

(2017) 12 AHC CK 0039
ALLAHABAD HIGH COURT
Case No: 22694 of 2017

Pankaj Kumar And
Another

APPELLANT

Vs

State Of U.P. Thru.
Secy. Home And
Others

RESPONDENT

Date of Decision: Dec. 14, 2017

Acts Referred:

- Constitution of India, Article 226 - Power of High Courts to Issue certain writs
- Code of Criminal Procedure, 1973, Section 482, Section 164 - Saving of inherent powers of High Court - Recording of confessions and statements
- Indian Penal Code, 1860, Section 363, Section 366, Section 361 - Punishment for kidnapping - Kidnapping, abducting or inducing woman to compel her marriage, etc - Kidnapping from lawful guardianship

Hon'ble Judges: Ajai Lamba, Dinesh Kumar Singh

Bench: Division Bench

Advocate: Jalaj Kumar Gupta

Final Decision: Allowed

Judgement

1. The present petition has been filed by the petitioners for quashing the First Information Report dated 08.07.2017 registered at Police Station Tikunia, District Lakhimpur Kheri bearing Case Crime No.103 of 2017 under Sections 363, 366 I.P.C.

2. The allegation as per the F.I.R. is that respondent no.5 was enticed away on 12-13.07.2017 at around 10:00 PM by the petitioner no.1 in connivance with his father, petitioner no.2. It is alleged that respondent no.5 was 16 years of age and she had taken some cash with her while going away with the petitioner no.1.

3. Respondent no.4 who happens to be the brother of respondent no.5 lodged the F.I.R. In pursuance to the aforesaid F.I.R., respondent no.5 was recovered on 17.08.2017 and her statement under Section 164 Cr.P.C. was recorded on 22.08.2017. In her statement recorded under Section 164 Cr.P.C., respondent no.5 said that she was 20 years of age. She further said that her marriage was fixed with the petitioner no.1 and thereafter, they started meeting each other. Her family members became greedy and, therefore, they wanted to marry her with some other person after taking money.

4. It has further said that she refused to marry someone else than the petitioner no.1. For this reason she was tortured and given beatings. The family members were pressurising her to marry some other person from whom they had taken money. Under these circumstances, on 12.08.2017 she left the house secretly and performed the marriage with petitioner no.1. She was not enticed away by anyone but whatever she had done, it was on her own volition and free will using her discretion. She said that she was living happily with her husband, petitioner no.1 and petitioner no.1 did not instigate her for marriage with him.

5. Respondent no.5 refused to go to her parental house when she was produced before Bal Kalyan Samiti on 26.09.2017. Bal Kalyan Samiti taking into consideration the date of birth of the respondent no.5 mentioned in School Transfer Certificate i.e. 12.09.2002 and without considering the medical report in which her age was found to be 18-20 years, sent her to Dr. Rajendra Prasad Sudhar Grah Paliya, Kheri. This Court on 14.11.2017 passed the interim order in the writ petition that the petitioners would not be taken in custody till the next date of listing.

6. Counter affidavit has been filed on behalf of the Prosecuting agency. However, despite notice, the complainant, respondent no.4 has not appeared in the case. The stand of the prosecuting agency in the short counter affidavit is that as per the School Transfer Certificate of the respondent no.5 her age on the date of incident was 14 years 10 months and she was a minor therefore, the F.I.R. cannot be quashed and as the offence under Section 363 I.P.C. is clearly made out against the petitioner.

7. We have considered the rival contentions advanced on behalf of the petitioners and the State represented by Mr. R.K. Dwivedi learned AGA.

8. The ingredients of Section 361 I.P.C. are required to be present in the case for invoking the offence under Section 363 I.P.C. Section 361 I.P.C. reads as under:

"361. Kidnapping from lawful guardianship.-Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

9. It is clear from the reading of the above Section that taking or enticing away a minor put of the keeping of a lawful guardian is an essential ingredient of offence of kidnapping. Considering the statement of respondent no.5 recorded under Section 164 Cr.P.C., it is clear that she on her free will and own volition and accord knowingly fully well and having capacity of knowing what was she doing, voluntarily joined petitioner no.1 and performed marriage with him without any force or coercion as is evident from her statement recorded under Section 164 Cr.P.C. by the Magistrate. She specifically states that the petitioner no.1 did not force her for marriage.

