

(2010) 09 P&H CK 0426

High Court Of Punjab And Haryana At Chandigarh

Case No: C.R.A. No. 3179 SB of 2009

Balwinder

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: Sept. 24, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 361, 363, 366, 376

Hon'ble Judges: Nirmaljit Kaur, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Nirmaljit Kaur, J.

The appellant was made to face trial for offence punishable u/s 363, 366 and 376 of Indian Penal Code. The Additional Sessions Judge, Jind, vide his Judgment and order dated 19.11.2009/20.11.2009 acquitted the appellant of the charges levelled against him under Sections 376, 366 of Indian Penal Code. However, held him guilty u/s 363 IPC and accordingly convicted him of the said charge and sentenced him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 2000/-, in default of thereof, to further undergone simple imprisonment for a period of two months.

2. While challenging the aforesaid Judgment and order of the trial Court, learned Counsel for the appellant raised the following arguments:

a) The appellant is acquitted of the charge levelled against him u/s 376 and 366 IPC. It was argued that offence under Sections 376 and 366 IPC are more serious, the appellant cannot be convicted for offence u/s 363 IPC on the basis of the same evidence and relied on the Judgment of the Apex Court rendered in the case of [S. Varadarajan Vs. State of Madras](#), as also on the judgements rendered by this Court in the cases of Narinder v. State of Haryana reported as 2004 (3) C.C.C. 306 and

Vinod v. The State of Haryana reported as 2010 (3) RCR 309 to substantiate his argument that in case of consent and willingness of the prosecutrix to accompany the appellant, the offence of taking away the prosecutrix from the lawful guardians does not arise.

3. Learned Counsel for the appellant does not dispute that the age of the girl was less than 18 years, nevertheless submitted that since the evidence before the Court was that she had consented to accompany the appellant and was accordingly acquitted of the charges under Sections 376 and 366 IPC, the appellant cannot be convicted u/s 363 IPC.

4. Learned Counsel for the respondent, while opposing the appeal, submitted that the prosecutrix was under 18 years of age and as per Section 361 IPC, kidnapping from lawful guardianship of any minor who is less than of 16 years if a male and 18 years of age if a female without the consent of such guardian is stated to have kidnapped such a minor. Thus, the appellant has been rightly convicted u/s 363 IPC. The question of consent will not arise in the present case as the prosecutrix was a minor.

5. Heard.

6. While convicting the appellant u/s 363 IPC, the Additional Sessions Judge, Jind observed as under:

44. Thus, from the above discussion the prosecution has miserably failed to prove its case against the accused u/s 366 and 376 IPC. So, he is acquitted of the charge levelled against him under Sections 366 and 376 IPC. However, from the above discussion, it is proved that the accused had kidnapped the prosecutrix from the lawful guardianship of her parents and the age of the prosecutrix on the date of alleged occurrence is below 18 years. Hence, the accused is held guilty and convicted u/s 363 IPC. Let he be heard on the quantum of sentence on 20.11.2009.

Section 361 of Indian Penal Code reads as under:

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.

Explanation: - The words "lawful guardian" in this section include any person lawfully entrusted with the care of 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

7. The definition of "kidnapping" is evident from Section 361 IPC.

8. The prosecutrix herself appeared in the witness box as PW10 and stated that she was kidnapped on 14.07.2008 at about 8.00 p.m. by two persons who came on a motorcycle. Accused Ladi alias Balwinder was driving the motorcycle and the pillion rider took her on the motorcycle after giving some substance to smell and took her to the fields of her uncle in a Kotha. Even her statement u/s 164 of the Code of Criminal Procedure was recorded by Sub Divisional Judicial Magistrate, Safidon, wherein she deposed that she was forcibly taken on the motorcycle. She further stated, in her cross examination, that she did not raise any hue and cry at any point of time because the accused was having knife and gave threat to her and she was kept away from her guardianship till the time she was found.

9. Thus, in the facts of the present case, the Judgment rendered by Hon"ble Supreme Court in S Varadarajan"s cas (supra) is not applicable. In that case, the girl had left the house of her father and telephoned the appellant to meet her on some road in that locality from where she went off willingly and it was in those circumstances, the Apex Court came to the conclusion that the prosecutrix was not enticed away but she had willingly accompanied the appellant. Thus, the ingredients of Section 361 of Indian Penal Code were not made out.

10. Whereas, in the present case, whatever may be the position with respect to the fact that subsequently the prosecutrix continued to remain in the company of the appellant and accompanied from one place to other and did not raise any hue and cry or make any any attempt to run away, the evidence of the girl shows that initially there was no intention on her part to leave the house of her father but was forcibly taken away. Thus, the girl being minor and having been taken away forcibly, Section 361 IPC is attracted and accordingly the petitioner is liable to be convicted u/s 363 of IPC.

11. In view of the above discussion, there is no merit in the appeal and the same is accordingly dismissed.

12. However, taking into account the totality and peculiar facts and circumstances of the present case as well as the age of the appellant at the time of conviction, being only 21 years, the sentenced awarded to him by the trial Court is ordered to be reduced to as having already undergone. He has undergone substantial period of sentence. It is not disputed that the appellant has already undergone two years and two months out of the total period of sentence of three years.

13. Accordingly, the present appeal is dismissed except for the modification in the sentence of the appellant to that of as having already undergone.

14. The appellant be released forthwith.