

State of H.P. Vs Rajesh Kumar and Another

Court: High Court of Himachal Pradesh

Date of Decision: June 23, 2010

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 313, 378, 378(3)
Penal Code, 1860 (IPC) â€” Section 10, 109, 248, 34, 361

Hon'ble Judges: V.K. Sharma, J; R.B. Misra, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

R.B. Misra, J.

The present criminal appeal has come up for consideration after the leave to appeal has been granted u/s 378(3) of the

Code of Criminal Procedure, in reference to the judgment dated 14th February, 1996, passed by learned Sessions Judge, Hamirpur, in Sessions

Trial No. 04 of 1994, thereby acquitting both the Respondents / accused persons for the offence under Sections 363, 366, 368 and 376 of the

Indian Penal Code.

2. In order to adjudicate the present criminal appeal, it is necessary to give the factual background of the case. The facts, according to the

prosecution story, are that on 17.8.1993, Raseel Singh, father of the prosecutrix / victim (name not narrated) reported to the Police Station,

Sujanpur, that his daughter aged about 16 - 17 years studying in DAV College at Sujanpur in 10 + 1 used to go to the College daily from her

house in village Lahar but on 16.8.1993, the prosecutrix did not come back home. Accordingly, the father enquired from fellow students in the

village but nothing was known definitely. Thereafter, the father of the prosecutrix visited the Principal of the College during the night and enquired

about his daughter and had come to know that his daughter left for her house after the period was over. Thereafter, the father of the prosecutrix,

accompanied by Principal, visited the Lecturer of the College at Sujanpur, who in turn accompanied them to the President of the College

Committee, who had disclosed that he heard a rumour that one girl with boy cut was taken in a bus by accused Rajesh, along with two boys,

round about 5 PM towards Nadaun. On report of the father of the prosecutrix, the case for offences under Sections 363, 366 read with Section

34 IPC was registered against the accused persons. During investigation, it was found that accused Rajesh took the prosecutrix in the house of his

aunt (Mausi) at Nangal from Nadaun on 16.8.1993. On 17.8.1993 Vidhi Chand, father of accused Rajesh, after having come to know about the

registration of such case, reached in a taxi driven by one Vijay Kumar and accompanied by his relative Vinod Kumar and accused Kamal Kumar

at Nangal. After having some consultations, the prosecutrix / victim was brought at Hamipur in the same taxi for the purpose of solemnization of her

marriage with accused Rajesh and the victim was made to stay in the house of accused Kamal Dev. After coming to know that the age of the

prosecutrix was less than 18 years and her marriage with accused Rajesh cannot be solemnized, as such, the prosecutrix as well as accused Rajesh

were sent to their relatives' house at Nangal in District Bijnaur (Uttar Pradesh). Consequently, on 19.8.1993, the prosecutrix and accused Rajesh

were made to board the bus from Hamirpur to Una, Bijnaur, while Vidhi Chand, accused Kamal Dev came back to their houses. The case u/s 368

read with Section 109 IPC was registered against them. In an attempt of search, ultimately on 23.8.1993 the prosecutrix, along with accused

Rajesh, was apprehended at Nangal and accused Rajesh was arrested while the prosecutrix, after medical examination, was handed over to her

father Raseel Singh.

3. The case was committed for sessions trial and on examination, the learned Sessions Judge discharged Vidhi Chand, Vinod Kumar and Ravinder

Kumar, however, has charged Rajesh Kumar for offences under Sections 363, 366 and 376 IPC and accused Kamal Kumar alias Kamal Dev for

offence u/s 368 IPC.

4. In order to prove its case, the prosecution has examined as many as 13 witnesses, whereas, the Respondents / accused, through their statement

u/s 313 Code of Criminal Procedure, have denied the charges and prosecution case.

5. PW-1, Victim / prosecutrix, has stated that being a student of Senior Secondary School, Sujampur, she used to go to school and come back to

home in HRTC bus. Accused Rajesh wanted to develop friendship and was approaching time and again to visit her school while waiting for the

bus at Bus Stand, Sujampur accused used to tease her at the bus stop and kept on saying to develop the friendship with him, lest he would lift and

take her away (as per the testimony of PW-1 prosecutrix / victim). On refusal of the victim for friendship, she had even warned the accused to

leave the prosecutrix and also not to follow her. Otherwise if her parents would come to know that the accused had been following her, studies

would be discontinued. On this, accused Rajesh used to tell that he would lock her parents in the room and kill them. However, out of fear, the

prosecutrix did not disclose the matter to anyone. She has further stated that accused Rajesh used to board the same bus and he used to follow her

for about 8 - 9 kilometers. Accused Rajesh also threatened the prosecutrix in the bus if the prosecutrix / victim would be engaged with some other

fellow, he would kill him.

