. But this would constitute not the act of “taking,” but an act of “detaining.”

16. The word “taking” fell for consideration before the Supreme Court in the case of S. Varadarajan v. State of Madras, reported as **AIR 1965 SC 942** where the allegation against the accused was that he had taken the victim out of the keeping of her lawful guardian. While drawing the distinction between the word ‘taking’ and ‘merely permitting the victim to accompany’ in the context of the offence of kidnapping, it was held 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 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.

10. 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".

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26. After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State."

17. The position was again reiterated by the Supreme Court in Parkash vs. State of Haryana reported as (2004) 1 SCC 339, where the following observations in its earlier decision in Thakorlal D. Vadgdama v. The State of Gujarat reported as (1973) 2 SCC 413 were quoted with approval:

"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 allurements 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."

18. As per the prosecution case, it was stated by the prosecutrix in her statement recorded during investigation that she left her house on 25.05.2012 to check her 10th class results at a nearby cyber café. She was disappointed with her marks and felt frightened to go back to her home. She took a bus to reach her aunt's home however, not knowing the address, she roamed in the market and sat outside a doctor's clinic which happened to be the clinic of the co-accused, Dr. Vidhya Mehta. It was the co-accused, who spotted the prosecutrix outside her clinic and talked to her. The co-accused told her that she would be sent to a place where she could get to study as well as earn some money. The prosecutrix stayed with the co-accused for 4-5 days where after she was sent to the house of the present petitioner. The prosecutrix stayed at the house of the petitioner for about 20-22 days and thereafter the petitioner went to her

mother's house along with the prosecutrix. It has come in the statement of the prosecutrix that as this house happened to be in the same locality as her own house, she left and reached her house.

19. From above, it is apparent that the petitioner neither 'took' nor 'enticed' the prosecutrix out of the keeping of her lawful guardian in as much as the petitioner did not induce or persuade the prosecutrix to go along with her. The prosecutrix had initially left her home voluntarily and then stayed with the co-accused for 4-5 days. The prosecutrix came in touch with the petitioner at the instance of the co-accused. There is no mentioning of any soliciting, persuasion or use of force at the instance of the petitioner. As such, I have no hesitation to hold that in the present case, the basic ingredients of the offence punishable under Section 363 IPC are not made out.

20. Coming to the next contention of the learned counsel for the petitioner that from a bare reading of the charge sheet, the ingredients of the offence punishable under Section 368 IPC are also not made out, I deem it appropriate to reproduce Section 368 IPC as under:

“368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.—Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement”

21. A bare reading of the Section would show that before a person is wrongfully concealed or confined by the accused, it is essential that the accused must have the 'knowledge' that such a person had been

kidnapped. In order to constitute an offence under Section 368 IPC, it was obligatory on the part of the prosecution to establish the following facts:

“(i) the person in question had been kidnapped.

(ii) accused knew that such person had been kidnapped.

(iii) accused having such knowledge, wrongfully concealed or confined the person concerned.”

[Refer: Brahm Dutt (supra)]

22. Again, in Puran Singh & Ors. v. State of Bihar reported as **JT 2001 (8) SC 647**, while acquitting the accused for the offence punishable under section 368 IPC, the Supreme Court held as under:

“4. The sine qua non for attracting provisions of Section 368, Indian Penal Code is that a person who either wrongfully conceals or confines the victim, must have the knowledge that, the victim had been kidnapped or had been abducted and on proof of that, the accused can be punished in the same manner as if he had kidnapped or abducted the victim with the same intention or knowledge, or for the same purpose as that with which he concealed or detained the victim..”

23. To the similar extent are the decisions of the Supreme Court in Smt. Saroj Kumari v. The State of U.P. reported as **(1973) 3 SCC 669** and Om Prakash vs. State of Haryana reported as **(2011) 14 SCC 309**.

24. A perusal of the material placed on record reveals that none of the statements of the prosecutrix recorded during investigation indicate that she was induced by the petitioner to go with her or to stay in her home. There are no allegations that the prosecutrix was either illegally confined or concealed or that the petitioner had knowledge of the fact that the prosecutrix was a kidnapped person. Further, the replies filed by the

complainant and the prosecutrix, in support of the present petition, also completely exonerate the petitioner.

25. On the basis of the above discussion, this court is of the view that none of the charges framed against the present petitioner are sustainable. The same are quashed.

26. Resultantly, the present petition is allowed.

27. A copy of this judgment be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 17, 2020
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