

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 552 of 2007

Nikhil Mondal @ Sarkar

-Vs-

The State of West Bengal

For the appellant	: Mr. Prabir Majumder
For the State	: Mr. Saswata Gopal Mukherjee Mr. N.P. Agarwal Mr. Pratick Bose
Heard on	: 24.01.2023, 08.02.2023
Judgment on	: 26.04.2023

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of conviction dated 31.07.2007 passed by Learned Additional Sessions Judge Fast Track Court '1', Krishnanagar, Nadia in Sessions Trial No. 'V/October/2005' arising out of Sessions Case No. 33 (4) 2005 convicting the appellant under Section 363 of the Indian Penal Code sentencing him to rigorous imprisonment for 3 years and to pay a fine of Rs.2000/-, in default to suffer further rigorous imprisonment for 6 months.

2. The prosecution case originated from a complaint dated 18.11.2004 filed by Rabindranath Raha, the father of victim alleging that his daughter Annapurna Raha alias Nandita Raha aged 14 Years 10 Months, her date of birth being 16.12.1990, was missing since the night of 11.11.2004. The complainant returned from his workplace immediately and searched for his daughter. On 15.11.2004 his daughter was traced out to be present in the house of the appellant who refused to part with his daughter despite request. The appellant had forcefully eloped with his minor daughter in order to marry her. Earlier, the brother of the complainant had lodged a diary at the Police Station of Nakashipara on 11.11.2004. The complainant urged to rescue his daughter and to punish the perpetrator.
3. Based on the aforesaid complaint, Nakashipara P.S. Case No. 272 of 2004 dated 17.11.2004 was instituted under Section 363/366 of the Indian Penal Code. Investigation ensued and concluded with submission of charge-sheet. Charges were framed, to which the appellant pleaded no guilty and claimed to be tried.
4. The prosecution in order to establish its case cited 11 witnesses and exhibited certain documents.
5. The Learned Advocate for the appellant submitted the delay to lodge the complaint was not explained. The victim i.e., PW-3 did not incriminate the appellant and stated to have left her house at her own volition as the father of the victim did not agree to her marriage with the appellant belonging to a different caste. The evidence of PW-5 and PW-6 was

contradictory to each other. The Learned Trial Judge should have released the appellant on bond on provision of good conduct. The prosecution failed to establish the mens rea on the part of the appellant and accordingly the appeal shall be allowed.

6. The Learned Advocate for the victim girl submitted that the victim has married the appellant and are parents to a child. The victim has been released from the shelter whom and resides with the appellant as a married couple.
7. The Learned Advocate for the State submits that the consent of the minor is immaterial in an offence under Section 363/366 of the Indian Penal Code. The prosecution proved the age of the minor at the time of the commission of offence to be 15 years of age (approximately) and the Trial Court has rightly convicted the appellant.
8. Assessing the evidence of the prosecution witnesses it transpired PW-1 deposed the potency of the appellant with regard to his sexual functionality. PW-2 the Medical Officer attached to District Hospital, Krishnanagar, Nadia conducted ossification test of the victim and concluded her age to be 15 years with certain variation as depicted in the medical report prepared and signed by him marked as 'Exhibit-2'. He further identified the X-Ray plate concerning thereto marked 'MAT Exhibit (i)' collectively. PW-3 the victim girl deposed to have known the appellant being involved with him romantically and got married to him in the year 2004 on the date of Kalipuja. She identified her signatures recorded under Section 164 of Code of Criminal Procedure marked