6. According to the prosecutrix, no other student of her class was aware of such aspects. According to PW-1, she took admission in DAV

College, Sujampur in the year 1993 and on 16.8.1993 she was called by the College Principal who told her as to who was teasing her, at that time

name of accused Rajesh was disclosed to the Principal and the Principal wanted to check the previous record of the prosecutrix is bad or not and

asked the prosecutrix to call her parents. On such enquiry of Principal, she felt humiliated, became restless and depressed and left the College and

went to Bus Stand for going to her house. Thereafter, the prosecutrix thought to ask from accused Rajesh as to why he was teasing her and she on

her own went towards his house but the accused met her on the way near his house. The prosecutrix enquired from him as to why he had been

teasing her throughout and also the College Principal was asking about it. On this accused Rajesh told her that he was mentally upset and she

should accompany him to the house of the accused. The prosecutrix on her own went to the house of the accused and was offered "Illaichi". The

prosecutrix was not feeling well and became almost dumb. Accused Rajesh took the prosecutrix to the road near the Hospital from where both of

them boarded the bus from Nadaun and on way accused Rajesh told the prosecutrix that he would marry her and also told her not to disclose this

matter to anyone lest he would kill her. The prosecutrix was taken by the accused to Nangal in a bus from Nadaun where she stayed for a night in

the house of maternal aunt (Mausi) of accused Rajesh. Next day, father of accused Rajesh, namely, Vidhi Chand, came in the morning, along with

two brothers of Rajesh and brother-in-law of Rajesh, in a taxi and on some consultation amongst themselves, the prosecutrix was brought to

Hamirpur in the house of Kamal Kumar where the prosecutrix stayed for a night and next day at about 4 or 5 PM. The prosecutrix was taken to

the Bus Stand by accused Rajesh and another accused Kamal Kumar. From there the prosecutrix was taken to Bhota. PW-1 has further stated

that only accused Rajesh accompanied her in that bus, from Bhota the prosecutrix was taken to Nangal and from there to Chandigarh where they

stayed for a night at Bus Stand, Chandigarh. The next morning, the prosecutrix was taken to Saharanpur and she also took a round at Sarahanpur

market and in the evening she was taken to some other place and thereafter she was taken to village Dandera in Uttar Pradesh and spent a night at

Railway station Dandera. Next day, the prosecutrix was taken to Sihora in District Bijnaur and thereafter the prosecutrix / victim was taken to

village Koori and stayed in the house of Salil Khan, a friend of accused Rajesh. Salil Khan was putting up with his parents and children. The

parents of Salil Khan asked the prosecutrix why she accompanied Rajesh, on that she told them that accused Rajesh enticed her away and wanted

to marry her forcibly. She has further stated that accused Rajesh had demanded money from the parents of Salil Khan. However, they did not

allow staying with them. Thereafter, accused Rajesh brought the prosecutrix to Nangal in the night and wanted to go to the house of his Mausi of

accused. However, the house of Mausi could not be located, as such, the prosecutrix was taken by the accused through a small path and next

morning the prosecutrix was taken to the house of Mausi of the accused. From there, both of them went to the Bus Stand and thereafter in the

morning accused took the prosecutrix to the house of his Mausi but left the prosecutrix on the way at Nangal. He returned after some time. She

has further stated that when they were going to Bus Stand, Nangal, Police came and apprehended them. Thereafter, the prosecutrix was taken to

Police Station, Sujanpur along with accused Rajesh. The prosecutrix has further stated that her date of birth is 15.9.1976, as per matriculation

certificate.

7. In her cross examination, PW-1, has stated that the police recorded her statement twice but she did not remember the dates. She took "illaichi"

on being offered by the accused and has also stated that when she was going with accused Rajesh in Jaryal Bus from Sujanpur to Nadaun, lot of

passengers were present in the bus and she was standing in the bus along with accused and ultimately a seat in the rear portion of the bus was

found vacant which was occupied by her. As per the testimony of PW-1, in her cross examination, the prosecutrix took her separate ticket from

Sujanpur to Nadaun and accused took his separate ticket and the prosecutrix did not complain to anyone about the enticing away by the accused.

PW-1 has further stated that she got much relief by from the affect of the "illaichi" after reaching Nadaun and voluntarily disclosed on record that

she did not disclose to anyone on her being enticed away as the accused was threatening her. In her cross examination, PW-1 has stated that she

has admitted that rape was committed with her at a distance of about 40 feet away from the bus stand.

8. PW-2, Dr. Sunita Galoda, Medical Officer, has stated that on 23.8.1992, at about 7 PM, she had medically examined the prosecutrix and on

the medical examination, PW-2 did not find any mark of injury over her body and has opined that red bruise 2.0 x 1.0 cm present over fourchette

which was tender on touch and it was covered with discharge. The hymen was intact (not torn). Vagina admitted index finger with difficulty. The

examination was found tender (painful). The vaginal smears were also taken from posterior fornix which were sealed and handed over to the police

for further examination. Prima facie, the possibility of sexual intercourse could not be ruled out. In the opinion of PW-2, the prosecutrix had

undergone sexual intercourse. PW-2 has further stated that before examination of PW-1 she had taken consent of her father thinking that she is

minor and PW-2 has further opined that in case of struggle in sexual assault, the injury may appear on the prosecutrix or the assailant or on the

both.

