

(2013) 11 AHC CK 0107

Allahabad High Court

Case No: Criminal Appeal No. 1436 of 1982

Ram Raksha @ Raksha Ram and
Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Nov. 22, 2013

Citation: (2014) 1 ACR 449 : (2013) 11 ADJ 139 : (2014) 84 ALLCC 184

Hon'ble Judges: Sunita Agarwal, J

Bench: Single Bench

Advocate: G.P. Mathur and Tripathi B.G. Bhai, for the Appellant;

Final Decision: Allowed

Judgement

Sunita Agarwal, J.

Three accused namely, Ram Raksha alias Raksha Ram, Nag Nath and Khelawan alias Ram Khelawan were committed to the Court of Sessions for facing trial under Sections 363, 366, 376 and 368 I.P.C. alongwith other four co-accused, namely, Waheed, Alimullah, Kumare and Muslim. The other four accused Waheed, Alimullah, Kumare and Muslim were not found guilty of offence of which they were charged and consequently they were acquitted. The accused appellants Ram Raksha alias Raksha Ram and Nag Nath were convicted for the offence under Sections 363 and 366 I.P.C. Both were sentenced three and a half years R.I. for each offence under Sections 363 and 366 I.P.C. Both the sentences were to run concurrently. The accused appellant Khelawan alias Ram Khelawan was sentenced three and a half years R.I. for the offence punishable u/s 368 I.P.C. During pendency of the present appeal, accused-appellant No. 3 Khelawan alias Ram Khelawan died and the appeal was abated as against him by order dated 16.3.2010 on the report of the C.J.M. Gonda. Another accused-appellant No. 1 Ram Raksha alias Raksha Ram was also reported to be dead by the C.J.M. Siddharth Nagar and the appeal stands abated as against him by order dated 19.9.2012.

2. Heard Shri Tripathi B.G. Bhai, learned counsel for the appellant Nag Nath and learned A.G.A.

3. The prosecution case is that a written report was received at the police station Domariyaganj Village Parsa Imad, District Basti on 20.1.1977 at 11 a.m. which was signed by Jhinnan Mishra and scribed by one Chandrama Prasad. As per the report, accused Nag Nath and Ram Raksha alias Raksha Ram had enticed away Km. Durgesh Nandini daughter of Jhinnan Mishra in the night of 11.1.1977 at about 9 p.m. When he started search for her on 11.1.1977, Ram Dulare, Ram Uzagir and Chandrama Prasad who were returning from Rani Ganj Bazar informed him that they had seen Durgesh Nandini being taken away by Nag Nath and Ram Raksha alias Raksha Ram on the bridge over Aami river, when they enquired they were told that her mother was ill and, therefore, they were taking her to village Nankthar i.e. her maternal grand father's home. The report was lodged after an attempt to trace the girl failed. The age of the girl Durgesh Nandini was mentioned as 13 years in the F.I.R.

4. On information received from an informer that Durgesh Nandini had been detained in village Ramwapur P.S. Pach Perwa in Gonda district, the police of P.S. Domariyaganj raided the house of Ram Khelawan alongwith the informant and the police personnel of P.S. Pach Perwa. However, girl was shifted alongwith Ram Raksha alias Raksha Ram from the house of Ram Khelawan to the store house of Kalpa Nath as they got information about the police raid. Finally Durgesh Nandini was recovered from the store house of Kalpa Nath in the custody of Ram Raksha alias Raksha Ram and Ram Khelawan. The recovery memo, thereafter, was prepared and girl was taken into custody alongwith two accused.

On 26.1.1977 the Investigating Officer returned to Domariyaganj, police station and girl was sent for medical examination. Dr. Pushpa Srivastava of Ladies' Hospital, Basti had medically examined Durgesh Nandini on 27.1.1977. She gave a report that there was no evidence of rape upon her. She suggested radiological test for determination of her age. The radiological examination of the girl was conducted by Dr. R.C. Verma of the District Hospital, Basti on 28.1.1977. The medical legal opinion was that all the epiphyses of the elbow were found fused. However, in the X-ray of wrist epiphyses were not fused fully. As per opinion of both the doctors on the basis of radiological test the girl Durgesh Nandini was aged between 17 to 18 years.

