ANVERSINH @ KIRANSINH FATESINH ZALA

v.

STATE OF GUJARAT

(Criminal Appeal No. 1919 of 2010)

JANUARY 12, 2021

[N. V. RAMANA, CJI, S. ABDUL NAZEER AND SURYA KANT, JJ.]

Penal Code, 1860: ss.361 and 366 – Kidnapping – Victim-minor girl aged 16 years recovered from custody of appellant – Appellant admited to having established sexual intercourse and of having an intention to marry the victim – Conviction under ss.361 and 366 – Held: For establishing offence of kidnapping, there should be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian – Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl – In the instant case, besides the fact that the victim was recovered from custody of appellant, he also admitted to having established sexual intercourse and of having an intention to marry the prosecutrix – The testimonies of witnesses made out a clear case of enticement – The evidence further unequivocally suggested that the appellant induced the prosecutrix to reach at a designated place to accompany him – Appellant failed to propound how the elements of kidnapping were not made out – His core contention that in view of consensual affair between them and the prosecutrix joined his company voluntarily cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age – A bare perusal of the relevant legal provisions, show that consent of the minor is immaterial for purposes of s.361 – A minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping – Similarly, s.366 postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage

of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted – It was not the appellant's case that he had no active role to play in the occurrence – Rather, the eye-witnesses testified to the contrary which illustrated how appellant had drawn the prosecutrix out of the custody of her parents – There is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuities and maturity to take care of herself – In addition to being young, she was not much educated – Courts below were right in observing that the consent of the minor would be no defence to a charge of kidnapping – No fault can thus be found with the conviction of the appellant under ss.361 and 366 of IPC.

Sentence/Sentencing: There cannot be any mechanical reduction of sentence unless all relevant factors have been weighed and whereupon the Court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence – It would thus depend upon the facts and circumstances of each case whether a superior Court should interfere with, and resultantly enhance or reduce the sentence – In the instant case, it is apparent that no force was used in the act of kidnapping – There was no pre-planning, use of any weapon or any vulgar motive – Although not a determinative factor, the young age of the accused at the time of the incident cannot be overlooked – He was no older than about 18 or 19 years at the time of the offence and admittedly it was a case of a love affair – His actions at such a young and impressionable age, therefore, ought to be treated with hope for reform, and not punitively – Both the victim and the appellant are now in their forties; are productive members of society and have settled down in life with their respective spouses and families – It, therefore, might not further the ends of justice to relegate the appellant back to jail at this stage –Given these multiple unique circumstances, the sentence of five years' rigorous imprisonment awarded by the courts below, is disproportionate to the facts of the this case – The concerns of both the society and the victim can be respected, and the twin principles of deterrence and correction would be served by reducing the appellant's sentence to the period of incarceration already undergone by him.

Partly allowing the appeal, the Court A

HELD : 1. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can B **also be through subtle actions like winning over the affection of a minor girl. In the instant case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established sexual intercourse and of having an intention to marry her. The** C **testimonies of numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him. [Paras 12, 13][259-D-H; 260-A]**

D

King Emperor v. Gokaran **AIR 1921 Oudh 226 ;** *Emperor v. Abdur ahman* **AIR 1916 All 210 – approved.**

1.2 The appellant failed to propound how the elements of kidnapping have not been made out. His core contention appears E **to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age. A bare perusal of the relevant legal provisions, show that consent of the minor is immaterial for purposes of Section 361 of** F **IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent. Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation** G **with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence**

H

to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted. [Paras 14, 15, 16][260-B-E]

S.Varadarajan v. State of Madras **[1965] 1 SCR 243 – distinguished.**

Satish Kumar Jayanti Lal Dabgar v. State of Gujarat **(2015) 7 SCC 359 : [2015] 2 SCR 751 – referred to.**

2. It has not been the appellant's case that he had no active role to play in the occurrence. Rather the eye-witnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuities and maturity to take care of herself. In addition to being young, the prosecutrix was not much educated. Her support of the prosecution version and blanket denial of any voluntariness on her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully. It is apparent that instead of being a valid defence, the appellant's vociferous arguments are merely a justification which although evokes sympathy, but can't change the law. The Courts below were seemingly right in observing that the consent of the minor would be no defence to a charge of kidnapping. No fault can thus be found with the conviction of the appellant under Section 366 of IPC. [Paras 18, 19][261-A-D]