9. PW-3, Rasil Singh, the father of the victim / prosecutrix, has stated that the date of birth of the prosecutrix is 15.9.1976. PW-3 retired from

Army and the prosecutrix was studying at the place of his posting. The prosecutrix was admitted in Senior Secondary School, Sujanpur and she

was coming and going by bus to School. According to PW-3, the prosecutrix failed in Science in +1 and she was re-admitted in DAV Girls

College, Sujanpur in the year 1993 and on 16.8.1993 the prosecutrix left the house for College at about 8.30 AM but did not return in the

evening. PW-3 has further stated that enquiry was made from the College mates about the prosecutrix and thereafter the enquired from the

Principal of the College, who informed that the prosecutrix had left the school for her home. However, at the request of PW-3, he was taken to the

Member of the Managing Committee, who told that he heard a rumour in the bazaar from the boys that a bob-cut girl was taken by two persons in

Jaryal Bus towards Nadaun and thereafter PW-3 informed the police and F.I.R. Ext.PD was registered. PW-3, in his cross examination, has

stated that the date of birth of the prosecutrix was got notified in the Unit. According to PW-3, he accompanied SHO Puran Chand, Head

Constable Satish Kumar and two other Constables in a taxi, driven by Vijay Kumar and reached at Puri at about 12 noon on 22.8.1993. Sujanpur

police took assistance from Sihora Police. PW-3, however, has denied that he is not aware as to whether his daughter (the prosecutrix) had

voluntarily accompanied the accused but on being asked she told him that she was taken forcibly and against her wishes.

10. PW-4, Virender Singh, has stated that he was waiting for a bus on 11.8.1993 in the afternoon at Bus Stand, Sujanpur and then Rajesh alias

Billa was threatening and teasing the victim / prosecutrix and PW-4 prevented accused Rajesh from teasing the prosecutrix. In cross examination,

PW-4 has stated that on 11.8.1993, 5-7 passengers were present at the Bus Stand, no other person came to help the victim / prosecutrix when

she was objecting accused Rajesh from teasing her.

11. PW-5, Dinesh Kumar, has stated that he joined the Police on 23.8.1993, during the investigation of the case and had seen the Salwar Ext.P-1

produced by the victim and had taken into possession the same vide memo Ext.PA.

12. PW-6, Ranjit Singh, Pradhan of Gram Panchayat, Sohal Banehar, has stated that when he had gone to Sujampur for his personal work and

was waiting for his bus at about 2 1/2 /3 PM. He observed that one boy named Billa was forcing a girl to take her and marry with him. On

intervention of PW-6, accused Rajesh left the place. In cross examination PW-6 has stated that when he observed the above incidence, at that that

time 100 or 150 persons were there at the bus stand.

13. PW-7, Dalip Singh, Secretary, Gram Panchayat, Muthan Block Baijnath, District Kangra, has stated that he had issued the certificate Ext.PF,

showing the birth entry of the victim / prosecutrix in Panchayat Register.

14. PW-8, Mahant Ram, LHC No. 164, had tendered in evidence his affidavit Ext.PG. in support of the prosecution, however, nothing substantial

could be derived from his testimony.

15. PW-9, Head Constable Satish Kumar and PW-10 ASI Kishan Dev, in usual discharge of their duties, have tried to support the prosecution

case.

16. PW-11, Surjit Singh, Principal DAV College, Sujampur, who has supported the prosecution case, has stated that he called the victim /

prosecutrix on 16.8.1993 and had inquired from her about her problem, she replied that she was being teased by a boy nick-named as Billa. PW-

11 told the victim to call her parents so that they could be apprised of the matter. Thereafter, the victim / prosecutrix attended the class, the college

used to be over at 1 PM and on that day it was also closed at 1 PM as usual. PW-11 has further stated that on the same night the father of the

prosecutrix came to him and enquired about his daughter and complained that his daughter did not reach the house, then PW-11 accompanied the

father of the prosecutrix to Sujampur and went to the Vice President, DAV Managing Committee, Sujampur who told that the prosecutrix was

taken away and accordingly information was given to the police. However, nothing substantial could be derived from the testimony of PW-11.

17. PW-12, S.I. Puran Chand, while supporting the case of the prosecution, has stated that on 17.8.1993 at the instance of Rasil Singh, the father

of the prosecutrix, F.I.R. Ext.PD was lodged and investigation was started on 19.8.1993 and according to PW-12, on 23.8.1993 at about 9 AM

the prosecutrix met the investigating party and accordingly accused Rajesh was arrested and at that time father of the prosecutrix / victim was with

the police party. The prosecutrix as well as the accused were medically examined and in cross examination of PW-12 the victim / prosecutrix was

raped at about 40 feet away from the outer boundary of the bus stand, Nangal.

18. PW-13, Digvijay Singh, Medical Officer, had examined accused Rajesh Kumar and on examination, no tear of cloth or blood stains or any

kind of stains on his wearing apparels or any injury or any nail mark was noticed on his body. However, accused Rajesh was found to be major

and was fit for sexual interaction.