5. Prosecution examined P.W. 1 Jhinnan Mishra, father of the girl, P.W.2 girl Km. Durgesh Nandini, P.W.3 Chandrama Prasad scribe of the report, P.W.4 Ram Pragat, witness of the recovery of the girl, P.W. 5 Ram Gulam Sharma and P.W. 8 Sharada Prasad Mishra, who were Investigating Officers, P.W. 6 Dr. R.C. Verma, radiologist of District Hospital, Basti, who conducted the radiological test and P.W.7 Dr. Pushpa Srivastava, lady doctor, who had examined the girl when she was recovered.

Durgesh Nandini, in her examination-in-chief submitted that on the date of incident, at about 9 p.m. Nag Nath came to her house when her father was in Kolhara and her mother had gone to her maternal uncle's house. She was told by Nag Nath and Ram Raksha alias Raksha Ram that her mother was ill and asked her to accompany them. She came out of the house but before moving with them she asked them to inform her father, upon which Ram Raksha alias Raksha Ram and Nag Nath told her that they had already informed her father. Believing them she moved out of her house and when they had reached the boundary of the village other accused Alimullah, Wahid, Muslim and Kumare met them. They then threatened her to accompany Nag Nath and Ram Raksha alias Raksha Ram and also threatened her to marry with Ram Raksha alias Raksha Ram, otherwise they would kill her.

6. She further submits that when they reached the bridge of Aami river, Ram Uzagir, Ram Dulare and Chandrama Prasad met them. They inquired from Ram Raksha alias Raksha Ram and Nag Nath as to where they were taking her, then Ram Raksha alias Raksha Ram told that they were taking Durgesh Nandini to see her mother who was ill. As she was threatened by Ram Raksha alias Raksha Ram and Nag Nath alongwith other accused so she did not raise any alarm when Ram Uzagir, Ram Dulare and Chandrama Prasad met her alongwith Ram Raksha alias Raksha Ram and Nag Nath on the bridge of Aami river. As per statement of the Durgesh Nandini she was brought to Rudhauri by Nag Nath and Ram Raksha alias Raksha Ram from there they reached Basti in a motor-bus. At Basti Ram Raksha alias Raksha Ram told Nag Nath to take her to Gonda and promised to meet them at Gonda Railway station after making arrangement for some money. According to Durgesh Nandini she was taken to Tulsipur from Gonda by Ram Raksha alias Raksha Ram and thereafter they went to Devipatan. In the temple of Goddess of Devipatan, Ram Raksha alias Raksha Ram forcibly put vermilion in the braids of her hair against her will and thus he married her against her wishes.

7. Further statement of the Durgesh Nandini is that from Devipatan she was brought to village Ramwapur by Ram Raksha alias Raksha Ram alone and was kept in the house of his brother-in-law Ram Khelawan. She further stated in the examination-in-chief that the accused Ram Raksha alias Raksha Ram raped her at Devipatan and Ramwapur (in the house of Ram Khelawan). She also stated that when police reached at the house of Ram Khelawan, he took her from his house and concealed her in the store house of Kalpa Nath containing Bhusa and Kanda from where she was recovered.

8. Learned counsel for the appellant Nag Nath submits that statement of the girl Durgesh Nandini that she was enticed or taken away from her house by Ram Raksha alias Raksha Ram and Nag Nath against her wishes is unbelievable. It is also unbelievable that three persons, namely, Ram Uzagir, Ram Dulare and Chandrama Prasad had last seen the girl in the company of Nag Nath and Ram Raksha alias Raksha Ram on the bridge of Aami river that too at about 11 p.m. He further

submits that it is hard to accept the statement of Durgesh Nandini that she came out of her house only on the information given by Ram Raksha alias Raksha Ram and Nag Nath that her mother was ill and accompanied them with an intention to go to her maternal grand father's place without seeking permission of her father in the night at 9 p.m. From her statement it is clear that all her brothers and sisters had gone with her mother except her eight year old younger brother, who was sleeping when she left her father's place.