State of Madhya Pradesh v. Surendra Singh **(2015) 1 SCC 222 : [2014] 13 SCR 554 – relied on.**

3.1 There cannot be any mechanical reduction of sentence unless all relevant factors have been weighed and whereupon the Court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence. It is apparent that no force had been used in the act of kidnapping. There was no pre-planning, use of any weapon or any vulgar

motive. Although the offence as defined under Section 359 and 361 of IPC has no ingredient necessitating any use of force or establishing any oblique intentions, nevertheless the mildness of the crime ought to be taken into account at the stage of sentencing. *Second,* although not a determinative factor, the young age of the accused at the time of the incident cannot be overlooked. The appellant was at the precipice of majority himself. He was no older than about eighteen or nineteen years at the time of the offence and admittedly it was a case of a love affair. His actions at such a young and impressionable age, therefore, ought to be treated with hope for reform, and not punitively. *Third,* owing to a protracted trial and delays at different levels, more than twenty-two years have passed since the incident. Both the victim and the appellant are now in their forties; are productive members of society and have settled down in life with their respective spouses and families. It, therefore, might not further the ends of justice to relegate the appellant back to jail at this stage. *Fourth,* the present crime was one of passion. No other charges, antecedents, or crimes either before 1998 or since then, have been brought to notice. The appellant has been rehabilitated and is now leading a normal life. The possibility of recidivism is therefore extremely low. [Paras 21-25][262-C-; 262-E-H; 263-A-B]

State of Haryana v. Raja Ram **(1973) 1 SCC 544 : [1973] 2 SCR 728 ;** *Thakorlal D. Vadgama vs. State of Gujarat* **(1973) 2 SCC 413 : [1974] 1 SCR 178 – referred to.**

3.2 There is no grotesque misuse of power, wealth, status or age which needs to be guarded against. Both the prosecutrix and the appellant belonged to a similar social class and lived in geographical and cultural vicinity to each other. Far from there being an imbalance of power; if not for the age of the prosecutrix, the two could have been happily married and cohabiting today. Indeed, the present instance is an offence: *mala prohibita*, and not *mala in se*. Accordingly, a more equitable sentence ought to be awarded. Given these multiple unique circumstances, the sentence of five years' rigorous imprisonment awarded by the Courts below, is disproportionate to the facts of the this case.

A **The concerns of both the society and the victim can be respected, and the twin principles of deterrence and correction would be served by reducing the appellant's sentence to the period of incarceration already undergone by him. The prosecution has established the appellant's guilt beyond reasonable doubt and**
B **that no case of acquittal under Sections 363 and 366 of the IPC is made out. However, the quantum of sentence is reduced to the period of imprisonment already undergone. [Paras 26-28] [263-B-F]**

Case Law Reference

C **[1965] 1 SCR 243**	**distinguished**	**Para 9**
[1974] 1 SCR 178	**referred to**	**Para 12**
[2015] 2 SCR 751	**referred to**	**Para 15**
[2014] 13 SCR 554	**relied on**	**Para 20**
D **[1973] 2 SCR 728**	**referred to**	**Para 26**
[1974] 1 SCR 178	**referred to**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1919 of 2010.

E From the Judgment and Order dated 28.07.2009 of the High Court of Gujarat at Ahmedabad in Special Criminal Appeal No. 142 of 2003.

Ms. Manisha T. Karia, Ms. Nidhi Nagpal, Adarsh Kumar, Sukhda Kalra, Naresh Kumar, Aniruddha P. Mayee, Advs. for the appearing parties.

F The Judgment of the Court was delivered by

SURYA KANT, J.

1. This criminal appeal has been heard through video conferencing. The appellant-Anversinh impugns the judgment pronounced by the High
G Court of Gujarat dated 28.07.2009 by which his conviction under Section 376 of the Indian Penal Code, 1860 ("IPC") was overturned, but the charge of kidnapping under Sections 363 and 366 of IPC was upheld and consequential sentence of rigorous imprisonment of five years was maintained.

