

(2002) 01 AP CK 0012

Andhra Pradesh High Court

Case No: Criminal R.C. No. 31 of 1999 and Cri. Revision Petition No. 31 of 1999

Palipireddi Satyanarayana alias

Sathi Babu

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision: Jan. 21, 2002

Acts Referred:

- Penal Code, 1860 (IPC) - Section 361, 363, 497, 498

Citation: (2002) 2 ALD(Cri) 327 : (2002) 2 ALT(Cri) 170 : (2002) CriLJ 2319

Hon'ble Judges: Gopala Krishna Tamada, J

Bench: Single Bench

Advocate: Ch. Dhananjaya, for the Appellant; Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Gopala Krishna Tamada, J.

The petitioner was tried for the alleged offence punishable u/s 363 of the Indian Penal Code in Sessions Case No. 167 of 1996 on the file of the Assistant Sessions Judge, Peddapuram, East Godavari District and ultimately he was convicted and sentenced to undergo Rigorous Imprisonment for a period of three years and also to pay a fine of Rs. 1,000/- (Rupees One Thousand only) and in default of payment of fine amount to suffer simple Imprisonment for a period of three months. On appeal, in Criminal Appeal No. 236 of 1996, the learned Sessions Judge, East Godavari District, by his Judgment, dated 30-11-1998, dismissed the same confirming the conviction and sentence passed by the trial Court.

2. The case of the prosecution is that the petitioner is a resident of Mallala village and eking out his livelihood by running a soda shop and he was married. P.W. 3 who is the daughter of P.Ws. 1 and 2 are also the residents of same village where P.W. 1 is carrying on hotel business. The killi shop run by the petitioner is just opposite to the hotel belonging to P.W.I. On 7-11-1995 while P.W.3 was sleeping at her resident,

the petitioner forcibly kidnapped her from the lawful guardianship of P.W. 1 and took her to Visakhapatnam in a lorry where he kept her in a rented house and the petitioner used to commit sexual intercourse with P.W.3 without her consent.

3. Basing on the report given by P.W. 1, the father of P.W.3, a case in Cr. No. 136 of 1995 was registered against the petitioner for the offence punishable u/s 363 of the Indian Penal Code and after investigation, charge-sheet was filed against the petitioner.

4. In all the prosecution has examined P.Ws. 1 to 8 and got marked Exs. P-1 to P-8 and after detailed discussion of the entire evidence, the trial Court held that the petitioner has committed the offence punishable u/s 363 of the Indian Penal Code and accordingly, it convicted and sentenced him to undergo rigorous imprisonment for a period of three years and also to pay a fine amount of Rs. 1,000/- (Rupees One Thousand only) and in default of payment of fine amount to suffer simple imprisonment for a period of three months. Aggrieved by the conviction and sentence passed by the trial Court, the petitioner preferred an appeal as stated above and the lower appellate Court confirmed the Judgment of the trial Court and dismissed the appeal.

5. Sri Ch. Dhananjaya, the learned Counsel for the petitioner, strenuously contended that since P.W.3 is a consenting party throughout it cannot be said that the petitioner is taken away without the consent of the lawful guardian to attract the provisions of Section 363 of the Indian Penal Code. His further submission is that according to the admission of P.W.3 and the evidence of P.W. 7 coupled with the evidence of P.W.4, P.W.3 is aged not under 18 years and as such the provisions of Section 361 of the Indian Penal Code have no application to the case on hand. In support of his contention he relied on a Judgment of the Apex Court reported in [S. Varadarajan Vs. State of Madras, ; State of Kerala v. T. J. Jose \(1989\) 1 Crimes 577 \(Ker\)](#) and [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others, .](#)

6. Heard the learned Public Prosecutor.

7. It is relevant here to mention the provisions of Section 361 of the Indian Penal Code, which defines kidnapping :

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.

8. From a reading of the above provisions, it is clear that three requirements are to be satisfied i.e., the girl must be (1) under 18 years of age, (2) is taken away and (3) without the consent of the lawful guardian. If these three requirements are

satisfied, it can be safely concluded that the accused has committed the offence u/s 363 of the Indian Penal Code. Of course, the evidence of P.W. 3 is to the effect that she was a consenting party for the acts committed by the petitioner. The relevant portion of Chief-Examination of P.W.3 reads as follows :

In the following morning my mother woke me up and I went for answering calls of nature. The accused came and took me away. When I cried aloud he threatened me to kill. He boarded me in a lorry and took me to Jaggampeta and from there to Gajuwaka. On Wednesday itself the accused took me to Gajuwaka and kept me in a house for two days and thereafter secured a house and kept me there. The accused used to go for cooli work. Myself and the accused resided in that house with harmonious relationship. The accused used to give me the amount earned by him in cooli work. I did not question the accused as to why he brought me there. He also did not say. Both of us stayed in one room only and there used to be sexual intercourse between us. I did not protest for the sexual intercourse by the accused with me. We stayed in that house for one month and during that one month everyday we used to have sexual intercourse. The accused and myself had sexual intercourse during the above entire one month willingly only. I was never unwilling for the sexual act with me. After one month the accused brought me to Jaggampeta and asked me to stay at Sai Baba Temple and said that he would come back shortly. But he did not turn up. Then police took me to Government Hospital, Peddapuram. Doctor examined me. I knew even by the time the accused was taking me away that he was married. Though I stated to the accused that he was married and I was not married. He promised that he would marry me also. I surrendered to him believing his words that he would marry me. I stated to the police that the accused had sexual intercourse with me by force everyday in Gajuwaka. Now I am carrying 9th month pregnancy. I got this pregnancy through the accused only. Now I am 16 years old. During previous karteekarmasam I was 15 years old.