9. There is no element of "taking away" or "enticing away" the girl out of keeping of her lawful guardianship which is apparent from the statement of Durgesh Nandini, rather it is a case of "elopement" as she left her house in the company of Nagnath and Ram Raksha alias Raksha Ram of her own free will. Even if accepting her age between 17 to 18 years as per radiological examination and the statement of doctor it is difficult to accept that the girl of that age could have left her house with two males in the night only on getting information of her mother's illness.

10. He further submits that as regard to the age, the testimony of Jhinnan Mishra, father of the girl and Durgesh Nandini is unreliable. So far as the medico legal opinion is concerned both the doctors have stated that the age of the girl was between 17 to 18 years. There cannot be any definite medico legal opinion with regard to age of the girl on the basis of radiological test. He placed reliance on the judgment of Apex Court in the case of [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others](#), , in order to submit that the margin of error in age ascertained by radiological examination is two years on either side.

11. Learned counsel for the appellant submits that basic ingredients of the offence are absent because there is no question of any enticing or taking away the girl even if it is assumed that she was minor as a matter of fact that she had voluntarily gone with appellants. In order to substantiate his argument he placed reliance on the judgment of Apex Court in [S. Varadarajan Vs. State of Madras](#), . Placing reliance of the said judgment he submits that there is distinction between "taking" and allowing a minor to accompany a person.

12. Learned A.G.A. refuting the submission of the learned counsel for the appellant and supported the prosecution case submits that so far as the girl leaving house of her father in the company of Ram Raksha alias Raksha Ram and Nag Nath and her recovery in village Ramwapur where she was kept concealed in the house of Ram Khelawan, brother-in-law of Ram Raksha alias Raksha Ram is supported from the statement of Investigating Officer Sharda Prasad Mishra P.W.8 and Ram Pragat P.W. 4, the witness of recovery memo. The fact that girl was shifted from the house of Ram Khelawan to store house of Kalpa Nath is also established from the fact of recovery of the girl alongwith Ram Khelawan and Ram Raksha alias Raksha Ram. The witness of recovery of girl Ram Pragat, P.W.4 though did not support the prosecution story as he had turned hostile, however, stated that he was present when the girl was recovered from village Ramwapur. Thus, the prosecution case

regarding recovery of girl from village Ramwapur where she was concealed at the house of Ramkhelwan is proved beyond doubt.

13. He further submits that two doctors who conducted medical and radiological examination of the girl gave a definite report that girl was between 17 to 18 years. They have categorically submitted in their examination that the age of the girl would not be more than 18 years. Under these circumstances offences punishable under Sections 363 and 366 I.P.C. have been made out. The accused-appellants were rightly held guilty of offences of which they convicted.

14. So far as the first submission of the learned counsel for the appellant is that elements of kidnapping were not found from the very statement of the girl itself. Before dealing with the said submissions it would be appropriate to reproduce Section 361 I.P.C. It may be noted that punishment of Section 361 I.P.C. is provided u/s 363 I.P.C. Section 361 I.P.C. is reproduced below:

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

The two words "takes" and "entices" as used in Section 361 I.P.C. clearly suggest 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. There is no suggestion given by girl Durgesh Nandini that appellant had at some earlier stage solicited or persuaded her in any manner for leaving her father's house. There is no suggestion of any force, inducement or persuasion to the girl. From her statement itself, it is apparent that she herself left her father's house without any inducement by the accused appellant who merely asked her to accompany them on the pretext of her mother's illness. From the fact it is apparent that there was an element of willingness on the part of the girl who had voluntarily came out of her house in the night and joined the accused.