H

FACTS

2. The complainant - Kiransinh Jalamsinh (PW-1) when came back from work on the night of 14.05.1998, he was informed by his wife that their eldest sixteen-year-old daughter (PW-3; hereinafter, "prosecutrix") had not returned home. Educated till Class VII, the prosecutrix worked as a maid; sweeping and mopping a few hours every noon and evening. The complainant-father made enquiries at her workplace where he learnt from a watchman that his daughter hadn't come for her second shift and that she was last seen coming out of the vacant Bungalow No. 4 of the Ramjani Society with the appellant. It was learnt upon enquiry that the appellant had left for his home in Surpur with the prosecutrix. The complainant rushed to the appellant's home with his uncle and brother-in-law but could not trace the prosecutrix's whereabouts. After returning to Ahmedabad, a police complaint was registered on 16.05.1998. The police were able to locate both the appellant and the prosecutrix to a farm near Modasa, from where they were brought back to Ahmedabad on 21.05.1998. After medical examination and seizure of her clothes, the prosecutrix was reunited with her family.

3. The prosecution examined eight witnesses and adduced twelve documents in order to prove their case that the minor prosecutrix was forcibly taken by the appellant with the intention of marriage and later subjected to sexual intercourse against her will. The prosecutrix's father (PW-1) corroborated the version of events noted above and testified that his daughter who was aged around 15 years had been taken from his custody without his consent. He additionally deposed that he was informed by the prosecutrix's friend, Rekha, that she had communicated a message from a boy to the prosecutrix asking her to come to 'Sardarnagar'. PW-2, an assistant teacher at the prosecutrix's primary school, brought the school records and testified that her date of birth at the time of admission was recorded as 08.02.1982. The prosecutrix (PW-3) identified the appellant and deposed that she had been caught by him on her way to work and was forcibly taken in an auto-rickshaw to a nearby bus stand from where she was transported by bus to the appellant's village. She further claimed to have repeatedly been raped and pressurised into performing marriage with the appellant. The prosecutrix nevertheless admitted during cross-examination to being in love with the appellant, having had consensual sexual intercourse with him on a prior date and also having met him outside her home on previous

A occasions. It further emerged that during her alleged kidnapping, she was seated with other passengers on the back seat of the autorickshaw whereas the appellant was on the front seat. She admitted to spending a week at the appellant's village where both went to work together and were living akin to husband and wife. PW-4 and PW-6 who were *panch* witnesses to the recording of the FIR, physical condition of the prosecutrix and seizure of the prosecutrix's clothes, both turned hostile and discarded the prosecution's version. PW-5, being a Doctor at the Civil Hospital, proved the medical record and injury certificates showing that the prosecutrix had indeed been subjected to sexual intercourse. Finally, PW-7, was the police officer who registered the FIR and PW-8 deposed being the Investigating Officer of the case.

4. It is pertinent to mention that the Investigating Officer (PW-8) admitted in his cross-examination that there was no reference to Rekha's statement in the FIR; that the prosecutrix had not stated that the appellant caught her on way to work and that she had been forcefully abducted, or that her modesty was outraged. Instead, PW-8 disclosed that the prosecutrix in her statement under Section 161 of the Code of Criminal Procedure, 1973 ("CrPC") claimed to know the appellant for a month prior to the occurrence, and of having a regular physical relationship in a damaged bungalow near her place of work. After they were caught by the guard while coming out of such bungalow, they had run away to Surpur where they started labour work on the farm of one Bhikabhai to earn a livelihood and co-habit as husband and wife. Besides these oral depositions, the prosecution also produced documents in the form of birth certificate, medical papers, FSL report, police and other records.

5. At the stage of recording statement under Section 313 of the CrPC on 01.11.2002, the appellant stated his age as 23 years and claimed to be innocent. The legal aid counsel, engaged from the defence side, controverted the prosecution's imputations and resultant conclusions. A parallel version was projected wherein both appellant and the prosecutrix were allegedly in love and had consensual physical relations since long before the date of the incident. It was claimed that the prosecutrix had run away solely and completely on her own accord; and had wished to marry the appellant without any enticement on his side. A catena of case laws was cited to show that neither charges of kidnapping nor rape were made out in such cases of love affairs.

6. The learned Additional Sessions Judge vide his order dated 16.12.2002 held that the testimony of the prosecutrix unequivocally established that she had been raped three to four times by the appellant, thus meriting his conviction under Section 376 of IPC. It was further observed that although there was a love affair but considering the fact that the prosecutrix was 16 years, 3 months and 6 days old at the time of occurrence and was thus minor, her consent was wholly irrelevant for the charge of kidnapping. In light of the prosecutrix's claim of forcible abduction and discovery along with the appellant, it was also held that the appellant had enticed and lured the minor girl with the intention to have intercourse and marriage, and thus all the ingredients of Sections 363 and 366 of IPC were well established. Considering the serious nature of the offence, the trial Court awarded sentence of one-year rigorous imprisonment and fine of Rs 1,000 (or simple imprisonment of two months in lieu thereof) for offence under Section 363; five years rigorous imprisonment and fine of Rs 5,000 (or simple imprisonment of three months in lieu thereof) for offence under Section 366; and ten years rigorous imprisonment and fine of Rs 10,000 (or simple imprisonment of six months in lieu thereof) for offence under Section 376 of IPC.

