
(2019) 03 UK CK 0123
In the Uttarakhand High Court
Case No : Criminal Appeal No. 420 Of 2018

Vivek

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision : 27-03-2019

Acts Referred:

Indian Penal Code, 1860 — Section 361, 363, 366A, 375, 376
Protection Of Children From Sexual Offences Act, 2012 — Section 3, 3(a), 4, 5(l), 6
Code Of Criminal Procedure, 1973 — Section 164, 313
Prohibition Of Child Marriage Act, 2006 — Section 3, 12

Citation : (2019) 03 UK CK 0123

Hon'ble Judges : Alok Singh, J

Bench : Single Bench

Advocate : Mohd. Safdar, Pushpa Bhatt

Final Decision : Allowed

Judgement

Alok Singh, J

1. Present appeal is directed against the judgment and order dated 27.08.2018 / 31.08.2018 passed by Special Judge, POCSO, Haridwar in Special Sessions Trial No. 05 of 2015 whereby appellant was held guilty for the offence punishable under Section 363, 376 IPC & under Section 4, 6 of the Protection of Children from Sexual Offences Act (for short "POCSO Act") and was sentenced to undergo three year rigorous imprisonment and to pay fine of Rs.10,000/- and in default of making payment of fine, to undergo one month additional imprisonment under Section 363 IPC; sentenced to undergo seven year rigorous imprisonment and to pay fine of Rs.10,000/- and in default of making payment of fine, to undergo one month additional imprisonment under Section 376 IPC; and sentenced to undergo seven year rigorous imprisonment and to pay fine of Rs.10,000/- and in default of making payment of fine, to undergo one month additional imprisonment under Section 4 of the POCSO Act and sentenced to undergo ten year rigorous imprisonment and to pay fine of Rs.10,000/- and in default of

making payment of fine, to undergo one month additional imprisonment under Section 6 of the POCSO Act.

2. Brief facts of the present case, inter alia, are that PW1 informant - father of prosecutrix lodged an FIR with police station Kotwali Jwalapur, Haridwar on 11.02.2015 stating therein that her daughter prosecutrix, aged about 16 years, is missing since 10.02.2015 at 03.30 p.m.; she went for tuition but she did not come till evening; he inquired from his relatives but did not get any clue; yesterday, she did not go for tuition class; today, I come to lodge her missing complaint. He believed that one Vivek enticed her away; kindly, lodge the FIR and accordingly, FIR was registered.

3. After investigation, PW6 Sub Inspector Geeta Chaudhary submitted charge-sheet under Section 363, 366A, 376 IPC and 3/4 of the POCSO Act against the appellant.

4. When prosecutrix came to know that her father has lodged FIR, prosecutrix herself appeared before the police station on 12.02.2015. On 13.02.2015, she was produced before II Judicial Magistrate, Haridwar and her statements were recorded under Section 164 CrPC and on the same day, her medical examination was done.

5. After committal of the case to the court of Session, learned trial court was pleased to frame charges under Section 363, 366A, 376 IPC and under Section 3(a)/4 and 5(I)/6 of the POCSO Act. Appellant denied the charges and claimed trial.

6. To prove the prosecution story, PW1 father of the prosecutrix, PW2 prosecutrix, PW3 Dr. Rajendra Rana, PW4 mother of prosecutrix, PW5 Sub Inspector Janki Bhandari PW6 Sub Inspector Geeta Chaudhary, PW7 Constable Manish Rawat and PW8 Rukam Singh were examined. Thereafter, statement of appellant was also recorded under Section 313 Cr.P.C.

7. Having heard learned counsel for the parties and perusing the entire material available on record, trial court was pleased to pass the impugned judgment and order. Feeling aggrieved, appellant has preferred the present appeal.

8. I have heard Mohd. Safdar, learned counsel for the appellant, Ms. Pushpa Bhatt, Deputy Advocate General for the State and have carefully perused the record.

9. Prosecutrix in her statement recorded under Section 164 Cr.P.C. stated as under:

"I knew Vivek since October. Vivek is residing in Ghasmandi. I went with Vivek out of my own sweet will in November. Three months before, I solemnized court marriage with Vivek in Roshnabad and after marriage, I came to my home and two days before, I along with Vivek came to his sister's house in Raiwala. I want to go with Vivek. If he does not want to take me, I will stay with my parents.

Vivek has neither compelled me for marriage nor for stay with him."

10. While appearing in the witness box PW2 prosecutrix stated on oath that she married with appellant out of her own sweet will. Nobody compelled her for marriage. There was no quarrel between the parties. Appellant did not compel her for any sinful act. After the incident, accused never disturbed her. She did not want any legal action against accused. She went with appellant out of her own will. Neither accused appellant ever threatened me nor did any insolence act.

11. Now let me examine as to whether appellant had committed any offence punishable under Section 363, 376 IPC and under Section 4, 6 of the POCSO Act.