'Exhibit-3, Exhibit-3/1 and Exhibit-3/2'. She further identified her signature on the ossification test report marked as 'Exhibit-4'. The victim stated to be more than 18 years of age at the relevant time and that *"Accused did not do with me anything with promise to marry me."* PW-3 had come to the Court from the district shelter home on the date of the testimony. During her cross-examination PW-3 stated to have discontinued her studies after 'Class 7' since her father settled her marriage elsewhere and was opposed to her relationship with the appellant, so she left the house and married the appellant against the consent of her parents. She further stated to have been a minor below 18 years of age. She had given birth to a child and both the victim girl and the appellant considered each other to be a married couple. PW-4 filled up a formal FIR which was signed by him marked as 'Exhibit-1'. PW-5 the mother of the victim narrated the incident of the victim girl to have gone missing and further rescued from the house of the appellant corroborating the complaint case as well as the deposition of PW-6 the father of the victim. PW-6 the father of victim identified the written complaint filed by him scribed by one Haradhan Raha which was signed by him marked as 'Exhibit-2/1'. PW-6 stated the date of birth of the victim to be 16.12.1990. PW-7 scribed the written complaint with his signature on it marked as 'Exhibit-2/2'. PW-8, PW-9 and PW-10 deposed their ignorance about the incident of the victim girl who went missing. PW-11 the Investigating Officer on completion of investigation filed

charge sheet on 31.12.2004 under Section 363/366 of the Indian Penal Code.

9. Primarily this is an exemplary case of conflict and opposition between the parents and the victim girl who on her own accord left the lawful guardianship of the parents without being enticed or allured by the appellant for wrongful gain. It is a fact that the victim was a minor at the time of the incident. The provisions under Section 363/366 of the Indian Penal Code states as follows:-

- a. **“Section 363. Punishment for kidnapping.**—Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
- b. **Section 366. Kidnapping, abducting or inducing woman to compel her marriage, etc.**—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in the Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.”

10. In Section 363 I.P.C. the word used is ‘kidnaps’ and the word kidnapping is defined under Section 359 I.P.C. and kidnapping from lawful guardianship is defined under Section 361 I.P.C.

11. The case of **S. Varadarajan v. State of Madras**¹ the Hon'ble Supreme Court has acquitted the appellant, when the girl was college going student and she was on verge of attaining majority, and the appeal was allowed. The observations made in para-7, 9, 13, 19 and 20 of the said case are quoted below:-

- a. *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:*
 - i. *"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."*
- b. *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 L2Sup./64—3 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*

¹ 1965 AIR (SC) 942

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 blandishments 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 good and 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(1) 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 Sather's case(I) 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:

- i. "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."
- c. 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.

It must, however, be bone 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. It would, however, be sufficient if the prosecution establishes that through 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”.

12. In **Mafat Lal & Anr. vs The State of Rajasthan**² the Hon’ble Supreme Court observed as follows :-

“Kidnapping would necessarily involve enticing or taking away any minor under eighteen years of age if a female for the offence under Section 363 Indian Penal Code. In the present case, the abductees had clearly stated that she was neither taken away nor induced and that she had left her home of her own free will. Section 366 Indian Penal Code would come into play only where there is a forceful compulsion of marriage, by kidnapping or by inducing a woman. This offence also would not be made out once the appellant no. 2 the abductees has clearly stated that she was in love with the appellant no. 1 and that she left her home on account of the disturbing circumstances at her parental home as the said relationship was not acceptable to her father and that she married appellant no. 1 on her own free will without any influence being exercised by appellant no. 1.”

13. PW-3, the victim did not deviate from her statements recorded under Section 164 Code of Criminal Procedure and asserted the same narrative before the Court during her examination. PW-2 left the lawful guardianship of her father at her own free will without being allured, induced or deceptively persuaded by the appellant on ground of false promise or any kind of compulsion or threat. Therefore the element of ‘taking’ or ‘enticing’ the victim to commit the offences as alleged is absent. The victim in dissent and at variance with her father’s disapproval of the appellant to be her prospective husband on retaliation, voluntarily left his guardianship, as a protest against getting married to a

² 2022 Live Law (SC) 362

person of her father's choice which does not indict the appellant with criminality.

14. Accordingly the Appeal is allowed.
15. Under the facts and circumstances of the case in absence of proof of commission of the offence by the appellant beyond reasonable doubt, the prosecution has failed to prove its case and accordingly the appeal is allowed.
16. CRA 552 of 2007 is disposed of accordingly.
17. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
18. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)