15. Further noticeable fact is that as per her statement she was taken from one place to another and finally reached at Devipatan where she alleged that deceased Ram Raksha alias Raksha Ram forcibly married her. The appellant Nag Nath as per

prosecution case had accompanied Ram Raksha alias Raksha Ram up to Domariyaganj. From Gonda she went with Ram Raksha alias Raksha Ram to Tulsipur and Devipatan. The statement of the girl is that she went to Basti by motor bus with the appellant and they stayed at the railway station of Gonda and then she went with Ram Raksha alias Raksha Ram alone to Tulsipur and lastly to the temple of Goddess Devipatan. These places are public places and she had ample chance to raise an alarm that she had been kidnapped by Ram Raksha alias Raksha Ram and Nagnath. The fact that she did not raise any alarm during course of her journey from her village Parsa Imad, district Basti to Devipatan and then to Ramwapur, is sufficient to conclude that she had gone voluntarily with Ram Raksha alias Raksha Ram and Nag Nath knowing that she would marry Ram Raksha alias Raksha Ram. This fact is further fortified from the statement of the girl that she left her house without informing her father when her eight years old younger brother was sleeping. Thus basic ingredients of the offence are absent in the instant case.

16. The Apex Court in *S. Varadarajan (supra)* had distinguished the case of "taking" or enticing away from the mere act of elopement. In the said case their Lordship observed that a case 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 case 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 formation of the intention of the minor to leave the house of her guardian. Their Lordships held that even if a lady who had not attained the majority i.e. age of 18 years goes out with a man of her own accord then it could not be said to be a case of either taking away or enticing away a minor woman out of her keeping of lawful guardianship.

17. In the instant case on consideration of evidence on record this Court is of the considered view that it is case of "elopement" rather than kidnapping as suggested by the prosecution even if it is accepted that girl was minor when she left her house. There is nothing on record that there was any kind of inducement or persuasion, promise and offer by the appellant Nag Nath and deceased Ram Raksha alias Raksha Ram at the time when Durgesh Nandini left the house of her father with two accused-appellants. The manner in which she had left the house is not tantamount to "taking away" or enticing away". The story set up by the girl Durgesh Nandini in her statement is unbelievable.

18. In the instant case as regard the age of the girl as per medico legal opinion her age was in between 17 to 18 years. As has been held in the case of *Jaya Mala (supra)* margin of error in age ascertained by radiological examination is of two years on either side. Taking into consideration the report of the radiologist and statements of two doctors who conducted medical examination and radiologist test, namely, Dr.

R.C. Verma and Dr. Pushpa Srivastava, this Court has no hesitation in recording that girl Durgesh Nandini could be above 18 years of Age.

19. In view of the observations made above, it is difficult to endorse the finding of the learned First Additional Sessions Judge, Basti on the basis of statements of both the doctors that age of the girl was below 18 years. Learned First Additional Sessions Judge had erred in recording the finding that two doctors had categorically stated that girl would not be more than 18 years and, therefore, under these circumstances the consent of Durgesh Nandini becomes immaterial. The deceased accused-appellants Ram Raksha alias Raksha Ram and Nagnath were held guilty of offences punishable under Sections 363 and 366 I.P.C. So far as the charge of offence u/s 376 I.P.C. is concerned, it was held that as age of the girl was above 16 years, therefore, offence u/s 376 I.P.C. has not been made out. This Court finds no hesitation in observing that learned First Additional Sessions Judge Basti had erred in law in holding that appellant Nag Nath was guilty of offences punishable under Sections 363 and 366 I.P.C. though the finding is that Durgesh Nandini departed in the company of Nagnath and Ram Raksha alias Raksha Ram out of her own will. Merely because the age of the girl was stated to be between 17-18 years as per medico legal opinion, it cannot be ascertained that girl of more than 16 years of age is not in a mental status of understanding the full import of leaving house at night with two males, that too without informing her father. The lower Court had erred in not considering this aspect of the matter.

Accordingly the appeal of Nag Nath appellant No. 2 is allowed. The judgment and order dated 29.5.1982 passed in S.T. No. 240 of 1979 is set aside. The appellant No. 2 Nagnath is acquitted for the offences punishable under Sections 363 and 366 I.P.C. The accused-appellant Nagnath is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

Certify the judgment to the lower Court within a week from the date of judgment. The original record of the case be also transmitted to the Court below immediately. The compliance shall be reported by the Chief Judicial Magistrate Basti within four weeks from the date of receiving the copy of this order.