19. Now, in order to scrutinize the testimony of the prosecution witnesses, to bring the Respondent / accused within the purview of the offence

alleged against them, we notice from the record that as per testimony of PW-1, her date of birth was 15.9.1976, which was corroborated by the

testimony of PW-3 Rasil Singh, the father of the prosecutrix / victim. Taking the date of birth of the prosecutrix as 15.9.1976, the age of the victim

/ prosecutrix, at the time of occurrence / incident on 16.8.1993, was one month less to 17 years and in order to bring the accused Rajesh within

the purview of offence u/s 376 IPC, indisputably the victim / prosecutrix was in a position to go for sexual interaction or any sexual assault by the

accused by the accused cannot be covered within the provisions of Section 376 IPC. However, the prosecutrix is less than 17 years, therefore, we

have to examine very carefully that how accompanying the victim / prosecutrix at such age, act of accused would tantamount taking her or enticing

her from lawful guardian within the meaning of Section 361 whether accompany the victim / prosecutrix with accused in reference to the

prosecution case would tantamount to kidnapping within the provisions of Section 366 of the Indian Penal Code and her accompany with accused

from 16.8.1993 to 23.8.1993 would tantamount to kidnapping, abduction or enticing her and compel her to marry the accused within the provision

of Section 366 IPC. For this aspect, the relevant ingredients of Sections of 361, 366 and 376 are being reproduced below:

Section 361:

1. Taking or enticing away a minor or a person of unsound mind;
2. Such minor must be under sixteen years of age, if a male, or under eighteen years of age, if a female;
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind; and
4. Such taking or enticing must be without the consent of such guardian.

The Explanation to Section 361 provides that the words "lawful guardian" in the said section includes any person lawfully entrusted with the care or

custody of such minor or other person. The word "take" means to cause to go, to escort or to get into possession. It implies want of wish and

absence of desire of the person taken. There is, however, a distinction between taking and allowing a minor to accompany a person. The word

"entices" involves an idea of inducement or allurement by exciting hope or desire in the other.

So far Section 366 IPC is concerned, its essential ingredients are:

(i) Kidnapping or abducting any woman;

(ii) Such kidnapping or abducting must be

(a) 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;

(b) 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.

The second part of the section requires two things:

(1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place; and

(2) Such going must be with intent that she may be, or with knowledge that it is likely that she will be forced or seduced to illicit intercourse, with

some person.

The word "woman" has been defined in Section 10. It also includes a minor female;

The essential ingredients of Section 376 IPC are:

(1) Sexual intercourse by a man with a woman.

(2) The sexual intercourse must be under circumstances falling under any of the six clauses in the section.

20. Mr. Anil Jaswal, learned Deputy Advocate General, appearing on behalf of the Appellant / State, has endeavoured to say that the learned

Sessions Judge has failed to appreciate that the prosecutrix / victim (PW-1) has time and again been refusing to develop friendship with accused

Rajesh and on several occasions had refused to go with him and was not ready to marry him, as has been observed by the prosecution witnesses

i.e. PW-4 and PW-6. However, he has fairly indicated that the victim / prosecutrix (PW-1) has not divulged the aspect of her being taken by the

alleged accused Rajesh to any person in the residential locality or in the College or in the bus to any passenger or subsequently to anybody,

including her father. However, according to Mr. Jaswal, learned Deputy Advocate General, on the fateful day in depression and in restless

condition, she thought to go accused's house to ascertain as to why on his teasing, such inquiry has been made by the Principal of the College,

humiliating her as this aspect of teasing by accused was not known to anybody and such going by the victim / prosecutrix on her own to the place

of accused will not tantamount to going on her own sweet will. According to Mr. Jaswal, learned Deputy Advocate General, the victim /

prosecutrix was not in her stable mental state of applying her mind freely and wisely to restrain herself for coming out of humiliation, therefore, the

approaching of victim / prosecutrix on 16.8.1993 to accused's place should not be treated that she had gone to accused on her free and sweet

will.

21. Mr. Jaswal, learned Deputy Advocate General, for the State has submitted that merely accompanying PW-1 (victim / prosecutrix) with

accused Rajesh unwillingly would tantamount to not accompanying at her sweet and free will, In the facts and circumstances and on inquiry of the

principal of the college, victim / prosecutrix had become perturbed, restless and depressed, in that state of mind, taking decision or choosing a

course to go to the place of accused to apprise him about her anxiety and thereafter being taken by the accused Rajesh, should not be treated as if

the victim / prosecutrix has accompanied the accused at her own choice, more so, when undisputedly she was minor. As such, the provisions and

ingredients of Sections 361, 363 and 366 of IPC shall be effective. Looking from that point of view, the conduct and act of victim / prosecutrix

should be treated as secondary and her relentless and unwillingness under the prevailing circumstances in such state of mind under which she

became indecisive and was not able to apply her discretion shall be material and it should be taken for consideration that the victim has been

enticed, allured and has been taken from lawful guardian of her father for the purpose of being married or for a joy right. As per the submission of

Mr. Jaswal, the bonafide intent of victim has to be appreciated which supports the prosecution case, more so when victim / prosecutrix has not

categorically indicated any where that she has been accompanying the accused Rajesh Kumar on her sweet will despite having failed to inform any

person for her rescue.