7. The appellant assailed his conviction before the High Court claiming that the parties were in love owing to which the prosecutrix had left her parents' home and gone with him at her own free will. Additionally, she never raised any protest or alarm despite numerous opportunities to do so and thus none of the constituents of 'kidnapping' or 'rape' was established.

8. The High Court in its order under appeal observed that the factum of the prosecutrix being in love with the accused having been established beyond any doubt coupled with the fact that they used to meet frequently, the appellant could not be held guilty of committing 'rape' and his consequential conviction and sentence under Section 376 IPC was set aside. However, there being no evidence suggesting that the prosecutrix had consented to be taken from her parents' lawful custody and given her undisputable minority, the appellant's conviction under Sections 363 and 366 of IPC was sustained.

CONTENTIONS OF PARTIES

9. The appellant being aggrieved by his conviction under the charge of kidnapping has approached this Court re-asserting his innocence.

A Learned counsel for the appellant highlighted that the High Court has acknowledged that there was a love affair, frequent meetings, and consensual relationship between the parties, which merited the appellant's acquittal under Section 376 IPC. But in the very same breath, the High Court has also held that the prosecutrix did not willingly leave her parents' custody and had not consented to be taken for marriage. These two findings were canvassed as being mutually contradictory. Reliance was placed on the judgment of this Court in ***S. Varadarajan v. State of Madras,***[1] to drive home the point that voluntary abandonment of home by a minor girl would not amount to kidnapping, and that in the absence of some active involvement, the appellant could not be said to have C 'taken' or 'enticed' the prosecutrix.

10. In contrast, learned State Counsel supported the impugned judgment of conviction. He emphasised on the concurrent findings of the Courts below read with the plain language of the Statute (IPC) and re-iterated that consent of a girl below 18 years could be no excuse in a D case of 'kidnapping' within the meaning of Section 361 IPC.

ANALYSIS

I. Whether a consensual affair can be a defence against the charge of kidnapping a minor?

E 11. Having given our thoughtful consideration to the rival submissions, it appears to us that although worded succinctly, the impugned judgment does not err in appreciating the law on kidnapping. It would be beneficial to extract the relevant parts of Sections 361 and 366 of IPC which define 'Kidnapping from Lawful Guardianship' and consequential punishment. These provisions read as follows:

F

> ***"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* G *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*

H [1] (1965) 1 SCR 243.

of such minor or other person.

xxx

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 this 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 also be punishable as aforesaid].”*

12. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl.[2] However, mere recovery of a missing minor from the custody of a stranger would not ipso-facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of ***King Emperor v. Gokaran***[3] and ***Emperor v. Abdur Rahman***[4].

13. Adverting to the facts of the present case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established sexual intercourse and of having an intention to marry her. Although the victim's deposition that she was forcefully removed from the custody of her parents might possibly be a belated improvement but the testimonies of

[2] *Thakorlal D Vadgama v. State of Gujarat*, (1973) 2 SCC 413, ¶ 10.
[3] AIR 1921 Oudh 226.
[4] AIR 1916 All 210.

numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him.

14. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age.

15. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 of IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent.[5] Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

16. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.

17. The ratio of ***S. Varadarajan (supra)***, although attractive at first glance, does little to aid the appellant's case. On facts, the case is distinguishable as it was restricted to an instance of "taking" and not "enticement". Further, this Court in ***S. Varadarajan (supra)*** explicitly held that a charge of kidnapping would not be made out only in a case where a minor, with the knowledge and capacity to know the full import of her actions, voluntarily abandons the care of her guardian without any assistance or inducement on part of the accused. The cited judgment, therefore, cannot be of any assistance without establishing: *first,* knowledge and capacity with the minor of her actions; *second,* voluntary abandonment on part of the minor; and *third,* lack of inducement by the accused.

---

[5] *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat* , (2015) 7 SCC 359, ¶ 15.

