

A

PRAKASH

v.

STATE OF HARYANA

DECEMBER 2, 2003

B

[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

C

Penal Code, 1860—Sections 361, 363, 366, 376, 511—Kidnapping and attempted rape of minor child—Trial Court and High Court convicting the appellant under section 361—Plea of consent of child in going along with accused—Validity of—Held, minor children protected by lawful guardians under section 361—Hence, the consent of a minor is immaterial—On evidence, the conviction of appellant upheld.

D

The appellant and another person were charged for offences of kidnapping and attempted rape of a 5-1/2 year old victim under sections 363, 366 and 376 read with section 511 IPC. The incident was noticed by her grandmother - PW 5. The trial court convicted the appellant and awarded custodial sentence of 3 years for the first two offences and 4 years for the last one. Another person was acquitted by the trial court. In appeal by the appellant, the High Court confirmed the conviction for offences under sections 363 and 366 IPC and set aside the conviction under section 376 read with section 511 IPC.

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In appeal, the appellant contended that the appellant was falsely implicated in the offence since there were pending litigations between the appellant's family and the family of the father of the prosecutrix; that PW 5 was hard of hearing, and could not have heard the cries of the victim which no one else has heard; and that the ingredients necessary for conviction under sections 363 and 366 IPC have not been made out and has not been proved beyond reasonable doubt.

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The respondent-State contended that the evidence of PW 5 is cogent and trustworthy; and that the appellant was convicted based on clear evidence.

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Dismissing the appeal, the Court

HELD : 1.1. It is highly improbable that for making false implication, a child of 5-1/2 years would be used as a pawn unmindful of the disrepute she would have to suffer in public with a stigma for the rest of her life. Evidence of PW 5 has essence of credibility and truthfulness. She has explained as to how she chanced upon seeing the victim, after hearing her cries. Merely because nobody else has heard it or came forward hearing it cannot be a ground to discard her evidence. [440-B-C-D]

1.2. The object of section 361 is to protect minor children from being seduced for improper purposes and 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 the section, out of the keeping of lawful guardian without the consent of such guardian. 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 the 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. It is not 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. [441-A-B-C-D-E]

State of Haryana v. Raja Ram, [1973] 1 SCC 544 and *Thakkorlal D. Vadgdama v. The State of Gujarat*, AIR (1973) SC 2313, relied on.

Reg v. Job Timmins [169 English Reports 1260]; *Reg. v. Robb*, 176 English Reports 466 and *Reg. v. Manketelow*, 6 Cox Criminal Cases 143, referred to.

1.3. The trial court and the High Court were justified in convicting the appellant on the basis of the evidence on record. The sentence imposed appears to be liberal when loathsome nature of the offence is considered. [443-B-C]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 390 of 1997.

From the Judgment and Order dated 30.4.96 of the Punjab and Haryana High Court in CrI. A. No. 164-SB of 1987.

B J.P. Dhanda and Vineet Dhanda for the Appellant.

Vinay Kumar Garg for the Respondent.

C The Judgment of the Court was delivered by

D **ARIJIT PASAYAT, J.** Perversity and degradation of mind sometimes reach rock bottom of humanness when tiny girl become victims of sexual assault and libidinous behaviour. One wonders to what low level of depravation, perpetrators of such crimes can condescend. The case at hand is one such shocking case where the victim was about five years of age. We do not propose to indicate the name of the victim, who suffered the traumatic experiences on 24.2.1986. The accused-appellant and another person who faced trial with him allegedly committed offences of kidnapping and attempted rape punishable under Sections 363, 366 and 376 read with Section 511 of the Indian Penal Code, 1860 (for short the 'IPC'). The victim was called and taken away by the accused-appellant who was known to her, for fulfilling his lust and her absence was noticed by her octogenarian grandmother (PW-5). She went out in search of her. After going to a short distance, she could hear the cries of the victim and rushed to the house of the accused from where her sound was coming. She found the victim naked and accused-appellant lying on top of her while acquitted accused was standing nearby. The father of the victim (PW-6) lodged the report on learning about the incident from the victim and PW-5. Initially there was an attempt to settle the matter which was not accepted by the father of the victim. Information was lodged at the police station. The girl was medically examined and charge sheet was placed after completion of investigation.

H The accused persons pleaded innocence and false implication on account of litigations. The trial Court found the accusations established so

far as commission of charged offences under Sections 363 and 366 IPC are concerned and awarded custodial sentence of 3 years for the first two offences, and 4 years for the last one. However, finding that the other accused was not properly described or identified in the first information report he was entitled to the benefit of doubt. For holding the accused guilty reliance was placed on the evidence of eyewitness (PW-5). The accused-appellant preferred an appeal before the High Court of Punjab and Haryana. By the impugned judgment, the High Court upheld the conviction so far as offences relatable to Sections 363 and 366 IPC are concerned, but set aside the conviction recorded under Section 376 read with Section 511 IPC.