22. However, Mr. Janesh Gupta, has controverted these aspect of analysis and has submitted that it is the conduct and act of victim which is more

important and not the intention as the victim / prosecutrix has chosen not to inform anybody if she was unwilling and was being taken by the

accused Rajesh Kumar at different places during different days and despite getting opportunities, she had never informed to any person of locality

where she has stayed or any of the passengers of the bus in which she had travelled. Being a girl, she might have agitated at open places, wherever,

she had availed the occasion of meeting the accused person prior to the date of 16.8.1993 on the day she was being taken by the accused Rajesh

Kumar. However, her act and conduct reveal that she was feeling comfortable in the company of accused Rajesh Kumar and without any protest

or raising any hue and cry or any whisper to any of the person or passenger in the bus she stayed with the accused at different places during

unusual hours and during night also. According to Mr. Janesh Gupta, even if the victim / prosecutrix had not attained the age of 18 years but the

victim / prosecutrix was physically fit, quite grown up student going and attending the school daily and was capable of applying her discretion

before coming to the association of accused Rajesh Kumar and on being asked by the principal she might be perplexed or might be restless, but

ultimately her conduct had become more important and on her own not being persuaded by anybody she had chosen to visit the place of accused

Rajesh Kumar and even after meeting and even after making complaint she did not turn back to her own house. She had accompanied with the

accused and remained in his company for several days without any protest and had also came in physical contact with accused and also sexually

interacted with him. In these circumstances, the victim / prosecutrix though being 17 years of age cannot be said to have been enticed, she should

certainly be treated to have applied her wisdom, mind and discretion and should be said to be conscious of the consequences of the accompany of

the accused Rajesh Kumar.

23. Sh. Janesh Gupta, learned Counsel for the Respondent - accused, has invited the attention of this Court to the several decisions of the

Supreme Court as well as the High Court of HP and has submitted that taking out of the lawful guardian in Section 361 of IPC, becomes

redundant in the facts and circumstances when victim / prosecutrix alone was going and coming and was attending the school by bus alone. It is not

that she was being taken by some guardian or some attendant and non- disclosure of harassment, if any, to the victim / prosecutrix in the hand of

accused Rajesh goes a conscious acceptance on the part of victim / prosecutrix as the interaction of the accused Rajesh prolonged for a long time

and despite availing opportunities to inform to the class-fellow, principal, the father or any near-dear, the conduct of accused Rajesh was

deliberately concealed. Mr. Janesh Gupta has invited the attention of this Court to the following decisions:

(a) The Supreme court in S. Varadarajan Vs. State of Madras, has held that where a minor girl was kept at his relative house and when girl has

insisted on marrying the accused and the accused has not given threat or inducement, in that condition, the guardianship of father was treated to be

continued and in such circumstances even taking or enticing away a minor out of the keeping of lawful guardian is an essential ingredient of the

offence of kidnapping. However, in the facts and circumstances, the fact of accompanying a minor girl with accused at her own desire to be the

wife of accused in which the desire of accompanying him wherever he went is of course implicit. In such circumstances, no inference can be drawn

that the accused is guilty of taking away the girl out of keeping of her father as the victim girl had willingly accompanied the accused and law does

not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.

b) Supreme Court in *Ram Murti Vs. State of Haryana*, has observed that in case under Sections 366 and 376, age of prosecutrix is though

important, however, when the victim says that she was compelled, threatened or otherwise induced to go with accused who had alleged to have

raped her without her consent, in such circumstances, statement of victim in order to base conviction of accused must be corroborated with some

material particulars from independent source.

24. According to Mr. Janesh Gupta, in the present case, though PW-1 victim / prosecutrix had stated in her examination-in-chief that she was

afraid from accused as she was being threatened and in cross examination also she had stated that out of fear and being threatened she was

accompanying the accused Rajesh Kumar, but here statement cannot be relied upon as for several days she had traveled by different means of

transport including the bus and had stayed at different places including bus stand and railway station and in the village where she had sexually

interacted with accused without making any hue and cry or any opposition. In such situation, her mere assertion that she had been threatened to be

killed by accused could not be reliable statement because if a victim of about 17 years of age was unwilling, she might have slipped or escaped

from the control of accused Rajesh Kumar or might have availed some time to inform somebody or some passenger out of 100 to 150s at the bus

stop and at railway station.

(c) In *Thakorlal D. Vadgama Vs. The State of Gujarat*, the Supreme Court, while considering its earlier decision in *S. Varadarajan (supra)*, has

also distinguished the same on facts only. Relevant Paras-9 and 10 of the same are extracted below:

9..... The two words "takes" and "entices", as "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 leaves her parental home, completely

uninfluenced by any promise, 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. But if the, "guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be

considered to have influenced the minor or weighed: with her in leaving her guardian's custody or keeping and going to the guilty party, then prima

facie it would be, difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited

or induced her in any manner to leave her father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter,

then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no

valid defence and would not absolve him....

10. On the view that we have taken about the conclusions of the two courts below on the evidence, it is unnecessary to refer to all the decisions

cited by Shri Dhebar. They have all proceeded on their own facts. We have enunciated the legal position and it is unnecessary to discuss the

decisions cited. We may, however, briefly advert to the decision in S. Varadarajan Vs. State of Madras, on which Shri Dhebar placed principal

reliance. Shri Dhebar relied on the following passage at page 245 of the report:

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 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 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 going to 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"". From this passage, Shri

Dhebar tried to infer that the case before us is similar to that case and, therefore, Mohini herself went to the Appellant and the Appellant had

absolutely no involvement in Mohini's leaving her parents' home. Now the relevant test laid down in the case cited is to be found at page 248:

It must, however, be borne 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 Section 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 theft 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. S. Varadarajan Vs. State

of Madras, . 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. 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 fulfilment 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".