18. Unfortunately, it has not been the appellant's case that he had no active role to play in the occurrence. Rather the eye-witnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuities and maturity to take care of herself. In addition to being young, the prosecutrix was not much educated. Her support of the prosecution version and blanket denial of any voluntariness on her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully.

19. It is apparent that instead of being a valid defence, the appellant's vociferous arguments are merely a justification which although evokes our sympathy, but can't change the law. Since the relevant provisions of the IPC cannot be construed in any other manner and a plain and literal meaning thereof leaves no escape route for the appellant, the Courts below were seemingly right in observing that the consent of the minor would be no defence to a charge of kidnapping. No fault can thus be found with the conviction of the appellant under Section 366 of IPC.

II. Whether the punishment awarded is just, and ought there be leniency given the unique circumstances?

20. Having held so, we feel that there are many factors which may not be relevant to determine the guilt but must be seen with a humane approach at the stage of sentencing. The opinion of this Court in ***State of Madhya Pradesh v. Surendra Singh***[6] on the need for proportionality during sentencing must be re-emphasised. This Court viewed that:

> *"13. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law.* ***It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a***

[6] (2015) 1 SCC 222.

A ***sentence commensurate with the gravity of the offence.*** *The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be* B *counterproductive in the long run and against the interest of the society."*

[emphasis supplied]

21. True it is that there cannot be any mechanical reduction of C sentence unless all relevant factors have been weighed and whereupon the Court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence. It would thus depend upon the facts and circumstances of each case whether a superior Court should interfere with, and resultantly enhance or reduce the sentence. Applying such considerations to the peculiar facts and findings returned D in the case in hand, we are of the considered opinion that the quantum of sentence awarded to the appellant deserves to be revisited.

22. We say so for the following reasons: *first,* it is apparent that no force had been used in the act of kidnapping. There was no pre-planning, use of any weapon or any vulgar motive. Although the offence E as defined under Section 359 and 361 of IPC has no ingredient necessitating any use of force or establishing any oblique intentions, nevertheless the mildness of the crime ought to be taken into account at the stage of sentencing.

23. *Second,* although not a determinative factor, the young age of F the accused at the time of the incident cannot be overlooked. As mentioned earlier, the appellant was at the precipice of majority himself. He was no older than about eighteen or nineteen years at the time of the offence and admittedly it was a case of a love affair. His actions at such a young and impressionable age, therefore, ought to be treated with hope for G reform, and not punitively.

24. *Third,* owing to a protracted trial and delays at different levels, more than twenty-two years have passed since the incident. Both the victim and the appellant are now in their forties; are productive members of society and have settled down in life with their respective spouses

H

and families. It, therefore, might not further the ends of justice to relegate the appellant back to jail at this stage.

25. *Fourth,* the present crime was one of passion. No other charges, antecedents, or crimes either before 1998 or since then, have been brought to our notice. The appellant has been rehabilitated and is now leading a normal life. The possibility of recidivism is therefore extremely low.

26. *Fifth,* unlike in the cases of ***State of Haryana v. Raja Ram***[7] and ***Thakorlal D. Vadgama v. State of Gujarat***[8]**,** there is no grotesque misuse of power, wealth, status or age which needs to be guarded against. Both the prosecutrix and the appellant belonged to a similar social class and lived in geographical and cultural vicinity to each other. Far from there being an imbalance of power; if not for the age of the prosecutrix, the two could have been happily married and cohabiting today. Indeed, the present instance is an offence: *mala prohibita*, and not *mala in se*. Accordingly, a more equitable sentence ought to be awarded.

27. Given these multiple unique circumstances, we are of the opinion that the sentence of five years' rigorous imprisonment awarded by the Courts below, is disproportionate to the facts of the this case. The concerns of both the society and the victim can be respected, and the twin principles of deterrence and correction would be served by reducing the appellant's sentence to the period of incarceration already undergone by him.

CONCLUSION

28. In light of the above discussion, we are of the view that the prosecution has established the appellant's guilt beyond reasonable doubt and that no case of acquittal under Sections 363 and 366 of the IPC is made out. However, the quantum of sentence is reduced to the period of imprisonment already undergone. The appeal is, therefore, partly allowed in the above terms and the appellant is consequently set free. The bail bonds are discharged.

Devika Gujral Appeal partly allowed.

[7] (1973) 1 SCC 544.
[8] (1973) 2 SCC 413.