

**(1994) 03 AHC CK 0097**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 241 of 1981

Santosh Kumar

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** March 24, 1994

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 362, 366, 376

**Citation:** (1994) 18 ACR 685 : (1996) 3 UPLBEC 1687

**Hon'ble Judges:** K. Narayan, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

K. Narayan, J.

By the judgment and order dated 29.1.1981 the Appellant was found guilty and convicted of the offences under Sections 366 and 376, I.P.C. in S.T. No. 99 of 1979 and sentenced to rigorous imprisonment for 4 years under each count. The sentences were, however, made to run concurrently.

2. The prosecution story in brief has been that the accused Appellant had enticed one Km. Savita, aged about 16 years when she had gone to take examination of High School on 4.5.1979. The first information report about the incident is said to have been lodged on 10.5.1979, also conveying that she was seen with the accused by Babu Ram and Santosh Kumar. The girl is said to have been recovered when she was staying with the accused in a Dharmshala in Modi Nagar, on 19.5.1978 by the Sub-Inspector of Police. Santosh Kumar, the Appellant accused was arrested on the same date.

3. Km. Savita was produced for medical examination and in the opinion of Dr. Mrs. V.L. Tewari, P.W. 10, she had well developed, auxiliary and pubic hair and breast were also well developed, and her vagina examination, hymen was found to have been torn old healed and admitted two fingers easily. There was no external or

internal mark of injury. In the opinion of doctor she was used to sexual intercourse. Skiagram examination was also taken up and according to the report of radiologist epiphyseal union epiphysis was seen round the elbow and knee joint, whereas union at distal ends of radius and ulna bones were nearing completion (almost united). On these observations the medical opinion was that her age was about 18 years. Before proceeding with other things it may be mentioned here that there was also evidence about her date of birth having been recorded in the school register as 2.6.1961 as stated by P.W. 5 Jagan Nath Prasad Singh and in view of the medical observation of about 18 years and the entry of the date of birth in the school registers I have least hesitation in concluding that she was a little less than 17 years on the date of alleged occurrence which was in May 1978.

4. The prosecution case as later on developed after investigation was in the form that she was taken by force or enticed away by the accused and that he had forcibly committed sexual intercourse with her against her wishes.

5. The prosecution had examined P.W. 1, P.D. Sharma, the Sub-Inspector of Police who had arrested the accused and recovered Km. Savita from Dharamshala on 19.5.1978 P.W. 2 Santosh Kumar and P.W. 6 Babu Ram were examined to state that they had seen the accused and Km. Savita going together on the date of alleged enticement. As to what is the value thereof may be considered below if required and for the present it may be said that there is no occasion for discarding their evidence P.W. 3 Gajraj was the manager of the dharamshala where the two had stayed and obviously there is not much dispute about that factor. P.W. 7 Atma Ram the father was not an eye witness of anything except the matter of age which I have already accepted. I am not prepared to accept his contention that Km. Savita was below 16 years at that time as it is in contradiction with both the medical evidence as well as the recorded date of birth which presumably must have been given by him long before the alleged occurrence itself. P.W. 8 Chandra Prakash was an X-ray Technician and his evidence was formal while P.W. 9 Surendra Singh. Sub-Inspector of Police had investigated the case.

6. The material evidence in the case has been that of P.W. 4 Km. Savita who may be called victim prosecutrix or anything. The learned Sessions Judge has come to conclusion that she was forced to sexual intercourse but this is a very superficial appreciation of the evidence. According to her statement she was compelled by the accused to go with him. In fact, it is difficult to understand as to what stand she wanted to take? In the first instance she stated that the accused had allured him with a promise "Panipath ke pas ek jheel hai waha tujhe ghuma lau." It is also stated by her that he had allured her with future promise for giving good clothes and ornaments. Can it said to be use of force at all. The mere idea was that it was an enticement is also against the exactness of general behaviour specially with girl. It is easy to say that because she was minor, she could not understand but that does not obtain any weight in view of the fact that she was used to sexual intercourse and