12. Kidnap from lawful guardian, as defined under Section 361 IPC, reads as under:

"361. 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.

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 the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

13. Having perused Section 361 I.P.C., I find that to prove kidnapping from lawful guardianship prosecution must prove four ingredients as under:-

(i) Taking or enticing away a minor or person of unsound mind.

(ii) Minor must be under 16 years of age if male and under 18 years of age if female.

(iii) The taking or enticing must be out of keeping of the lawful guardian of such minor or person of unsound mind.

(iv) Such taking or enticing must be without the consent of guardian.

14. To constitute an offence punishable under Section 363 IPC, ingredient, as defined under Section 361 IPC, must be proved.

15. Three-Judge Bench of Hon'ble Apex Court in the case of S. Varadarajan Vs. State of Madras reported in AIR 1965 SC 942 has held as under:

"But when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority and is a senior college student) from the house of the relative of father where she is kept, herself telephones the accused to

meet her at a certain place, and goes there to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various various places and ultimately to the Sub-Registrar's Office where they get an agreement to marry registered, and there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from her side, the accused by complying with her wishes can by no stretch of imagination be said to have "taken" her out of the keeping of her lawful guardianship, that is, the father.

The fact of her accompanying the accused all along is quite consistent with her own desire to be the wife of the accused in which the desire of accompanying him wherever he went is of course implicit. Under these circumstances no inference could be drawn that the accused is guilty of taking away the girl out of the keeping of her father. She has willingly accompanied him and the law does not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him.

There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid 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. Where the minor leave her father's protection knowing and having capacity to know the full import of what she is doing voluntarily joins the accused person, the accused cannot 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.

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. 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 fulfilment of the intention of the girl. But that part 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".

16. As per statement of prosecutrix stated that she was in love with appellant; on the fateful day, she out of her own will went along with appellant to his sister's house; appellant never forced her to stay with him, therefore, taking away or enticing on the part of the accused appellant does not stand proved. Therefore, offence under Section 363 IPC cannot be said to have been made out

against the appellant.

17. Now, let me examine as to whether offence punishable under Section 376 IPC is made out against the appellant.

18. Ms. Pushpa Bhatt, learned DAG for the State has vehemently argued that since prosecutrix was found to be below

18 year of age, therefore, her consent loses its importance for the purpose of clause (6) of Section 375 IPC. Since, she is below the age of 18 years, therefore, sexual intercourse with the prosecutrix shall amount to rape.

19. Admittedly, date of birth of prosecutrix is 01.07.1997, therefore, on the date of incident, she was 17 years 7 months old.

20. Now, question arises whether marriage of prosecutrix, who is below 18 years of age, is void or not?

21. Sections 3 and 12 of the Prohibition of Child Marriage Act, 2006 are being reproduced herein as under:-

"3. Child marriages to be voidable at the option of contracting party being a child. -

(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child fulfilling the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

12. Marriage of a minor child to be void in certain circumstances. - Where a

child, being a minor-

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place;
or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void."

22. It is important to mention herein that as per Section 3

of the Prohibition of Child Marriage Act 2006, every child marriage is voidable, at the option of the contracting party, who was a child at the time of the marriage and as per Section 12 of the Act marriage of minor child shall be void, if same is performed after taken or enticed away out of keeping of lawful guardianship or marriage is performed by compulsion or deceitful means or minor was sold for the purpose of marriage.

23. As observed hereinbefore, it cannot be proved by the prosecution that appellant enticed away rather she went herself because she was in love with the appellant. As per statement of prosecutrix, she was never compelled to marry and she married with the appellant without there being any compulsion or coercion. Therefore, marriage cannot be said to be void. Marriage can only be said to be voidable at the instance of prosecutrix.

24. Prosecutrix nowhere stated that appellant sexually assaulted or raped her. Even in the medical report PW3 Dr. Rajendra Rana opined that there were no internal or external injuries on the body of prosecutrix and no definite opinion about the sexual assault can be given. Therefore, allegation of rape is not proved either by the statement of prosecutrix or by medical evidence. Even if, we assumed that there was cohabitation between the parties, even then, prosecutrix herself stated that she married with the accused appellant, therefore, in view exception of Sec. 375 I.P.C. sexual intercourse with his own wife, the wife not being under fifteen years of age, is not rape. Even after the 2013 amendment in Section 375 IPC such exception still finds place. Accordingly, in my view, no offence under Section 376 IPC and under Section 4 and 6 of the POCSO Act is made out against the appellant.

25. In the result, appeal is allowed. Impugned judgment and order dated 27.08.2018/ 31.08.2018 is hereby set aside. Appellant is acquitted of the charges levelled against him. Appellant is in jail. Let he be released forthwith, if not wanted in any other case. Let copy of this judgment be sent to court below for compliance along with lower court record.