

CASE NO.:
Appeal (crl.) 48 of 1998

PETITIONER:
Moniram Hazarika

RESPONDENT:
State of Assam

DATE OF JUDGMENT: 13/04/2004

BENCH:
N.Santosh Hegde & B.P. Singh.

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J.

The appellant before us was charged of an offence punishable under Section 366 IPC before the Addl. Sessions Judge, Jorhat who after trial sentenced him for an offence punishable under the said section to undergo RI for three years and a fine of Rs.300/- in default in payment of fine to undergo further RI for three months. An appeal filed against the said judgment and conviction before the High Court of Gauhati came to be dismissed by the impugned judgment and the appellant is now before us in this appeal.

Brief facts necessary for the disposal of this appeal are as follows:-

On 30.3.1990 at about 8.30 p.m., PW-1 Paresh Saikia lodged a complaint in Bebarapara police out post alleging that his younger sister Bibi Saikia who was a minor had been kidnapped by the appellant herein who was also a resident of the same village. On the basis of the said complaint a case was registered and investigation was initiated. In the course of the investigation, the I.O. recorded the statement of as many as six witnesses and on completion of the investigation a chargesheet under Section 366 IPC was filed before the trial court. In the complaint filed by PW-1, as also in his evidence before the court, PW-1 stated that his sister (PW-2) was a student of VIII standard at that time and was a minor and at about 6.30 p.m. on 30.3.1990 he came to know from his brother that his sister was missing and he was also informed that she was seen in the company of the appellant in the locality. So suspecting the appellant of having kidnapped his sister, he went to the house of the appellant where he was not allowed to enter the house by the appellant and his brother. However, he noticed there that arrangements were made for performing a marriage ceremony. He also mentioned in his evidence as also in his complaint that his sister was a minor and in support of his case he had produced her date of birth as entered in school certificates. The victim was subjected to medical examination and PW-5 the doctor who examined the victim had opined after performing the necessary tests that she was below the age of 18 years. While the evidence of PW-4 the father of the victim as supported by the records of the school also showed that the girl was a minor on the date of the incident. Victim (PW-2) herself has stated in her evidence that on the relevant date when she had gone out to answer the call of nature the appellant by force took her to his house where his mother and sister-in-law were present who made her change her dress and put vermilion on her forehead and prepared her for the marriage with the appellant.

Thus on the basis of the above evidence the courts below came to the conclusion that on the date of the incident PW-2 was

a minor and the act of the appellant in taking her with the object of getting her married to him amounted to an offence punishable under Section 366 IPC and hence found him guilty and sentenced him as stated above.

Shri Vijay Kumar the learned counsel appearing for the appellant did not seriously controvert before us the fact that the victim was a minor on the date of the incident. However, his case was that both the appellant and victim(PW-2) were in love for number of years prior to the date of the incident and she voluntarily and willingly went with him, therefore even though she is a minor, since there was no enticement or taking away as contemplated under Section 361 of the Indian Penal Code appellant cannot be held guilty of kidnapping PW-2. It is his contention that even a minor has every right to abandon the house of the guardian and go to any place of his or her choice and there is no legal obligation on the person to whose place such minor goes to restore back the minor to the custody of the legal guardian. He contended from the evidence on record, it is clear that PW-2 accompanied him voluntarily to his house with a desire to marry him and therefore conviction under Section 366 IPC was not maintainable. The learned counsel apart from relying on Sections 361 and 366 of the Code also relied on a judgment of this Court in the case of S. Varadarajan Vs. State of Madras (AIR 1965 SC 942). He submitted the law laid down therein and the facts of the said case are fully applicable to the facts of the present case. Therefore, the conviction recorded by the two courts below against the appellant is unsustainable in law. He also placed reliance on two other judgments one of Himachal Pradesh High Court in Paramjit Singh Vs. State of Himachal Pradesh (1987 Crl. Law Journal 1266) to support his argument that when a minor accompanies a person voluntarily, the said person cannot be held guilty of kidnapping. He further relied on a judgment of Calcutta High Court in Sachindra Nath Mazumder Vs. Bistupada Das & Ors. (1978 Crl. Law Journal 1494) to support his contention that when a minor child abandons his or her guardian, there is no obligation on the person to whose custody such minor chooses to go, to return such minor to the original guardian. He placed emphasis on the words "whoever takes away or entices" found in Section 361 of the Code, to argue that unless any one of these conditions is established by the prosecution, there can be no question of accusing a person of kidnapping a minor. It was the further submission that if it is not an offence of kidnapping as contemplated under Section 361 IPC, the further question of convicting such person under Section 366 of the Code does not arise.

Keeping in mind the above requirement of law, we will examine the facts of this case to find out whether two courts below were justified in convicting the appellant. It is clear from the finding of facts of two courts below which is based on material available on record, that PW-2 was a minor at that time when she was taken away from her lawful guardian. As a matter of fact the said finding is not seriously challenged. The case of the appellant is that PW-2 voluntarily accompanied him with a view to marry him and there was no enticement or taking away of PW-2 as contemplated under Section 361 of IPC. We think the material on record shows otherwise. It has come on record that the appellant was known to the family of PW-2 and was on visiting terms. It is his own case that during such visits he developed intimacy with PW-2. It is the case of the defence that even on the day of incident when the appellant was standing outside the house, PW-2 came to him and requested him to take her away. But there is material on record to show that the appellant promised to marry her and it is based on such promise she went away with the appellant and there is also material on

record to show that on that day preparation for marriage was already made in the house of the appellant. Thus two things are clear from this fact; one, that there was a promise of marriage and secondly, based on the said promise PW-2 went with the appellant. Of course, PW-2 had come out with the case that she had come out of the house to answer the call of nature when she was forcibly taken by the appellant which part of the prosecution case is not accepted. But the material on record, as stated above, shows that there was a promise of marriage made to PW-2 which amounts to enticement of a minor because of which she had left the house of her lawful guardian. In this background, in our opinion, the courts below were justified in coming to the conclusion that the appellant had committed the offence punishable under Section 366 of IPC.

As stated above, the learned counsel for the appellant placed strong reliance on the judgment of this Court in Varadarajan's case (supra). The facts of that case show that the minor in that case left the house of the legal guardian as per her own choice and not on the basis of any enticement or persuasion on the part of the accused. This is clear from the following observations of this Court in that case :

"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 blandishments or anything like that."

It is on the basis of the said finding that the minor in that case walked out of the house of her guardian without any inducement from the accused, this Court came to the conclusion that the accused in that case was not guilty of the offence. It is also worthwhile to notice what this Court said about the act of accused in such cases which amounts to enticement which is found in paragraph 10 of the said judgment and which reads thus:-

"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." (emphasis supplied)

It is clear from the above observations of this Court that if the accused played some role at any stage by which he either

solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping.

In the instant case, we have noticed from the evidence that appellant who was a regular visitor to the house of PW-1, took undue advantage of his friendship and persuaded the minor to abandon the guardianship with a promise of marriage which on facts of this case is sufficient to uphold the judgments of the courts below.

We having considered two other judgments cited before us by the learned counsel for the appellant, are satisfied that it is not necessary for us to deal with the same elaborately since on facts of this case it is established that the appellant had taken the minor by enticing her and hence had committed the offence of kidnapping which kidnapping was for the purpose of marrying the said minor. In our opinion, courts below were justified in convicting the appellant for an offence punishable under Section 366 IPC.

For the reasons stated above this appeal fails and is dismissed.