10. Even if the contention of the prosecution is believed that the respondent no.5 was minor as per her School Transfer Certificate on the date of incident, the Court is required to find out whether the part played by the petitioner no.1 amounts to taking out of the keeping of the lawful guardian of the respondent no.5. Respondent no.5 herself in her statement in unambiguous words has categorically stated that she left her parent's house on her own volition and there is nothing to suggest that she left the house of her parents at the instance of the petitioner no.1.

11. The marriage between the petitioner no.1 and the respondent no.5 was performed in compliance of her wishes. Considering the statement of the respondent no.5, by no stretch of imagination it can be said that the petitioner no.1 has taken the respondent no.5 out of keeping of her lawful guardian.

12. There is nothing on record to show that the respondent no.5 who has attained age of discretion and was on the verge of attaining the age of majority even as per the School Transfer Certificate, was forced by the petitioner no.1 to accompany him under threat or coercion. The conduct of the respondent no.5 suggests that she went with the petitioner no.1 out of her own desire to marry him and be his wife. From the aforesaid facts and circumstances we do not find anything from which an

inference could be drawn that the petitioner no.1 could be held guilty of taking away the respondent no.5 out of the keeping of her father.

13. The Supreme Court in the case of S.Varadarajan versus State of Madras AIR 1965 SC 942 in para 7 held as under:-

"6.....she willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her.....

14. In paras 9 and 10, the Supreme Court in S. Vardharajan's Case(supra) further held as under:-

"9.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 s. 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 that 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.

10.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 fulfillment 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".

15. Besides it is also a well established law that the medical evidence with respect to the age of the victim of offence cannot be discarded on the basis of date of birth mentioned in the Scholar's register or in the School Certificate unless date of birth so recorded in the testimonials is on the basis of birth certificate issued by a competent authority such as municipal body or hospital etc. In absence of the evidence collected by the prosecuting agency regarding the basis of entry of date of birth in school certificate etc., the credence has to be given to the medical certificate and not to the school certificate.

16. The Supreme Court in several judgments including in the Case of Birad Mal Singhvi Vs. Anand Purohit reported in 1988 (Supp) Supreme Court Cases 604 has considered the question of probative value of an entry regarding the date of birth made in the Scholar's register and in School Certificate in election cases and has consistently held that the date of birth mentioned in the Scholar's register or Secondary School Certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined.

17. The Supreme Court in somewhat similar facts in the case of Juhi Devi Vs. State of Bihar and Others reported in (2005) 13 SCC 376, while dealing with the confinement of the girl in the remand home in para 2 opined as under:-

"The petitioner herein is alleged to have married another person of her age and the 5th respondent herein, the father of the petitioner, objected to the said marriage. It seems that the petitioner had eloped with that person and the father of the petitioner, the 5th respondent, has filed a complaint and the petitioner was produced before the CJM, Patna. The petitioner claims that she was a major and voluntarily left with her husband. The father of the petitioner alleged that the petitioner was a minor and the question of age was referred to a Medical Board. The Medical Board opined that as on 17-5-2003, the petitioner must have been aged between 16 and 17 years. However, the father of the petitioner produced two certificates before the Revisional Court and contended that her date of birth is 12-10-1985 and she has not attained majority. However, the medical report shows that she must have been aged more than 16 years, even on 17-5-2003. Having regard to these facts, we are of the view that she must have attained majority and her stay at the remand home would not be in the interest of justice and we think that her continued stay at the remand home would be detrimental and she would be in a better environment by living with the person whom she had allegedly married."

18. We have to see whether the impugned F.I.R. discloses commission of an offence and whether the continuance of criminal prosecution would account to abuse of process of the Court. The Supreme Court in the case of *State of Haryana versus Bhajan Lal and others* (1992) Sup 1 SCC 335 has listed out the categories of cases by way of illustrations wherein the High Court can exercise the extraordinary power under Article 226 of the Constitution of India or power under Section 482 of the Cr.P.C. to quash the F.I.R. or criminal proceedings. Para 102 of the said judgment reads as under:-

"In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Cod.

(3) where the uncontroverted allegations made in the FIR or "complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

19. In view of the law enunciated by the Supreme Court of India in the said judgment and keeping in mind the statement of the victim under Section 164 Cr.P.C., her medical age i.e. 18-20 years, we are of the considered view that continuance of the criminal prosecution in pursuance of the impugned F.I.R. would be in abuse of process of the Court. None of the ingredients of Section 363, 366 I.P.C. is satisfied and in the facts and circumstances of the case, it would be unjust to allow the process of the Court to be continued against the petitioners.

20. In the result, we quash the impugned F.I.R. and allow the petition.