

**(2008) 09 GUJ CK 0046**  
**In the Gujarat High Court**

**Case No :** Criminal Appeal No's. 1840 of 2004 and 763 of 2006

Arvindbhai Shanabhai Jhala

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision :** 16-09-2008

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 363, 366, 376

**Citation :** (2008) 09 GUJ CK 0046

**Hon'ble Judges :** J.C. Upadhyaya, J;A.L. Dave, J

**Bench :** Division Bench

**Advocate :** P.K. Shukla, for the Appellant; Mukesh Patel, APP for Opponent 1, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

A.L. Dave, J.—These two appeals arise out of a judgment and order rendered by Additional Sessions Judge, 4th Fast Track Court, Kheda at Nadiad on 10.8.2004 in Sessions Case No. 9/2003.

2. The appellant was charged for offences punishable under Sections 363 366 and 376 of Indian Penal Code, alleging that he kidnapped/abducted Shakuntala, daughter of Kanubhai Merubhai Beldar from the lawful guardianship of her father at about 5 a.m. on 9.9.2002, from her father's residence at Village Kathoda, Tal.Matar. It is also the case of the prosecution that the appellant and the prosecutrix moved together for about 11 days at different places from 9.9.2002 to 20.9.2002 and then presented themselves voluntarily before Mehemdabad Police. On basis of the complaint lodged by the father of the prosecutrix, offence was registered and investigated, and ultimately chargesheet was filed. Learned Magistrate committed the case to the Court of Sessions and Sessions Case No. 9/2003 came to be registered.

3. Charge was framed against the accused at Exh.3, to which he pleaded not guilty and he claimed to be tried.

On basis of the evidence led by the prosecution, the Trial Court came to the conclusion that the prosecution was successful in establishing the charge for the offence punishable u/s 363 of Indian Penal Code, but was not successful in establishing the charges for offences punishable under Sections 366 and 376 of Indian Penal Code, and therefore, convicted the accused-appellant of offence punishable u/s 363 of Indian Penal Code and sentenced him to undergo simple imprisonment for 3 years and to pay fine of Rs. 2,000/-, in default to undergo further simple imprisonment for a period of 3 months. It is against this judgment and order, the present Criminal Appeal is preferred by the accused bearing No. 1840/2004.

4. The State has preferred Criminal Appeal No. 763/2006 against acquittal of the accused - respondent in the said appeal, for the offences punishable under Sections 363 and 376 of Indian Penal Code. For the sake of convenience the appellant in Criminal Appeal No. 1840/2004 and the respondent in Criminal Appeal No. 763/2006 is referred to as "the accused". We noticed from the record of this Court that the accused was ordered to be released on bail by order dated 4.5.2005 by suspending the sentence. However, it also appears that the accused could not furnish the bail, and therefore, he underwent the sentence. He has been thereafter released from the prison on 3.9.2007 on undergoing sentence.

5. We have heard learned advocate Mr. Shukla and learned APP Mr. Patel on merits and we have examined the records and proceedings.

6. It is evident from the School Leaving Certificate that the date of birth of the prosecutrix was 5.12.1985. The incident occurred on 9.9.2002, and therefore, when the incident occurred, the age of the prosecutrix was 16 years, 9 months and a few days more. It is reported that prosecutrix was more than 16 years of age.

7. From the evidence of the prosecutrix, we find that she alleges that she was enticed by the accused from her parental house. That the accused took her to different places and during that time, they had physical relationship, which was against her will. She also states that at the last place where they went together, she was intimidated for not disclosing anything to anyone.

This evidence of the prosecutrix has to be examined in context of other pieces of evidence. It has come in the evidence of Doctor that the prosecutrix in history before the Doctor indicated that the prosecutrix and the accused had left house of the father of the prosecutrix voluntarily together. She is unable to give the time and date when she was enticed away by the accused, as alleged by her. The prosecutrix then gives history to the Doctor that she had been having physical relationship with the accused for more than 4 months, and during this period that they were away from her parental house, they had physical relationship voluntarily. The theory propounded by the prosecutrix that she was intimidated, and therefore, she did not disclose, cannot be accepted for the reason that admittedly the intimidation was given only at the last phase of their trip. Before

that, she has not raised any objection, she has not raised any shout for help nor has she taken any steps to escape. Subsequent thereto, it is a matter on record that both the accused and the prosecutrix presented themselves before police, voluntarily. All these factors together would go to show that the element of compulsion, either in going with the accused or in having physical relationship, was not present, and if the prosecutrix is consenting party, offence of rape cannot be said to have constituted.

8. For the foregoing reason, the trial Court was justified in recording acquittal, so far as offence of rape is concerned.

Similarly, the ingredients for constituting an offence punishable u/s 366 are also found to be absent, as can be seen from the foregoing discussion, and the trial Court was therefore, justified in recording acquittal for offence punishable u/s 366 also.

9. In light of the above discussion, we do not find any merit in the appeal by the State bearing Criminal Appeal No. 763/1997. The appeal therefore, must fail.

10. So far as the conviction of the accused u/s 363 of Indian Penal Code is concerned, as stated above, the age of the prosecutrix was 16 years and 9 months and it has also come in evidence that the prosecutrix left the house of her father with the accused, and therefore, technically, she can be said to have been taken from lawful guardianship of her father, and she being a minor, technically speaking that offence can be said to have been constituted or committed by the accused. In our opinion, therefore, the conviction u/s 363 of Indian Penal Code is validly recorded. We do not find any reason to interfere with the judgment and order, and therefore, the appeal by the accused bearing Criminal Appeal No. 1840/2004 also must fail.

11. For the foregoing reasons, both the appeals stand dismissed.