In support of the appeal, learned counsel for the appellant submitted that the prosecution has tried to improve its case at different stages. Nowhere at the investigation stage, it was stated that the accused took the victim by putting hand on her mouth; but in Court such an improvement was made. With reference to the conviction under Sections 363 and 366, it is submitted that the ingredients necessary for constituting the said offences have not been made out and the case has not been proved beyond reasonable doubt. The behaviour of PW-5 is unnatural. It is quite improbable that a grandmother finding her granddaughter being sexually assaulted by any person would silently take the victim away without even giving a tongue-lashing to the accused. The Courts below have lost sight of the fact that there were litigations pending between accused's family and the family of the father of the victim. Since the co-accused has been acquitted by the trial court said factor should have weighed with the Courts below. PW-5, the so-called eyewitness admittedly had defective eyesight and was hard of hearing. It is hard to believe that the victim was crying in such a loud voice that PW-5 who is hard of hearing could hear it, but none others.

In response, learned counsel for the respondent-State submitted that PW-5's evidence is cogent and trustworthy. The victim was playing outside at 1.30 p.m. Noticing her absence she went out to search for her. This is a natural behaviour. The child was recovered from the house of the accused in naked condition. Whether the child was taken by putting her hand on her mouth or not has no relevance. Gravamen of the offence

A is taking away a minor child from lawful custody of her guardians. There is clear evidence in that regard, and the convictions deserve to be upheld.

Both the trial Court and the High Court have analysed in great detail the evidence of PW-5, the grandmother. Though it was submitted that there were differences between accused and PW-6 because of some dispute, it is highly improbable that for making false implication a child of 5½ years would be used as a pawn unmindful of the disrepute she would have to suffer in public with a stigma for the rest of her life. Evidence of PW-5 has essence of credibility and truthfulness. She has explained us as to how she chanced upon seeing the victim, after hearing her cries. Merely because nobody else has heard it or came forward hearing it as contended by the accused-appellant, same cannot be a ground to discard her evidence. The Courts below have rightly acted upon her evidence.

D Next comes the question whether ingredients of Sections 363 and 366 IPC are made out.

Section 361, I.P.C. reads :

E “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.

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

G *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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

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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 Section 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.

In *State of Haryana v. Raja Ram*, [1973] 1 SCC 544 English decisions were noticed by this Court for the purpose of illustrating the scope of the protection of minor children and of the sacred right of their parents and guardians to the possession of minor children under the English Law. The decisions noticed were *Reg v. Job Timmins*, 169 English Reports 1260; *Reg v. Handley and Another*, 175 English Reports 890 and *Reg. v. Robb*, 176 English Reports 466. In the first case Job Timmins was convicted of an indictment framed upon 9 Geo. IV, Clause 31, Section 20 for taking an unmarried girl under sixteen out of the possession of her father, and against his will. It was observed by Erle, C.J. that the statute was passed for the protection of parents and for preventing unmarried girls from being taken out of possession of their parents against their will. Limiting the judgment to the facts of that case it was said that no deception or forwardness on the part of the girl in such cases could prevent the person taking her away from being guilty of the offence in question. The second decision is authority for the view that in order to constitute an offence under 9 Geo. IV, Clause 31, Section 20 it is sufficient if by moral force a willingness

- A on the part of the girl to go away with the prisoner is created; but if her going away with the prisoner is entirely voluntary, no offence is committed. The last case was of a conviction under the Statute (24 & 25 Vict. Clause 100, Section 55). There inducement by previous promise or persuasion was held sufficient to bring the case within the mischief of the
- B State. In the English Statutes the expression used was "take out of the possession" and not "out of the keeping" as used in Section 361, IPC. But that expression was construed in the English decisions not to require actual manual possession. It was enough if at the time of the taking the girl continued under the care, charge and control of the parent : see *Reg. v. Manketelov*, 6 Cox Criminal Cases 143. These decisions were held to confirm the view that Section 361 is designed also to protect the sacred right of the guardians with respect to their minor wards.

- D The position was again reiterated in *Thakorlal D. Vadgdama v. The State of Gujarat*, AIR (1973) SC 2313 wherein it was, *inter alia*, observed as follows:

- E "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.
- F 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
- G 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
- H leaves her parental home completely uninfluenced by any prom-

ise, 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.” A

When the evidence on record is tested in the background of aforesaid legal principles, the inevitable conclusion is that the trial Court and the High Court were justified in convicting the accused. The sentence as imposed also appears to be liberal when loathsome nature of the offence is considered. B

The appeal is without any merit and is dismissed. C

B.S.

Appeal dismissed.