9. The learned Counsel for the petitioner has drawn my attention to the evidence of P.W.7, who is the Medical Officer, to establish that P.W.3 is aged 19 years. In the cross-examination, P.W.7 has stated as follows :

As per P.W.3's statement, I mentioned her age in Ex. P-6 as 19 years. The requisition given by police to me is Ex. P-7. In Ex. P-7 the age of the girl brought to me for examination is mentioned as 16 years old. In spite of it I mentioned her age in Ex. P-6 as 19 years basing upon her own statement.

10. No doubt, it is true from a reading of the evidence of P.W.3 coupled with the evidence of P.W. 7, it *prima facie* appears that P. W. 3 was aged 19 years and she was a consenting party. But the evidence of P.W. 4 who is a Radiologist and is competent to certify the age has categorically stated that P.W.3 was aged 16 years at the relevant point of time. When we add two years as per the decisions of the High Court and Supreme Court in *State of Kerala v. T. J. Jose 1989 (1) Crimes 577* and [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others,](#)

P.W.3 must be under 18 years of age. In the light of the certificate, Ex. P-2, issued by P.W.4, this Court has no hesitation to hold that P.W.3 was under 18 years of age.

11. As already observed, of course, the evidence of P.W.3 is to the effect that she was a consenting party after the commission of the offence, but the question whether she was a consenting party or not is immaterial to attract the provisions of Section 361 of the Indian Penal Code. The requirements are that, she must be under 18 years of age and was taken away without the consent of her lawful guardian. P.W.I, who is the father of P.W.3, has given a complaint, which shows that the acts committed by the petitioner are against the Will and consent of P.W.3. It is also not the case of the petitioner that a false case is foisted against him.

12. In the Judgment reported in *Varadarajan v. State of Madras* 1965 (2) Cri LJ 33 their Lordships of the Apex Court had an occasion to interpret the word "taking away" in the context of Section 361 of the Indian Penal Code. It is relevant to extract the relevant paragraphs of the said Judgment hereunder :

(7)...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 got into 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. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the

appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. 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. She was no uneducated or unsophisticated village girl but a senior College student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area....

(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 purpose 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 that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be sworn 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".

(12)... It must be borne in mind that while Sections 497 and 498, Indian Penal Code are meant essentially for the protection of the rights of the husband, Section 361 and other cognate Sections are intended more for the protection of the minors and

persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection we may refer to the decision in [State Vs. Harbansing Kisansing,](#). In that case Gajendragadkar, J. (as he then was) has, after pointing out what we have said above, observed :

It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves.

(13) While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in Sections 497 and 498 of the Indian Penal Code should be given a wide interpretation so as to effectuate the object underlying these provisions there is no reason for giving to that word a wide meaning in the context of the provisions of Section 361 and cognate sections.

13. From a reading of the above Judgment, it is clear that the victim girl Savitri went to the accused Varadarajan on her own accord and both of them after visiting various places, ultimately went to the office of the Sub-Registrar and get an agreement of marriage registered. From the facts and circumstances of that particular case, the learned Judges of the Apex Court viewed that the girl was never "taken away" from the lawful custody of her guardian and, therefore, the provisions of Section 363, I.P.C. are not attracted.

14. In the instant case, the facts are altogether different and, therefore, the ratio laid down by the Apex Court has no application to this case. P.W.3, i.e., the victim girl in this case, has categorically deposed in her evidence that when she went to attend the calls of nature, the petitioner herein came and took her away and when she raised alarm, the petitioner threatened to kill her. From the above evidence, It cannot be inferred or said that the victim girl was not "taken away" by the petitioner on the date of offence from the lawful guardianship of her father (P.W. 1). Of course, the subsequent conduct of P.W.3 is that she was a consenting party for cohabitation. In the light of the facts and circumstances of this case and in view of the fact that P.W.3, being a rustic woman, though attained the age of discretion, did not go on her own accord along with the petitioner, it can safely be concluded that the petitioner took away P.W.3 without the consent of her lawful guardian and thereby attracted the provisions of Section 361 of the Indian Penal Code. In the light of the above discussion, the concurrent findings of the Courts below are not liable to be disturbed. However, in view of the admissions made by P.W.3 that she is a consenting party after the commission of the offence, some indulgence can be shown in favour of the petitioner in regard to the sentence.

15. Accordingly, while confirming the conviction imposed against the petitioner for the offence punishable u/s 363 of the Indian Penal Code and the sentence of fine awarded by the Courts below, the sentence of three years rigorous imprisonment

awarded by the Courts below is reduced to one year and the petitioner is further directed to pay a fine of Rs. 5,000/-, within a period of six weeks from today. In default of payment of the aforementioned fine, the petitioner shall undergo the sentence of imprisonment as awarded by the Courts below. The fine amount imposed by this Court shall be paid to P.W.3.

16. With the above modification in sentence, the Criminal Revision Case is allowed in part.