was going to take examination which for any student carries more meaning than a future promise for ornaments or clothes or a suggestion to go for roaming out to a lake. It may be that the child aged about 3 or 4 years may be enticed by presentation of a Lolipop but a girl of 17 knows herself better and if she is pretending that she did not know as to what for she was being offered the promise of clothes and ornaments, she is deceiving herself in her effort to deceive the Court. Her statement that she went up to Panipath for the above promise and was thereafter taken to Ambala by force, is again another effort to tell a lie which is so clear on its face that nobody could believe it. There is no evidence except in her own statement that she was taken to Ambala or Kalka or Simla. The Investigating Officer has been very particular about obtaining the extract of the register of Dharamshala but no effort was made to verify her statement from hotels at Shri Nagar where she had stated to have stayed in a hotel. She must have been in the presence of the manager of the hotel before getting entry into the room. Her statement in cross-examination that whenever she tried to raise an alarm her mouth was shut forcibly does not stand to scrutiny because if she wanted to raise alarm it must have been in the presence of several others and if she could not have raised alarm. She could have shown her resentment by movement of her hands and legs which would have naturally invited the attention of passers by. Her statement that the accused used to give fists blows in her stomach is beyond understanding as that will also be seen by others.

7. After a perusal of statement of Km. Savita. I have least hesitation in concluding that she was not only a willing lady for sexual intercourse but there could also be some force in the statement of the accused where he had narrated that she had herself written her letters and had come with some money from her house, in order to enjoy herself. There was, therefore, no occasion for any conviction u/s 376. I.P.C.

8. The next question that arises is as to whether the accused herself can be said to have enticed her during her minority.

9. Learned Counsel for the Appellant has referred to two decisions in this behalf. The first case was Mashrooq alias Rustam v. State of U.P. (XXII) 1985 ACC 387 . Where this High Court in similar circumstances i.e. where the age of prosecutrix for 17 years and she was consenting party, it was held that the accused could not be held guilty as the fact that the girl was not above 18 years of age at the time of occurrence was not proved beyond reasonable doubt. The other case is a decision of Hon"ble Supreme Court in the case of [S. Varadarajan Vs. State of Madras](#), . It appears that in this case the girl was at the verge of attaining majority and had telephoned accused to meet her at a certain place and from there had gone with him to various places. It was held that it appeared that the insistance of her marriage came from her side and in the circumstances, it could not be paid that the accused had taken her out or of keeping her out of lawful guardianship i.e. father.

10. In order to properly appreciate the applicability of Section 366, I.P.C. an eye section itself will be of use. The section reads as under-

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.

11. It is apparent from the above definition that the intention while taking away any woman has to be to compel or knowing it to be likely that she will be compelled to marry any person against her will. There is no evidence to that effect in this case. Having sexual intercourse with consent is something quite different from even a persuasion of marriage what to say of compulsion. The other part is that she may be forced or seduced to illicit intercourse and that again is not available as a consented sexual intercourse after the age of 16 years cannot be said to be illicit intercourse. The still third ingredients is where the woman is taken by means of criminal intimidation or abuse of authority or any other method of compulsion applied to any woman to go from one place to other. This again is wanting and according to her own statement there was no intimidation and only allurement.

12. Reverting to the question of kidnapping and abducting one may again referred to Section 362, I.P.C. which defines abduction. It requires movement of any person from one place to other by force or by deceitful means. There was no use of force in this case for the purposes of taking if It could be said taking at all, nor any deceitful misrepresentation was made even according to the statement of Km. Savita.

13. So far as the kidnapping is concerned one has to bear a ratio in mind with reference to the age. Nobody is expected to obtain an affidavit about the age before proceeding to satisfy the sexual invitation of another girl. The girl herself is also supposed to know something herself and her future. In the cases where the age is nearing majority the factor of an year or two should be allowed to weigh in favour of the accused unless he had some different reason to believe that-he has dealing with minor.

14. In the circumstances, and for the discussion mentioned above. I am in judgment that no offence was made out against the accused Appellant and his conviction or sentence cannot be sustained. The appeal, therefore, should succeed.

15. The appeal is allowed. The conviction and sentence rendered by the trial Court are hereby set aside and the accused Appellant shall stand acquitted of the charges framed against him. He is on bail. His bail Bond is cancelled and sureties discharged. In case, he has been taken in custody in pursuance of the order dated 8.2.1994 of this Court he shall be released forthwith unless wanted in some other case.