It is obvious that the facts and the charge with which we are concerned in the present case are not identical with those in Varadarajan's case

(supra). The evidence of the constant behaviour of the Appellant towards Mohini for several months preceding the incident on the 16th and 17th

January 1967 completely brings the case within the passage at Section 248 of the decision cited. We have before us ample material showing earlier

allurements and even of the, Appellant's participation in the formation of Mohini's intention and resolve to leave her father's house. The

Appellant's conviction must, therefore, be upheld.

(d) Relying on the earlier decision of Supreme Court in S. Varadarajan (supra), this High Court in Bittu alias Anand Singh v. State of HP 1986

Shim.L.C. 113, has held that when the victim / prosecutrix was undisputedly of 15 years 10 months and 10 days, i.e. one month and 20 days short

of the crucial 16 years of age and the victim / prosecutrix is not only willing party to go with the accused but also plays an active part in going away

with the accused, in such circumstances, no offence u/s 363 IPC can be said to have been made out.

(e) In view of the decision of Allahabad High Court in Baldeo (In Jail) Vs. State of U.P., it has been observed that victim / prosecutrix though

minor, however, has attained the age of discretion and had been willfully left her father's house and voluntarily accompanied the accused and had

never made any complaint that the accused by deceitful means abducted her from her house and the accused though facilitated for fulfillment of her

desire to leave her house, in such situation, it cannot be regarded as overt act of accused for inducement in reference to the offence under Sections

361, 363 and 366 of IPC. Relevant paragraph 16 is extracted below:

16. So far as the taking away of the prosecutrix out of the keeping of the lawful guardian is concerned, the age of the girl has to be determined first.

According to the prosecution version, she was aged about 13 or 14 years at the time of incident, but on the basis of the X-ray reports the Doctor

has found her to be 16 or 17 years old because the Doctor found Epiphysis around elbow joints fused and around the lower ends of radius and ulna

not fused. I may point out here that, according to Modi Medical Jurisprudence on Toxicology, distal end of ulna is fused at the age of 19(18-19)

years. If the lower end of radius and ulna were not found fused by the Doctor, it means that she was less than 19 years of age. The learned

Counsel for the Appellant relied upon two Supreme Court decisions reported in Jaya Mala Vs. Home Secretary, Government of Jammu and

Kashmir and Others, and Bhoop Ram Vs. State of U.P., and on the basis of those decisions he argued that one can take judicial notice of the fact

that the margin of age as ascertained by Radiologist may be two years either side and in the manner, it cannot be said that the girl was minor at the

time of incident and even if it is assumed so, she had attained the age of discretion and was on the verge of attaining majority as has been held in

the case of S. Varadarajan Vs. State of Madras, .

(f) In view of the decision of Supreme Court in Shyam and another Vs. State of Maharashtra, while testing the applicability of Section 366,

abduction of girl who had not attained the age of 18 years of age, the Supreme Court has observed that when the victim / prosecutrix did not put

up struggle or raised alarm while being taken away by accused, in such situation, the victim / prosecutrix appearing to be willing party to go with

accused on her own, in such a situation, culpability of accused not established and conviction is set aside in reference to Section 366 of IPC. In

order to strengthen the submission, Mr. Janesh Gupta has invited the attention of this Court to paragraph 3 of above referred case Shyam and Anr.

(supra). The said paragraph is reproduced here in below.

3. In her statement in court, the prosecutrix has put blame on the Appellants. She has deposed that she was threatened right from the beginning

when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be

difficult to dislodge, but having regard to her conduct, as also the manner of so-called "taking", it does not seem that the prosecutrix was truthful in

that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found

alone, or that her whereabouts would be under check by both the Appellants/accused and that they would emerge at the scene abruptly to commit

the offence of kidnapping by "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society

to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have

been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one

who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused-Shyam, that

he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her

then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It

seems she was a willing party to go with Shyam-the Appellant on her own and in that sense there was no "taking" out of the guardianship of her

mother. The culpability of neither Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the

Appellants/accused u/s 366 I.P.C. would thus fail. Accordingly, the Appellants deserve acquittal. The appeal is, therefore, allowed acquitting the

Appellants.

