

**(2014) 05 AHC CK 0227**

**Allahabad High Court**

**Case No:** Criminal Revision No. 2638 of 2013

Asha

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** May 13, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 171, 97
- Penal Code, 1860 (IPC) - Section 363, 366

**Citation:** (2014) 3 ACR 2650 : (2014) 86 ALLCC 23

**Hon'ble Judges:** Vijay Lakshmi, J

**Bench:** Single Bench

**Advocate:** A.P. Tewari and R.S. Tripathi, Advocate for the Appellant

**Final Decision:** Allowed

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### **Judgement**

Vijay Lakshmi, J.

Heard Mr. A.P. Tewari assisted by Mr. R.S. Tripathi, learned Counsel for the revisionists as well as learned A.G.A. on behalf of opposite party Nos. 1 and 2. No one is present on behalf of opposite party No. 3 (informant) despite the fact that he has been personally served with the notice as per the report dated 17.2.2013 of the Chief Judicial Magistrate, Budaun. Learned Counsel for the revisionists prays that the case be decided on merits today as it is pending since long specially in the light of the note appended on the top of the cause list that "no case shall be adjourned on the ground that learned Counsel for the informant is not present". Learned Counsel has further submitted that even after expiry of one year from personal service of notice the opposite party No. 3 (informant) has neither appeared nor engaged any Counsel to argue the case on his behalf.

2. In view of the aforesaid facts, I am deciding this criminal revision today on merits, after hearing learned Counsel for the revisionist, learned A.G.A. and after carefully perusing

the records.

3. The instant criminal revision is being preferred against the order dated 18.7.2013 passed by the Chief Judicial Magistrate, Budaun in Criminal Case No. 1481 of 2013 (State v. Kishanveer) under sections 363 and 366 I.P.C. whereby the prosecutrix-revisionist No. 1 was sent to Nari Niketan.

4. Learned Counsel for the revisionists has challenged the legality of the aforesaid by arguing that the prosecutrix has been detained in Nari Niketan against her will and thus her right to liberty has been infringed. The prosecutrix is major and she has categorically stated in her statement recorded u/s 164 Cr.P.C. that she has performed marriage with Kishanveer (revisionist No. 2) out of her own free will and she intends to live with him in her matrimonial home. The radiological age of the girl has been found to be 18 years but the learned Magistrate, relying on the School Leaving Certificate and admission register of prosecutrix has held her minor, without paying any attention to the fact that the Headmaster of the school had denied that the prosecutrix had ever studied in his school. Learned Counsel has further argued that the impugned order clearly shows that when the prosecutrix was asked to name any of her relatives with whom she intends to go, she specifically stated that she intends to go with Kishanveer and with no other relative, but ignoring her statement the learned Magistrate has sent her to Nari Niketan against her wishes. Learned Counsel for the revisionists has vehemently argued that even a minor can not be sent to Protection Home against his/her wishes. In this regard he has placed reliance on a Division Bench judgment of this Court reported in [Smt. Raj Kumari Vs. Superintendent, Women Protection House and Others](#), in which, the Division Bench of this Court relying on two earlier Division Bench judgments in the matter of Smt. Parvati Devi, 1982 (19) ACC 32 and [Mrs. Kalyani Chaudhari Vs. The State of U.P. and Others](#), has held that:

...no person can be kept in a Protective Home unless she is required to be kept there either in pursuance of Immoral Traffic in Women & Girls Protection Act or under some other law permitting her detention in such a home. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home.

5. In the case of Smt. Parvati Devi (supra) the Division Bench of this Court has held that:--

...confinement of an accused in Nari Niketan against her wishes could not be authorised either u/s 97 or u/s 171 Cr.P.C. and the respondents have failed to bring to the notice of the Court, any legal provision whereunder the Magistrate has been authorised to issue direction that a minor female witness shall against her wishes, be kept in Nari Niketan.

6. Per contra learned A.G.A. has contended that the learned Magistrate has committed no illegality while holding the prosecutrix as minor on the basis of her school certificates

relying on two judgments of the Supreme Court cited in the impugned order and sending her to Nari Niketan.

7. After hearing the rival submissions of learned Counsel for the parties and considering the materials on record I am of the considered view that this revision deserves to be allowed and the impugned order dated 18.7.2013 is liable to be quashed and set aside for the following reasons:--

1. The learned Magistrate while passing the impugned order has not considered the fact that the radiological age of the prosecutrix was found to be 18 years. Learned Magistrate has blindly placed reliance on school leaving certificate and admission register of the girl even without considering that the Headmaster of the school has denied that the prosecutrix had ever studied in his school relying on two judgments of Hon"ble Apex Court.

8. I have carefully gone through both the judgments of Hon"ble Apex Court relied on by learned Magistrate for ascertaining the age of the girl.

9. The first case cited by learned Magistrate is (Ranga Swami v. State). 2011 (1) JIC (SC) In this case Hon"ble Supreme Court has held otherwise by observing as under:--

.....the age of the girl could not have been fixed on the basis of transfer certificate in absence of any reliable evidence to couch safe the correctness of the date of birth as recorded in transfer certificate and where the expert evidence (of Radiologist x-ray report) does not rule out the possibility of the girl being major.....

10. To the contrary the impugned order shows that perhaps the learned Magistrate either without going through the aforesaid judgment or without understanding it, has held the prosecutrix as minor, on the basis of uncorroborated school leaving certificate of such school, the principal of which has even denied the prosecutrix being ever a student of his school. Learned Magistrate has totally ignored her radiological report, testimony of radiologist and the statement of prosecutrix recorded u/s 164 Cr.P.C.

11. The second case relied on by learned Magistrate is (Muntgan v. State of Tamil Nadu), 2011 (73) ACC 922 (SC) : 2011 (102) AIC 59 which is not applicable to the present case as the facts of both the cases are entirely different. In Murugan"s case the date of birth mentioned in school certificate stood supported and corroborated by birth certificate issued by municipality and the reliable oral testimony of the witnesses. Moreover in Murugan"s case the issue pertained to reduction of quantum of punishment whereas the instant revision is preferred against the order for sending the prosecutrix to Nari Niketan.

The statement recorded u/s 164 Cr.P.C. of the prosecutrix clearly shows that the prosecutrix has stated not only to have willingly performed marriage with Kishanveer but to have established physical relations too, with him. In these circumstances there was no occasion to send her to Nari Niketan against her wishes.

Even assuming for the sake of arguments that the prosecutrix was minor at that time, she should not have been sent to Nari Niketan against her wishes in wake of the clear law as laid down earlier by the Division Bench of this Court in the 3 decisions cited above,.

For the abovesaid reasons, the revision is allowed. The impugned order dated 18.7.2013 is set aside. The opposite party Nos. 2 and 3 are directed to release the prosecutrix forthwith, if not wanted in any other case, and send her to her husband"s (revisionist No. 1 Kishanveer) home under proper security.