(g) Referring and relying on the decision of S. Varadarajan (supra), followed in Baldeo (supra) and Ram Murti (supra), this Court in Trilok Chand

v. State of HP 1996 (1) Shim. L.C. 187, in reference to Section 366 IPC has observed that the victim / prosecutrix being more than 16 years of

age but less than 17 years of age, consented to sexual intercourse on her by accused as she was in love with accused and eloped with him

undisputedly and without any sign or evidence of influence or coercion on the part of accused, victim / prosecutrix has left her house voluntarily to

elope with accused in night hours without raising any hue and cry in a planned manner of elopement. In such a situation despite being less than 17

years of age and despite sexually assault by accused, the accused could be acquitted for the charge u/s 366 of IPC. Relevant paragraph-9 of

judgment is extracted as below:

9. After scrutinizing the available evidence carefully, I am of the considered opinion that no offence u/s 366, Indian Penal Code is made out. It

may be that prosecutrix was below eighteen years on the day of occurrence, however, is absolutely clear from her conduct and the evidence that

she had reached the stage of discretion. She was in complete love with the accused for a long time. She had written number of letters to him

disclosing her close intimacy and friendship with the accused. It is not possible to believe that the prosecutrix was in any way influenced or coerced

by the accused either for friendship, or for marriage and providing her ornaments and clothes. It appears that she had already settled to elope with

the accused that is why the accused came at that hour of the night entering into the room where the prosecutrix was sleeping with her sister and

two brothers and parents in the adjoining room. The fact that the prosecutrix had not bolted the door from inside, also reinforces the conclusion

that she had invited the accused to take her at that time of the night. She changed her clothes and left this place so secretly that the elopement was

not noticed by any one of the inmates. There could be no reason for the prosecutrix to be under any kind of pressure from the accused.

Voluntarily, she left the place and moved with the accused from place to place for days together without raising hue and cry. The facts rather

disclose that it was the prosecutrix, who played the dominant role in leaving the house. When the elopement was settled, it can be legitimately

inferred that the accused may not have at all entered the room of the prosecutrix and coerced her to leave the place as alleged. Rather, she must be

waiting for his appearance. At one time, she had gone out during the night looking for the accused, though she has stated that she had done so for

urination, yet the fact remains that when she returned to the room, she did not bolt the door from inside. Consequently, it is plainly clear that the

prosecutrix left her father's guardianship voluntarily and the accused was not responsible for the same. The trial Judge has not appreciated the

evidence correctly with the result that wrong conclusion has been drawn on this aspect of the case.

(h) Relying on the decision of Trilok Chand (supra), a Division Bench of this Court, in which one of us Justice V.K. Sharma, Judge, is a Member,

has dealt with a situation in case titled State of H.P. v. Harinder Pal 2010 (2) Him.L.R. 625, in reference to offence u/s 363, 366 and 376 against

an accused for having sexually assaulted a girl below 18 years, it has been observed that if the prosecutrix is above age of consent and slightly

below age of discretion (18 years) and from attendant facts and circumstances of case on an overall view of the matter, if an interference is

deducible that minor prosecutrix had left protective umbrella of her natural guardian out of her free and independent volition and Respondent had

not taken any active part in such exercise, it would not be safe to return a guilt to the accused, as the victim / prosecutrix, in the facts and

circumstances was the willing party to go with Respondent/accused of her own sweet will had been submitting herself to all such alleged acts, in

such circumstances, the victim / prosecutrix could be treated as a willing and consented party at the relevant time and the accused cannot be held

guilty of offence under Sections 363, 366 and 376 IPC.

25. In case of adjudicating the criminal appeal, and in the matter of acquittal, the power of appellate Court has been elaborated in *State of HP v.*

Bharat Bhushan and Anr. 2010 (2) Shim.L.R. 718. For convenience, relevant paragraph-7 of same is extracted as below:

7. At the outset, we may note that the principles relating to the powers of the Appellate Court while dealing with an appeal against acquittal which

have been enumerated by the Apex Court in *Chandrappa and Others Vs. State of Karnataka*, The Apex Court held as follows:

"15. Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been

imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High

Court has full power to re-appreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to

reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an

order of acquittal."

16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of

innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is

proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly

not weakened but reinforced, reaffirmed and strengthened by the trial court."

26. In the light of above submissions made by Mr. Janesh Gupta on behalf of the accused / Respondent, we have carefully analyzed, scrutinized

the prosecution witnesses. We notice noticed that even the victim / prosecutrix was left alone for some time by accused Rajesh when he went

some where and on his coming back, both of them were walking together at Bus stand, Nangal when all of a sudden, police appeared at the scene

and apprehended both of them. In such circumstances, in our considered view, nothing prevented the victim / prosecutrix from fleeing in the

morning of 23.8.1993 on being left alone for some time. We have also noticed that right from 16.8.1993 and onwards, on several nights, the

accused and victim / prosecutrix stayed together at different places and during the night on 18.8.93, the victim / prosecutrix stated with accused

Rajesh at Chandigarh bus stand on the night of 19.8.93 at a place beyond Saharanpur, on the night of 20.8.93 at Railway station, Dandera and on

the night of 21.8.1993 at the bus stand of Sihora. Even during such stay on her own version of PW-1 (victim / prosecutrix), she was not sexually

assaulted or was forced to do so. Surprisingly, as per the prosecution story, the place near bus stand at Nangal on the night of 22.8.1993 was

chosen by accused Rajesh for the sexually assault to the victim / prosecutrix and even after such sexual assault, victim / prosecutrix accompanied

the accused Rajesh and spent with him during night together.

27. In the facts and circumstances, we notice that if the deposition of the victim / prosecutrix is found trustworthy, in the present case, her

deposition despite establishing the culpability of accused Rajesh has been providing corroboration to the defence version. The defence version is

that the accused Rajesh and the victim / prosecutrix were quite intimate and on the day of occurrence i.e. on 16.8.1993, victim / prosecutrix visited

the house of accused Rajesh from the school itself instead of choosing to go to her house and before reaching to the house of accused, victim

expected from one Tek Chand- a neighbour of accused Rajesh to call accused Rajesh who accordingly obeyed her wishes and when accused

Rajesh reached in his house, victim / prosecutrix during talk with accused, refused to go back to her home and told that if she was forced to do so,

she would commit suicide. To corroborate such version of Sh. Tek Chand, DW @ Teku, defence version becomes more relevant, when victim /

prosecutrix desired accused Rajesh on arrival at Chandigarh firstly to visit Hardwar and thereafter, accordingly they visited Hardwar and further

from there they intended to visit Nainital. In between, victim / prosecutrix and accused halted at village Kuri in the house of one Salal Khan, the

friend of accused Rajesh at village Kuri and next morning they were on their way to catch the bus for Nainital when the police apprehended them

in village Kuri.

28. Salil Khan has been examined as DW-3, who has fully corroborated the defence version, while stating that on 19.8.1993 he came across

accused Rajesh and victim / prosecutrix at Railway station, Sihora while he was going to Delhi by train and accordingly Salal Khan left victim and

the accused Rajesh at the place of his friend and he reached back Sihora in the evening of 21.8.1993 and then he carried accused Rajesh and

victim / prosecutrix to his house where they stayed for night and when he enquired from them about the purpose of their visit, then victim /

prosecutrix disclosed that they are on tour to Nainital and in case she is forced to go to her parents, she will commit suicide. DW-3 has further

stated that although accused Rajesh told him that he is not willing to accompany the victim / prosecutrix, but in turn she has forced him to do so.

DW-3 has further stated that on 22.8.1993 in the forenoon he requested Rajesh and victim / prosecutrix to return to the place, who agreed to do

so, but in the meantime, Himachal Police arrived, accompanied with the father of victim / prosecutrix in a taxi driven by one Vijay Kumar and

accordingly the police brought back both of them to Himachal Pradesh.

29. Vijay Kumar, Taxi driver was examined as DW-4, who fully corroborated the defence version. One Nemisharan Verma, Pradhan of Gram

Panchayat Kuri Bangar was also examined as DW-5, who also corroborated the defence version, to the extent that on 22.8.1993 the Himachal

police arrived in a Maruti van at village Kuri and apprehended the accused Rajesh and one girl.

30. We are of the considered view that the victim / prosecutrix even if not completed 18 years of age, but is capable of applying her wisdom,

discretion and mind independently and is understanding the consequences of accompanying a person with whom she became friendly and had

fallen in love with him and if has voluntarily accompanied such accused person at her own sweet will without any protest and without making hue

and cry and took active part in going with the accused, even if was sexually assaulted by such accused person then if scrutiny of facts and

circumstances indicate that the victim / prosecutrix had enjoyed good time with accused without showing resistance and without any endeavour to

escape from the company of such accused and victim / prosecutrix was a willing and consenting party of the company of accused at the relevant

time, then the victim / prosecutrix cannot be said that she had been enticed and kidnapped from her lawful guardian and cannot also be said to be

abducted or induced for marriage. In such situation, the act and conduct of accused cannot be regarded an overt act for inducement in reference to

the offence under Sections 361, 363 and 366 of the Indian Penal Code.

31. In view of the above analysis of prosecution witnesses and material on record, we are of the considered view that accused Rajesh has rightly

been acquitted by the learned Sessions Judge for the offence u/s 363, 366 and 376 IPC. So far as the offence u/s 368 against the

accused/Respondent Kamal Kumar @ Kamaldev is concerned, no material has been emanating from the prosecution witnesses and the learned

Sessions Judge has rightly acquitted him from the said offence as there was a sole deposition of victim / prosecutrix that on 17.8.1993 she was

brought back to Hamirpur from Nangal where she and accused Rajesh stayed in the house of accused Kamal Kumar and next morning this

accused accompanied both of them upto the bus stand at Hamirpur when she and accused Rajesh boarded the bus for Bhoti. Ms. Urmila Aunt

(Mausi) of accused Rajesh has been examined as DW-2, who deposed about the arrival of accused Rajesh and victim / prosecutrix in her house at

Nangal during the night of 16.8.1993 and about their stay on the said night and was denied the arrival of any other relation of accused in the next

morning in her house. She also denied that accused Rajesh and victim / prosecutrix were brought back to Hamirpur on 17.8.1993.

32. In these circumstances, the sole deposition of victim / prosecutrix cannot be relied upon regarding the fact that she having been brought back to

Hamirpur on 17.8.1993 and she having been made to stay for the night in the house of accused Kamal Kumar @ Kamaldev. Therefore, the

accused Kamal Kumar is to be acquitted for the offence u/s 368 of IPC.

33. In our considered view the learned Sessions Judge has rightly observed that the prosecution has failed to prove its case beyond reasonable and

prosecution has failed to bring him guilt to the accused.

34. Resultantly, the appeal fails and is accordingly dismissed.

35. Bail bonds, furnished by the Respondents, are hereby discharged.